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### Disability and Reproductive Justice

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#### Recommended Citation

Bagenstos, Samuel. "Disability and Reproductive Justice." *Harv. L. & Pol'y Rev.* 14, no. 2 (2020): 273-92.

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# Disability and Reproductive Justice

Samuel R. Bagenstos\*

*In the spring of 2019, disability and abortion rights collided at the Supreme Court in a case involving an Indiana ban on “disability-selective abortions.” In a lengthy concurrence in the denial of certiorari, Justice Thomas argued that the ban was constitutional because it “promote[s] a State’s compelling interest in preventing abortion from becoming a tool of modern-day eugenics.” Just a few months earlier, disability and reproductive rights issues had intersected in a very different way in the debate over the nomination of Brett Kavanaugh to the Supreme Court. Disability rights advocates drew attention to an opinion then-Judge Kavanaugh had written upholding government decisions to require individuals with intellectual disabilities to have abortions.*

*Debate over disability and reproductive rights has typically focused on the issues raised by Justice Thomas’s opinion. This Article argues that any full assessment of the intersection between disability and reproductive rights must also address the issues raised by then-Judge Kavanaugh’s opinion. Disabled people are frequently denied their own rights to conceive, bear, and parent children. Indeed, the practices that continue to prevent people with disabilities from having and raising children are in many ways the disability analogues of the race-based eugenic practices that Justice Thomas himself decried. Consideration of insights drawn from the disability rights movement and the reproductive justice movement suggests that both Justice Thomas and then-Judge Kavanaugh gave the wrong answers on the questions before them.*

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## INTRODUCTION

Since at least the 1960s, public debate over abortion rights has frequently turned to issues of disability. Those who argue for the liberalization of abortion laws have often been successful by raising the specter of fetal disability—whether caused by Thalidomide, or rubella, or otherwise.<sup>1</sup> Those who agitate for restricting or banning abortion, by contrast, have often argued that pro-choice advocates devalue the lives of people with disabilities.<sup>2</sup>

In the spring of 2019, disability and abortion rights collided at the Supreme Court. Indiana had adopted a law “barring the knowing provision of

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\* Frank G. Millard Professor of Law, University of Michigan Law School. Thanks to the *Harvard Law & Policy Review* for inviting me to contribute to the symposium on the “Politics of Pregnancy” and for providing incisive editorial suggestions. Thanks to Leah Litman, Harry Bagenstos, and (as always) Margo Schlanger for helpful comments.

<sup>1</sup> See Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, 29 HARV. J.L. & GENDER 425, 437–38 (2006); Mary Ziegler, *The Disability Politics of Abortion*, 2017 UTAH L. REV. 587, 590, 595, 610 (2017).

<sup>2</sup> See Bagenstos, *supra* note 1, at 438; Ziegler, *supra* note 1, at 600, 612.

sex-, race-, or disability-selective abortions by abortion providers.”<sup>3</sup> The Seventh Circuit invalidated that law.<sup>4</sup> In *Box v. Planned Parenthood of Indiana & Kentucky*,<sup>5</sup> the Supreme Court denied certiorari (though it summarily reversed the Seventh Circuit’s invalidation of a separate Indiana law regulating the disposal of fetal remains).<sup>6</sup> Justice Thomas concurred in the denial of certiorari, but he filed a lengthy separate opinion arguing that the ban on selective abortions was constitutional.<sup>7</sup> He argued that “this law and other laws like it promote a state’s compelling interest in preventing abortion from becoming a tool of modern-day eugenics.”<sup>8</sup> He thus gave rhetorical support to the efforts of antiabortion activists to create an opposition between disability rights and reproductive rights.

Justice Thomas argued that birth control and abortion had been understood during the early twentieth century Eugenics Era as tools for preventing reproduction among a group known as “the unfit.”<sup>9</sup> Although he noted that eugenicists’ understandings of “fitness” had a strong racial and ethnic component, Justice Thomas also emphasized the bias against individuals with disabilities: “A typical list of dysgenic individuals would also include some combination of the ‘feeble-minded,’ ‘insane,’ ‘criminalistic,’ ‘deformed,’ ‘crippled,’ ‘epileptic,’ ‘inebriate,’ ‘diseased,’ ‘blind,’ ‘deaf,’ and ‘dependent (including orphans and paupers).’”<sup>10</sup> And he argued that eugenics was not merely in the past, but that today “a growing body of evidence suggests that eugenic goals are already being realized through abortion.”<sup>11</sup> He pointed, in particular, to extremely high reported rates of abortion for fetuses diagnosed with Down syndrome.<sup>12</sup>

Just a few months earlier, disability and reproductive rights issues had intersected in a very different way in the debate over the nomination of Brett Kavanaugh to the Supreme Court. Disability rights advocates drew attention to an opinion then-Judge Kavanaugh had written in a case in which individ-

<sup>3</sup> *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1781 (2019) (per curiam).

<sup>4</sup> See *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 888 F.3d 300, 310 (7th Cir. 2018).

<sup>5</sup> 139 S. Ct. 1780 (2019) (per curiam).

<sup>6</sup> *Id.* at 1781–82.

<sup>7</sup> See *id.* at 1782 (Thomas, J., concurring).

<sup>8</sup> *Id.* at 1783.

<sup>9</sup> *Id.* at 1784.

<sup>10</sup> *Id.* at 1786 (quoting ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* 139 (2016)).

<sup>11</sup> *Id.* at 1787.

<sup>12</sup> See *id.* at 1790–91 (“In Iceland, the abortion rate for children diagnosed with Down syndrome in utero approaches 100%. Other European countries have similarly high rates, and the rate in the United States is approximately two-thirds” (citations omitted)). Critics have argued that the Iceland 100 percent statistic is misleading, because the denominator is those parents who chose to undergo prenatal testing and whose fetuses tested positive for Down syndrome. With a testing rate of eighty to eighty-five percent, many children with Down syndrome continue to be born in Iceland (though, presumably, many fewer than would be born in the absence of prenatal testing). See Alex Kasprak, *Has Iceland Eliminated Down Syndrome Through Abortion?*, SNOPEs (Aug. 15, 2017), <https://www.snopes.com/fact-check/iceland-eliminated-syndrome-abortion/> [<https://perma.cc/3Y9T-LXP4>].

uals with developmental disabilities challenged a District of Columbia policy that denied them the right to make decisions about their medical care.<sup>13</sup> The case was *Doe ex rel. Tarlow v. District of Columbia*.<sup>14</sup> The D.C. Circuit reversed a district court decision enjoining that policy.<sup>15</sup> Rejecting the plaintiffs' due process claim, then-Judge Kavanaugh explained that "accepting the wishes of patients who lack (and have always lacked) the mental capacity to make medical decisions does not make logical sense and would cause erroneous medical decisions—with harmful or even deadly consequences to intellectually disabled persons."<sup>16</sup>

Judge Kavanaugh's opinion did not say anything specifically about reproductive rights. He treated the case entirely as one about the (lack of a) right of incompetent persons to consent to medical treatment. But the case itself was very much a reproductive rights case. Two of the three plaintiffs had been forced to have abortions without their consent; they sued precisely to challenge the policy that had taken away their power to choose.<sup>17</sup> Although Kavanaugh had a reputation as a strong "pro-life" judge,<sup>18</sup> here he voted to uphold government decisions to require individuals with intellectual disabilities to have abortions. Both disability rights and reproductive rights advocates sought to rally opposition to Kavanaugh around what they characterized as his denial of self-determination and reproductive choice to disabled people,<sup>19</sup> but the issue did not gain the salience of other controversies surrounding his nomination.

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<sup>13</sup> The article that first raised the issue was Hannah Leibson & Rebecca Cokley, *Kavanaugh Thinks It's Okay to Perform Elective Surgery on People Without Their Consent*, TALKPOVERTY (Aug. 8, 2018), <https://talkpoverty.org/2018/08/09/kavanaugh-thinks-okay-perform-elective-surgery-people-without-consent/> [<https://perma.cc/893A-XEGP>].

<sup>14</sup> 489 F.3d 376 (D.C. Cir. 2007).

<sup>15</sup> See *id.* at 384.

<sup>16</sup> *Id.* at 382.

<sup>17</sup> See *Doe I through III v. District of Columbia*, 232 F.R.D. 18, 20 (D.D.C. 2005) ("In 1984, allegedly without either consulting with Jane Doe I's legal representative or obtaining substituted judgment from a court, District officials gave their consent to have Jane Doe I's pregnancy aborted."), *rev'd in part and vacated in part*, 489 F.3d 376 (D.C. Cir. 2007); *id.* ("Jane Doe III became pregnant in 1978 and, according to plaintiffs, decided to carry the pregnancy to term. District officials, however, allegedly decided that she should have an abortion and gave their consent for the procedure without consulting with Jane Doe III's legal representative and without obtaining substituted judgment from a court.")

<sup>18</sup> See Ed Kilgore, *Anti-Abortion Activists Have No Doubts About Kavanaugh*, NEW YORK: INTELLIGENCER (July 20, 2018), <http://nymag.com/intelligencer/2018/07/anti-abortion-activists-are-sure-about-kavanaugh-to-scotus.html?gtm=top> [<https://perma.cc/C3ZZ-9XPY>]. Judge Kavanaugh's reputation rested in part on his high-profile dissenting opinion in *Garza v. Hargan*, 874 F.3d 735, 752 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting), *cert. granted and judgment vacated*, 138 S. Ct. 1790 (2018).

<sup>19</sup> See Amanda Marcotte, *Brett Kavanaugh's Disturbing Abortion History: He Ruled Against Women Who Were Forced to Abort*, SALON (Aug. 20, 2018, 10:00 AM), <https://www.salon.com/2018/08/20/brett-kavanaugh-disturbing-abortion-history-he-ruled-against-women-who-endured-forced-abortions/> [<https://perma.cc/5ETL-TBLF>]; S.E. Smith, *Brett Kavanaugh's 'Forced Abortion' Decision Is About Far More Than Reproductive Rights*, REWIRE.NEWS (Aug. 28, 2018, 2:11 PM), <https://rewire.news/article/2018/08/28/brett-kavanaughs-forced-abortion-decision-is-about-far-more-than-reproductive-rights/> [<https://perma.cc/LQZ2-2F5Z>].

Debate over disability and reproductive rights has typically focused on the issues raised by Justice Thomas's opinion in *Box*—whether fetal disability is an acceptable reason for terminating a pregnancy, and what the law should do about it. Those are important questions. But any full assessment of the intersection between disability and reproductive rights must also address the issues raised by then-Judge Kavanaugh's opinion in *Doë*. Disabled people are frequently denied their own rights to conceive, bear, and parent children, whether through forced sterilization or abortion, the denial of assisted reproduction, or the denial of parental rights once their children are born. Some of these practices—notably forced sterilization—are emblematic of the Eugenics Era. But they are not confined to the past. Indeed, the practices that prevent people with disabilities from having and raising children—practices like the law Kavanaugh upheld in *Doë*—are in many ways the disability analogues of the race-based eugenic practices that Justice Thomas himself decried in his *Box* opinion.

When Justice Thomas and others seek to weaponize disability rights against abortion, they distort or disregard the full history of eugenics. They thus paint a misleading picture of the disability-based threats to reproductive rights. And they also, I will argue, misapprehend key aspects of disability rights ideology.

In this Article, I offer a fuller consideration of the intersection of disability and reproductive rights. I do so by considering the legal and societal treatment of fetuses and children with disabilities alongside the legal and societal treatment of parents with disabilities. And I do so by bringing to bear insights drawn from two distinct social movements: the disability rights movement and the reproductive justice movement. These movements have different constituencies and histories, but I will argue that they offer complementary insights into these issues. When those insights are considered together, they suggest that people with disabilities have more to fear from a regime that denies them reproductive rights than from one in which women's reproductive choices are respected. And these insights suggest that we must focus on the context surrounding the making of reproductive decisions as much as on formal restrictions on the choices women may make.<sup>20</sup>

I argue that, taken together, the disability rights and reproductive justice perspectives offer substantial purchase on the questions raised by Justice Thomas in his *Box* concurrence. They suggest, I will argue, that those questions are serious indeed, but that Thomas gave the wrong answer to them.

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<sup>20</sup> For earlier suggestions that the disability rights and reproductive justice movements can be complementary, see Seema Mohapatra, *Law in the Time of Zika: Disability Rights and Reproductive Justice Collide*, 84 BROOK. L. REV. 325, 343 (2019); Dorothy Roberts & Sujatha Jesudason, *Movement Intersectionality: The Case of Race, Gender, Disability, and Genetic Technologies*, 10 DU BOIS REV. 313, 317 (2013); Dorothy Roberts, *Reproductive Justice, Not Just Rights*, DISSENT, Fall 2015. Mary Ziegler has made a thoughtful and well-supported argument that a reproductive justice approach can help to reconcile the tensions between disability rights and pro-choice advocates, though she focuses exclusively on issues involving disabled fetuses and children. See generally Ziegler, *supra* note 1. My analysis of those issues overlaps substantially with Ziegler's, though I also address issues involving potential parents with disabilities.

These perspectives also suggest that any effort to address the intersection of disability and reproductive rights needs to address the questions raised by then-Judge Kavanaugh's *Doe* opinion—and that Kavanaugh, too, gave the wrong answer.

I should note one important caveat: I do not mean to say that the answers I offer are the *only* ones one we can derive from looking at these questions through disability rights and reproductive justice lenses. Given the diversity within these social movements, I am sure that some movement participants would disagree with important aspects of my argument.<sup>21</sup> But I do think these lenses offer an important perspective on the problem, and I believe my argument is consistent with the key principles articulated by activists in both the disability rights and the reproductive justice movements.

## I. THE DISABILITY RIGHTS AND REPRODUCTIVE JUSTICE MOVEMENTS

To set the stage for my discussion below, I begin with a brief overview of the relevant insights I draw from the disability rights and reproductive justice movements. This overview necessarily proceeds at a high level of abstraction, and it passes over a lot that is interesting—but not as relevant for present purposes—about these movements. Nonetheless, some general consideration of disability rights and reproductive justice is necessary to ground the arguments I will make below.

The American disability rights movement is large and diverse. As with any social movement, its ranks include people who take a range of different positions on questions of goals, strategies, and tactics.<sup>22</sup> But there are two basic principles on which the overwhelming majority of U.S. disability rights advocates would agree. The first is an opposition to paternalism, and a concomitant belief that people with disabilities should make decisions for themselves rather than being subject to the choices of nondisabled parents, professionals, or other do-gooders.<sup>23</sup> The second is what has come to be

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<sup>21</sup> Some participants in the disability rights movement, for example, would agree with Justice Thomas that states should be permitted to ban disability-selective abortion. See, e.g., Marsha Saxton, *Why Members of the Disability Community Oppose Prenatal Diagnosis and Selective Abortion*, in *PRENATAL TESTING AND DISABILITY RIGHTS* 147 (Erik Parens & Adrienne Asch eds., 2000).

<sup>22</sup> See SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 12 (2009).

<sup>23</sup> See, e.g., JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT* 3 (1998) (“Control has universal appeal for DRM [disability rights movement] activists because the needs of people with disabilities and the potential for meeting these needs are everywhere conditioned by a dependency born of powerlessness, poverty, degradation, and institutionalization. This dependency, saturated with paternalism, begins with the onset of disability and continues until death.”); Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 *WM. & MARY L. REV.* 921, 1011–12 (2003) (“Although there were many differences among these groups [that came together in the disability rights movement], all sought to make their own decisions concerning their lives, with all the risks that would entail. All sought freedom from professionals and welfare bureaucracies

known as the “social model” of disability—the notion that disability is not a condition that is inherent to the disabled person, but is instead one that results from the interaction between a person’s physical or mental attributes and the contingent social decisions that make particular opportunities or environments incompatible with those attributes.<sup>24</sup> “Rather than providing charity or public assistance—an approach that both stigmatizes its recipients and leaves the disabling aspects of the environment in place—most disability rights activists insist that society as a whole has a responsibility to eliminate the social and physical structures that deny people with ‘disabilities’ access to opportunities and thereby create ‘disability.’”<sup>25</sup>

The term “reproductive justice” was “conceived in 1994 by feminists of color to conceptualize reproductive rights struggles embedded in social justice organizing that simultaneously challenged racism and classism, among other oppressions.”<sup>26</sup> Loretta Ross, one of the key participants in the movement, says that “[t]he Reproductive Justice framework analyzes how the ability of 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.”<sup>27</sup>

Reproductive justice approaches thus broaden the frame beyond narrow pro-choice advocacy in two ways. First, they look not just to the moment of choice but also to the broader social, legal, and institutional structures in which people make reproductive decisions.<sup>28</sup> Second, they focus on aspects of reproductive freedom that go beyond the question whether to terminate a pregnancy.<sup>29</sup> The reproductive justice framework “includes not only a woman’s right not to have a child, but also the right to have children and to

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that paternalistically made decisions for them.”); Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 795 (2007) (“[P]aternalism has historically been one of the most significant contributors to the disadvantage people with disabilities experience. Non-disabled parents, teachers, doctors, rehabilitation counselors, employers, and others have arrogated to themselves the prerogative to decide what is best for people with disabilities. In so doing, they have deprived people with disabilities of opportunities to work and participate in the community. They have denied people with disabilities the autonomy that consists in making one’s own choices. And they have denied people with disabilities the dignity of risk—the opportunity to develop their skills, test them in the world, and succeed or fail according to their talents.” (footnotes omitted) (internal quotation marks omitted)).

<sup>24</sup> See, e.g., Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 428–29 (2000).

<sup>25</sup> *Id.* at 430 (footnote omitted).

<sup>26</sup> Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327, 328 (2013).

<sup>27</sup> Loretta Ross, *What is Reproductive Justice?*, in REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE 4, 4 (2007).

<sup>28</sup> See *id.* (“Moving 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, this framework also includes obligations from our government for protecting women’s human rights. Our options for making choices have to be safe, affordable and accessible, three minimal cornerstones of government support for all individual life decisions.”).

<sup>29</sup> See, e.g., Roberts, *supra* note 20, at 79 (contrasting the reproductive justice movement with the “mainstream movement for reproductive rights” in this regard).

raise them with dignity in safe, healthy, and supportive environments.”<sup>30</sup> And it looks comprehensively to the “many kinds of laws [that] shape the conditions in which women conceive and bear children.”<sup>31</sup> In all of these aspects, reproductive justice advocates employ a self-consciously intersectional analysis that attends to the “political context of intersecting race, gender, and class oppressions.”<sup>32</sup> Reproductive justice thus takes the approach Dorothy Roberts advocated in her book *Killing the Black Body*:

Reproductive liberty must encompass more than the protection of an individual woman’s choice to end her pregnancy. It must encompass the full range of procreative activities, including the ability to bear a child, and it must acknowledge that we make reproductive decisions within a social context, including inequalities of wealth and power. *Reproductive freedom is a matter of social justice, not individual choice.*<sup>33</sup>

Although the disability rights and reproductive justice perspectives are not identical, they share important affinities. Both perspectives look beyond individual acts and choices to the social structures in which those acts and choices take place. Both focus on justice for marginalized or devalued groups. And just as the disability rights movement organized in response to harmful systems of paternalism toward people with disabilities—including, notably, eugenics-inspired policies that sterilized thousands of disabled Americans—the reproductive justice movement was itself significantly a response to the paternalism of those who would force particular reproductive choices on women of color.<sup>34</sup> These overlapping histories and insights provide the basis for the argument I will make in the rest of this Article.

## II. THE *BOX* QUESTION: BEARING AND RAISING DISABLED CHILDREN

How might an approach informed by the disability rights and reproductive justice perspectives help us think through the issues raised by the concurring opinion in *Box*? Such an approach, I will argue, suggests that

<sup>30</sup> *Id.*; see also Luna & Luker, *supra* note 26, at 343 (“[R]eproductive justice is equally about the right to not have children, the right to have children, the right to parent with dignity, and the means to achieve these rights.”).

<sup>31</sup> Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—and Why It Matters in Law and Politics*, 93 IND. L.J. 207, 210 (2018).

<sup>32</sup> Roberts, *supra* note 20, at 79. The *locus classicus* of the concept of intersectionality is Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. For an excellent recent review of intersectionality scholarship, see Devon W. Carbado et al., *Intersectionality: Mapping the Movements of a Theory*, 10 DU BOIS REV. 303 (2013).

<sup>33</sup> DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 6 (1997).

<sup>34</sup> See generally *id.* (detailing the history of paternalistic control of African Americans’ reproduction).

Justice Thomas identified a real problem, but that he endorsed the wrong solution to it.

First, both perspectives should lead us to take seriously the concerns Justice Thomas raises in *Box*. Indeed, disability rights activists have for many years argued that women are unduly pressured to abort disabled fetuses. Those activists have done so in terms that resonate strongly with arguments that reproductive justice adherents have deployed to oppose pressures placed on the reproductive choices of women of color.

Although it is tempting to think that invoking disability is just an opportunistic ploy to justify a rollback of abortion rights,<sup>35</sup> the arguments in Justice Thomas's opinion resonate strongly with an important line of thinking that has emerged from the American disability rights movement. In a very large fraction of cases, women who find fetal defects in prenatal testing do decide to have abortions.<sup>36</sup> Disability rights activists have argued "that prenatal testing followed by selective abortion is morally problematic, and that it is driven by misinformation."<sup>37</sup>

They contend that selective abortion is morally problematic because it "reflects a view that life with a disability is not worth living."<sup>38</sup> And they argue that if selective abortion succeeds in reducing the number of disabled people who are born—what some call "the eugenicist's dream of eliminating disabilities"<sup>39</sup>—it will increase disability prejudice by reducing the opportunities for intergroup contact and diminishing the constituency for rights protections.<sup>40</sup>

Disability rights advocates argue that selective abortion is driven by misinformation because medical professionals provide women with misleading information and pressure them to choose abortions.<sup>41</sup> "Despite the professional commitment to non-directiveness in genetic counseling," the late Adrienne Asch wrote, "it is clear that many professionals do not practice in a way that legitimates the choice to maintain a pregnancy of a fetus affected by a disabling trait."<sup>42</sup> "Too often, disability rights advocates contend, the advice

<sup>35</sup> See, e.g., S.E. Smith, *Disabled People Are Tired of Being a Talking Point in the Abortion Debate*, VOX (May 29, 2019 4:10 PM), <https://www.vox.com/first-person/2019/5/29/18644320/abortion-ban-2019-selective-abortion-ban-disability> [<https://perma.cc/9KVN-5DD3>] ("Using disability to sneak past an abortion ban or put abortion advocates in an uncomfortable position is a brilliant tactic, and one advocates must not fall for.")

<sup>36</sup> See Bagenstos, *supra* note 1, at 438–39. For a suggestion that the estimates of 90 percent abortion rates, like those offered by Justice Thomas, are likely overblown, see Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1416 n.183.

<sup>37</sup> Erik Parens & Adrienne Asch, *The Disability Rights Critique of Prenatal Genetic Testing: Reflections and Recommendations*, in *PRENATAL TESTING AND DISABILITY RIGHTS* 3, 13 (Erik Parens & Adrienne Asch eds., 2000).

<sup>38</sup> Bagenstos, *supra* note 1, at 439.

<sup>39</sup> Edward J. Larson, *The Meaning of Human Gene Testing for Disability Rights*, 70 U. CIN. L. REV. 913, 932 (2002).

<sup>40</sup> See Bagenstos, *supra* note 1, at 439.

<sup>41</sup> See Bagenstos, *supra* note 1, at 440–41.

<sup>42</sup> Adrienne Asch, *Disability Equality and Prenatal Testing: Contradictory or Compatible?*, 30 FLA. ST. U. L. REV. 315, 334 (2003).

pregnant women receive after discovering a fetal disability focuses on (often unduly) negative predictions about short life expectancies and extensive medical needs rather than on the ways children with disabilities ‘can participate in the life of family, school and community.’<sup>43</sup> In part, this advice stems from the negative views health professionals hold about the quality of life with a disability.<sup>44</sup> These disability rights arguments parallel reproductive justice advocates’ critique of a “privacy” or “choice” framework for abortion rights. As we have seen, those who take a reproductive justice perspective find that individualized framework insufficient in part because it fails to appreciate the many constraints beyond state regulation that keep women from making truly free choices.<sup>45</sup>

So, the issue raised by Justice Thomas is a serious one. And the connection he draws with the eugenics movement is one that disability rights activists themselves have drawn. That connection also resonates in significant ways with arguments that reproductive justice advocates have made. The question is whether his proposed solution—banning disability-selective abortion—is the right one.

Viewing the issue through a reproductive justice lens can help us to work through the answer to this question. As we have seen, the reproductive justice approach seeks to widen the frame beyond the moment of choosing an abortion to look more broadly at the context in which that choice is made. When we widen the frame in this way, we can see a number of solutions short of banning selective abortion that might address the problem raised by Justice Thomas.

As Mary Ziegler notes, “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

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<sup>43</sup> Bagenstos, *supra* note 1, at 440 (quoting Asch, *supra* note 42, at 335).

<sup>44</sup> See Carol J. Gill, *Health Professionals, Disability, and Assisted Suicide: An Examination of Relevant Empirical Evidence and Reply to Batavia* (2000), 6 PSYCHOL. PUB. POLY & L. 526, 530 (2000) (“[H]ealth professionals significantly underestimate the quality of life of persons with disabilities compared with the actual assessments made by people with disabilities themselves. In fact, the gap between health professionals and people with disabilities in evaluating life with disability is consistent and stunning.”); Tom Shakespeare et al., *Disability and the Training of Health Professionals*, 374 LANCET 1815, 1815 (2009) (“Evidence is mixed on the impact of education on medical students’ attitudes towards disability. Professional training can lead to an erosion of empathy and growth in cynicism. Some studies have found that medical students have more negative attitudes to disability than the general norm, whereas others trace improvements during the course of medical education. Many courses of instruction medicalise disability, fail to take a holistic view of health, and ignore the human rights of people with disabilities. As a result, most students are sympathetic and display concern but have negative views about the experience of living with disability.”).

<sup>45</sup> See *supra* notes 22–34 and accompanying text. Their arguments in this regard draw from and overlap with those of feminist critics of the privacy or choice framework. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 93–102 (1987); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1415–16 (2009).

adults, such as poverty and unemployment.”<sup>46</sup> One way we might “actually reduce the odds of disability-based abortions” then, is to expand services and protections for people with disabilities in the world.<sup>47</sup> “Guaranteeing meaningful choices,” Ziegler contends, “inevitably involves the removal of the discrimination and tangible obstacles that make abortion more common in cases of fetal defect or disability.”<sup>48</sup> She thus argues that reproductive justice requires expansion of work supports for disabled people, the elimination of work disincentives in the Social Security Disability Insurance and Supplemental Security Income programs, and “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.”<sup>49</sup>

People considering whether to have a disabled child might not be looking so far into the future, though. They might be concerned with whether they will receive the supports necessary to help their children flourish. The Individuals with Disabilities Education Act (IDEA) has, since 1975, promised children with disabilities a free appropriate public education in the least restrictive environment.<sup>50</sup> But Congress has never appropriated funds that would come close to fully funding the federal government’s share of the cost of implementing that law.<sup>51</sup> The IDEA’s effectiveness has also been limited by other policy developments—notably the rise of charter schools, where disability rights compliance is uncertain at best.<sup>52</sup> And Medicaid, which provides key services for many disabled children, is constantly at risk of cuts.<sup>53</sup>

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<sup>46</sup> Ziegler, *supra* note 1, at 589. For a discussion of the policy gaps that remove supports for disabled individuals just as they reach adulthood, see Samuel R. Bagenstos, *The Disability Cliff*, DEMOCRACY, Winter 2015, at 55. Dov Fox and Christopher Griffin find that the birth rates of babies with Down syndrome significantly decreased after adoption of the ADA, and they hypothesize that “the ADA paradoxically might have promoted disability-selective abortion if social interactions reinforced negative attitudes toward people with disabilities or if the media portrayed people with disabilities as incurring undesirable costs for society.” Dov Fox & Christopher L. Griffin, Jr., *Disability-Selective Abortion and the Americans with Disabilities Act*, 2009 UTAH L. REV. 845, 893 (2009).

<sup>47</sup> Ziegler, *supra* note 1, at 589.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 627–30.

<sup>50</sup> See 20 U.S.C. §§ 1400–1487 (2012).

<sup>51</sup> See Kim Dancy, *Fully Funding IDEA: A Democratic Dream or Just an Empty Promise?*, NEW AMERICA (Mar. 23, 2016), <https://www.newamerica.org/education-policy/edcentral/fully-funding-idea/> [<https://perma.cc/HAU9-MK45>] (noting that the law specifies that the federal government will pay for forty percent of the costs of the IDEA, but that it in fact pays for about sixteen percent).

<sup>52</sup> See Deborah Pergament, *What Does Choice Really Mean?: Prenatal Testing, Disability, and Special Education Without Illusions*, 23 HEALTH MATRIX 55, 115 (2013) (arguing that “access to public education services is dependent on a parent’s ability to navigate the increasingly fragmented system of public resources or reliance on the private resources of family and marketplace, if available,” that “[a]ccess to private resources may also require the willingness to waive meaningful legal protections under the IDEA and other civil rights statutes,” and that this is a crucial context for women’s decisions about whether to continue a pregnancy after prenatal testing identifies a defect).

<sup>53</sup> See, e.g., Stephanie Armour, *Medicaid Standoff: Trump Plan to Tighten Oversight of States Draws Objections*, WALL ST. J., Feb. 15, 2020, <https://www.wsj.com/articles/medicaid-standoff-trump-plan-to-tighten-oversight-of-states-draws-objections-11581771601> [<https://>

Entrenching full funding for the IDEA and for the services and supports provided to children with disabilities by Medicaid would be consistent with a reproductive justice approach. So would efforts to ensure paid family leave, respite services, and other supports for the caregivers of disabled children.<sup>54</sup>

Those sorts of societal and policy interventions would help to change the broader context in which individuals make decisions about disability-selective abortions. But, as we have seen, disability rights critics of prenatal testing have focused as well on a different aspect of the context of these decisions—alleged misinformation and coercion by medical professionals.<sup>55</sup> It would be consistent with both a reproductive justice and a disability rights approach to respond directly to that misinformation and coercion by ensuring that individuals receive accurate information about life with a disability.<sup>56</sup> Elizabeth Emens, for example, proposes that “prospective parents awaiting prenatal testing results could be given access to resources on living with a disability or with a disabled child, in terms of the experience of disability, or the changes in the laws and resources available to people with relevant disabilities.”<sup>57</sup> These resources might include “[i]nformational video or audio recordings,” “[a]ccess to engaging movies and literature related to relevant disabilities, or the recent flourishing in disability arts,” and “resources for connecting with and learning from families with children with relevant disabilities, as well as adults with those disabilities.”<sup>58</sup> Seema Mohapatra suggests a similar effort to educate individuals who are pregnant with fetuses that might be affected by the Zika virus.<sup>59</sup>

Laws in a number of states encourage medical professionals to provide pregnant women with information that might counteract negative stereotypes about fetal and childhood disability.<sup>60</sup> For example, a Pennsylvania law requires doctors who diagnose a fetus with Down syndrome to provide the pregnant woman with information about the positive life prospects of people with that condition, as well as connections to support services.<sup>61</sup> Some repro-

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perma.cc/26JH-AXQA] (“The Trump administration has previously invited states to change the open-ended funding of Medicaid to limited block grants for some enrollees. A just-released White House budget proposal would cut Medicaid spending by about \$920 billion over the next decade. Plans are also under way to increase oversight of how states verify that enrollees in the program are eligible for the services.”).

<sup>54</sup> See Pasquale Toscano & Alexis Doyle, *Legal Abortion Isn't the Problem to be Solved*, ATLANTIC (June 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/selective-abortion-bans-treat-disability-tragedy/592000/> [<https://perma.cc/A9LV-SNMMN>].

<sup>55</sup> See *supra* notes 41–45 and accompanying text.

<sup>56</sup> See Mohapatra, *supra* note 20, at 362 (arguing that “[l]egislation of this nature can build bridges between reproductive rights and disability rights in the medical counseling arena”); see generally Rachel Rebouché & Karen Rothenberg, *Mixed Messages: The Intersection of Prenatal Genetic Testing and Abortion*, 55 How. L.J. 983, 1014 (2012) (“The response to the confusion or anxiety resulting from testing, now and with future advances, is to call for clear and full communication of evidence-based information to patients.”).

<sup>57</sup> Emens, *supra* note 36, at 1417.

<sup>58</sup> *Id.*

<sup>59</sup> See Mohapatra, *supra* note 20, at 365–66.

<sup>60</sup> See *id.* at 360–63.

<sup>61</sup> See *id.* at 360–61.

ductive justice advocates might object to these sorts of efforts. Deborah Pergament, for example, argues that, without a significant increase in the public commitment to provide services to disabled children, these efforts “may actually present an unrealistic and unattainable—or even coercive—picture of the choice to parent a child with a disability.”<sup>62</sup> Arthur Caplan argues that requiring genetic counselors to provide “deliberately positive” information about life with a disability will “overturn[ ] the long-standing foundational ethical norm of genetic testing and counseling—neutrality in the provision of information.”<sup>63</sup>

And, of course, outside of the disability context “informed consent” requirements for abortion often are imposed precisely because they place obstacles in the way of women having abortions—and their advocates often justify them as an effort to overcome social coercion that leads to “unwanted” abortions.<sup>64</sup> Abortion rights advocates are therefore justifiably wary of opening the door to endorsing them. Erwin Chemerinsky and Michele Goodwin, for example, argue that “[t]he state must adopt a position of neutrality” and “may not involve itself in the choice of whether or not to have an abortion,” for doing so “den[ies] a woman the right to make an autonomous decision.”<sup>65</sup> They argue that “informed consent” requirements violate this principle of neutrality.<sup>66</sup>

But there is no neutral here. If medical professionals and prospective parents have an unduly negative understanding of life with a disability, driven by widespread societal stereotypes, then their decisions will be driven by bias unless the state steps in to counteract those stereotypes. The pro-“neutrality” argument rests on a public/private distinction of the type that has been criticized by feminist fellow-travelers of the reproductive justice movement.<sup>67</sup> Once we accept that private as well as governmental pressures can be coercive, we face the “classic Legal Realist problem” that the principle of free choice alone cannot tell us what sorts of regulation are permissible.<sup>68</sup>

The “reproductive justice approach,” which encourages an affirmative government role “in ensuring that all women have the social, political, and economic power and resources to make the best decisions for themselves and their families,”<sup>69</sup> might well lead one to support carefully tailored informed

<sup>62</sup> Pergament, *supra* note 52, at 84.

<sup>63</sup> Arthur L. Caplan, *Chloe's Law: A Powerful Legislative Movement Challenging a Core Ethical Norm of Genetic Testing*, 13 PLOS BIOLOGY 1, 3 (2015).

<sup>64</sup> For a good discussion, see Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1712–33 (2008).

<sup>65</sup> Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1242 (2017).

<sup>66</sup> See *id.* at 1245–46.

<sup>67</sup> See West, *supra* note 45, at 1415–16.

<sup>68</sup> Bagenstos, *supra* note 1, at 426.

<sup>69</sup> Sujatha Jesudason & Julia Epstein, Editorial, *The Paradox of Disability in Abortion Debates: Bringing the Pro-Choice and Disability Rights Communities Together*, 84 CONTRACEPTION 541, 542 (2011).

choice requirements here to overcome inaccurate societal stereotypes. Sujatha Jesudason and Julia Epstein, for example, argue:

In the context of a prenatal diagnosis of disability, [reproductive justice] means ensuring that women have the most accurate and comprehensive information possible, including realistic perspectives from individuals with the disability in question. A woman in this situation requires access to abortion services in a timely manner if she decides to terminate her pregnancy, and the supports necessary to sustain her family if she decides to carry the pregnancy to term.<sup>70</sup>

Jesudason and Epstein's position is persuasive—at least where the information requirements are tailored to ensure that they do not impose a particular burden on a woman's ultimate choice.<sup>71</sup> In line with the general reproductive justice approach, Jesudason and Epstein consider the choice to have an abortion in a broader social and policy context. They focus on ensuring that pregnant individuals have accurate information in making the choice, and on ensuring full social supports for whatever choice is made. In the end, though, they leave the choice whether to terminate a pregnancy with the woman. They thus come to a very different conclusion on that question than does Justice Thomas.

Most, though not all, disability rights advocates seem to agree with that position.<sup>72</sup> If selective abortion has such negative consequences for disabled people, though, why don't they seek to ban the practice?<sup>73</sup> One answer looks to a core principle articulated by participants in the disability rights movement.<sup>74</sup> One of the key targets of that movement was the paternalistic control of disabled people's bodies by nondisabled people.<sup>75</sup> Reproduction was often—and continues to be—a key site of that paternalistic control.<sup>76</sup> Just as “regulating Black women's reproductive decisions has been a central aspect of racial oppression in America,”<sup>77</sup> regulating disabled people's reproductive decisions has been a central aspect of disability oppression in America. And that has led many disability rights activists to take a strongly pro-choice

<sup>70</sup> *Id.*

<sup>71</sup> Elizabeth Emens suggests, for example, that everyone who undergoes prenatal testing should receive information about living with a disability *before* they receive their test results. See Emens, *supra* note 36, at 1416–17. Because that information would be provided well before an individual sought an abortion, it would not place any particular obstacle in the way of exercising the choice.

<sup>72</sup> See Bagenstos, *supra* note 1, at 441 n.85.

<sup>73</sup> Cf. John F. Muller, *Disability, Ambivalence, and the Law*, 37 AM. J.L. & MED. 469, 488 (2011) (noting this seeming incongruity and suggesting that it reflects a broader ambivalence toward disability).

<sup>74</sup> For a good expression of the argument, see Rebecca Cokley, *The Anti-Abortion Bill You Aren't Hearing About*, REWIRE NEWS (May 20, 2019, 11:10 AM), <https://rewire.news/article/2019/05/20/the-anti-abortion-bill-you-arent-hearing-about/> [<https://perma.cc/B4BM-AXSK>].

<sup>75</sup> See *supra* note 23 and accompanying text.

<sup>76</sup> See *infra* notes 83–102 and accompanying text.

<sup>77</sup> ROBERTS, *supra* note 33, at 6.

stance. For them, a law seeking to deny women the right to make their own reproductive choices—even with full information—feels disturbingly similar to the laws and practices that have sought to deny disabled people the right to make their own reproductive choices.<sup>78</sup> Just as many reproductive justice advocates “acknowledge the justice of ensuring equal access to birth control for poor and minority women without denying the injustice of imposing birth control as a means of reducing their fertility,”<sup>79</sup> many disability rights advocates strongly defend a woman’s ultimate right to choose without denying the ways in which those choices have sometimes been exercised unjustly.

Consistent with their position, and that of many reproductive justice activists, I contend that changing the context in which potential parents make reproductive choices is a far better approach than denying them the power to choose in the final instance. In part, that is because it is possible to intervene to counteract disablist stereotypes while ensuring that women retain the power to choose. In part, that is because prohibitions of selective abortion would authorize the penal authorities to examine a woman’s reasons for choosing abortion in virtually every case, which would impose a massive chilling effect on the exercise of the abortion right.<sup>80</sup>

Of course, this position will not satisfy those who oppose abortion—or disability-selective abortion—in every case. But if one takes seriously the anti-paternalistic principles articulated by both the disability rights and the reproductive justice movements, one should be very wary of a position that denies the ultimate choice to pregnant women. A position that creates a fair context for making choices is far preferable. Justice Thomas is thus correct to be concerned about selective abortion, but he is wrong to support a ban as a remedy. A ban will broadly harm women’s autonomy, without changing the context that devalues people with disabilities and encourages discrimination in a variety of settings.

### III. THE *DOE* QUESTION: DISABLED PARENTS

In his *Box* concurrence, Justice Thomas invoked the history of eugenics to justify a law prohibiting selective abortion. But the eugenic practices he invoked—including forced sterilization, the denial of the right to marry, and compulsory abortions for disabled parents<sup>81</sup>—are much better exemplified by the policy then-Judge Kavanaugh upheld in the *Doe* case. Recall that the *Doe* policy denied people with developmental disabilities the right to make choices about their medical care; under that policy, two of the plaintiffs were

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<sup>78</sup> See Cokley, *supra* note 74.

<sup>79</sup> ROBERTS, *supra* note 33, at 56–57.

<sup>80</sup> See Fox & Griffin, *supra* note 46, at 894 (arguing that “attempts to criminalize disability-selective abortion could authorize easily abused inquiries into the legitimate reasons that women have for seeking abortions”).

<sup>81</sup> See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1786 (2019) (Thomas, J., concurring) (discussing forced sterilization and the denial of the right to marry); *id.* at 1789 (discussing forced abortion).

forced to have abortions.<sup>82</sup> Eugenic Era practices were similarly carried out by violently denying the reproductive rights of disabled people. The legacy of those practices remains today—with too little legal recourse available, and too little public attention afforded to the issue. As I argue in this part, any consideration of disability and reproductive rights must consider people with disabilities as parents, not just as fetuses. In doing so, we must recognize the legacy of eugenics in the treatment of parents and potential parents with disabilities, applying reproductive justice and disability rights principles to rectify that harmful legacy.

As Robyn Powell recently wrote, the eugenic impulse has been instantiated in different ways over time—beginning with “[f]orced sterilizations” during the Eugenics Era; then, as “compulsory sterilizations lessened,” morphing into “restrictions on marriage”; and now often being “manifested through discriminatory child welfare practices that presume unfitness.”<sup>83</sup> But the constant has been a refusal to treat disabled individuals as proper parents.<sup>84</sup>

Most legal readers are familiar with the forced sterilization laws of the eugenics period. The Supreme Court legitimated those laws in its infamous *Buck v. Bell*<sup>85</sup> decision in 1927. *Buck* upheld a Virginia sterilization law.<sup>86</sup> Justice Holmes’s brief opinion for the Court fully endorsed the Eugenics Era’s harmful stereotypes about people with mental disabilities: that they “sap the strength of the State;”<sup>87</sup> that they might not even be able to perceive the harm caused them by being sterilized;<sup>88</sup> and that allowing disabled people to reproduce would lead to society “being swamped with incompe-

<sup>82</sup> See *supra* notes 13–17 and accompanying text.

<sup>83</sup> Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 127, 130 (2016); see also Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL’Y 387, 387–88 (2000) (“Gone are the days when the ‘mentally disabled’ or mentally retarded were mandatorily sterilized as a condition of deinstitutionalization because it was believed ‘three generations of imbeciles [were] enough.’ However, the underlying belief that persons with mental disabilities should not reproduce and are inherently unable to provide proper parenting to their children survives today.” (footnote omitted)).

<sup>84</sup> Although it is different in some details, the story of efforts to control the reproductive choices of disabled people thus parallels (and is in significant ways intertwined with) the story Dorothy Roberts tells about efforts to control the reproductive choices of Black women. See, e.g., ROBERTS, *supra* note 33, at 6 (arguing that “regulating Black women’s reproductive decisions had been a central aspect of racial oppression in America”); see also *infra* note 92.

<sup>85</sup> 274 U.S. 200 (1927).

<sup>86</sup> For the classic investigation into the collusive nature of the litigation, which concludes that Carrie Buck did not have a mental disability, see Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (1985).

<sup>87</sup> *Buck*, 274 U.S. at 207.

<sup>88</sup> See *id.* (describing being sterilized as “lesser sacrifices, often not felt to be such by those concerned”).

tence.”<sup>89</sup> Holmes’s concluding sentences are among the most infamous in the *United States Reports*<sup>90</sup>:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.<sup>91</sup>

As Mary Dudziak notes, “through his uncritical embrace of eugenic policy, Holmes gave a shaky eugenics movement a strong stamp of legitimacy.”<sup>92</sup>

Scholars have estimated that states relied on Eugenics Era laws to sterilize more than 65,000 people, often based on their supposed “feeble-mindedness.”<sup>93</sup> Official state sterilization programs continued long after one might think. North Carolina’s program, for example, extended to 1974.<sup>94</sup> And these programs imposed harms that were not based on disability alone but that struck at the intersection between disability and race. Particularly in the South, a disproportionate number of the sterilized individuals were Black persons who had been diagnosed with mental disabilities.<sup>95</sup>

<sup>89</sup> *Id.*

<sup>90</sup> See Stephen A. Siegel, *Justice Holmes, Buck v. Bell, and the History of Equal Protection*, 90 MINN. L. REV. 106, 106 (2005) (describing *Buck* as Holmes’s “most despised opinion and one of the most reviled decisions in the entire Supreme Court canon” (footnote omitted)).

<sup>91</sup> *Buck*, 274 U.S. at 207 (citation omitted).

<sup>92</sup> Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 836 (1986) (footnote omitted).

<sup>93</sup> See NAT’L COUNCIL ON DISABILITY, *ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN* 15 (2012) (“The Supreme Court endorsed the legislative trend toward forced sterilization; as a result of these state statutes, by 1970 more than 65,000 Americans had been involuntarily sterilized.”).

<sup>94</sup> See KEVIN BEGOS ET AL., *AGAINST THEIR WILL: NORTH CAROLINA’S STERILIZATION PROGRAM AND THE CAMPAIGN FOR REPARATIONS* iii (2012) (North Carolina’s sterilization program continued into the 1970s); Alfred L. Brophy & Elizabeth Troutman, *The Eugenics Movement in North Carolina*, 94 N.C. L. REV. 1871, 1877 (2016) (“Between 1929 and 1974, North Carolina authorized the sterilization of nearly 7,600 people under the state’s 1929 sterilization law and subsequent North Carolina Eugenics Board program.”). For an example from a neighboring state, see Genevieve Carlton, *Virginia Ran a Secret Eugenics Program That Didn’t End Until 1979*, MEDIUM (Apr. 18, 2018) [https://medium.com/@editors\\_91459/virginia-ran-a-secret-eugenics-program-that-didnt-end-until-1979-e9fcbfd23c64](https://medium.com/@editors_91459/virginia-ran-a-secret-eugenics-program-that-didnt-end-until-1979-e9fcbfd23c64) [<https://perma.cc/7CRH-C8XF>].

<sup>95</sup> See ROBERTS, *supra* note 33, at 89–90 (“The demise of Jim Crow had ironically opened the doors of state institutions to Blacks, who took the place of poor whites as the main target of the eugenicist’s scalpel. South Carolina reported in 1955, for example, that all of the twenty-three persons sterilized at the State Hospital over the previous year were Black women. The North Carolina Eugenics Commission sterilized nearly 8,000 ‘mentally deficient persons’ in the 1930s and 1940s, some 5,000 of whom were Black.” (footnote omitted)); see also Maya Manian, *Coerced Sterilization of Mexican-American Women: The Story of Madrigal v. Quilligan*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* 97, 99 (Melissa Murray et al. eds., 2019) (describing coerced sterilization of Mexican-American women in California into the 1970s).

It would be a mistake to think that the practice of involuntary sterilization of disabled people ended in the 1970s, though.<sup>96</sup> In 2001, the Eighth Circuit, citing *Buck*, said that involuntary sterilization of “the mentally handicapped” could be constitutional if appropriate procedural protections were provided.<sup>97</sup> Following a remand for a trial, the court upheld a decision finding no constitutional violation where a woman with developmental disabilities agreed to undergo sterilization in order to convince a child services caseworker to return her already-born children to her custody.<sup>98</sup> A 2012 report by the National Council on Disability found that eleven states continued to have laws on the books that authorize involuntary sterilization for people with “hereditary forms of ‘idiotcy’ and ‘imbecility,’” or that use similar formulations.<sup>99</sup>

And as a matter of informal practice, people with some disabilities—particularly intellectual disabilities—continue to be routinely sterilized without their making a meaningful choice. The National Council on Disability found that “there appears to be a growing trend nationally and internationally toward sterilizing people with intellectual or psychiatric disabilities.”<sup>100</sup> Often, as in the case of the so-called “Ashley Treatment,” the sterilization occurs with the consent of a disabled person’s parent—though not of the disabled person herself.<sup>101</sup> If the parents and doctors are all on board, these sorts of sterilization decisions can easily fly under the radar and evade mechanisms of legal accountability.<sup>102</sup>

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<sup>96</sup> See Powell, *supra* note 83, at 133 (“Strikingly, although not as popular as previously, coercive sterilization of people with intellectual disabilities persists. Moreover, several states still restrict people with disabilities, mostly intellectual or psychiatric disabilities, from marrying.” (footnote omitted)).

<sup>97</sup> *Vaughn v. Ruoff*, 253 F.3d 1124, 1129 (8th Cir. 2001). The court unfortunately did not specify what procedural protections would be necessary or sufficient. See *id.* at 1129 n.3 (“Because no procedural protections were given, we need not decide what minimum procedures are required by the Due Process Clause.”).

<sup>98</sup> See *Vaughn v. Ruoff*, 304 F.3d 793, 796 (8th Cir. 2002).

<sup>99</sup> NAT’L COUNCIL ON DISABILITY, *supra* note 93, at 40.

<sup>100</sup> *Id.*

<sup>101</sup> See generally Julia Epstein & Stephen A. Rosenbaum, *Revisiting Ashley X: An Essay on Disabled Bodily Integrity, Sexuality, Dignity, and Family Caregiving*, 35 *TOURO L. REV.* 197 (2019); Mary Koll, *Growth, Interrupted: Nontherapeutic Growth Attenuation, Parental Medical Decision Making, and the Profoundly Developmentally Disabled Child’s Right to Bodily Integrity*, 2010 *U. ILL. L. REV.* 225 (2010).

<sup>102</sup> See, e.g., Alicia R. Ouellette, *Growth Attenuation, Parental Choice, and the Rights of Disabled Children: Lessons from the Ashley X Case*, 8 *HOUS. J. HEALTH L. & POL’Y* 207, 221 (2008) (“Parental decisions to consent to medical interventions for their children are subject to very few legal restrictions. Even a review by a hospital ethics committee is not legally required, and the recommendations of such a committee are non-binding. The vast discretion given to parents is rooted in their constitutional right to oversee the upbringing of their children.”); Patricia J. Williams, *Babies, Bodies and Buyers*, 33 *COLUM. J. GENDER & L.* 11, 21–22 (2016) (arguing that “[i]n essence, the hospital allowed ethical questions about Ashley’s long-term care and comfort to be privatized by deferring so unquestioningly to her parents’ posited love” and noting that “much of the debate about Ashley’s treatment since 2006 has tended to leave the decision to parental determination of risk-benefit analysis, and to dismiss regulatory oversight as some kind of invasion of privacy”). Even in the eugenic programs of the past, many acts of sterilization were based on purported “consent”—which was likely often coerced, and

But even when disabled people can conceive and bear children, they face substantial discrimination in the child welfare system.<sup>103</sup> There are indications that child protective services investigations are initiated against disabled parents at a higher rate than against nondisabled parents.<sup>104</sup> Parents with disabilities lose custody of their children at higher rates as well.<sup>105</sup> As one analysis summarized the cases, “[f]requently, the only basis for removal is the parent’s disability and a baseless speculative concern that the parent will not be able to provide practically, developmentally, or in some other way for the child.”<sup>106</sup>

Once the child of a disabled parent is in the child welfare system, the parent will often face further discrimination. Although the law requires that the state provide reunification services before terminating an individual’s parental rights, parents with disabilities often do not receive these services or do not receive services that are appropriate to their needs.<sup>107</sup> Laws authorizing termination of parental rights (TPR) often explicitly list disability as a ground for termination.<sup>108</sup> And judges adjudicating TPR cases often rule based on their own negative preconceived notions about the ability of disabled people to parent.<sup>109</sup> Three decades ago, Robert Hayman aptly described the persistent discrimination against parents with disabilities in termination proceedings as a modern-day legacy of *Buck v. Bell*.<sup>110</sup>

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which provided a means of avoiding judicial scrutiny. See Brophy & Troutman, *supra* note 94, at 1930 (describing North Carolina’s experience).

<sup>103</sup> See, e.g., Robyn M. Powell, *Family Law, Parents with Disabilities, and the Americans with Disabilities Act*, 57 FAM. CT. REV. 37, 38 (2019) (arguing that “parents with diverse disabilities—including intellectual and developmental disabilities, psychiatric disabilities, physical disabilities, and sensory disabilities— . . . contend with substantial and persistent bias within the family law system, often threatening their custody and visitation rights”); Charisa Smith, *Unfit Through Unfairness: The Termination of Parental Rights Due to a Parent’s Mental Challenges*, 5 CHARLOTTE L. REV. 377, 399–401 (2014) (describing discrimination against parents with mental disabilities in the child welfare system).

<sup>104</sup> See NAT’L COUNCIL ON DISABILITY, *supra* note 93, at 79–84; Powell, *supra* note 103, at 39 (stating that “parents with disabilities are more likely to be referred to the child welfare system than nondisabled parents”).

<sup>105</sup> For some statistics, see Ella Callow et al., *Parents with Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community*, 17 TEX. J.C.L. & C.R. 9, 15 (2011) (“Statistics collected by independent organizations indicate that based on the disability population, removal ranges from 40–60% for parents with developmental disabilities to as high as 70–80% for those with psychiatric disabilities. Statistics on removal rates for parents with physical or sensory disabilities are not as readily available, though these communities report significantly heightened rates of removal. In one study of 1,000 predominantly physically disabled parents, 15% reported experiencing pathological, discriminatory treatment related to custody litigation.” (footnotes omitted)).

<sup>106</sup> *Id.* at 10.

<sup>107</sup> See NAT’L COUNCIL ON DISABILITY, *supra* note 93, at 88–93; Kerr, *supra* note 83, at 403; Powell, *supra* note 83, at 137.

<sup>108</sup> See NAT’L COUNCIL ON DISABILITY, *supra* note 93, at 84 (“Currently, 36 states list psychiatric disabilities, 32 list intellectual or developmental disability, 18 list ‘emotional illness,’ and 7 list physical disabilities as grounds for TPR.”).

<sup>109</sup> See Powell, *supra* note 83, at 139–40.

<sup>110</sup> See Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1202, 1203 (1990) (“Each mentally retarded parent faces the substantial likelihood that, by legal prescription, she will soon no longer be. The class of

Many state courts have refused to apply disability antidiscrimination principles to the termination of parental rights process. They have reached this conclusion through two paths. Some courts have held that the Americans with Disabilities Act (ADA) simply does not apply to TPR proceedings.<sup>111</sup> Such a holding seems to conflict with both the text of the ADA, which indicates that it applies to anything a state government entity does,<sup>112</sup> and the Supreme Court's decision in *Pennsylvania Department of Corrections v. Yeskey*,<sup>113</sup> which gave the statute a reach as broad as its plain text.<sup>114</sup> Other courts have held that the ADA cannot be raised as a defense in those proceedings, but must be asserted by the disabled parent earlier, such as when reunification services are being (or should be) provided.<sup>115</sup> But many disabled parents in the child welfare system—parents who are often poor and unsophisticated—are not able to assert these rights in a timely fashion and accordingly lose them.<sup>116</sup>

Disability rights and reproductive justice perspectives overlap when considering this discrimination against disabled parents and potential parents. All of these practices, from sterilization, to denial of custody, to termination of parental rights, rest on a paternalistic understanding of people with disabilities as incompetent—in conflict with basic principles of disability rights. That understanding is a false one. People with a range of both physical and mental disabilities can be successful parents with appropriate supports.<sup>117</sup> And it is the very discriminatory acts of child welfare officials and others that deny disabled parents the reunification services and other supports they need.<sup>118</sup>

Even if the courts took acts of discrimination against parents and potential parents with disabilities more seriously, it would be difficult for the

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mentally retarded parents, meanwhile, drifts toward a eugenicist vision: due in large part to the systematic termination of their parental rights—one of the law's more vulgar fictions—and in small part to some strategic definitional retreats, utter extinction of the class is not altogether improbable. Three generations must have been enough after all; the law has said as much." (citations omitted)).

<sup>111</sup> See Charisa Smith, *Making Good on an Historic Federal Precedent: Americans with Disabilities Act (ADA) Claims and the Termination of Parental Rights of Parents with Mental Disabilities*, 18 QUINNIPIAC HEALTH L.J. 191, 223 (2015) (noting that "a majority of courts have found that TPR proceedings are not considered 'services, programs, or activities' under the ADA, and thus preclude an ADA defense" (citations omitted)).

<sup>112</sup> 42 U.S.C. § 12132 (2012) ("Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

<sup>113</sup> 524 U.S. 206 (1998).

<sup>114</sup> See *id.* at 211–12.

<sup>115</sup> See Smith, *supra* note 111, at 224 ("In certain other cases, courts have denied an ADA defense to TPR simply because the matter was not raised in earlier proceedings, and should have been raised by parents' attorneys sooner—possibly when a service plan was created, or soon after that time.").

<sup>116</sup> See *id.*

<sup>117</sup> See NAT'L COUNCIL ON DISABILITY, *supra* note 93, at 185–227; Smith, *supra* note 103, at 387–89.

<sup>118</sup> See *supra* notes 103–10 and accompanying text.

victims of discrimination to challenge those acts. Many of the relevant acts take place below the radar—in the practices of state probate courts, obscure and unaccountable state bureaucracies, isolated medical professionals, and even in the actions of disabled individuals' own parents and guardians. The affected disabled individuals often are disempowered and cut off from effective access to legal counsel. Individual enforcement of the disability rights laws is thus unlikely to solve the problem.

Because of the barriers to individual enforcement by disabled parents, the government must take an active role in vindicating the principles of non-discrimination and accommodation that appear in the ADA. During the Obama Administration, the Department of Justice (DOJ) and the Department of Health and Human Services (HHS) took some steps in that direction. DOJ and HHS conducted a joint investigation of the Massachusetts Department of Children and Families, and they found that the state agency had violated the rights of a mother with a developmental disability by removing her child from her custody two days after birth and then failing to provide her supports and services.<sup>119</sup> The two federal departments followed that action by issuing guidance to all states' child welfare agencies regarding the protections the disability discrimination laws afford to parents with disabilities.<sup>120</sup> That is the sort of effort that is necessary to take seriously the reproductive rights of disabled parents. The federal government should make an aggressive effort to educate judges and participants in the health care and child welfare systems about the possibility of accommodating disabled parents, and it should aggressively investigate, sue, and threaten to cut off funding from those entities that do not heed the mandate against discrimination.

## CONCLUSION

When questions of disability come up in discussions of reproductive rights, they are often raised by those who, like Justice Thomas, seek to raise the specter of selective abortion to challenge abortion rights generally. In this Article, I have argued that the focus on selective abortion misses crucial aspects of the problem—and that the solution of banning selective abortion is misguided. The true descendants of the Eugenics Era practices Justice Thomas decried in his *Box* concurrence are not selective abortions, but the legal and societal decisions to deny reproductive rights to disabled people—decisions instantiated, for example, in the statute then-Judge Kavanaugh upheld in *Doe*. Any true effort to promote reproductive justice for people with disabilities must address those practices.

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<sup>119</sup> See U.S. DEP'T OF HEALTH & HUMAN SERVS. & U.S. DEP'T OF JUSTICE, PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES: TECHNICAL ASSISTANCE FOR STATE AND LOCAL CHILD WELFARE AGENCIES AND COURTS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT (2015), [https://www.ada.gov/doj\\_hhs\\_ta/child\\_welfare\\_ta.html](https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html) [https://perma.cc/92KR-2VQK].

<sup>120</sup> See *id.*