6. Chervenak F, McCullough L. *Ethics in Obstetrics and Gynecology*. New York: Oxford University Press; 1994:100–8.

7. I have developed this criticism more fully in *Bioethics and Women*. New York: Oxford University Press; 2006:61–9.

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Testing, Terminating, and Discriminating

JAMES LINDEMANN NELSON

In my previous thinking about the considerations that go under the heading of the "expressivist argument," I have been fascinated chiefly by two of its features: its (implicit) semantic commitments and its independence from disputes about the moral standing of fetuses.[1] Abortions prompted by prenatal testing are undertaken because of indications that the fetus has physical features that would be configured as disabilities in the social world into which it would otherwise emerge. The expressivist argument's allegation, as I have understood it, is that abortions so motivated convey semantic content—"send a message"—to people who are currently living with disabilities that is somehow insulting, hateful, dismissive, or disparaging. It is thus uncontroversial moral subjects who are wronged, not—or, at least, not necessarily—the aborted fetuses. So far as this argument goes, a person might hold strongly pro-choice views about abortion generally and still object to "selective" abortions.

To credit this allegation, we have to understand how is it that such events—events that are not in the ordinary sense sentences or symbols—can have such semantic content. I have concluded that the expressivist argument fails due to problems with both of these distinctive features: its semantic assumptions, once excavated and scrutinized, are dubious and it cannot distinguish properly between the kinds of abortions it wants to criticize and those about which it is officially neutral. Abortions prompted by prenatal testing are insufficiently rule governed to send a specific message as such (the communicative intentions of particular individuals who might terminate their pregnancies out of spite for people with disabilities raise other questions, but I assume this is rare). Further, if for sake of argument, we allowed that abortions sparked by prenatal testing could send morally objectionable messages to people with disabilities, we would be saddled with the problem of explaining how abortions otherwise motivated manage to avoid insulting many other kinds of people: poor people, for instance, if economic considerations motivate the termination, people from single-parent households, if being unpartnered is the reason leading to abortion, people in large families, if the number of her children moves a woman to abort, and so on.

Professor Mahowald's understanding of the expressivist argument, its challenges, and prospects, is different, though fascinating in its own way. Some (unnamed) critics think that the differences between fetuses and born persons derail the discrimination charge; she thinks that they are mis-

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taken. She does, however, think that there is a successful defense of prenatal testing and termination that in fact concludes that women may have a *duty* to undergo testing and submit to abortion.

This is a big agenda for a short paper, and that may be why I find myself puzzled virtually from start to finish. Consider the first premise of her version of the argument:

> Prenatal tests to select against disabling traits express discrimination toward people born with disabilities. (p. 457)[2]

I think it clear that "select against" means that the tests are coupled with termination (and are not, for example, aimed at any sort of therapeutic goal.)[3] The phrase "express discrimination" is a bit odd, though. We can speak of expressing discriminatory *attitudes* or *thoughts* or of an action's being an *instance* of discrimination; as I read Mahowald, "express discrimination" embraces both of these meanings. She says that the first premise can be challenged effectively by pointing out that many women who test and terminate "do not harbor discriminatory attitudes toward people born with disabilities" (p. 458). In fact, she says that although "some women undoubtedly harbor and express discriminatory attitudes toward people with disabilities . . . the fact that some, perhaps many, do not is all that is necessary to make the expressivist conclusion questionable with regard to pregnant women who make these decisions" (p. 458).

Yet Mahowald is hardly done with the argument at this point, which suggests that her primary concern is with prenatal testing and terminating as an instance of unjust discriminatory practice, not with the discriminatory expression of invidious attitudes. In my view, there is rather more to the expression point than this: Defenders of the expressivist argument should not rest content with the idea that testing and terminating send discriminatory messages only if those who seek out the testing and decide to terminate are themselves expressly motivated by morally objectionable beliefs about people with disabilities. If that is where their objection lies, it does seem susceptible to Mahowald's counterpoint—many women who seek out such services are not so motivated. It is also vulnerable to the related point that, if the problems with testing and termination are the attitudes and beliefs of the women in question, then critics need to attend to shifting those attitudes. The practice itself is innocuous, so far as the argument goes, just as long as people do not do it for the wrong reasons.

A more robust version of the expressivist argument will claim that testing and terminating is like flying the Stars and Bars over a state capitol building, à la past practice in South Carolina: good intentions alone (or an absence of bad ones) do not keep that action from sending a hateful message to a state's African-American citizens. The task for the robust expressivist is to show that testing and terminating operates in a similar way. As I see the matter, the fundamental snag is that abortions are not flags—unlike such state symbols, abortion's semantic properties, insofar as it has any, are much less well defined. But this is where defenders of the view need to dig in and offer a plausible semantics of testing and aborting—if all they can rely on is hateful attitudes harbored by specific women, they are easy prey to Mahowald's observation.

As a critical essay, though, the weight of her position considers testing and

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terminating as an instance of invidious discrimination, exemplifying or instantiating, rather than expressing, a practice of failing to recognize that people with disabilities have the same value as those who are not (yet) disabled. She claims that fetuses and the children they may become are connected in ways that are reasonably seen as morally relevant, and that therefore we cannot simply exclude the possibility that the charge of discrimination is correct, on the grounds that fetuses are not people. Added to which, of course, is the possibility that "people" may in fact be just what they are. The critic of the expressivist position needs to be armed with an argument, not just an assumption, that fetuses cannot be subjects of injustice, and given the continuity between embryonic and fetal development, parturition, and newborn life, particularly as revealed in the lived experience of gestational mothers, such a conclusion, Mahowald implies, will not be easy to demonstrate.

The point that confuses me here, though, does not turn on whether or not Mahowald is successful in showing that the connection between fetuses and children is such that it is possible to discriminate against fetuses, or even whether she is located where the burden of proof on this matter lies. My concern is whether the kind of injustice putatively involved in these abortions is well characterized as discriminatory—or, at least, as discriminatory against people with disabilities. Women take many traits into account in the diverse decisions they make about whether to sustain or to end their pregnancies. If fetuses are people, or so connected to people as to make them appropriate subjects of justice, then, as I suggested earlier, we have a problem with ending pregnancies because a woman's partner abandons her and all of a sudden her fetus acquires the (proleptic) trait of being a "single-parented" child, or because the woman gets sick, or loses her job, or gets her long-shot Princeton fellowship. All these circumstances interact with features of the going system of social cooperation in ways that create or highlight vulnerabilities that their infants would have, just as circumstances of a fetus's genetic structure interact with social practices to create or shape what we call disabilities.

Mahowald may think that such decisions are wrong, or defeasibly wrong, but it is hard to see how they are a matter of discrimination against people with disabilities or against fetuses with impairments. Of course, we would not allow termination of a newborn with the same traits the fetus had, but that observation holds across the board: The woman with the Princeton fellowship cannot kill her newborn to make it possible to take up the position. She can, however, end a pregnancy for that reason. We discriminate between fetuses and born children, but if the connections to which Mahowald draws our attention show that there is little or no moral difference between the two, then prenatal testing is only a small part of our problem. It may seem tempting here to turn to an observation of Professor Asch's that Mahowald quotes approvingly—the claim that in abortions prompted by beliefs about future disabilities, "the part stands in for the whole" (quoted on p. 458). Yet this observation actually gets us nowhere new. Insofar as Asch's claim is true about aborting on the basis of disabilities, it will be equally true in cases where a woman terminates a pregnancy because of concerns about her partner's stability, or because she has lost her job, or because her family is too large, or because a child would impede her career: None of these features of *any* of these prospec-

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tive children's lives would make up her or his whole story.

Quite apart from the question of the moral status of fetuses, then, I find that this part of Mahowald's discussion misfires as an effort to defend the expressivist argument against its critics—what she is actually offered is a set of considerations that make "selective" abortions dubious only insofar as they make abortion dubious in much more general terms. It is her defense of prenatal testing and termination that strikes me as most surprising, however. Against the backdrop of a view that takes fetuses with considerable moral seriousness, Mahowald offers an argument concluding that women have a *positive moral duty* to be tested and to terminate if the results so indicate, not merely an *option* it is morally licit to exercise. The argument here rests on the idea that women have an obligation to promote the welfare of any children that they intend to bring into the world, and that obligation entails that they select against impaired fetuses, so long as doing so would not "involve disproportionate harm to others who are of equal moral weight" and that it is consistent with fetal moral standing that they be treated as instrumental goods to promote the welfare of others.

The notion that women are morally *obliged* to undergo prenatal testing and to abort a fetus with impairments unless doing so would harm someone else of equal (or, presumably, greater) moral weight needs a very close look. Consider the first premise of the argument's "first draft," the "more compelling argument," which leaves out the "disproportionate harm" clause.

> Pregnant women (who intend to give birth) are morally obliged to promote the welfare of their potential offspring. (p. 461)

Immediately, we have a problem: This premise is ambiguous between at least two (and probably indefinitely many) readings. It could be read as (1) "Pregnant women (who intend to give birth) are morally obligated to *do whatever will* promote the welfare of their potential offspring." If that is the accepted construal, then the argument is valid—although, so understood, the premise is almost surely false. It could also be read as (2) "Pregnant women (who intend to give birth) are morally obligated to *take reasonable steps* to promote the welfare of their potential offspring." This reading is, of course, vague (and could be multiply specified), but it is much more plausible than reading (1) for all that.[4] Yet the argument is not valid on the more plausible construal of the premise, because it may not be the case that prenatal testing to select against disabilities is among the reasonable steps that pregnant women who intend to give birth are obliged to take; that needs an argument of its own. Mahowald is confident that this "more compelling argument" is valid, but in fact we cannot determine whether the argument is valid or not, because it is not clear just what is being argued.

Beyond the logical problem, the argument is suspect substantially. Consider the second premise:

> Prenatal testing to select against disabilities promotes the welfare of potential offspring. (p. 461)

This might be true of the fetus being tested if its impairments were so grave that abortion saved it from a fate worse than death—a kind of fetal euthanasia, as Mahowald calls it. But, although I happen to be sympathetic with this position, I am far from confident that every woman who thinks of her fetus as her child will recognize

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that its sufferings makes it morally mandatory that she authorize its destruction. Whether a person is allowed or obliged to promote the welfare of her prospective offspring by killing them is surely just one of the substantive moral disputes that makes the first premise as it stands so unsatisfactory.

If the fetus's impairments are not so grave as to be incompatible with a life worth living, then a woman's obligation to test and to terminate is, apparently, a function of whether her doing so will promote the welfare of other potential offspring (at least so long as it does not wrong an embryo to treat it as an instrumental good—certainly, another contentious point, particularly in view of Mahowald's discussion of fetal status earlier in the paper). But this all seems very curious. Is it only women who expect to have more children who have an obligation to be tested and to terminate if the findings indicate? Surely, if women have very strong obligations to promote the interests of their offspring, that obligation includes the interests of the actual children that they already have as well as those they simply may have: Why could not promoting the welfare of *those* children obligate her to test and terminate? Why, for that matter, should the obligation be restricted to offspring, either potential or actual? Why should not obligations to promote the welfare of a spouse or a parent—or herself—entail an obligation to be tested and to terminate if the news is bad? Finally, what about those circumstances, if any, in which testing and terminating is a legitimate option? Is testing and terminating either strictly obligatory or altogether forbidden?

The reformulated version of the more compelling argument—"the most compelling argument"—does not address the ambiguity problem in the first premise. It takes into account that testing and terminating may do some harm as well as promote welfare and is inserted in the second premise:

> Prenatal testing to select against disabilities promotes the welfare of potential offspring if it does not involve disproportionate harm to others who are of equal moral weight. (p. 461)

The qualifying clause really seems to belong in the first premise, where it would modify the conditions that set up maternal obligations, rather than the conditions that promote welfare—surely, it is perfectly possible in principle to promote the welfare of one party in a way that involves harming others of equal moral weight (arguably, I do it every time I pay my child's tuition rather than send the money to Oxfam). Yet however it stands with where the qualifying clause should be placed in the premises, the reformulated conclusion seems to leave women with an obligation, apparently rooted in their obligation to promote the welfare of their potential offspring (because we have seen no other account of the source of a woman's obligations or of her options) to test and terminate in just those cases where doing so does not harm morally equivalent others in a disproportionate fashion.

The task that needs addressing now is to show how we might think about what constitutes disproportionate harms and, in particular, about how it might involve people with disabilities—a whale of a job, given the controversies about fetal status. Mahowald's own concluding discussion takes a different tack. She writes that including the "disproportionate harm" clause makes it morally legitimate for a woman to *choose* to terminate her pregnancy because "continuation of the pregnancy or mother-

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hood entails harms to her that are greater than the harm of termination to the embryo" (p. 461). How that clause does that trick, however, escapes me. It looked as though the inclusion of disproportionate harm was intended to *limit* the contexts in which women have an obligation to terminate impaired fetuses to those in which the benefits of doing so to potential offspring were not overcome by harms to morally equal others (presumably the fetus itself, or possibly people with disabilities, although the mechanism of such harm crucially needs to be spelled out). What Mahowald's discussion of her argument suggests, rather, is an *extension of* the contexts in which such abortions are moral, opening up a range of moral discretion in which a woman may legitimately choose to abort impaired fetuses if she conscientiously believes that the harms to the fetus are not as great as the harms that she faces in continuing the pregnancy, which is to say, to pretty much the same contexts in which abortion is allowable in general.

What Mahowald aims to have achieved here, as I understand it, is to show that prenatal testing and termination can be legitimate—even required—without having to maintain that fetuses are beyond the reach of injustice. I take her to conclude that, though they may be subjects of justice, fetuses must be aborted if their lives would overall be a harm to them or (at least so long as their status of possible subjects of justice does not preclude their being treated instrumentally) if their being aborted would promote the welfare of a woman's other potential offspring and no other morally considerable being is disproportionately harmed. Such fetuses may be aborted if failing to abort them would cause disproportionate harm to the woman bearing them.

This is a strikingly interesting conclusion, although, as I have underscored from the start, I am puzzled about many of the details of the route that got us here. I end myself by noting one more feature of Mahowald's discussion that strikes me as curious. It is a major departure from standard discussions to make testing and terminating a duty if pregnant women believe that the welfare of potential offspring might be promoted by her subjecting herself to these practices. Further, advocates for people with disabilities inclined to take the expressivist argument seriously in the first place are unlikely to be mollified by a view that allows a woman's judgment of whether the harms to her of continuing a pregnancy with an impaired fetus to determine whether it is legitimate for her to elect to terminate. They would likely insist on at least discussion of what would constitute an informed judgment on the part of such women and probably require exploration of whether genetic counseling needs to include information about such matters as how many families that include children with disabilities flourish. Yet Mahowald thinks that the "limited scope" of her justification of testing and terminating might make her understanding seem acceptable to those disabilities advocates. I think she is being enormously sanguine about her prospects in this respect.[5]

Notes

1. See Nelson JL. The meaning of the act: Relationship, meaning, and identity in prenatal genetic screening. In: *Hippocrates' Maze: Ethical Explorations of the Medical Labyrinth*. Lanham, Md: Rowman and Littlefield; 2003:1–28. I discussed the same themes in the *Kennedy Institute of Ethics Journal* (vol. 8, no. 2, and vol. 10, no. 3), and in my contribution to Parens E, Asch A, editors, *Prenatal Testing and*

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Disability Rights. Washington, D.C.: Georgetown University Press; 2000.
2. Mahowald MB. Prenatal testing for selection against disabilities. *Cambridge Quarterly of Healthcare Ethics* 2007;16:457–62. Further references to this paper will be given in the text.
3. Preimplantation genetic diagnosis and selection would also seem to be covered by at least many of the considerations on the table here.
4. I am well aware that very many pregnant women accept heavy burdens to promote their future children's best interests, and I greatly respect the fact that they do so. I do not for a moment think that most such women would do "whatever they can" to provide the smallest advantage to their fetus, with no thought for the needs or interests of themselves or of other people who depend upon them.
5. My thinking about these matters has been much influenced by discussions with my colleague Hilde Lindemann, particularly in connection with her recent work on abortion and moral luck. Responsibility for these particular conclusions is my own, of course.

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A Response to Nelson and Mahowald

ADRIENNE ASCH and DAVID WASSERMAN

It is gratifying that thoughtful philosophers and bioethicists like Mahowald and Nelson are continuing to address the objections to prenatal testing that have been made by disability scholars and advocates. But it is frustrating to see those objections presented in ways that reflect the doubts of those who reject them more than the intentions of those who make them, in ways that make those objections appear censorious toward pregnant women and prospective parents or naïve about nonverbal expression. We recognize that disability critics share the responsibility for these misunderstandings, that their objections to prenatal disability testing have not always been made as clearly or consistently as they might have been. We therefore welcome this opportunity for clarification and rebuttal. Briefly, we will argue against Mahowald that it is not apparent how prospective parents could have a duty to potential offspring requiring them to prevent the birth of any child expected to have a life worth living. And we will remind Nelson that our primary concern is with the perpetuation of stigma; that even if any reason for abortion can be framed in terms of a trait of the fetus to be aborted, only certain reasons for abortion are based on the rejection of future children because of *stigmatized* traits.

We largely agree with Nelson's critique of Mahowald. Although we do not think that, in focusing on duties to potential offspring, Mahowald means to exclude duties to actual offspring or others, or to suggest that only women have duties to their potential offspring, we share Nelson's confusion about which potential offspring the woman is supposed to have a duty to. She surely does not have a duty to promote the welfare of all the offspring she could bear—even qualified by a disproportionate-harm exemption, that duty would require her to bear as many children as she could stand. But if her duty is not to all her potential offspring, then to which? If she is already carrying a single fetus—the most common circumstances for prenatal testing—she will hardly pro-

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