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THE DISABILITY POLITICS OF ABORTION

Mary Ziegler*

Abstract

With Ohio considering passing the nation's second ban on abortions motivated by Down Syndrome, the relationship between abortion and disability law has taken on new importance. Disability-based bans raise unique legal, moral, and political difficulties for those supporting legal abortion. The core commitments supporting legal abortion—including sex equality—stand in some tension with justifying abortion in the case of a fetal defect or disability.

Given the problems with disability-based bans, it may seem that there is no urgent need to resolve these tensions. Disability-based statutes likely create an impermissible undue burden under Planned Parenthood of Southeastern v. Casey and seem impossible to enforce. However, historical analysis shows that the bans under consideration may transform the abortion debate even if they are never enforced.

First, this history explains the puzzling lack of discussion of disability in abortion politics, illuminating the political payoff of disability-based justifications used by activists otherwise committed to equal treatment. Second, this history makes clear the perils that a disability-based ban creates for supporters of legal abortion. Raising the salience of “selective” abortion may allow pro-lifers to win over ambivalent voters and legislators who are concerned about disability discrimination. Moreover, the arguments made prominent by such a law can easily justify other restrictions that might fare better in the courts, including limitations on access to noninvasive prenatal genetic diagnosis and prohibitions on abortion after the twentieth week of pregnancy.

To avoid the danger illuminated by the history studied here, pro-choice attorneys and legislators should push for laws that actually reduce the odds of disability-based abortion. Ironically, parents who might not otherwise choose to terminate a pregnancy in the case of disability do so because they feel they have no choice, particularly given the bleak outcomes faced by many disabled adults confronting both poverty and unemployment. Reproductive justice should include a commitment to adequate funding for the programs on which disabled adults and children depend, as well as the removal of perverse legal incentives that discourage disabled Americans from taking steps that would make employment more realistic. Guaranteeing meaningful

* © 2017 Mary Ziegler. Mary Ziegler is the Stearns Weaver Miller Professor of Law at Florida State University College of Law. She would like to thank Jake Linford, Paul Lombardo, Jaime King, Alicia Ouelette, Johanna Schoen, Mark Spottswood, and Nat Stern for agreeing to share their thoughts on earlier drafts of this piece.

choices inevitably involves the removal of the discrimination and tangible obstacles that make abortion more common in cases of fetal defect or disability.

INTRODUCTION

After Indiana passed the second law in the country banning abortions on the basis of certain fetal disabilities, the relationship between abortion and disability law took on new importance.¹ Disability-based bans raise unique legal, moral, and political difficulties for those supporting legal abortion.² The core commitments

¹ On the passage of the Indiana law, see, for example, Danielle Paquette, *Doctors Respond to Indiana Banning Abortions Because of Down Syndrome*, WASH. POST (Mar. 25, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/03/25/doctors-respond-to-indiana-banning-abortions-because-of-down-syndrome/?utm_term=.99f13440cf59 [https://perma.cc/858D-KN53]. A federal judge subsequently blocked enforcement of the law on constitutional grounds. See, e.g., Erik Eckholm & Mitch Smith, *Federal Judge Blocks Indiana Abortion Law*, N.Y. TIMES (June 30, 2016), http://www.nytimes.com/2016/07/01/us/federal-judge-blocks-indiana-abortion-law.html?_r=0 [https://perma.cc/2A9F-BT8P] (suggesting it was an “illegal limit on a woman’s long-established constitutional right”). Ohio considered this, but ultimately did not pass a similar measure. See, e.g., Martin Pengelly, *John Kasich Pledges to Sign Bill Banning Abortions Due to Down’s Diagnosis*, THE GUARDIAN (Sept. 20, 2015), <https://www.theguardian.com/us-news/2015/sep/20/john-kasich-ohio-abortion-bill-downs-syndrome> [https://perma.cc/P6TV-DHNM] (“Kasich has said he will sign a state bill currently under debate that would ban abortions carried out because a child has Down’s syndrome.”); V.v.B., *Ohio’s Controversial Abortion Bill*, THE ECONOMIST (Aug. 26, 2015), <http://www.economist.com/blogs/democracyinamerica/2015/08/down-syndrome> [https://perma.cc/V9YU-YMG3] (“Ohio lawmakers are expected to approve a measure that would ban doctors from performing an abortion if the patient wants to avoid giving birth to a child with Down syndrome.”). For the North Dakota law already in effect, see, for example, Associated Press, *National Digest: N.D. Limits Abortions: Ind. Upholds School Voucher Program*, WASH. POST (Mar. 26, 2013), https://www.washingtonpost.com/politics/national-digest-nd-limits-abortions-ind-upholds-school-voucher-program/2013/03/26/efd82ea8-964f-11e2-8b4e-0b56f26f28de_story.html?utm_term=.c09c29239a28 [hereinafter *National Digest*] [https://perma.cc/RD3X-FJBK]; Liz Szabo, *Earlier Prenatal Tests Usher in “Heartbreaking” Decisions: Advocates for Those with Down Syndrome Tell the World These Lives Are Worth Living*, USA TODAY, May 2, 2013, at 1A; James MacPherson, *Judge Blocks “Invalid” N.D. Abortion Law*, BOS. GLOBE (July 23, 2013), <https://www.bostonglobe.com/news/nation/2013/07/22/federal-judge-delays-north-dakota-abortion-law/ZSVH9J92WKYEeIDz9ei1BM/story.html> [https://perma.cc/DQE5-ZX4S].

² See, e.g., Sonia Suter, *The “Repugnance” Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1564 (2008) (“Prenatal testing and PIGD therefore present a dilemma if we want to understand reproductive rights in terms of equality.”); Maya Manian, *Lessons from Personhood’s Defeat: Abortion Restrictions and Side Effects on Women’s Health*, 74 OHIO ST. L. J. 75, 104–05 (2013) (treating disability discrimination as a legitimate concern but concluding that existing antiabortion laws did little to protect the

supporting legal abortion—including sex equality—stand in some tension with justifying abortion in the case of a fetal defect or disability.

Given the problems with disability-based bans, it may seem that there is no urgent need to resolve these tensions. Disability-based statutes likely create an impermissible undue burden under *Planned Parenthood of Southeastern Pennsylvania v. Casey*³ and seem impossible to enforce. However, historical analysis shows that the bans under consideration may transform the abortion debate even if they are never enforced.

First, this history explains the puzzling lack of discussion of disability in abortion politics, illuminating the political payoff of disability-based justifications used by activists otherwise committed to equal treatment. Second, this history makes clear the perils that a disability-based ban creates for supporters of legal abortion. Raising the salience of “selective” abortion may allow pro-lifers to win over ambivalent voters and legislators who are concerned about disability discrimination. Moreover, the arguments made prominent by such a law can easily justify other restrictions that might fare better in the courts, including limitations on access to noninvasive prenatal genetic diagnosis and prohibitions on abortion after the 20th week of pregnancy.

To avoid the danger illuminated by the history studied here, pro-choice attorneys and legislators should push for laws that actually reduce the odds of disability-based abortions. Ironically, parents who might not otherwise choose to terminate a pregnancy in the case of disability do so because they feel they have no choice, particularly given the bleak outcomes faced by many disabled adults, such as poverty and unemployment. Reproductive justice should include a commitment to adequate funding for the programs on which disabled adults and children depend, as well as the removal of perverse legal incentives that discourage disabled Americans from taking steps that would make employment more realistic. Guaranteeing meaningful choices inevitably involves the removal of the discrimination and tangible obstacles that make abortion more common in cases of fetal defect or disability.

The Article proceeds in four parts. Part I explores the legal and political history of abortion and disability starting in the 1960s. Part II places the new wave of antiabortion laws in historical context and explains why they do nothing to resolve the tension between legal abortion and disability rights. Part III identifies several legal proposals that would help remove some of the reasons that disability still prompts some parents to seek abortion, and Part IV concludes the discussion.

disabled); Jaime Staples King, *Not This Child: Constitutional Questions in Regulating Noninvasive Prenatal Genetic Diagnosis and Selective Abortion*, 60 UCLA L. REV. 2, 73–74 (2012) (proposing an intermediate scrutiny test for restrictions on access to noninvasive prenatal genetic diagnosis in recognition of the fact that “the collective result of individual reproductive decisions has the potential to create significant discrimination and societal harm”).

³ 505 U.S. 833 (1992).

I. DISABILITY AND ABORTION IN LEGAL HISTORY

In the early 1970s, in explaining the progress of the campaign to legalize abortion, Harriet Pilpel of Planned Parenthood argued that a rise in birth defects had “brought home to the American public the scope, complexity and immediacy of the [abortion] question.”⁴ As Pilpel recognized, disability politics had helped to turn the repeal of abortion restrictions into a pressing political question. Thalidomide, a drug used to control morning sickness, caused fetal defects in the United States and thousands more abroad.⁵ Following a rubella epidemic in the early 1960s, women infected in the first trimester also confronted dramatically higher odds of birth defects.⁶

When more women worried about disability in pregnancy, amniocentesis and other technologies designed to identify chromosomal abnormalities also became more effective and widespread.⁷ As it seemed increasingly possible to identify disabilities before birth, pro-choice physicians, lawyers, and activists made disability-based justifications a centerpiece of the demand for the reform of abortion laws.⁸ Even after the movement demanded the complete repeal of all abortion restrictions, arguments based on fetal disability or defect continued to figure centrally in the pre-1973 argumentative agenda of organizations like the National Abortion Rights Action League (then the National Association for the Repeal of Abortion Laws, NARAL).⁹

⁴ Alan F. Guttmacher & Harriet F. Pilpel, *Abortion and the Unwanted Child*, 2 FAM. PLAN. PERSP. 16, 16 (1970).

⁵ See, e.g., SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* 14 (1991) (explaining that thalidomide causes fetal deformity); KRISTIN LUKER, *ABORTION & THE POLITICS OF MOTHERHOOD* 83 (Brian Berry & Samuel L. Popkin eds., 1984) (stating that “[t]he thalidomide cases were very much in the mind” of the California Junior Chamber of Commerce when considering whether or not to continue pregnancy to term in difficult situations).

⁶ See, e.g., LESLIE J. REAGAN, *DANGEROUS PREGNANCIES: MOTHERS, DISABILITIES, AND ABORTION IN MODERN AMERICA* 60–63 (2010) (explaining that thalidomide had severely harmed ten thousand or more children).

⁷ See, e.g., Cynthia M. Powell, *The Current State of Prenatal Genetic Testing in the United States*, in *PRENATAL TESTING AND DISABILITY RIGHTS* 44, 45–46 (Erik Parens & Adrienne Asch eds., 2000) (explaining that these technologies were capable of detecting many disabilities, and by the 1980s, most women were being offered the screenings during pregnancies); RAYNA RAPP, *TESTING WOMEN, TESTING THE FETUS: THE SOCIAL IMPACT OF AMNIOCENTESIS IN AMERICA* 29–30 (1999) (explaining how the technology of prenatal diagnosis continues to evolve at a rapid pace).

⁸ For examples of these arguments, see Society for Science & the Public, *Need New Abortion Laws*, 86 SCIENCE NEWS LETTER 397, 397 (1964); Society for Science & the Public, *Abortion Laws Condemned*, 90 SCIENCE NEWS, 320, 320 (1966). Part I discusses these claims at greater length.

⁹ For examples of these arguments, see NARAL SPEAKER AND DEBATER’S NOTEBOOK (1972), in NATIONAL ABORTION RIGHTS ACTION LEAGUE, *RECORDS OF THE NATIONAL ABORTION RIGHTS ACTION LEAGUE, 1968–1976: A FINDING AID*, Carton 7;

After the Supreme Court decided *Roe v. Wade*,¹⁰ pro-choice groups mostly moved away from the disability-based arguments used in the campaign for legalization.¹¹ By contrast, through the later 1970s and early 1980s, pro-lifers stepped up arguments that disability discrimination represented an important reason to reverse *Roe*.¹² In this analysis, “eugenic” abortion laws had exposed the larger damage legalization would do to the society—the denigration of all vulnerable and disabled persons before and after birth. This argument played an important role in pro-life efforts to discredit the opposition and win allies not invested in banning abortion. While organizations like NARAL downplayed the potential of fetal defects, related arguments remained a part of activists’ defense of both prenatal genetic testing and late-term abortion.

Starting in the mid-1990s, when Congress dealt with the effort to ban dilation and extraction (D&X),¹³ or “partial-birth abortion,” both social movements returned to familiar arguments about disability and abortion. In arguing against the ban, pro-choice groups insisted that providers used D&X primarily in cases of severe disability.¹⁴ While implicitly suggesting that such abortions might be more justifiable, abortion opponents replied that physicians performed D&X for reasons of convenience.¹⁵

Until the recent introduction of “prenatal discrimination laws,”¹⁶ disability-based justifications remained a strong argument for access to abortion. However,

LARRY LADER TO NARAL BOARD MEMBERS RE: THE DAMAGE TO THE ABORTION MOVEMENT FROM THE SECOND HOUR OF THE TV REPORT ON THE AMERICAN COMMISSION ON POPULATION CONTROL (1972), in THE NARAL PAPERS, CARTON 7, DEBATING THE OPPOSITION FOLDER, SCHLESINGER LIBRARY, HARVARD UNIVERSITY [hereinafter LARRY LADER TO NARAL BOARD MEMBERS].

¹⁰ 410 U.S. 113 (1973).

¹¹ On arguments stressed by pro-choice leaders in the aftermath of *Roe*, see MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* 121–26 (2015).

¹² For examples of these arguments, see Marlene Cimon, *The Activist Surgeon General: It Used to Be a Figurehead Position. Then C. Everett Koop Came Along.*, L.A. TIMES (Sept. 14, 1986), http://articles.latimes.com/1986-09-14/magazine/tm-12280_1_surgeon-general [<https://perma.cc/34FG-9ZUB>]; Fred Marc Biddle, *Bernardin Defends Stance on Infertility*, CHI. TRIB. (Apr. 30, 1987), http://articles.chicagotribune.com/1987-04-30/news/8702020199_1_cardinal-bernardin-vatican-document-vatican-congregation [<https://perma.cc/8NNH-9B4Z>].

¹³ On the early debate in Congress, see David Espo, *Late Term Abortion Ban Passes Congress*, PITT. POST-GAZETTE, Mar. 28, 1996, at A1.

¹⁴ See, e.g., *Abortion Foes Rip Clinton for Veto Dole Criticizes ‘Extreme’ Position*, ATL. J. CONST., Apr. 11, 1996, at A1 [hereinafter *Abortion Foes Rip Clinton*] (explaining that severe fetal defects prompted five women to have abortions).

¹⁵ See, e.g., Roy Rivenburg, *Partial Truths*, L.A. TIMES, Apr. 2, 1997, at 8 (suggesting through a newspaper ad that the reasons people seek-late term abortions include not being able to “fit into prom dress”).

¹⁶ For an example of such a model law, see AMERICANS UNITED FOR LIFE, *PRENATAL NONDISCRIMINATION ACT MODEL LEGISLATION & POLICY GUIDE FOR THE 2016 LEGISLATIVE YEAR* (2015), <http://www.aul.org/downloads/2016-Legislative-Guides/>

after 2000, when pro-life groups began experimenting more with laws banning abortion on the basis of sex or gender, disability-based bans gained support.¹⁷ Nonetheless, as the history of disability and abortion suggests, the current understanding of the relationship between Down Syndrome, other conditions, and abortion is neither inevitable nor unchanging.

A. Disability Serves as a Justification for Abortion Reform and Repeal

Prior to the 1950s, the controversy centered on abortion in the case of hereditary defects. For example, in 1936, a committee chartered by the British Medical Association agreed that abortion should be legal when there “is reasonable certainty that serious disease will be transmitted to the child,” including in cases of hereditary blood disorders and mental illness.¹⁸ From roughly 1900 to 1945, in the United States and abroad, a powerful eugenic legal reform movement contended that a variety of undesirable behaviors, including sexual promiscuity and criminality, had genetic origins.¹⁹ The eugenic legal reform movement championed statutes restricting access to marriage and mandating the sterilization of the unfit.²⁰ In the early twentieth century, the movement enjoyed widespread influence, prompting the introduction of more than 30 sterilization laws and forging an often-troubled partnership with early proponents of family planning, including Margaret Sanger and Planned Parenthood.²¹ Perhaps unsurprisingly, the earliest eugenic justification for abortion relied on the same kind of genetic explanation that had

Abortion/Prenatal_Nondiscrimination_Act_-_2016_LG.pdf [https://perma.cc/WM6L-5V6H].

¹⁷ For examples of the push for these laws, see *supra* note 1 and accompanying text.

¹⁸ T.N.A. Jeffcoate, *Indications for Therapeutic Abortion*, 1 BRIT. MED. J. 582, 585 (1960).

¹⁹ On the history of the eugenic legal reform movement, see DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 92–94 (1985); WENDY KLINE, BUILDING A BETTER RACE: GENDER, SEXUALITY, AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM 2–3 (2001); STEFAN KÜHL, THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN NATIONAL SOCIALISM (1994); MARK LARGENT, BREEDING CONTEMPT: THE HISTORY OF COERCED STERILIZATION IN THE UNITED STATES 1–4 (2008).

²⁰ On the laws advocated by the eugenic legal reform movement, see KEVLES, *supra* note 19, at 99–100; LARGENT, *supra* note 19, at 65–66, 127–28.

²¹ On the passage of eugenic sterilization laws, see LARGENT, *supra* note 19, at 65–66, 127–28. On the relationship between the early family planning movement and eugenic legal reformers, see JEAN H. BAKER, MARGARET SANGER: A LIFE OF PASSION 162–63, 201–22 (2011); NANCY ORDOVER, AMERICAN EUGENICS: RACE, QUEER SCIENCE, AND THE ANATOMY OF NATIONALISM 130–48 (2003); see also Mary Ziegler, *Eugenic Feminism: Mental Hygiene, The Women’s Movement, and the Campaign for Eugenic Legal Reform*, 31 HARV. J. L. & GENDER 211, 211–31 (2008) (discussing early feminism’s role in eugenics policy formation during the early twentieth century).

fueled the movement for compulsory sterilization.²² At a time when eugenic concerns seemed applicable to a small group with known hereditary disorders, the kind of justification invoked by the British Medical Association did little to influence abortion laws. Since relatively few Americans had a known hereditary disorder, eugenic justifications seemed likely to authorize only a small number of abortions.

After World War II, the eugenic legal reform movement found itself in retreat.²³ Scientists discredited many of the core arguments of the eugenic legal reform movement, and legislators shied away from enforcing laws that closely resembled those applied in Nazi Germany.²⁴ While the idea of eugenics lost influence, however, disability-based justifications for abortion gained support. Over the course of the 1940s and 1950s, as researchers learned that environment contributed significantly to the existence of fetal defects, a lack of abortion access in cases of fetal abnormality seemed likely to affect more Americans.²⁵ As early as 1941, physicians found evidence that rubella, a contagious viral disease, significantly increased the risk of fetal defects.²⁶ The 1950s witnessed the publication of a wide variety of studies suggesting that fetal defects resulted not only from genetics but also from the environment and a complex interaction between the two.²⁷

In the 1950s and 1960s, news broke that thalidomide, a drug produced in Germany, had resulted in over 10,000 cases of severe birth defects.²⁸ Although the drug was never licensed in the United States, the thalidomide controversy drove home that non-genetic factors could produce fetal abnormalities, and several children in the United States suffered from severe birth defects traceable to the drug.²⁹

²² See, e.g., Jeffcoate, *supra* note 18, at 585 (listing potential fetal abnormalities such as serious disease or hereditary blood disorders that will be transmitted to the child).

²³ On the movement's loss of influence, see ELAZAR BARKAN, *THE RETREAT OF SCIENTIFIC RACISM: CHANGING CONCEPTS OF RACE IN BRITAIN AND THE UNITED STATES BETWEEN THE WORLD WARS 1-2* (1992); NATHANIEL DEUTSCH, *INVENTING AMERICA'S WORST FAMILY, EUGENICS, ISLAM, AND THE FALL AND RISE OF THE TRIBE OF ISHMAEL* 16 (2009); LARGENT, *supra* note 19, at 116-17.

²⁴ See *supra* note 23 and accompanying text.

²⁵ See *infra* Part I.

²⁶ Herbert Packer & Ralph Gampell, *Therapeutic Abortion: A Problem in Law and Politics*, 11 STAN. L. REV. 417, 434 (1959).

²⁷ JOHN E. MORISON, *FOETAL AND NEONATAL PATHOLOGY* 15 (1952); F. Clarke Fraser & T.D. Fainstat, *Causes of Congenital Defects*, 82 AM J. DISEASES OF CHILDREN 593, 593-96 (1951); Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 555 (1962).

²⁸ SCOTT AINSWORTH & THAD HALL, *ABORTION POLITICS IN CONGRESS: STRATEGIC INCREMENTALISM AND POLICY CHANGE* 4-5 (2011); MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 12 (1987); REAGAN, *supra* note 6, at 60-63 (2010).

²⁹ STAGGENBORG, *supra* note 5, at 14; REAGAN, *supra* note 6, at 266 n.13.

The 1962 case of Sherri Finkbine, a middle-class, white television presenter, made disability-based abortion more compelling.³⁰ Finkbine had taken thalidomide during her pregnancy and became deeply concerned about fetal defects.³¹ After a hospital refused Finkbine's request for an abortion, she filed a lawsuit, using the testimony of psychiatrists to establish that it would harm her to "have a deformed baby."³² After the birth of several disabled children whose mothers had taken thalidomide, a court dismissed Finkbine's suit, concluding that if physicians and prosecutors agreed that her life would be threatened by continuing her pregnancy, there was no case or controversy to resolve.³³ Fearing prosecution, Finkbine and her husband traveled to Sweden, a country that authorized abortions in cases of fetal defect.³⁴

Finkbine's struggles helped bolster demand for legalizing abortion, at least when a child might be born with severe abnormalities.³⁵ In 1962, Rabbi Israel Margolies, later a prominent pro-choice figure, explained:

The truly civilized mind would be hard put to devise a greater sin than to condemn an innocent infant to the twilight world of living death, or to sentence two innocent parents to a life term of caring for . . . a creature who is a grotesque mockery of God's image.³⁶

While thalidomide use in the United States was never widespread, a 1963–1964 rubella epidemic reshaped public attitudes.³⁷ Estimates of the odds of fetal defects for a woman exposed to rubella in the first trimester of pregnancy ran from 10% to 90%.³⁸ While abortion laws at the time did not authorize abortions in cases of fetal defect, some hospitals agreed to perform the procedure for rubella victims.³⁹ However, in the winter of 1963, when a rubella epidemic hit the East Coast, the disability politics of abortion took on new urgency.⁴⁰ That year, Massachusetts recorded five times the number of cases treated in the previous year,

³⁰ On the influence of Finkbine's case, see SARA DUBOW, *OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA* 64–66 (2011); RICKIE SOLINGER, *PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA* 179–81 (2005); REAGAN, *supra* note 6, at 58–59.

³¹ REAGAN, *supra* note 6, at 58–59.

³² *Abortion Suit Is Filed*, N.Y. TIMES, July 26, 1962, at 25.

³³ *Mother Loses Round in Legal Battle for Abortion*, N.Y. TIMES, July 31, 1962, at 9; *Mother, Rebuffed in Arizona, May Seek Abortion Elsewhere*, N.Y. TIMES, Aug. 1, 1962, at 19.

³⁴ *U.S. Mother Seeks Aid from Sweden*, N.Y. TIMES, Aug. 5, 1962, at 64.

³⁵ See sources cited *supra* note 30.

³⁶ *Rabbi Attacks Abortion Laws*, N.Y. TIMES, Nov. 18, 1962, at 76.

³⁷ REAGAN, *supra* note 6, at 1–25.

³⁸ Packer & Gampell, *supra* note 26, at 434.

³⁹ Edwin M. Schur, *Abortion and the Social System*, 3 SOC. PROBS. 94, 99 (1955).

⁴⁰ On the rubella epidemic in 1963, see FLORA DAVIS, *MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICA SINCE 1960* 163–64 (1999); DUBOW, *supra* note 30, at 65.

while New York City battled a sixteen fold increase.⁴¹ By 1964, New York City reported more than 10,000 new cases.⁴² At a time when any pregnant woman faced the possibility of a rubella infection and all that it entailed, the need for new abortion laws seemed evident to a larger group of people.

In the aftermath of the thalidomide and rubella controversies, family-planning organizations and physicians more often used disability as a justification for legalizing abortion. As early as 1959, the American Law Institute (ALI) had set out a proposed reform law that would authorize abortion under certain circumstances, including cases in which a child would be born with a “grave physical or mental defect.”⁴³ Supporters of abortion used fears of fetal disability and defect as a key reason to reform abortion laws. In 1964, speakers at the Planned Parenthood Federation of America convention argued that abortion should be legal, at least in cases of fetal defect.⁴⁴ Dr. Robert E. Hall presented related justifications as the most obvious reason for abortion reform.⁴⁵ In cases of defect or disability, he argued that abortion would be “condoned by [physicians’] consciences, accepted by their peers and demanded by their patients.”⁴⁶

Other supporters of abortion reform used similar reasoning. “Our present law prohibits termination of pregnancy with the result that many infants are forced to suffer through their blighted lives, a burden to themselves, their families, and to society,” argued Robert Force, the author of a proposed abortion reform bill in Indiana.⁴⁷ “For society to compel this result borders on the grotesque.”⁴⁸ Ruth Lidz, another supporter of abortion reform, put the point bluntly: “As a physician, I believe that in a proven abnormality of a fetus it could be immoral and inhumane to subject the mother, her family and, perhaps, society to the burdens of bearing, nuturing [sic] and rearing an abnormal child.”⁴⁹

Given the physical suffering and societal discrimination some believed “abnormal” children faced, reformers used bans on abortion in cases of fetal defect to showcase the irrationality and cruelty of broad abortion bans. At a time when few agreed on when, if at all, abortion should be legal, reformers framed disability-based abortions as obviously moral and medically necessary. These arguments helped to explain the progress of ALI-style bills in a handful of states over the course of the 1960s. Twelve states introduced such laws in less than a decade.⁵⁰

⁴¹ REAGAN, *supra* note 6, at 57.

⁴² *Id.*

⁴³ MODEL PENAL CODE § 207.11 (AM. LAW INST., Council Draft No. 22, 1959).

⁴⁴ *Need New Abortion Laws*, *supra* note 8, at 397.

⁴⁵ *Abortion Laws Condemned*, *supra* note 8, at 320.

⁴⁶ *Id.*

⁴⁷ Robert Force, *Legal Problems of Abortion Reform*, 19 ADMIN. L. REV. 364, 371–72 (1967).

⁴⁸ *Id.* at 372.

⁴⁹ Ruth W. Lidz, *Review: More Light on Abortion*, FAM. PLAN. PERSP. 63, 63 (1971).

⁵⁰ See, e.g., GENE BURNS, THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES 185 (2005) (listing some of the states that enacted ALI-type laws by 1970); LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE

The fetal-defect exception written into the ALI model appeared to be a part of the blueprint for future abortion laws.

Moreover, arguments about defects and disabilities fit well alongside an existing reform message about the benefits of allowing women to have only wanted children. Throughout the 1960s, Planned Parenthood had painted a dire picture of the consequences of compulsory pregnancy, including a perceived spike in juvenile delinquency.⁵¹ Planned Parenthood leader William Vogt similarly tied juvenile delinquency to uncurbed population growth and unwanted children. In criticizing the delinquency reforms recently championed by then New York State Attorney General Jacob Javits,⁵² Vogt wrote: “It is well known that unloved and ‘rejected’ children are prone to become neurotics. Much juvenile misbehavior shows a marked neurotic pattern.”⁵³ Vogt further contended that some working mothers, many of them likely poor, were guilty of “maternal neglect.”⁵⁴ In either case, Vogt insisted, “Perhaps these poor youngsters should never have been born at all to parents, who, because of their own deficiencies, are unable to provide their children the emotional and spiritual environment indispensable to their health.”⁵⁵ Because Planned Parenthood already used arguments about the harm done to the larger society by unwanted children, claims about fetal defects fit well in the organization’s argumentative agenda.

While the ALI proposal was in ascendancy, technological advances made it possible for parents to identify a broader array of defects in utero. By the late 1960s, amniocentesis—a procedure used to detect chromosomal abnormalities—had become a common obstetric procedure.⁵⁶ In 1968, the *New York Times* reported that many area hospitals performed abortions if physicians detected a chromosomal abnormality, especially in cases of Down Syndrome.⁵⁷ Indeed, the *Times* suggested that physicians were the most willing to perform therapeutic abortions in cases of fetal defect.⁵⁸

Notwithstanding the growing support for abortion in cases of disability, abortion reformers moved away from the disability-based arguments of the early 1960s. Frustrated by the results observed in states with the ALI proposal in place,

ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING 24–25 (2010) (discussing the American Law Institute’s 1962 abortion policy).

⁵¹ See, e.g., Mary Ziegler, *Roe’s Race: The Supreme Court, Population Control, and Reproductive Justice*, 25 *YALE J. L. & FEMINISM* 1, 12–14 (2013) (discussing Planned Parenthood’s 1960’s argument that “unwanted children . . . created the delinquency that the government sought to prevent”).

⁵² William Vogt, Letter to the Editor, *N.Y. TIMES*, Jan. 17, 1955.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See sources cited *supra* note 7 and accompanying text.

⁵⁷ Robert Reinhold, *Abortions Linked to Genetic Defect: Fetal Tests Said to Be Used as Basis for Operations*, *N.Y. TIMES*, Sept. 2, 1968, at 19.

⁵⁸ *Id.*

the leaders of pro-choice groups concluded that nothing less than complete repeal of abortion restrictions would ensure meaningful access to abortion.⁵⁹ Because some of the statutory grounds for abortion could be interpreted narrowly, some physicians in ALI states like California refused to perform the procedure.⁶⁰ Convinced that the ALI bill had not worked, abortion reformers downplayed the fetal-defect arguments sometimes used to support it. In 1966, the American Civil Liberties Union (ACLU) of Southern California explained the reasoning of many repeal groups:

There appears to be extensive public acceptance of [repeal when there is] . . . a substantial risk that the offspring would be born with grave mental or physical defects. . . . However, the ACLU of Southern California believes that . . . the true issue is the individual's fundamental, personal right to determine when and whether to produce offspring without interference by the state.⁶¹

In 1967, the national ACLU also began experimenting with constitutional arguments, and leaders of the organization framed abortion as a constitutional right—not a subject for legislative discretion.⁶² The following year, Planned Parenthood (then known as Planned Parenthood-World Population) voted in favor of a resolution demanding the repeal of all abortion bans.⁶³ Like the ACLU statement, the Planned Parenthood resolution framed legal abortion as a matter of constitutional law involving the rights of patients to receive medical treatment and

⁵⁹ See, e.g., DONALD T. CRITCHLOW, *INTENDED CONSEQUENCES: BIRTH CONTROL, ABORTION, AND THE FEDERAL GOVERNMENT IN MODERN AMERICA* 134–35 (1999) (explaining that “while this reform movement initiated changes in existing state legislation to allow for therapeutic abortions, more militant voices called for repeal of all abortion laws”); LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973*, at 233–35 (1997) (explaining that various branches of the abortion rights movement had adopted the position that all abortion laws had to be repealed); STAGGENBORG, *supra* note 5, at 15–24 (describing the origins of the movement to legalize abortion).

⁶⁰ See, e.g., Keith Monroe, *How California's Abortion Law Isn't Working*, N.Y. TIMES, Dec. 29, 1968, at 29.

⁶¹ Policy Statement on Abortion from the ACLU of Southern California (Sept. 21, 1966) (on file with the Schlesinger Library at Harvard University).

⁶² See Memorandum from William Kopit & Harriet F. Pilpol to Due Process Committee (Dec. 7, 1966), 1–4, (on file with the Schlesinger Library at Harvard University).

⁶³ See, e.g., Morris Kaplan, *Abortion and Sterilization Win Support of Planned Parenthood: Proper Medical Procedures, Agency Says —Asks End of Laws Forbidding Them*, N.Y. TIMES, Nov. 14, 1968, at 50 (explaining that Planned Parenthood-World Population, for the first time in its 52 years as a national voluntary birth-control agency, unanimously called for liberalizing the criminal laws that prohibit abortion and sterilization).

the rights of physicians to provide it.⁶⁴ In 1969, when NARAL organized, the group also used constitutional rhetoric to describe its goal.⁶⁵

The reasons for the spread of constitutional justifications were evident in a meeting held the same year for all reformers by the Abortion Reform Association (ARA), a group that funded state level repeal efforts. In 1969, the ARA hosted a strategy workshop for different groups supporting legal abortion.⁶⁶ Attendees agreed to demand nothing less than complete repeal and to describe abortion primarily as “a woman’s civil right.”⁶⁷ While frustrated with the functioning of ALI-style statutes, attendees also argued that a rights-based formulation would appeal to more women and “allay concerns about genocide.”⁶⁸ In their own organizations and groups dedicated to abortion reform, feminists embraced rights arguments, seeing women’s interests as the central issue in the abortion debate. Because fetal-defect justifications remained tied to an ALI proposal that many found inadequate, the disability-based justifications fell somewhat out of favor.

As soon as the late 1960s and early 1970s, however, disability-based justifications reemerged, this time as part of the response to the rise of an increasingly sophisticated pro-life movement. In the late 1960s, reformers continued relying on disability-based justifications for abortion under certain circumstances, particularly when explaining the inadequacy of ALI-style bills.⁶⁹ Garret Hardin, an ecologist and supporter of population control policies, published an article arguing that the ALI would not allow abortions in many cases of fetal defect.⁷⁰ As Hardin explained, women whose children had severe fetal abnormalities might still have been denied an abortion under the ALI statute because the probability of defect in a particular case was too low or because they did not have access to prenatal testing that would reveal the existence of an abnormality.⁷¹ Roy Lucas, one of the attorneys who would help engineer the challenge in *Roe v. Wade*, echoed Hardin’s argument.⁷² While reminding the American public of the value of abortion in cases of disability or defect, Hardin and Lucas argued that only the complete repeal of abortion restrictions would guarantee women the power to terminate pregnancies in cases of fetal defect.⁷³

⁶⁴ *Id.*

⁶⁵ See *New Group Will Seek Changes in Abortion Laws*, N.Y. TIMES, Feb. 17, 1969, at 32.

⁶⁶ See Report of Attendance at a Workshop of the Abortion Reform Association (Oct. 10–11, 1969) (on file with the Schlesinger Library at Harvard University).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Garret Hardin, *Abortion or Compulsory Pregnancy?*, 30 J. MARRIAGE & FAM. 246, 246–51 (1968).

⁷⁰ See *id.*

⁷¹ See, e.g., *id.* (explaining that the probability of defective embryos is generally low and women often did not have access to abnormality-revealing prenatal testing).

⁷² See Roy Lucas et al., *Abortion: Litigative and Legislative Processes*, 1 HUM. RTS. 23, 31 (1971).

⁷³ See *id.*; Hardin, *supra* note 69, at 246–51.

When the pro-life movement began making progress, groups like NARAL also turned to disability-based justifications to explain the need for repeal. Starting in the mid-1960s, as states began considering the reform or repeal of existing laws, an opposition mobilized to defend existing bans.⁷⁴ Often supported by local Catholic dioceses, early pro-life groups began experimenting with images of late term abortions as a tool to defeat referenda and persuade legislators.⁷⁵ Dr. John Willke of Ohio perfected a slide show later used in many states to heighten public discomfort with abortion.⁷⁶ At times, pro-lifers using these images had great success. Before *Roe*, New York, one of the few states to repeal all abortion restrictions, passed a law reinstating old restrictions before Governor Nelson Rockefeller vetoed the measure.⁷⁷ In 1972, pro-lifers in Michigan defeated a proposed referendum legalizing abortion.⁷⁸ The images circulated by the pro-life movement clearly resonated with an ambivalent public.

The leaders of the pro-choice movement recognized the need to develop an effective reply to the images deployed by the opposition. NARAL leaders used disability-based arguments to help counter the fetal-rights strategy that pro-lifers had used so effectively. The organization's pre-1973 debate manual included a claim that "[l]egal abortion could decrease the tragedy of the birth of deformed children."⁷⁹

In 1972, disability-based arguments again attracted attention after NARAL members participated in a major television debate.⁸⁰ During the event, pro-lifer Marjory Mecklenburg stunned the audience by displaying an aborted fetus.⁸¹ Frustrated by the outcome, NARAL leader Larry Lader urged his colleagues to avoid a similar debacle by drawing on the shock value of fetal defects.⁸² "When they bring up innocent fetal life," Lader advised, "keep hammering on . . . the deformed and unwanted infant, . . . the horror of bringing a deformed child into the world with half a head, no arms, etc."⁸³ The group later developed visual materials

⁷⁴ On the early pro-life movement, see ZIAD W. MUNSON, *THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOVEMENT MOBILIZATION WORKS* 192 (2008); Keith Cassidy, *The Right to Life Movement: Sources, Development, and Strategies*, in *THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE* (Donald T. Critchlow ed., 1996).

⁷⁵ See, e.g., ZIEGLER, *supra* note 11, at 32–33 (explaining that some pro-life groups used images of aborted fetuses).

⁷⁶ See, e.g., *id.* (describing the effects the slideshows had on the public).

⁷⁷ See, e.g., LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 47 (1992) (explaining that, in 1970, New York repealed its abortion law and that the legislature considered and almost passed a reform law).

⁷⁸ See, e.g., STAGGENBORG, *supra* note 5, at 35–38 (talking about the strength of the anti-abortion movement).

⁷⁹ NARAL SPEAKER AND DEBATER'S NOTEBOOK, *supra* note 9.

⁸⁰ See, e.g., LARRY LADER TO NARAL BOARD MEMBERS, *supra* note 9 (describing the "shock technique" to be used on television).

⁸¹ See *id.*

⁸² See *id.*

⁸³ *Id.*

that similarly spotlighted fetal defects.⁸⁴ As one prominent pamphlet explained: “Legal abortion means . . . women can’t be forced to bear a deformed child. Which do you prefer . . . legal abortion? Or an anencephalous ‘baby’?”⁸⁵

Before *Roe*, disability-based arguments helped activists explain why nothing less than complete repeal would serve the needs of the American public. Instead of merely arguing for abortion in cases of fetal defect, pro-choice advocates insisted that nothing short of repeal would ensure that women could terminate pregnancies when providers detected a fetal abnormality. At the same time, as pro-lifers perfected visual images of abortion, supporters of legalization used images of disability and defect to invoke the fear, disgust, and anxiety often elicited by the opposition.

After the *Roe* Court struck down most of the nation’s remaining abortion laws,⁸⁶ the politics of disability and abortion shifted. Seeking to make the most of their victory in the Supreme Court, pro-choice activists downplayed concerns about fetal defects in favor of arguments about a woman’s right to choose. As feminists took the helm of organizations like NARAL and Planned Parenthood,⁸⁷ movement leaders directed more attention to arguments about the liberty and equality of women. As the decade progressed, however, pro-lifers took up the issue of disability, using it to argue for the reversal of *Roe* and the importance of the right to life. While abortion opponents had argued against abortion in cases of fetal defect since the mid-1960s, the new disability arguments were more ambitious. Pro-lifers argued that as long as abortion remained legal, the nation was on its way down a slippery slope that threatened all disabled and vulnerable persons.⁸⁸ This slippery-slope argument helped pro-lifers appeal to those ambivalent about abortion and reinforced their claim that abortion opponents, not those on the other side, stood up for civil rights.

B. Pro-Lifers Use Disability to Describe a Slippery Slope

After *Roe*, the pro-life movement committed to passing a constitutional amendment that would outlaw abortion from coast to coast.⁸⁹ Starting in 1973, Congress considered a variety of proposals that would amend the Constitution, all of them designed to change the Fourteenth Amendment.⁹⁰ Well before the

⁸⁴ See, e.g., Pamphlet, “Legal Abortion Means . . .” (n.d., ca. 1972), in The NARAL Papers, Carton 7, Debating the Opposition Folder, Schlesinger Library, Harvard University (describing pictures of deformed children to be placed in the pamphlet).

⁸⁵ *Id.*

⁸⁶ *Roe v. Wade*, 410 U.S. 113, 163–65 (1973).

⁸⁷ See, e.g., ZIEGLER, *supra* note 11, at 121–26 (describing how feminists used the *Roe* decision to remake the identity of the abortion-rights movement).

⁸⁸ See *infra* notes 97–101 and accompanying text.

⁸⁹ See, e.g., ZIEGLER, *supra* note 11, at 37–40 (describing the pro-lifers push for a fetal-protective amendment).

⁹⁰ See, e.g., *id.* at 37–44 (discussing how “Congress introduced fetal-protective amendments”).

Supreme Court's 1973 decision, pro-life activists had argued that the Fourteenth Amendment recognized the personhood of the unborn child and protected the fetus under both the Equal Protection and Due Process Clauses.⁹¹ As part of this argument, the leaders of groups like the National Right to Life Committee (NRLC), the largest national antiabortion organization, sought to position their cause as an extension of the social-justice movements of the 1960s, particularly the civil rights movement.⁹² Far from presenting themselves as another conservative group, pro-life organizations identified with social movements championing the rights of the helpless and defenseless.⁹³

After *Roe*, in developing an ideal constitutional proposal, pro-lifers reinforced this argument by guaranteeing a right to life not only for the fetus but also for the disabled and the elderly. Americans United for Life (AUL), the group that would become the nation's leading pro-life public interest law firm, argued that the group's purpose was: "To impress upon all the dignity and worth of each individual life, whatever the state or circumstance, especially mindful of the innocent, the incompetent, the impaired, the impoverished, the aged, and all those otherwise weak and disadvantaged."⁹⁴ Struggling with financial difficulties and political isolation, NRLC leaders seeking to broaden their base argued that legal abortion was just the beginning of a dangerous trend that would threaten other Americans.⁹⁵ In a 1975 pamphlet, the NRLC described this risk as follows: "The questions we must ask ourselves are these: if we allow the killing of the unborn now, where does it end?"⁹⁶ The same year, the organization circulated materials arguing that the noble dedication to human life is compromised in the increasing attack on individual human life evidenced in abortion, the increasing advocacy of infanticide of the defective child, and euthanasia.⁹⁷

⁹¹ See, e.g., Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 893–98 (explaining how pro-life activists argued that the fourteenth amendment recognized the personhood of an unborn child and protected the child's rights).

⁹² See, e.g., *id.* at 891–98 (noting that "[t]he procedural due process strategy immediately attracted the interest of the NRLC").

⁹³ See, e.g., *id.* at 889–98 (noting that the "equal-protection argument used by anti-abortion activists compared fetuses to other discrete and insulate minorities—fetuses were defenseless, subject to discrimination (in the form of abortion), and defined by trait . . . over which they had no control").

⁹⁴ Americans United for Life, "Statement of Purpose" (n.d., ca. 1973), in *The Americans United for Life Papers*, Executive File, Concordia Seminary, Lutheran Church-Missouri Synod.

⁹⁵ See, e.g., CONNIE PAIGE, *THE PRO-LIFERS: WHO THEY ARE, HOW THEY GET THEIR MONEY, WHERE THEY GET THEIR MONEY* 86–87 (1983) (discussing the NRLC's financial difficulties, including chronic debt running as high as \$25,000); ZIEGLER, *supra* note 11, at 74 (noting the "messy finances of the organization").

⁹⁶ Pamphlet, National Right to Life Committee, "Abortion: Where Does It End?" (1975), in *The National Right to Life Committee Papers*, Box 8, 1975 NRLC File, Gerald Ford Memorial Library, University of Michigan.

⁹⁷ *Id.*

Convinced that the pro-life movement could remain unified only if the NRLC and sister organizations focused exclusively on abortion, leading groups often deemphasized disability issues and pushed the slippery-slope argument only so far.⁹⁸ However, for much of the 1970s, moderate antiabortion groups, including American Citizens Concerned for Life (ACCL), made concern about disability discrimination more central to their argumentative agenda.⁹⁹ In the mid-1970s, when neither major political party took a clear stand on abortion, influential abortion opponents in Congress, the academy, and leading pro-life groups worked with ACCL partly because they worried that a single issue approach would never convince politicians to ban abortion.¹⁰⁰ ACCL leaders emphasized the importance of “present[ing] the pro-life cause and its responsibility in terms of broadly based concern for human life rather than narrowly focusing on the fetus only” and “establish[ing] the pro-life cause as a legitimate bi-partisan concern.”¹⁰¹

To achieve this goal, ACCL tried to define a pro-life agenda that would protect the handicapped as well as fetal life. “American Citizens Concerned for Life is committed to working toward a [world] in which all lives are respected,” the organization explained in promotional materials.¹⁰² “This protective and enabling philosophy of action is not limited to abortion alone but applies to other vulnerable classes and individuals, such as the mentally retarded, the aged, and the handicapped.”¹⁰³ In concrete terms, the organization advocated for additional funding for research on the prevention of birth defects and developed model legislation on end-of-life issues for the disabled.¹⁰⁴

Throughout the 1970s, pro-life groups used the idea of disability discrimination to attack legal abortion. In the early 1980s, when the nation dealt

⁹⁸ On the single-issue focus of pro-life groups, see FAYE D. GINSBURG, *CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY* 47 (1998); STAGGENBORG, *supra* note 5, at 9, 95, 107, 199.

⁹⁹ This Part later discusses the ACCL’s position at greater length.

¹⁰⁰ See, e.g., American Citizens Concerned for Life, “Purposes and Objectives” (1978), in *The American Citizens Concerned for Life Papers*, Box 8, American Citizens Concerned for Life Policy Folder, Gerald Ford Memorial Library, University of Michigan (discussing the multi-issue approach aimed to convince politicians to ban abortion).

¹⁰¹ *Id.*

¹⁰² American Citizens Concerned for Life, “Objectives of the Organization” (1978), in *The American Citizens Concerned for Life Papers*, Box 8, American Citizens Concerned for Life Policy Folder, Gerald Ford Memorial Library, University of Michigan.

¹⁰³ *Id.*

¹⁰⁴ See, e.g., American Citizens Concerned for Life, “To Build a Caring Society: The Goals of American Citizens Concerned for Life” (1978), in *The American Citizens Concerned for Life Papers*, Box 8, American Citizens Concerned for Life Policy Folder, Gerald Ford Memorial Library, University of Michigan (discussing the educational, legislative, research and service activities that the ACCL focuses on); American Citizens Concerned for Life, “1978 Objectives” (1978), in *The American Citizens Concerned for Life Papers*, Box 8, American Citizens Concerned for Life Policy Folder, Gerald Ford Memorial Library, University of Michigan (discussing the educational, legislative, research, service and religious objectives that the ACCL focuses on).

with a new controversy surrounding the treatment of severely disabled newborns, pro-life groups made disability arguments a more central part of their message and strategy.¹⁰⁵ Abortion opponents channeled more resources into battling laws involving the withdrawal of treatment and aid-in-dying.¹⁰⁶ At the same time, groups like the NRLC emphasized disability-based concerns even in the battle about reproductive rights.¹⁰⁷ Activists presented pro-choice organizations as heartless and indifferent to the struggles of weak, vulnerable, and handicapped persons. Moreover, by pointing to the early relationship between family planners and eugenic legal reformers, antiabortion leaders emphasized that genetic engineering, not women's rights, explained their opponents' commitment to legal abortion. While Planned Parenthood and early family planning organizations sometimes clashed with the eugenic legal reform movement and pursued a different agenda, pro-lifers could score political points by highlighting the prior partnership between the two factions and downplaying the differences between eugenic supporters, family planners, and the modern pro-choice movement.

C. *The Baby Doe Controversy Makes Disability Arguments a Core Weapon*

Notwithstanding pro-life arguments about a slippery slope, in the early 1980s, abortion in cases of fetal defect seemed more popular than ever. As early as 1976, Congress had allocated over \$90 million for research, prevention, and identification of fetal defects, and access to prenatal genetic counseling slowly increased.¹⁰⁸ By 1981, access to counseling had become so widespread that the Food and Drug Administration considered bringing to market a consumer product that could detect common genetic abnormalities.¹⁰⁹ As Jane Brody of the *New York Times* explained: “[I]t might soon become culturally ‘acceptable and even expected to avoid the birth of a defective child.’”¹¹⁰

By 1982, however, the so-called Baby Doe controversy made the rights of disabled newborns more hotly debated than ever. In 1982, in Bloomington, Indiana, a child born with Down Syndrome suffered from esophageal atresia, a defect that physicians could often correct with surgery.¹¹¹ The child's parents

¹⁰⁵ See *infra* text accompanying notes 127–128.

¹⁰⁶ See *infra* text accompanying notes 125–126.

¹⁰⁷ See *infra* text accompanying notes 131 and 133.

¹⁰⁸ See, e.g., Jane E. Brody, *Genetic Defects Sought in Fetus: Goal Is to Find Them When Abortion Is Still Possible*, N.Y. TIMES, May 12, 1976, at 17 (referencing an act of Congress that allocated federal funds for genetic testing and counselling).

¹⁰⁹ See, e.g., Dava Sobel, *Simple Test Could Screen All Expectant Mothers*, N.Y. TIMES (Jan. 13, 1981), <http://www.nytimes.com/1981/01/13/science/simple-test-could-screen-all-expectant-mothers.html?pagewanted=all> [https://perma.cc/R9CK-MQH3] (discussing a commercial test that detects certain crippling or lethal birth defects).

¹¹⁰ Brody, *supra* note 108, at 17.

¹¹¹ For coverage of the Baby Doe case in Indiana, see *Charges Weighed for Parents Who Let Baby Die Untreated*, N.Y. TIMES (Apr. 17, 1982), <http://www.nytimes.com/1982/04/17/us/charges-weighted-for-parents-who-let-baby-die->

declined surgery, and the infant died.¹¹² President Ronald Reagan responded by ordering the Department of Health and Human Services (HHS) to withhold federal funding from any public health care facility that refused to provide lifesaving care to severely handicapped newborns, citing the Rehabilitation Act of 1973, a forerunner of the Americans with Disabilities Act (ADA) that outlawed disability discrimination in federal programs.¹¹³

In March 1983, HHS issued regulations based on the Rehabilitation Act, prompting a coalition of health care providers to file suit.¹¹⁴ In *American Academy of Pediatrics v. Heckler*, the district court struck down the rules on procedural grounds.¹¹⁵ The same year, Baby Jane Doe was born in Long Island, New York.¹¹⁶ Jane Doe also suffered from a defect correctable with surgery, but because of several handicaps, physicians informed her parents that she would be severely physically and mentally handicapped even if she survived.¹¹⁷ When Jane Doe's parents initially refused surgery, a pro-life attorney, Larry Washburn, sought appointment as guardian ad litem in state court, and the Reagan Justice Department asked the federal courts to intervene, invoking the Baby Doe Rules to force the hospital to release medical records.¹¹⁸

In the meantime, in January 1984, the Reagan Administration issued final Baby Doe Rules, and Congress amended the federal Child Abuse Prevention and

untreated.html [hereinafter *Charges Weighed*] [<https://perma.cc/4XBB-BFUK>]; Robert Pear, *Rules to Aid Handicapped Infants Face Court Test*, N.Y. TIMES (Apr. 9, 1983), <http://www.nytimes.com/1983/04/09/us/rules-to-aid-handicapped-infants-face-court-test.html> [<https://perma.cc/T7DX-8FSW>].

¹¹² See, e.g., *Charges Weighed*, *supra* note 111 (noting that the 6-pound infant died).

¹¹³ See, e.g., Pear, *supra* note 111 (noting that "President Reagan took an interest in the issue, and directed the Department of Health and Human Services to remind hospitals of their responsibilities" under the Act).

¹¹⁴ See *Am. Acad. of Pediatrics v. Heckler*, 561 F. Supp. 395, 397–98 (D.D.C. 1983).

¹¹⁵ See *id.* at 403–04.

¹¹⁶ On the state litigation about Baby Jane Doe, see Marcia Chambers, *Initiator of 'Baby Doe' Case Unshaken*, N.Y. TIMES (Nov. 13, 1983), <http://www.nytimes.com/1983/11/13/nyregion/initiator-of-baby-doe-case-unshaken.html> [<https://perma.cc/4BSH-URNU>]; David Margolick, *Battle for 'Baby Doe,'* N.Y. TIMES (Oct. 25, 1983), <http://www.nytimes.com/1983/10/25/nyregion/battle-for-baby-doe.html> [<https://perma.cc/7SBT-PGVF>].

¹¹⁷ See Chambers, *supra* note 116; Margolick, *supra* note 116.

¹¹⁸ See Chambers, *supra* note 116; Margolick, *supra* note 116. On the Reagan Administration's suit, see Marcia Chambers, *Parents of 'Baby Doe' Criticize 'Intrusion' by U.S.*, N.Y. TIMES (Nov. 6, 1983), <http://www.nytimes.com/1983/11/06/nyregion/parents-of-baby-doe-criticize-intrusion-by-us.html?rref=collection%2Fbyline%2Fmarcia-chambers&action=click&con...> [<https://perma.cc/UBX8-XQLJ>]; Herbert D. Hinkle, *A Matter of Life and Death in the Courtroom*, N.Y. TIMES, Nov. 6, 1983, at NJ40. Ultimately, a New York judge refused to appoint a guardian ad litem and fined Washburn several hundred dollars for bringing the case. See *Suit by Lawyer Over Baby Jane Doe Is Thrown Out*, N.Y. TIMES (Jan. 21, 1984), <http://www.nytimes.com/1984/01/21/nyregion/suit-by-lawyer-over-baby-jane-doe-is-thrown-out.html?pagewanted=print> [<https://perma.cc/7WY5-6G8A>].

Treatment Act to cover disabled newborns.¹¹⁹ After the American Medical Association and the American Hospital Association again attacked the Baby Doe Rules, the case eventually reached the Supreme Court.¹²⁰ In *Bowen v. American Hospital Association*, the Court struck down the regulations, holding that mandatory requirements outlined in the rules found no justification in the Rehabilitation Act.¹²¹

The Baby Doe wars transformed the priorities and message of antiabortion groups. Calling the Baby Doe conflict “a landmark in the rights of infants,” Washburn and his allies developed a network of nurses who would report on the perceived mistreatment of handicapped newborns.¹²² AUL held its first major conference about Baby Doe litigation and legislation, and by 1984, the organization committed half of its budget to fighting what members saw as euthanasia.¹²³ Other pro-life groups stepped up their involvement in end-of-life debates. In 1984, James Bopp, Jr., the general counsel for the NRLC, founded the National Legal Center for the Medically Dependent and Disabled, a public-interest litigation group designed to focus “primarily on the medical and legal issues in the treatment of the critically or terminally ill handicapped and medically dependent persons.”¹²⁴ Minnesota Citizens Concerned for Life, an NRLC affiliate, argued that the right to die, including the withdrawal of treatment, threatened “a wide range of people,” including the “aged, the mentally ill, the retarded, etc.”¹²⁵

In the mid-1980s, pro-life activists and political figures soon took up arguments against amniocentesis and genetic screening as well as abortion. In the first part of the decade, Surgeon General Edward Koop, a vocal critic of abortion, condemned amniocentesis as a “search and destroy mission” that would encourage more women to terminate their pregnancies.¹²⁶ In 1987, the Vatican issued a

¹¹⁹ On the amendment of the Child Abuse Prevention and Treatment Act, see Seymour Rosenbloom, *An Issue Transcending “Privacy of the Family,”* N.Y. TIMES (Aug. 11, 1984), <http://www.nytimes.com/1984/08/11/opinion/1-an-issue-transcending-privacy-of-the-family-124670.html> [<https://perma.cc/KB95-CNLK>]; *Baby Doe Compromise*, WALL STREET J., July 25, 1984, at 26. For the final version of the Baby Doe rules, see 45 C.F.R. § 84.55 (2005).

¹²⁰ See *Bowen v. Am. Hosp. Ass’n*, 476 U.S. 610, 612–24 (1986).

¹²¹ See *id.* at 640–46. On the aftermath of the Baby Doe litigation, see David G. Savage & Philip Hager, *Court Bars U.S. Rights Role in Baby Doe Cases*, L.A. TIMES (June 10, 1986), http://articles.latimes.com/1986-06-10/news/mn-9742_1_baby-doe [<https://perma.cc/ANY4-AZV4>]; Stephen Wermiel, *Top Court Invalidates ‘Baby Doe’ Rule on Care of Severely Disabled Infants*, WALL STREET J., June 10, 1986, at 1.

¹²² Marcia Chambers, *Advocates for the Right to Life*, N.Y. TIMES (Dec. 16, 1984), <http://www.nytimes.com/1984/12/16/magazine/advocates-for-the-right-to-life.html?page-wanted=all> [<https://perma.cc/7F7D-6J8M>].

¹²³ See *id.*

¹²⁴ *An Introduction to the National Legal Center for the Medically Dependent & Disabled, Inc.*, 1 ISSUES L. & MED. 1, 2 (1985).

¹²⁵ Minnesota Citizens Concerned for Life, “The Euthanasia Debate” (n.d., ca. 1973), in the Father Paul Marx Papers, Box 72, Folder 19, Notre Dame University.

¹²⁶ Cimos, *supra* note 12, at 16.

statement condemning any use of prenatal screening that would lead to abortion as “gravely illicit.”¹²⁷ Joseph Cardinal Bernardin, the chairman of the National Conference of Catholic Bishops’ Pro-Life Committee, backed the Pope’s position: “If we are not comfortable with turning the creation of human life into an impersonal or ‘pick and choose’ process, what principles exist to restrain such activity?”¹²⁸

Concerned that pro-lifers would use arguments against amniocentesis to limit abortion access, some pro-choice politicians and activists began defending women’s right to terminate pregnancies in cases of fetal defect or disability. In Illinois, state pro-life groups lobbied for a bill that would allow physicians to refuse to perform amniocentesis for reasons of conscience.¹²⁹ While Illinois pro-lifers reiterated arguments about the “eugenic” motives of many women seeking abortion, the leader of a state affiliate of the ACLU labeled the law “immoral,” insisting that under such a statute, “pregnant women would be denied vital medical information to make informed decisions.”¹³⁰

As the Illinois controversy suggested, pro-choice groups soon leveraged anxiety about fetal abnormality to counter a new pro-life attack on late-term abortion. That campaign gained momentum in 1987, when the NRLC began screening the *Silent Scream*, a short film that supposedly showed the abortion of a 19.5 week-old fetus.¹³¹ Hoping to benefit from longstanding public discomfort with late term abortions, groups like the NRLC emphasized the film’s claim that “[l]ate abortion was especially odious.”¹³² In trying to render the *Silent Scream* less effective, pro-choice leaders fell back on popular support for access to abortion in cases of disability. Citing the fact that most women did not have amniocentesis until late in pregnancy, Douglas Gould of Planned Parenthood insisted that women had late-term abortions “for some of the most compelling reasons imaginable,” including those based on disability.¹³³

In the late 1980s and early 1990s, NARAL’s debating guidebook, *Choice*, also foregrounded arguments about fetal defects. In responding to arguments about amniocentesis, NARAL included the following arguments:

¹²⁷ Arthur Caplan, *Spotlight on Prenatal Diagnosis: Vatican Points Up Moral Fudging Over Abortion Implications*, L.A. TIMES, Mar. 13, 1987, at 7.

¹²⁸ Biddle, *supra* note 12, at 6.

¹²⁹ See, e.g., Timothy J. McNulty, *Growing Pains Afflict Birth Technology*, CHI. TRIB., July 28, 1987, at 1 (mentioning “a controversial bill to amend the Illinois Right of Conscience Act” that would relieve doctors of certain responsibilities).

¹³⁰ Tom Gibbons, *Bill Threatens Moms’ Rights*, CHI. SUN TIMES, July 12, 1987, at 3.

¹³¹ On the attention attracted by the *Silent Scream*, see Stephen Chapman, *Abortion and the ‘Silent Scream,’* CHI. TRIB., Mar. 17, 1985, at 3; Sandy Johnson, ‘*Graphic in the Extreme*’: *Anti-Abortion Doctor Plans Follow-Up Film*, L.A. TIMES, Dec. 5, 1985, at 1.

¹³² United Press International, *Officials to Get Graphic Abortion Film Pro-life Group Distributes 28-minute Video In Lobbying Effort*, ORLANDO SENT., July 25, 1987, at 3.

¹³³ *Id.*

Less than 3% of such tests result in abortion. The tests permit parents who know they are at risk of giving birth to a child with birth defects to conceive. . . . It is heartless to deny parents access to medical technology that would permit them to avoid giving birth to an incurably ill or severely retarded infant.¹³⁴

In part, NARAL argued that genetic counseling and amniocentesis did not necessarily lead to abortion and might actually convince some parents to carry a pregnancy to term. Nevertheless, as Gould did in response to the *Silent Scream*, NARAL framed permitting abortion for reasons of disability and defect as legitimate and compassionate. NARAL suggested that any compassionate lawmaker would understand the reasons that parents wished to avoid “giving birth to an incurably ill or severely retarded infant.”¹³⁵

In the debate manual, the threat of fetal defects also represented a primary rationale for keeping late-term abortions legal.¹³⁶ The manual included a common pro-life argument that women waited too long for abortions and too often sought out the procedure after the first trimester.¹³⁷ In the proposed response, the manual highlighted that most fetal defects, including those detected by amniocentesis, could not be discovered until later in pregnancy.¹³⁸

Later in the 1990s, the pro-life movement focused on banning a particular late term abortion procedure, D&X, that activists labeled partial birth abortion.¹³⁹ For pro-choice leaders, the risk of fetal defects helped to counter the quest to ban a procedure that many in the public opposed.¹⁴⁰ Pro-lifers framed D&X as a procedure providers performed for reasons of convenience.¹⁴¹ Those leading organizations like NARAL replied that providers used D&X only in rare and

¹³⁴ NARAL, “Choice” (n.d., ca. 1990), in *The Robin Chandler Duke Papers*, Box 2, NARAL 25th Anniversary Folder, Bingham Library, Duke University.

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ *See id.*

¹³⁹ On the focus on partial-birth abortion, see DEANA A. ROHLINGER, *ABORTION POLITICS, MASS MEDIA, AND SOCIAL MOVEMENTS IN AMERICA* 65 (2015); JEAN REITH SCHROEDEL, *IS THE FETUS A PERSON?: A COMPARISON OF POLICIES ACROSS THE FIFTY STATES* 68–69 (2000).

¹⁴⁰ *See, e.g.*, CAROL MASON, *KILLING FOR LIFE: THE APOCALYPTIC NARRATIVE OF PRO-LIFE POLITICS* 88 (2002) (noting that some pro-choice advocates “tried to focus debates about partial birth abortion on the fact that late-term abortions are performed on women whose pregnancies are considered catastrophic, that is, pregnancies in which the fetus is grossly deformed to the point of being unable to function and survive should it be born”).

¹⁴¹ *See, e.g.*, KENNETH J. HEINEMAN, *GOD IS A CONSERVATIVE: RELIGION, POLITICS, AND MORALITY IN CONTEMPORARY AMERICA* 240–42 (1998) (discussing the claim that “[p]artial-birth abortions were frequently performed as a matter of convenience”).

morally compelling cases, including instances of fetal defects.¹⁴² The logic of the partial-birth abortion debate assumed that fetal disabilities counted among the most reasonable grounds for choosing abortion.

D. The Partial-Birth Abortion Battle Revives Disability-Based Justifications

In the mid-1990s, when pro-lifers led a battle against D&X, pro-choice groups put new emphasis on disability-based justifications for abortion. The pro-life movement zeroed in on D&X because of public discomfort with late-term abortions.¹⁴³ Describing D&X in great detail, abortion opponents inside and outside of Congress asserted that women having abortions late in pregnancy had no legitimate reason to do so.¹⁴⁴ In arguing against the so-called “partial-birth” abortion ban, pro-choice groups emphasized that providers used D&X as a measure of last resort—in cases in which a woman’s health could be compromised or a child would be born with grave abnormalities.¹⁴⁵ For leading pro-choice groups, fetal disability remained one of the unquestionable arguments for choosing abortion.

However, the partial-birth abortion debate forced some in the pro-choice movement to reconsider how to handle justifications for abortion that made many uncomfortable. Because the struggle focused on the issue of fetal abnormalities, disability-rights activists questioned the ease with which many turned to abortion in fetal-defect cases.¹⁴⁶

Although the disability-rights movement had mobilized earlier and scored important victories in Congress and the courts, by the late 1990s, concern about

¹⁴² See, e.g., *Abortion Foes Rip Clinton*, *supra* note 14, at A1 (discussing the “small but extremely vulnerable group of women and families” that receive the life- and health-saving procedure each year).

¹⁴³ See, e.g., Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1001 (1999) (noting the unpopularity of late-term abortions).

¹⁴⁴ See, e.g., *id.* (discussing the portrayal of partial-birth abortions as a selfish delay by waiting “until the last minute”).

¹⁴⁵ *Id.* at 1010.

¹⁴⁶ On disability-rights critique of selective abortion and debate about it within the disability-rights movement, see, for example, Marsha Saxton, *Disability Rights and Selective Abortion*, in *ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950 TO 2000* 374 (Rickie Solinger ed., 1998); ERIK PARENS ET AL., *THE HASTINGS CTR., THE DISABILITY RIGHTS CRITIQUE OF PRENATAL GENETIC TESTING: REFLECTIONS AND RECOMMENDATIONS S1* (1999), https://www.geneticsandsociety.org/downloads/parens-and-asch-disability-rights-critique_1.pdf [<https://perma.cc/3K94-8BPR>]; Adrienne Asch et al., *Respecting Persons with Disabilities and Preventing Disability: Is There a Conflict?*, in *THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL* 319–46 (Stanley S. Herr et al., eds., 2003); Steven A. Holmes, *Abortion Issue Divides Advocates for Disabled*, N.Y. TIMES (July 4, 1991), <http://www.nytimes.com/1991/07/04/us/abortion-issue-divides-advocates-for-disabled.html> [<https://perma.cc/RK9C-FWJB>].

disability discrimination became mainstream.¹⁴⁷ Worried about alienating handicapped individuals and their families, some in the pro-choice movement questioned the value of disability-based arguments for abortion.¹⁴⁸ Recognizing that disability-based justifications could be a strategic handicap for those on the other side, the pro-life movement also experimented with abortion bans explicitly based on disability discrimination, including those prohibiting the abortion of children with Down Syndrome.¹⁴⁹

In 1995, Ohio became the first state to ban elective use of D&X.¹⁵⁰ By September 1996, Congress had passed a federal ban.¹⁵¹ With late abortions center stage, the pro-choice movement found itself in a politically difficult position. A July 1996 Gallup Poll found that more than 70% of respondents favored a prohibition on D&X.¹⁵²

President Bill Clinton sparked considerable controversy when he vetoed the ban.¹⁵³ Republican leaders used the partial-birth abortion ban to present pro-choice activists as dangerous extremists. Senator Bob Dole, a leading Republican in Congress, argued that the pro-choice movement's rejection of a partial-birth abortion ban reflected "the extreme position of those who support abortion at any

¹⁴⁷ On the expanding influence of the disability-rights movement in the 1990s, see RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY* 185 (2nd ed. 2009); KATIE ELLIS, *DISABILITY AND POPULAR CULTURE: FOCUSING PASSION, CREATING COMMUNITY, AND EXPRESSING DEFIANCE* 5 (2015).

¹⁴⁸ Booklet, NARAL, *Roe v. Wade at 25: A Symposium on the Future of Reproductive Issues* (1998), 25–26, in *The Robin Chandler Duke Papers*, Box 2, NARAL 25th Anniversary Folder, Bingham Library, Duke University.

¹⁴⁹ See, e.g., James MacPherson, *North Dakota Lawmakers OK Strictest Abortion Laws*, ASSOCIATED PRESS (Mar. 15, 2013), <https://www.usatoday.com/story/news/politics/2013/03/15/north-dakota-abortions/1991223/> [<https://perma.cc/7C59-4TE9>] (discussing anti-abortion procedures that prohibit women from having an abortion because a fetus has a genetic defect); *Antiabortion Bills in North Dakota Spur Protests: One Bill Defines Life as Beginning at Conception*, BOS. GLOBE, Mar. 6, 2013, at 13 (discussing measures passed by the Legislature that ban abortions based on genetic defects such as Down syndrome); *National Digest*, *supra* note 1, at A3 (noting a measure that the governor signed into law that bans abortions based on genetic defects such as Down syndrome).

¹⁵⁰ See, e.g., *Ohio Becomes First to Outlaw 'Dilation' Abortions*, THE COMMERCIAL APPEAL, Aug. 18, 1995, at A11 (noting that Ohio became the first state to outlaw dilation and extraction abortions); Catherine Candisky, *State to Fight for Late-Term Abortion Law Despite Ruling*, COLUMBUS DISPATCH, Dec. 15, 1995, at 5C.

¹⁵¹ David Espo, *Late-Term Abortion Ban Passes Congress*, PITT. POST-GAZETTE, Mar. 28, 1996, at A1.

¹⁵² Barbara Vobejda, *Harsh Details Shift Tenor of Abortion Fight*, WASH. POST, Sept. 17, 1996, at A1.

¹⁵³ See, e.g., Alison Mitchell, *Clinton, in Emotional Terms, Explains Abortion Veto*, N.Y. TIMES, Dec. 14, 1996, at 11 (noting the controversy surrounding the procedure and its ban); Associated Press, *Clinton's Foes Keep Focus on His Veto of Late-Term Abortion Ban*, DALLAS MORNING NEWS, May 28, 1996, 7A (noting the volatility surrounding the ban on late-term abortions).

time, at any place and for any reason.”¹⁵⁴ Some claimed that physicians performed partial-birth abortions for trivial reasons, including instances in which parents did not want a child born with a cleft palate.¹⁵⁵

The pro-choice movement responded by treating D&X as a measure of last resort, available only in the most readily justifiable abortions.¹⁵⁶ When Clinton vetoed the bill, several women who had terminated pregnancies because their children would have suffered from devastating fetal disorders joined him.¹⁵⁷ A strategy centered around disabilities, defects, and disorders would shape much of the rest of pro-choice strategy in the partial-birth abortion wars, especially outside of court. Whereas pro-life activists presented the ban as a modest effort to recognize the value of fetal life ignored by women who waited too long to terminate a pregnancy,¹⁵⁸ Kate Michelman, the leader of NARAL, maintained that Clinton had “chosen compassion and concern for families facing medical tragedies. . . .”¹⁵⁹

The partial-birth abortion struggle soon revolved around the legitimacy of all late-term abortions. Michelman defended abortions late in pregnancy by arguing that “late-term abortions are used to protect a woman’s health or life or because of grave fetal abnormality.”¹⁶⁰ Pro-lifers responded that all abortion decisions—including those late in pregnancy—came for frivolous reasons.¹⁶¹ The National Conference of Catholic Bishops ran an ad campaign arguing that women had partial birth abortions because they “w[ouldn]’t fit into [their] prom dress.”¹⁶² Although Clinton promised to sign a version of the bill with a health exception, Congress passed the ban without any such exception, and Clinton vetoed the bill again in the fall of 1997.¹⁶³

The central role of fetal defects in the partial-birth abortion wars prompted pro-choice leaders to take stock of the arguments used to defend abortion rights. In 1998, on the occasion of the twenty-fifth anniversary of the Supreme Court’s decision in *Roe*, NARAL hosted a strategy session about how to develop the strongest protections for abortion.¹⁶⁴ Participants focused on how the rise of pre-conception and pre-implantation genetic screening could help or hurt the cause of legal abortion. These technological shifts, as one participant put it, had

¹⁵⁴ Terence Hunt, *Clinton Kills Ban on Procedure Abortion Foes Vow Election-Year Battle*, MOBILE REGISTER, Apr. 11, 1996, at A1.

¹⁵⁵ John Leo, *Partial-Birth Abortions Take Debate Beyond Choice*, SEATTLE TIMES, Nov. 14, 1995, at B5.

¹⁵⁶ See *infra* notes 167 and 171 and accompanying text.

¹⁵⁷ Susan Page, *Late-Term Abortion Bill Vetoed*, USA TODAY, Apr. 11, 1996, at 1A.

¹⁵⁸ *Abortion Foes Rip Clinton*, *supra* note 14, at A1.

¹⁵⁹ *Id.*

¹⁶⁰ *Abortion Activist Has Trouble with the Truth*, WASH. TIMES, July 2, 1996, at A16.

¹⁶¹ Rivenburg, *supra* note 15, at 1.

¹⁶² *Id.*

¹⁶³ Alissa J. Rubin, *Bill to Ban Abortion Method Vetoed*, L.A. TIMES, Oct. 11, 1997, at 22.

¹⁶⁴ NARAL, *Roe v. Wade at 25*, *supra* note 148, at 1–3.

“invigorated the debate around private eugenics as opposed to government sponsored public eugenics.”¹⁶⁵ Another attendee noted: “Disability-rights people raised the question about whether aborting [a pregnancy] . . . demeans what it [means] to be a human being with a disability.”¹⁶⁶ By treating disability as nothing more than a justification for abortion, activists did not leave room for solutions that acknowledged the moral ambiguity of disability-based abortion.

Notwithstanding activists’ qualms about the disability politics of abortion, pro-choice groups continued relying on exceptions to partial-birth abortion bans involving severe fetal abnormalities.¹⁶⁷ After the election of George W. Bush in 2000, the pro-life movement believed that the passage of a ban on D&X had become inevitable.¹⁶⁸ In 2003, Congress once again debated the ban.¹⁶⁹ By the time Congress took up the issue, more than thirty states had banned D&X.¹⁷⁰ Opponents of the ban continued arguing that the law should, at a minimum, allow for abortion in cases of severe fetal abnormalities.¹⁷¹ President Bush signed the Partial-Birth Abortion Act of 2003 into law,¹⁷² but over the course of the following decade, abortion opponents would soon use disability-based arguments for their own purposes.

E. Pro-Life Activists Use Disability Politics to Restrict Abortion

Starting in the mid-2000s, abortion opponents began transforming the disability-based justifications many had used to defend abortion to demand new restrictions on access to the procedure. In 2004, conservative commentator Ramesh Ponneru criticized parents and providers for reflexively aborting disabled fetuses.¹⁷³ In 2009, in the *Human Life Review*, a major pro-life publication, activist

¹⁶⁵ *Id.* at 35.

¹⁶⁶ *Id.*

¹⁶⁷ Bill McAuliffe, *Third House Committee Passes Ban on Late-Term Abortion Procedure*, STAR TRIB., Mar. 20, 1999, at 3B.

¹⁶⁸ See, e.g., Alissa Rubin, ‘*Partial-Birth*’ Abortion Ban Won’t Be Easy to Deliver, L.A. TIMES, Mar. 18, 2001, at 34 (noting that President Bush declared that he would sign a partial-birth abortion ban into law during his presidential campaign); *House GOP Puts Rush on Bill to Ban Partial-Birth Abortions*, WASH. TIMES, July 10, 2002, at A6 (discussing how House Republicans placed the proposed ban of partial-birth abortion on the fast track).

¹⁶⁹ See, e.g., *Abortion Procedure Banned by Lawmakers*, L.A. TIMES, Oct. 26, 2003, at A4 (discussing congressional debates about partial-birth abortion ban); *Bush Signs Partial-Birth Abortion Ban*, WASH. TIMES, Nov. 5, 2003, at A1 [hereinafter *Partial-Birth Abortion Ban*] (discussing votes by House and Senate members in favor of the bill banning partial-birth abortion).

¹⁷⁰ *Partial-Birth Abortion: House OKs Ban*, CIN. INQUIRER, June 7, 2003, at B12.

¹⁷¹ See Susan Milligan, *Senate OK’s Ban on a Late-Term Form of Abortion*, BOS. GLOBE, Mar. 14, 2003, at A1.

¹⁷² See, e.g., *Partial-Birth Abortion Ban*, *supra* note 169, at A1 (“President Bush yesterday [November 4, 2003] signed into law a ban on partial-birth abortion . . .”).

¹⁷³ See Ramesh Ponnuru, *Weeding Out the Unfit*, 32 HUMAN LIFE REV. 2, 29 (2006).

and writer Mary Meehan wrote an article describing what she characterized as “the deep influence of eugenics . . . in encouraging prenatal testing and eugenic abortion.”¹⁷⁴ As Ponneru recognized, many Americans continued to favor access to abortion in cases of disability or defect.¹⁷⁵ If abortion opponents could convince Americans to oppose disability-based abortion, pro-lifers could turn a longstanding weapon available to pro-choice leaders into a political trap.

Gradually, abortion opponents began translating arguments against disability-based abortion into concrete legal prohibitions. In 2013, after Arizona passed a law banning abortions after twenty weeks, activists in the state questioned the constitutionality of the law.¹⁷⁶ In particular, physicians challenging the law argued that it would unnecessarily prevent women from pursuing abortions in cases of “severe or lethal fetal anomaly.”¹⁷⁷ A pro-life group, the Center for Bioethics, framed the pursuit of disability-based abortion as a reason to restrict abortion, even before the point of fetal viability.¹⁷⁸ Noting that most abortions after twenty weeks took place after the discovery of a defect or disability, the Center urged the Court to disavow disability-based abortions.¹⁷⁹ Nikolas Nikas of the Center reasoned: “Aborting children with disabilities is a form of discrimination that threatens to devalue the lives of people born and living with disabilities.”¹⁸⁰

In recent years, a disability-based strategy has continued to advance in pro-life circles. In 2013, in North Dakota, activists promoted a law that would outlaw abortion when a parent wanted to prevent the birth of a child with Down Syndrome or another disability.¹⁸¹ The disability ban passed, alongside more stringent restrictions that banned abortion as early as six weeks when a fetal heartbeat could be detected.¹⁸² Abortion providers in the state argued that the fetal-heartbeat law

¹⁷⁴ Mary Meehan, *Eugenics Triumphant in Prenatal Testing*, 35 HUMAN LIFE REV. 4, 87 (2009).

¹⁷⁵ See, e.g., *60 Percent of Americans Support Access to Abortion at 20 Weeks in Cases of Severe Fetal Abnormalities*, PLANNED PARENTHOOD (May 11, 2014), <http://www.plannedparenthood.org/about-us/newsroom/press-releases/new-poll-shows-americans-strongly-oppose-20-week-abortion-bans-when-they-understand-reality-of-the-issue> [<https://perma.cc/T8WZ-VRN6>] (stating that when voters are reminded that abortions are very rare after 20 weeks of pregnancy and that fetal abnormalities are often involved, 60 percent support access to abortion at 20 weeks).

¹⁷⁶ See *Disability Advocates Back Stricter Arizona Abortion Law*, LEG. MON. WORLDWIDE, Nov. 12, 2013, 2013 WLNR 28524073.

¹⁷⁷ *Id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ *Id.*

¹⁸¹ See *supra* note 149 and accompanying text.

¹⁸² See, e.g., Esme E. Deprez, *North Dakota Governor Signs Early Abortion Limit*, WINDSOR STAR (Mar. 27, 2013), <https://www.pressreader.com/canada/windsor-star/20130327/282273842818460> [<https://perma.cc/9GPQ-Y7N4>] (stating that the North Dakota Governor “signed a ban on abortions as early as six weeks into a pregnancy . . . mak[ing] it a felony to perform a non-emergency abortion after a fetal heartbeat can be detected”); Erik Eckholm, *Judge Blocks North Dakota Abortion Restrictions*, N.Y.

clearly outlawed a large fraction of pre-viability abortions and therefore constituted an undue burden under *Planned Parenthood v. Casey*.¹⁸³

Disability-based bans again took center stage in 2015. In January, Indiana state legislators considered a bill that would ban abortions performed because of an actual or potential physical or mental disability such as Down Syndrome.¹⁸⁴ Soon after, Texas legislators proposed an informed consent law designed to discourage abortion in cases of Down Syndrome.¹⁸⁵ In May, Ohio legislators began hearings on a law that would ban abortions pursued only because a fetus was diagnosed with Down Syndrome.¹⁸⁶ “Choosing to end a person’s life simply because of this diagnosis is discrimination, period,” explained Representative Sarah LaTourette, one of the chief sponsors of the law.¹⁸⁷ Bills in Ohio and Missouri are pending at the time of this writing, and the fate of the Indiana statute signed into law remains

TIMES (July 22, 2013), <http://www.nytimes.com/2013/07/23/us/judge-blocks-north-dakota-abortion-restrictions.html> [<https://perma.cc/DRD7-3L99>] (noting that with a few exceptions, the ban barred the procedure once a fetal heartbeat is detected, often about six weeks into pregnancy).

¹⁸³ See *MKB Mgmt. Corp. v. Burdick*, 954 F. Supp. 2d 900, 900 (D.N.D. 2014); *MKB Mgmt. Corp. v. Stenejehm*, 795 F.3d 768, 768 (8th Cir. 2015). In *Stenejehm*, the Court criticized the viability framework and suggested that *Roe* should be overruled but ultimately struck down the fetal-heartbeat ban under *Casey*. See *Stenejehm*, 795 F.3d at 778–90.

¹⁸⁴ See, e.g., Stephanie Wang, *Bill Would Ban Abortions for Fetal Disability or Gender*, USA TODAY (Jan. 13, 2015), <https://www.usatoday.com/story/news/politics/2015/01/13/bill-ban-abortions-fetal-disability-gender/21686853/> [<https://perma.cc/JVQ8-DPJW>] (citing a state senator’s proposal “to prohibit abortions if the provider knows the procedure is being sought because of the fetus’s gender or due to a genetic mental or physical disability such as Down syndrome”).

¹⁸⁵ See, e.g., Brittney Martin, *Bill to Provide Info About Down Syndrome to Prospective Parents Receives Pushback*, DALLAS MORNING NEWS (Apr. 15, 2015), <http://trailblazersblog.dallasnews.com/2015/04/bill-to-provide-info-about-down-syndrome-to-prospective-parents-receives-pushback.html/> [<https://perma.cc/2MKU-TQN5>] (describing a bill that requires health care providers and genetic counselors to provide information about “physical, developmental, educational and psychosocial outcomes, life expectancy, clinical course and intellectual and functional development for individuals with Down Syndrome” to prospective and new parents); Brittney Martin, *Abortion Opponents Push for New Clinic Signs, Parental Consent Rule*, DALLAS MORNING NEWS (Apr. 16, 2015), <https://www.dallasnews.com/news/texas/2015/04/15/abortion-opponents-push-for-new-clinic-signs-parental-consent-rule> [<https://perma.cc/PP3D-UQ53>] (last visited Sept. 28, 2015) (noting a proposal by Texas legislators that “would require health care providers to give certain information about Down syndrome to prospective parents”).

¹⁸⁶ See Marc Kovac, *Ohio Bill Would Ban Down Syndrome Abortions*, CINCINNATI ENQUIRER, May 8, 2015, at A22; *Down Syndrome Abortion Ban Voted Out of Committee with Bipartisan Support*, NAT’L RIGHT TO LIFE NEWS TODAY, Aug. 21, 2015, at 19; Editorial, *The Debate Over Abortion and Down Syndrome*, STAR LEDGER (Aug. 26, 2015), http://www.nj.com/opinion/index.ssf/2015/08/the_debate_over_abortion_and_down_syndrome_editori.html [<https://perma.cc/LD72-7A8F>].

¹⁸⁷ Kovac, *supra* note 186, at A22.

unclear following a federal court decision enjoining enforcement on constitutional grounds.¹⁸⁸ The AUL has drafted model legislation available to other states that want to follow suit.¹⁸⁹

As Part II shows, the kind of measure proposed in Ohio has both functional and constitutional flaws that make it unworkable. However, as the history of disability and abortion suggests, motive-based bans will still influence the law and politics of abortion even if those statutes are never enforced.

II. THE PROBLEM WITH DISABILITY-BASED ABORTION BANS

In 2013, North Dakota enacted House Bill 1305, which prohibits any provider from performing an abortion when she knows that the procedure is sought solely for purposes of sex selection or because the fetus has been diagnosed with a “genetic abnormality or a potential for a genetic abnormality.”¹⁹⁰ At present, the Ohio bill would prohibit a provider from performing, inducing, or attempting to perform an abortion if a woman “is seeking the abortion solely because of a test result . . . or a prenatal diagnosis of Down syndrome in an unborn child.”¹⁹¹ The AUL model legislation differs slightly from either statute. Like the North Dakota law, the Prenatal Nondiscrimination Act would outlaw sex selection and disability-based abortions.¹⁹² With respect to disability, the proposal would make it illegal for any provider to intentionally perform an abortion with the knowledge that a pregnant woman is seeking an abortion solely because a child has been diagnosed either with Down Syndrome, genetic abnormality, or a potential of either.¹⁹³

At least under current abortion doctrine, each proposal seems likely to fail the undue burden test set out in *Casey*. Even if the Court modifies the *Casey* framework, the bans currently proposed would do little to accomplish the goals of the activists and legislators who proposed such a strategy. This Part takes up each of these points in turn.

¹⁸⁸ On the pending bills in Ohio and Missouri, see, for example, David M. Perry, *Indiana Abortion Law Won't Help the Disabled*, USA TODAY (Mar. 26, 2016, 7:13 PM), <http://www.usatoday.com/story/opinion/2016/03/26/indiana-abortion-law-down-syndrome-disabled-column/82272912/> [<https://perma.cc/DP6L-XA9W>]. On the fate of the Indiana bill, see *supra* note 1 and accompanying text.

¹⁸⁹ See AM. UNITED FOR LIFE, PRENATAL NONDISCRIMINATION ACT: MODEL LEGISLATION & POLICY GUIDE FOR THE 2015 LEGISLATIVE YEAR (2014), http://www.aul.org/downloads/2015-Legislative-Guides/Abortion/Prenatal_Nondiscrimination_Act_-_2015_LG.pdf [hereinafter PRENATAL NONDISCRIMINATION ACT] [<https://perma.cc/F86Y-EL65>].

¹⁹⁰ N.D. CENT. CODE ANN. § 14-02.1-04.1 (West 2017).

¹⁹¹ H.B. 135, 131st Gen. Assemb., Reg. Sess. (Ohio 2016).

¹⁹² See *supra* notes 16 and 189 and accompanying text.

¹⁹³ See *id.*

A. *The Constitutional Flaws of Disability-Based Bans*

Under *Casey*, a state abortion regulation may not have the purpose or effect of creating a substantial obstacle to a woman's abortion decision.¹⁹⁴ While recognizing that the state has an interest in potential fetal life throughout a pregnancy, a regulation must be calculated to "inform the woman's free choice, not hinder it."¹⁹⁵ States have the power to create "a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn" or to introduce laws designed to "persuade [women] to choose childbirth over abortion."¹⁹⁶ *Casey* further upheld "truthful and non-misleading" laws involving informed consent, as well as parental involvement restrictions that provide a judicial bypass option for mature minors.¹⁹⁷

The first problem with disability-based abortion bans involves the viability principle upheld in *Casey*. In *Roe v. Wade*, the Supreme Court permitted states to advance an interest in protecting fetal life only after viability, the point at which a child can survive outside the womb.¹⁹⁸ While rejecting *Roe*'s trimester framework, the *Casey* Court reaffirmed the importance of viability as a dividing line.¹⁹⁹ In part, *Casey* relied on the importance of *stare decisis* in reaching a decision.²⁰⁰ Nevertheless, the *Casey* Court found merit in drawing the line at viability.²⁰¹ The majority explained that viability was the most workable boundary for abortion rights.²⁰² As importantly, the *Casey* Court concluded that drawing the line at viability was the fairest result.²⁰³ "In some broad sense," the Court explained, "it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."²⁰⁴

Disability-bans outlaw all abortions chosen for a particular reason, both pre- and post-viability. Would this create the kind of burden described in *Casey*? While the Court has decided only a handful of cases on abortion since 1992, the Justices' decision in *Gonzales v. Carhart*²⁰⁵ offers some guidance. *Carhart* first offers reason for skepticism about a challenge to disability bans under the *Casey* purpose prong. The Court identified three legislative purposes supporting the federal Partial-Birth Abortion Act under the *Casey* framework—the "coarsen[ing] of society to the humanity of not only newborns, but all vulnerable and innocent

¹⁹⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 885–88.

¹⁹⁷ *Id.* at 898–900.

¹⁹⁸ *See Roe v. Wade*, 410 U.S. 113, 159–64 (1973).

¹⁹⁹ *See Casey*, 505 U.S. at 860 ("Whenever it may occur, the attainment of viability may continue to serve as the critical fact.").

²⁰⁰ *See id.* at 860–62.

²⁰¹ *See id.* at 870–71.

²⁰² *See id.* at 870.

²⁰³ *See id.*

²⁰⁴ *Id.*

²⁰⁵ 550 U.S. 124 (2007).

human life,” the protection of the medical community and its reputation, and the prevention of post-abortion regret.²⁰⁶

Arguably, several of these purposes might support a disability-based ban. *Carhart* recognized a state interest in protecting all “vulnerable” life, a term that could be understood to include the disabled.²⁰⁷ The interest in protecting the integrity of the medical profession, as understood in *Carhart*, also arguably supports a disability-based ban. *Carhart* emphasized the importance of preserving the image of a profession tasked with saving life.²⁰⁸ Arguably, disability-based abortions would undermine that image. Of course, the *Carhart* Court put particular emphasis on the nature of D&X and its resemblance to infanticide.²⁰⁹ Disability-based abortions could take place at any point in pregnancy and would not necessarily invoke the kind of disgust expressed by the majority in *Carhart*.²¹⁰ Nevertheless, given the relatively generous reading of *Casey*’s purpose prong so far used by a majority, a disability ban may well survive *Casey*’s purpose analysis.

Casey’s effect prong may well prove more problematic for disability-based bans. *Carhart* is easily distinguishable from any case involving disability bans. The Partial-Birth Abortion Act did not prevent women from having an abortion. At most, the law ruled a particular procedure out of bounds. The effect analysis in *Carhart* turned on whether the law should fail because it lacked an explicit exception for women’s life or health.²¹¹ In the face of what the Court saw as scientific uncertainty, the majority held that a facial challenge to the Partial-Birth Abortion Act failed.²¹² By contrast, for women motivated by a particular diagnosis, disability-based bans make abortion of any kind impossible to access. *Casey* explains that “[w]hat is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.”²¹³ By outlawing abortion for any woman choosing the procedure for one particular reason, disability-based bans deprive women of the final say in a way that contravenes the principles set forth in *Casey*.

The other regulations considered by the *Casey* Court also differ significantly in their effect from a disability-based ban. This distinction becomes clear in comparing a disability-based ban to restrictions upheld in *Casey* and its progeny. The *Casey* Court first upheld an informed consent provision that forced a woman to consider certain information about the gestational age of the fetus, the law of

²⁰⁶ *Id.* at 157–59.

²⁰⁷ *See id.* at 157.

²⁰⁸ *See id.*

²⁰⁹ *See id.* at 156–57 (“The Act proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process.”).

²¹⁰ On the importance of disgust in *Carhart*, see Courtney Cahill, *Abortion and Disgust*, 49 HARV. C.R.-C.L. L. REV. 409, 415 (2013); Sonia M. Suter, *The “Repugnance” Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1517–20 (2008).

²¹¹ *See Carhart*, 550 U.S. at 165–69.

²¹² *See id.* at 167.

²¹³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

child support, and the details of the abortion procedure.²¹⁴ The Court upheld the requirement, explaining: “If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.”²¹⁵

Casey also upheld a 24-hour waiting period provision.²¹⁶ In analyzing this part of the challenged statute, the Court repeated findings made by the district court about the obstacles imposed by the waiting period: some women would have to make two visits to the doctor and incur additional expenses to do so; women would face potential harassment from antiabortion picketers on more than one occasion; and some women would have difficulty explaining repeated absences to employers or partners.²¹⁷ While describing some of these findings as “troubling,” the *Casey* Court distinguished the “increased costs and potential delays” created by the waiting period from the kind of obstacle that would constitute an undue burden.²¹⁸ At least on the record before the Court, *Casey* did not treat laws that made abortions more difficult for some women to obtain as undue burdens.²¹⁹

A disability-based ban, by contrast, makes abortion impossible to access at any point in pregnancy for women who pursue the procedure for a particular reason. *Casey* emphasizes the importance of allowing women to have the final say because of the consequences, both symbolic and concrete, of reproductive decisions.²²⁰ In practical terms, disability-based bans take these decisions away from women entirely. In symbolic terms, such a ban substitutes the state’s judgment about the reasons for terminating a pregnancy for a woman’s own. Because *Casey* confirms that a woman must be the final decision maker in any reproductive decision, disability-based bans are constitutionally problematic.

The *Casey* Court’s analysis of a spousal-notice provision reinforces this concern.²²¹ At the time of the litigation, Pennsylvania law prohibited any physician from performing an abortion, absent a medical emergency, if a woman did not certify in writing that she had informed her husband that she was terminating a pregnancy.²²² The law also created an exemption for a woman certifying in writing that she was pregnant as the result of spousal sexual assault, that her husband did not impregnate her, that she could not locate her husband, or that she feared death or serious injury if she did notify her husband.²²³

²¹⁴ *See id.* at 881.

²¹⁵ *Id.* at 882.

²¹⁶ *Id.* at 885–87.

²¹⁷ *See id.*

²¹⁸ *Id.* at 886.

²¹⁹ *See id.*

²²⁰ *See id.* at 879 (“[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”).

²²¹ *See id.* at 887–98.

²²² *See id.* at 887.

²²³ *See id.*

Notwithstanding these exemptions, the Court concluded that the law constituted an undue burden.²²⁴ Emphasizing the possibility of domestic violence, the Court explained:

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.²²⁵

In *Casey*, it was not dispositive that many women did not face the possibility of domestic violence.²²⁶ For those women who were in abusive relationships, the law created an insurmountable obstacle to abortion access. Similarly, in the context of disability-based abortion, many women may pursue abortion for other reasons. Nevertheless, for those women who do wish to terminate a pregnancy after a test for Down Syndrome or some other disability, access to abortion would be just as limited as it would if the state had outlawed abortion altogether.

The Supreme Court's recent decision in *Whole Woman's Health v. Hellerstedt*²²⁷ may cast even more doubt on the constitutionality of disability-based abortion bans. *Whole Woman's Health* involved a challenge to two Texas laws, a measure requiring abortion providers to have admitting privileges at a nearby hospital and a provision requiring clinics to comply with the regulations governing ambulatory surgical centers (ASCs).²²⁸ By a vote of 5 to 3, the Court struck down both provisions, concluding that *Casey* required courts to balance the benefits and costs of abortion restrictions and reasoning that states could not claim a benefit to women without substantial evidence backing their claims.²²⁹ *Whole Woman's Health* made the undue-burden test much more rigorous, making it less likely that any abortion regulation will survive in Court.²³⁰ Moreover, the decision signaled

²²⁴ *See id.* at 893–94.

²²⁵ *Id.*

²²⁶ *See id.*

²²⁷ 136 S. Ct. 2292, 2292 (2016).

²²⁸ For the admitted-privilege provision, see TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)(1) (West 2017); 25 TEX. ADMIN. CODE §§ 139.53(c)–56(a) (2017). For the ASC provision, see TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (West 2017); 25 TEX. ADMIN. CODE § 139.40 (2017).

²²⁹ *Whole Woman's Health*, 136 S. Ct. at 2310.

²³⁰ *See id.* For analysis of the decision's impact, see Erik Eckholm, *Anti-Abortion Group Presses Ahead Despite Recent Supreme Court Ruling*, N.Y. TIMES (July 9, 2016), <http://www.nytimes.com/2016/07/10/us/anti-abortion-group-supreme-court-ruling.html>

that the Court was not yet willing to retreat from *Casey*, suggesting that “nothing in *Roe*, *Casey*, or any other subsequent Supreme Court decisions suggests that a woman’s right to choose an abortion prior to viability can be restricted if exercised for a certain reason.”²³¹

At a minimum, pre-viability, disability-based bans seem constitutionally problematic. Pro-lifers in major social-movement organizations and state legislatures have introduced a variety of other laws that clearly seem unconstitutional under *Casey*, including the heartbeat law on the books in North Dakota. These laws represent an educated guess that the Supreme Court will undermine at least some of the protections that *Casey* creates. Even if this bet pays off, however, disability-based bans are unlikely to accomplish their goal.

B. Disability-Based Bans Are Difficult to Enforce

Even if disability-based bans were constitutional, there are obvious obstacles in the way of their enforcement. The North Dakota law and the AUL model law prohibit physicians from performing abortions motivated solely by fetal abnormality, whereas the Ohio law outlaws abortions performed at least partly because of a Down Syndrome diagnosis.²³² None of these proposals explain how physicians are to determine why a woman is requesting an abortion.²³³ One possibility is that physicians could learn of a test result from reviewing relevant medical records and presume that women will choose to abort after a diagnosis of Down Syndrome or some other fetal disability. However, this presumption does not hold up to close scrutiny. Some parents will (or will not) choose to terminate a pregnancy for a variety of reasons, ranging from moral convictions about abortion, religious beliefs about human life, and ideological positions on disability discrimination.

As a second possibility, providers could ask women why they pursued an abortion and take their patients at their word. Relying on such a strategy seems extremely naïve. Abortion providers—many of whom might be expected to disagree with the existence of a disability-based ban—might easily frame a question in such a way as to put women on notice about which grounds for

?_r=0 [https://perma.cc/2QDS-X34K]; Amanda Hollis-Brusky and Rachel VanSickle-Ward, *Here Are Two Ways that Breyer’s Wonky Opinion in Whole Woman’s Health Could Transform Abortion Politics*, WASH. POST (July 13, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/03/here-are-2-ways-that-breyers-wonky-opinion-in-whole-womens-health-could-transform-abortion-politics/ [https://perma.cc/2KGE-XE8B]; Deanna A. Rohlinger, *Turning the Anti-Abortion Tide*, THE AM. PROSPECT (July 5, 2016), http://prospect.org/article/turning-anti-abortion-tide [https://perma.cc/SR4F-JR8T].

²³¹ Planned Parenthood of Ind. & Ky. v. Commissioner, 194 F.Supp.3d 818, 830 (S.D. Ind. 2016).

²³² Compare N.D. CENT. CODE ANN. § 14-02.1-04.1 (West 2017), and PRENATAL NONDISCRIMINATION ACT, *supra* note 189, with H.B. 135, 131st Gen. Assemb., Reg. Sess. (Ohio 2015–16).

²³³ See *supra* note 230 and accompanying text.

abortion are permissible or tell a woman that only certain reasons for abortion are legally permissible. To be sure, providers have no obvious duty to ask under any of the proposals under consideration at the time of this writing. Moreover, women seeking an abortion have every reason to stay silent about their reasons for choosing to terminate. Women committed to ending a pregnancy will not reliably volunteer information that will prevent providers from performing a procedure.

Intent is notoriously difficult to prove, as the Court's jurisprudence under the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act makes clear.²³⁴ Absent an admission of what motivates a decision, courts may rely on circumstantial evidence that would discredit a permissible explanation of a particular action.²³⁵ In the Title VII context, for example, statistical evidence about an employer's failure to hire minorities may show a race-neutral explanation is pretextual.²³⁶ So too might comparator evidence—the differing treatment of a person who resembled a claimant in every way excluding her membership in a protected class.²³⁷ In the context of disability and abortion, it is hard to imagine what kind of circumstantial evidence might exist. For the most part, women seeking abortions are not repeat players, and physicians may lack the context or experience that would allow them to second-guess women's explanations of their own request.

Worried about the shortcomings of a strategy based on freedom from state interference, scholars have argued for reproductive justice, a more robust alternative that rejects the individualism in favor of recognition that “the ability of

²³⁴ See, e.g., David Kairys, *Unexplainable on Grounds Other Than Race*, 45 AM. U.L. REV. 729, 731 (1996) (describing the “near impenetrable brick wall” that minorities run into when bringing an equal protection claim); Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COL. L. REV. 387, 426–32 (1999) (acknowledging the Court's unwillingness to infer discriminatory intent, notwithstanding strong circumstantial evidence); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 295 (1997) (observing that even though discrimination claims are subject to a preponderance of the evidence standard of proof, the Court rarely invokes this standard, which is another reason why “discrimination is so difficult to prove”); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136 (1997) (noting that the “discriminatory purpose requirement now insulates many, if not most, forms of facially neutral state action”).

²³⁵ See, e.g., *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (explaining that under Title VII, “[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence” (citation omitted) (quotation marks omitted)).

²³⁶ See, e.g., Kingsley R. Browne, *Statistical Proof of Discrimination: Beyond “Damned Lies,”* 68 WASH. L. REV. 477, 479 (1993) (discussing how “statistical evidence plays a central role in demonstrating that an employer has engaged in a pattern or practice of intentional discrimination”).

²³⁷ See, e.g., Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 196–98 (2009) (suggesting the increasing importance of comparator evidence in Title VII cases).

any woman to determine her own reproductive destiny is linked directly to the conditions in her community—and these conditions are not just a matter of individual choice and access.”²³⁸ In the context of disability, however, mainstream pro-choice groups have not consistently learned the lesson offered by supporters of reproductive justice. Instead of explaining why women may terminate pregnancy in cases of disability and addressing the community conditions that make those decisions more likely, activists have often framed disabilities as nothing more than a logical reason for individual women to seek abortion.

The disconnect between reproductive justice and the disability politics of abortion matters. Abortion opponents leverage concern about disability and abortion in seeking a variety of restrictions, some of which may have more staying power than the bans now under consideration. In Congress and the states, pro-lifers have spotlighted concern about disability discrimination in pushing for bans on abortion after the twentieth week of pregnancy.²³⁹ Logically, abortion opponents could use the same reasoning to lobby for laws restricting access to prenatal and pre-implantation genetic testing, amniocentesis, and other diagnostic tools.²⁴⁰ With the spread of the Zika epidemic, more pregnant women may face the threat of severe fetal abnormalities caused by the virus, and abortion opponents may turn to strategies developed in the context of disability-based abortion bans.²⁴¹ In these contexts, disability arguments can create a credibility deficit for pro-choice activists focused on women’s ability to make every reproductive choice, including the decision to raise a child. By appealing to concern about discrimination, antiabortion arguments of this kind may win over ambivalent politicians and dampen the enthusiasm of those angry about abortion restrictions.

To address this danger, activists and lawyers should make disability rights a central part of pro-choice work. Protecting women’s ability to make reproductive decisions requires not only laws ensuring access to contraception, sex education, and abortion but also legal reforms that address the conditions encouraging parents to terminate pregnancies in cases of disability.

²³⁸ Loretta Ross, *What Is Reproductive Justice?*, in REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE 4, 4 (Pro-Choice Public Education Project ed. 2007), <http://www.protectchoice.org/downloads/Reeproductive%20Justice%20Briefing%20Book.pdf> [https://perma.cc/Q362-AC54].

²³⁹ See *infra* Part III.

²⁴⁰ See *infra* Part III.

²⁴¹ On the spread of Zika, see, for example, Donald McNeil Jr., *Predict Zika’s Spread? It’s Hard Enough to Count the Cases*, N.Y. TIMES (Sept. 19, 2016), https://www.nytimes.com/2016/09/20/health/zika-spread-predictions.html?_r=0 [https://perma.cc/5CKH-DQHQ]. On the influence of Zika on the politics of late-term abortion and disability-based abortion, see Samantha Allen, *Pro-Life Groups Back Marco Rubio: No Abortions for Zika-Infected Women*, DAILY BEAST (Aug. 8, 2016), <http://www.thedailybeast.com/articles/2016/08/08/pro-life-groups-back-marco-rubio-no-abortions-for-zika-infected-women> [https://perma.cc/SVZ9-VYJW]; Jennifer Haberkorn, *How Zika Could Change the Politics of Late Term Abortion*, POLITICO (Aug. 22, 2016), <http://www.politico.com/story/2016/08/zika-abortion-politics-227285> [https://perma.cc/BQ S4-YRTA].

III. REPRODUCTIVE JUSTICE AND DISABILITY

While disability-based bans may not be enforceable, they may well change the political conversation in ways that will make new restrictions on abortion more likely. This Part begins by exploring potential side effects of the new focus on disability and abortion. These side effects are both tangible and intangible. In ideological terms, the focus on disability exposes a possible disconnect between the treatment of disability by prominent pro-choice groups and a broader commitment to reproductive justice. More concretely, a focus on disability creates a potential credibility deficit that may smooth the way for new regulations of women's reproductive health. This Part examines possible solutions for the problem disability-based bans have created for supporters of legal abortion.

A. The Side Effects of Disability-Based Bans

Disability-based abortion bans like the one under consideration in Ohio likely will not prevent many disability-based abortions. That is not to say that these regulations will leave the abortion debate unchanged. The first issue involves the identity and message of those advocating for legal abortion. As this section shows, starting in the 1990s, leading commentators, lawyers, and activists deemphasized the language of choice, relying instead on a reproductive-justice framework. Beginning in the mid-1990s, as this section argues, women of color raised new questions about the rights framework that had long dominated the work of the pro-choice movement. In 1994, after returning from the Cairo Conference on International Population and Development, a caucus of African-American women took inspiration from the comprehensive vision of reproductive health set forth in international human rights law.²⁴² The 1994 Cairo Programme of Action had defined reproductive health as a human right, exposing the gap between pro-choice rhetoric at home and the bolder agenda promoted abroad.²⁴³ At a meeting of the Illinois Pro-Choice Alliance in Chicago, a group of African-American women coined the term reproductive justice to describe the vision they identified with

²⁴² See, e.g., Carole Joffe & Jennifer Reich, *Introduction: Reproduction and the Public Interest in Private Acts*, in *REPRODUCTION AND SOCIETY: INTERDISCIPLINARY READINGS* 239 (Carole Joffe & Jennifer Reich eds., 2015) (noting the successes and failures of the Cairo conference); Veronique Mottier, *Reproductive Rights*, in *THE OXFORD HANDBOOK OF GENDER AND POLITICS 2* (Georgina Waylen et al. eds., 2013), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199751457.001.0001/oxfordhb-9780199751457-e-8?print=pdf> [<https://perma.cc/97JK-4MD6>] (discussing the gap between “legal rights and the actual usage of such rights and links reproductive rights with social justice”).

²⁴³ See U.N. Population Information Network (POPIN), *Report on the International Conference on Population and Development, Cairo, 5–13 September 1994*, 9 U.N. Doc. A/CONF. 171/13 (Oct. 18, 1994).

international human rights law.²⁴⁴ The idea of reproductive justice wove in familiar attacks on the idea of choice, noting that poor and often non-white women lacked the support and resources to control their own reproductive lives.²⁴⁵ As Loretta Ross explained, choice-centered rhetoric “masked the ways that laws, policies and public officials punish or reward the reproductive activity of different groups of women differently.”²⁴⁶

The idea of reproductive justice reflected the work of established organizations like the National Black Women’s Health Project (founded in 1984) and the National Latina Health Organization (founded in 1986), many of which raised concerns about a choice-centered framework in the late 1980s and early 1990s.²⁴⁷ After the mid-1990s, new groups like the SisterSong Women of Color Reproductive Health Collective formed to champion the idea of reproductive justice.²⁴⁸ To be sure, the push for reproductive justice in the mid-1990s bore some fruit. Both NARAL and Planned Parenthood adopted broader reform agendas, and the National Organization of Women (NOW) made welfare rights a priority.²⁴⁹

After 2010, mainstream organizations themselves adopted the rhetoric and reasoning of reproductive justice. Beginning in 2011, frustrated at its inability to reach younger women, Planned Parenthood conducted polling and focus groups that revealed that a choice-centered message did not capture the range of issues, including health care, insurance coverage, pay equity, and birth control coverage, motivating many voters.²⁵⁰ In the 2014 election season, Planned Parenthood responded by setting aside the rhetoric of choice, searching for arguments that

²⁴⁴ See, e.g., JESSICA LEE ANN URBAN, *NATION, IMMIGRATION, AND ENVIRONMENTAL SECURITY* 19 (2008).

²⁴⁵ See Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 *YALE L.J.* 1394, 1425 (2009); Ross, *supra* note 238, at 4.

²⁴⁶ LORETTA ROSS, *UNDERSTANDING REPRODUCTIVE JUSTICE* 5 (May 2006), https://d3n8a8pro7vhm.cloudfront.net/irfp/pages/33/attachments/original/1456425809/Understanding_RJ_Sistersong.pdf?1456425809 [https://perma.cc/9RPC-CXTY].

²⁴⁷ See, e.g., RICKIE SOLINGER, *PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA* 247 (2005) (noting how these groups and others “stressed the need to break the silence surrounding the fact that reproductive capacity has been a site of exploitation, punishments, and other form of oppression”); URBAN, *supra* note 244, at 119.

²⁴⁸ See Jael Miriam Silliman et al., *Undivided Rights: Women of Color Organize for Reproductive Justice* 42 (2004); Mottier, *supra* note 242, at 3.

²⁴⁹ See Solinger, *supra* note 247, at 248.

²⁵⁰ See, e.g., Jackie Calmes, *Activists Shun “Pro-Choice” to Expand Message*, *N.Y. TIMES* (July 28, 2014), http://www.nytimes.com/2014/07/29/us/politics/advocates-shun-pro-choice-to-expand-message.html?_r=1 [https://perma.cc/U8ZF-7R4L] (discussing how the term pro-choice “does not reflect the range of women’s health and economic issues now being debated”); Dawn Laguens, *We’re Fighting for Access, Not Choice*, *HUFFINGTON POST* (July 30, 2014), http://www.huffingtonpost.com/dawn-laguens/were-fighting-for-access_b_5635999.html [https://perma.cc/PU5U-255V] (noting Planned Parenthood’s doubts about the capacity of the “pro-choice” label to fully represent the views of many women).

resonated with more women and opening the door to a more in-depth discussion of reproductive justice.²⁵¹

As early as 2004, NOW's national conference featured sessions on reproductive justice.²⁵² By 2014, the organization campaigned not only against abortion restrictions but also against limits on contraceptive access.²⁵³ As the organization's materials explained: "NOW affirms that reproductive rights are issues of life and death for women, not mere matters of choice."²⁵⁴

Nor has interest in reproductive justice been limited to grassroots activists and attorneys; scholars have also developed a rich theoretical framework to elaborate on the ideas and experiences of grassroots champions of reproductive justice.²⁵⁵ Defined by the work of legal commentators like Dorothy Roberts and Robin West and historians like Rickie Solinger, the new theory of reproductive justice makes a compelling case for a more comprehensive approach to reproductive health.²⁵⁶

In the context of assisted reproduction, a disability-rights critique has influenced scholars' approach to disability-based abortion and other reproductive issues.²⁵⁷ In the political arena, by contrast, disability-based arguments for abortion remain a visible and important part of debate. Why has this gap developed? From the beginning of the movement for abortion reform, disability-based justifications for abortion enjoyed significant public support. When pro-life activists seem to

²⁵¹ See Calmes, *supra* note 250 and accompanying text.

²⁵² See, e.g., 2004 NOW National Conference Resolutions, NAT'L NOW TIMES, Oct. 1, 2004, at 13 ("NOW's national platform provides a forum for women of color to support and organize for social, political, economic and reproductive justice.").

²⁵³ See, e.g., *Reproductive Rights and Justice*, NATIONAL ORGANIZATION FOR WOMEN, <http://now.org/issues/abortion-rights-reproductive-issues/> [<https://perma.cc/M2JV-DGFZ>] (discussing NOW's opposition to restrictions on abortion, birth control and emergency contraception).

²⁵⁴ *Id.*

²⁵⁵ See, e.g., DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997); JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT 1* (2003) (discussing debates surrounding reproductive rights); RICKIE SOLINGER, *BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES 3* (2001) (discussing viewpoints from various scholars); West, *supra* note 245, at 1425.

²⁵⁶ See *supra* notes 245, 247, and 255 and accompanying text.

²⁵⁷ For a sample of the scholarship on disability rights and reproduction, see ERIK PARENS ET AL., *THE HASTINGS CTR., THE DISABILITY RIGHTS CRITIQUE OF PRENATAL GENETIC TESTING: REFLECTIONS AND RECOMMENDATIONS S1* (1999), https://www.geneticsandsociety.org/downloads/parens-and-asch-disability-rights-critique_1.pdf [<https://perma.cc/3K94-8BPR>]; Samuel Bagenstos, *Disability, Life, Death, and Choice*, 29 HARV. J. L. & GENDER 425, 426–29 (2006); Janet Dolgin, *The Ideological Context of the Disability Rights Critique: Where Modernity and Tradition Meet*, 30 FLA. ST. U. L. REV. 343, 344–50 (2003); Jaime S. King, *And Genetic Testing for All: The Coming Revolution in Noninvasive Prenatal Testing*, 42 RUTGERS L.J. 599, 601–05 (2011); Vicki G. Norton, *Unnatural Selection: Nontherapeutic Preimplantation Genetic Screening and Proposed Regulation*, 41 UCLA L. REV. 1581, 1583 (1994).

have the upper hand, it is tempting to fall back on the “hard cases” that many Americans see as justification for abortion, including those involving fetal defects.²⁵⁸ However, as attitudes about disability shift, the short-term benefit gained by using these arguments contrasts sharply with their potential long-term costs.

First, by steering debate to disability-based abortions, pro-life politicians and activists can more effectively question the value of the reproductive-justice approach that mainstream pro-choice groups have started to embrace. A reproductive-justice framework calls on supporters of legal abortion to go “beyond a demand for privacy and respect for individual decision making to include the social supports necessary for our individual decisions to be optimally realized.”²⁵⁹ Relatedly, reproductive justice activists seek to rectify “the isolation of abortion from other social justice issues.”²⁶⁰ With respect to many reproductive-health issues, groups like NOW and NARAL have adopted some of the logic associated with a reproductive-justice framework.²⁶¹ This move has important legal and political consequences—allowing supporters of legal abortion to speak more effectively to the concerns of women of color, to build cross-movement alliances, and to develop a more comprehensive agenda.

Conventional disability-based justifications for abortion fit poorly in the reproductive-justice framework. First, presenting disability as an obvious reason to pursue abortion creates tensions between the pro-choice movement and potential allies in the disability-rights movement. As importantly, the use of disability as a justification for abortion stands in stark contrast to the reproductive-justice commitment to changing the conditions in which women make choices. A wide array of factors contributes to certain decisions about disability and abortion, including a lack of governmental assistance, ignorance about the prognosis for disabled children, and concern about the discrimination or stigma attached to disability. By simply falling back on the assumption that disability-based abortions are justifiable, pro-choice activists miss an important opportunity.

More concretely, the disability-based arguments refined in the fight for Down Syndrome bans have already contributed to the success of new abortion restrictions and will likely do the same in the future. In Congress and certain states, the antiabortion movement has committed to the introduction of bans on abortion after the 20th week of pregnancy.²⁶² Eleven states have already passed such a ban, as

²⁵⁸ On the use of the “hard cases” terminology, see CHRISTOPHER KACZOR, *THE ETHICS OF ABORTION: WOMEN’S RIGHTS, HUMAN LIFE, AND THE QUESTION OF JUSTICE* 187 (2015); JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 242 (1996); *BIOETHICS: A CULTURE WAR* 8–9 (Nicholas C. Lund-Molfese & Michael L. Kelly eds., 2004).

²⁵⁹ Ross, *supra* note 238, at 4.

²⁶⁰ *Id.*

²⁶¹ See *supra* notes 249, 254, and 258 and accompanying text.

²⁶² For analyses of twenty-week bans, see John A. Robertson, *Symposium: Science Challenges for Law and Policy: Science Disputes in Abortion Law*, 93 *TEX. L. REV.* 1849, 1869–73 (2015); Manian, *supra* note 2, at 84–86.

did the House of Representatives in January 2015.²⁶³ In demanding these bans, pro-life politicians and activists have highlighted the fact that a significant number of late-term abortions occur because of a diagnosis of fetal abnormality. Representative Cathy McMorris Rodgers (R-WA), one of the leading proponents of a twenty-week ban in the House, framed the bill partly as a remedy for disability discrimination, emphasizing the experience of her own son with Down Syndrome.²⁶⁴ In Ohio, activists connected a proposed 20-week ban with the Down Syndrome prohibition by emphasizing that many women who terminated a pregnancy after the first trimester did so because of a fetal abnormality.²⁶⁵

Assuming that the Court maintains viability as a dividing line, 20-week bans will likely be found to create an undue burden under *Casey*. Although the precise definition of viability is contested and fluid, a 20-week ban clearly would outlaw at least some pre-viability abortions.²⁶⁶ Even though *Whole Woman's Health* made the undue-burden test more meaningful, the Court went out of its way to emphasize that its decision did not conflict with *Carhart*, a decision that emphasized that D&X is performed late in pregnancy in justifying a federal ban on the procedure.²⁶⁷ In the near future, pro-life groups plan to target later term abortions, seeing these procedures as vulnerable notwithstanding the outcome of *Whole Woman's Health*.²⁶⁸ Effectively combatting 20-week bans will require a more nuanced response to the issue of disability and abortion. While affirming that women should have the ultimate decision about whether to terminate a pregnancy,

²⁶³ For an analysis of state laws on the subject, see ALAN F. GUTTMACHER & HARRIET F. PILPEL, GUTTMACHER INSTITUTE, STATE POLICIES ON LATER ABORTIONS (Sept. 1, 2015), <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortion> [https://perma.cc/3Y8G-KA78]. On the House bill, see Mike Debonis, *Senate Democrats Block GOP Bill Banning Late Abortions*, WASH. POST (Sept. 22, 2015), https://www.washingtonpost.com/news/powerpost/wp/2015/09/22/senate-democrats-block-gop-bill-banning-late-abortion/?utm_term=.cf1f03b28ced [https://perma.cc/AEQ2-7RAY]; *Senate Blocks Anti-Abortion Bill*, ST. LOUIS POST-DISPATCH, Sept. 23, 2015, at A4.

²⁶⁴ See, e.g., Alan Fram, *GOP Pushes Abortion Bill Through House After Earlier Stumble*, SEATTLE POST-INTELLIGENCER (Jan. 22, 2015), <http://newsok.com/after-stumble-gop-pushes-different-abortion-bill/article/feed/786763> [https://perma.cc/PK9N-S9LX] (discussing a bill that would tighten federal restrictions on abortion).

²⁶⁵ See, e.g., Editorial, *Ohio Legislators Sidetracked by Abortion Issues*, CLEVELAND PLAIN DEALER, July 4, 2011, at A7 (discussing bill that outlaws abortions if a fetal heartbeat can be detected); *Twenty Week Abortion Ban Clears Senate*, CLEVELAND PLAIN DEALER, June 25, 2015, at A1 (discussing legislation that would ban abortion after twenty weeks).

²⁶⁶ On the definition of viability, see Pam Belluck, *Premature Babies May Survive at 22 Weeks If Treated, Study Finds*, N.Y. TIMES (May 6, 2015), http://www.nytimes.com/2015/05/07/health/premature-babies-22-weeks-viability-study.html?_r=0 [https://perma.cc/UJ7M-KJFV].

²⁶⁷ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016).

²⁶⁸ See Eckholm, *supra* note 230.

those fighting 20-week bans should explore solutions that would make abortions on the basis of disability less likely.

The new focus on disability and abortion may also fuel new regulation of prenatal testing. As Jaime Staples King has argued, limiting access to prenatal diagnostic tools may accomplish what disability-based bans could not—limiting the number of disability-based abortions.²⁶⁹ As is often the case with assisted reproduction and other new technologies, it is far from clear how the courts would resolve constitutional questions about restrictions on access to noninvasive prenatal genetic diagnosis.²⁷⁰ Politically, it will be difficult for supporters of reproductive justice to fend off restrictions on these technologies by continuing to reflexively treat disability as a reason for abortion. The disability-rights movement and its allies have complicated discussion of the issue in a way that would make the arguments often used in the abortion dialogue a strategic liability.

What would a better response to the new disability-based bans involve? The following section of this Article considers several proposals that should be incorporated into a reproductive-justice agenda.

B. Disability Discrimination and the Preconditions for Reproductive Choice

By definition, a reproductive-justice agenda includes an effort to change the conditions that push women to make some choices while putting others out of reach. What are some of those conditions in the context of disability? To be sure, the disability-rights movement has already changed the legal climate in significant ways.²⁷¹ Nevertheless, significant barriers remain that might influence potential parents considering abortion. Notwithstanding the introduction of the ADA, only one in five disabled Americans is employed.²⁷² The poverty rate for disabled Americans continues to be far higher than other groups, rising to roughly 32% in 2013 when only 11% of Americans without a work limitation fell below the poverty line.²⁷³ Knowing that disabled children may struggle to live independently, potential parents may hesitate to bring a pregnancy to term.

To change the conditions in which women consider the issue of disability, supporters of reproductive justice should call for adequate support of disabled children and adults under the Supplemental Security Income (SSI)²⁷⁴ and Social

²⁶⁹ See King, *supra* note 2, at 26–51.

²⁷⁰ See generally *id.* at 43–51 (arguing that states may try to prevent prenatal genetic testing and concluding that “the Fourteenth Amendment should protect the ability to decide to have a prenatal genetic test.”).

²⁷¹ See *supra* note 147 and accompanying text.

²⁷² See, e.g., Pam Fessler, *Why Disability and Poverty Still Go Hand in Hand 25 Years After Landmark Law*, NPR (July 23, 2015), <http://www.npr.org/sections/health-shots/2015/07/23/424990474/why-disability-and-poverty-still-go-hand-in-hand-25-years-after-landmark-law> [<https://perma.cc/XZ4R-8YQH>] (discussing employment rates for disabled persons).

²⁷³ See *id.*

²⁷⁴ See 42 U.S.C.A. § 1382 (West 2017).

Security Disability Insurance (SSDI) programs.²⁷⁵ At present, disabled children under age 18 may receive SSI benefits, whereas adults with a disability that began before age 22 may receive SSDI benefits.²⁷⁶ At a time when structural and cultural barriers limit the employment opportunities of disabled Americans, a reproductive-justice agenda should involve calls for adequate annual funding under both programs, as well as under Medicaid. Parents deciding about disability and abortion would have a more meaningful choice if they knew that the government would provide more meaningful financial support.

A reproductive-justice agenda should also include a commitment to removing some of the barriers that deny employment and financial security to disabled individuals with the capacity to work. The ADA already prohibits disability discrimination and mandates the reasonable accommodation of disability in the workplace.²⁷⁷ The Individuals with Disabilities Education Act requires that the government provide all disabled children a “free appropriate public education.”²⁷⁸ More recently, the Workforce Innovation and Opportunity Act provides expanded access to training, education, and vocational rehabilitation for disabled individuals transitioning from school to work.²⁷⁹ Finally, Congress acted in 2014 to pass the Achieving Better Life Experience Act (ABLE Act), which allows disabled individuals to save up to \$14,000 in a tax-free account without jeopardizing existing federal benefits.²⁸⁰

However, the causes of unemployment and poverty among the disabled are far more complex. Some of the obstacles to employment for disabled Americans stem from the inadequate funding of existing programs. Because of inadequate funding for transportation initiatives like the Section 5310 transportation for elderly persons and persons with disabilities program,²⁸¹ many disabled Americans face multi-hour commutes that prevent some individuals from taking certain jobs.²⁸² Disabled workers may have to take medical leave more often than their counterparts without a work limitation. Although the federal Family Medical Leave Act (FMLA) allows for 3 months of unpaid leave for qualifying workers, not all disabled workers are covered by the Act, including those employed at

²⁷⁵ See 42 U.S.C.A. § 423 (West 2017).

²⁷⁶ See *supra* notes 274–275 and accompanying text.

²⁷⁷ See 42 U.S.C.A. §§ 12101–12213 (West 2017).

²⁷⁸ 20 U.S.C.A. § 1400 (West 2017).

²⁷⁹ See Workforce Innovation and Opportunity Act, Pub. L. No. 113-128, 128 Stat. 1425 (2014).

²⁸⁰ See Stephen Beck Jr., Achieving a Better Life Experience Act of 2014, § 103 of Pub. L. No. 113-295, 128 Stat. 4056 (2014).

²⁸¹ See 49 U.S.C.A. § 5310 (West 2017).

²⁸² See, e.g., Fessler, *supra* note 272 (discussing how disabled persons’ daily transportation can be delayed).

smaller businesses or in part-time positions.²⁸³ Even those covered by the FMLA may not be able to afford to take unpaid leave.²⁸⁴

A program of paid medical leave or a dramatic increase in transportation funding may seem politically impossible at the time of this writing. Moreover, employers refrain from hiring disabled individuals partly because of the perceived added costs of doing so, including the price of accommodations mandated by the ADA and FMLA.²⁸⁵ Adding a paid leave requirement might deter more employers from hiring disabled workers in the first place.

At a minimum, even if more ambitious reforms seem out of reach, a reproductive-justice agenda should include reasonable legislative steps that will make it easier for disabled workers who can achieve economic independence to do so. First, notwithstanding the introduction of the ABLE Act, other federal programs discourage the kind of saving that helps workers climb out of poverty. For example, under SSI, recipients have a \$2,000 resource or asset limit for eligible individuals and a \$3,000 limit for couples.²⁸⁶ Since 1972, when Congress first introduced the SSI program, the asset limitation has not kept up with inflation—estimates of an adjusted asset limit would be more than four times higher than those that currently apply.²⁸⁷ At present, disabled individuals face a perverse incentive—any additional income or resources above the asset limit may jeopardize the receipt of SSI benefits. Supporters of reproductive justice should join other groups asking for an updating of SSI limits that will allow for more saving and investment by disabled individuals without penalty.

Similarly, many disabled workers require attendant services to achieve independence at home and at work. Most personal insurance policies do not cover these services. For those who do not qualify for Medicaid, attendant services and employment may be out of reach. Section 201 of the Ticket to Work and Workplace Incentive Act creates a state-based, optional Medicaid buy-in program for disabled individuals who would not otherwise be eligible for Medicaid, and a

²⁸³ For the text of the Family Medical Leave Act, see 29 U.S.C.A. §§ 2601–19, 2631–54 (West 2017); 5 U.S.C.A. §§ 6381–87 (West 2017).

²⁸⁴ See Fessler, *supra* note 272.

²⁸⁵ See, e.g., John J. Donohue III, *Understanding the Reasons for and Impact of Legislatively Mandated Benefits for Selected Workers*, 53 STAN. L. REV. 897, 909 (2001) (noting that the ADA “will impose burdens on employers that they will seek to avoid by reducing their employment of the disabled . . .”); Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 273–82 (2001) (discussing challenges that employers face when hiring disabled persons).

²⁸⁶ See Fact Sheet, *2015 Social Security Changes*, SOCIAL SEC. ADMIN. (2015), <https://www.ssa.gov/news/press/factsheets/colafacts2015.html> [https://perma.cc/8JWP-8VBA].

²⁸⁷ See Center on Budget and Policy Priorities, *Introduction to the Supplemental Social Security Income (SSI) Program* (Feb. 27, 2014), <http://www.cbpp.org/sites/default/files/atoms/files/1-10-11socsec.pdf> [https://perma.cc/A65L-3U4P].

similar buy-in program operates under the Balanced Budget Act of 1997.²⁸⁸ At present, 46 states and the District of Columbia administer a Medicaid buy-in (MBI) program.²⁸⁹

In practice, however, many states apply strict eligibility limits and limit available services in a way that make buy-in programs useless to certain disabled workers. In Texas, for example, disabled workers cannot make more than \$2,475 per month to qualify for a buy-in program.²⁹⁰ The program does not cover attendant services that some workers need to pursue meaningful employment.²⁹¹ A reproductive-justice agenda should include the campaign for a federal MBI law that would set minimum service and eligibility requirements to create meaningful access to needed services.

Finally, a reproductive-justice agenda should include an effort to continue to remove the stigma that discourages employers from hiring disabled adults and decreases the odds that parents will bring a pregnancy to term in cases of disability. In economic terms, because of concerns that workers are not up to the task or worry that accommodations will cost too much, employers still seem reluctant to hire adults with disabilities. As Samuel Bagenstos has argued, the stigma surrounding disability stems from “the legacy of a history of exclusion and reflects a series of broader ideological developments.”²⁹² The argumentative strategy used by supporters of legal abortion should not rely on the stigma surrounding disability. Instead, in explaining the reasons some parents choose abortion in cases of disability, supporters of reproductive justice should do more to challenge the inaccurate and politically charged stereotypes surrounding disability.

IV. CONCLUSION

While the disability politics of abortion seem to be a new feature of the political terrain, the issue has a long history that shapes the legal opportunities available today to those on either side of the abortion debate. Starting in the 1960s, a diagnosis of fetal disability has served as a core justification for access to legal abortion. Activists used disability first as an exception to sweeping bans on the intentional termination of pregnancy. Over time, as demand for the repeal of all

²⁸⁸ See Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106–170, 113 Stat. 1860 (1999); Balanced Budget Act of 1997, Pub. L. No. 105–33, 111 Stat. 251 (1997).

²⁸⁹ See *Medicaid Employment Incentives*, MEDICAID.GOV, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Delivery-Systems/Grant-Programs/Employment-Initiatives.html> [<https://perma.cc/8Y8S-XCUU>].

²⁹⁰ *MEPD, M-5000, Income*, TEX. DEP’T OF HEALTH & HUMAN SERVS., <https://hhs.texas.gov/laws-regulations/handbooks/medicaid-elderly-people-disabilities-handbook/chapter-m-medicaid-buy-program/mepd-m-5000-income> [<https://perma.cc/49N3-YUB9>].

²⁹¹ See *id.*

²⁹² Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 444 (2000).

abortion restrictions intensified, arguments about fetal disability played a central role in efforts to counter the impact of new arguments raised by the pro-life movement.

After *Roe*, while pro-life activists raised concern about a slippery slope that would threaten all disabled, elderly, and dependent Americans, pro-choice activists continued turning to disability-based justifications when defending controversial policies, including access to late-term abortion. Recently, as the disability-rights movement has built political influence, pro-life activists have put more emphasis on the issue of discrimination against the handicapped. Abortion opponents use these arguments to justify motive-based abortion bans as well as prohibitions on late-term abortions.

This history helps explain a strange disconnect between the disability politics of abortion and a broader reproductive justice agenda. Because disability-based justifications consistently enjoyed popular support, pro-choice activists in the political arena strategically deploy such arguments when access to reproductive health services comes under fire.

Increasingly, these short-term gains will come at a substantial cost. The disability-based bans considered in Ohio and Indiana may not themselves make a significant difference to abortion access. Constitutionally dubious and unenforceable in practical terms, these bans will not do much to stop the abortions targeted by statute. Nevertheless, the disability-discrimination arguments made in support of such bans may resonate with legal and political audiences not usually receptive to antiabortion rhetoric. Such claims have already fueled the push for bans on abortion after the 20th week of pregnancy and may serve in new campaigns to limit access to noninvasive prenatal diagnostic technologies or to ban abortion following a Zika diagnosis.

To avoid these political traps, a meaningful reproductive-justice approach should play down justifications for abortion based on disability. Instead, those supporting access to legal abortion should take on some of the legal obstacles that make it harder for parents to choose to bear and raise disabled children. Tackling these obstacles, and encouraging legislators and judges to be more attentive to them, can create a disability politics of abortion that accords with the value supposedly endorsed by those on either side of the abortion question—the goal of expanding equal treatment for those traditionally left behind in American politics.