JUDGING IN THE PUBLIC SPHERE

Everything valuable is vulnerable
(Lucebert)
Cornelis Dekker

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A philosophical and empirical inquiry into ethico-political judgment and public discourse on prenatal diagnosis and screening in the Netherlands and Sweden

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To Simon and Elsa
CHAPTER 1

An inquiry into ethico-political judgment

We live in a technological society. Technology is changing our everyday lifeworlds. Technology also raises fundamental moral and political concerns. According to Jonas, modern technology has introduced actions of such novel scale, objects, and consequences that the framework of former ethics cannot even contain them.¹ 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. New objects of action have been added to the case material on which the received rules of conduct are to be applied. Furthermore, the qualitatively novel nature of some of our actions has opened up a whole new dimension of moral relevance for which there is no precedent in the standards and canons of traditional ethics. Jonas argues that, in traditional ethics, all dealings with the nonhuman world were morally neutral, and the good and evil that were related to the act lay close to the act itself.

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. Is this challenge to ethics as profound as in the case of prenatal diagnosis and screening, technologies which during this inquiry will be examined? 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. Moral theories and principles offer starting points for public deliberation over moral and political questions concerning such technologies as prenatal diagnosis and prenatal screening. However, there is no agreement on the interpretation and application of moral principles, which stresses the importance of judgment.

We have seen that, for Jonas, modern technology raises intricate moral questions. For Arendt, the challenging questions raised by technology are predominantly of a political nature. She emphasizes the relevance of deliberation over the question

of how we want to use fresh scientific and technological knowledge.² According to Arendt, this question can by no means be decided by scientific methods, or left to scientists and politicians. It is, on the other hand, a political question of the first order, which urges action. Action – in Arendt’s opinion the only activity that goes on directly between people without the intermediary of things or matter – corresponds to the human condition of plurality, to the fact that humankind lives on Earth, and inhabits the world. Action is, for Arendt, a broader concept than the kind of action we would normally think of as political. It is a way of revealing ourselves to others. Arendt has been criticized for pursuing an ancient conception of action. Yet we find clues in Arendt’s doctrine of action when thinking of the kind of action necessary to judge modern technology.

For Arendt, to act means to take an initiative, to begin, to set something in motion. Speechless action would no longer be action because there would no longer be an actor and the actor. In acting and speaking, men show who they are, actively revealing their unique personal identities and thus making their appearance in the human world. 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. Speech, which we encounter in public discourse regarding prenatal diagnosis and screening in this inquiry, is actually a deed and is in between citizens. Even though political action in this inquiry is defined in a narrower sense than in the account of Arendt, her ideas about action have relevance when considering public discourse in which citizens reveal themselves to others. Citizens show who they are in deliberation over moral and political questions, in the sense of having points of view. By engaging in action as speech, citizens shape relationships with each other. Judging is, for Arendt, as we will see, a way of shaping relationships in terms of ‘sharing-the-world-with-others’.

1.1 A philosophical and empirical inquiry into ethico-political judgment

Judging is quintessential as far as moral and political questions regarding, for instance, new technologies are concerned. When there is disagreement concerning new technologies, judging is a way to deal with this disagreement. Judging requires that we take the points of view of others into account and that

² Arendt (1958).
we reflect in this way upon our own judgment. In this inquiry, moral and political judgment is understood in terms of ethico-political judgment. The aim of this inquiry is to elaborate on a deliberative conception of ethico-political judgment. This is to be achieved using a philosophical inquiry and an empirical inquiry into public discourse on prenatal diagnosis and screening in the Netherlands and Sweden. The empirical inquiry is conducted in order to enhance our understanding of ethico-political judgment and the philosophical inquiry may in turn be relevant when thinking about public deliberation. I consider ethico-political judgment as the deliberative formation of a justifiable judgment concerning a public course of action.

As the purpose of ethico-political judgment, I discern common ground regarding a justifiable judgment. Common ground may be the outcome of the process of judging in terms of agreement. It is quintessential for judging, and for finding common ground, that the plurality of points of view in society is taken into account. Such a plurality can be found in pluralist societies with a diversity of values and worldviews. I consider ethico-political judgment, with its purpose of common ground, to be an ideal for public deliberation over moral and political questions. This means that, in public deliberation, we seek common ground in view of the plurality of points of view. I suggest that we reflect upon the question of what it is that makes a judgment justifiable in terms of good reasons. Ethics matters to politics to the extent that it offers an opportunity to reflect upon the question of what it is that makes a reason for a judgment a good one. Politics matters to ethics since judgments have to be made in a pluralist society, often concerning a public course of action. How much common ground can we hope for when there is a plurality of points of view in society? My answer is that we have, in principle, a ground of judgment in common enabling us to make common political judgments, inferred from good reasons. Common ground places burdens on deliberation. Deliberation asks that we reflect upon our own judgment by taking the points of view of others into consideration.

I have defined ethico-political judgment in a stipulative sense as the deliberative formation of a justifiable judgment concerning a public course of action, as an ideal for public deliberation over moral and political questions. We can also speak of ethico-political judgment in an empirical sense, as the formation of a judgment, and regard public discourse concerning moral and political questions as ethico-political judgment. Public discourse is an empirical concept whereas public deliberation is a theoretically influenced concept. Public discourse can be defined as the ‘utterances and texts (spoken, written, images) that circulate in society and which, through their communicative forms, are accessible to a larger number of people’. Let me add to this definition that the utterances and texts are

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3 My translation: de ‘uttalanden och texter (talade, skrivna, bilder) som cirkulerar i samhället och som genom sina kommunikativa former är tillgängliga för ett större antal människor’ (Bakshi 2000: 13).
circulating and accessible in a public sphere. I will define public deliberation as a
deliberative practice in the public sphere characterized by the giving and asking
for reasons. To the extent that public discourse can be considered as public
dereliberation – the extent to which reasons are given and asked for – public
discourse could also be such a practice. Public discourse can be conceived of as
public deliberation to the extent that citizens give reasons for their judgments.
However, words may also be weapons, as well as persuasive and rhetorical tools.

As an example of public deliberation over moral and political questions, I have
chosen public discourse on prenatal diagnosis and screening. Other examples
where public deliberation is relevant include scientific and technological
developments in the field of biotechnology, genetics and gene therapy, pre-
implantation genetic diagnosis, and assisted reproduction. We can also think of
other examples such as euthanasia, the allocation of resources in health care, or
privacy. Prenatal diagnosis and screening have been widely discussed in arenas in
the public sphere, and continue to be, and I find this case suitable for my inquiry
into ethico-political judgment. The empirical inquiry is comparative and
encompasses public discourse in the Netherlands and Sweden. Since judgment is
inextricably linked with the public sphere, as I will argue below, the comparative
inquiry in these two countries, with their partly different public spheres, may lead
to enhanced understanding of ethico-political judgment. Using an empirical
inquiry, it is possible to examine ‘judging’ in public discourse.

Philosophical and empirical inquiry

I relate philosophical inquiry to empirical inquiry. Philosophical inquiry consists
of asking questions at a general, abstract level. Empirical inquiry consists of
asking concrete questions to an empirical material which in turn may lead to
more general considerations. In asking questions, we interpret in the sense of
aiming to understand. Philosophical inquiry entails conceptual analysis in order
to further our understanding of concepts. Characteristics of philosophy are
argument and justification.4

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. 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.5

4 Føllesdal (1996).
5 Elgin (1999: 123).
While knowledge is traditionally concerned with facts, we understand, for instance, rules and reasons, actions and passions, objectives and obstacles, and facts. 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.

In my inquiry, I aspire to enhance our understanding of ethico-political judgment as an ideal of public deliberation over moral and political questions. As an example of such deliberation, public discourse on prenatal diagnosis and screening is examined. By considering ethico-political judgment, not merely in theoretical terms but also on the basis of an empirical inquiry, I wish to enhance our understanding of the concept. The inquiry into public discourse has as its goal to further our understanding of ethico-political judgment. This means that the results of the empirical inquiry are interpreted in terms of the concept of ethico-political judgment. Public discourse is, to this end, considered in terms of the purpose and the conditions of ethico-political judgment. The concept of ethico-political judgment here developed may also be relevant when thinking about public deliberation.

1.2 Public discourse as deliberation in the public sphere

The public sphere is, as I will argue below, the arena of public discourse conceived of as deliberation. The comparative inquiry into public discourse in the Netherlands and Sweden entails public discourse being investigated in the context of the Dutch and Swedish public spheres. By means of a comparative inquiry into public discourse in the Netherlands and Sweden, it will be possible to examine possible differences in interpretive frameworks, reasoning, and judgments: concepts with which public discourse will be examined. It will also be possible to investigate the role of context in the framing of questions:

[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

A brief characterization of the Dutch and Swedish contexts of public discourse

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

For a long time in Sweden, the opinion was that politics should be based upon facts and rational analysis. In the spirit of positivism, moral questions would have received little attention. However, a re-moralization of politics would have taken place and developments in reproductive technologies have been widely discussed. In the process of preparing White Papers, the political parties are involved, together with experts. This can be understood against the backdrop of the Swedish tradition of samförstånd, i.e. consensus. Yet, contrary to the thesis of re-moralization, moral dimensions would come into political decision-making in a depoliticized way and a large number of citizens would not consider White Papers.

The public sphere: arena of public discourse

Let us consider the concept of the public sphere in some detail. We can ask what is meant by ‘public’. According to Fornä, that which is public is open and accessible to everyone. Open access is one of the central meanings the norm of publicity. In the view of Fornä, ‘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

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10 Burg and Brom (1999).
15 Fraser (1992).
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’ is in contrast with the term ‘private’ but, as 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; while politics, a public activity, is a matter of judgment, family relations, a private way of acting, are not. According to Steinberger, judging is an inherently public activity while judging privately would be a contradiction. 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. This gathering is emphasized by Arendt who distinguishes between two meanings of the term ‘public’. First, 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. Second, 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 in between those who have it in common. The public sphere gathers us together.

It is the second meaning of the term public that 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

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16 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’ (BFN 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 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.
17 Cooper (1989). It is in this respect also possible 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’ (Yankelovich 1991: 42).
19 Arendt (1958).
20 Taylor (1995) takes over the idea of Arendt 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 about these matters. The public sphere plays a crucial role in the self-justification of a free self-governing society. In such a society, people form, according to Taylor, their opinions freely in coming to a common mind. Such common minds matter; they may influence government.
view that action corresponds to the human condition of plurality, to the fact that humankind lives on the earth and inhabits the world. Judgment is, for Arendt, a way for a man to orient herself in the public realm, 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 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. How the public sphere is to be conceived of, which arenas are relevant, should be determined from case to case. In our inquiry into public discourse on prenatal diagnosis and screening, the relevant arenas have to be identified. The fact there is not a single arena where citizens can gather to judge questions of common interest only reveals the challenge facing judgment in the public sphere. Judgment will have to be exercised in various arenas.

Public deliberation as a deliberative practice in the arena of the public sphere

I will define public deliberation as a deliberative practice in the arena of the public sphere characterized by the ‘giving and asking for reasons’. This definition of public deliberation is based upon the theory of inferentialism of Brandom. Let us take a brief look at this theory. Brandom argues that the giving 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 essential feature that distinguishes what is propositionally contentful (propositional in terms of a statement) is that it can serve both as a premise and as

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21 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 (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 will call arenas.
the conclusion of inferences, or conclusions. According to Brandom, saying or thinking that things are thus-and-so is undertaking a distinctive kind of ‘inferentially articulated commitment’. This means putting it forward as 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 give and ask for reasons.24

A discursive practice is, for Brandom, a linguistic practice. What makes something a specifically linguistic practice is that it accords some performances the force of significance of claimings or ‘propositionally contentful commitments’ which can both serve as and stand in need of reasons. For Brandom, the giving and asking for reasons for actions is only possible in the context of the practices of giving and asking for reasons generally – that is, of the practices of making and defending claims or judgments. Giving a reason always means expressing a judgment; making a claim. Claiming, being able to justify one’s claims, and using one’s claims to justify other claims and action are what initially enable talking and thus thinking, sapience in general (in contrast to sentience).

I find the theory of inferentialism helpful to reflect upon the concept of a public deliberation as a deliberative practice. I regard public deliberation as a deliberative practice in the public sphere characterized by the giving and asking for reasons. Giving a reason means expressing a judgment and making a claim. To form judgments is to infer from reasons. I will speak throughout of a discursive rationality which entails the giving and asking for reasons. Let me consider the relation between a discursive practice and a deliberative practice. A discursive practice is, for Brandom, a linguistic practice which is characterized in terms of claiming or propositionally contentful commitments. I regard a deliberative practice in this sense as a discursive practice in the public sphere.25

In deliberative practices, we make and defend claims or judgments – as in

25 My conception of discourse differs from the account of Focault (2006). For 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 statement. There is a corpus of knowledge that presupposed 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, I consider a rather limited period of time. 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.
discursive practices in general – but typical of deliberative practices is the fact that judgments are to be defended in a public sphere where it is often unclear to whom judgments have to be defended.

Public discourses on reproductive and gene technologies: deliberative practices?

There are numerous studies of public discourses regarding technologies. In what follows, I will consider some inquiries into public discourses concerning reproductive and gene technologies. I will focus particularly on Dutch and Swedish inquiries into public discourse and will also consider some comparative studies. I am interested in how public discourse is conceived of, how it is inquired into, and the extent to which it can be conceived of as a deliberative practice.

Trappenburg studies medical ethics discussions in the Netherlands by inquiring how these have involved. She regards a debate as having rules of discussion and a logic of its own. According to Trappenburg, the result of a debate that takes place with the best of intentions is norms. Participants in 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. The debate on genetics is, for Trappenburg, characterized in terms of a search where no clear-cut answers exist to the questions raised by genetics. In her analysis of medical ethics discussions, she uses Walzer's concept of ‘shared understandings’. With this concept it would, for instance, be possible to formulate norms for genetics such as medicalization. It can be asked what kind of norms Trappenburg points to. For me, judgments concerning a public course of action may be the outcome of public discourse. Political norms could be based upon judgments but are the responsibility of representatives. I find the concept of shared understandings appealing. We can, in my view, speak of shared understandings in terms of finding the common ground concerning a question.

Brom analyzes arguments in Dutch public discourse which have led to the ‘no unless’ position of the Dutch Government regarding animal gene technology. Arguments and points of view have a function of convincing; using arguments, participants to try to articulate that which others have not seen. In a modern, democratic society, the acknowledgment that a situation or action in the public sphere is morally problematic is a rationale for public debate. For Brom, ‘morally problematic’ entails that the implicit morality leading to an action or situation has reached its limits. Brom, then, reconstructs arguments used in public debate

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26 Brom (1997).
systematically. In the public debate on animal gene technology, many ‘vague concepts’ are used, entailing that the analysis of arguments cannot result in clear concepts. Vague conceptions matter, however, since they help to articulate moral intuitions. We can see that the concept of ‘morally problematic’ also has its place in the public discourse on prenatal diagnosis and screening. It is in particular at the level of applying moral principles that we can speak of these technologies as ‘morally problematic’. There is, thus, a rationale for public debate in view of the moral disagreement existing in society concerning these technologies.

Theune, also inquiring into Dutch public debate on animal gene technology, regards public debates as being associated with informal, spontaneous, non-organized debates in which potentially every citizen is involved. Public debates take place in the media but also in institutionalized debates in Parliament, and in forums like journals and conferences. Public debate is conceived of by Theune as consisting of many interrelated minor debates that may even take place in the private sphere. 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. For Theune, public discourse is constituted by discourse in the several arenas of the public sphere. In my view, it is impossible, however, to speak of public debates that take place in the private sphere. The public sphere is characterized by publicness in the sense of being accessible and open to all. We find that Theune also conceives of public debate from the perspective of deliberation.

Van den Boer-Van den Berg has, in a study of the moral justifiability of prenatal diagnosis, implicitly studied the public discourse on prenatal diagnosis in the Netherlands in a long historical perspective. She examines the influence of the Churches, the Government, physicians, and ethicists on the discussion regarding prenatal diagnosis during the 20th century. Her claim is that that the self-determination of parents should be respected in the discussion on prenatal diagnosis. Van den Boer-Van den Berg has thus chosen to concentrate on a number of arenas in what implicitly can be called public discourse over a long period of time. Swierstra has studied public discourse on cloning, including the debates organized by the Dutch Rathenau Institute. Swierstra dwells on the question of whether debates on cloning should be organized at all. Swierstra concludes that no internal development of the public debate has taken place: the main arguments for and against cloning were recurring in the public debate. At the meetings of the Rathenau Institute, moral questions were dealt with which in the media debate were largely absent. However, the conclusions of these meetings do not add any essential insights compared with the debate in the

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29 Swierstra (2000).
media. Swierstra points to a possible pitfall in public discourse: no new arguments are voiced. In this sense, we can hardly speak of a transformation in public discourse.

Bakshi studies public discourse on gene technology and prenatal diagnosis in Sweden. Bakshi’s study has a discourse analytical and dialogical perspective. She has studied five different genres, namely newspaper articles, popular scientific journals, a medical journal, the journal of a disability organization, and political motions to Parliament. One of Bakshi’s conclusions is that participation in public discourse is not equal. It is mostly the utterances of physicians, politicians, and people with academic degrees that are published. Furthermore, many of the analysed texts would be monological rather than dialogical. A comment that can be made here is that Bakshi also considered news articles which obviously have no dialogical structure in the sense that they are responses to the points of view of citizens. By focusing on mere debate articles, it would be possible to conclude that articles have a dialogical structure.

Hugo studies moral disagreement in Swedish public debate by using a variety of texts on genetically modified food. Hugo focuses on three main arguments: human beings should act according to their nature; risk and utility; and democracy, freedom of choice and labelling. 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. Hugo’s conclusion is that the communicative ethics of Benhabib have much to contribute to the debate about genetically modified food in terms of how an ideal dialogue would function. In many debates, publicness would be restrained in such a way that it excludes groups. Hugo thus distinguishes between debate and dialogue. It would be interesting to see whether, and how, the kind of organized debates Swierstra refers to would enable a real dialogue, rather than a mere recurrence of arguments.

In her inquiry concerning articles on gene technology in Swedish daily Dagens Nyheter, 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. Olofsson indicates that public debate, which she defines as spoken or written messages in a public sphere, entails more arenas than just in the mass media. This may have implications for the conclusion that public discourse follows the sequence which she discovered. In public discourse on prenatal diagnosis, we can presume, moral questions have been discussed thoroughly in relation to

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30 Bakshi (2000).
31 Hugo (2005).
32 Olofsson (2002).
regulation. The risks surrounding prenatal diagnosis and screening are also discussed in terms of miscarriages due to invasive procedures. We can, however, observe that the risks, ethics, and regulation in public discourse on prenatal diagnosis and screening are discussed in relation to each other.

For Ferree et al., in a study of abortion discourse in Germany and the USA, public discourse is public communication about topics and actors related to either some particular policy domain or to the broader interests and values that are involved.33 This does not only include information and argumentation but also images, metaphors, and other condensing symbols. Public discourse is carried out in various forums. A forum includes an arena in which individual or collective actors engage in public speech. There are different forums in which public discourse takes place. The public sphere is regarded by Ferree et al. as the set of all forums. In the current era, there is one forum that overshadows all others, making them sideshows, namely the mass media as a master forum. 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 do German articles, have a so-called dialogical structure, the reference to other stances and a measure of dialogue. My approach to the public sphere, as constituted by different arenas, is similar to the idea of Ferree et al. that public discourse is carried out in forums which in turn are arenas. Even though the mass media may be a ‘master forum’, it is in my view one-sided to focus merely on the mass media. There are many other arenas from where public discourse originates.

Van Dyck, in a study of the public debate on in vitro fertilisation 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.34 She argues that the need for technology is not simple there, but is created in an ideological process. Those who participate in the debate – doctors, researchers, feminists, investors, and others – try to promote a particular meaning of new reproductive technologies:

The trophy of a public debate is to turn a particular interpretation into an accepted fact which seems beyond the stage of negotiation.35

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. Public discourse does not entail that reasons are given and asked for concerning the moral rightness of a technology. Rather, what is right is the outcome of a discussion in which meanings are negotiated. Public discourse

33 Ferree et al. (2002).
involves this negotiation concerning meanings as well as the creation of a need for a particular technology.

We can conclude that public discourse, in a number of studies, can be characterized in terms of a deliberative practice, namely as public deliberation characterized by the ‘giving and asking for reasons’. Public discourse has rules of discussion; with arguments participants try to articulate that which others have not seen; debating rules would have been respected; and public discourse has many characteristics of deliberation. The ideal of public discourse as a deliberative practice with the giving and asking for reasons is also questioned, however. 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 and asking for reasons concerning the rightness of a technology.

1.2 ‘Judging’ in public discourse: interpretive frameworks, reasons, and judgments

Judging in public discourse is understood in terms of interpretive frameworks, reasoning and judgments concerning a public course of action. I will 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 the basis of which we justify judgments by means of reasoning.

Interpretive frameworks, framing and horizons of understanding

I regard interpretive frameworks as understandings by citizens of moral questions. These questions may be framed in 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 that prenatal diagnosis, for instance, is considered as a violation of human dignity: the moral question is understood in terms of human dignity.

The concept of the framework has been advanced by Goffman who equals frameworks with schemata of interpretation:
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.\(^36\)

Goffman sees a primary framework as one that renders what would otherwise be a meaningless aspect of the scene into something that is meaningful. Goffman distinguishes further between natural and social primary frameworks. In the case of natural frameworks, no actor continuously guides the outcome, whereas social frameworks are a matter of ‘guided doings’ which subject the doer to standards of social appraisal. Frameworks can be of individuals, who decide what is going on given their particular interests, and of social groups. The primary frameworks of social groups constitute a central element of its culture, according to Goffman.

I understand an interpretive framework in relation to how moral and political questions are framed. Framing can be regarded as

> The process by which a source defines the essential problem underlying a particular social or political issue, and outlines a set of considerations purportedly relevant to that issue.\(^37\)

We can speak of a connection of framing and interpreting, regarding framing as

> A particular way of representing knowledge, and as the reliance on (and development of) interpretive schemas that bound and order a chaotic situation, facilitate interpretation and provide a guide for doing and acting.\(^38\)

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. Simon and Xenos relate the framing paradigm to deliberation.\(^39\) Deliberative processes, entailing the formation of associations between concepts within discourse, are intimately linked, according to Simon and Xenos, 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.\(^40\)

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\(^36\) Goffman (1986: 21).
\(^37\) Nelson et al. (1997: 222).
\(^39\) Simon and Xenos (2000).
\(^40\) Ibid. (2000: 367).
In my empirical inquiry, I regard frames and frameworks as closely related. For Goffman, when an individual recognizes a particular event (or issue), he implies a framework, or interpretive scheme. With a frame, citizens define problems underlying issues, and also presuppose interpretive schemas. With frameworks or frames, citizens interact with each other following Simon and Xenos. Framing is the act of understanding an issue on the basis of an interpretive framework, or frame.

I understand an interpretive framework as part of what Gadamer calls horizon. Gadamer has introduced the concept of horizon 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 speak 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 is moving. To acquire a horizon means that one learns 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 interpretive horizon as the method 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, for instance, a principle 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, understanding is always interpretation and hence interpretation is the explicit form of understanding. This fusion between understanding and interpretation has led to the third element, application, being excluded from hermeneutics. According to Gadamer, however,

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41 Gadamer (1999: 302 ff.).
43 Ibid. (1999: 307 ff.).
understanding always involves applying the text to be understood to the interpreter’s present situation.

Application is central to legal hermeneutics. In legal hermeneutics, an essential tension exists between the law, on the one hand, and the sense arrived at by applying it at the concrete moment of interpretation, on the other. A law does not exist in order to be understood historically but to be concretized in its legal validity by being interpreted. Understanding is always application since a text such as a law must be understood at every moment, in every concrete situation, in a new and different way. According to Gadamer, the meaning of a law that emerges in its normative application is not fundamentally different from the meaning reached in understanding a text. We see that the work of interpretation involves concretizing the law in each specific case: it is a work of application.

I suggest that the application of moral principles, understood in terms of interpretive frameworks, can be conceived of in a way analogous to Gadamer’s treatment of the application of law. Principles have to be understood by interpreting them in their application to the problems of prenatal diagnosis and screening. For instance, the principle of human dignity reveals its meaning when applying it to prenatal diagnosis. We understand human dignity by grasping its significance for deliberation over prenatal diagnosis. The abstract definition of the principle is understood in terms of its relevance to a particular case. I consider an interpretive framework to contain the three elements of hermeneutics; 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.

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. 44 For Turner, 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 would have an ineluctable hermeneutical dimension which means that

44 Turner (1997).
all human judgment crucially rests on interpretation.\textsuperscript{45} 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 thus based on interpretation.

A descriptive analysis of reasoning and moral ways of reasoning

Let us now consider the second concept used in the inquiry into public discourse: reasoning. In the inquiry into public discourse, I will 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; in our inquiry, often judgments.\textsuperscript{46} 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.\textsuperscript{47} 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, by necessity, accept the conclusions.

I not only examine the reasons from which judgments are inferred, but also to which extent moral ways of reasoning can be found in public discourse. I distinguish three ways of moral reasoning: consequentialist, deontological, and reconstructive. There are other traditions in ethics than the three traditions related to these ways of reasoning. Nussbaum notes that, besides consequentialist and deontological traditions, another tradition is often considered as an alternative, namely virtue ethics.\textsuperscript{48} Virtue ethics entail 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 from an ethics based on Enlightenment ideals

\textsuperscript{45} Steinberger (1993).
\textsuperscript{46} Björnsson, Kihlbom, Tersman, and Ullholm (1996).
\textsuperscript{47} 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.
\textsuperscript{48} Nussbaum (1999).
of universality to an ethics based upon tradition and particularity. Virtue ethics are not based upon principle, but on virtue. Furthermore, they are 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, consequentialist or reconstructively, it is to a lesser extent observable that is reasoned in a virtue ethical way.

A consequentialist way of reasoning entails that actions are judged in terms of their consequences, for instance 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.\(^{49}\) Early utilitarians claimed that the best consequences would be those which contained the greatest amount of happiness. In the words of Mill

‘Utility’, or the ‘Greatest Happiness’ Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness.\(^{50}\)

Utilitarianism is historically related to the concept of harm, and the idea that there is something wrong with causing harm to others. The relationship of utilitarianism to justice, rights, or autonomy, notions that are historically related to deontological theories, is less direct, but we may find that ‘most people are happier if there is general observance of a rule which implies that human beings have certain rights’.\(^{51}\) A utilitarian way of reasoning will justify judgments regarding actions in terms of their promoting happiness and preventing suffering.

A deontological way of reasoning will, in contrast, start out from basic notions of obligation or duty. The concept is said to come from the Greek word for duty, and explains what we ought to do.\(^{52}\) Deontological moral theories, of which Kant’s ethics constitutes an example, insist that some actions are right and some are wrong, regardless of their consequences.\(^{53}\) Acting in accordance with the categorical imperative reminds us that, if we think that it is wrong for others to behave in a certain way, then we cannot claim that it is morally acceptable for us to behave in the same way. A deontological way of reasoning does not entail that consequences do not matter. As we will see, Kant distinguishes, for instance, the duty of well-being. However, the moral worth of an action from duty is settled by the universalizability of the maxim for this action.

\(^{49}\) Thomson (1999).
\(^{50}\) Mill (1979: 7).
\(^{51}\) Thomson (1999: 130).
\(^{52}\) Williams (2006).
\(^{53}\) Ibid. (1999). As we will see, however, Kant’s ethics do not concern themselves with the rightness of an action, but with its moral worth.
In public discourse, we may observe examples of deontological reasoning and consequentialist reasoning. We can also discern examples where 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 Birnbacher, autonomy, one of these four principles, can be endorsed, for instance, since it would result in the best consequences, e.g. liberty or happiness. However, the principle can also be endorsed since, in Kantian terms, it would enable citizens to determine the will through the moral law. According to Birnbacher, autonomy belongs to the reconstructive model of bioethics together with beneficence, nonmaleficence, and justice, the other three principles of biomedical ethics developed by Beauchamp and Childress. The model is reconstructive since it relates ‘applied’ abstract principles, not to a priori considerations, but to the reconstruction of moral convictions that are 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.

A classification of judgments concerning a public course of action

I will call a judgment an inference from reasons. For me, the purpose of ethico-political judgment is to find common ground regarding a justifiable judgment concerning a public course of action. Any account of moral judgment has to deal with the difference between theoretical and value judgments. Baier provides an account of this difference. For him, judgment involves giving 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. Judgments and factual claims serve, for Baier, 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

55 Baier (1965).
give rise to the question of correct criteria. Value judgments not only have to be 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.56

In my view, we can discern factual and value judgments in terms of their epistemic characteristics. With regard to a factual, theoretical judgment, we can say that it is true or false. The truth of this judgment can be determined objectively. A value judgment can be characterized in terms of right or wrong. However, contrary to factual judgments they can in my view only be accepted in terms of rational acceptability, not of their truth-value. Consider the judgment ‘female circumcision is wrong’. Can we evaluate this statement in terms of true or false? This is a difficult question. I suggest that we can speak of the rational acceptability of value judgments instead. Putnam speaks, in this respect, of the importance of standards of rational acceptability in order to have a world at all, either a world of ‘empirical facts’ or a world of ‘value facts’.57

Skorupski offers a challenging account of what he calls evaluative judgments.58 When I make an evaluative judgment, I presuppose that others will confirm my judgment. Essential to an evaluative judgment is their presupposition of rational acceptance by others. For Skorupski, moral propositions are evaluative, normative propositions. They are propositions regarding what there is reason to feel, specifically to disapprove, and to respond to with blame or guilt. Evaluative normative judgments are evaluations, and judgments are evaluations in this specific sense. If judgments are evaluations, what then is their relationship to practical reasons? This is, for Skorupski, a question of the relationship between reasons to act and reasons to feel. Evaluations are in general genuine judgments because they are accountable to standards of correctness, but these standards can be entirely internal. We distinguish between having an emotional response and judging it to be justified, even when there is no external criterion of justification, such as danger in the case of fear. 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.59

56 Ibid. (1965: 22).
58 Skorupski (1999).
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. 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. Practical normative judgments are similarly grounded on a disposition to acknowledge reasons to act.

We can conclude that judging, for Skorupski, means making a claim which others – scrutinizing the evidence and argument – would have reason to accept. It is the mere nature of judging – making a judgment – that implies this rational acceptability of judgments. The position of Skorupski, influenced by Kant among others, entails that there is a potential agreement regarding a certain judgment. It is evidence and argument that may enable an agreement on a judgment. Skorupski’s description of an evaluative judgment is related to ethico-political judgment as I understand it. Starting with a plurality of judgments, we aim at a shared understanding of the question of which judgment is justifiable in the public sphere. In ethico-political judgment, we anticipate an agreement with others in the mere exercising of judgment. We want to convince others that they should accept our judgment.

Let me now consider the concept of judgment in relation to this inquiry into public discourse. Besides employing the concept of the interpretive framework and reasoning, public discourse is understood in terms of judgments. I distinguish, on the basis of my reading of public discourse, four kinds of possible judgments concerning a public course of action relating to prenatal diagnosis or screening. 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, in principle, not considered justifiable, with exceptions. A restrictive judgment entails that the use of prenatal diagnosis or screening is not considered justifiable.

By classifying judgments in terms of (moderate) permissive and (moderate) restrictive judgments, it is possible to see the extent to which common ground has been found in public discourse. If we encounter only restrictive and permissive judgments, common ground will apparently be absent. Moderate judgments are, in this respect, closer to each other. 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 question 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.

The presence of diverging judgments in public discourse is an expression of the plurality of the points of views held by society. Skorupski argues, as we have seen, that when I judge, I enter a commitment that inquirers who scrutinize the relevant evidence and argument available to them would converge on my judgment. When holding a judgment, I presuppose that others would accept it if my reasons convince them. When there is no logical connection between the reasons and the judgment, however, it is possible that others may agree with our judgment, while disagreeing with the underlying reasoning. We can, at least, expect that reasons are given for judgments; this in the sense that not merely utterances meaning ‘this is wrong’ are expressed. We can ask why a particular course of action would be wrong. Valid reasoning entails that the conclusion, the judgment, by necessity follows from the reasons. If everyone were to accept the reasons we provide, then everyone would even accept our judgment.

*The relation between interpretive frameworks, reasoning and judgments*

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.

I have discerned three ways of moral reasoning that may be found in the empirical inquiry into public discourse. It is conceivable that, on the basis of consequentialist, deontological, and reconstructive ways of reasoning, similar judgments are defended even though interpretive frameworks may differ. Of course, it also possible that, on the basis of a particular way of reasoning, different judgments are made, varying from restrictive to permissive. As we have seen, some principles may be related to various ways of reasoning. Only by considering the reasoning on the basis of the interpretive framework will it be possible to discern the way of reasoning in question. Not every text appeals to
moral principles, however, and we cannot discern in each text a consequentialist, deontological, or reconstructive way of reasoning related to judgments.

The concept of ethico-political judgment presupposes that we find common ground in view of the plurality of points of view in society. Common ground is to be understood as an agreement concerning a justifiable judgment related to a public course of action. When judgments differ, and when the four kinds of judgments can be identified in public discourse, there will be a rationale for ethico-political judgment, as a deliberative concept. The formation of a judgment is a process during which citizens, on the basis of interpretive frameworks, provide reasons in support of judgments. Whether or not judgments are justifiable in the light of the reasons is a matter for public deliberation.

1.4 On the empirical 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 Ricoeur, a text is any discourse fixed by writing.60 Fixed by writing is a discourse that 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.

Carlshamre discusses various maxims for the interpretation of texts.61 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 it becomes a unity and true. Other maxims that Carlshamre mentions include ‘Try to consider the text as a relevant contribution to the ‘conversation’ it is part

61 Carlshamre (1994).
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 the text. 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, dependent on the horizon of understanding of the reader interpreting the text. My interpretation of texts in public discourse presupposes that we can 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 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 ethico-political judgment on prenatal diagnosis? Even though selective abortions are, under Dutch and Swedish law, treated like any other abortion, 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, is discussed in public discourse. The discussion differs, however, from the abortion discourse in general: the specific reason that a woman might have for terminating the pregnancy, namely an afflicted fetus, is questioned;

- **Attitudes toward the disabled.** How do prenatal diagnosis and screening influence attitudes to the disabled and should this influence ethico-political judgments on prenatal diagnosis? Some disability organizations have criticised 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 have for women and their partners and should this influence ethico-political judgment on prenatal diagnosis and screening?
Screening tests are increasingly becoming available and offered to pregnant women in order to provide a risk with a justification in terms of autonomy, notably concerning the question of whether the fetus has a chromosomal aberration leading to Down syndrome. The justifiability of prenatal screening is, however, a topic of public discourse;

- Limits to medicine. This focus in public discourse addresses the question of what the indications of prenatal diagnosis and screening should be. In public discourse, the question is addressed whether there should be limits to medicine as far as prenatal diagnosis is concerned in view of, for example, new genetic diagnoses. An example indication for prenatal diagnosis which has been discussed is gender selection or 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; 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 120 texts for further inquiry, of which 59 belong to the Swedish public discourse and 61 belong to the Dutch discourse. My selection criterion for these 120 texts is that a text must contain normative reasoning. From the selected 120 texts, 50 are considered in detail in terms of interpretive frameworks, reasoning, and judgments concerning a public course of action. The other texts are considered in footnotes, in order to provide a more comprehensive overview of public discourse. Of the 50 texts that are considered to a greater extent, 27 belong to the Swedish public discourse and 23 to the Dutch public discourse. There are three selection criteria for the texts considered in detail. After having interpreted the broader material of public discourse, I have chosen texts which I regard to be representative of various points of view in society. I have also focused on texts with a dialogical structure. These texts are part of a discussion regarding the moral justifiability of prenatal diagnosis and screening in relation to a public course of action. Lastly, political documents have been included.

Public discourse is considered during the period 1989-2006. I have chosen to consider public discourse from 1989 due to a Swedish White Paper being published in this year and 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 further developed; 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. The first thematic focus, the unborn life was mainly discussed in the Netherlands and Sweden during the early years of the period 1989-2006, roughly until the mid-1990s; the second, third, and fourth thematic foci were discussed in both countries during the entire period 1989-2006.

**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 illness or impairment in the fetus.\(^{62}\)

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 at between 200 and 300 % per annum, while in some countries, tests for over 1,000 conditions are currently being offered. 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.\(^{63}\) In a study on health practitioners’ discussions with regard to 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.\(^{64}\) In the future, one possible development in prenatal diagnosis, perhaps with the isolation of fetal cells from maternal blood, may be

\(^{62}\) Vehmas (2002).

\(^{63}\) Boyle and Savulescu (2003).

\(^{64}\) Williams et al. (2002).
DNA chip technology based upon ‘multiplex gene expression analysis’\textsuperscript{65}. 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).\textsuperscript{66} 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.\textsuperscript{67} 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 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 based upon maternal blood samples, became available.\textsuperscript{68} Women with Down syndrome pregnancies have a reduced level of AFP concentrations. Using a blood sample, it is possible to calculate the risk which, in some cases, entails that the woman is referred to amniocentesis.\textsuperscript{69} In the 1990s, the screening method of fetal nuchal translucency measurement using ultrasonography was introduced, a method that results in the estimation of the risk of having a child with Down syndrome.\textsuperscript{70} Screening trials for other afflictions are also 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 an 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.\textsuperscript{71}

Prenatal screening, and diagnosis are part of reproductive genetics, the ‘utilisation of DNA-based technologies in the medical management and supervision of reproduction, and ultimately, female bodies’.\textsuperscript{72} Powerful social and cultural processes would be involved in the medical organization of genetic tests for prenatal diagnosis. Prenatal screening can also be regarded as an example of science and technology undergoing the process of ‘reflexive

\textsuperscript{65} Henn (2000).
\textsuperscript{66} Findlay et al. (1998).
\textsuperscript{67} Ettorre (2001).
\textsuperscript{68} Renzo and Picchiassi (2006).
\textsuperscript{69} Zindler (2005).
\textsuperscript{70} Renzo and Picchiassi (2006).
\textsuperscript{71} Fanos et al. (2006).
\textsuperscript{72} Ettorre (2002).
modernization’, the evolution from industrial to risk society in the light of its risks.\(^{73}\) The development of prenatal screening is notably based upon the risk of having an afflicted child perceived by the pregnant woman and her partner. However, doubt, uncertainty, choice, individuality, and risk which all permeate reflexive modernity, and which are associated with human genetics, would not have supplanted older ‘modernist values’ of objectivity, progress and certainty entirely.\(^{74}\)

Legislation and regulation

In the Netherlands and Sweden, selective abortions are by law treated similarly to other abortions. In the Netherlands, the Termination of Pregnancy Act (Wet afbreking zwangerschap, 1981) makes abortion 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 to the woman. In Sweden, it is the Abortion Act (Abortlagen, 1974) that applies. In Sweden, women may request an abortion up until the 18\(^{\text{th}}\) 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, 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) applies to prenatal screening. A permit must be requested from the Minister of Health for 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 White Paper published in 1989. In Sweden, trials are taking place using a combined blood and ultrasonography test. Also in the Netherlands, new methods of prenatal screening are being introduced. In the Netherlands, around 550 selective abortions are currently being carried out each year. 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. We will see in our inquiry into public discourse that the question of whether there should at all be legislation and regulation concerning prenatal diagnosis and screening is addressed. We can conclude, in the light of developments in the field of prenatal diagnosis and screening, that these technologies are suitable for an inquiry into judging.

\(^{73}\) Beck (1996).
\(^{74}\) Kerr and Cunningham (2000).
more new technologies are developed, and can be introduced, the greater the rationale for public deliberation and ethico-political judgment.

1.5 Outline

As I have pointed out, ethico-political judgment is studied in this inquiry in both a philosophical and an empirical sense. Chapters 2 and 3 concern the philosophical inquiry into ethico-political judgment, Chapters 4 and 5 concern the empirical inquiry into public discourse in the Netherlands and Sweden, and Chapter 6 discusses public discourse in relation to ethico-political judgment. In Chapter 2, the concept of ethico-political judgment is elaborated by focusing on the concept of judgment, politics and public justifiability, and morality. I have suggested that, in relation to ethico-political judgment, we turn to ethics in order to assess whether or not our reasons are good ones. To this end, I undertake an exegesis of Kant’s ethics and Habermas’ discourse ethics. I understand the categorical imperative as a ‘principle of judgment’ and Habermas’ discourse ethics as a dialogical account of justification, in terms of reasons. Kant’s ethics and discourse ethics may help when thinking about the question of what it is that makes a reason a good reason. In Chapter 3, the focus is on the capacity to judge. This is done in relation to the first part of the third Critique of Kant, and on the basis of the exegesis of this first part by discussing the interpretation of Arendt. I take from Arendt the notion of impartiality of judgment, which I regard to be one of the four conditions of ethico-political judgment, together with reciprocity, dialogicity, and publicity. The four conditions are necessary in order to find common ground, the purpose of ethico-political judgment. In Chapter 3, judging is also discussed in relation to ethics and politics. Chapters 4 and 5 concern the empirical inquiry in the Netherlands and Sweden. The results of the empirical inquiry are presented; texts have been analyzed in terms of their interpretive frameworks, reasoning, and judgments. In Chapter 6, the question of the extent to which public discourse meets the purpose and conditions of ethico-political judgment is addressed. This is done by relating judgments to common ground; interpretive frameworks to the condition of impartiality of judgment; and reasoning to the condition of reciprocity. In Chapter 6, public discourse is considered as ethico-political judgment in an empirical sense. I discuss common ground on the basis of a proposal to have recourse to a neutral framework in ethics. I conclude by emphasizing the relevance of the concept of ethico-political judgment to thinking about public deliberation.
CHAPTER 2

Ethico-political judgment and moral deliberation

Habermas’ discourse ethics is one of the most profound challenges to the presumed monological character of the categorical imperative in Kant’s ethics. Habermas proposes an alternative procedure of universalization that still resembles the universalization procedure of the categorical imperative. While there are tensions between Kant’s ethics and discourse ethics, I suggest that these may complement each other when trying to assess whether our reasons are good. It is obvious that reasons play a major role in discourse ethics, with its emphasis on an argumentative practical discourse in order to test the validity of our norms, rules for action, with respect to all affected. Even Kant’s ethics can be related, however, to reason-giving when we assess whether a maxim for an action can become a universal law. Ethico-political judgment presupposes that we test our reasons for our judgments in order to arrive at a justifiable judgment in the end. I have suggested that we turn to ethics in order to find a procedure to test, whether our reasons are good or not. I will suggest a definition of morality, the object of ethics, in terms of critical morality and lifeworld morality. Moral reflection is related to critical morality as the reflective consciousness of the right and the good. Critical morality is opposed to lifeworld morality as valuations, values, and norms. I will consider, at the beginning of the chapter, the concept of judgment and discuss politics in relation to prudence and public justifiability. Public justifiability is the extent to which judgments are justifiable in the public sphere. It presupposes giving and asking for reasons.

2.1 The concept of judgment

In relation to my inquiry, I discern four relevant aspects of the concept of judgment. We can speak of the faculty of judgment; a judgment as an inference from reasons; judgment as the formation of a judgment; and judgment as assessment. 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.

75 This definition is defended by 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, with which I am alone concerned, aims at the appropriate application of moral rules to particular circumstances insofar as their application requires choosing among morally different alternatives’ (1987: 7).
that judgment in public. In the third sense, we can speak of the formation of judgment.\textsuperscript{76} 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. In the fourth sense, judgment is equivalent to assessment.

Judging means exercising the faculty of judgment when forming a judgment. Judging is to subsume the particular under the universal.\textsuperscript{77} We can understand this using an example; judging that the physical punishment of a child is not a responsible act is the subsumption of the particular punishment under the universal principle of responsibility. Formation can be conceived of merely as a singular concern, but it can also be conceived of in the plural. When it comes to a public course of action, such as legislation, formation is a plural process. I can, in this respect, hold that the physical punishment of a child is wrong because it would be a violation of the principle of responsibility, and hence that there should be a ban. Then, however, I have to justify my judgment by offering reasons, in a deliberative practice. I have to consider the judgings of others.

\section*{2.1 The relation between morality and politics}

What is the relation between morality – which I will define in terms of valuations, values, and norms – and politics – which will be defined as the necessity of public action? Many would regard ethics and politics as immiscible and even antithetical.\textsuperscript{78} To mix them is to compromise both. Politics would lose its practical effectiveness if restrained by ethical principle; ethics would lose its moral ground if required to justify political necessity.\textsuperscript{79} I consider some accounts of the relation between morality and politics.

\textit{‘Morality first’ or ‘politics first’?}

Tronto distinguishes a ‘morality first’ and ‘politics first’ position in thinking about the relation between morality and politics. According to Tronto, rather than viewing morality and politics as a set of congruent and intertwined ideas, most contemporary political thinkers view the relationship of politics and morality in

\begin{footnotesize}
\footnotesize{76} Urteilsbildung (German), oordeelsvorming (Dutch).
\footnotesize{77} This is how Kant speaks of judgment, see chapter 3.
\footnotesize{78} Pellegrino (2006).
\footnotesize{79} For 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. For Emmet, there is a relationship between morality and politics, but it will be utilitarian ethics that prevail in the political sphere.}
\end{footnotesize}
either of two ways. In the first case, the ‘morality first’ view 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. An example of the ‘morality first’ view is that, rather than dealing with conflicting claims by trying to identify the elusive and shifting intersecting sets of people’s beliefs, 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. Moral truth is to be aimed at in public debate and institutionalized means. Tronto clarifies that the ‘politics first’ view political thinkers assert the primacy of political values, e.g. gaining power and preserving it through force and strength. Moral values should only be introduced to politics in accordance with the requirements of these political concerns.

Bobbio defends a position which entails that neither the ‘morality first’ nor the ‘politics first’ option has to be chosen. 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 morals, but to social morals – morals that concern the activities of an individual which interfere with the sphere of other individuals. Monism entails politics either being reduced to morals, thus ‘morality first’, or morals being reduced to politics, thus ‘politics first’. Bobbio offers a solution to the problem of monism:

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.

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

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80 Tronto (1994).
81 An example of the ‘morality first’ position is provided by 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 Höffe (1987), not any kind of morality has a place in politics, however. Furthermore, it is not possible to deduce concrete politics from the morality legitimate for politics. A legitimate role in politics, according to Höffe, 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 to constitute the co-existence and co-operation in such a way that the disadvantages and advantages are shared in an impartial way. Justice is, for 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.
82 Shapiro (2003).
struggle of political interests. In practical democratic politics, perspectives of purposiveness will often prevail over moral impulses.\textsuperscript{84}

What is the relation between morality and politics in ethico-political judgment as an ideal for public deliberation over moral and political questions? According to Franzen, the interrelations between the moral and the political sphere make it impossible to separate both areas, as well as to determine their relation in general terms.\textsuperscript{85} Morality and politics are two distinct spheres with interrelations. The fact that there should be, in the case of prenatal diagnosis and screening, a relation between morality and politics can, in my view, be defended. This does not entail that moral values should prevail in politics. In view of moral disagreement in a pluralist society, 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 where a relation between morality and politics is called for. What is technologically possible would not be an option for public action when it contradicts prevailing morality.\textsuperscript{86} 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 regarding 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. I will argue below that the judgments on which decisions are based should be justifiable in the public sphere. This entails reasons being provided which can be justified. Moral reflection can entail reflection upon what would constitute good reasons for judgments concerning morally controversial technologies. When decisions are justifiable in the public sphere, their legitimacy may be enhanced. This is not to say that moral values should prevail over political values, but even in the sphere of politics, it could, from a democratic point of view, be required that good reasons are given for decisions.

\textbf{2.3 Politics, prudence, and public justifiability}

For Barber, politics can be defined as

\begin{quote}
 a necessity for public action, and thus for reasonable public choice, in the presence of conflict and in the absence of private or independent grounds for judgment.\textsuperscript{87}
\end{quote}

\textsuperscript{84} Freund (1961).
\textsuperscript{85} Franzen (1987).
\textsuperscript{86} Daele (1989).
\textsuperscript{87} Barber (2003: 120 ff.).
Barber regards the sphere of politics primarily as a sphere of human action. He
describes politics as a sphere of action, but not all action is, of course, political.
Politics is restricted to public action, both when undertaken by a public and when
intended to have public consequences. Politics encompasses, for Barber, the
sphere, not simply of action, but of necessary action. Even the choice not to make
a political decision will have public consequences, however. We could consider
public action, in the case of prenatal diagnosis and screening, for instance 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 – nonimpulsive, thoughtful, and fair. Politics arises out
of conflict and takes place in a sphere defined by power and interest. Regarding
the absence of an independent ground, this absence of judgment is, for Barber,
novel and central.

I have discerned three ways of moral reasoning, of which consequentialist and
deontological ethics are foundationalist theories. There is no agreement, however,
concerning an independent ground for judgment at the ethical level, and even if
there were agreement (say concerning the principle of utility), I claim that we
should not choose a ‘morality first’ position. Thus, as far as ethico-political
judgment is concerned, we do not have an independent ground for judgment. In
the political sphere, ‘all’ we have is the discursive rationality of the giving and
asking for reasons.

Political judgment as prudence

I will consider Aristotle’s concept of phronesis, which can be translated as
prudence, or practical wisdom, in relation to political judgment. Phronesis is a
much-discussed concept in relation to political judgment. Aristotelian phronesis
would be essential to politics because

it is flexible, practical, and the product of shared understandings concerned with
particular, concrete human beings.

In Book VI of the Nicomachean Ethics, Aristotle tries to grasp the nature of
prudence by considering what sort of people are called prudent. The man who is
capable of deliberation will be prudent. Prudence, phronesis, is a virtue for
Aristotle. It is not possible to deliberate about things that are necessarily so.

88 The concept of phronesis is also employed by neo-Aristotelians in ethics. For instance, for MacIntyre
(1984), phronesis is the exercise of judgment in particular cases. MacIntyre highlights the fact that, for
Aristotle, phronesis is a central virtue.
90 NE 1140a24-b12.
Therefore, prudence cannot be science or art. Prudence 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, about which prudence is, is different from production, about which art is:

What remains, then, is that it is a true state, reasoned, and capable of action with regard to things that are good or bad.91

Prudential 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. Prudence 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.92

Prudence 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 prudence are, for Aristotle, the same state of mind but their essence is not the same. Prudence 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. Prudence involves knowledge of particular facts which become known from experience.93 Prudence does not exercise authority over wisdom since it does not use wisdom but provides for its realization.94

Judgment in action

We can think of prudence as entailing deliberation concerning conduct, or human action.95 According to Beiner, prudence is not the same as the faculty of judgment but can, without doubt, be grounded in sound judgment. Phronesis can be described as the faculty of judgment embodied in action.96 Nichols and White describe prudence as ‘acting with discretion, discernment, foresight.’97

91 NE 1140a24-b12.
92 NE 1141b8-27.
93 NE 1142a12-29.
94 NE 1144b33-1145a11.
95 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, and an appeal to testimony and emotion, from deliberation. See O’Neill (2002).
97 Nichols and White (1979: 378).
According to them, all these notions are bound up with good judgment. Prudence conditions 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. 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*. Politically prudential action is judgment in action. It entails deliberation over action in the light of the human good, action with discretion, discernment, and foresight. Prudent is the person who is capable of deliberation. The relevance of prudence to the inquiry into ethico-political judgment is that we do not merely encounter reflection upon the moral justifiability of judgments, but also upon the extent to which political judgments are prudential.

Public justifiability of judgments concerning a public course of action

I defend the premise that ethico-political judgment can be considered as an ideal of public deliberation over moral and political questions. This entails that, in public deliberation, we aim for common ground as the purpose of ethico-political judgment. But what is the rationale for public deliberation? I defend the premise that the concept of public justifiability of judgments is a reason to aim for public deliberation, and hence ethico-political judgment. Public justifiability of judgments may enhance the legitimacy of decisions which are based upon the judgments. As I understand public justifiability, it concerns the extent to which reasons are justifiable in the public sphere. Public justifiability is related to, but different from, the concept of public justification. Public justification is said to be at the core of theories about liberalism. According to Rawls, public justification, of his conception of ‘justice as fairness’, is, for instance, a way to ensure the legitimacy of political authority:

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98 Long (2003). Public justification entails, for 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). Reason-giving is, as D’Agostino clarifies, ambiguous. It may entail a reason R being provided which is a reason for each and every one of the members of the community. It may also involve each member being given a reason why he or she should accept this arrangement. In the latter case, the reason for one individual might differ from that of others: some public justifications appeal to a consensus, whereas others are based upon a convergence of opinions. In the first sense, public justification is a quest for a rational consensus which, for Gaus, means that ‘Principle/policy P is publicly justified if and only if, supposing everyone reasoned in good faith, reasoned perfectly and had perfect information, everyone would accept P (Or no one would reject P),’ (2003: 135).
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.  

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. 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. I understand public justifiability as a concept that is associated with the public political sphere, as well as the informal public 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. How much justification a decision enjoys is, in my view, however, better expressed by the notion of the public justifiability of judgments – the extent to which extent judgments are justifiable in the public sphere – than by the notion of public justification which primarily concerns the process of justifying a decision by representatives.

The public justifiability of judgments presupposes public deliberation. Public deliberation is cherished by proponents of deliberative democracy. Let me consider the proposal for deliberative democracy of Gutmann and Thompson, for whom deliberation is about justification:

Most fundamentally, deliberative democracy affirms the need to justify decisions made by citizens and their representatives.

The aim of deliberative democracy is to provide the most justifiable conception for dealing with moral disagreement in politics. For Gutmann and Thompson, deliberative democracy serves four purposes. It promotes the legitimacy of collective decisions; it encourages public-spirited perspectives on public issues; it promotes mutually-respectful processes of decision-making; it helps to correct mistakes made during decision-making. Most deliberative democrats do not insist that ordinary citizens regularly take part in public deliberation and favor some kind of representative democracy. Gutmann and Thompson see deliberative democracy as a way to broaden representative democracy:

100 Charney (1998).
102 Gutmann and Thompson (2004: 3).
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 deliberative.\textsuperscript{103}

The deliberative ideal presumes reciprocity, which means that citizens owe one another justifications for the mutually binding laws and public policies they collectively enact. We see that, for Gutmann and Thompson, one of the cornerstones of deliberative democracy is that citizens and their representatives justify collective decisions.\textsuperscript{104}

As we have seen, for Gutmann and Thompson, deliberative democracy promotes the legitimacy of collective decisions. This point is also stressed by Bohman who sees public deliberation as a normative ideal and a test of democratic legitimacy:

\begin{quote}
Political decision making is legitimate insofar as its policies are produced in a process of public discussion and debate in which citizens and their representatives, going beyond mere self-interest and limited points of view, reflect on the general interest or on their common good.\textsuperscript{105}
\end{quote}

Decisions should be justified using reasons. These reasons should be generally convincing to everyone who is participating in the process of deliberation. Bohman has a dialogical account of deliberative democracy. At stake is the exchange of public reasons via the give and take of dialogue which makes speakers answerable and accountable to one another. Deliberation is also interpersonal: it concerns the process of forming a public reason, a reason that everyone in the deliberative process finds acceptable. According to Bohman, public deliberation is more likely to improve the epistemic quality of the justifications of political decisions.

We find an ambiguity in Bohman's account of public deliberation since it includes both citizens and their representatives. For Gutmann and Thompson, deliberation, which in their account is primarily a concern of representatives, promotes the legitimacy of decisions. For Bohman, the legitimacy of decisions presupposes that public deliberation has taken place, of which legitimacy is the consequence. If ‘public’ is conceived of in the sense of the public political sphere, this can be understood; if the legitimacy of decisions is made dependent on the justification of these decisions in deliberation in the broad public sphere,

\textsuperscript{103} Ibid (2004: 29).
\textsuperscript{104} Even Cohen 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).
\textsuperscript{105} Bohman (1996: 5).
the ideal of representative democracy will be compromised (and some form of participatory or direct democracy cherished).

It is in my view important, once again, to emphasize the difference between the public justification and public justifiability of judgments. The public justification of decisions is a concern of the representatives: the extent to which decisions can be justified in the public sphere is a concern of citizens. Let me conclude with the comment that the public justifiability of judgments can be defended in terms of enhancing the legitimacy of decisions based upon those judgments. It is a rationale used to aim at public deliberation. Ethico-political judgment entails that – given the fact of moral pluralism – the citizens’ concerns are taken seriously in the decision-making process and that they are given the opportunity to judge decisions in the public sphere.

2.4 Critical morality and lifeworld morality

We engage, among other things, in moral reflection when we wish to examine whether or not our beliefs and judgments can be justified in a reciprocal way, on the basis of our fundamental principles. We are interested in what a justifiable course of action is, or a good life. Ethics are not merely an academic discipline, but also a kind of reflection which engages many. I distinguish between a philosophical and everyday use of the concept of ethics. Philosophical ethics can be called the meta-ethical, normative-reflective, and interpretive study of morality: the object of ethics. In everyday use, I take ethics to mean reflection upon how to live – related to views on the good life – and how to act – which actions are right and wrong. Morality, the object of ethics, is considered, by Hart, to be a positive and critical morality. Positive morality is the morality actually accepted and shared by a given social group, whereas critical morality encompasses the general moral principles used in the criticism of actual social

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106 An argument for the public justifiability of judgments is provided by 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.

107 Representatives may wish to enhance their understanding of concerns that are formulated by citizens in public discourse. Through public involvement in the decision-making process, the legitimacy may be enhanced since citizens have been able to express their concerns. See, for instance, Joss (2002) about citizens’ involvement in questions concerning technology. Hamlett argues that the point of a discursive practice concerning technology – such as consensus conferences, citizen juries, and participatory design – is ‘not only to interject new or previously excluded, preset preferences into the bargaining mix but to introduce a qualitatively different voice’ (2003, 121).

108 Concerned with the linguistic and logical properties of moral statements.
institutions, including positive morality.  

Critical morality

I would like to explore the concept of critical morality in terms of including Kant’s *Moralität*. Critical morality is to be understood as the reflective consciousness of the right and the good.  

According to Rawls, there are – independent of one’s own conception of the good life – goods we all wish to have as means for the good life, such as rights and liberties, opportunities and power, and income and wealth.  

I will understand ‘right’ in relation to principles. On the basis of principles, such as the principle of justice, we may agree on rights and liberties. In *Groundwork for the Metaphysics of Morals*, Kant defines what I call critical morality (including *Moralität*, to be contrasted with *Moral*, customs) as the reference of all action to the legislation which alone can render a kingdom of ends possible.  

This legislation must be capable of existing in every rational being. According to Kant, in one of the main formulations of the categorical imperative, as we will see later, we should act so that the will can at the same time regard itself as giving through its maxim’s universal laws. Kantian morality consists of following a maxim through which the will can regard itself as legislating. Morality entails that we follow a principle, entailing that an act should follow a maxim which can become a general law. For Kant, the moral law can be known through respect [Achtung]:

> The immediate determination of the will by the law, and the consciousness of this, is called respect, so that this is regarded as an *effect* of the law on the subject, and not as the *cause*.  

Respect is thus the determination of the will through the law and consciousness. I contend that we can speak of critical morality as the reflective consciousness of the right and the good. The concept of reflective consciousness is discussed by Korsgaard, who speaks of a reflective structure of human consciousness.  

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109 Hart (1963: 20). Critical morality exists, according to Brom (1998), in this way as a ‘hermeneutical construct’, meaning that the process of formulating critical moralities never ends; it exists in a repeating process in which a part of morality is criticised in the light of the whole or morality in order to amend this part.  

110 ‘We [also] speak of moral problems, judgments, moral codes, moral arguments, moral experiences, the moral consciousness, or the moral point of view’, see Frankena (1973: 5).  

111 Rawls (1971).  

112 G § 434.  

113 G § 401 n. 2: ‘Die unmittelbare Bestimmung des Willens durchs Gesetz und das Bewußtsein derselben heißt Achtung, so daß diese als Wirkung des Gesetzes aufs Subjekt und nicht als Ursache derselben angesehen wird’ (GMS § 401).  

structure establishes a relation we have for ourselves: it is a relation of authority over ourselves which is the source of obligation. The reflective structure of consciousness sets us normative problems and it is, following Korsgaard, because of this that we require reasons for action, and a conception of the right and the good.

When I regard critical morality as reflective consciousness, the consciousness of principles related to the right may also be unreflective: we may have internalized a principle such as responsibility. The definition of critical morality endorsed here explains where views on the right and the good have their origin, namely in the reflective structure of our consciousness. This structure enables the exertion of authority over ourselves. My understanding of critical morality encompasses, contrary to Hart, more than general principles on the basis that 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 what ideas and pictures underlie our sense of respect for others but also those which underpin our notions of a full life.\textsuperscript{115}

Reflection is the mere essence of ethics; we reflect upon a good life and upon correct actions. Critical morality entails conceptions of the good and the right. I am, as I made clear above, particularly concerned with the reflective consciousness of the ‘right’, related to principles. Using principles, we can hope to assess what a correct action would be. Principles can be regarded as containing duties: duties are encoded in principles.\textsuperscript{116} I understand the concept of duty in a Kantian sense. Duty is the concept of a necessitation of free choice through the moral law.\textsuperscript{117} It is a commonplace that principles may guide correct action. However, principles and rules would not be able to fully guide action; they must be complemented by judgments. Judgments are not supplements, but can supplant principles.\textsuperscript{118}

\textsuperscript{115} Taylor (1989:14).

\textsuperscript{116} According to Ross (1930), duties are encoded in general principles. He speaks of principles of duty. Each principle imposes a \textit{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 \textit{prima facie} rightness or wrongness’ (1930: 31).

\textsuperscript{117} MM 6: 379.

\textsuperscript{118} Montague defends a view on moral principles in which these influence what sort of consideration should be taken into account when deciding which actions are right or wrong: ‘Moral principles are concerned with moral relevance; i.e., they tell us what kinds of considerations can legitimately be taken into account – and how they count – when attempting to determine whether particular actions are right or wrong.’ (1986: 643).
Lifeworld morality

I have thus far defended the fact that critical morality concerns the consciousness of the right and the good. How then to transcend from critical morality to lifeworld morality? For Hart, positive morality is the morality that is actually accepted and shared by a given social group. This leaves open the question of what morality consists of. I regard Hart’s positive morality as lifeworld morality. The concept of lifeworld morality implies that morality consists of moral, lived, experience.\footnote{According to medical ethicist Dupuis (1998), cumulative experience regarding the question of how to live can be considered as 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.’} It is thus a concept to be explored, not only by normative-reflective, but also by interpretive ethics. Lifeworld morality can be said to consist of valuations – opinions on what is good or right; values – stable concerns\footnote{By Engelhardt (1986), morality is described as the taken-for-granted webs of moral values that constitute the character of everyday lifeworlds. Frankena (1973) demarcates deontic judgments – related to norms – strictly from aretic judgments – related to values. 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.}; and norms – rules for actions.\footnote{Jacobs suggests that philosophical ethics could thus be called a hermeneutics of moral experience, which only reveals its meaning in its application: ‘One could even call moral experience itself hermeneutical: it makes explicit in every new situation what is to count as courage, loyalty, or a regard for human beings as ends in themselves’ (1992: 25). It is the application of principles, not the principles per se, that is controversial, Warnke (1999) argues. Debates such as the one on abortion are not moral debates about which principles we should adopt, rather they are interpretive debates about the meanings of principles we already possess.} There is an interaction between critical and lifeworld morality. Valuations, values, and norms are reflected upon in the critical morality; critical morality can inform lifeworld morality in the sense of, for instance, questioning norms.

Lifeworld morality is a descriptive concept: it articulates the valuations, values, and norms of people in their everyday lifeworlds, and their moral experience. Critical morality is a normative concept: we reflect upon the question of what our principles ought to be and how to understand them in their application. Application can be understood analogously to the application of laws in the sense of coming to an understanding.\footnote{See Blackburn (2000).} In critical morality, we do not merely reflect upon our principles, and valuations of the right, but also on our valuations of the good, or what Taylor calls our ‘strong evaluations’.\footnote{Taylor (1989).} We become, in critical morality, aware of our values as stable concerns and the rules we follow for our actions in everyday life. Lifeworld morality is both subjective and intersubjective. As Pellegrino and Thomasma, point out, the lifeworld is personal,
since every experience has some kind of meaning for us and is valued, and social, since our experiences take place in a community rooted in time. It is in the social context, they claim, that the responsibility of one human being toward another is developed. \(^{124}\)

Using the distinction between critical and lifeworld morality, we can accommodate criticisms of morality as highly abstract, as a concept which is merely philosophical. Walker, for instance, criticizes a so-called ‘theoretical-juridical’ model of morality and moral theory. \(^{125}\) 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 which, according to Walker, consist of a family of practices which show what is valued by making people accountable to each other. Morality is a practice that is interpersonal for Walker and morality arises out of what goes on between, or among, people. Morality consists of practices of responsibility that implement shared understandings. 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 is at the heart of justification of actions that we are in need of codifiable propositions. \(^{126}\) Lifeworld morality may include what Walker calls shared understandings of responsibility, a concept which is codifiable at the level of critical morality when reflecting upon principles. Lifeworld morality can be described in terms of what we value (valuations), e.g. relationships, our stable concerns (values) and norms tied up with our lifeworlds.

### 2.5 A general account of justification

A clear account of justifying judgments can be found in Audi who regards reasoning in terms of a major and minor premise as well as a practical judgment. \(^{127}\)

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\(^{124}\) Pellegrino and Thomasma (1981).

\(^{125}\) Walker (1998).

\(^{126}\) 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.

\(^{127}\) Audi (2006).
- The major premise is, for him, *motivational*: I want $\varphi$
- The minor premise is a *cognitive* or *instrumental* premise: my choice of A would contribute to realizing $\varphi$
- The conclusion is, thus, a *practical judgment*: I should A

For the purpose of understanding reasoning in public discourse, I interpret a motivational premise, for instance, as meaning that I want to respect a principle. I am not, in Kantian terms, inclined but willing to respect, for instance, the principle of human dignity.\textsuperscript{128} An act A may be in accordance with respecting this principle, or it may not. In the first case, we should A, in the second case we should not A. We have seen that it is crucial for an action that we are also able to abstain from it. For Audi, then, it is the reasonableness of the conclusion relative to the premises, by which he means that, given the premises, the conclusion is quite likely to be true; what is commonly called a ‘reasonable inference’ from the premises. Reasonableness is, for Audi, related to justification as an epistemic concept; if a person is rational, relevantly informed, and has nothing to go on but the premises than where the conclusion is a reasonable inference from them, S at least has minimal justification for the conclusion. Reasonableness is, following Audi, normally the appropriate standard for good practical reasoning, and it goes with justification. Our having sufficient warrant to take an argument to be valid may justify our believing its conclusion. Good practical reasoning, then, 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.

According to Audi, moral judgment normatively overrides in the sense that it provides both the strongest kind of justification for action, and in fact a kind even stronger than any combination of other sorts, such as pragmatic and aesthetic justification. But how can we understand moral judgment in terms of Audi’s own scheme? As we have seen, judgment can mean a capacity for judging, the inference or conclusion from reasons, an assessment and formation. Judgments have, in Audi’s scheme, the form of a conclusion: it could be argued that, in moral judgment, premises from which the conclusion is inferred are of a moral kind. These premises may, for instance, include moral principles.

\textsuperscript{128} Moral worth is for Kant a kind of moral value which is based upon duty. Even when acts from inclination are morally permissible they have no moral worth (see G). A comment on voluntariness in Kant’s ethics. I suggest that we can interpret the term motivational in Audi’s scheme in terms of willing; I want $\varphi$ is equivalent to I am willing $\varphi$. A justification for this interpretation is given by Bayertz (2006) who argues that the Kantian answer to the question why we should be moral is that ‘One ought to be moral, because you want it yourself (as reasonable being)’. The moral ought is actually a moral willing.
Reasons and judgments

We have considered Audi’s account of how judgments may be supported by premises, or reasons. If judgments such as ‘this is wrong’ are without justification, then on the other hand, we have no opportunity to enter into deliberation over our judgments.  For Brandom, there is a clear connection between reasons and judgments. As we have seen, for Brandom, giving and asking for reasons for actions is possible only in practices of making and defending claims or judgments. Giving a reason is, for Brandom, always expressing a judgment or making a claim. Judgments cannot only be supported by reasons, but they can also serve as reasons:

The context within which concern with 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.

The status of a judgment as a discursive commitment depends, for Brandom, on its being liable to conditions of justification:

Judging or claiming is taking a claim – undertaking a commitment. The conceptual articulation of these commitments, their status as distinctive discursive commitments, consists in the way they are liable to conditions for justification.

Public deliberation is the giving and asking for reasons in the public sphere. What is the relation between judging and deliberation? This relation is emphasized by McBride. She argues that what is needed, in the view of deliberative democrats who place the exercise of citizens’ deliberative capacities at the centre, is better judgment, 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:

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129 For Larmore (2001), judgments can be supported by reasons. Moral judgment, in the view of Larmore, is far from being a marginal phenomenon. Moral disagreement emerges chiefly in areas where judgment must be exercised: We tend to disagree, not about the validity of general moral rules, but rather about whether they are being properly applied, how they are satisfied, and what to do when they come into conflict. Moral judgment is for Larmore not arbitrary, but appeals to reason.


132 Benjamin (1990) contrasts the ‘essentially social or dialogical nature of reflective judgment, as well as its variability, uncertainty and unpredictability’ with a rationalistic conception that has a set of impersonal rules that can and should be followed to the very same end by anyone capable of understanding them.
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.\footnote{McBride (2003: 113). Impartiality imposes, for McBride, 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.}

We can conclude that, by providing reasons, we attempt to justify the judgments we make. Justification is essentially a matter of public deliberation. We are required to provide reasons for our judgments, and can ask for reasons for judgments made by others. Still, there is more to say than the fact that justification consists of the mere providing of reasons. Moral judgment overrides, as Audi claims. In a deliberative practice, justification entails that we give and ask for reasons. I want to relate such a practice to an account of moral deliberation and reason-giving by having recourse to Kant’s ethics, as well as Habermas’ program of discourse ethics.

\subsection*{2.6 The categorical imperative as a ‘principle of judgment’}

It is well known that, for Kant, only a good will can be qualified as good:

Nothing can possibly be conceived of in the world, or even out of it, which can be called good without qualification, except a \textit{good will}.\footnote{G § 393: ‘Es ist überall nichts in der Welst, ja überhaupt auch außer derselben zu denken möglich, was ohne Einschränkung für gut könnte gehalten werden, als allein ein \textit{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. Duty is, for Kant, a concept of the will which is highly estimated for itself and is good without a view to anything further; the concept includes that of a good will.\footnote{This conception of duty differs from the description in \textit{Metaphysics of Morals} where duty is the concept of a necessitation of free choice through the law. We can relate the moral law to the will, however.} Kant identifies, in \textit{Metaphysics of Morals}, four cardinal duties toward others: these are beneficence, gratitude, sympathy, and respect.\footnote{MM.} Benevolence is taking satisfaction in the happiness, which Kant’s defines as well-being, of others, \textit{beneficence} is the maxim of making others’ happiness one’s end, and the duty to it consists of the subject’s being constrained by his reason to adopt this maxim as a universal law. \textit{Gratitude} consists of honoring a person because of a benefit he has rendered us. \textit{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 a recognition of dignity in other human beings.

\begin{footnotesize}
\begin{enumerate}
\itemsep0em
\item McBride (2003: 113).
\item G § 393: ‘Es ist überall nichts in der Welst, ja überhaupt auch außer derselben zu denken möglich, was ohne Einschränkung für gut könnte gehalten werden, als allein ein \textit{guter Wille}’ (GMS § 393).
\item This conception of duty differs from the description in \textit{Metaphysics of Morals} where duty is the concept of a necessitation of free choice through the law. We can relate the moral law to the will, however.
\item MM.
\end{enumerate}
\end{footnotesize}
Let me clarify the difference between a utilitarian account of happiness and, in the formulation of the duty of beneficence, Kant’s account. For the utilitarian, an action is right if it contributes to the greatest happiness of all. Happiness is the moral principle by which actions are to be judged. For Kant, who does not speak of actions in terms of their ‘rightness’ or ‘wrongness’, but in terms of their moral worth, the extent to which the maxim of affecting others’ happiness can be justified is dependent on whether the action is carried out through duty; duty is the necessity of acting from respect for the moral law. If a maxim for an action, which for instance entails that someone’s happiness may be affected, is not universalizable, the action will have no moral worth whatever its consequences.

**Three formulations of the categorical imperative**

Kant argues that a maxim, which for him is a subjective practical principle, has moral content if an action is done through duty, not through inclination. An action done through duty derives its moral worth, not from the purpose which is to be attained by it, but from the maxim by which it is determined, and thus does not depend on the realization of the object of the action, but merely on the principle of volition by which the action has take place. The pre-eminent good which we can call moral consists of nothing else than the representation of the law itself 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. The conception of an objective principle is called a command and the formulation of the command is called an imperative. There is one categorical imperative: *Act only on that maxim whereby you can at the same time will that it become a universal law*. There are three main formulations of which the first is this Formula of Universal Law. Kant exemplifies the procedure of the categorical imperative using the act of borrowing money. When I think myself to be in need of money, I will borrow some and promise to repay it, although I know that I never will be able to do so. 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.

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137 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 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.

138 G § 421.
O’Neill regards the categorical imperative as a universality test. For Kant, universalization entails that a subjective practical principle, a 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. O’Neill clarifies that rightness and wrongness, which are used as standard in the appraisal of outward features of action, are not the fundamental forms of moral acceptability and unacceptability that Kant takes the categorical imperative to be able to discriminate:

Since the locus of application of Kant’s universality test is agents’ fundamental principles or intentions, the moral distinction that it can draw is in the first place an intentional moral distinction, namely that between acts that have and those that lack moral worth.

The categorical imperative provides a criterion in the first place for duties to act on underlying intentions or principles – as we have seen, a maxim is, for Kant, a subjective practical principle – that is morally worthy. Maxims that are not universalizable are contrary to duty, clarifies O’Neill. For Kant, then, the ‘canon of the moral judgment of the action generally’ is that we must be able to will that a maxim of our action should be a universal law. If duty is a conception which is to have any import and real legislative authority for our actions, it can only be expressed, for Kant, in categorical, and not at all in hypothetical, imperatives. There is a necessary law for all rational beings that these should always judge their actions by means of maxims which they themselves can will should serve as universal laws. The second 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. A violation of this formulation of the categorical imperative is lying, which would entail using another human being merely as a means. We cannot escape treating human beings as means, but Kant’s second formulation of the categorical imperative urges us to also treat others always as ends in themselves.

It is, for Kant, 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

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141 For Kant, a hypothetical imperative treats an action as good only for a subjective purpose; for example, to obtain sensory pleasure. Hypothetical imperatives are rooted in a person’s contingent ends.
142 G § 429.
To provide universal laws in its maxims is a procedure of judging actions. The concept of every rational being as one that must consider itself as providing, in all the maxims of its will, universal laws, so as to judge itself and its actions form this point of view. This concept leads, for Kant, to another which is dependent on it, namely, that of a kingdom of ends. This kingdom is, for Kant, 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 (including both rational beings as ends in themselves and the special ends which each may propose to himself) is a kingdom of ends. The Formula of the Kingdom of Ends is the third main formulation of the categorical imperative: 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. Morality is the condition under which alone a rational being can be an end in himself, since by this alone, it is possible that he can be a legislating member in 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.

The role of judgment in Kant’s ethics

Moral judgment of an action, in terms of assessment, 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 can themselves will that they should serve as universal laws. In the Critique of Practical Reason, Kant argues that it is the notions of good and evil that first determine an object of the will. They are themselves, for Kant, subjected to a practical rule of reason, which, if it is pure reason, determines the will a priori relative to its objects. In this second Critique, Kant gives an explicit role to judgment as regards determining whether action comes under a rule:

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 (in abstracto) is applied to an action in concreto.

143 G § 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 Imperative darin gar wohl schicken, daß es, eben um der Idee der allgemeinen Gesetgebung willen, sich auf kein Interesse gründet und also unter allen möglichen Imperativen allein unbedingt sein kann’ (GMS § 432).
144 G § 434.
145 A rule for making other rules is, for Kant, a maxim.
146 CPrR 87.
For Kant, the rule of the judgment, according to laws of pure practical reasons, is this: ask yourself whether, if the action you propose were to take place by a law of the system of nature of which you yourself were a part, you could regard it as possible by your own will. Everyone does, in fact, decide by 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 can itself also conceive of, that is, conformity to law.

We have seen 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. According to Herman, judgment plays, in the procedure of the categorical imperative, a major role. She understands this procedure as follows; in order to use the categorical imperative as a ‘principle of judgment’ or assessment, the agent must first produce his maxim. That is to say, he must formulate a subjective principle that correctly describes what he is intending to do and why. If actions are to be assessed or judged by the categorical imperative through their maxims, it will be necessary that agents realize that the actions they want to carry out are morally questionable. Kant’s analysis of examples in *Groundwork* suggests, for Herman, that the

Need for judgment characteristically arises when an agent has what he takes to be good or compelling reasons to act to satisfy some interest or need and yet realizes that what he would do violates a known moral precept.

Because the categorical imperative procedure assesses maxims of action and because maxims contain only the descriptive elements belonging to an agent’s conception of his action and circumstances, the categorical imperative cannot be an effective practical ‘principle of judgment’ unless agents have some moral understanding of their actions before using the categorical imperative procedure. According to Herman, this procedure is a ‘principle of judgment’.

Herman’s interpretation of the categorical imperative as a ‘principle of judgment’ emphasizes the importance of judgment in Kant’s ethics. We have seen that, for Kant, rational beings should judge their actions by maxims of which they should will that they can become universal laws: this is, for Kant, moral judgment.

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147 Herman (1993). This point is also stressed by Silber (1974) who claims that, for Kant, judgment has the responsibility of both determining the nature of one’s specific duty and seeing its enactment. If there is any merit in an ethical theory at all, it must consist of the ability of that theory to provide principles for guiding moral judgment. The moral law is itself to be understood as a principle which specifies the procedure of judgment in the act of moral schematism.

148 Herman (1993: 77).
Whether an action comes under a rule – or maxim – or not is decided by judgment. Kant speaks of a ‘rule of judgment’. Rationalism of judgment entails, for Kant, the fact that reason conceives of itself, in conformity with the law. In *Theory and Practice*, Kant also emphasizes the role of judgment in ethics. A concept of the understanding which contains a general rule must be supplemented by an act of judgment where 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.

Can we say that judgments concerning our actions can be justified through the categorical imperative? For Rescher, who highlights the importance of an evaluative test, this is the case:

> Now as regards the process of reasoned justification the most common and familiar means of justifying a particular evaluation is with reference to moral rules, familiar and acknowledged criteria of right action, the Kantian ‘maxims’.¹⁵⁰

How can we justify a particular judgment in situations where the relevant common rules of ethical practice generate conflict and paradox instead of providing guidance? The key to this question, for Rescher, lies in the concept of an evaluative test. For Rescher, an example of this is Kant’s test of universalization. According to Rescher, this test entails that an action is right only if the ‘principles’ or standards of action which it embodies can reasonably be conceived of as universal and binding upon all men.¹⁵¹

For Kant, any rational being can be expected to arrive at the same maxims for his or her actions: this is implied by the universalization procedure of the categorical imperative. In this sense, the categorical imperative appears to be monological. The procedure is performed by an individual moral agent. When dealing with moral and political questions in a pluralist society, we cannot, in my view, merely have recourse to the procedure of the categorical imperative. It is Habermas’ discourse ethics that constitute one of the most profound challenges to Kant’s ethics in view of the presumed monological character of the categorical imperative. According to Wellmer, Habermas’ discourse ethics constitute a

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¹⁴⁹ TP 61.
¹⁵⁰ Rescher (1958: 249).
¹⁵¹ For Emmett, the notion of universalizability operates within a context where a judicial spirit is assumed: the notion consists of making impartial judgments, of arguing distinctions between relevant and irrelevant reasons for differential treatment, of appealing to precedents, and of realizing that decisions must be allowed to form precedents which can be used to establish new principles. Judgments presuppose the test of universalization: ‘Judgments are judgments guiding decisions as to what we ought to do, where the ‘ought’ concerns our acts with regard to other people and/or a considered policy as to how we should live.’ (Emmet 1963: 215).
dialogical ethics in which a principle of dialogue takes the place of the moral principle. In an ethics of dialogue, which according to Wellmer could, in principle, be developed on the basis of Kant’s ethics, a principle of dialogue is derived, whereas the moral principle is foundational.

### 2.7 Discourse ethics as a dialogical account of justification

Habermas’ discourse ethics are essentially intersubjective. For Habermas, interactions are communicative when the participants coordinate their plans of action consensually, with the agreement reached at any point being evaluated in terms of the intersubjective recognition of validity claims. Moral-practical discourses require a break with all of the unquestioned truths of an established concrete ethical life, in addition to distancing oneself from the contexts of life with which one’s identity is inextricably interwoven. Higher-level intersubjectivity is, for Habermas, constituted only under the communicative presuppositions of a universal discourse in which all those possibly affected can take part in and adopt a hypothetical argumentative stance. This impartial standpoint overcomes the subjectivity of the individual participant’s perspective, and of what Habermas calls the monological procedure of the categorical imperative. The moral point of view is, for Habermas, a point of view that permits the impartial treatment of questions of justice. The moral point of view requires, namely, that maxims and contested interests be generalized: in this sense, Habermas’ account resembles, at first glance, the Kantian requirement of universalizability.

The program of justification pursued by discourse ethics sets itself the task of deriving, from suppositions of rationality, a kind a rule of argumentation for discourse in which moral norms can be justified. Habermas’ principle of universalization is justifiable by having recourse to argumentation in language. As we have seen, Habermas claims that his discourse ethics enable an impartial standpoint overcoming subjectivity. How can we understand this? For Habermas, the moral point of view is obviously an impartial point of view. Habermas’ account resembles Kant’s account, namely that this point of view requires that maxims have to be universalized. However, as we will see, Habermas does not speak of maxims but of interests in his principle of universalization (U). To observe the interests of all those affected by a norm becomes Habermas’ answer to the question of what an impartial moral point of view is.

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153 MCC.
154 JA.
The principles of universalization and discourse ethics

According to Habermas, all studies of the logic of moral argumentation end up by introducing a principle of universalization as a rule of argumentation: a principle that has a function equivalent to the principle of induction in the discourse of the empirical science. Philosorphers would come up with principles whose basic ideas are similar. All variants of cognitivist ethics, of which Habermas’ discourse ethics is an example, take their bearings from the basic intuition contained in Kant’s categorical imperative, of which the underlying idea, following Habermas, is to take the impersonal or general character of valid universal commands into account. According to Habermas, the categorical imperative is to be understood as a principle that requires the universalizability of modes of action and maxims, and of the interests furthered by them. The impartiality of judgment is, for Habermas, 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. For Habermas, every valid norm requires that:

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

Thus, impartiality is, for Habermas, the observance of consequences and side effects for all affected. (U) is Habermas’ proposal for the moral principle, and it acts like a knife that makes razor-sharp cuts between evaluative statements (of the good life) and strictly normative ones, between the good and the just. With a discursive framework, Habermas argues that we ought to perceive the lived world of the communicative practice of everyday life from an artificial, retrospective point of view. At this ‘postconventional’ stage of moral consciousness, moral judgment becomes dissociated from local conventions and historical coloration of a particular form of life: it can no longer appeal to the naïve validity of the context of the lifeworld. To become effective in practice, every universalistic morality has to make up for this loss of concrete ethical substance. The lifeworld offers, for Habermas, both an intuitively pre-understood context for an action situation and resources for the interpretive process in which participants, in communication, engage as they strive to meet the need for agreement in the action situation. Habermas’ justification of the proposed principle of universalization takes the following form: every argumentation, regardless of the context in which it occurs, rests on pragmatic presuppositions from whose

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155 BFN.
156 MCC.
157 MCC 65.
propositional content (U) can be derived.\textsuperscript{158} Habermas also sets out a principle of discourse ethics:

\begin{quote}
(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.\textsuperscript{159}
\end{quote}

(D) makes reference to a procedure, namely the discursive redemption of normative claims to validity. Habermas’ proposal for discourse ethics is formal (like Kant’s categorical imperative). Discourse ethics do not offer substantive guidelines, only a procedure, namely practical discourse. To introduce a discourse principle already presupposes that practical questions can be judged impartially and decided rationally.\textsuperscript{160} The discourse principle is only intended to explain the point of view from which norms of action can be impartially justified. Habermas assumes that the principle itself reflects those symmetrical relations of recognition built into communicatively-structured forms of life in general. What is the difference between the principle of discourse ethics (D) and the principle of universalization (U)? As we will see, several commentators question the tenability and the necessity of (U). (D) states that norms can be valid only with the approval of all affected, as participants in a practical discourse. (U) states that a norm can be valid only when all affected can accept the consequences and the side effects its general observance can be anticipated to have for the satisfaction of everyone’s interests. Both principles entail that norms only can be valid with the approval of all affected: (U) seems to be a narrower principle than (D) since it speaks of consequences and side effects. While (D) leaves things open as regards for what reasons those who are affected can approve or disapprove of a norm, (U) ‘only’ entails that it is the consequences and side effects of a proposed norm that matter.

How does Habermas relate his principle of universalization (U) to the categorical imperative? According to Habermas, Kant bases his justification of the categorical imperative on the substantive normative concepts of autonomy and free will.\textsuperscript{161} This makes Kant’s account vulnerable to the objection that he has committed a \textit{petitio principii}.\textsuperscript{162} 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.\textsuperscript{163}

\textsuperscript{158} The derivation of U does not appear to be grounded in rational communication as such: participants should advance, in support of proposed norms, only reasons that respect the interests of all (Kelly 2000).
\textsuperscript{159} MCC 66.
\textsuperscript{160} BFN.
\textsuperscript{161} MCC.
\textsuperscript{162} Begging the question or assuming the thing that was to be argued for.
\textsuperscript{163} Finlayson points out that, for Habermas, Kant mistakenly assumes that the procedure by which moral norms are selected takes place somehow inside each solitary individual; he would be blind to the intersubjective or social nature of reason: ‘Discourse ethics locate rational standards by which moral
Discourse ethics thus reject the presumed monological approach of Kant, who would assume that the individual tests his maxims of action *foro internō* or, as Husserl puts it, in the loneliness of his soul.\(^{164}\) Discourse ethics prefer to view shared understandings of the generalizability of interests as the result of an intersubjectively mounted public discourse. Discourse ethics replace the Kantian categorical imperative with a procedure of moral argumentation. A narrow individualistic conception of morality rests, for Habermas, on a negative reading of the categorical imperative understood as being applied in a monological fashion.\(^{165}\) Already in Kant, however, the moral principle is 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 for me alone. Habermas’ principle of universalization as the criterion of morality would be his postmetaphysical rendition of Kant’s categorical imperative.\(^{166}\)

*The justification of judgments in discourse ethics*

How can discourse ethics justify judgments on the basis of the principle of universalization (U)? Moral argumentation serves, for Habermas, to settle conflicts of action by consensual means. Normative claims to validity have cognitive meaning and can, in fact, be treated like claims to truth. The justification of norms and commands requires, for Habermas, that a practical discourse be carried out and thus cannot occur in a strictly monological form, as Kant’s categorical imperative. The meaning of ‘rightness’ consists entirely of ideal warranted acceptability.\(^{167}\) We ourselves contribute to the fulfillment of the validity conditions of judgments and norms by constructing a world of well-ordered interpersonal relationships. A norm’s ideal warranted assertibility does not refer beyond the boundaries of discourse to something that might ‘exist’ independently of having been determined to be worthy of recognition. The justification-immanence of ‘rightness’ is based upon a semantic argument: since the ‘validity’ of a norm consists of being accepted, i.e. recognized as valid, under ideal conditions of justification, ‘rightness’ is an epistemic concept.

Moral justifications resolve disputes concerning rights and duties, that is, concerning the rightness of the corresponding normative statement. According to

\(^{164}\) *Foro internō*: it affects only the personal conscience.

\(^{165}\) JA.

\(^{166}\) Abdel-Nour (2004).

\(^{167}\) TJ.
Habermas, the principle of universalization (U) performs the role of a rule of argumentation only as regards justifying judgments. We say that moral commands are ‘right’ or ‘wrong’ and understand this in a sense analogous to truth. For Habermas, when judgments are dialogically justified, they can be said to be ‘right’. The internal connection between norms and justifying grounds constitutes the rational foundation of normative validity. Impartiality of judgment is, for Habermas, essentially dependent on whether or not the conflicting needs and interests of all participants are given their due and can be taken into consideration from the viewpoint of the participants themselves.

How does Habermas conceive of practical discourse, which is crucial for understanding (D)? In engaging in moral reflection, and in ethico-political judgment, we adopt a moral point of view which, as we have seen, 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 (assessment):

There is a reasonable prospect of deriving the fundamental principle of universalistic morality from the necessary practical presuppositions of argumentation in general.\textsuperscript{168}

For Habermas, when we engage in practical discourse, consensus is implied by the mere presuppositions of language. In practical discourse, we move from lifeworlds to a critical understanding of morality:

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.\textsuperscript{169}

Practical discourse can be related to the concept of ethico-political judgment, with which attempts are made to achieve common ground regarding a justifiable course of action. In this sense, practical discourse is an ideal for deliberation in the public sphere. Valid statements must admit of justification by appeal to reasons that could convince anyone irrespective of time or place.\textsuperscript{170} In rational discourse, the speaker seeks to convince his audience through the force of the better argument; we presuppose a dialogical situation. Anyone who seriously engages in argumentation must indeed presuppose that the conditions of the ‘ideal speech situation’ alluded to are sufficiently realized. Practical discourses are, for Habermas, open communicative practices in which the participants seek

\textsuperscript{168} JA 50.
\textsuperscript{169} JA 50.
\textsuperscript{170} Validity of the norms and maxims in question has to be determined solely by the ‘force of the better argument’ independently of any appeal to the particular ethical criteria according to which we perceive a norm to be morally just or unjust, see Finke (2000).
to reach *Verständigung* or mutual understanding regarding the truth of a proposition or the validity of an action norm\textsuperscript{171}.

\textit{A critique of the principle of universalization}

Is Habermas’ dialogical reformulation of Kant’s categorical imperative warranted\textsuperscript{172}? McMahon distinguishes between weak and strong dialogicity, arguing that Habermas’ discourse ethics are only tenable in the weak sense\textsuperscript{173}. 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 involves, for McMahon, a simple requirement to consult everyone who might have evidence germane to the identification of the correct principles of morality. Universalization can be understood as embodying the essence of the moral point of view, a thought experiment that gives rise to the social dimension of principle (U). Now, for McMahon, (U) is simply implausible. A full rational conviction of the appropriateness of accepting a certain principle as a genuine principle of morality would require all those potentially affected to cooperate in identifying and assessing the force of the relevant reasons. The judgments cashing in on the reasons need not, however, be collective. Any agent’s deviation will throw the whole group into a situation where no one can legitimately make such a judgment.

Another criticism of (U) has been formulated by Benhabib, who still defends Habermas’ proposal for a universalistic morality:

\begin{quote}
Instead of asking what an individual moral agent could or would will, without self-contradiction, to be a universal maxim for all, [...] a procedural model of an argumentative praxis replaces the silent thought-experiment enjoined by the Kantian universalizability test.\textsuperscript{174}
\end{quote}

\begin{footnotes}
\item \textsuperscript{171} BFN.
\item \textsuperscript{172} According to Heath (2001), there is a tendency to draw too close an analogy between (U) and the categorical imperative. Unlike the categorical imperative, (U) is never applied to action but only to norms. (U) 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 (U). For 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 (U) as a criticism of Habermas who discusses (U) as the continuation of Kant’s categorical imperative.
\item \textsuperscript{173} McMahon (2000).
\item \textsuperscript{174} Benhabib (1992: 24).
\end{footnotes}
Discourse ethics thus offer, according Benhabib, no scope for the deliberation of an individual agent. Another difficulty Benhabib discerns is that Habermas would have given (U) such a consequentialist formulation that his theory would now be subject to the kinds of arguments that deontological rights theorists have always successfully brought forward against utilitarians. Benhabib argues that (U) is actually redundant in Habermas’ discourse ethics and that it adds little but consequentialist confusion to (D); according to her, the basic premise of discourse ethics. A communicative ethics version of (U) 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.\textsuperscript{175}

I find Benhabib’s criticism of (U) more plausible than McMahon’s charge. Discourse ethics do not presuppose an actual speech situation, but an ‘ideal speech situation’. This ideal speech situation can be said to be contra-factual: it is something to be aimed at. Verständigung, coming to an agreement, is implied by Habermas’ principles of (D) and (U). (U) is problematic in my view since it concerns reflection upon generalizable interests rather than reflection upon actions regarding duty and universalizable maxims. Still, discourse ethics imply monological reflection from the perspective of all affected: they ask us to question our own perspectives from this perspective. The moral requirement identified by (U) is that agents need to engage in practical discourse to test whether all affected can accept a norm in view of its consequences and side effects. I will not deal any further here with the question of whether (U) is tenable or not, but I regard with Benhabib (D) as the basic principle of discourse ethics.

\subsection*{2.8 Moral deliberation and good reasons}

Before discussing whether or not Kant’s ethics and discourse ethics can help us to find good reasons, I will first consider the relation between Kant’s ethics and discourse ethics. As we have seen, Habermas suggests a dialogical formulation of the categorical imperative. Habermas takes over Kant’s ambition of finding a valid moral point of view, from where judgments can be tested with regard to their validity.\textsuperscript{176}

\textsuperscript{175} Ibid. (1992: 35). When we act on positive duties, we are required to do so. Negative duties entail that we are forbidden to act on them.
\textsuperscript{176} Bordum (2005).
Keul 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. We can understand Keul’s reference to the self-relation within the will in relation to the categorical imperative with which a moral agent tries to test the maxim. According to Keul, the test of universalizability remains, for Habermas, intact, but it is no longer a matter of universalizing maxims but of generalizing competing interests: no longer of acknowledging the personal dignity of what is an end in itself. We can understand Keul’s account of this acknowledgment in terms of the Formula of the End-in-itself.

Gilabert 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 is 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. There are no items intervening at the level of the justifying resources of moral assessment which are not the categorical imperative itself. According to Gilabert, this is ‘obviously wrong’. One cannot assume that what one person rationally concludes on the basis of applying the categorical imperative will be the same as what another person concludes. Gilabert discusses the example of helping the needy of Kant 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 contrary. Neither justifies his actions in terms of egocentric self-interest, both are concerned for 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. Habermas provides, according to Gilabert, an intersubjective account of moral justification. This entails that rational agents argue for their different positions on the basis of what is right or wrong. Habermas would provide an account of the justification of objectivity as rational agreement.

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

177 Keul (2002).
others in need, whether 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.179

As justification, Kant contends that cases are conceivable where he would have need of the love and sympathy of others and where he would deprive himself of all hope of the aid he desires. Now, irrespective of whether 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 that moral agents, through the procedure of the categorical imperative, can determine whether an action is in accordance with a moral law or not.

Kant’s ethics, discourse ethics, and good reasons

Maxims can be related to reasons. For Birondo, Kantian maxims are reasons for an agent’s being motivated by whatever reasons, by facts of his or her situation.180 A fact is, for instance, someone making a promise. This fact is, for Birondo, a reason to keep that promise, given that a failure to do so would involve a failure to respect the dignity of the person to whom the promise was made. Facts are reasons for action and reasons to fulfill the ethical duty in question:

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.181

The fact of a situation in which one has a duty will be a reason to act in order not to violate it. Thus, justification entails following Birondo – that facts are themselves reasons for action: they are reasons to fulfill the ethical duty in question. It is the fact which serves as the justification. I find Birondo’s claim that we can regard a fact, such as a reason for action, warranted but want to add that a fact will only then be a reason to act when the maxim, which serves as a judgment concerning the question of whether or not a certain fact can serve as a reason, can be universalized. I understand, in addition to Birondo, maxims as reasons in terms of the criterion of universalizability of the categorical

179 G § 423.
180 Birondo (2007).
imperative. If a maxim is not universalizable, there will be a reason not to act in accordance with the maxim. The maxim ‘killing is wrong’, as a subjective practical principle for action, is a reason not to kill when the maxim cannot be universalized. ‘Always tell the truth’ is only then a reason to tell the truth when the maxim can be universalized.

How can we conceive of deliberation when thinking of good reasons? Korsgaard defines moral deliberation in Kantian terms:

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.\(^{182}\)

We thus have a choice of determining our actions under the moral law and acting on duties. We have a reflective consciousness from which we can determine whether our maxims for actions can become a universal law. As we saw, for Habermas, maxims of action cannot be tested in the ‘loneliness of the soul’. Rather, we should follow a procedure of moral argumentation, or a practical discourse. Good reasons are the ones when the norms based upon them can meet the approval of all affected in their capacity as participants in a practical discourse. This is what the principle of discourse ethics demands from us. The Habermasian principle of universalization demands that we reflect upon a norm in terms of the consequences and side effects that its general observance can be anticipated to have for the satisfaction of everyone’s interests.

Good reasons are, in Habermas’ discourse ethics, the ones that point beyond individual lifeworlds. They can be generalized, abstracted, and enlarged. The impartial standpoint demands of us that we reflect upon the subjectivity of our own judgments and proposals for norms, as rules for action, from the standpoint of everyone affected. This is also implied by the categorical imperative which demands that we act on duties when the maxim of the action can become a universal law, i.e. that humanity is treated as and end in itself and never merely as a means. According to Habermas, however, deliberation should be carried out in the context of a practical discourse. This is a recognition of the plurality of points of view in society.\(^{183}\) In sum, good reasons are the ones which urge us to act

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182 Korsgaard (2005: 100).
183 In the light of the Formula of the Kingdoms of Ends, O’Neill (1989) speaks of a possible community of separate, free, and rational beings. Furthermore, she 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’. In this sense, Kant speaks of plurality. However, for Kant, there are, in the end, no diverging judgments since each agent is supposed to arrive at the same judgment by following the procedure of the categorical imperative.
when the maxim for the act is universalizable, this is in accordance with Kant’s ethics, and reasons that overcome the subjectivity of the individual judgment by considering the interests of all affected, in accordance with discourse’s ethics.

Kant’s ethics and Habermas’ discourse ethics are related to reciprocity, one of the conditions of ethico-political judgment that I discern. By reciprocity I mean that my reasons can be endorsed by others as their own; they are mutually acceptable. If, in Kant’s ethics, a maxim for an action is universalizable, there will be a reason to act and this reason can be endorsed by all rational beings. If all affected are considered in a practical discourse, in discourse ethics, we will also be able to speak of reciprocity. My reasons are scrutinized from the perspective of others, and in aiming at an impartial standpoint, my reasons may be mutually acceptable.

The example of abortion

I will now deal with the question of whether we can test our reasons in relation to the abortion issue. There is clearly a plurality of points of view between proponents, who may be attracted to the principle of respect for autonomy, and opponents, who may be attracted to the principle of the sanctity of human life. Is it conceivable that proponents and opponents can agree by asking themselves whether their maxims can become a moral law and accept the force of the better argument in a practical discourse?

Let me first 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.¹⁸⁴ 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.¹⁸⁵

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

¹⁸⁴ JA.
¹⁸⁵ JA 60.
sharply between the good and the right.\textsuperscript{186} 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. 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.

As we have seen, Kant discerns duties such as respect and beneficence. Respect is the recognition of a dignity in other human beings, a worth that has no price. Beneficence entails the well-being of others being considered. For Hansson, there is a tension between these two duties in the case of abortion. We have a duty to respect all human beings and we have a duty of beneficence also to the fetus:

From a justice perspective, we have fundamental duties toward the fetus but also a duty to respect the moral autonomy of the woman, and the man who is the father. Seen from this perspective, there is no easy way out of the dilemma.\textsuperscript{187}

On basis of the Kantian ethical system, Hansson argues that selective abortion can be justified in view of the quality of life of the child and the extent to which the parents can carry the burden of a disabled child.

In \textit{Groundwork}, Kant speaks of a procedure of judging actions as providing universal laws in its maxims. Is there a reasonable prospect that citizens, in the light of the abortion controversy, on the basis of the procedure of universalization, can agree on the moral worth of a particular course of action with regard to abortion? As for the principle of discourse ethics, the ‘principle of judgment’ requires of citizens that they be prepared to enter into deliberation, monological and dialogical, in order to assess whether reasons are good or not. In this sense, the principles require much from citizens. We have seen that Hansson speaks of a dilemma in terms of a tension between the duties of respect and beneficence. The dilemma can in, Kantian terms, be resolved in principle, however, by carrying out the procedure of the categorical imperative and by judging on which duties we ought to act.

\textsuperscript{186} MCC.
\textsuperscript{187} Hansson (1991: 172).
In summary, I have emphasized the importance of moral deliberation in order to assess whether or not our reasons underlying judgments are good ones. Can we speak, in a Kantian sense, of a relation between moral deliberation and the assessment of reasons? In my view, this is the case. Herman claims that the role of the procedure of the categorical imperative is to provide a set of instructions for moral deliberation or judgment. An individual can, in specific circumstances and with particular intentions, determine the permissibility of a proposed action or end. Korsgaard provides a detailed account of the role of reasons in moral deliberation. Let me discuss her account. A reason means reflective success. For Korsgaard, a desire may be a reason to act by means of reflection. We need reasons because our reflective nature gives us a choice as regards what to do:

We may need to appeal to the existence of reasons in the course of an explanation of why human beings experience choice in the way we do, and in particular, of why it seems to us that there are reasons.

According to Korsgaard, reasons are derived from principles. The free will must have a principle. 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 its claim to normativity is true. The Kantian test for determining whether an impulse is a reason is whether we can will, acting on that impulse as a law. Korsgaard discusses the reciprocity of reasons: if I have a reason to take your reasons into account and you have a reason to take my reasons into account, then we have a reason to share our reasons, and we could just as well call them all our reasons: public reasons. I suggest that we could speak of public reasons as good reasons. In the view of Korsgaard, to act on a reason is to act on a consideration whose normative force may be shared with others. Korsgaard endorses a Kantian account. She argues that, on this account, a personal relationship is a reciprocal commitment on the part of two people to take another’s views, interests and wishes into account. This kind of reciprocity leads to what Kant calls ‘a unity of will’. This entails that the two parties must, at least in the areas their relationship concerns, deliberate as one.

In my view, moral deliberation matters when finding good reasons. I have to take the standpoint of others when assessing that my reason for a judgment is a good one; whether it has normative force. In moral deliberation, we can assess whether our reasons for judgments are good ones. The categorical imperative, as a ‘principle of judgment’, entails that we, as members of the union of rational beings through common law, when providing universal laws, are ourselves

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188 Herman (1996).
subject to them (this is what is expressed by the Formula of the Kingdom of
Ends). In a pluralist society, moral deliberation can have a relation to public
deliberation where we are required to justify our judgments in terms of reasons to
others. The principle of discourse ethics urges us to engage with the reasons of
others. Habermas urges us to break with all our unquestioned truths regarding
concrete ethical life. Habermas argues that the categorical imperative requires the
universalizability of modes of action and maxims. In the categorical imperative is
already expressed that true statements are not valid for you or me alone.

Habermas thus suggests what could simultaneously be called a monological and
dialogical application of the categorical imperative although he also claims that
discourse ethics is the dialogical reformulation of the presumed monological
categorical imperative. I do not see any contradiction between a monological and
dialogical application of the categorical imperative. The procedure of the
categorical imperative is not solipsistic, but concerns humanity as an end in itself.
Arguably, Habermas’ discourse ethics are indeed the continuation and
concretization of Kant’s ethics. Discourse ethics are in my view both
monological and dialogical – they require that we aim at an impartial standpoint
in relation to all affected by a norm –and offers a fruitful starting point for moral
deliberation. That does not mean that there are no tensions between Kant’s ethics
and discourse ethics. As we have seen, the role of (U) in discourse ethics is
controversial. I consider Kant’s ethics and discourse ethics as complementary to
each other. We start with the categorical imperative and in a pluralist society,
characterized by moral disagreement, we carry out the procedure of the
categorical imperative in relation to a practical discourse in which we can test our
maxims. I will, in the following chapter, concern myself with the Kantian notion
of enlarged thought and will relate this notion to Habermas’ discourse ethics.
CHAPTER 3

The capacity to judge and ethico-political judgment

In this chapter, I concern myself with an interpretation of the first part of the third of Kant’s *Critiques*, namely the *Critique of Judgment*. In her posthumously published *Lectures on Kant’s Political Philosophy*, Arendt claims that this *Critique* is more connected with things political than with anything in the other *Critiques* of Kant. According to Arendt, the third *Critique* can be said to contain Kant’s political philosophy. I will try to come to an understanding of the reflective judgment of taste with which Kant is concerned in the first part of the third *Critique* in order to understand the notions of *sensus communis* and enlarged thought, which are important in Arendt’s interpretation, in their context. I will argue that Arendt’s claim that the third *Critique* can be interpreted in a political sense is untenable but defend her emphasis on the importance of enlarged thought which I understand in terms of impartiality of judgment. Impartiality of judgment is one of the conditions of ethico-political judgment which are elaborated upon at the end of the chapter. I suggest that we are able to understand the *sensus communis* as a ground of judgment that is common to all. Judgment is to be understood here as a faculty of judgment. If we have a ground of judgment that is common to all, this will make it possible, in principle, to make common judgments and to find common ground, which is the purpose of ethico-political judgment. In this chapter, I also consider the role of reflective judgment in ethics and the role of judgment in politics.

3.1 Taste and the capacity to judge

*Determinant and reflective judgment*

In the introduction to the *Critique of Judgment*, Kant regards judgment as an intermediate between understanding and reason. Judgment is a principle peculiar to itself upon which laws are sought, although merely subjective *a priori*, not given by experience. This principle has no field of objects appropriate to it as its realm. 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*.\(^{190}\)

\(^{190}\) 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
We can think of subsumption as the inclusion, or placement, of a particular within something larger or more comprehensive, the universal. In *Prolegomena*, Kant claims that judgments are rules. Empirical judgments, insofar as they have objective validity, are judgments of experience. Judgments that are only subjectively valid are merely judgments of perception. The latter do not need a pure concept of the understanding, just 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. As we will see, Kant regards judgments of taste not as objectively valid but as subjectively valid.

In the view of Fleischacker, determinant and reflective judgment are related; reflective judgment not only consists of a play between concepts and intuitions, but 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 for their responsibility to evidence, to the facts, and that means that our determining judgments and the concepts they define must always be open to being reinterpreted, reshaped into a new system, by reflective judgment:

The play in reflective judgment, and between reflective and determining judgment, is what keeps our concepts honest, our beliefs responsible to the world around us.

Let me consider the relation between determinant and reflective judgment in ethics. That there is such a relation is not self-evident. 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 *Critique of Judgment*. Kant also speaks of the determinant as the pure form of universal lawfulness embodied in a maxim. Also Blaug claims that all moral judgment is determinant since it involves the application of a pre-given universal, the categorical imperative, to a real situation. Both Kant’s ethics and Habermas’ discourse ethics are related to

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191 Prol § 23.
192 Prol § 18.
193 Fleischacker (1999).
195 TP.
196 Blaug (2000). Also, according to Blaug, for Habermas, moral judgment is determinant: the pre-given universal under which the particular is subsumed is the idea of domination-free communication, the account of judgments remains determinant.
determinant judgment. Many have emphasized the role of reflective judgment in ethics, however. Hansson, for instance, 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.197

We will see that the first part of the third Critique is also related to ethics by some commentators. Let us now turn to the account of reflective judgments of taste.

*Reflective judgments of taste*

For Kant, taste is:

The faculty of estimating an object or a mode of representation by means of a delight or aversion *apart from any interest*. The object of such a delight is called *beautiful*.198

The judgment of taste is contemplative which, for Kant, means that it is indifferent to the existence of an object, and only decides how its character stands with the feeling of pleasure and displeasure. Reflective judgment, for Kant, has no field of objects, and judgments of taste are not cognitive judgments:

If we wish to discern whether something is beautiful or not, we do not refer the representation of it to the object by means of the imagination (acting perhaps in conjunction with understanding) we refer the representation to the subject and its feeling of pleasure and displeasure.199

The judgment of taste is, therefore, not a cognitive judgment and not logical: it is aesthetic. This means that it is a judgment whose determining ground cannot be

197 Hansson (1991: 124). Benhabib (1992) argues that moral judgment is not the subsumption of the particular under the universal (moral rule) but the contextualization of the universal such that it comes to bear upon the particular.
198 CJ § 5: ‘Geschmack ist das Beurteilungsvermögen eines Gegenstandes oder einer Vorstellungsort durch ein Wohlgemachte, oder Mißfallen, ohne alles Interesse. Der Gegenstand eines solchen Wohlgemacht heißt schön’ (KrU § 5).
199 CJ § 1: ‘Um zu unterscheiden, ob etwas schön sei oder nicht, beziehen wir die Vorstellung nicht durch den Verstand auf das Objekt zum Erkenntnisse, sondern durch die Einbildungskraft (vielleicht mit dem Verstande verbunden) auf das Subjekt und das Gefühl der Lust oder Unlust desselben’ (KrU § 1).
other than subjective. The judgment of taste is not, for Kant, grounded on concepts and not intentionally directed to them. 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 concept of it. Judgments of taste, on the contrary, have no object and hence there is no concept for them. According to Guyer, judgments of taste are still reflective in the sense that they subsume the particular under something universal. Even though no concept is given for reflective judgment, and hence we cannot speak of knowledge, we subsume in reflective judgment the particular under the idea of ‘subjective universal validity’. Allison explains that subjective universal validity can be understood as the validity of a feeling with respect to the entire sphere of judging subjects. We claim, for our judgment, the universal assent of others, although it clearly has neither the objective warrant of theoretical judgments nor the binding force of moral judgments. This is what is meant by subjective universality of taste.

What does it mean to assert beauty rather than express liking, asks Nedelsky. 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.

Kant speaks of a delight for all men. 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.207

We have to be aware that communicability does not mean that we can communicate our feelings. Communicability in German is *Mitteilbarkeit*, which, according to Cassirer, wrongly suggests that one individual should be capable of letting another know precisely what his state of mind is.208 Rather, Kant is of the opinion that the feelings of the two people are identical in character. We cannot describe them accurately as objective concepts will then be required.

Kant distinguishes between the taste of sense and the taste of reflection.209 The first lays down merely private judgments, the second lays down judgments of general validity. Both are aesthetic – not practical – judgments about an object merely in respect of the bearings of its representation on the feeling of pleasure or displeasure. The taste of reflection demands agreement in its universality. Kant introduces the concept of general validity which 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 it attributes this agreement to everyone:

We are suitors for agreement from everyone else, because we are fortified with a ground common to all. Further, we would be able to count on this agreement, provided we were always assured of the correct subsumption of the case under that ground as the rule of approval.210

In the judgment of taste, there is a subjective universal communicability.211 We have seen that communicability entails that two feelings of judging subjects are identical. Let us compare the communicability of judgments of taste with how

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207 CJ §11: ‘Zweckmäßigkeit in die Vorstellung eines Gegenstandes, ohne allen (weder objektiven noch subjektiven) Zweck, folglich die bloße der Zweckmäßigkeit in der Vorstellung, wodurch uns ein Gegenstand gegeben wird, sofern wir uns ihrer bewußt sind, das Wohlgefallen, welches wir, sofern wir uns ihrer bewußt sind, das Wohlgefallen, welches wir, ohne Begriff, als allgemein mitteilbar beurteilen, mitthine den Bestimmungsgrund des Geschmacksurteile, ausmachen’ (KrU § 11).

208 Cassier (1938).

209 CJ § 8.

210 CJ § 19: 'Man wirbt um jedes andern Beistimmung, weil man dazu einen Grund hat, der allen gemein ist; auf welche Beistimmung man auch rechnen könnte, wenn man nur immer sich wäre, daß der Fall unter jene, Grunde als Regel des Beifalls richtig subsumiert wäre' (KrU § 19).

211 CJ § 9.
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.²¹²

As we have seen, judgments of taste do not have a concept contrary to moral judgments. Kant also distinguishes between a faculty of aesthetic judgment – judging forms without the aid of concepts – and a faculty of intellectual judgment for the forms of practical maxims. This faculty determines delight \textit{a priori} which is made into a law for everyone, without our judgment being founded on any interest. In the former judgment, the pleasure or displeasure is that of taste; the latter is that of moral feeling.²¹³

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 concept at all.²¹⁴ However, with a logical judgment, the judgment of taste has in common that it asserts a universality and necessity that are merely subjective. The judgment of taste, not determinable by means of concepts, can, in the view of Kant, only have its ground in the subjective formal condition of a judgment in general. The subjective condition of all judgments is the judging faculty itself. This requires the harmonious accordance of two powers of representation; the imagination – for the intuition and the arrangement of the manifold of intuition – and understanding – for the concept as a representation of the unity of this arrangement.²¹⁵ Since no concept of the object underlies the judgment here, it can consist only of the subsumption of the imagination itself.

²¹² CJ § 39: 'Dieses Gefühl, welches das sittliche heißt, erfordert aber Begriffe; und stellt keine freie, sondern gesetzliche Zweckmäßigkeit dar, läßt sich also auch nicht anders, als vermittels der Vernunft, und, soll die Lust bei jedermann gleichartig sein, durch sehr bestimmte praktische Vernunftbegriffe, allgemein mitteilen' (KrU 387).
²¹³ CJ § 42.
²¹⁴ CJ § 35.
²¹⁵ ‘Imagination’ is a translation of \textit{Einbildungskraft}, and ‘intuition’ of \textit{Anschauung}. Intuition is, for Kant, a concept that is dependent on the presence of an object. Our intuition of the reality of an object is possible through sensation (\textit{Sinnlichkeit}). That the object of sensitivity can be intuited is \textit{a priori} possible, not given by experience (Prol). A reflective judgment concerning a given object can be aesthetic when the judgment, without a concept for the given intuition, relates the imagination to the understanding (Fl).
Sensus communis and enlarged thought

According to Kant, the common human understanding, as mere sound understanding, has the dubious honor of having the name of common sense. Rather:

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 conditions which could readily be taken for objective, an illusion that would exert a prejudicial influence upon its judgment. 216

How can this faculty of judgment, the sensus communis, be exerted when taking account of the mode of representation of all other men in thought? According to Kant, this is possible by weighing the judgment, not so much against the actual, rather 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.

There are, for Kant, three maxims of 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 Denken]; the third is of consistent thought. 217 The third maxim is, according to Kant, the most difficult to attain. The maxims are also characterized by Kant in terms of understanding, judgment, and reason. The enlarged thought, following the second maxim of enlarged thought or 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

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216 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 Vorstellungssart 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).

217 With Kant’s second maxim of the common human understanding, the maxim of judgment, the cognitive power is put to a purposive use as 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 rather 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.
universal standpoint (which he can only determine by shifting his ground to the standpoint of others).  

In § 40, taste is not mentioned by Kant. Guyer sees this paragraph 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. Kant writes in § 40 that the maxims of common human understanding indeed do not properly come in here as constituent parts of the Critique of Taste. However, they may still serve to elucidate its fundamental propositions.

Allison suggests that the common sense in § 21, where Kant argues that the universal communicability of a feeling presupposes common sense, is rather to be considered as Gemeinsinn [gemeinschaftlichen Sinn] than the sensus communis logicus of § 40. By common sense, we must understand not taste per se, but rather the faculty for immediately seeing whether 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 by the sensus communis logicus, which is equivalent to common human understanding.

3.2 Arendt on judging: sharing-the-world-with-others

According to Arendt, the Critique of Judgment is perhaps the greatest and most original aspect of Kant’s political philosophy. It contains an analytic of the beautiful from the judging spectator. According to Arendt, the capacity to judge is political in that I aim toward a potential agreement with others:

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218 CJ § 40: ‘wenn er sich über die subjektiven Privatbedingungen des Urteils, wozwischen 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).

219 In their commentaries on Kant’s account of aesthetic judgment, Marc-Wogau (1938) and Cassirer (1938) do not discuss the passages regarding sensus communis and enlarged mentality. This may have to do with the fact that judgment in § 40 has a general character.


221 Allison (2001).

222 Arendt (1993). Vollrath (1977) maintains, like Arendt, that aesthetic judgment is inherently political and that Kant’s Critique hides a reconstruction of political judgment. The second maxim of judgment is, according Vollrath, a political one. An action can be judged as political when it follows the maxim of judgment.
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.\(^{223}\)

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.\(^{224}\) 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.\(^{225}\)

In the view of Arendt, political thought is representative.\(^{226}\) I form an opinion by considering a given issue from different viewpoints by making present to my mind the standpoints of those who are absent, that is, I represent them. The capacity for an enlarged mentality (Arendt’s translation of *erweiterte Denken*) 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. The very process of opinion formation is determined by those in whose places somebody thinks and uses his own mind, and the only condition for the exertion of the imagination is disinterestedness, liberation from one’s own private interests. But the very quality of opinion, as of a judgment, depends upon the degree of its impartiality.

Taste judgments share, with political opinions, the fact that they are persuasive: the judging person can only ‘woo the consent of everyone else’ in the hope of coming to an agreement with him eventually. Arendt refers here to Kant in § 19 of the *Critique of Judgment*:

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\(^{223}\) Arendt (1993: 220).

\(^{224}\) For 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. For Gueorguieva (2003), on the other hand, common sense or *sensus communis* is both a way of thinking and acting. Enlarged thought is a capacity which allows one, among other things, to orient one’s action while anticipating the judgment of others.

\(^{225}\) Arendt (1993: 221).

\(^{226}\) Arendt (1982).
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.  

According to Arendt, reflective judgments resemble political opinions in the sense that they are persuasive. The wooing or persuading corresponds to the convincing and persuading speech which was regarded by the Greeks as the typically political form of people talking with one another. Persuasion is, for Arendt, the opposite of the philosophical way of speaking which is concerned with knowledge and finding truth. 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.  

According to Arendt, the faculty that guides communicability is taste. The condition *sine qua non* for the existence of beautiful is communicability. The judgment of the spectator creates the space without which no such objects could appear at all. The public realm is constituted by the critics and the spectators. Arendt speaks of a ‘company of 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.’ Arendt notes that it is surprising that common sense, the faculty of judgment and of discriminating between right and wrong, should be based on the sense of taste. The *sensus communis* is a specifically human sense because communication, i.e. speech, depends on it. In *Life of the Mind*, Arendt calls common sense, *sensus communis*, a kind of sixth sense needed to keep our five senses together and to guarantee that it is the same object that I see, touch, taste, smell, and hear. This common sense fits the sensations of my other strictly private five senses into a common world shared by others.

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227 CJ § 19: ‘Das Geschacksurteil 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).
229 Arendt (1982).
230 For Kant, the spectator is aligned with the public use of his reason. According to Kistner (1997), spectatorship, disinterestedness, universality, and morality would, for Arendt, be attributes that draw aesthetic judgment and political judgment together. Publicness, for her, would pertain to the spectator in the public sphere; common sense as a public sense, defined in part by the public use of one’s reason. I do not agree with Kistner that, for Arendt, judgment is about mere spectatorship. Certainly, a development in Arendt’s work from political to disinterested, historical, judgment can be observed. However, for her, judging is also a way for a man to orient himself in the common world.
In *Lectures*, Arendt quotes two letters by Kant to Herz in order to emphasize that judgment is impartial. These letters could 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 overthrowing 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.234

In this letter, Kant speaks of a third view; in the description of enlarged thought is referred 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 is adopts in turn every conceivable standpoint, verifying the observations of each by means of all the others.235

Arendt quotes the letters written to Herz in a passage on critical thinking which, for her, implies the application of critical standards. This application cannot be learnt 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’ – in the third *Critique* the disinterested delight in the beautiful – in terms of impartiality. According to Kant, pleasure is disinterested when its existence is in no way bound up with desire.236 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.237

In the view of Arendt, the very quality of an opinion or a judgment depends upon the degree of its impartiality. I suggest that Arendt’s interpretation of enlarged mentality is related to what can be called impartiality of judgment. The first letter of Kant quoted could arguably shed some light on enlarged mentality in § 40 in

233 Herz was a physician who gave public lectures on the philosophy of Kant.
236 Zangwill (2003). The notion of disinterestedness in Kant’s account of judgments of taste is highly controversial, see Allison (2001).
terms of impartiality in relation to a third view. Also in the second letter, the idea of enlarged thought is mentioned. While I reject Arendt’s interpretation of the first part of the third Critique in terms of a political reading of judgments of taste, I defend Arendt’s emphasis on the role of enlarged thought in politics.

A critical discussion

I will critically discuss Arendt’s interpretation of the first part of the third Critique. As I see it, there are three main problems with Arendt’s account: the absence of a public realm for reflective judgment; the fact that communicability is not communication; and the separation of judgment and knowledge.

For Arendt, the exercise of judgment may be a 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. Following Arendt, Beiner speaks of a community of judgment. For Beiner, the very act of communication implies some basis of common judgment. For instance, there must be some agreement of judgment on what would count as valid moral considerations. For judgment to be possible, there must be standards of judgment, which implies a community of judgment. Judgment does not compel validity, rather it appeals to the judging people who are present, who are members of the public realm where the objects of judgment appear.

In § 8, Kant speaks of a whole sphere of judging subjects. For a subjective universal validity, no conclusion can be drawn to the logical:

But for this very reason, the aesthetic universality must also be of a special kind, seeing that it does not join the predicate of beauty to the concept of the Object taken in its entire logical sphere, and yet does extend this predicate over the whole sphere of judging Subjects.

238 According to Bernstein, Kant was, in his approach to reflective judgment, primarily concerned with the disinterested judgment of the ‘pure’ spectator, not with that of participants in human affairs. Bernstein accepts the interpretation of Arendt, however. Rather than speaking of community, Bernstein uses the concept of ‘communal’ in commenting upon Arendt. According to Bernstein, Arendt seeks to show the importance of taste as a communal civic sense, a sensus communis, that is basic to aesthetics, understanding, and politics: ‘Judgment is communal and intersubjective; it always implicitly appeals to and requires testing against the opinions of other judging persons’ (1983: 218).


240 Beiner (1982).

241 CJ § 8: ‘Eben darum aber muß auch die ästhetische Allgemeinheit, die eine Urteile beigelegt wird, von besonderer Art sein, weil sich das Prädikat der Schönheit nicht mit dem Begriffe des Objekts, in seiner ganzen logischen Sphäre betrachtet, verknüpft und och eben dasselbe über die ganze Sphäre der Urteilende ausdehnt’ (KrU § 8).
Can we interpret this sphere of judging subjects in terms of a public realm? This is not, in my view, the case. In § 31, Kant explicitly emphasizes the autonomy of the judging subject:

Now if 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, and yet is also not to be derived from concepts; then it follows that such a judgment – and such the judgment of taste in fact is – has a double and also logical peculiarity.242

§ 31 should, according to Lyotard, be enough to discourage all sociologizing and anthropologizing of aesthetic common sense.243 He mentions Arendt in particular. According to Lyotard, the community which is referred to by judgments of taste is not society; it is not a public and neither is it a community determined by a cultura animi, not at all a social consensus.244 The community of sense is above all an ‘uncertain polyphony’ where different voices participate. Lyotard, nevertheless, mentions § 40 which seems to lend itself to a sociological or anthropological interpretation.245

According to Arendt, communicability is the condition sine qua non for the existence of the beautiful. The judgment of the spectator creates the space without which no such objects could appear. The spectator operates in the public realm. Sensus communis is related, in the view of Arendt, to communication; it is a specifically human sense. For Kant, the specific quality of sensation may be communicable to others provided that everyone has a similar sense to our own.246 We have seen that communicability does not entail that we can let another know what our state of mind is but that two feelings are identical. Ricoeur argues, however, that the condition of plurality offers an evident kinship with the requirement of communicability implied by the judgment of taste.247 According to Ricoeur, not only does this concept which stems from the third Critique receive a decisive clarification from its use within the framework of political judgment, it also offers in return the means for a political reinterpretation of the judgment of taste. This is puzzling in view of the fact that communicability

242 CJ § 31: ‘Wenn nun diese Allgemeingültigkeit sich nicht auf Stimmensammlung und Herumfragen bei andern, wegen ihrer Art zu empfinden, gründen, sonder gleichsam auf einer Autonomie des über das Gefühl der Lust (an der gegebenen Vorstellung) urteilenden Subjekts, d.i. auf seinem eigenen Geschmacke, beruhen, gleichwohl aber doch auch nicht von Begriffen abgeleitet werden soll: so hat ein solches Urteil – wie das Geschmacksurteil in der Tat ist – eine zwiefache und zwar logische Eigentümlichkeit’ (KrU § 40).
244 Delruelle (2003).
245 Lyotard (1994).
246 CJ § 39.
247 Ricoeur (2000).
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.

Gilabert also 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 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.248

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 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. As we have seen, § 40 has an autonomous position in the first part of the third Critique. Sensus communis is not merely sensus communis aestheticus, 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.

With a reference to § 19, Arendt claims that the judging subject ‘woos the consent of everyone else’. Arendt sees an important role of persuasive speech in politics. Judgment has to be distinguished from knowledge or truth. Arendt’s separation of opinion and knowledge has been criticized. Habermas ascribes Arendt an antiquated concept of knowledge in distinguishing between knowledge and truth, on the one hand, and judgment and decision, on the other:

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.249

249 AC 22-23. According to 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 saw, on the other hand, no reason to
As we have seen, there is no concept of reflective judgment. In this sense, reflective judgments differ from moral or logical judgments. Arendt stresses the role of reflective judgment of taste in politics. In her interpretation, the enlarged thought is related to persuasion. In my view, judgment needs to be related to a discursive rationality in the sense of giving and asking for reasons. Judgments, I have argued, can be supported by reasons.

### 3.3 Judgment in ethics and politics

Where do we go from here? In my view, we have to reject Arendt’s interpretation of the first part of the third *Critique*. It could, however, be argued that § 40, with its general account of judgment, is the most important paragraph in Arendt’s account of judgment. The second maxim of the common human understanding, the enlarged thought, can, in my view, be considered in terms of impartiality of judgment. This is how Arendt, in my view, considers enlarged thought or the maxim of judgment, with her reference to the letters of Kant. We reflect upon our own judgment from a universal standpoint which can only be determined by taking the standpoints of others. As Arendt points out, this has nothing to do with empathy. I discern impartiality of judgment as one of the conditions for ethico-political judgment.

I claim that *sensus communis* can be related to a ground of judgment common to all, which enables common judgment, or to find common ground. 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 faculty of judgment *Beurteilungsvermögen*. A straightforward explanation is that *sensus communis* is common human understanding and that the three maxims, including enlarged thought as the maxim of judgment, are maxims of *sensus communis*.

I 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. Also Steinberger (1993) 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 nonrationalist sense. Wellmer (2001) also points, like Habermas and Steinberger, 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 which would allow us to recognize the internal relationship between different kinds of intersubjectivity validity claims, for instance, moral, and corresponding forms of argumentation. Yet with regard to Habermas’ ‘discursive rationality’, Wellmer argues that an autonomous faculty of judging is not highlighted in his work.
This interpretation is not uncontroversial, however. *Sensus communis* would essentially be *sensus communis aestheticus*.\(^{250}\) As we have seen, Allison claims that *sensus communis aestheticus*, however, should be identified with common sense rather than with *sensus communis* in § 40. According to Kimmerle, *sensus communis* is relevant in politics, history, religion, and ethics.\(^{251}\) I regard *sensus communis*, in accordance with what is suggested in § 40, as a critical faculty. This is the faculty of judgment or *Beurteilungsvermögen*.\(^{252}\) I suggest, with Allison, that we can conceive of *sensus communis* as common human understanding. *Sensus communis* is a ground of 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. Let us consider some accounts of the role of enlarged mentality and reflective judgment in ethics. As I argued in the former chapter, ethics matters to ethico-political judgment to the extent that we can assess whether or not our reasons are good ones. A good reason presupposes some kind of universalizability and a consideration of other points of view. I suggest that the enlarged mentality has a role in ethics in order to test our reasons by taking the points of view of others, by reflecting upon our own judgment and by trying to form an impartial standpoint.

**Reflective judgment and enlarged mentality in ethics**

O’Neill discusses *sensus communis* in relation to ethics. According to O’Neill, the notion of common sense related to *sensus communis* is used without reference to sensation. The *sensus communis* consists of three principles or maxims that constrain understandings, indeed 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.\(^{253}\)

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*

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\(^{250}\) According to 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 no community spirit, no general will, no common sense, no *intellectio communis*, no *gemeine Menschenverstand*, no common human understanding, and no *sensus communis logicus*, rather, it is *sensus communis aestheticus*.

\(^{251}\) Kimmerle (2000).

\(^{252}\) In the translation of J.H. Bernard, *Beurteilungsvermögen* is translated as ‘faculty of judgment’.

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. 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. O’Neill understands this maxim in terms of interpretation of others. Only those who try to think from the standpoint of everyone else and who strive to listen to and interpret others, and to see the point of their contribution, are genuinely aiming to be fellow workers and to avoid maxims with which others cannot agree.

O’Neill offers a fruitful account of the role of reflective judgment in ethics. According to her, the situation of agents is primarily one which requires reflective judgment. Only when a process of reflection has produced an appraisal of a case, will principles be able to be applied and a solution sought:

> The most significant single element in 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 judgeable in the light of some rather than other principles.254

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 placed by locating it in a larger coherent and systematic whole, we will be able to speak of reflective judgment. Appraising a particular case may also entail that we try to expand rather than narrow our horizon. Following a strategy of reflection and appraisal entails, in case of disagreement, apprehending and appreciating others’ appraisals and connecting them to our own. With reference to Kant’s enlarged thought, O’Neill claims that once we share the standpoints of others’ reflection, this may lead us toward reappraisals in which coherence is restored. Strategies of appraisal require us to listen to others’ appraisals and to reflect on and perhaps modify our own. We can conclude that, as was also suggested at the beginning of the chapter, not merely determinant but even reflective judgment has a place in ethics.

For Kant, as we have seen, the maxim of the enlarged thought, ‘put oneself in thought in the place of everyone else’, is related to the faculty of judgment that according to Silber is *sensus communis*. 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.255

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Silber refers here to the Formula of an End-in-itself, which implies that we never treat humanity merely as a means, but always as an end in itself. The maxim of the enlarged thought is interpreted by Silber in terms of Kant’s ethics. Silber suggests that what I call impartiality of judgment is required in order to apply the second Formula in *Groundwork*. For Silber, judgment is a procedure to reflect upon one’s own judgment from the standpoint of others. Implicitly, he relates determinant moral judgment, as expressed by the categorical imperative, to reflective judgment in the sense of putting oneself in the place and point of view of other beings.

Let me consider some other proposals for the role of reflective judgment in ethics. Forst claims that reflective judgment has significance for moral, determinant judgment:

Moral judgment is to consider, as a human being, other human beings as members of a comprehensive community and to relate to each other in terms of justification of universal reasons. That is the meaning of ‘reflective’ judgment, which does not subsume the particular under the universal but assigns the particular with the authority to require generally justifiable reasons for actions.  

Forst refers implicitly to the second 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 concept, as is the case with moral judgments. While, as we have seen, reasons can play a role in Kant’s ethics, they do not in Kant’s account of reflective judgment.

Also Früchtl wishes to relate moral judgment and reflective judgment, in my view in an unfortunate way. According to Früchtl, reflective judgment entails all others being considered:

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256 My translation: ‘Moralisch urteilen heisst als Mensch andere Menschen als Mitglieder der umfassenden Gemeinschaft aller Menschen zu betrachten und sich einem jeden gegenüber hier und jetzt so zu verhalten wie es mit allgemeine Gründen gerechtfertigt werden kann. Das ist der Sinn der ‘reflektierenden’ Urteilskraft, die das Besondere nicht unter das Allgemeine subsumiert, wohl aber das Besondere mit der Auktorität ausstattet, allgemein zu rechtfertigen Gründe für Handlungweise zu fordern’ (Forst quoted in Hermenau 1999: 65).
The aesthetic judgment can claim 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.²⁵⁷

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.

**Judgment in politics**

Is there a ground of judgment common to all that can play a role in politics? According to Beiner, this is the case.²⁵⁸ 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 as such, and intrinsic to man as a political being. What is it that endows human beings with the ability to make reasonable judgments about human affairs and to judge the common world they share with others? The answer is that it is the faculty of judgment. According to Beiner, political judgment is like aesthetic judgment reflective but in reflective judgment, 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. In order for reflective judgment to operate, imagination is necessary, as Beiner exemplifies using the example of chess:

I must project myself, imaginatively, into a position I do not actually occupy, in order to enlarge my perspective and thereby open up an awareness of new possibilities, to broaden the range of alternatives from which my judgment then makes a selection.²⁵⁹


Political judgments are judgments about the form of collective life that is desirable for us to pursue within a given context of possibilities. According to Beiner, political judgment is characterized by the need to come to an agreement about the common form of our relating-together. The reason why public judgments are possible at all is that the objects of those judgments are shared by those who judge. Even though Beiner wishes to broaden the scope of reflective judgment in order to include cognitive efforts, he rejects an overemphasis of the discursive dimension of politics. According to Beiner, Habermas sometimes falls into this kind of error. It was the fallacy of the Enlightenment to assume that the world would be remade by rational inquiry and discourse, free from prejudice. It seems to me, however, that Beiner does not succeed in his attempt to include a discursive rationality in aesthetic judgment and to broaden Kant’s conception of reflective judgment which entails, as we have seen, that there is no concept of reflective judgments (or at least the concept of subjective universal validity). 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 have a role in moral and political judgment. It is important to scrutinize judging in terms of an analysis of the reasons from which judgments are inferred.

Steinberger explicitly highlights the role of rational inquiry in political judgment. Even he contends that we do have a common sense or faculty of judgment that matters when making political judgments. 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. Steinberg suggests a tripartite model of judgment. Any judgment – as the bringing together somehow of a universal and a particular – would seem to require at least three things: (1) the universal qua concept must be identified, and this means being able to specify at least some of the conceptual features that make it what it is; (2) the particular must be identified, and this means being able

to specify at least some of the characteristics that individuate it; and (3) there must be a mental faculty that allows us to establish some kind of demonstrable and explicable connection between the universal’s features and the particular’s characteristics such that we can say with some justification that ‘X is (or is not) Y’.

Steinberger wishes to reconcile what he calls the intuitive and inferential sides of judgment. The intuitive side concerns insight or invoking common sense. Insight is to possess *phronesis*, which as we have seen can mean practical wisdom or prudence. According to Steinberger, insight is a question of reflective rather than determinate judgment. Judgment, however, also has to do with intelligent performance. To judge correctly, and hence to engage in thinking that is properly understood, is to undertake an intelligent performance of which the adequacy can only be established through rational reconstruction. Good judgment is a matter of rendering claims and making decisions that are consistent with and authorized by the preponderant assumptions and tacit beliefs of a socio-cultural tradition. If those assumptions and beliefs require that political decisions pass a test of moral legitimacy, then judgment in politics is likely to involve ethical criteria. The question of morality and judgment depends on particular understandings of the nature and purpose of politics and is therefore a matter of historical – and not philosophical – fact.

We see that the accounts of Beiner and Steinberg, of political judgment, differ. Both speak of a common sense or a faculty of judgment that enables us to make common or reasonable judgments. While for Beiner, reflective judgment is similar to aesthetic judgment, Steinberger relates reflective judgment – in terms of insight – to intelligent performance. Rational inquiry is crucial to political judgment. We will, on the basis of the empirical inquiry, be able to conclude that there are assumptions and beliefs which require that political decisions are based upon moral considerations as far as, for instance, prenatal diagnosis is concerned. Particularly to ethico-political judgment, political judgment matters. Moral judgment, however, is also of significance to the extent that it enables scrutiny of our reasons for judgments.

I suggest, following Steinberger in his account of the political faculty of judgment, that ethico-political judgment, as the formation and the exercise of the faculty of judgment, is related to a discursive rationality. I have discussed Audi for whom practical reasoning follows the syllogism structure with premises and a practical judgment. Reasonableness can be understood in terms of the premises being true and justifiable and the practical judgment being justifiably inferred from them. We can conclude that reasons are used in practical reasoning, leading to practical judgments: reasoning presupposes making claims or judgments. This can also be understood in terms of Brandom’s inferentialism. The fact that we
have a ground of judgment that is common to all entails, among other things, that we can be reasonable. This not only entails that we can give and ask for reasons; we can also take the standpoints of others and reflect upon our own judgment when forming an impartial judgment. This is what is meant by impartiality of judgment.

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. 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.

According to Mendus, 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 a critical scrutiny of one’s own judgment in view of the points of view of others.

**Enlarged thought in ethico-political judgment**

I argue that ethics matter to ethico-political judgment since they enable an opportunity to assess whether or not our reasons are good ones. Let me relate the discussion on moral deliberation and good reasons from the previous chapter to the notion of enlarged thought. I concentrate on Habermas’ discourse ethics although, as we have seen, for Silber and O’Neill, the categorical imperative can also be related to enlarged thought. Habermas does not speak of an autonomous faculty of judgment, but in my view, discourse ethics can be understood in terms of enlarged thought. There are three elements in Habermas’ discourse ethics that seem to lend themselves to such an interpretation: the questioning of the one’s own perspective, taking the standpoints of others, and arriving at an impartial judgment.

In the view of Habermas, moral-practical discourses require a break with all the unquestioned truths of concrete ethical life. We have to distance ourselves from the contexts of the lifeworld with which our identity is inextricably interwoven.

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262 Mendus (2002).
According to Habermas, an impartial standpoint entails adopting a hypothetical argumentative stance in a practical discourse in which all those possibly affected can take part. We have to consider all those who are affected by a norm. In terms of enlarged thought, the impartial standpoint can only be determined by taking the standpoint of others. Our judgments should be abstracted from local conventions and the ‘historical coloration of a particular form of life’. In my view, we could speak of discourse ethics in terms of enlarged thought, even though Habermas does not highlight the role of the faculty of judgment. This faculty is presupposed, however, when we have to reflect upon our own judgment by determining a hypothetical argumentative stance in a practical discourse where those affected are considered.

Habermas’ discourse ethics entail what I have called a discursive rationality. Habermas asks us to consider all those affected by a proposed rule for action in an argumentative practical discourse. Habermas’ discourse ethics recognize the political fact of pluralism. That we can understand discourse ethics in terms of enlarged thought does not necessarily mean that emphasis of the faculty of judgment is unimportant. We find such an emphasis in the work of O’Neill.

On the basis of Kant’s ethics and discourse ethics, I have argued that good reasons are those that urge us to act when the maxim for the act is universalizable and reasons that overcome the subjectivity of the individual judgment by considering the interests of all affected. In a political sense, the enlarged thought has relevance in relation to public deliberation. We may aim at an impartial standpoint and consider the standpoints of others in public deliberation while reflecting upon our own judgment. Ethico-political judgment as an ideal for public deliberation does not only demand the giving and asking for reasons. In order for reasons to be good ones, reflection upon our own reasons is required from the standpoint of others.

I will, in this inquiry, concern myself with impartiality of judgment, and enlarged mentality, in a political sense. Enlarged mentality in a moral sense may also be of relevance to ethico-political judgment with the emphasis on moral impartiality on the basis of which we can test our reasons. Arendt’s interpretation of enlarged thought is political. As we have seen, for Arendt, the power of judgment rests on potential agreement with others. The thinking process which is active in judging finds itself always and primarily in an anticipated communication with others with whom I know I will finally come to some agreement. From this potential agreement, judgment derives its specific validity.\(^\text{263}\) In the view of Arendt, the quality of judgment depends on its degree of impartiality.

The enlarged thought is a maxim of *sensus communis* which could be interpreted as a ground of judgment common to all. *Sensus communis* may enable the making of common judgments and the finding of common ground. *Sensus communis* entails us comparing our judgment with the possible, rather than the actual, judgments of others. The enlarged mentality demands that we, in our reflection on questions such as prenatal diagnosis, take the standpoints of others. This could mean that we compare our judgment with the actual judgments of others, and not only with possible judgments. Still, it could be argued that it is important that our reflection considers even the possible judgments of others. When I hold a judgment, I may scrutinize it on the basis of possible, various other judgments. In this sense, I may arrive at an impartial judgment.

But why should we be concerned with impartiality in relation to ethico-political judgment? Wolf argues that a moral point of view, often associated with impartiality, is not 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.264

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. We may contrast this with another point of view, or with his or hers. When I speak of impartiality of judgment, I do not mean that we identify an overarching point of view. In my view, public discourse is enriched when there are contributions ‘from here’ with personal experiences. By impartiality, I mean that we reflect upon our own experiences on the basis of the perspectives of others. Impartiality is a way to objectivize our own experiences, making it possible to give them a role in public deliberation. We reflect upon our own judgment, and our own reasons, on the basis of judgments of others. To arrive at impartiality means that we do not merely deliberate from our own point of view, but try to find reasons for our judgments which can be endorsed by others. This is what is expressed by the condition of reciprocity, which is one of the conditions for ethico-political judgment.

We have seen that, for Kant, the enlarged thought entails that we reflect upon our own judgment from a universal standpoint [*einem allgemeinem Standpunkte*], which can only be determined by taking the standpoints of others. How can we relate this maxim of judgment to judging from the view *from here*? Is not a universal standpoint, by definition, a morally-impartial, overarching point of view? This does not apply, in my view, to a universal standpoint in the sense we

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are concerned with here. For making political judgments, we arguably do not need a morally-impartial point of view. Ethico-political judgment concerns in the first place political judgments – not moral judgments which may be difficult to make in a pluralist society – and ethics matters to ethico-political judgment to the extent that we can assess whether or not our reasons are good ones. What, then, can be meant by a ‘universal standpoint’ in relation to judging? It is an impartial standpoint which means that we try to adopt a third view, which, as we have seen, is referred to in one of the letters written by Kant and quoted by Arendt. We assess whether or not our judgment can stand up to scrutiny in view of the standpoints of others. It does not necessarily mean that we adopt another judgment, it means that we have reflected upon our own judgment on the basis of the judgments of others.

3.4 Common ground and the conditions of ethico-political judgment

Let me now elaborate on the conditions of ethico-political judgment and its purpose. I discern four conditions of ethico-political judgment: impartiality of judgment, which has been considered in this chapter; reciprocity, which can be related to Kant’s ethics and discourse ethics; dialogicity; and publicity. These conditions are, in my view, necessary for ethico-political judgment and its purpose of common ground. Common ground is already presupposed when we have a ground of judgment common to all that makes it possible, in principle, to make common judgments. The purpose of ethico-political judgment is to find common ground regarding a justifiable judgment, in view of the plurality of points of view in society. The empirical inquiry into public discourse in the next two chapters may answer the question of the extent to which the conditions for ethico-political judgment are met.

Common ground: the purpose of ethico-political judgment

I have claimed that we have a ground of judgment common to all that enables common judgments. Common ground is a basis agreed upon by all participants in order to reach a common understanding, e.g. a judgment mutually agreed upon. For Schäfer, Baumann, and Kettner, it is discourse ethics – which state that the reasons on which people claim that something is morally right must be such as to be conceivably acceptable from the first-person plural perspective of everyone concerned – which unleashes the communicative power that is necessary for constructing how much common ground is possible between reasonable people with heterogeneous moral horizons.265

Kettner regards a moral horizon as the stance taken by someone who identifies with some morality for assessing practical activities, as well as the reasons for which people take themselves to be justified in doing what they do. The fusion of moral horizons— all participants should be able to sufficiently understand articulated need-claims in the corresponding moral horizons of whoever articulates them—is one parameter that is a characteristic conceptual element of the idea of a moral discourse. I have related Gadamer’s discussion of a horizon to the concept of interpretive frameworks. For Gadamer, understanding is always the fusion of horizons that are supposed to exist by themselves.

What is the relation between common ground, consensus, and compromise? Consensus entails, in the case of, for instance, reproductive medicine, construing a reproductive morality which is suitable for the technical options available today:

The idea of consensus provides us with a criterion for the legitimacy of such ‘construed’ norms: a moral norm which everybody has agreed may legitimately oblige everybody.

If we regard common ground, however, as a basis agreed upon by all, compromise may also be implied by common ground. Compromise accompanies adopting a moral standpoint. Even a negotiated compromise creates tensions for those who adopt it. A compromise is not a synthesis that all regard as superior to their previous position. Even though all consider the agreement as the most acceptable to all concerned, each still retains his or her own view of what is best. Compromise would essentially be a question of judgment. Whether citizens decide 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; more the outcome of reflective judgment than of a rationalistic decision procedure.

Confronted with rationally-irreconcilable moral conflict, we should remind ourselves of what we have in common with those with whom we disagree, while at the same time not ignoring deep and important differences. In the latter sense, we can stress the importance of mutual respect. According to Gutmann 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. We should value reaching conclusions.

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266 Kettner (1999).
through reason rather than force, and more specifically through moral reasoning rather than through self-interested bargaining. In the evaluation of public discourse, common ground will be related to judgments concerning a public course of action. To the extent that there is disagreement, this disagreement will concern judgments, and to some extent even reasoning.

Is common ground really an ideal in a pluralist society? Ziarek proposes an 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 differend – the erased conflicts in which victims cannot signify their damages.  

I disagree that we should aim at dissensus. Reflection should start with a profound understanding of the plurality of opinions, and in public deliberation there should be space for ‘contentful’ contributions, but, in my view, common ground is still an ideal. The quest for common ground should not, in my view, neglect difference, however, and not exclude diverging points of view.

*Impartiality of judgment: reflecting from a universal standpoint*

I have, following Arendt, interpreted enlarged thought in terms of impartiality of judgment. The second maxim of common human understanding, enlarged thought, asks that we reflect upon the subjective private conditions of our own judgment from a universal standpoint. As we have seen, this universal standpoint can only be determined by placing ourselves in the standpoints of others. In a sense, the condition of impartiality of judgment is related to dialogicity, which will be discussed below; to which extent do participants in public discourse take the perspective of others in responding to them? Dialogicity entails citizens taking judgments and each other’s justifying reasons seriously. Impartiality of judgment not only entails that we take the standpoint of others, which is not to be confused with empathy, but also that we reflect upon our own judgment from a universal standpoint. Impartiality of judgment refers to the faculty of judgment. In the evaluation of public discourse, impartiality of judgment will be related to interpretive frameworks. It is on the basis of interpretive frameworks that we judge. Our reasoning and our inferring of judgments from reasons are based upon interpretive frameworks.

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We can contrast impartiality of judgment with the concept of moral impartiality. Let us consider an account by Gert.\textsuperscript{272} He criticizes the standard account of impartiality of treating like case alike. This would be confusing impartiality with consistency. For Gert, an agent is impartial, in a certain respect, vis-à-vis a group if, and only if, the agent’s actions in this respect are not influenced by which members of the group benefit from, or are harmed by, these actions.\textsuperscript{273} It is only when considering the violating of moral rules, e.g. ‘do not kill’ and ‘keep your promises’, that morality requires impartiality.\textsuperscript{274} Moral impartiality thus entails, in the account of Gert, that we do not treat any member of a group which might be affected by our actions differently.\textsuperscript{275} Impartiality of judgment, we can conclude, is different from moral impartiality, even though both kinds of impartiality require that we consider the standpoints of others. This is expressed by Friedman for whom the method of universalization presupposes that impartiality results from the incorporation of all perspectives into one standpoint.\textsuperscript{276} That is, the universalizing reasoner must somehow compile the views of all standpoints in reaching his or her normative conclusions.

\textit{Reciprocity: offering mutually acceptable reasons for judgments}

Reciprocal reasons are public reasons; they are reasons which we can reasonably expect others to accept as their own.\textsuperscript{277} For Gutmann and Thompson, reciprocity requires citizens to make moral claims when appealing to reasons or principles that can be shared by fellow citizens; the moral reasoning will in this way be mutually acceptable.\textsuperscript{278} 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.\textsuperscript{279}

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:

\textsuperscript{272} Gert (2004).
\textsuperscript{273} Ibid. (2004: 118).
\textsuperscript{274} Kant, whose categorical imperative is widely regarded as a test of impartiality, makes the mistake, in the view of Gert, of requiring that all our actions conform to the categorical imperative, rather than just those actions that involve violations of moral rules.
\textsuperscript{275} Boran (2004) speaks in this sense of impartial judgment within a focal group, such as a two-person situation, a society, all human beings, or all sentient beings.
\textsuperscript{276} Friedman (1989: 649).
\textsuperscript{277} McBride (2007).
\textsuperscript{278} Gutmann and Thompson (1996).
\textsuperscript{279} Ibid. (2004).
When citizens deliberate, they seek agreement on substantive moral principles that can be justified on the basis of mutually acceptable reasons.²⁸⁰

Deliberative arguments for universal health care would, for instance, appeal to a mutually-recognized principle of basic opportunity for all citizens. Insofar as moral 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.

Gutmann and Thompson discuss, as an example of the importance of reciprocity, the criticizing by religious fundamentalists of ‘liberal’ books used in education.²⁸¹ When teachers require children to read stories describing a Catholic Indian settlement in New Mexico, the effect is not to inculcate belief in Catholicism. The empirical claims which fundamentalist parents make, that the belief of their children is being compromised, fail to meet the test of reciprocity because they cannot be sustained by reliable methods of inquiry. There is no reliable evidence that children who are required to read about different religions or different ways of life are likely to convert to those religions or choose those ways of life. The parents also object to teaching that each human being has dignity and worth. This belief, however, is necessary for basic liberty and opportunity. It underlies the principle of reciprocity itself.

The condition of reciprocity can be understood as a requirement to provide mutually acceptable reasons for the judgments that are made. In my view, impartiality of judgment is a precondition of reciprocity. Considering one’s own judgment in view of the plurality of others’ judgment, and thereby adopting a universal standpoint, may result in reasons that are mutually acceptable. Just what constitutes mutually acceptable reasons, however, is itself a matter of deliberation. Reciprocity may be related to ways of moral reasoning, be it consequentialist, deontological or reconstructive. These ways of reasoning may be employed to find out what it is that makes a reason a good, reciprocal, one; that is to say that others can endorse the reason as their own. As I have argued, we may have recourse to ethics to find out whether or not our reasons are good ones. I have suggested that the reasons for an action can be related to Kant’s ethics in terms of universalizable maxims and, in this sense, reasons are

reciprocal. Also in discourse ethics, we can speak of reciprocal reasons from the perspective of all affected by a norm. 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.282

**Dialogicity: taking the reasons of others seriously**

Dialogicity is a concept associated with 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.283

For Bakhtin, dialogical relations are relations between any utterances in speech communication. Guruvitch 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:

[A]ny moment in dialogue is a threshold not only between utterances or speakers, but between plurality and non-plurality.284

Dialogue can be regarded as a criterion for a process in which one provides fully developed arguments for one’s own position and takes seriously and responds to the arguments of others.285 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.

Dialogicity is implied by the concept of the deliberative formation of judgment; in a sense, dialogue and deliberation can be conceived of as synonyms. In dialogue or deliberation, utterances are responses to other utterances. Judgments are not made in isolation but in a public sphere where other judgments are made,

285 Ferree et al. (2002).
some in response to other judgments. I will, in my analysis of public discourse, consider the dialogical structure of texts and discuss how citizens participating in public discourse formulate their responses to other citizens.

Publicity: the public judgment of judgments

For Holder, judgments meet a publicity condition when there is openness in the methods used to persuade an audience of their rightness.\(^{286}\) This requires the information, principles, and rules on which the judgments are advocated generally and easily being 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.\(^{287}\)

On a general understanding of publicity, a claim is publicly justifiable ‘insofar as it employs information, principles, and rules that are generally accepted as adequate’.\(^{288}\) For Kant, as Deligiorgi clarifies, publicity entails that people must be allowed the freedom to judge publicly the proposed laws of the state.\(^{289}\) Publicity is also regarded as a test of right and wrong. For Kant, in *Perpetual Peace*:

> All actions relating to the rights of other men are wrong, if the maxims from which they follow are inconsistent with publicity.\(^{290}\)

Publicity provides, for Kant, an ‘easily applied criterion which is to be found *a priori* in the reason’, so that in each particular case, we can at once recognize the falsity or illegality of a proposed claim. According to Deligiorgi, 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. Kant’s urging of citizens to be allowed to judge publicly is similar to Holder’s suggestion that judgments be made public. Judgments concerning a public course

\(^{286}\) Holder (2004). For 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.

\(^{287}\) Holder (2004: 512). McBride 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 institutionalising the exchange of reasons therefore serves to justify public confidence that the democratic process is not prey to arbitrariness’ (2007: 179).

\(^{288}\) Holder (2004: 513).

\(^{289}\) Deligiorgi (2002).

\(^{290}\) P 185.
of action underlying norms for a public course of action should thus be public: that is the implication of the condition of publicity.

Making judgments public is a precondition of what we have called the public justifiability of judgments. Unlike the other conditions of ethico-political judgment, which can be aimed at by citizens in public deliberation, publicity is a condition that cannot be realized, yet demanded, by citizens. Rather, it has to be secured by representatives and formal bodies. I distinguish publicness, the characteristic of a public sphere which is, in principle, accessible and open to all citizens, and publicity, which entails that judgments concerning a public course of action are made public in the sense that citizens can judge these judgments.291

Common ground and the conditions of ethico-political judgment

In my view, the conditions of impartiality of judgment, reciprocity, dialogicity, and publicity are necessary and sufficient for common ground. I will discuss the four conditions in relation to common ground. Starting with impartiality of judgment, we have seen that this condition can be understood in terms of the adopting of a third view. We can speak of impartiality of judgment as a precondition for common ground. We can understand the condition of impartiality of judgment in terms of a preparedness to question one’s own judgment when it cannot sustain scrutiny in view of the judgments of others in aiming to find common ground.

The condition of reciprocity entails citizens sharing mutually acceptable reasons. Deliberation entails that citizens seek agreement on moral principles that can be justified on the basis of mutually acceptable reasons. If reasons are mutually acceptable, then even the judgments inferred from reasons are mutually acceptable. This is because valid reasoning entails that the judgment, by necessity, follows from the reasons. We can speak of consequentialist, deontological, and reconstructive reasoning. It is perhaps not the principles on which these ways of reasoning are based per se that lead to disagreement, but their application. We can conclude that, if citizens can agree on reasons, they can also agree on judgments. Agreement on judgments can be understood in terms of

291 For 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 to judge agreements. Rather than the content of the issues 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: publicness is, for Bohman, strong publicity, it includes weak publicity.
common ground; in this sense, reciprocity is an obvious precondition for common ground.

*Dialogicity* entails citizens responding to each other in public discourse. Dialogicity is a precondition for common ground, and reciprocity, in the sense that only when public discourse has the character of dialogue or deliberation, will we be able to speak of a quest for mutually acceptable reasons and common understanding as regards judgments concerning a public course of action. Plurality in public discourse requires dialogicity. When seriously engaging with the reasons and judgment of other citizens, we can speak of dialogicity as a precondition for making shared judgments, presupposing a common basis that is agreed upon. *Publicity* offers an opportunity for citizens to judge judgments concerning a public course of action and political norms. It is an indirect precondition for common ground.

We can also relate the notion of *public justifiability of judgments* to common ground. It is an evaluative notion which assesses the extent to which judgments can be justified in the public sphere. It is related to the condition of reciprocity. Justifiability is a measure of the extent to which common ground has been found in the public sphere. I have defined ethico-political judgment as the deliberative formation of a justifiable judgment. The extent to which a judgment is justifiable is expressed by the notion of the public justifiability of judgments. Common ground not only requires that citizens agree on judgments but also on the reasoning underlying them. If citizens can agree on the reasons underlying judgments, they will also agree on the judgment concerning a public course of action.
In this chapter and Chapter 5, we will concern ourselves with the empirical part of this inquiry. On the basis of this chapter and the chapter on Swedish public discourse, in Chapter 6 there will be reflection upon the question of the extent to which the purpose and conditions of ethico-political judgment are met. In the last chapter, frameworks will be discussed in terms of impartiality of judgment; reasons in terms of reciprocity and moral ways of reasoning; and judgments in terms of common ground.

In this chapter, texts belonging to public discourse in the Netherlands on prenatal diagnosis and screening will be analyzed by considering interpretive frameworks, judgments concerning a public course of action, and the reasoning from which these judgments are inferred. Dutch discourse on the unborn life can be characterized 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. The texts on the unborn life date roughly from the beginning of the period 1989-2006; texts on the attitudes toward the disabled concern the 1990s; texts concerning the implications of new choices cover the entire period 1989-2006; while texts concerning the limits of medicine have mainly been published during the 1990s.

4.1 The unborn life: 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 frames the discussion on the unborn life in terms of the limitation of prenatal diagnosis to severe afflictions, as well as a rejection of 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:
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.292

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 Dupuis and geneticist 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 defensible view on human being-in-becoming. In their interpretive framework, they refer to not yet human beings.293 Potential beings are, in the view of Dupuis and Galjaard, equal to not yet human beings:

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293 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 (Ten Kate, Leo P.’ De vraag is: wie mogen wij het leven aandoen’ [The question is: who will live?], *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. For 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 (Commisie ‘Biomedische ethiek’ (1991). *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).
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.294

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.295 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.296

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


295 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 (Van Steendam, G. (1988). ‘Abortus in het kader van erfelijkheidsadviesering’ [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 (De Wert, G.M.W.R. (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 (De Wert, Guido (1999). Met het oog op de toekomst. Voortplantingstechnologie, erfelijkheidsonderzoek en ethiek [Vision of the future. Reproductive technologies, hereditary research and ethics]. Amsterdam: Thela thesis).

296 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.
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.

Ethicists Beemer and 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

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297 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 (Te Braake Th.A.M. (1990). ‘Prenatale diagnostiek’ [Prenatal diagnosis], in H.A.M.J. Ten Have (ed), Ethiek en recht in de gezondheidszorg. Deel XVI. Deventer: Kluwer).

298 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 doding. Zij beschermt 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 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.

299 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 (Studiecommissie gentechnologie CDA (1992). Genen en grenzen. Een christen-democratische bijdrage aan de discussie over gentechnologie [Genes and limits. A Christian Democratic contribution to the discussion about gene technology]. Den Haag: Rapport van het wetenschappelijk instituut).
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 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 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.300

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

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300 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’. Van de Meent-Nutma, E.M. ‘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.
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. 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 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.

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302 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 biosociaiteit: een humanistische visie op de ethiek van het biomedisch handelen* [The biosociety: a humanist view on the ethics of biomedical acting]. Amersfoort: Acco).

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.\(^{304}\)

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 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.

4.2 Attitudes toward the disabled: valuation of the disabled

Theologian and ethicist Kuitert discusses, in an article in a journal, why the idea of a slippery slope and a eugenic population policy persist, framing the issue in terms of *eugenics*. Eugenics is defined by Kitcher 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.\(^{305}\) According to Kuitert, then, the reason for the persistence of a eugenic population policy is the prospect of a


\(^{305}\) Kitcher (1996).
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.306

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 tendency toward eugenics when the birth of child with a disability is questioned.307 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, the concept in the interpretive framework, 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 Oudkerk argued, for instance, that he knew many blind people who had a decent life.308 In a newspaper article, ethicist Den Hartogh


307 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 I.D. De Beaufort, I.D. en M.T. Hilhorst (eds.), Kind, ziekte en ethiek. Baarn: Ambo).

308 Köhler, Wim. ‘Ongefundeerde kritiek van politici op abortussen’ [Unwarranted criticism of politicians over abortions], NRC Handelsblad October 13, 1995.
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 Hartogh’s interpretive framework includes the question of 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.309

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 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 Reinders frames, 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’

309 My translation: ‘Het leven van een gehandicape is echter tot op zekere hoogte een ander leven, waarin gemeten wordt met andere maatstaven’. Den Hartogh, Govert. ‘Het was beter als u er niet geweest’ [It would have been better if you had never existed], Trouw March 2, 1996.
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.  

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.

The disabled thus have reason to take offence from prenatal diagnosis. According to Reinders, negative valuations of the existences of disabled people do matter.

310 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.


312 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
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. For Reinders, however, this is no reason to condemn prenatal diagnosis.313 Reinders supports the conviction 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 Verkerk frames, 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 then men; it is, for instance, difficult to find the means to live and start relationships. Is this a 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).

313 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 project in de publieke moraal van de liberale samenleving’ [The Human Genome Project in the public morality of the liberal society], Christen democratische verkenningen 3).
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.\(^{314}\)

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 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.\(^{315}\) 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

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\(^{314}\) My translation: ‘Of iemand een nadeel ervaart in zijn of haar leven is gerelateerd aan de situatie waarin iemand zich bevindt’. Verkerk, Marian.‘Gehandicapten emancipeert u!’ [Disabled emancipate yourselves!], *Trouw* March 9, 1996.

\(^{315}\) 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.
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 to choose whether or not to use new technologies, whereas the notion of protectability is outweighed by the judgment in favor of prenatal diagnosis.

316 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 (Van de Kamp, J.J.P. (1990). 'Prenatale diagnostiek' [Prenatal diagnosis], in Ethiek en recht in de gezondheidszorg).


318 Reinders notes in Moeten wij gehandicapt leven voorkomen? that Dutch disability organizations have been surprisingly silent on prenatal diagnosis, which can be contrasted with the protests made by the Swedish disability organizations.
4.3 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 frames 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.319

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.320

319 My translation: ‘De morele rechtvaardiging van dergelijke screening is gelegen in het principe van ‘leed voorkomen’: deelname stelt de betrokkenen in staat de uitkomst van de zwangerschap mee te bepalen op grond van wat – volgens hun eigen beoordeling – het krijgen van een (ernstig) gehandicapt 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). Prenatale screening. Down syndroom, neurale buisdefecten, routine-echoscopie [Prenatal screening. Down syndrome, neural tube defects, routine ultrasonography], Den Haag. The Population Screening Act entails that a permit is required in order to screen populations for severe diseases or abnormalities for which treatment or prevention is not possible. Since Parliament has stated that termination of a pregnancy must not be regarded as a form of prevention, a permit is required for prenatal screening.

320 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, Gunialla 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
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 Van Berkel is of the opinion that autonomy consists of such coercion. She frames, in a popular science publication, 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.’

Health Council 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, counselling, 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?’ (Van der Maas, P.J. en Dondorp, W.J. (2001). ‘Tripeltest voor alle zwangere’ [Triple test for all mothers-to-be], Medisch Contact 27/28).

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).

As a remedy, 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.323

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.’324 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, Ross-van Dorp, of the Christian Democratic Party, defends, in reaction to the advice of the Health 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 social coercion. The so-called free choice is often a ‘coerced’ choice. Another disadvantage is that children with 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 (Van Dijk, Gert. Tripeltest schept ook problemen [Triple test also creates problems]).


324 Beauchamp and Childress (2001: 60).
Council, a reluctant policy toward prenatal screening with the medicalization of pregnancy in her interpretive framework. She defends the fact that prenatal 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

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325 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 Belangenverenigingen Ondering Sterk L.F.B. en Federatie van Oudervenningen (2004). Standpunt prenatale screening [Position on prenatal screening]).

326 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 (Wetenschapelijk instituut voor het CDA (1992). Genen en Grenzen. Een christendemocratische 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).

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, but that the distinction between informing them about tests and offering them tests would remain intact. 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 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 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.

According to Tijmstra, the experience of being pregnant would thus change due to the offer of prenatal screening. Furthermore, technology gives pregnant

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328 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).

329 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.


331 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
women certainty but not after making them uncertain at the beginning. Elsewhere, Tijmstra discusses another disadvantage of screening. 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 De Wert and Berghmans, reacting in a newspaper article directed at the Secretary of State, find her stance on prenatal screening patronizing. They 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). ‘Al is 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 & 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?], Medisch Contact 16).

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
frame the discussion on screening by appealing to freedom of choice.\textsuperscript{335} If the Government wants to inform but does not want to make tests accessible to all, then there is no freedom of choice. The ethicists defend the advice of the Health Council:

\begin{quote}
[A]ll pregnant women can, if they so desire, use screening and in this way make an informed choice.\textsuperscript{336}
\end{quote}

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 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).

\textsuperscript{335} 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 (Den Hartogh, Govert (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 (De Beaufort, I.D. (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], Nederlandse Tijdschrift voor Geneeskunde 140). Referring to Dutch social scientific studies, physicians Wiersma and Flikweert doubt whether freedom of choice is possible on more fundamental grounds: technology is not value-free but norms are embedded in medical technology (Wiersma, Tjerk en Flikweert, Sander. (2002). ‘Prenatale screening op het syndroom van Down en neurale buisdefecten’ [Prenatal screening for Down syndrome and neural tube defects], Medisch contact. http://www.medischcontact/artsen.net, accessed 2006-10-04 ).

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 Van der Hoven and 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.337

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 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.338 Cobben frames, in a


338 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
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.339

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.

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4.4 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 Galjaard, in a companion, frames the question in terms of *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:

> 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.  

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.

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340 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* (1989). 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).

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 Van den Bergh, Brom, and 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. 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:

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.

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;

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342 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. 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. 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).

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. 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 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. He frames the question 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? 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 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 frames the question of indications of prenatal diagnosis in terms of limits. 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

344 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).

345 Feenstra, Gerbrand. ‘Fetus met oogziekte aborteren al jaren praktijk’ [Aborting fetuses with eye diseases has already been practice for years], Volkskrant October 13, 1995.
only morally justifiable when the severe suffering of the future child or family can be prevented:

A practice whereby each affection 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.  

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 gender-related ichthiosis and mutations that only lead, in combination with environmental factors, to a certain increased risk of health problems.

Much discussion will take place about the criteria for a list. When, for instance, is an affection 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 afflictions 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’.  

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347 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 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
Ethicist Reinders frames, in a newspaper article, the question of indications, in relation to the prenatal diagnosis of blindness, by distinguishing between 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.\(^{348}\)

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.

\(^{348}\) My translation: ‘Want wie geen trivialisering 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 abortuswet zijn morele problemen niet verdwenen’ [Under the abortion law, moral problems have not disappeared], Trouw October 14, 1995.
The Minister of Health, Welfare, and Sport, Borst 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 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.349

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.350 However, the Minister argues, prenatal diagnosis should not be carried out in the case of clearly mild afflictions such as color-blindness or

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349 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 boven 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 (Van Den Boer-Van den Berg, J.M.A (1996). ‘Prenatale diagnostiek en de keuzemogelijkheden’ [Prenatal diagnosis and the choices], Bijblijven 12/7).

350 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. ‘Ongefundeerde kritiek van politici op abortussen’ [Unwarranted criticism of politicians regarding abortions], NRC Handelsblad October 13, 1995).
recessive diseases such as cystic fibrosis. A clear boundary with the criteria to classify 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.

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351 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 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).
In this chapter, 27 texts belonging to the public discourse in Sweden on prenatal diagnosis and screening will be analyzed in detail. As in the Dutch public discourse, I will analyze interpretive frameworks. Furthermore, judgments concerning a public course of action are considered and the way they are inferred from reasons. The discourse on the unborn life can be characterized in terms of human dignity and suffering; the discourse on attitudes toward the disabled in terms of the questions 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’. Texts on the unborn life belong, as in the Netherlands, to the beginning of the period 1989-2006; texts on the attitudes toward the disabled also belong, with some exceptions, to the beginning of this period, texts on the implications of new choices belong to the entire period and texts concerning the limits of medicine belong mainly to the 1990s.

A comment on the translation of ‘human dignity’. It should be noted that human dignity is not a literal translation of the Swedish människovärde which can be taken to mean equal human value. In German, the equivalent of människovärde is Menschenwürde. 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.352

5.1 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 inviolability of human life and 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, gender, 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.353 The committee defends another doctrine which entails that human life is a possibility, and is developing354:

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.355

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

353 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-ethiskt 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. For 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]).

354 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 Gothburgensis).

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.\(^{356}\)

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.

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.\(^{357}\) 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

\(^{356}\) 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.

\(^{357}\) Swedish organizations are invited to write comments regarding White Papers, see also Chapter 6 on the system of making comments.
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.358

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

358 My translation: ‘Men man kan också hävda att den avvikelse som fostret skulle födas med skulle
kunna leda till ett lidande som minskar värdet av att födas. Här kommer principen om att inte skada och
att minska lidandet i blickpunkten’. Statens Medicinsk-Etiska Råd SMER (1990:5). Yttrande över
life is a specific human life and, as such, an individual with human interests and with the right to life and development.359

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. For the churches, there is a relation between the fetus as an individual, with rights, and the fetus having human dignity.

Philosopher 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, thus suffering, while giving birth to a child that can be supposed to live a whole and good life prevents suffering, on the other hand:

[E]ither 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.360

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.361

Tännö`s 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.362 Tännö` 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. For 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.363 The reduction of suffering, the concept with which Tännö` 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 Sundström frames, 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

361 Physician Seidal, discussing Tännö`’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. Tännö`’s attempt to disqualify Christian values therefore cannot achieve a serious dialogue (Seidal, Tomas (1989). ‘Läkaretik måste avspeglas i utredning om fosterdiagnostik’ [Medical ethics should be reflected in investigation on prenatal diagnosis], Läkartidningen 46).

362 In reaction to Tännö`, 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).

363 Tännö` 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 (Tännö`, Torbjörn (1989). ‘Nyтоморален 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, Tännö` 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 (Tännö`, Torbjörn (1991). Välja barn. Om fosterdiagnostik och selektiv abort [Choosing children. On prenatal diagnosis and selective abortion]. Stockholm: Sesam).
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 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:

[I]n the fact of a pregnancy, ‘the other’ is manifested with an ‘appeal’ that requires an ‘answer’.\(^{364}\)

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.

5.2 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\(^\text{365}\), 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. 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\(^\text{366}\), 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.\(^\text{367}\)

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:

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\(^{365}\) In Swedish ‘graderad’.

\(^{366}\) In Swedish, the organization talks about ‘utsorterande’ prenatal diagnosis.

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.\(^{368}\)

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?\(^{369}\) The Federation requires 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’.


\(^{369}\) 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 (Christina Johansson. (1990). ‘Den fullständige kontrollen’ [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 (KDS. ‘Fosterdiagnostik och människovärdet’, Motion till riksdagen 1992/93, So486 [Prenatal diagnosis and human dignity. Parliamentary Bill]).
Physician 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. 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:

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370 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 (Neurologiskt Handikappades Riksförförd NHR (1990). Remiss beträffande SOU 1989:51. [Comment on White Paper 1989:51]). 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).

371 As we have seen, in 2004, approximately 350 selective abortions were carried out in Sweden.
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.  

For Brodsky, ethics are, 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. For 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 Grunewald responds to Brodsky's article in the same medical journal, framing the question of attitudes toward the disabled in terms of 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.  

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.

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,

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373 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 Fosterdiagnostik och abort’, Motion till riksdagen 1994/95:So28 [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.

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. 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.

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.

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 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.

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375 Sam Brodsky (1989). 'Den moderna fosterdiagnostiken förebygger svårt mänskligt lidande' [Modern prenatal diagnosis prevents severe human suffering], *Läkartidningen* 35.
376 Karl Grunewald (1989). 'Fosterdiagnostik som trend och hot' [Prenatal diagnosis as trend and threat], *Läkartidningen* 41.
378 Karl Grunewald (1989). 'Fosterdiagnostiken behövs – men kan bantas’ [Prenatal diagnosis is needed – but can be slimmed down], *Läkartidningen* 36.
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 Tännsjö formulates three possible arguments belonging to what is called the disability critique, which he then criticizes. The first argument discerned by Tännsjö 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 Tännsjö. With regard to the first argument, however, Tännjsö 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. 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

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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.

5.3 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 framed in terms of 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.381

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.382

Ethicist Collste also frames 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.383

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.

For Collste, screening thus changes the experience of pregnancy: something changes in the relationship with the fetus. Implicitly, he suggests that autonomy

382 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]).

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 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 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.³⁸⁴

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 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. 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, frames 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

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385 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).
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.  

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 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:

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387 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).
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.388

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.389 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. For 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 Munthe goes one step further than the provision of information and defends prenatal diagnosis being offered to all pregnant women.390 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


389 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 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 oroas i onödan' [Pregnant women are unnecessarily anxious], Dagens Nyheter March 26, 2001).

390 The 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 (Swedish National Council on Medical Ethics. Yttrande. Etiska frågor kring fosterdiagnostik [Opinion. Ethical questions concerning prenatal diagnosis]. Stockholm).
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:

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.

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

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391 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).

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. 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. In the White Paper, it is recommended that routine 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. Autonomy can, in this context, be regarded as an abstract concept, the White Paper claims:

393 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]).

394 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 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).

395 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,
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.396

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.397 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 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.

5. 4 Limits of medicine: heading toward liberal eugenics?

In the Swedish discussion regarding the question of which indications should apply to prenatal diagnosis, philosopher 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 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 (Tännö, Torbjörn (1991). Välja barn. Om fosterdiagnostik och selektiv abort [Choosing children. On prenatal diagnosis and selective abortion]. Stockholm: Sesam). 396 My translation: ‘Autonomi kan inte minst i detta sammanhang uppfattas som ett abstrakt begrepp, något som är eftersträvansvärmt men svårt att uppnå praktiskt. Det finns i idag inget enkelt sätt att garantera att beslut i samband med fosterdiagnostik blir autonoma’. Kommittén om genetisk integritet (2004: 281). Genetik, integritet och etik [Genetics, integrity and ethics]. SOU 2004:20. 397 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 nackuppklargning för tidig upptäckt av Down syndrom’ [Nuchal translucency screening for the early detection of Down syndrome], Läkartidningen 50).
according to her plans. According to Tännsjö, 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. Tännsjö’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 Tännsjö 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.398

Tännsjö 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, Tännsjö 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 Tännsjö, 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 meaning399:

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.400

This hedonistic position entails, for Tännsjö, 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, Tännsjö does not want to infringe on the rights of the woman to choose prenatal


399 Krabbe’s disease is a progressive brain disease with a life expectancy of 2-3 years.

diagnosis, for whatever reason. As in the newspaper article, Tännsjö argues for free selective abortion. The alternative would, in the view of Tännsjö, be a list of indications for prenatal diagnosis. 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, Tännsjö 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 gender. Tännsjö argues that the reason society should offer women the opportunity to determine gender 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 gender determination is when a woman is at risk of sustaining an injury when she does not give birth to a son:

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401 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 gender of the child (Utredningen 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).

402 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 Tännsjö, 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 gender 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 gender 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 gender 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 gender should not be allowed (Fridén, Lennart (m). 'Könsaborter'. Motion till riksdagen 200/01: So260 [Gender-selective abortions. Parliamentary Bill]).
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.\textsuperscript{403}

Tännsjö notes that there are proposals to allow prenatal diagnosis for certain indications but to ban others.\textsuperscript{404} 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 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 are 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.\textsuperscript{405}

Philosopher Pérez-Bercoff defends, in a journal, the position of Tännsjö while criticizing the criticism of Stenius. He rhetorically asks whether or not Stenius


\textsuperscript{404} For 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).

believes that we are unburdened from responsibility for our actions when we deliberately choose to ignore the risks we expose someone to:

In criticizing Tännsjö, 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.\textsuperscript{406}

According to Pérez-Bercoff, Tännsjö 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, Tännsjö wants to make us conscious of the duty to respect the suffering of the future child. Pérez-Bercoff thus implicitly refers to the \textit{suffering} of the future child which can be prevented using prenatal diagnosis. Editor Isaksson to a certain extent agrees, in the same journal, with Pérez-Bercoff:

\textit{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.\textsuperscript{407}

However, contrary to Tännsjö, 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 Tännsjö’s position is not based upon an argument with Tännsjö regarding the justifiability of prenatal diagnosis, she supports prenatal diagnosis, but about the moral justification of Tännsjö of prenatal diagnosis. For 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. For Pérez-Bercoff, there is an unequivocal justification of prenatal diagnosis, particularly of prenatal diagnosis for severe afflictions, and he agrees with Tännsjö 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 Tännsjö.


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.408

Svensson defends a democratic view of human beings which entails that all human beings regardless of race, gender, 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.409

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

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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 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 frames the question of limits in terms of regulation. The HUGO project will make it possible to identify afflictions and traits that are not related to disease. 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.410

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

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However, prenatal diagnosis may also be offered to parents who 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 Tännsjö. 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.

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 Huntingtons sjukdom – etiska riktlinjer' [Predictive and prenatal diagnosis of Huntington disease – ethical guidelines], Läkartidningen 25).
CHAPTER 6
Public discourse and ethico-political judgment

The empirical inquiry into public discourse shows that there is obviously a plurality of points of view in society, both in the Netherlands and in Sweden, concerning all four thematic foci in relation to prenatal diagnosis and screening. Prenatal diagnosis and screening have been thoroughly discussed in all arenas of the public sphere; particularly in the public political sphere, the arena of the mass media, and the medical arena but also in the civic and academic arenas. In this Chapter, I will consider to which extent public discourse meets the purpose, common ground, and conditions of ethico-political judgment in relation to interpretive frameworks, reasoning and judgments in public discourse. Public discourse will be considered as ethico-political judgment in the empirical sense of the concept. The question of how much common ground we can hope for is addressed on the basis of the example of prenatal screening. Finally, the relevance of the inquiry into ethico-political judgment to thinking about public deliberation is emphasized.

6.1 Common ground, the conditions of ethico-political judgment, and public discourse

As I have pointed out, ethico-political judgment is the deliberative formation of a justifiable ethico-political judgment. In relation to public discourse, we can speak of ‘judging’. Judging in public discourse entails that is inferred to a judgment on the basis of reasons which are in turn related to interpretive frameworks. Ethico-political judgment is an ideal for public deliberation. As I have argued, public discourse can be regarded as public deliberation to the extent that it is characterized by the giving and asking for reasons characteristic of public deliberation. We will, on the basis of the inquiry into public discourse, be able to examine the extent to which public discourse satisfies the conditions of ethico-political judgment. I will first discuss how common ground, impartiality of judgment, and reciprocity will be discussed in relation to public discourse.

Common ground is a basis agreed upon by citizens in order to reach a common understanding. I have suggested that we can interpret the Kantian sensus communis as a general ground of judgment common to all, which enables the making of common judgments. The question that will be dealt with here is whether or not citizens can find common ground concerning judgments relating to a public course of action which have been found in public discourse. I will discuss to which extent there are common judgments concerning a justifiable
Common ground is the purpose of ethico-political judgment. It presupposes that, in a pluralist society, agreement is possible, in principle, if citizens give and ask for reasons in a deliberative practice.

In Chapter 1, the concept of the interpretive framework was related to the concept of horizon. Gadamer regards a horizon as the range of vision that includes everything that can be seen from a particular point. I argue that an interpretive framework is part of an interpretive horizon. An interpretive framework contains the three elements of understanding, which is always interpretation, and application. Understanding involves the application of text in terms of the interpreter’s present situation. I wish to relate the concept of the interpretive framework to the universal standpoint in the account of the impartiality of judgment which has been related to the enlarged thought. The impartiality of judgment refers to the faculty of judgment. Is it possible, in accordance with the enlarged thought, to reflect upon the ‘subjective private conditions’ of one’s own judgment from a universal standpoint, by placing oneself at the standpoint of others in accordance with the enlarged thought?

Reciprocity implies that moral reasoning is mutually acceptable. The reasons underlying judgments concerning a public course of action can be endorsed by all citizens. In this sense, in view of the plurality of judgments in public discourse, reciprocity seems to be difficult to realize. However, it seems plausible that citizens agree on at least some of the principles in the discourse on prenatal diagnosis and screening. Whether principles, and ways of reasoning, can be mutually acceptable or not is a matter for deliberation itself: whether or not there are such principles and how they should be interpreted can only be discovered during the process of deliberation. I will discuss to which extent ways of reasoning in public discourse can be characterized in terms of consequentialist, and deontological and reconstructive reasoning.

**Common ground and judgments in public discourse**

Common ground is the purpose of ethico-political judgment and presupposes the discerned conditions. The aim of ethico-political judgment is to find common ground regarding the justifiability of judgments concerning a public course of action. Has common ground been found in the discourse on the unborn life? We have seen that judgments in the Dutch discourse with regard to the unborn life are restrictive, permissive, moderate-restrictive and moderate-permissive. This indicates that common ground has not been found. If judgments were to be merely moderate-restrictive or moderate-permissive, it would arguably be easier to find common ground. Also in the Swedish discourse concerning the unborn life, it cannot be concluded that common ground has been found. Judgments are
permissive, moderate-restrictive, and restrictive. Even on the basis of the proposed compromises between opponents and proponents of prenatal diagnosis, common ground is unlikely.

Is common ground on the justifiability of prenatal diagnosis possible, in view of the question of attitudes toward the disabled? Judgments in the Dutch public discourse, with regard to attitudes toward the disabled, are permissive, implicitly restrictive, and moderate-permissive. In the Swedish public discourse, the justifiability of prenatal diagnosis *per se*, in view of negative valuations, is in doubt. Profound disagreement exists as to the justifiability of prenatal diagnosis in view of attitudes toward the disabled. Judgments in the Swedish discourse on attitudes toward the disabled are restrictive and permissive: no judgment has been found that is moderate. This is an indication of the absence of a proposal for compromise, a proposal which may lead to common ground. In the Dutch and Swedish discourse, the disagreement concerns, among other things, the question of whether or not prenatal diagnosis entails a negative valuation of the disabled.

Establishing a realistic image of the disabled and opposing cuts in care of the disabled are necessary, in the judgment of critics, in order to avoid the side effects of prenatal diagnosis, which, in itself, is not rejected in the Dutch discourse. Common ground is compromised due to different judgments that prenatal diagnosis entails a value judgment of the disabled. In the Swedish discourse, disability organizations question prenatal diagnosis on a principled basis, and reject prenatal diagnosis when it results in selective abortions. It is argued that selective abortions of afflicted fetuses have side effects for the disabled as a group. Tolerance of this group would diminish due to prenatal diagnosis. This stands in contrast to those who regard prenatal diagnosis as an individual choice which would not lead to elitist considerations or prejudices against the disabled.

What about discourse with regard to the implications of new choices? Judgments in the Dutch discourse are moderate-restrictive, moderate-permissive, restrictive, and permissive. Judgments in the Swedish discourse are permissive, moderate-restrictive, and implicitly restrictive. In the Dutch discourse, it is argued that autonomy would be difficult to realize if screening were offered to all pregnant women. Furthermore, freedom of choice would be compromised since information is provided by medical personnel. The proponents of screening argue that freedom of choice is warranted when prospective parents are provided with the pros and cons of prenatal diagnosis. Autonomy would give pregnant women opportunities to make decisions on the basis of underlying plans and aspirations. In the Swedish discourse, to a greater extent than in the Dutch, most proponents and critics of prenatal screening frame their concerns in terms of the principle of respect for autonomy, but disagree as to whether or not autonomy can be
realized. The question of whether or not autonomy can be realized is discussed. In the Dutch discourse, the medicalization concept is used by the opponents of screening. Medicalization can be used as a descriptive concept – pregnant women are subjected to a health care – but in fact the concept is also used as a normative concept.

Judgments with regard to the limits of medicine in the Dutch discourse are permissive, restrictive, and moderate-permissive. Judgments with regard to the limits of medicine in the Swedish discourse are permissive, moderate-permissive, restrictive, and moderate-restrictive. Thus, common ground is unlikely. The question of whether or not it is possible to distinguish between severe and less severe afflictions has been discussed in public discourse. Two questions in relation to such distinctions are considered; whether or not it is possible to make such a distinction and whether it would be desirable. Particularly in the case of whether or not it would be desirable to make a distinction between severe and less severe afflictions, common ground has not been found in the Dutch discourse. This also applies to the Swedish discourse, where a liberal judgment is in contrast with judgments that should be distinguished between severe and less severe afflictions.

What lessons can we draw regarding ethico-political judgment? We have seen that common ground is not easily found in public discourse. Diverging judgments exist in public discourse. Even though citizens may claim that it is their judgment that is valid, there is a plurality of judgments. However, even if we find that common ground has hardly been found, this illuminates the condition of ethico-political judgment. We can understand the condition of common ground in terms of the difficulty to find common ground in public discourse. Ethico-political judgment is the deliberative formation of a justifiable judgment. What constitutes a justifiable judgment with regard to a public course of action is at stake in public discourse. That is, deliberation concerns the question of to which extent citizens can agree upon a justifiable judgment.

**Impartiality of judgment and interpretive frameworks in public discourse**

I will now consider whether or not interpretive frameworks, in terms of what is reasoned to support judgments, may be the result of impartiality of judgment. I will start with public discourse on the unborn life. Selective abortions are regulated in the Netherlands and Sweden by general laws on abortion. Let me consider these laws in order to answer the question of whether or not we in public discourse can find (judgmental) impartial stances with regard to selective abortion. The Dutch *Termination of Pregnancy Act* is based upon the doctrine of growing protectability. The human fetus has a certain level of protection under
law, depending on the potency of becoming a human being. However, this protection is not as encompassing as for a viable fetus. The Act provides women with the opportunity for abortion in case there is a situation of distress to her. Is the law based upon an impartial, universal standpoint that is determined by means of considering the standpoints of citizens? The law is, in any case, based upon a compromise between the proponents and opponents of abortion.

The notion of growing protectability expresses this compromise: on the one hand, there is reference to the protectability of the unborn life, while on the other, this protectability is not absolute for the undeveloped fetus and abortion is the free choice of the woman. It could be argued that the law, in this sense, is the result of the exercising of impartiality of judgment; those who have formulated the doctrine of growing protectability have placed themselves in the standpoint of others. Even in Sweden, abortion is regulated by law, the *Abortion Act*, which entails that women can request an abortion until the 18th week. Selective abortions are considered as abortions in general and are thus allowed under the law. As in the Netherlands, selective abortion has nevertheless been discussed extensively in the Swedish public discourse.

As far as interpretive frameworks in the public discourse on the unborn life are concerned, we see that these differ between the Dutch and the Swedish discourse. In the Dutch discourse, we can discern interpretive frameworks such as the protection or protectability of the fetus; not yet human beings; freedom of choice; and quality of life. In the Swedish discourse, there is reference to the inviolability of human life; human dignity; nonmaleficence; suffering; and the appeal from ‘the other’. How ethical questions concerning the unborn life are framed is, for instance, dependent on the context. A difference between the Dutch and the Swedish discourse is that, in the Dutch discourse, we can identify the framework of the protectability of the fetus, whereas in the Swedish, this question is framed in terms of human dignity. Protection and human dignity are related in the sense that the protectable fetus is assigned human dignity.

How is impartiality of judgment related to interpretive frameworks in public discourse? As such, impartiality of judgment is not visible in public discourse. Impartiality of judgment is related to the faculty of judgment, rather than the formation of a judgment. In this sense, impartiality of judgment is a precondition for ethico-political judgment. Common ground may entail a compromise which is based on an interpretive framework that is based on an acknowledgment of the plurality of points view. A proposal for compromise in the Dutch discourse is the relation of the notion of protectability to the notion of quality of life. On the one hand, the unborn life deserves a measure of protection; on the other, quality of life may justify selective abortion. A controversial proposal for a compromise in the Swedish discourse is the distinction between the inviolability of the life of the
fetus, on the one hand, and the inviolability of developed life, on the other. The justification of judgments is questioned in this case.

Questions regarding attitudes toward the disabled are framed in the Dutch discourse in terms of eugenics; the valuation by the disabled of their own lives; the valuation of the lives of the disabled; emancipation; the protection of life; and equal human value. In the Swedish discourse, we can discern the interpretive frameworks of inviolable human value; human dignity; autonomy; and a disability critique. It cannot be concluded that the result of the impartiality of judgment may be a compromise, on the basis of a universal standpoint or a third view while the standpoint of others is taken. It is difficult to examine to which extent citizens have taken the plurality of standpoints into consideration. We see that the Dutch and the Swedish discourse differ in terms of interpretive frameworks. In the Dutch discourse, it is the valuation of the disabled that is discussed. Does prenatal diagnosis entail a value judgment of the disabled? In the Swedish discourse, the mere use of prenatal diagnosis is questioned by the opponents of prenatal diagnosis, framing the question in terms of human dignity. Prenatal diagnosis would violate human dignity by grading this principle; it entails that fetuses are chosen in order to be aborted. More than in the Dutch discourse, the interpretive frameworks of the Swedish discourse reveal a principled criticism of prenatal diagnosis.

Frameworks in the Dutch discourse regarding the implications of new choices are advantages and disadvantages; autonomy and freedom of choice; medicalization; and suffering. In the Swedish discourse, questions concerning the implications of new choices are framed in terms of reluctance; justice; autonomy and freedom of choice; and information. Does the framework of autonomy enable an impartial, universal standpoint regarding prenatal screening? In the Dutch discourse, the answer is more complicated than in the Swedish discourse. Certainly, an implicit standpoint in the Dutch discourse is that screening would be justifiable if autonomy were not compromised, which would be the case due to possible coercion. Autonomy is defended by those who argue that the offer of screening allows women to make an informed choice.

In the Dutch discourse, those who criticize prenatal screening being offered to all pregnant women do not frame the question in terms of the interpretive framework of autonomy – the extent to which autonomy can be realized – but in terms of the interpretive framework of medicalization. It could, of course, be argued that the medicalization critique entails that it is questioned whether or not decisions can be autonomous. Individuals would have no choice but to regard life merely in terms of disease, and are becoming dependent on health care. In the Swedish discourse, many contributions are framed in terms of autonomy. Whereas in texts by the proponents of screening the interpretive framework of autonomy can be
observed, opponents argued that autonomy cannot be realized. It is argued that the application of the principle of respect for autonomy is difficult to realize. It would not be possible to realize autonomy, or freedom of choice, since the pregnant woman would be subject to coercion by her family or by society.

Questions concerning the limits of medicine are, in the Dutch discourse, framed in terms of the undesirability of what is severe; autonomy and information; coping; and self-determination. In the Swedish discourse, these questions are framed in terms of happiness and suffering; race hygiene, and regulation. Is there an interpretive framework that enables an impartial, universal standpoint, in view of the disagreement in public discourse? On the basis of my reading of public discourse, the answer has to be negative. In the Dutch discourse, it is argued that it would be impossible to distinguish severe afflictions from less severe ones. The fact that it would be difficult to distinguish between what is severe and what is not is also used to defend a restrictive stance on prenatal diagnosis. A list of afflictions for which prenatal diagnosis should not be carried out is also proposed. Even though a list of indications for prenatal diagnosis may be undesirable or impossible, it is argued that there are certain limits to the use of prenatal diagnosis.

In the Swedish discourse, we also encounter criticism of the idea that there should be limits to the use of prenatal diagnosis. This would entail a statement regarding what lives are valuable. However, some argue that limits should be formulated – for instance for gender selection. Severe and less severe afflictions can, according to some citizens, be distinguished; in the latter case, less severe disabilities, treatable diseases, and traits within normal variation are mentioned. However, others question the desirability of such a distinction.

I have related impartiality of judgment to interpretive frameworks in public discourse. Impartiality of judgment is a condition for ethico-political judgment. In the formation of judgment, we start with different interpretive frameworks. Interpretive frameworks contain, for instance, the principle of autonomy or medicalization and are an indication of the judgment concerning prenatal diagnosis and screening that is being made. Some interpretive frameworks can be interpreted in terms of a possible compromise. We can envisage a framework where, on the one hand, the unborn life is valued and, on the other, consequences of prenatal diagnosis have a role in the reasoning.

Reciprocity and ways of reasoning in public discourse

Valid reasoning entails that judgments by necessity follow from the reasons. I will evaluate public discourse in terms of ways of reasoning and ask whether or
not reasoning can be considered reciprocal. In the Swedish discourse on the unborn life, the utilitarian principle is referred to with which moral questions are framed in terms of the consequences of prenatal diagnosis, with happiness and suffering as an interpretive framework. We have seen that, in the Dutch discourse, a compromise has been proposed in terms of the protectability of the fetus, on the one hand, and the quality of life, on the other. It could be argued that, in this case, deontological reasoning and consequentialist reasoning are combined to justify a compromise. In the case of the protectability of life, not the consequences but the duty to protect the unborn life is emphasized. In the case of quality of life, selective abortion is considered in terms of consequences, namely severe afflictions resulting in a life of suffering.

In the Swedish case, we can observe a deontological way of reasoning whereby a distinction is made between the inviolability of the fetus and the inviolability of developed life. The consequences of prenatal diagnosis are not taken into account. The reference to the interpretive framework with a humanist view of human beings, autonomy (based on knowledge), beneficence, nonmaleficence and justice can be understood in terms of reconstructive reasoning. We find, here, the four principles of biomedical ethics, as well as the notion of a humanist view of human beings. It could be argued that reconstructive reasoning is, to a larger extent, reciprocal than mere deontological or consequentialist reasoning. We can, at least, agree on principles, and possibly their application. The concept of nonmaleficence, which means that harm should be avoided, is related to the principle of reducing suffering. We find an explicit example of utilitarian reasoning with which prenatal diagnosis is justified in terms of the reduction of suffering that is enabled.

The utilitarian way of reasoning is also to be found in the Swedish discourse on the limits of medicine where it is argued that a system of free selective abortion would secure the happiness of the child and the parents. The utilitarian way of reasoning has been criticized for suggesting that it is possible to calculate the amount of happiness. It is the utilitarian justification of judgments that is questioned. In this sense, it can be concluded that utilitarian reasoning has not proven itself to be reciprocal. In the Dutch discourse concerning attitudes toward the disabled, we find an implicit consequentialist way of reasoning when it is argued that we ought to prevent disability. Also, the possible consequences in terms of eugenics are mentioned. Prenatal diagnosis is judged in terms of its possible consequences. In general, public discourse is about the consequences for the disabled in terms of possible value judgments about their lives. There is, however, no agreement regarding the question of whether or not prenatal diagnosis entails a value judgment. In the Swedish discourse, we can observe a deontological way of reasoning when it is argued that prenatal diagnosis is a violation of the principle of human dignity. Prenatal diagnosis would entail life
being extinguished; here we find an example of a deontological way of reasoning. The possible consequences of prenatal diagnosis in terms of value judgments are also discussed. Also in the Swedish discourse on attitudes toward the disabled, justifications in general terms are given for propounded judgments.

We find in the Dutch discourse regarding the implications of new choices, implicitly, a consequentialist way of reasoning when it is argued that prenatal screening may prevent suffering. There is an implicit appeal to autonomy. The prevention of suffering can be understood in terms of nonmaleficence. Arguably, nonmaleficence can be related to reconstructive reasoning. The argument that prenatal screening may lead to medicalization is implicitly consequentialist in the sense that prenatal screening is judged in terms of possible consequences, for instance anxiety. However, we can also understand the concept in relation to the principle of respect for autonomy. It is possible to support autonomy by consequentialist reasoning – it would have the best consequences – as well as deontological reasoning – we ought to respect the principle of respect for autonomy.

Reasoning is quintessential to public deliberation over moral and political questions. I understand public deliberation as the giving and asking for reasons in the public sphere. In this sense, public discourse can be conceived of as deliberation. The purpose of ethico-political judgment, i.e. to find common ground, presupposes the condition of reciprocity for ethico-political judgment. If we can agree on reasons, it follows that we can agree on judgments.

_Dialogicity: dialogical structure in public discourse_

The extent to which participants in public discourse respond explicitly to each other’s judgments is a potential measure of dialogue. As we have seen, for Bakhtin, dialogical relations are relations between any utterances during speech communication. Dialogical structure measures, furthermore, the presence of citizens with opposing views in articles. To which extent is dialogical structure present in the examined texts on public discourse? An explicit dialogical structure is often found in newspaper articles regarding the four thematic foci that have been examined. In these texts, citizens respond to each other. Also in medical journals, a dialogical structure can be observed. The Swedish White Paper on prenatal diagnosis and the advice of the Dutch Health Council have, furthermore, led to different kinds of texts with a dialogical structure; in Sweden, particularly due to the system of comments. When there is no explicit dialogical structure, it is still important to relate the text, as a discourse, to other texts. All texts are related to questions raised by prenatal diagnosis and screening.
The analyzed texts are related to questions evoked by prenatal diagnosis and screening. I have discerned four thematic foci in public discourse related to the question of to which extent the fetus is protectable and whether selective abortion in the light of this question can be justified; how prenatal diagnosis and screening may affect the disabled; whether prenatal screening can be justified; what the limits of prenatal diagnosis and screening should be, if there are to be any limits at all. It is possible to discern dialogical relations between texts in public discourse. We also see that some texts have an implicit dialogical structure, as opposed to texts where a clear reference to texts by other citizens is present. Some philosophers and ethicists do not write about actual judgments but about possible ones. In a sense, these texts have an implicit dialogical structure since they are a response to points of view in society. That is not to say that dialogue is only furthered by texts that have an explicit or implicit dialogical structure. Ethico-political judgment is, as has been argued, a deliberative concept. Dialogicity is quintessential to deliberation: without dialogue there would be no deliberation. The giving and asking for reasons presupposes the condition of dialogicity.

Publicity: the publicness of judgments in public discourse

To what extent are judgments concerning a public course of action public? Publicity entails the ‘information, principles and rules’ on which the judgments are based being easily available to the general public. While public discourse is a deliberative practice in the public sphere which, in principle, is open to all, differences exist between the openness and accessibility of the various arenas. Texts belonging to other arenas than the mass media are accessible to a lesser extent. Medical journals are, for instance, not commonly read by the general public. However, public discourse not only takes place in the mass media. Interested members of the public can, of course, get access to political documents and monographs. In what follows, publicity regarding in particular the White Paper on prenatal diagnosis and screening, as well as the advice of the Dutch Health Council on prenatal screening, will be considered.

Concerning judgments relating to the unborn life, no specific legislation regarding selective abortion exists in the Netherlands or in Sweden; abortions following prenatal diagnosis and screening are regulated by the law on general abortion. In the Swedish discourse, judgments concerning a public course of action relating to legislation and regulation are discussed in the White Paper on prenatal diagnosis and screening. However, the White Paper proposes no changes in legislation and regulation and follows the guidelines of clinical practice. The judgments concerning a public course of action in the White Paper have been commented upon by a number of organizations. This system of commenting,
enabling citizens to judge ethico-political judgment, is an institutionalized form of publicity which does not exist in the Netherlands. Let me consider this system.

The system is called *remissväsen*, a system of commenting on White Papers. Organizations are invited to make comments on the proposals featured in White Papers for Government Bills. This system of commenting has different functions.\(^{412}\) Using 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. *Remissväsen* allows citizens to make comments on judgments with regard to legislation and regulation and the underlying reasoning. In this sense, the system allows publicity regarding these judgments. It is a formal form of publicity.

This can be contrasted with informal kinds of publicity. In the advice of the Dutch Health Council regarding prenatal screening, judgments are propounded for a public course of action. As we have seen, citizens refer, particularly in the mass media, to the report of the Health Council. The reports of the Health Council are, in principle, accessible to all and can be read by interested members of the public. The Health Council is an independent scientific advisory body with the task of advising Ministers and Parliament on matters in the field of public health. Ministers ask the Health Council for advice on which to base policy decisions. In addition, the Health Council has an ‘alerting’ function, which also allows it to give unsolicited advice.

Ministers or Secretaries of State sometimes ask organizations for their comments, as is the case with the reaction of three disability, parental, and disease organizations as regards prenatal screening.\(^{413}\) However, with regard to the new embryo law, attempts to initiate a broad public debate would have failed even though organizations were invited to make comments.\(^{414}\) With regard to the advice of the Dutch Health Council on prenatal screening, but also to the proposal of the Secretary of State, it is possible to speak of informal publicity. Rather than invited comments, citizens respond at their own initiative. Such informal publicity can also be found in the Swedish discourse, of course. In addition to formal publicity in the system of comments, the White Paper from 1989 has been widely discussed in the informal public sphere.

As we have seen, in the White Paper from 1989, the responsibility of judging prenatal screening on a case-by-case basis is delegated to the National Board of Health and Welfare. A disability organization criticizes this delegation, claiming

\(^{412}\) Sannerstedt (1989).
\(^{413}\) CG-raad, L.F.B. en Federatie van Ouderverenigingen.
\(^{414}\) Zeegers (2003).
that the board would be liberal. In the Netherlands, as we have seen, decisions regarding prenatal screening are the responsibility of the Secretary of State. How do these different kinds of regulation of prenatal screening affect the publicity of judgments concerning a public course of action? In the Swedish case, by delegating the responsibility to the Board, no direct opportunity exists for politicians to influence screening. Achen argues that it is characteristic of legislation on human genetics that the National Board of Health and Welfare is given an influential role in applying ethical norms. According to Achen, ethics, in this respect, is reduced to an administrative technique:

Ethics is transformed [...] into an administrative technique and, in this respect, it loses a crucial reflexive element.415

The question of prenatal screening is again discussed again in the White Paper from 2004. The White Paper lacks, however, proposals for the regulation of prenatal screening while mentioning the trials using a combination of serum screening and nuchal translucency screening.416 The question of prenatal screening remains the responsibility of the National Board of Health and Welfare. In this sense, it could be argued, publicity is compromised. The question is no longer being discussed in the public political sphere with its public-ness.

Prenatal screening in the Netherlands is regulated differently, yet there has been tension between practice and political discourse. Stemerding and Van Berkel note, regarding the Dutch situation, a 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.417 A report by the Dutch Health Council from 1987 leads to political judgments in which the 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. Stemerding and Van Berkel argue for a renewed practice of technology assessment, which stimulates social learning between the different parties involved.

415 My translation: ‘Etik transfomeras således [...] til en administrativ teknik, hvorved etikken taber ett væsentligt refleksivt element’. Achen (1998: 229). According to Achen, an important reason why politicians relegate responsibility to an administrative agency may be the fact that bioethical and biomedical expertise are considered to be areas that are closely connected.

416 In Sweden, trials of prenatal screening are taking place without political regulation. Screening, in the sense of an offer to pregnant women, has been going on for a longer time even though politicians were reluctant vis-à-vis screening while having decided that only ultrasonography will, as standard, be offered to all pregnant women. However, in many regions, the so-called AFP (maternal serum) test has been offered in order to detect fetuses with a neural tube defect.

We see that, despite the reluctant political discourse in Sweden and the Netherlands, new methods for prenatal screening have been introduced anyway. While in Sweden, decisions regarding screening are deliberately being delegated to an administrative body, in the Netherlands, politicians would not be able to get a grip on developments. I find it apt to characterize developments in prenatal screening as, according to Beck, ‘sub-politics. According to Beck, 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. An example of a typical sub-political development is the development of genetic technology. Protests against this development are widespread, but they are inconsequential; the age of genetic modification has started, without any choice for or against:

The sensitivity of democratically legitimated politics to criticism contrasts with the relative immunity to criticism of techno-economic sub-politics which, unplanned, and closed to decision-making, only becomes aware of itself as social change at the moment of its realization.418

According to Beck, no ‘politics, parliament, law, the public sphere, or meeting of citizens’ initiative groups’ would be able to stop the autonomous development of science and technology.419

Arguably, the development of prenatal screening is one example of this process of sub-politics. There is, to a certain extent, a gap between the introduction of new methods of screening and discourse in the public political sphere. Publicity, which presupposes that judgments concerning a public course of action are made public, is an important condition for ethico-political judgment. Without publicity, it would not be possible to judge judgments concerning a public course of action, judgments proposed in the public political sphere, in the informal public sphere. The development of prenatal screening shows, however, that the condition of publicity is not always met.

6.2 Public discourse as ethico-political judgment

I have defined ethico-political judgment in a stipulative sense as the deliberative formation of a justifiable judgment concerning a public course of action. It is an ideal for public deliberation over moral and political questions. Can we understand public discourse in terms of ethico-political judgment? In an

empirical sense, ethico-political judgment could be the formation of a judgment. Still, this requires that public discourse does not merely consist of utterances in the public sphere, but also that citizens wish to deliberate. The outcome of this deliberation could be a common judgment. That there is a formation of a judgment is evident, at least as far as the public political sphere is concerned, where judgments are made in relation to a public course of action, or the absence of a certain course of action. I have examined ‘judging’ in public discourse, assuming that judgments are inferred from reasons which, in turn, can be related to interpretive frameworks. Judging in the sense of ethico-political judgment entails that we provide reasons for our judgments and take the positions of others into account in order to reflect upon our own judgment. We have a ground for judgment common to all that makes it possible, in principle, to make common judgments. Judging in the context of moral and political questions presupposes impartiality of judgment and reciprocity, and is crucial for finding common ground.

We can conclude that public discourse satisfies the conditions of ethico-political judgment to a certain extent. Common ground, however, has often not been in existence in public discourse. To the extent that pluralism is a characteristic of deliberation in the public sphere, this result may not come as a surprise. There would hardly be public discourse without disagreement in society. Pluralism is the rationale for deliberation in the public sphere. On the basis of the evaluation of public discourse in terms of the conditions of ethico-political judgment, we can conclude that the concept of ethico-political judgment places considerable burdens on public deliberation over moral and political questions. The concept is an ideal for public deliberation over moral and political questions.

Moral and political judgments

Critical morality – the reflective consciousness of the right and the good – is an ethical concept. We can understand reflection upon the right and the good in relation to principles. Citizens assume that certain judgments can be based upon moral principles. Moral principles that are appealed to include autonomy, protectability, the reduction of suffering, happiness, human dignity, harm, the sanctity of life, beneficence, justice, and respect. These principles are, in public discourse, related to a public course of action. Ethico-political judgment is the formation of a justifiable judgment regarding a public course of action. However, the extent to which public action should be taken is itself a topic of public discourse. There is disagreement on whether or not legislation or regulation are desirable. For instance, disability organizations argue for societal regulation and others for a public list of allowed indications for prenatal diagnosis, whereas others disagree. Some argue for a revision of the abortion law in the light of
possible gender selection or prenatal diagnosis for late-onset diseases.\textsuperscript{420} What public course of action should be taken regarding prenatal screening is also a controversial question.

Public discourse also provides examples of proposed judgments concerning what has been called a prudential action. For instance, good care of the disabled as a precondition for autonomy is defended. Providing information on what a disability entails is also mentioned. Another example of a moral and political judgment, in the Dutch discourse, is that unnecessary medicalization should be avoided. Medicalization is, in itself, a term which is not directly moral, although it is claimed that it can be related to the principle of respect for autonomy.\textsuperscript{421} Another example of a proposed moral and prudential judgment is that self-determination, at least to some extent, should be limited since not each indication for prenatal diagnosis should be allowed. A moral judgment, with an appeal to autonomy, is combined with a political judgment, namely that, to a certain extent, there should be a distinction between ‘severe’ and ‘less severe’.

We see that in public discourse, both moral and political questions are discussed. Moral questions concern the justifiability of prenatal diagnosis and screening from a moral point of view, political questions concern what is politically prudential. As far as politics is concerned, the question of whether or not laws have to be adjusted, and what regulation should apply to prenatal diagnosis and screening, is discussed.

Public discourse on prenatal diagnosis and screening can be regarded as an example relevant to ethico-political judgment. There is a relation between morality and politics and justifications for judgments are given in terms of reasons, based upon interpretive frameworks. To the extent that public discourse can be conceived of in terms of interpretive frameworks, reasoning and judgments, we can say that public discourse is about ‘judging’. We can study ethico-political judgment in terms of public discourse on prenatal diagnosis and screening as an example of public deliberation over moral and political questions. The ethico-political formation of a judgment in the pluralist context of public discourse is a process in which various citizens are involved.

\textsuperscript{420} After the news that abortions following ultrasound were carried out after a harelip had been detected, Dutch politicians argued for changes to the abortion law. A harelip is a congenital abnormality in which there is a cleft or split in the upper lip, and such a lip can be detected by ultrasonography. The AMC in Amsterdam has carried out two selective abortions due to the presence of a fetus with a harelip, according to a journalist, ‘Abortus om hazenlip komt voor’ [Abortions due to harelip occur], \textit{Trouw} December 11, 2006). In Sweden, selective abortions due to a harelip are carried out frequently.

\textsuperscript{421} On medicalization and autonomy, see Verweij (2000).
The context of ethico-political judgment

How does ethico-political judgment, to the extent that it can be understood as public discourse, differ between Sweden and the Netherlands? The development of prenatal diagnosis and screening is largely international. The context of public discourse is not only national – including the political culture and the tradition of deliberating in the public sphere – but also influenced by similar international developments in the medical community. Such a development is the introduction of nuchal translucency screening, which has led to reluctant political discourse in the Netherlands and Sweden. The comparative inquiry shows that similar questions regarding prenatal diagnosis and screening – the unborn life, attitudes toward the disabled, implications of new choices, the limits of medicine – are being discussed both in the Netherlands and in Sweden. These questions are, to a certain extent, framed differently, while the concerns may be similar.

We have seen that, with regard to many questions, we can discern different frameworks in the Dutch and the Swedish public discourse. For instance, the principle of human dignity, as equal human value, is used to a larger extent in the Swedish discourse than in the Dutch. In the Dutch discourse, there is more talk of the protectability of the fetus. The equivalent of quality of life in the Dutch discourse is arguably nonmaleficence and suffering in the Swedish discourse. Medicalization is a concept that is only explicitly referred to in the Dutch discourse. It is difficult to speculate as regards the question of why certain concepts and principles are referred to in the Dutch discourse but not in the Swedish, and vice versa. There are arguably cultural and social explanations.

There are also differences in the process of political decision-making as regards prenatal diagnosis and screening in the Netherlands and Sweden, which may influence public discourse. In Sweden, White Papers are prepared by political parties and experts. Organizations are invited to make comments after which Government Bills are prepared. In the Netherlands, the Dutch Health Council prepares expert reports which are the input from the political decision-making process. Arguably, the Swedish system is, to a larger extent than the Dutch, oriented toward consensus since the political parties are involved from the beginning. All parties can influence the process of preparing White Papers. In particular the White Paper from 1989 has led, nevertheless, to much discussion concerning selective abortion, discussion facilitated by the system of comments as well as discussion in the informal public sphere. In the Netherlands, the reports of the Dutch Health Council are discussed in the public sphere as are the proposals of politicians.
In sum

The purpose and conditions of ethico-political judgment are not easy to realize. In my view, this emphasizes their relevance. Ethico-political judgment is a deliberative concept. Can we conclude that the formation of a judgment in public discourse is deliberative? To this end, the plurality of points of view has to be taken into account in deliberation. Furthermore, citizens must agree to participate in public deliberation by giving and asking for reasons. We can conclude that this giving and asking for reasons is not easy to realize in the public sphere where there are various arenas for public discourse. There is not one arena where citizens can gather to discuss common affairs. Another question is whether or not judgments proposed in the public political sphere are to be made public – according to the condition of publicity. Public justifiability requires publicity in order to enable judgments related to political decisions to be justified in the public sphere. On the basis of the inquiry into public discourse, it could be argued that we need more ways of communication between the arenas of the public sphere, particularly between the political arena and the informal public sphere. This would increase the transparency of the political decision-making process and enable public deliberation. This would be recognition of the prevailing pluralism in society and a means of enhancing the legitimacy of political decisions by enabling the condition of publicity.

How can empirical inquiry lead to an enhanced understanding of the concept of ethico-political judgment? We can conclude that the purpose and conditions of ethico-political judgment are not easily realized. If there is a prospect of common ground, it will be likely that this common ground is more of a compromise than a consensus in view of the plurality of the points of view being expressed in public discourse. This leads to an understanding of the condition of common ground. It is difficult to observe whether or not the condition of the impartiality of judgment is being met. We can conclude that the application of widely-accepted principles such as autonomy, human dignity, and nonmaleficence may be controversial and, in this sense, reasoning on the basis of these principles may not be reciprocal. We can also conclude that dialogue, which is presupposed in the deliberative formation of a judgment, is a characteristic of public discourse. If ethico-political judgment is to be an ideal for public deliberation, there need to be adequate channels for publicity, whether formal or informal.

We can better understand the concept of ethico-political judgment by understanding the difficulties of realizing its purpose and conditions. Empirical inquiry sheds light on the relevance of the purpose and conditions of ethico-political judgment as an ideal for public deliberation. The empirical inquiry into public discourse provides an understanding of the plurality of points of view in society; ethico-political judgment needs to be based on an understanding of how,
in view of this plurality, common ground can be found. Ethico-political judgment requires that citizens be prepared to give and ask for reasons during public deliberation; the inquiry into public discourse emphasizes the relevance of judging the judgings of others in terms of an anticipated agreement.

6.3 How much common ground can we hope for?

Common ground presupposes the conditions of ethico-political judgment that I have discerned. That entails that we adopt a universal standpoint in terms of impartiality of judgment; that we reason reciprocally in terms of providing mutually-acceptable reasons; that citizens seriously engage with reasons for the judgments of others; and, finally, that decisions concerning a public course of action can be judged in the public sphere. The ideal of achieving common ground places considerable burdens on ethico-political judgment; the formation of a justifiable ethico-political judgment. How much common ground can we hope for in view of the plurality of points of view? Is it reasonable to expect a ‘transformation’ such as deliberative democrats hope for in public deliberation? During successful deliberation, citizens would come to agree upon a ‘second best’ if they realize that their own judgment cannot be mutually agreed upon. Transformation entails citizens being able to understand the positions of others, searching for a common judgment that can be lived with.

_Procedural ethics rather than contentful ethics?_

Engelhard challenges the ideal of achieving substantial common ground. His doctrine of secular humanism is explicitly based upon the idea that citizens, in their joint affairs, should accept a ‘second best’. Secular humanism provides the moral language of moral strangers, it provides individuals with a moral framework when they step outside of their ‘contentful’ lives to meet and work with ‘strangers’. We would not have a common sense of rationality to settle our disagreements:

> 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 endeavors.

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According to Engelhardt, ethics is a procedure for resolving conflict in a pluralist society. This is to be contrasted with contentful ethics. Engelhardt’s ‘neutral and secular moral framework’, aiming at the peaceful solution of problems in biomedicine, consists of the principles of respect for autonomy and beneficence. With the example of prenatal diagnosis, the distinction between procedural and contentful ethics is exemplified. Engelhard distinguishes a number of moral questions regarding prenatal diagnosis. 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 aid a woman in securing amniocentesis and abortion, should she want them? Also an ontological question is a contentful question raised by prenatal diagnosis; are fetuses persons?

Engelhardt applies a distinction between ethics as a procedure – respecting the freedom of moral agents – and ethics as content – involving the pursuit of particular goods. In the light of this distinction, the only relevant question in a neutral framework in relation to, for instance, prenatal diagnosis is the general question of whether or not a woman should be allowed to abort a fetus. A procedural framework entails that we ensure that citizens are protected against fraud and other varieties of uncommented-to harm and coercion. This is due to a fundamental normative consensus not being unattainable:

The hope of the modern age to be able on the basis of reason to establish a canonical and contentful moral account that can authorize a contentful public policy is vain.

As we have seen, contentful moral questions are, without doubt, being discussed in public discourse; for some, not only is the question of whether or not a woman should be allowed to abort a fetus relevant but also the question of whether or not she ought to choose selective abortion in case of the possible suffering of the child. Also, ontological questions are clearly being discussed in public discourse; what is the status of the fetus, how much protection does it deserve? All these moral questions are related to the political question of whether or not a woman should be able to decide for herself about selective abortion. Should the aim be to avoid these questions in public discourse in order to achieve a workable agreement between ‘moral strangers’ by adopting the neutral framework of autonomy and beneficence? Engelhardt’s assumption is that procedural ethics has to authorize public policy. The moral question of what the right course of action is becomes the mere question of what the right public course of action is.

According to Zwart, however, Engelhardt’s framework is far from neutral. It presumes the existence of irresolvable moral conflict in liberal democratic societies and the absence of any opportunity to reach agreement on concrete issues, as distinguished from abstract, procedural, issues. Zwart argues that, by determining the terms of public discourse beforehand, the outcome becomes predictable. What Engelhardt ignores is the fact that, in his ‘minimalist’ approach, fundamental human commitments are becoming inarticulate. Starting with the assumption that there is widespread unease with minimalism in ethics, Zwart aspires to articulate other, presumably more adequate, interpretations of the moral dialogue. In what follows, I will argue that moral experience should be a topic of moral reflection beyond procedural ethics and public deliberation.

**Beyond mere procedural ethics**

Ethics has, in a philosophical sense, been defined as the meta-moral, normative-reflective, and interpretive study of morality. Both normative-reflective and interpretive ethics are of importance to ethico-political judgment, and to public deliberation over moral and political questions such as the example of prenatal diagnosis and screening. As the study of morality, ethics deals with both critical morality and lifeworld morality. Lifeworld morality has been described as moral, lived, experience. Moral experience is central to hermeneutic ethics. Pellegrino notes that hermeneutics is extremely popular today in European bioethical circles: its focus is the interpretation on 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 lacking 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.\(^{428}\)

While an ethic that includes an account of moral experience, and ‘thick’ concepts such as medicalization, may do justice to the understanding of morality as lifeworld morality, it cannot, in my view, do without the reflective consciousness of right and the good that is characteristic of the critical morality. Whereas for Habermas, moral-practical discourse requires a break with all the unquestioned truths of concrete ethical life in the lifeworlds, I argue that interpretive ethics

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\(^{427}\) Zwart (1993).

\(^{428}\) Pellegrino (2000: 664).
should be based on a profound understanding of how our lifeworlds are affected by technologies such as prenatal diagnosis and screening. The critical morality at the level of normative-reflective ethics presupposes an understanding of the lifeworld morality.

According to some, both moral experience and our values are affected by the development of prenatal screening. Screening may, on the one hand, lead to a more complicated experience of pregnancy, but, it is argued, the majority of women would still prefer a test. Others point, on the other hand, to more ambivalence. Two Dutch women describe how the necessity of making decisions about the life or death of the child-in-becoming was suddenly increased during the pregnancy, giving them a new perspective on motherhood; Is one allowed to decide over issues of life and death? They wrestled intensively with the question of whether or not to undergo a prenatal test. Furthermore, a controllable life with the help of screening would also be a medicalized life in which disease is in the hands of experts. Decisions would be troublesome due to negating the tragic. As we have seen, in Swedish discourse too, 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’.

In a Dutch inquiry concerning women’s experiences of prenatal tests, one of the results is that many women who chose to take the test were, to a certain extent, ambivalent. The offer of the test increases the consciousness of risks, while the tests led to less uncertainty but not to absolute certainty. Women have to deal with uncertainty due to the limited reliability of tests. The interviewed women faced dilemmas, considerations, doubts, and emotions in the trajectory of the test. Hardly anyone knew of the tests prior to pregnancy and the experience of the women is that they could not refuse the test. Despite positive emotions when the fetus had no aberrations, for many, the uncertainty has influenced their pregnancies; the experience of their pregnancies has been inhibited as one woman expresses it:

> It’s very detached; before it, you feel pregnant and then it starts and you’re facing the facts and you enter an uncertain period, and after it, it’s confirmed and you feel pregnant again.

As regards this experiencing of the so-called ‘tentative pregnancy’; women do not feel themselves to be pregnant until the result of prenatal diagnosis or

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429 Geelen et al. (2004).
430 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).
screening has also been referred to in public discourse. We can conclude that some citizens, when confronted with prenatal diagnosis and screening, experience ambivalence, to a certain extent, regarding screening. 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 to be just as good or just as bad, as valuable or as pointless.

The interpretive horizons of citizens, from which they understand moral questions in terms of what has been called interpretive frameworks, differ as we have seen. Not everyone is ambivalent. However, if the experience of citizens is ambivalent with regard to a course of action, and two alternatives seem just as good or just as bad, then moral reflection is called for, in my view.

How can we, for instance, understand the concept of harm, or the principle of nonmaleficence, in terms of moral experience relating to 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. Understanding is always application since a text such as a law must be understood at every given point, in every concrete situation, in a new and different way. The subsumption of particulars under universals is the essence of judgment. 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.

But why would an understanding of the principles of harm or respect for autonomy, in relation to experiences, further common ground? At first glance, the opposite seems more plausible. By articulating moral experiences in regard to prenatal screening, however, public discourse will not merely be understood in

431 The notion of tentative pregnancy was introduced by Katz Rothman (1993).
434 According to 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).
435 Asperen (2003) 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 that deepens our insight and makes us sensitive to situations. In many countries, ethicists play a prominent role in the process during which decisions are prepared; sometimes, they are regarded as experts. Often, however, there is no consensus among ethicists about many questions concerning prenatal diagnosis. Engelhardt describes 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’ (Engelhardt 2002: 79).
terms of principles and procedural ethics or in terms of right or wrong. For Engelhardt, there is no prospect of a substantive consensus in our pluralist society where there is no agreement concerning the meaning of life and death, or the final purposes and significance of human endeavors. My point is that it is quintessential for public discourse to engage seriously with the perspectives of other citizens, even if this means that we step outside a procedural framework and take contentful moral questions seriously. Only when I have been reassured that my, contentful, perspective is being taken seriously by others may I understand the reason for adopting ‘second best’ in seeking common ground.

6.4 Concluding remarks

Ethico-political judgment is the deliberative formation of a justifiable judgment concerning a public course of action. Justification in relation to ethico-political judgment is a question of giving and asking for reasons, a question of practical judgments that are inferred from reasons. I have suggested that we have recourse to ethics in order to examine whether or not our reasons are good ones. I suggest that moral deliberation can help us to find good reasons. Using the enlarged mentality, we could, arguably, test whether or not our reasons are good ones from the perspective of others. The enlarged mentality demands that we take the standpoint of others and that we reflect upon our own judgment while determining a third, impartial, view. The purpose of ethico-political judgment, common ground, presupposes that we have a ground of judgment that is common to all. It is the faculty of judgment that enables us, in principle, to find common ground during the process of forming judgment. The aim of public deliberation, however, is not only to find common ground but also to respect the plurality of points of view in society.

Public deliberation is a deliberative practice in the public sphere, characterized by the giving and asking for reasons. When public deliberation concerns moral and political questions, we can, in my view, speak of ethico-political judgment as an ideal. Ethico-political judgment places burdens on public deliberation. Pluralism is a characteristic of the public sphere. In view of pluralism, it may be difficult to find common ground. In order to find common ground, citizens may need to accept the force of the better reason during undistorted deliberation. Just what the better reason is, arguably, is a question of judgment. We need, in my view, channels for public deliberation in between the arenas of the public sphere in order to make undistorted public deliberation, and judging, possible.

Are the purpose and conditions of ethico-political judgment, as an ideal for public deliberation, realistic? We have seen that public discourse only meets these conditions to a certain extent. As for common ground, this is, in my view,
an ideal for public deliberation, whether or not this entails consensus or compromise. Reciprocity entails my reason possibly being accepted by others as theirs, and is often considered to be a crucial requirement for public deliberation. Impartiality of judgment is, in my view, an ideal when citizens judge in public deliberation, in taking the standpoint of others. In many texts belonging to public discourse, a dialogical structure can be discerned and, in this respect, we can speak of dialogicity. There is publicity regarding political decisions, even though not in all respects. The results of the empirical inquiry could be interpreted in such a way that the purpose and conditions of ethico-political judgment seem demanding and place too many burdens on the process of deliberation. This is not the case, in my view. Citizens need to be prepared, however, to engage in public deliberation in order for the purpose and conditions of ethico-political judgment to function as an ideal. The giving and asking for reasons presupposes anticipated agreement, reciprocity of reasons for judgment, and also, arguably, impartiality of judgment.

Judging consists of exercising the faculty of judgment and may, when citizens deliberate, result in the formation of a judgment. Judgment and deliberation are inextricably linked. We judge a certain technology to be right or wrong and we give and ask for reasons for our judgings during public deliberation. On the basis of the ground of judgment that is common to all, and by aiming to enlarge our thought, we will be able, in principle, to make reasonable judgments. In judging, we anticipate an agreement. Judging may even entail that we ‘share-a-world-with-others’.
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References are given in footnotes using the following abbreviations and page numbers. The English translations are used.


Works of Kant

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