Whose Ethics? Making Reproductive Ethics More Inclusive and Just

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Abstract

As the field of assisted-reproductive technology progresses, bioethicists continue to debate whether and how the availability of this technology creates new moral duties for parents-to-be. It is rare for these debates to seriously engage with questions related to race and class. Camisha Russell asks us to move race from the margins to the center of our discussions of reproductive ethics. She argues that this shift can work as a kind of corrective that will lead to better theory. In this paper, I build on Russell's work by considering two proposals related to prenatal genetic diagnosis [PGD] that received a lot of attention and debate—Julian Savulescu and Guy Kahane's argument in favor of a "principle of procreative beneficence" and Janet Malak and Judith Daar's argument in favor of a legal duty, in certain cases, to use PGD. My analysis of each of these arguments shows how a lack of diverse viewpoints leads to bad theory. I end the paper by showing how including a diversity of perspectives shifts our focus from rights to justice.

Keywords: ART, Race, PGD, Genetics, Reproduction

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As the field of assisted-reproductive technology [ART] progresses, bioethicists continue to debate whether and how the availability of this technology creates new moral duties for parents-to-be. However, many of these debates suffer from a lack of vision. Socrates famously said the wise man was one who knows what he does not know. Yet, many bioethicists seem blissfully unaware of viewpoints outside of their own – usually white, middle-class, and academic. Thanks to the work of activists, there has been a lively discussion about the implications of these technologies for those with disabilities. Still, it is rare for these debates to seriously engage with questions related to race and class.

In "Questions of Race in Bioethics," Camisha Russell asks us to move race from the margins to the center of our discussions of reproductive ethics. She argues that this shift can work as a kind of corrective that will lead to better theory.

> In the case of bioethics, then, I would argue that philosophers of race must insist upon not only the necessity but also the *centrality*, of discussions of race to the broader field. They must show that there are vital lessons to be drawn from the experiences of racial minorities for bioethics *as a whole*. (Emphasis in original. Russell 2016, 49)

Specifically, Russell believes that making race central to bioethics will shift our primary focus "from rights to justice, from consent to collaboration, and from competence to humility" (Russell 2016, 44). Russell discusses many ways race works in "our" understanding of assisted-reproductive technology. My analysis focuses more on class than race but yields similar results.

In this paper, I build on Russell's work by considering two proposals related to prenatal genetic diagnosis [PGD] that received a lot of attention and debate. First, I discuss Julian

Savulescu and Guy Kahane's argument in favor of a "principle of procreative beneficence." Much of their argument rests on "our" intuitions or what they call "commonsense morality." Similar to Russell's discussion of race and ART, I will show how their understanding of "commonsense morality" rests on certain class biases. Second, I discuss Janet Malak and Judith Daar's argument in favor of a legal duty, in certain cases, to use PGD. By putting their argument in the context of the criminalization of pregnancy, we can see how their discussion ignores the fact that many marginalized women are already being held legally accountable for pregnancy outcomes. In my analysis of each of these arguments, I show how a lack of diverse viewpoints leads to bad theory—hence the need for humility. After which, I end the paper by showing how including a diversity of perspectives shifts our focus from rights to justice.

The Principle of Procreative Beneficence

In "The Moral Obligation to Create Children with the Best Chance of the Best Life," Julian Savulescu and Guy Kahane argue in favor of the Principle of Procreative Beneficence (PB) which they define as:

> If couples (or single reproducers) have decided to have a child, and selection is possible, then they have a significant moral reason to select the child, of the possible children they could have, whose life can be expected, in light of relevant available information, to go best or at least not worse than any of the others. (Savulescu and Kahane 2009, 276)

Savulescu and Kahane are mainly interested in situations where PGD is possible. In these situations, they claim parents have a moral duty to choose "the most advantaged child" (Savulescu and Kahane 2009, 275). What they mean by a child who is most advantaged or whose life will go best is a bit vague, but would normally include selecting against disability (although they admit

there may be some situations when this is okay) and selecting in favor of greater human abilities like intelligence, empathy, and general health. For example, they state: "If parents could increase the prospects of future children's lives by selecting children who are far more intelligent, empathetic or healthier than existing people, then PB instructs parents to select such future children" (Savulescu and Kahane 2009, 290). They also explicitly state that they are focused on genetic endowments related to these traits, which makes sense given the focus on PGD. More important for my argument is that Savulescu and Kahane consider this a maximizing principle, not a baseline or threshold concept. In other words, parents have a moral obligation (when circumstances permit) to choose the child that is most likely have the best life, not just a life worth living or a good enough life. They find it counterintuitive that one would pick a least best option when given the choice.

To understand how and why diversity makes a difference here, I turn my attention to their defense of this principle. Their main argument in favor of this principle rests on "our" intuitions and what they call "commonsense morality." I argue that their analysis of "our" intuitions and "commonsense morality" is really a very middle-class view of parenting. If they had considered a greater diversity of viewpoints, then they would not be able to so easily defend this principle—at least not without more explicitly eugenic and racist arguments.

Bad Arguments

Let us begin with some key aspects of their main argument in favor of PB. They start with the idea that parents care about the potential well-being of children they choose to have. I would agree that this statement is fairly uncontroversial; however, they immediately move from this statement to a maximizing view: "If prospective parents have moral reasons to care about the potential for well-being of their future children, then it would seem that they should also have

reason to aim to have children who are more advantaged rather than leave this to chance or nature" (Savulescu and Kahane 2009, 276). I find this move less intuitive and more controversial. They support this shift by drawing on other moral intuitions.[1] For example, they discuss how parents consider emotional and financial resources in their decision about when to have kids and many wait years before starting a family to make sure these resources are sufficient. Savulescu and Kahane claim this is another way of maximizing your child's options or potential future well-being. Parents are waiting until they have optimal resources to provide their children with the most opportunities to support their future well-being. Savulescu and Kahane say their argument is based on the same reasoning, only applied to genetic endowments instead of financial and emotional resources. To further support their argument, they compare the PB to competing principles that we might use to guide reproductive decisions. I will focus on the two most relevant to our discussion—the minimum threshold view and the satisficing view.

The Minimum Threshold view argues that one may choose any child who will have a life worth living. The moral demand is that parents avoid having children "who will endure great suffering and hardship" (Savulescu and Kahane 2009, 280). Savulescu and Kahane dismiss this view as an adequate principle for *selection* of possible children by restating their previous position.

> It is hard to see, however, what could support such a view, once it is allowed that parents have reasons to care about the expected well-being of their future children. Many would agree that parents would be wrong not to wait before conceiving a

[1] In addition to the arguments discussed here, they also introduce a case where a couple must wait a few months to conceive in order to avoid a rubella outbreak. However, their main point with that case is to show that there are normal circumstances in which we find it morally permissible or even required to make "identity affecting" choices. That is they see a main objection to their argument being the idea that we are choosing one child over another; however, whenever parents choose to wait before starting a family, they are choosing a future child over the one they would conceive at the current time. Hence we already make identity affecting choices. Since this argument is not central to my critique, I do not discuss it here.

> child if this will mean that the child they bring into existence has greater endowment. (Savulescu and Kahane 2009, 280)

In other words, if you have the ability to choose between possible future children (either through timing of conception of selection of embryos), Savulescu and Kahane do not believe it is okay to choose any child that would have a life worth living. The ability to choose requires you to have the child with the best future options. However, they do agree that the Minimum Threshold View might work as a constraint on reproduction. In other words, if the only child you can have would have a life not worth living, then you should have no children at all.

Savulescu and Kahane spend more time analyzing the Satisficing View—which they define in the following way:

> If reproducers have decided to have a child, and selection is possible, then they have a significant moral reason to select one of the possible children they could have who is expected to have a *good enough life* over any that does not; they have no significant moral reason to choose one such possible child over any other. (Emphasis in original. Savulescu and Kahane 2009, 280)

The key part for Savulescu and Kahane's argument is the last clause or the idea that parents have no significant reason to *choose* one child over another as long as all will have a good enough life. If it is possible to choose, then Savulescu and Kahane think that you have reasons to choose the best option. They believe to do otherwise is irrational: "This constraint follows from the familiar conceptual connection between goodness and rational choice. Roughly, we have reason to choose what is good, and we have *more* reason to prefer what is better" (Emphasis in original. Savulescu and Kahane 2009, 280). In other words, they believe the norms of practical reason show that their view is superior to the Satisficing View. Again, we see how their argument mainly rests on "our"

intuitions and "common sense morality." The main problem is that this moral intuition does not apply to everyone. It is a specific type of parent who is focused on maximizing a child's opportunities and future options.

In *Unequal Childhoods*, Annette Lareau identifies and analyzes two main parenting styles. Middle-class parents participate in what she calls "concerted cultivation." In this model, parents cultivate children's talents—specifically, linguistic and reasoning skills as well as any natural talents such as sports or music. Key elements include "an emphasis on the development of the child through organized activities, development of vocabulary through reasoning and reading, and active parent involvement in schooling and other institutions outside of the home" (Lareau 2003, 24). In contrast, working class and poor parents approach parenting in a way that she calls "accomplishment of natural growth." In this approach, parents "viewed children's development as unfolding spontaneously, as long as they were provided with comfort, food, shelter, and other basic support" (Lareau 2003, 238). These parents believe it is their duty to provide for basic needs (i.e. food, shelter, etc.), love their children, and set boundaries (i.e. appropriate discipline) which includes teaching their children right from wrong. If parents uphold these duties, they believe children will have what they need to grow into happy and successful adults. Unlike the middle-class parents, they do not see their children as "projects" in need of cultivating. Instead they are children who need a safe and nurturing space to enjoy childhood before they must take on the responsibilities of being an adult.

As we can see, a key difference here is the active cultivation of children as a long-term project versus a more natural progression through developmental stages. It is the more active concerted cultivation that creates the moral intuition that favors maximizing. As Jennifer Senior points out in *All Joy and No Fun*, this is a decidedly modern and middle-class view of parenting:

"Today parents pour more capital—both emotional and literal—into their children than ever before, and they're spending longer, more concentrated hours with their children than they did when the workday ended at five o'clock and the majority of women still stayed home" (Senior 2014, 10). There are a number of factors that led parents in this direction. Concern over their children's future well-being is not the only reason, but it is definitely one that fuels the maximizing view that Savulescu and Kahane use to their advantage. As Senior points out, current economic insecurity has led to a kind of "arms race" in preparing children for college and future opportunities via extracurriculars:

> These mothers, too, believe that the opportunity cost of not enrolling their children in loads of extracurriculars is too great. It's the problematic psychology of any arms race: the participants would love not to play, but not playing, in their minds, is the same as falling behind. (Senior 2014, 144)

As these excerpts from Senior's work show, this kind of maximizing mentality is specific to certain social demographics. Thus, "our" intuitions depend on who is included and who is left out. This is a major problem for Savulescu and Kahane's theory as it rests mainly on "our" intuitions and "commonsense morality." Indeed, rejecting both the "minimal threshold view" (which argues that any life worth living is morally acceptable) and the "satisficing view" (which argues that any life that is good enough is morally acceptable), they seem to consider any non-maximizing view irrational: "Roughly, we have reason to choose what is good, and we have *more* reason to prefer what is better" (Emphasis in original. Savulescu and Kahane 2009, 280). Yet, it is not clear that these alternative viewpoints (especially the satisficing view) is as irrational as Savulescu and Kahane imply.

Bad Theory

To be clear, I am making two arguments against Savulescu and Kahane's theory. First, the main argument in support of their position is based on moral intuitions and "commonsense morality" that, in reality, only applies to a specific group of parents. This undercuts the strength of their argument. Second, if we compare this maximizing view to other approaches, it is not clear that it has the beneficial effects that Savulescu and Kahane assert—at least not without certain side effects. Their argument is based largely on an analogy between the way certain middle-class parents approach the project of parenting and applying that to PGD. They see maximizing genetic endowments as a natural progression from the way these parents already maximize opportunities and resources for their children. This version of childrearing may lead to economic success but can also undermine other valuable aspects of life and well-being. Senior also talks about how the families she studied were more isolated and the over scheduling of kids' activities takes a toll on both parents and kids. In contrast, the children in families that focused on the natural growth approach had stronger ties to family, were more respectful of adults, and were better able to manage their own free time without adult guidance. Therefore, we could at least ask whether applying this maximizing principle to genetic endowments might include similar trade-offs. In sum, this analysis broadens our discussion to take a closer look at the relationship between maximizing tendencies and what we mean by well-being.

Returning to Russell's call, I believe our analysis here shows how increasing the diversity of viewpoints in bioethics can lead to insights that are useful for the whole of bioethics. Namely, it leads us to question basic assumptions and opens the possibility of a more robust conversation. For example, Savulescu and Kahane state multiple times that maximizing genetic endowments related to intelligence is beneficial, but we could ask if this is *always* a boon. Depending on your personality and other natural talents, a significantly high level of intelligence may not be necessary

and could even undermine your general sense of well-being. Indeed, there are some who see a correlation between increased intelligence and anxiety and depression (Marquardt 2017). In fact, research into parental decisions related to PGD shows that different groups of parents have very different views on potential harms and benefits. In her analysis, Rayna Rapp found that Jewish parents were more likely to abort for genetic disorders that diminished mental capacities than for those that would result in physical disabilities. In contrast, Latinx parents were more likely to abort for physical disabilities than mental ones (Rapp 2000, 89–93, 283–85). To be fair, these decisions related to avoiding specific harms. If parents could "maximize" both physical and mental abilities, they may have chosen that option—we do not know. However, the reasoning they used to decide harms had to do with specific versions of the good life that gave different weight to different genetic endowments. So, it is reasonable to ask whether all parents would want to maximize all endowments or whether there may be more controversy here than Savulescu and Kahane want to acknowledge.

My point here is not to start a debate about specific traits. Instead, I simply want to point out how the intuitions Savulescu and Kahane use to support their argument skew the conversation in a specific direction. I want to question whether maximizing is always a universal good regardless of the specific traits. If our focus is on individual accomplishments in a competitive world, then *maybe* we should maximize genetic endowments such as intelligence and other talents.[2] But if we shift our view to those who know they are not going to win the educational and economic arms race (for reasons having as much to do with starting points and systemic issues

[2] I emphasize maybe here because it is not clear that it is even possible to maximize genetic endowments in the way they envision. For example, they ask, "How can the capacity to remember things better, concentrate longer, be less depressed, or better understand other people's feelings have the effect that one will be less likely to achieve the good life?" It is not clear to me that we can maximize all those traits at the same time so the kind of maximizing they propose may require some preliminary decisions about what to maximize or sacrifice maximizing one trait for a better balance of all traits (which seems to be moving us back toward a satisficing view).

than specific personal traits), then "our" intuitions are more likely to support the Minimum Threshold View or the Satisficing View. If this seems counterintuitive to Savulescu and Kahane, this is because their view is focused on personal, individual traits and gains, not on a broader view of how to support well-being for future children. In sum, they are focused on rights (responsibilities) not justice (and this is no accident).

In her work on pregnancy loss, Linda Layne illustrates how proponents of both medicalized birth and the natural birth movement emphasize control over the birth process. In the women's health movement, this control resides with the woman; thereby, also emphasizing individual responsibility (Layne 2003). As Layne points out, the belief that one can control birth and the emphasis on individual responsibility represent middle-class ideals of what birth should be like. In this way, we can see how Savulescu and Kahane's approach is in keeping with other birth messages directed at (or supported by) middle-class women. If this emphasis on control is largely a middle-class view of birth, then the very idea of putting so much energy and emphasis on a "selection" principle (versus a more general principle of reproductive ethics) is itself flawed.

Let me briefly return to Savulescu and Kahane's discussion of the Minimum Threshold View and the Satisficing View. Their main problem with these theories is that they are inadequate for a *selection* principle. They agree that the Minimum Threshold View works as a *constraint* on reproductive autonomy, but argue it is not robust enough for a selection criteria. Similarly, their comments about how it is illogical to say that parents have no significant reason to choose one child over another shows why they believe the Satisficing View fails as a selection principle. It is unclear whether it would be okay as a general rule of reproductive autonomy—that is would Savulescu and Kahane agree that it is okay to have any child who would have a good enough life? We do not know because they are committed to a selection principle. In fairness, they are primarily

focused on PGD or scenarios in which some choice will need to be made. If this only applied to those who were already undergoing PGD for whatever reason, then it might be okay. However, Savulescu and Kahane go on to argue:

> …we believe that PB instructs women to seriously consider [in-vitro fertilization] IVF if natural reproduction is likely to lead to a child with a condition that is expected to reduce well-being significantly, even if that condition is not a disease. (Savulescu and Kahane 2009, 281)

Which means they are explicitly embracing the mentality of control and individual responsibility described by Layne. So far I have argued this narrow view undermines their reliance on "our intuitions" to support their argument. I will say more about the problems with a focus on individual responsibility in the final section.

A Legal Duty to Avoid Genetic Harm

In "The Case for a Parental Duty to Use Preimplantation Genetic Diagnosis for Medical Benefit," Janet Malek and Judith Daar make both an ethical and a legal argument that, in some situations, parents have a duty to use PGD. In this paper, I focus mainly on their legal argument. To be fair, their argument is narrowly tailored, but they emphasize that it could possibly be expanded to include other cases. Specifically, they argue that if parents are already using in-vitro fertilization [IVF] and know (or should know) they are at risk for a serious genetic disorder, then those parents have both an ethical and a legal duty to add PGD to their IVF regimen (and choose non-affected embryos). To support the legal argument, Malek and Daar review current legal duties to existing children, fetuses, and embryos.

In considering duties to existing children, Malek and Daar discuss legal disputes over medical decisions and tort liability ("wrongful life" cases). In cases that challenge parents'

decisions to refuse or withdraw medical care, Malek and Daar point out that courts often override parental autonomy in favor of the children's welfare. Yet, when considering "wrongful life" cases, the courts are more reticent to punish parents or decide that a specific child should not have been brought into existence. To resolve this paradox, Malek and Daar argue that if we focus our attention on "those who commit the acts" (the parents) instead of "those upon whom the acts are committed" (the potential or actual children), then we can make a case in favor of parental duties to potential children.

> Once parents undertake an action on behalf of their existing/potential children, they have a duty to perform that duty with a high degree of care and in the best interest of the resulting child. That duty, as the cases mandating unwanted medical treatment demonstrate, often provokes parental anguish, which is subordinated to the anticipated beneficial outcome bestowed upon the child. (Malek and Daar 2012, 8)

In sum, Malek and Daar argue that cases of refused medical treatment are more relevant because they involve specific parental actions (or inactions) as well as the potential welfare of the child. In contrast, wrongful life suits are after the fact and (indirectly) ask the court to compare a specific life against non-existence—a much more difficult and fraught task.

When considering a legal duty to fetuses, Malek and Daar argue that case law is even more ambiguous. In general, parental autonomy seems to reign in the pre-viability phase (based on abortion law). However, when discussing children who are later born alive, the authors state that the relevant question is "whether the duty-bearer's actions were intentional or merely negligent" (Malek and Daar 2012, 9). They claim that case law related to prenatal harm is "sparse and mixed" (Malek and Daar 2012, 9). Again, they turn their attention mainly to "wrongful life" suits and say

the courts seem to favor the parents and worry about eroding pregnant women's autonomy. In only one sentence do Malek and Daar mention statutes that allow fetuses to fall under child protection statutes (Malek and Daar 2012, 9). As I will argue in the next section, they would do well to spend more time on this final issue. If we look at the use of ***criminal prosecutions***, we find a plethora of cases that favor their position, but also show why a move to *legal* duties is dangerous.

Finally, Malek and Daar consider legal duties to embryos. The case law here relates mainly to third parties—namely, cases brought against fertility clinics or physicians when using ART. They discuss at least one case where a fertility clinic was held liable for not using PGD to test embryos created from an egg donor known to carry the gene for cystic fibrosis (Malek and Daar 2012, 10). They argue a case can be made to extend these legal duties from third parties to the parents themselves—especially when the parents are already using IVF.

Thus, in their discussion of legal duties parents owe their children, Malek and Daar focus on cases of refusing medical treatment, "wrongful life" cases, and cases that hold third parties responsible for outcomes. They briefly mention statutes that extend child protection laws, but do not explore this in any depth. Similarly, the peer commentaries debating Malak and Daar's argument mainly question their interpretation of "wrongful life" suits and use of the best interest standard. These commentaries also emphasize that the law, except in special cases such as medical treatment, usually only requires parents to meet children's basic needs; it does not require parents to maximize children's welfare (Flicker 2012, 30). As I will now show, this entire discussion mostly ignores another area of law that is very relevant to this debate—namely, the prosecution of pregnant women for a variety of behaviors and outcomes. Thus, both the main article and the

commentaries ignore the fact that *some* women are already being held legally accountable for their procreative behaviors.

Bad Arguments

In this section, I discuss parallels between Malek and Daar's argument for a legal duty to use PGD and recent trends in criminal law. As a point of clarification, it is difficult to draw explicit legal duties from an analysis of these cases. Appellate courts often reverse these decisions and reject the legal arguments used (Paltrow and Flavin 2013, 322).[3] Yet, these cases continue to happen at an increasing rate and are often tied to relatively recent feticide laws that give personhood status to fertilized eggs, embryos and fetuses.[4] Therefore, we could argue that the status of pregnant women's behavior (and, if broadened to issues like PGD, parental behavior in general) is currently up for debate. For this reason, it is worth reviewing the arguments found in these cases and how they might apply to our previous discussion.

As previously discussed, Malek and Daar show that the best interest standard in *parens patriae* cases provides some of the strongest support for a legal duty to use PGD. The criminal prosecution of pregnant women further supports Malek and Daar's argument by broadening the use of *parens patriae* from existing children to fetuses. For example, in their recent review of prosecutions against pregnant women, Lynn Paltrow and Jeanne Flavin found that a significant number of these prosecutions were related not to illegal activity, but to medical issues.

[3] While most of the higher court reviews reverse court-ordered medical treatments, not all do. *Pemberton v. Tallahassee Memorial Regional Medical Center* is at least one example where the higher court upheld court-mandated medical treatment for a pregnant woman based on avoiding harm to the fetus/soon-to-be child.
[4] Paltrow and Flavin found 413 cases over the thirty-two year period between 1973 and 2005, but have found over 200 in the eight years since 2005. These statistics indicate that prosecutions are becoming more common.

> Sixteen percent of the cases involved no allegation that the woman had used an illegal, criminalized drug. These included cases in which women were deprived of their liberty based on claims that they had not obtained prenatal care, had mental illness, or had gestational diabetes, or because they had suffered a pregnancy loss. (Paltrow and Flavin 2013, 316-317)

In these cases, the physician or hospital is given "custody" of the fetus along with permission to consent to or perform any medical procedure deemed necessary for the health of the fetus. Thus, women are stripped not only of their parental autonomy but also their bodily autonomy (Cherry 2007, 2001; Ikemoto 1991).

If we look at cases specifically related to court-ordered cesareans, we see they are backed by reasoning very similar to that used by Malek and Daar. Malek and Daar claim that "once parents initiate the reproductive process, they have a duty to execute that process in a manner that produces the least harm to a resulting child" (Malek and Daar 2012, 7). They also argue that, for parents who are already using IVF, adding PGD to the process creates a minimal added burden. Similarly, some of the cases involving court ordered cesareans point out that (a) the woman has taken on additional responsibilities by choosing to carry the fetus to term and (b) she is going to give birth regardless of the method.

> The balance tips far more strongly in favor of the state in the case at bar, because here the full-term baby's birth was imminent, and more importantly, here the mother sought only to avoid a particular procedure for giving birth, not to avoid giving birth altogether. Bearing an unwanted child is surely a greater intrusion on the mother's constitutional interests than undergoing a cesarean section to deliver

> a child that the mother affirmatively desires to deliver. (From Pemberton v Tallahassee Memorial Regional Medical Center quoted in Cherry 2001, 607)

Here we see a parallel argument that the added burden is not so great once the woman has already chosen to carry to term and some method of birth is imminent. Others have also pointed out that courts continually downplay the potential burdens to women by claiming that forced medical intervention is a temporary (and implied short-term) restriction on the woman's autonomy (Ikemoto 1991, 494). In sum, cases of court-ordered medical treatment often use similar reasoning to Malek and Daar and the continued use of court-ordered medical interventions provides more support for their legal duty to use PGD.

If we turn our attention from forced medical treatment to cases of women who are using drugs or alcohol, we see the criminal law creating new rights for fetuses that support the parental duty proposed by Malek and Daar. The preferred legal tactic has been to extend child welfare statutes to the fetus (Cherry 2007). Given the complications with applying current child welfare statutes to fetuses, some states have written new legislation to explicitly include "unborn children." One of the first and most studied is the Wisconsin statute which states:

> …[t]o recognize that unborn children have certain basic needs which must be provided for, including the need to develop physically to their potential and the need to be free from physical harm due to the habitual lack of self-control of their expectant mothers in the use of alcoholic beverages, controlled substances, or controlled substance analogs…. (Quoted in Cherry 2007, 164)

The language of this law parallels not only Malek and Daar's legal arguments, but also some of their ethical arguments. We have seen that Malek and Daar argue that parents must proceed in a way that minimizes harm, similarly this law argues that fetuses have a need to be free of physical

harm caused by the pregnant woman's actions. However, this law also claims fetuses have a "need to develop physically to their potential." This parallels Malek and Daar's ethical arguments that parents should "promote the well-being of the future child" and "broaden the array of possibilities open to future children" (Malek and Daar 2012, 4). Although Malek and Daar argue against a strong version of these claims that would require parents to maximize benefits to future children, once this reasoning is codified into law it is open for broader interpretations. For example, if a woman does not have access to adequate nutrition and subsequently gives birth to a low-birth weight infant, has she violated the fetuses' need to develop to his/her physical potential as instantiated in this law?

While these statutes are meant to extend existing child welfare laws to fetuses, they create a variety of new problems. To begin with these laws allows the state to take "custody" of the fetus in the same way a state would remove a neglected or abused child from the parents' home. However, given the physical reality that a fetus cannot be removed from the woman, the end result is much different than in traditional child welfare cases. In these cases, the woman is usually incarcerated or detained in a drug treatment program for the duration of her pregnancy so the state can enforce compliance.

Also, the enforcement of these laws tends to be more vigorous than traditional child welfare laws. As Flicker points out in her commentary on Malek and Daar's article:

> The law permits parents to be selfish, distant, or unloving, as long as children's most basic needs are met. Courts only begin to question what is in the "best interest of the child" when a child's health or safety is in danger, or during a custody dispute. (Flicker 2012, 30)

Yet, the revisions to child protection statutes to include fetuses seem to move us far beyond the limited scope of "best interest standards" outlined by Flicker. Unlike cases where children are clearly abused, malnourished, or suffering some other immediate harm, it is very difficult to pinpoint a direct cause and effect between many prenatal behaviors and harm to the infant post-birth. Given this scientific reality, the harm from various prenatal behavior assumed in these prosecutions is often exaggerated. For example, in the Paltrow and Flavin review, the majority of cases (84%) included charges related to illegal drug use (most often cocaine) (Paltrow and Flavin 2013, 315). Yet, there is no direct causal relationship between in-utero cocaine use and specific fetal harms. In fact, recent research shows that potential harms of cocaine use during pregnancy are similar to and cannot be separated from other factors such as tobacco use and "quality of the child's environment" (Frank et. al. quoted in Paltrow and Flavin 2013, 334). In this way, the arguments for harm used in the criminal cases often do not rest on good scientific or medical evidence (Paltrow and Flavin 2013, 317-318). Therefore, the cases of prosecution are based on some need to protect children from harm, but they rest on only *potential* or assumed harm—neither of which are adequately proven.

Finally, commentators also point out how these broader child welfare statues create duties not just for parents but also for health professionals and law enforcement. Both are called upon to protect fetal health when pregnant women[5] fail to do so (Ville 1999, 332). For example, in an earlier review titled "The Detention, Confinement, and Incarceration of Pregnant women for the Benefit of Fetal Health," April Cherry states:

[5] Notice how these laws ignore any role the father may have in potentially harming the fetus such as abstaining from alcohol or drugs prior to conception or his role in enabling or encouraging the woman's substance abuse. Other laws, such as the fetal homicide laws, theoretically cover violence against the pregnant woman, but some have questioned how effectively these are enforced (Flavin 2009; Schroedel 2000).

> Judges and legislatures have used the deprivation of physical liberty, and threats thereof, as a way to prevent drug use by pregnant addicts, to compel pregnant women to access prenatal care, or to force women to submit to their physicians' direction regarding medical treatment for the benefit of fetal health. In every case, the detention of the pregnant woman was predicated upon the "right" of the fetuses to be born healthy. (Cherry 2007, 196)

If there is a reciprocal relationship between duties and rights, then these criminal cases are creating the rights for fetuses or future children upon which Malek and Daar's parental duty could be based.

To summarize, we see that Malak and Daar's analysis ignores a diversity of viewpoints to focus on middle-class (mostly white?) parents utilizing ART and their narrow focus leads to bad arguments. The arguments they present are incomplete at best as we can see how incorporating this broader context would add more support for their position. In their systematic review of prosecutions against pregnant women (or new mothers),[6] Paltrow and Flavin identify at least 413 cases from 1973 to 2005 (Paltrow and Flavin 2013, 299). In these cases, eighty-six percent of the women were charged with a crime and at least seventy-four percent were charged with a felony (Paltrow and Flavin 2013, 311). Based on this analysis, we could argue that states are already creating a variety of legal duties that *some* women have to their fetuses or future children.

However, a full understanding of this context might also lead Malek and Daar to rethink the move toward legal accountability. In the Paltrow and Flavin review, fifty-nine percent of the cases were women of color and seventy-one percent were economically disadvantaged (Paltrow and Flavin 2013, 311). Earlier reviews showed similar outcomes (Kolder, Gallagher, and Parsons

[6] Their review looked for any case in which pregnancy was "a necessary factor leading to attempted and actual deprivations of [a woman's] liberty"—by which they mean deprivation of physical liberty through actions such as incarceration, detention, or forced medical treatment (Paltrow and Flavin 2013, 301).

1987; Irwin and Jordan 1987). As we can see, these prosecutions are mainly directed at pregnant women from marginalized groups. We can also see that these prosecutions come with heavy penalties. Do Malak and Daar really want to create even more legal duties given this growing trend?

Bad Theory

If the majority of those who use ART are affluent whites, then the idea of holding them legally accountable for pregnancy outcomes would be a novel idea. Despite the variety of potentially harmful behaviors for which (mostly marginalized) women have been prosecuted, to my knowledge no parent has been prosecuted for passing on a known genetic disorder.[7] If ought implies can, we seem to hold those with the least resources most accountable and vice versa.

We also see that many bioethics arguments about reproductive autonomy seem to assume a level of power and knowledge that comes with affluence while ignoring the way structural power dynamics affect reproductive autonomy in many women's day-to-day lives. My review of criminal prosecutions shows how—in practice—the choices of privileged women are protected while the "choices" (or sometimes just circumstances) of less privileged women are penalized. In this way, criminal law reinforces "reproductive stratification"—a term used "to describe how reproduction is structured across social and cultural boundaries, empowering privileged women and disempowering less privileged women" (Greil et al. 2011, 2). There is no need to recount the variety of ways this has been perpetuated as it has been well documented in other places.[8] Given this context, we can reasonably ask whether creating a legal duty to use PGD would increase reproductive stratification.

[7] Although Malek and Daar note that third parties have been prosecuted for not performing genetic tests.
[8] For a small, but representative, sample see (Roberts 1997; King and Meyer 1997, 8-30; Flavin 2009).

If we create a legal duty to use PGD, we must consider the practical consequences of this policy. How will it be implemented? Malek and Daar focus their argument on a very narrowly tailored case. However, if this were instituted as a broader public policy, we would have to have a conversation about what kinds of genetic disorders would be included. Historically, our conceptions of harm have been distorted in a way that protected those using ART (more likely to be white and affluent) while punishing those who participate in other potentially harmful behaviors such as use of certain drugs. At the same time prosecutors began using child protection statutes in order to prosecute women for in-utero cocaine use, there was also much media attention surrounding the increase in high-order multiple births. Despite posing similar risks to fetuses, women who carried high-order multiples were not prosecuted and, in fact, were celebrated (Shivas and Charles 2005). Given this long history of reproductive stratification, I am not hopeful our analysis of harm would be any more objective when implementing a legal duty to use PGD. For example, how do we compare various genetic disorders such as Down's Syndrome, Cystic Fibrosis, and Sickle-Cell? My worry is that our already distorted notions of harm would shape this debate in a way that further perpetuates reproductive stratification.

I have looked at Malek and Daar's argument for a legal duty to use PGD in relation to an increasing trend to prosecute pregnant women for potential harm to their fetuses. It is useful to bring these two discussions together if for no other reason than trying to find some consistency across cases. Do parents have legally enforceable duties to their ***unborn*** children? If so, then Malek and Daar's argument seems much more reasonable when put in the context of the prosecution of pregnant women for a variety of potentially harmful behaviors. However, if we have no legally enforceable duty to avoid serious genetic harm to potential offspring, then it also seems unreasonable to prosecute women for behavior that is only *potentially* harmful. All of these

parallels and problems show why we should be very cautious about moving from ethical to legal arguments. We have seen how much of the reasoning used in the prosecution of pregnant women parallels the reasoning used by Malek and Daar. However, the implementation has led to an erosion of women's rights.

To be fair, when academic bioethicists turn their attention to prosecution and court-ordered medical treatment, they tend to argue against these moves and in favor of reproductive autonomy.[9] Also, most academic bioethicists have favored arguments about ethical duties recognizing the potential practical problems with legal enforcement.[10] Still, these conversations tend to be disconnected from each other and this is a problem. If we want to make strong ethical arguments and avoid reproductive stratification, then these debates must include a strong defense of reproductive justice—to which I now turn.

From Rights and Responsibilities to Reproductive Justice

In closing, I hope my analysis here has shown why many bioethicists need to recognize the limits their own viewpoint in favor of seeking out a broader range of experiences. We need a diversity of perspectives in order to create better arguments that lead to better theory and, hopefully, more just proposals. Russell has challenged us to move race from the margins to the center of our discussions related to reproductive ethics. I would add that we need other marginalized voices as well. Instead of making provocative arguments about personal responsibilities that individual parents have to specific children, bioethicists should be supporting reproductive justice which would improve the future well-being of all parents and children.

[9] For example, see (Adams, Mahowald, and Gallagher 2003; Mariner, Glantz, and Annas 1990; Purdy 1996; Young 1994).

[10] For example, both Laura Purdy and Julian Savulescu have argued that parents have strong moral duties to the children they create, but both also acknowledge practical reasons for not wanting to codify these duties into laws (Purdy 1996; Savulescu and Kahane 2009, 274-290).

Just as disability rights advocates ask us to take the broader social context into account when debating various uses of genetic testing, reproductive justice advocates ask us to consider "the complete physical, mental, spiritual, political, social, environmental and economic well-being of women and girls…." (Ross 2006, 1). In this case, we need to consider the broader social context when asking what duties parents have to their unborn or future children. If we argue that parents have an ethical duty to "select the child…whose life can be expected…to go best" or a legal duty to use PGD in order to avoid reproductive harm, then we must also ask what resources "parents" (women) have to fulfill these ethical and legal obligations. We cannot ask "parents" to avoid harm and maximize their children's interest without also asking not only whether parents have access to genetic tests and other ART resources that would allow them to "choose" the best children, but even whether they have access to things like adequate nutrition and prenatal care. An emphasis on individual responsibility while ignoring systemic oppression simply perpetuates injustice.

Both of the proposals reviewed here emphasize personal responsibility while ignoring the context in which parents make these decisions. Indeed, attention to systemic racism, poverty, and oppression would do more to increase the overall well-being of future children than the kinds of individual choices emphasized in these theories. For example, why does the question of financial security play such a significant role in the decision making of some parents? It is because we—as a society—do not provide adequate access to basic goods. Without personal financial resources, children are systematically denied access to adequate healthcare, educational opportunities, etc. Those parents who are capable of gaining access to financial resources know what a difference it can make in their children's future opportunities.[11] By adopting the maximizing mentality used

[11] Please note that I am not making a maximizing argument here. I am comparing the injustice of those who cannot even gain access to adequate resources to those who can. However, we have seen that many of those who can gain access to adequate resources also end up adopting a maximizing approach.

by many middle-class parents and applying it to PGD, Savulescu and Kahane reinforce a personal responsibility model that shifts our attention away from systemic injustices that undermine the well-being of many children. If we incorporate the viewpoint of less privileged parents, we are likely to focus on reproductive justice or the variety of contexts in which parents are having and raising children.

Similarly, Malek and Daar argue that parents have a legal as well as a moral duty to minimize reproductive harm. In the *AJOB* debate, some of the peer commentaries recognized that this kind of an argument has the potential to criminalize a variety of behaviors which would have a chilling effect on reproductive freedom. Here is a sample of the comments made:

> If generalized to all reproduction, this requirement of reproductive harm-minimization would be violated by any parental failure to minimize risks of harm to the resulting child, from cocaine use to the occasional drink of alcohol to a job with risks of toxic exposure to the failure to reduce a multiple pregnancy. (Francis and Silvers 2012, 16)

> We don't prosecute women when the put their fetus in harm's way with risky behavior during pregnancy. (Goldsammler and Jotkowitz 2012, 28)

> [The state] would be hard-pressed not to prohibit pregnant women from doing anything that might threaten the health of the children they were gestating, including using tobacco, alcohol, prescription medications, caffeine, and who knows what else! … Malek and Daar surely do not want the state to act as the reproductive police. But their proposal is not only dangerous on its own terms,

> restricted as they would like to be, but pernicious in its potential to turn the United States into the country depicted in Margaret Atwood's *Handmaid's Tale*. That is not a country in which any reasonable person wants to live. (Wasserman and Asch 2012, 24)

Many would like to dismiss these slippery slope arguments as unreasonable (indeed these commentators present them as fantastical outcomes), but our previous discussion shows that these implications are in fact very reasonable. Women ***are*** being prosecuted for "risky" behaviors during pregnancy that might harm the fetus including use of cocaine, alcohol, and failure to follow medical directives. None of these authors seem to realize that this injustice *already exists* for a significant number of women. This is because of whose point-of-view is or is not considered when framing the argument.

Again, including the voices of those who have been marginalized not only illustrates why this slippery slope is not theoretical, but also highlights the limits of a personal responsibility approach. For example, Paltrow and Flavin documented at least 74 cases where women were prosecuted for failing to seek prenatal care. Given that most of the women prosecuted were also economically disadvantaged, we could ask what barriers may have prevented the women from seeking care. Did they have access to insurance that would cover prenatal care? Did they have transportation to get to and from appointments? How hard would it be to schedule appointments around work schedules and childcare responsibilities? Again, we see how a personal responsibility approach frames the problem and potential solutions in a way that draws our attention away from questions related to reproductive justice and, therefore, is likely to perpetuate reproductive stratification.

In my analysis of these proposals, I have acknowledged that parents are generally interested in the well-being of their future children. What happens if we reframe this general concern and adopt a reproductive justice approach? In their 2014 report, "Reproductive Injustice: Racial and Gender Discrimination in U.S. Health Care," the Center for Reproductive Rights looks into various reasons for the high maternal mortality rate in the United States ("Reproductive Injustice: Racial and Gender Discrimination in U.S. Health Care" 2014). They document a variety of factors that contribute to a higher maternal mortality rate for women of color—especially black women in the south. These include lack of access to health care, racial discrimination in health care, and poor health services. While this is an obvious problem during the period of pregnancy and childbirth, it also sets women up to have more difficult pregnancies and births due to preexisting health issues. The report expands the scope of inquiry to look at access to family planning, sexual health information, and post-natal care. When asked about their experiences and priorities, these women wanted access to information, resources, and adequate care.

The additional parental duties proposed by Savulescu, Kahane, Malak, and Daar would do nothing to help these women improve the future well-being of their children. Instead these proposals will lead to more discrimination and condemnation and possibly increased criminal prosecutions for this group of mothers. Adding more burdens to those who are already disproportionally burdened and potentially separating families via increased prosecutions increases reproductive stratification. In this way, the proposals we have discussed are likely to undermine the well-being of these children.

In contrast, inclusion of marginalized voices and a commitment to reproductive justice would turn our attention toward increased access to resources. How much money would we spend on IVF and PGD to improve the potential genetic endowments of one child versus the improved

well-being we could gain for more children by putting that same money into access to (non-discriminatory and high quality) healthcare, post-natal care, and other support services? If bioethicists want their theories to be relevant and, more importantly, just, we would do well to broaden the conversation. I see this paper as part of a (hopefully growing) shift in bioethical analysis that makes previously marginalized voices a central part of our consideration. Doing so is not only a matter of justice but will also lead to better theories.

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