

# DISABILITY, LIFE, DEATH, AND CHOICE

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The endgame of the Theresa Schiavo case, which played out during the last two weeks of March 2005, will likely be remembered as the moment when the Religious Right overplayed its hand. Polls show that the overwhelming majority of Americans opposed congressional interference in the case and reacted harshly to what they perceived as the effort to politicize a family tragedy.<sup>1</sup> Indeed, when the federal courts quickly disposed of the last-minute appeals that Congress authorized in Public Law No. 109-3—legislation that Representative Tom DeLay dubbed the “Palm Sunday Compromise”<sup>2</sup>—most Americans believed they did the right thing.

But although the dominant narrative of the Schiavo case placed overreaching Christian conservatives on one side, and Theresa Schiavo’s anguished husband on the other (with Schiavo’s parents appearing in the middle as mere pawns of the Right), it is easy to miss another important point: the Schiavo case is the latest of several instances in which disability rights activists—many of whom consider themselves to be neither conservative nor opponents of abortion rights—entered into a conflict between pro-life and pro-choice forces and sided with the pro-lifers. This point was a distinctly minor theme in the news coverage of the case. Although participants in “the U.S. disability rights movement mounted an effort to be heard above the right-to-die and right-to-life rhetoric that had driven the public debate,”<sup>3</sup> their message did not penetrate deeply into the national consciousness.<sup>4</sup>

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<sup>1</sup> For examples of opinion polling data on the case, see *Political Fallout Over Schiavo*, CBS NEWS, Mar. 23, 2005, <http://www.cbsnews.com/stories/2005/03/23/politics/main682619.shtml>; *Federal Intervention in Schiavo Case Prompts Broad Public Disapproval*, ABC NEWS, Mar. 20, 2005, <http://www.abcnews.go.com/images/Politics/978a1Schiavo.pdf>.

<sup>2</sup> Charles Babington & Mike Allen, *Congress Passes Schiavo Measure*, WASH. POST, Mar. 21, 2005, at A01; Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005); see *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005) (per curiam); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289 (11th Cir. 2005) (per curiam).

<sup>3</sup> *Rest in Peace, Terri Schiavo*, RAGGED EDGE ONLINE, Mar. 31, 2005, <http://www.raggededgemagazine.com/life/deathschivo.html>.

<sup>4</sup> Nor did it appear to penetrate the consciousness of the federal judges who ruled on the Schiavo case. See Samuel R. Bagenstos, *Judging the Schiavo Case*, \_\_\_ 22 CONST. COMMENT. (2005) (forthcoming 2006) (arguing that the federal courts gave short shrift to the nonfrivolous, though perhaps not ultimately meritorious, Americans with Disabilities Act claim asserted by Schiavo’s parents).

That is a shame. The disability rights/right to life connection deserves close attention by those concerned with reproductive rights, for there is good reason to believe that it represents a model that anti-abortion advocacy will increasingly follow outside of the disability context in the coming years. Beginning with the “Baby Doe” cases in the 1980s,<sup>5</sup> and extending through the Schiavo case, many disability rights activists have made common cause with anti-abortion activists on a number of significant right-to-life/right-to-die issues. Those disability rights advocates embrace the principle of “choice,” but contend that societal stigmas and other social pressures effectively coerce people into making decisions that reflect biases against people with disabilities. It follows that regulation is not inconsistent with a commitment to free choice; such regulation in fact might be necessary to promote free choice. In the case of assisted suicide, disability rights advocates have taken this point to an extreme and urged that the social and professional pressures are so great that no regulation will be sufficient to protect free choice; a flat ban on the practice is necessary. Disability rights advocates have identified similar pressures on abortion decisions in cases where prenatal testing reveals fetal disability, but many have pointedly refused to endorse a regulatory solution.

Even if most disability rights advocates do not seek regulation of abortions, however, anti-abortion activists clearly will favor it. As I show in this Article, current Supreme Court abortion doctrine practically invites anti-abortion activists to justify regulation on the “pro-choice” ground that it overcomes private and social obstacles to “truly” free choice. That doctrine is rooted in a principle of autonomy—that the woman gets to choose—but it embraces the Legal Realist point that private as well as public actions may impinge on individual freedom. It thus permits regulations that are calculated to remove (private or societal) obstacles to a woman’s free choice. But the Supreme Court’s Legal Realist move faces a classic Legal Realist problem: once we recognize that private as well as public pressures may interfere with autonomy, we cannot know which pressures are coercive (and thus can justify regulation) unless we can judge them against some normative standard independent of free choice itself. Hints of one such principle—gender equality—appear in the Court’s recent abortion jurisprudence. But that principle may be less helpful in addressing particular regulations than academic advocates of the equality theory assume. Even equality-based arguments for abortion rights often depend on some notion of free choice.

The challenge posed by the arguments of disability rights activists is not limited to the disability setting. Rather, when read in the light of the Court’s recent abortion decisions, their arguments suggest a more general line of attack for opponents of abortion rights: restrictions on abortion even outside the disability context might be justified based on the argument

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<sup>5</sup> See discussion *infra* Part I.A.

that the regulation counteracts social pressures that would otherwise coerce a choice to abort. If one believes, as many pro-life activists do, that we live in a society that places strong pressure on many pregnant women to have abortions, the range of regulations that might be justified by that rationale is very broad indeed. Even if it might be difficult in principle for anti-abortion advocates to accept any notion of women's autonomy over the decision whether to terminate a pregnancy, the disability rights critique might provide them with a powerful tactical argument for limiting abortion rights.

These prospects present a dilemma for the many disability rights advocates who are firm supporters of abortion rights. Although the logic of their critique of selective abortion might seem naturally to justify regulation of that practice—just as they believe that the same critique justifies a ban on assisted suicide—disability rights advocates cannot endorse regulation in the abortion context without setting a precedent that may be applied to scale back abortion rights in areas that go far beyond disability. The laissez-faire position on disability-selective abortion thus may simply represent a compromise between the potentially conflicting goals of disability equality and gender equality. But that compromise undermines disability rights advocates' insistence that assisted suicide must be banned and not merely regulated. The disability rights case against selective abortion is virtually identical to the disability rights case against assisted suicide. If it is tolerable to disability rights interests to permit disability-selective abortions, without even regulating them to counteract the social pressures to abort, then it is hard to believe that a flat ban on assisted suicide is necessary to serve those same interests.

In this Article, I develop those points. I begin in Part I by introducing the critiques asserted by many disability rights activists against the nontreatment of infants with disabilities, proposals to legalize assisted suicide, and the practice of prenatal testing followed by selective abortion. In each of the three areas, disability rights critics have developed an argument that identifies powerful social forces that intrude on "free" choices, and accordingly might justify regulation in the name of choice. In the first two of these areas, disability rights advocates who consider themselves solidly pro-choice have sided with pro-life advocates against the organized abortion rights community in defending a regulatory solution. In the third, disability rights advocates have made a similar argument but have not followed it to the same conclusion. In Part II, I argue that the disability rights critique is one that could readily be embraced within abortion law as it has developed in the Supreme Court. The Court's doctrine could justify a wide range of restrictions on abortion outside of the disability context based on arguments similar to those offered by the disability rights critics. In Part III, I evaluate the disability rights critique in the light of the doctrinal analysis in Part II. I conclude that the critique

is full of internal tensions, which are a natural response to the dilemma posed by the broader political context in which the critique operates.

The matters discussed in this Article are important even for those who have no interest in disability rights. I hope to show how the disability rights critique of right-to-life/right-to-die issues may serve as one model—though surely not the only model—for future legislative restrictions on abortion rights outside of the disability context. If, as many observers believe, the Supreme Court will be inclined to uphold more and more abortion restrictions without overruling *Roe v. Wade*,<sup>6</sup> the disability rights critique provides a roadmap for one way of achieving that result. I do not mean in this Article to endorse or criticize the anti-abortion uses to which the disability rights critique may be put. I mean only to show that those potential uses make the stakes of the disability rights critique especially high.

### I. THE DISABILITY RIGHTS CRITIQUE

In this Part, I introduce three related issues on which some prominent disability rights advocates have allied themselves with either arguments or policy prescriptions associated with the right-to-life movement. In each of these three areas—the withholding of treatment from newborns with disabilities, physician-assisted suicide and the “right to die,” and prenatal testing for fetal disability—disability rights advocates have challenged practices that are also the targets of pro-life advocates. But they have done so on the basis of a distinctively disability-oriented argument—one that they believe does not entail opposition to abortion rights generally. In each of these areas, disability rights activists contend that the challenged practices reflect discriminatory attitudes about disability, and that any “choice” will not be a free one in light of social pressures, particularly those imposed by powerful professional cultures.<sup>7</sup> I will label that position the “disability rights critique.”

By referring to *the* “disability rights critique,” however, I do not mean to imply that the set of arguments I explore represents the only position within the disability community. To the contrary, as I note throughout,

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<sup>6</sup> See, e.g., Jack M. Balkin, *A Nominee After Bush's Own Heart*, NEWSDAY, July 20, 2005, at A39.

<sup>7</sup> Skepticism of professional cultures has long been an important part of the disability rights movement. See Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479, 1486 (2001). Interestingly, and not coincidentally, skepticism of professionals and their cultures was an important aspect of the early reproductive rights movement. See Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1575 (1991) (“Many radical feminists linked their commitment to abortion with hostility to a medical establishment they viewed as elitist, overly scientific, and patriarchal. Activists in the women’s health movement worked towards transformation of the American medical system by opening clinics that offered low-cost abortions, often run in a nonhierarchical way by people without medical credentials.”) (footnote omitted).

there is no single consensus disability-rights position on these matters. The disability rights movement “embraces people with a range of different disabilities, different life experiences, different material needs, and different ideological perspectives.”<sup>8</sup> The life-and-death issues that are the subject of this paper are among the most contentious among disability rights advocates. I focus here on those disability rights advocates who take positions that intersect with those of abortion opponents, because the phenomenon is important and understudied, and my goal is to analyze its implications. But those advocates hardly represent the unanimous view of the disability rights community.

#### A. *Selective Refusal To Treat Infants with Disabilities*

Disability rights activists first allied with abortion opponents in the early 1980s.<sup>9</sup> The occasion was a set of cases known as the “Baby Doe” cases, which involved challenges to the denial of treatment to infants with disabilities who had life-threatening medical conditions.<sup>10</sup> The Bloomington, Indiana case, which commenced in 1982, was the first to draw significant political and legal attention to the issue, and its facts are representative.<sup>11</sup> The case involved a child who was born with Down’s syndrome, as well as a tracheoesophageal fistula (a condition in which the upper part of his esophagus was not connected to the lower part of his esophagus). Surgery to connect the esophagus had a high prospect of success, but without the surgery, the baby was sure to die. The obstetrician who delivered the baby “pointed out to the parents that if the surgery were performed and if it were successful and the child survived, that this still would not be a normal child. That it would still be a mongoloid, a Down [s]yndrome child with all the problems that even the best of them have.”<sup>12</sup> Based on the obstetrician’s advice, the baby’s parents “agreed not to authorize surgery, food, or water for the child.”<sup>13</sup> Nurses at the hospital initiated legal proceedings to override the parents’ decision, but the Indiana courts ruled that the parents had the right to follow the obstetrician’s recommendation. The baby died when he was six days old.

The Bloomington “Baby Doe” case aroused substantial concern among abortion opponents, who saw the case as proof that society was “now falling

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<sup>8</sup> Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 7 (2004).

<sup>9</sup> See, e.g., Robert H. Mnookin, *Two Puzzles*, 1984 ARIZ. ST. L.J. 667, 676 (1984).

<sup>10</sup> See, e.g., U.S. COMM’N ON CIVIL RIGHTS, MEDICAL DISCRIMINATION AGAINST CHILDREN WITH DISABILITIES *passim* (1989); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 328–33 (1990); Phoebe Haddon, *Baby Doe Cases: Compromise and Moral Dilemma*, 34 EMORY L.J. 545, 573–79 (1985).

<sup>11</sup> See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 10, at 21–23. Unless otherwise noted, my factual discussion of the “Baby Doe” cases is drawn from these pages of the Civil Rights Commission’s report.

<sup>12</sup> *Id.* at 21 (internal quotation marks omitted).

<sup>13</sup> *Id.*

down the slippery slope” of disrespect for life.<sup>14</sup> The Reagan administration, not usually one to indulge a broad interpretation of civil rights statutes protecting minority groups,<sup>15</sup> responded by attempting to employ Section 504 of the Rehabilitation Act as a tool to prohibit similar denials of treatment in the future.<sup>16</sup> Section 504 prohibits recipients of federal funding—which include most hospitals—from discriminating on the basis of disability.<sup>17</sup> The administration argued that the refusal to perform surgery to reconnect the esophagus of an infant with Down syndrome constitutes disability-based discrimination, because an infant without Down syndrome would surely receive similar surgery if he needed it.<sup>18</sup>

The courts, however, rebuffed the administration’s position. Two cases were particularly significant. The first involved an infant with spina bifida, who died after her parents chose not to perform corrective surgical procedures that “were likely to prolong the infant’s life, but would not improve many of her handicapping conditions, including her anticipated mental retardation.”<sup>19</sup> In a lawsuit by the Reagan administration’s Department of Health and Human Services seeking to investigate the baby’s treatment as a possible violation of Section 504, the Second Circuit held that the statute was never intended to apply to medical treatment decisions, and that it could not intelligibly be read to apply “[w]here the handicapping condition is related to the condition(s) to be treated.”<sup>20</sup> In the other significant case, the Supreme Court sustained a facial challenge to the regulations the Reagan administration adopted to apply Section 504 to future “Baby Doe” cases.<sup>21</sup> A plurality of four justices who strongly supported the outcome of *Roe v. Wade*<sup>22</sup> concluded that Section 504 provided no basis for regulating hospitals’ failure to treat newborns with disabilities because the administration had not identified any cases where “a hospital failed or refused to provide treatment to a handicapped infant for which parental consent had been given.”<sup>23</sup> The plurality concluded that a “hospital’s withholding of treatment when no parental consent has been given cannot violate § 504, for without the consent of the parents or a surro-

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<sup>14</sup> Mnookin, *supra* note 9, at 676.

<sup>15</sup> See, e.g., Drew S. Days III, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309 (1984).

<sup>16</sup> See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 10, at 5–7.

<sup>17</sup> See 29 U.S.C. § 794 (2004). In substance, Section 504 remains the same today as it was then.

<sup>18</sup> See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 10, at 5–7.

<sup>19</sup> *United States v. Univ. Hosp., State Univ. of N.Y. at Stony Brook*, 729 F.2d 144, 146 (2d Cir. 1984).

<sup>20</sup> *Id.* at 157.

<sup>21</sup> See *Bowen v. Am. Hosp. Ass’n*, 476 U.S. 610, 647 (1986).

<sup>22</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>23</sup> *Bowen*, 476 U.S. at 634 (plurality opinion). The *Bowen* plurality was written by Justice Stevens and joined by Justices Marshall, Blackmun, and Powell. Chief Justice Burger concurred in the judgment without opinion.

gate decisionmaker the infant is neither 'otherwise qualified' for treatment nor has he been denied care 'solely by reason of his handicap.'"<sup>24</sup>

The "Baby Doe" cases became a major cause for the anti-abortion movement.<sup>25</sup> But they also became a major cause for the still-developing disability rights movement. Although some disability rights activists balked at allying themselves with right-to-lifers,<sup>26</sup> many others held the view advanced by the *Disability Rag*: "[w]e want the disability rights movement to be liberal, but liberals, in this issue, are siding with parents who want to withhold food from 'deformed' infants so they will die."<sup>27</sup>

When the Supreme Court heard the challenge to the Reagan administration's "Baby Doe" regulation, a number of disability rights groups joined several right-to-life groups as amici supporting the administration.<sup>28</sup> The briefs filed by the disability rights organizations had two major themes, which formed a template for later disability rights critiques of assisted suicide and prenatal testing. First, they contended that the decision to withhold treatment from an infant with a disability is often based on an erroneous, if not prejudiced, understanding of the "quality of life" experienced by individuals with disabilities.<sup>29</sup> The brief of (what was then called) the Association of Retarded Citizens was particularly blunt on this point: "[t]his difference in the treatment of handicapped and non-handicapped children directly reflects the physician's judgment that the life of the handicapped infant is of significantly less value than is the life of the non-handicapped infant."<sup>30</sup> The brief filed by the American Coalition of

<sup>24</sup> *Id.* at 630 (quoting 29 U.S.C. § 794 (1978)).

<sup>25</sup> Nat Hentoff, who considers himself to be a liberal opponent of abortion, noted this point sarcastically in his widely read article, *The Awful Privacy of Baby Doe*, ATLANTIC MONTHLY, Jan. 1985, at 54, 56 ("It is true that the most prominent defenders of Baby Does are such conservative hobgoblins as Ronald Reagan, the right-to-life squadrons, and the Reverend Jerry Falwell. Having picked up bad companions so early in life, the Baby Does indeed bear out the adage that people are judged by the company they keep.").

<sup>26</sup> See, e.g., JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 278–80 (1993).

<sup>27</sup> *Killing Babies: Left and Right*, DISABILITY RAG, May 1983, quoted in EDWARD D. BERKOWITZ, DISABLED POLICY: AMERICA'S PROGRAMS FOR THE HANDICAPPED 223 (1987).

<sup>28</sup> See Brief for the Am. Coal. of Citizens With Disabilities et al. as Amici Curiae Supporting Petitioner, *Heckler v. Am. Hosp. Ass'n*, 476 U.S. 610 (1986) (No. 84-1529), 1985 WL 669107 [hereinafter ACCD Brief]; Brief for the Am. Ass'n on Mental Deficiency et al. as Amici Curiae Supporting Petitioner, *Heckler*, 476 U.S. 610 (No. 84-1529), 1985 WL 669104 [hereinafter AAMD Brief]; Brief for the Ass'n for Retarded Citizens et al. as Amici Curiae Supporting Petitioner, *Heckler*, 476 U.S. 610 (No. 84-1529), 1985 WL 669102 [hereinafter ARC Brief]; Brief for the Disability Rights Ed. & Defense Fund, Inc. and Women's Legal Defense Fund as Amici Curiae Supporting Petitioner, *Heckler*, 476 U.S. 610 (No. 84-1529), 1985 WL 669109 [hereinafter DREDF Brief].

<sup>29</sup> For similar arguments from an academic advocate of disability rights, see Martha A. Field, *Killing "the Handicapped"—Before and After Birth*, 16 HARV. WOMEN'S L.J. 79, 87 (1993) ("One problem with the quality-of-life arguments is that very often they are based upon prejudice against the handicapped, and even more often they are based upon ignorance about the handicapped.").

<sup>30</sup> ARC Brief, *supra* note 28, at 7; see also AAMD Brief, *supra* note 28, at 6 ("Discriminatory withholding of necessary and appropriate medical care and treatment from handi-

Citizens with Disabilities and numerous other self-advocacy groups urged that physicians' judgments about the quality or value of life for infants with disabilities were "counterfactual" and "based on ignorance and prejudice."<sup>31</sup> And the brief filed on behalf of several professional organizations that supported disability rights urged that "[s]peculation about a child's future 'quality of life' typically involves an insidious combination of both dubious predictions about the course of that life and subjective value judgments about what kinds of lives are worth (or not worth) living."<sup>32</sup>

Second, the disability rights groups urged that it was the physicians' biases, and not an unconstrained exercise of parental choice, that led to the withholding of treatment from newborns with disabilities. The briefs argued extensively that parents' decisions to withhold treatment from their disabled infants cannot be understood as free choices. Parents necessarily rely on the specialized knowledge and experience of physicians.<sup>33</sup> Parents who must make treatment decisions for newborn children with disabilities are also mentally and emotionally vulnerable,<sup>34</sup> and they are often told that they must make their decisions quickly.<sup>35</sup> Moreover, the briefs

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capped infants is primarily based on the assumption that these children's handicaps make their lives less valuable than those of babies who have no detectable disability, and even renders them 'not worth living.'").

<sup>31</sup> ACCD Brief, *supra* note 28, at 16.

<sup>32</sup> AAMD Brief, *supra* note 28, at 12; *see also* ARC Brief, *supra* note 28, at 12 (arguing that those who would withhold treatment from infants with disabilities "consistently underestimate the developmental potential and employability of handicapped persons and ignore the substantial and valuable personal and economic contributions of handicapped children and adults to their families and communities").

<sup>33</sup> *See* ARC Brief, *supra* note 28, at 20 ("The relationship between the physician and the parents, is one which has as its foundation the theory that the former is learned, skilled and experienced in those subjects about which the latter ordinarily know little or nothing. Despite the vital importance of both the life and health of the child to the parent, the parent must necessarily place great reliance, faith, and confidence in the professional word, advice, and acts of the physician or other health care provider.") (footnotes omitted).

<sup>34</sup> *See* AAMD Brief, *supra* note 28, at 15 n.29 (noting the "unique vulnerability of parents upon being told that their newborn baby is 'deformed' or 'defective'"); ACCD Brief, *supra* note 28, at 29 ("Doctors know of parents' trust in their expertise and of their vulnerability in the turmoil of the newborn period.") (footnotes omitted); ARC Brief, *supra* note 28, at 23 ("After the birth of a sick and handicapped infant, families are often in 'a severe psychological crisis' in which they are foreclosed, as a result of psychological and emotional trauma that generally surrounds the birth of a handicapped infant, from either assimilating properly the information which is provided about the infant's condition or exercising clear and rational judgment concerning a no-treatment decision presented by a physician."). For an academic expression of the point, *see* Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CAL. L. REV. 151, 159-60 (1988) ("In the few traumatic days after the birth of a defective child, the parents cannot be said to know their child well, may not have begun to love (and may even have come to hate) their child, suffer under harsh emotional and social pressures, have many interests which conflict with the child's, are thinking often for the first time about moral issues of the cruelest difficulty, and frequently know little about their child's condition and prognosis.").

<sup>35</sup> *See* ARC Brief, *supra* note 28, at 23 ("In addition, time pressures, often artificial and unnecessary, imposed on parents to consent or acquiesce in the physician's recommendation affect both the capacity of the parents for rational judgment and the quality of the information upon which to base a judgment.") (footnotes omitted); *see also* Field, *supra*

argued, physicians take advantage of parents' vulnerability by "misinform[ing] them about the nature of their child's handicapping condition and the prospects for the child's development, education, and future,"<sup>36</sup> and by "resort[ing] to medical nomenclature to disguise the nonmedical grounds of the recommendation."<sup>37</sup> Two of the briefs referred to,

the suggestion of one physician that parents should not be encouraged to nurture their newborn handicapped baby lest a bond be established that might cause the parents to make a "selfish" decision to order the provision of life-saving treatment, and the admonition by a leading pediatrician that physicians who believe it to be desirable to withhold treatment from a child should be patient since "[f]irm rooting of a parental death wish for a defective child usually takes days, at least; and it is never free of ambivalence."<sup>38</sup>

In the end, the briefs argued, "what passes today for disclosure and consent in physician-patient interactions is largely an unwitting attempt by physicians to shape the disclosure process so that patients will comply with their recommendations."<sup>39</sup>

### B. Assisted Suicide

At around the same time that the "Baby Doe" cases initiated the tactical alliance between disability rights and anti-abortion activists, the two groups began to come together again to oppose physician-assisted suicide and the so-called "right to die." Disability rights activists and right-to-life

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note 29, at 91 (noting "problems with requiring a quick decision," including "[t]he shock and surprise of the family and the physical condition of the mother;" the fact that "many parents are uninformed about disabilities, retardation, likelihood of harm, facilities available to persons with disabilities, attitudes of parents of children who have disabilities, etc.," and the fact that "no one knows the child's condition in any reliable way in the first few days").

<sup>36</sup> AAMD Brief, *supra* note 28, at 15.

<sup>37</sup> ACCD Brief, *supra* note 28, at 29.

<sup>38</sup> AAMD Brief, *supra* note 28, at 18 n.29 (footnote omitted) (citing Eric J. Cassell, *Nurturing a Defective Newborn: Commentary*, 8 HASTINGS CENTER REP. 13, 14 (1978), and R. S. Duff, *Counseling Families and Deciding Care of Severely Defective Children: A Way of Coping with "Medical Vietnam,"* 67 PEDIATRICS 315, 317 (1981)); *see also* ARC Brief, *supra* note 28, at 19, 24 (citing Duff, *supra*; Cassell, *supra*).

<sup>39</sup> ARC Brief, *supra* note 28, at 25 (quoting Jay Katz, *Informed Consent—A Fairy Tale? Law's Vision*, 39 U. PITT. L. REV. 137, 142 (1977)); *see also* ACCD Brief, *supra* note 28, at 29 n.81 ("At the end, it is usually the doctor who has to decide the issue. It is not only cruel to ask the parents whether they want their child to live or die, it is dishonest, because in the vast majority of cases, the parents are consciously or unconsciously influenced by the doctor's opinion.") (quoting Anthony Shaw, *Dilemmas of Informed Consent in Children*, 289 NEW ENG. J. MED. 885, 886 (1973)). Of course, some of the discussion in the disability rights groups' briefs made the efforts of physicians look far from "unwitting."

organizations worked together on a number of prominent cases in the 1980s and 1990s in which people with disabilities sought to exercise the “right” to terminate their own lives.<sup>40</sup> When Dr. Jack Kevorkian began using his “suicide machine” to assist people, many of whom had disabilities,<sup>41</sup> in ending their lives, disability rights activists formed “Not Dead Yet,” an organization that opposes assisted suicide and euthanasia from a disability perspective.<sup>42</sup> In most major cases involving “right-to-die” issues—including the Schiavo case—Not Dead Yet has filed briefs arguing that the recognition of such a right threatens the lives and interests of people with disabilities.<sup>43</sup> The views of Not Dead Yet are not representative of those of all disability rights activists,<sup>44</sup> but they nonetheless are an important instance of overlap between disability rights and right-to-life views.<sup>45</sup>

As in the “Baby Doe” cases, opponents of abortion object to assisted suicide because it is inconsistent with their understanding of the sanctity of human life. But disability rights activists have again articulated a critique that is distinct from the arguments of the right-to-life movement.<sup>46</sup>

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<sup>40</sup> See, e.g., SHAPIRO, *supra* note 26, at 277–78. The earliest cases involved the discontinuance of life-sustaining treatment (as in the Schiavo case, which involved the discontinuance of life-sustaining feeding and hydration). As the text shows, disability rights activists later applied the same critiques to physician-assisted suicide. Accordingly, my discussion makes no difference between the discontinuance of life-sustaining treatment and physician-assisted suicide, despite the distinctions typically drawn between them in moral and legal debates.

<sup>41</sup> See, e.g., *id.* at 275–77; Paul Steven Miller, *The Impact of Assisted Suicide on Persons with Disabilities—Is it a Right Without Freedom?*, 9 ISSUES L. & MED. 47, 59–60 (1993).

<sup>42</sup> Not Dead Yet, <http://www.notdeadyet.org/> (last visited Mar. 17, 2006).

<sup>43</sup> See Not Dead Yet, In The Courts, <http://www.notdeadyet.org/docs/court.html> (last visited Mar. 17, 2006) (listing the group’s participation in litigation).

<sup>44</sup> See, e.g., NAT’L COUNCIL ON DISABILITY, ASSISTED SUICIDE: A DISABILITY PERSPECTIVE 10 (1997) (“Within the disability community, divergent opinions about assisted suicide have given rise to heated debates . . .”). For the explanation by a prominent disability rights advocate of his support for a right to physician-assisted suicide, see Andrew I. Batavia, *The Relevance of Data on Physicians and Disability on the Right to Assisted Suicide*, 6 PSYCHOL. PUB. POL’Y & L. 546 (2000). A group of prominent activist individuals with disabilities, including Batavia and now-professor Michael Stein, filed an amicus brief in the Supreme Court arguing that the Constitution guaranteed a right to assisted suicide. See Brief for the Gay Men’s Health Crisis et al. as Amici Curiae Supporting Respondents, *Washington v. Glucksberg* (No. 96-110), 1996 WL 711205 [hereinafter *Autonomy Brief*].

<sup>45</sup> See Carol J. Gill, *Health Professionals, Disabilities, and Assisted Suicide: An Examination of Relevant Empirical Evidence and Reply to Batavia*, 6 PSYCHOL. PUB. POL’Y & L. 526, 526 (2000) (“Although some prominent individuals with disabilities have lobbied in favor of legalizing assisted suicide, most major disability rights organizations in the United States—including the National Council on Disability, American Disabled for Attendant Programs Today (known as ADAPT), the National Council on Independent Living, the World Association of Persons with Disabilities, Justice for All, the Association for Persons with Severe Handicaps (TASH), the National Spinal Cord Injury Association, and World Institute on Disability—have adopted positions in opposition. In contrast, no major disability rights organization has endorsed legalization.”); *but see* Batavia, *supra* note 44, at 552 (“On the basis of the very limited empirical evidence available, it appears that a substantial majority of the people with disabilities in this country support the right to assisted suicide for people with terminal illnesses.”).

<sup>46</sup> For an academic argument expressing strong sympathy for disability rights interests,

In an argument that parallels their position on the “Baby Doe” cases, disability rights activists like those affiliated with Not Dead Yet contend that the practice of assisted suicide reflects a discriminatory belief that life with a disability is not worth living. They further argue that if the law recognizes a “right to die”—no matter how stringently regulated—people with disabilities will be pressured into exercising it.

Disability rights activists argue that if a person without a disability chooses to commit suicide, society treats that choice as the product of an irrational decisionmaking process that should not be given effect.<sup>47</sup> But “when a person ‘chooses’ death over an ‘undignified’ life with a disability, the system sympathizes with that individual’s plight and supports his right to die, assuming his disability is the root of his supreme despair.”<sup>48</sup> That difference, disability rights advocates argue, reflects biases about the “quality of life” experienced by individuals with disabilities.<sup>49</sup> Both medical professionals and nondisabled members of the lay public believe that disability has a more negative effect on life quality than people with disabilities themselves report.<sup>50</sup> People without disabilities thus “readily conclude that the disabled person’s wish to die is reasonable because it agrees with their own preconception that the primary problem for such individuals is the unbearable experience of a permanent disability.”<sup>51</sup> Their biases can be seen in the “intensely stigmatized language” in which the right-to-die debate proceeds, where “disabled people are defective, damaged, debilitated, deformed, distressed, afflicted, anomalous, helpless and/or infirm,” while “nonhandicapped persons are ‘normal.’”<sup>52</sup>

In the view of many disability rights advocates, supporters of assisted suicide fail to understand that “the greatest suffering of people with dis-

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while maintaining that a pro-choice position on abortion does not entail acceptance of a right to die, see Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Article on Roe, Casey, and the Right to Die*, 44 AM. U. L. REV. 803 (1995). Of course, some disability rights advocates oppose both assisted suicide and abortion rights. See, e.g., Stephen L. Mikochik, *Assisted Suicide and Disabled People*, 46 DEPAUL L. REV. 987, 1001–02 (1997).

<sup>47</sup> See Miller, *supra* note 41, at 47–48.

<sup>48</sup> *Id.* at 52.

<sup>49</sup> See PAUL K. LONGMORE, WHY I BURNED MY BOOK AND OTHER ARTICLES ON DISABILITY 167 (2003) (“Reading through the literature of the suicide rights activists, one is struck by their willing acceptance of prejudicial assumptions about persons with disabilities. Disability renders its ‘victims’ helpless and dependent. It robs them of the possibility of living meaningfully. It makes them emotionally, physically, and financially burdensome to themselves, their families, and society.”); Gill, *supra* note 45, at 526; Miller, *supra* note 41, at 49 (arguing that “the right to die movement is reinforcing stereotypical notions about the ‘tragedy’ of a disabled person’s existence”); *id.* at 55 (“Latent prejudice leads to society’s condoning suicide for persons with disabilities as a rational decision, or even a preferable solution.”).

<sup>50</sup> See, e.g., NAT’L COUNCIL ON DISABILITY, *supra* note 44, at 22–28; Gill, *supra* note 45, *passim*.

<sup>51</sup> Carol J. Gill, *Suicide Intervention for Persons with Disabilities: A Lesson in Inequality*, 8 ISSUES L. & MED. 37, 39 (1992).

<sup>52</sup> LONGMORE, *supra* note 49, at 166.

abilities is the socially stigmatized identity inflicted upon them.”<sup>53</sup> Disability rights advocates have long argued that the proper remedy for such stigmatization is not medical treatment to eliminate disabilities—and certainly not medical interventions to eliminate people with disabilities—but is instead guarantees of civil rights to change the hostile and inaccessible aspects of society.<sup>54</sup> “If society alleviated the suffering of facing prejudice,” writes Paul Miller, “perhaps life with a disability would be recognized as not only worth living but as valuable as that of anyone else.”<sup>55</sup>

Moreover, disability rights advocates who oppose assisted suicide argue that the “choice” by a person with a disability to end her life will rarely be a truly free one. Once recognized, they contend, “the right to die will inevitably become a duty to die. People with major disabilities will be pressured into ‘choosing’ to end their lives.”<sup>56</sup> Free choice in this context may be limited by a physician’s advice that is based on inaccurate understandings about the quality of life enjoyed by people with disabilities or erroneous predictions about the future course of an individual’s medical condition.<sup>57</sup> It may also be limited by financial pressures, particularly in a world of managed care, and by the related desire not to impose financial or psychological burdens on one’s family.<sup>58</sup> And free choice may be limited by the societal stigma attached to disability—stigma that people with disabilities may themselves have internalized:

[W]hen people with disabilities make a “choice” to seek their right to die, they do so from the position of a society that fears,

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<sup>53</sup> *Id.*

<sup>54</sup> See Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 426–30 (2000); see also Miller, *supra* note 41, at 49 (“The irony about assisted suicide is that concepts of personal autonomy, freedom, and dignity are used to empower persons with disabilities to kill themselves, rather than enabling them to live independent lives with dignity.”).

<sup>55</sup> Miller, *supra* note 41, at 54.

<sup>56</sup> LONGMORE, *supra* note 49, at 160; see also Kreimer, *supra* note 46, at 20–28 (detailing risks of coercion in assisted suicide); Martha Minow, *Which Question? Which Lie? Reflections on the Physician-Assisted Suicide Cases*, 1997 SUP. CT. REV. 1, 21 (arguing that the legalization of physician-assisted suicide would “systematically and routinely be used to push dying people into death”: “The problem is not merely risks of abuse; the problem arises from the inauguration of a regime in which people would have to justify continuing to live. Rooting the permission in a right or protected interest, based in autonomy or dignity, would not save individuals from pressures to die imposed directly or indirectly by family members, physicians, managed care providers, or the patients’ own sense of guilt and burden.”).

<sup>57</sup> See, e.g., NAT’L COUNCIL ON DISABILITY, *supra* note 44, at 22–28; Gill, *supra* note 45, *passim*.

<sup>58</sup> See, e.g., NAT’L COUNCIL ON DISABILITY, *supra* note 44, at 37–40; Miller, *supra* note 41, at 56–57; see also Kreimer, *supra* note 46, at 810 (“Legalization of euthanasia and assisted suicide, unlike abortion, raises the specter of an increasingly cost-conscious medical system advertently or unconsciously tracking vulnerable populations away from expensive and personally demanding medical treatment or palliative care toward less expensive and easier medical suicide. Desperately ill citizens may feel themselves forced to justify their decision to remain alive.”).

discriminates against, and stigmatizes disability as undignified. Facing a life of societal exclusion, prejudice, and fear, in conjunction with self-deprecation and devaluation based on those same irrational assumptions, is there really a choice at all?<sup>59</sup>

Importantly, disability rights advocates who have developed the critique of assisted suicide do not believe that there is any regulation that could adequately protect people with disabilities against being coerced into committing suicide.<sup>60</sup> Accordingly, they urge that a flat ban on the practice is necessary.<sup>61</sup> The Supreme Court largely vindicated that position in the *Glucksberg* and *Vacco* cases, which upheld Washington's and New York's absolute bans on assisted suicide.<sup>62</sup>

### C. Prenatal Testing

The “Baby Doe” and assisted suicide cases were merely proxy battles in the abortion rights wars. But since at least the 1960s, disability issues have frequently arisen as well in debates about abortion itself. In 1962, Sherri Finkbine's widely publicized effort to obtain an abortion catalyzed public support for the liberalization of abortion laws; Finkbine sought an abortion because she had been taking Thalidomide, which had recently been associated with a high risk of fetal disability.<sup>63</sup> A few years later, an epidemic of rubella—which, when contracted by a pregnant woman, will frequently cause disabilities in the fetus—created additional momentum for liberalization in California particularly.<sup>64</sup> And in the years since *Roe v. Wade*, pro-choice activists and politicians have frequently and successfully invoked “fetal deformity” as a circumstance in which abortions should

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<sup>59</sup> Miller, *supra* note 41, at 54; *see also* Mark C. Siegel, *Lethal Pity: The Oregon Death with Dignity Act, Its Implications for the Disabled, and the Struggle for Equality in an Able-Bodied World*, 16 LAW & INEQ. 259, 282–83 (1998) (discussing the internalization of disability stigma).

<sup>60</sup> *See* NAT'L COUNCIL ON DISABILITY, *supra* note 44, at 41–47. For an argument that regulation can be effective, *see* Sylvia A. Law, *Physician-Assisted Death: An Article on Constitutional Rights and Remedies*, 55 MD. L. REV. 292, 309–11 (1996).

<sup>61</sup> *See, e.g.*, Minow, *supra* note 56, at 22 (“Apparently, it is actually a rather small class of people who would evade ‘abuse’ of assisted suicide. It would be a lie, in short, to maintain that any regime permitting physician-assisted suicide would safeguard large numbers of people against abuse.”); *see also* Siegel, *supra* note 59, at 287–88 (“It is difficult to visualize an assisted suicide law which would not pose a threat to the lives of disabled persons, especially the severely disabled. To varying degrees, measures like the [Oregon Death with Dignity Act], coupled with societal views of the quality of life of disabled people, inherently impede the efforts of the disabled to integrate themselves into society.”).

<sup>62</sup> *See* *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997); *Vacco v. Quill*, 521 U.S. 793, 808–09 (1997); *cf.* *Gonzales v. Oregon*, 126 S. Ct. 904, 921 (2006) (holding that the Controlled Substances Act cannot be read to prohibit physician-assisted suicide, and noting the “‘earnest and profound debate’ across the country” regarding the practice).

<sup>63</sup> *See* KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 62–65 (1984).

<sup>64</sup> *See id.* at 80–82.

clearly be permitted.<sup>65</sup> At the same time, a number of pro-life advocates seem to oppose abortions based on fetal disability even more strongly than they oppose abortions generally. As Kristin Luker reported, “[t]o defend a genetically or congenitally damaged embryo from abortion is, in their minds, defending the weakest of the weak, and most pro-life people we interviewed were least prepared to compromise on this category of abortion.”<sup>66</sup> And, indeed, concerns about permitting abortion in cases of “fetal deformity” slowed passage of liberalized abortion laws in California<sup>67</sup> and New York.<sup>68</sup>

Despite the centrality of disability to general debates over abortion rights, for a long time many disability rights activists sought to “side-step[ ]” those debates.<sup>69</sup> In recent years, however, the rise of prenatal testing has spurred many supporters of disability rights to enter the discussion. Prenatal genetic testing now permits the discovery of “gene mutations associated with some 400 conditions, from those universally viewed as severe, such as Tay-Sachs, to those that many might describe as relatively minor, such as polydactyly (a trait involving an extra little finger),” and the number of tests continues to grow.<sup>70</sup> Although such tests are in some cases used to identify conditions that may be treated *in utero*, the

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<sup>65</sup> See WILLIAM SALETAN, BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WAR 89–90, 160, 164, 184–85 (2004); see also Bonnie Steinbock, *Disability, Prenatal Testing, and Selective Abortion*, in PRENATAL TESTING AND DISABILITY RIGHTS 108, 109 (Erik Parens & Adrienne Asch eds., 2000) (noting that “most people who regard abortion as justifiable” treat “a serious disabling condition” as “one of the strongest reasons for terminating a pregnancy,” and that even many of those “who are almost always opposed to abortion” will accept it in cases involving “a severe disability in the fetus”). In the academic world, Ronald Dworkin contends that under a “paradigm liberal view,” which “represent[s] the moral convictions of many people,” abortion is “morally justified” in cases of “severe fetal abnormality”—and perhaps even “morally required” in cases “when the abnormality is very severe.” RONALD DWORKIN, LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 33–34 (1993). For criticism, from a disability rights perspective, of some of the rhetoric of pro-choice advocates, see SHAPIRO, *supra* note 26, at 278–79 (“Proponents of legalized abortion at times have played shamelessly upon parents’ fear of giving birth to a child with birth defects—using exaggerated pity talk of ‘defective children,’ ‘a gruesome demand,’ and ‘a maimed and distorted human-without-a-future’ to defend a woman’s option to choose abortion.”).

<sup>66</sup> See LUKER, *supra* note 63, at 207–08. Of course, Luker’s study was conducted before the recent debate over so-called partial-birth abortion, which may now be considered the “worst” form of abortion for many anti-abortion activists. See, e.g., Cathy Cleaver Ruse, *Partial-Birth Abortion on Trial*, HUMAN LIFE REVIEW 87 (Spring 2005), available at <http://www.nrlc.org/abortion/pba/RusePBAonTrial.pdf>. The point holds, however, that many opponents of abortion oppose disability-selective abortion especially strongly.

<sup>67</sup> See Ruse, *supra* note 66, at 88–90 (describing Governor Ronald Reagan’s veto of liberalized abortion law because of its “fetal indications” clause).

<sup>68</sup> See LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 47 (1990) (describing successful efforts of state assemblyman Martin Ginsberg, who had a disability as a result of polio, to oppose a law “that permitted abortion in cases of serious fetal deformity”).

<sup>69</sup> SHAPIRO, *supra* note 26, at 280.

<sup>70</sup> Erik Parens & Adrienne Asch, *The Disability Rights Critique of Prenatal Genetic Testing: Reflections and Recommendations*, in PRENATAL TESTING AND DISABILITY RIGHTS, *supra* note 65, at 3, 3–4.

primary use of such tests is “as the basis of a decision to abort fetuses that carry mutations associated with disease and/or disability.”<sup>71</sup> Often, the tests are used to identify and abort fetuses whose disabilities would not prevent them from living long and fulfilling lives.<sup>72</sup>

Troubled by these developments, many advocates of disability rights have developed a critique of prenatal testing that parallels their critiques of the nontreatment of infants with disabilities and of assisted suicide. They contend “that prenatal testing followed by selective abortion is morally problematic, and that it is driven by misinformation.”<sup>73</sup> These advocates believe that testing for—and abortion of—fetuses with disabilities is morally problematic because it reflects a view that life with a disability is not worth living. To them, prenatal testing and selective abortion represents a significant step toward ultimate achievement of “the eugenicist’s dream of eliminating disabilities” by eliminating people with disabilities.<sup>74</sup> Selective abortions will inevitably reduce the numbers of people with disabilities and their attendant visibility in the community—visibility that has been crucial to overcoming a legacy of prejudice and fear.<sup>75</sup> Moreover, if fewer people with disabilities are born, and it becomes easier to prevent them from being born, the social and political commitment to treatment, social services, and nondiscrimination protections for people with those conditions may weaken substantially.<sup>76</sup> And the availability and employment of selective abortions may also entrench discrimination and prejudice against people with disabilities by “reinforcing the general public’s perception that disability is a tragic mistake (that could and should have

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<sup>71</sup> *Id.* at 4; see also Edward J. Larson, *The Meaning of Human Gene Testing for Disability Rights*, 70 U. CIN. L. REV. 913, 932–33 (2002) (“Human gene therapy raises the prospect of correcting disabling genes within the born or unborn, but such techniques remain futuristic and are unlikely to replace selective reproduction as the most practical means of eliminating disabilities.”) (footnotes omitted); MICHAEL BÉRUBÉ, *LIFE AS WE KNOW IT: A FATHER, A FAMILY, AND AN EXCEPTIONAL CHILD* 76 (1996) (stating that ninety percent of couples choose abortion when prenatal testing detects Down syndrome).

<sup>72</sup> See, e.g., Steinbock, *supra* note 65, at 117–18 (“One of the most common reasons for screening women over thirty-five in the United States is to detect trisomy 21 (Down syndrome). Down syndrome is not a fatal disease; many people with Down’s live into their fifties and sixties. Moreover, it is compatible with a good quality of life, with appropriate medical treatment and educational opportunities.”). The reaction to the pregnancy of Los Angeles news anchor Bree Walker Lampley, who has ectrodactyly (an hereditary condition that causes fused fingers and toes), is particularly striking in this regard. Many in the public were outraged that Lampley would continue her pregnancy and thus risk “bringing a disabled child into the world.” SHAPIRO, *supra* note 26, at 38–40.

<sup>73</sup> Parens & Asch, *supra* note 70, at 13.

<sup>74</sup> Larson, *supra* note 71, at 932.

<sup>75</sup> See, e.g., Field, *supra* note 29, at 117; Larson, *supra* note 71, at 936. The Supreme Court has recognized that isolation of people with disabilities from the general community “perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.” *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999); see generally Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393 (1991) (demonstrating the importance to disability rights advocates of the goal of integration in the community).

<sup>76</sup> See Field, *supra* note 29, at 117–18.

been avoided) and that disabled people are therefore justifiably marginalized.”<sup>77</sup> To these advocates, the medical detection and elimination of fetuses with disabilities thus represents the ultimate triumph of the “medical model” against which the disability rights movement has mobilized.<sup>78</sup>

In addition to believing that selective abortion decisions are morally problematic, disability rights critics of prenatal testing also believe that those decisions are misinformed, if not coerced. As in the “Baby Doe” cases, they contend that doctors and genetic counselors have a tendency (subtly or not) to urge pregnant women to subject their fetuses to prenatal testing and abort fetuses with disabilities.<sup>79</sup> As Adrienne Asch diplomatically puts it, “[d]espite the professional commitment to non-directiveness in genetic counseling, 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>80</sup> Too often, disability rights advocates contend, the advice 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>81</sup> They argue that this skew in advice rests on health professionals’ uninformed beliefs about disability: “[r]ecent studies suggest, for example, that many members of the health professions view childhood disability as predominantly negative for children and their families, in contrast to what research on the life satisfaction of people with disabilities and their families has actually shown.”<sup>82</sup> And skewed advice—even if presented in a “non-directive” manner—can effectively coerce women into choosing abortion.<sup>83</sup>

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<sup>77</sup> Marsha Saxton, *Why Members of the Disability Community Oppose Prenatal Diagnosis and Selective Abortion*, in *PRENATAL TESTING AND DISABILITY RIGHTS*, *supra* note 65, at 147, 150–51.

<sup>78</sup> See Bagenstos, *Subordination, Stigma, and “Disability,” supra* note 54, at 427 (“[V]irtually the entire ideology of the modern disability rights movement can be seen as a reaction to th[e] ‘medical/pathological paradigm’ of disability.”).

<sup>79</sup> See, e.g., Parens & Asch, *supra* note 70, at 6–7; Field, *supra* note 29, at 121–22 n.163.

<sup>80</sup> Adrienne Asch, *Disability Equality and Prenatal Testing: Contradictory or Compatible?*, 30 *FLA. ST. U. L. REV.* 315, 334 (2003).

<sup>81</sup> *Id.* at 335; see also BÉRUBÉ, *supra* note 71, at 81 (“There are still plenty of medical practitioners who tell their patients that children with Down syndrome cannot learn; there are plenty of doctors, just as there are plenty of professors, who haven’t updated their knowledge of the field in twenty years; and there are plenty of doctors who feel it is their duty, as trained professionals, to tell their patients not only what their condition is but what they’d better do about it.”).

<sup>82</sup> Parens & Asch, *supra* note 70, at 20. To similar effect, see Saxton, *supra* note 77, at 154.

<sup>83</sup> See Larson, *supra* note 71, at 933–34; see also BÉRUBÉ, *supra* note 71, at 47 (“If we had no way of knowing how loving, clever, and ‘normal’ a child like Jamie can be, we would simply have to rely on the advice of ‘experts.’ And if those experts told us there was no way to raise such a child, we would probably believe them.”); Bruce Jennings, *Technology and the Genetic Imaginary: Prenatal Testing and the Construction of Disability*, in *PRENATAL TESTING AND DISABILITY RIGHTS*, *supra* note 65, at 124, 135–36 (arguing that “genetic counseling cannot be completely neutral or nondirective,” and that it “create[s] a

As Mary Mahowald observes, “[a]lthough decisions for prenatal testing and termination are usually thought to be autonomous, some individuals report they feel pressured by physicians and others to undergo prenatal testing and encouraged to terminate when the result is positive.”<sup>84</sup>

Adherents to the disability rights critique of prenatal testing do not oppose abortion generally; many of them strongly endorse a pro-choice position.<sup>85</sup> Indeed, the most vocal disability-rights critics of prenatal testing and selective abortion do not even urge that those practices be subject to legal regulation to prohibit disability-based discrimination. They aim, instead, to *persuade* medical professionals to provide pregnant women with full information—including information about the positive aspects of living (and parenting a child) with a disability—before offering prenatal tests and suggesting selective abortions.<sup>86</sup> In Asch’s words, they seek “to facilitate true reproductive choice for women by urging changes in the way prenatal testing occurs and the rhetoric that surrounds it.”<sup>87</sup> But once prospective parents have full information, presented in a noncoercive manner, many of these advocates urge that we must “endorse the choices people make about their reproductive and family lives.”<sup>88</sup> Although the disability rights critique of selective abortion has the same structure as the critiques of nontreatment and assisted suicide, the critics in this context endorse a very different policy prescription.

## II. THE DISABILITY RIGHTS CRITIQUE AND “CHOICE”

As the discussion in the previous Part demonstrates, disability rights activists have urged that deep-rooted bias against disability, filtered through powerful professional cultures, prevents people from exercising true freedom of choice in making decisions regarding the treatment of infants with disabilities, assisted suicide, and prenatal testing and selective abortion.

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new social and discursive reality, which then becomes the touchstone and the reference point for all the information the parents receive and all the decisions they make from that point forward”).

<sup>84</sup> Mary B. Mahowald, *Aren’t We All Eugenicists? Commentary on Paul Lombardo’s “Taking Eugenics Seriously,”* 30 FLA. ST. U. L. REV. 219, 233 (2003).

<sup>85</sup> See BÉRUBÉ, *supra* note 71, at 46 (describing himself as “strongly pro-choice”); Parens & Asch, *supra* note 70, at 12 (“Virtually all the major work in the disability critique of prenatal testing emerges from those who are also committed to a pro-choice, feminist agenda . . .”); Steinbock, *supra* note 65, at 109 (“Some of the most passionate advocates of the disability perspective on abortion are generally pro-choice.”).

<sup>86</sup> See Asch, *supra* note 80, at 334–35; BÉRUBÉ, *supra* note 71, at 80–81; Janet Dolgin, *The Ideological Context of the Disability Rights Critique: Where Modernity and Tradition Meet*, 30 FLA. ST. U. L. REV. 343, 358–59 (2003); Field, *supra* note 29, at 119; Parens & Asch, *supra* note 70, at 29.

<sup>87</sup> Asch, *supra* note 80, at 317.

<sup>88</sup> *Id.* at 341; see also *id.* at 333–34 (“[T]he critique of testing and selective abortion is intended to change professional practice and rhetoric and to give more comprehensive information about disability to prospective parents. Critics have never intended to curtail women’s decision-making about their reproductive lives.”).

In this Part, I hope to illuminate some of the legal stakes of their argument and in so doing to highlight an underappreciated aspect of the Supreme Court's current abortion jurisprudence.

Current constitutional doctrine relating to abortion is rooted in a principle of autonomy.<sup>89</sup> The Court has held, most notably in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>90</sup> that a choice of such profound moral and practical significance for a woman must be made by her, freely. But the Court also has recognized—in the mode of the disability rights critique—that private as well as public pressure can inhibit free choice. Accordingly, it has upheld regulations of abortion that are justified as removing obstacles to the woman's authentic choice. But once we allow government to regulate the abortion decision in the name of removing private obstacles to free choice, we confront a classic Legal Realist baseline problem: *all* choices are made under an array of constraints,<sup>91</sup> so the government will always have some plausible argument for regulating to promote choice.<sup>92</sup> And the notion of autonomy, by itself, will not provide a basis for rejecting any such regulation.

The disability rights critique could thus serve as a model for those who wish to defend ever more stringent abortion regulations. Like the disability rights critics, anti-abortion activists need only identify private, social, or professional forces that, by pressuring women to have abortions, create obstacles to “truly” free choice.<sup>93</sup> Regulation can then be justified as overcoming those obstacles and promoting choice. Indeed, although many disability rights critics specifically disavow any desire to impose regula-

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<sup>89</sup> See Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 876 (1993) (“The language of autonomy has provided the central rationale for protecting individual women's control over the abortion decision.”).

<sup>90</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 848–53 (1992).

<sup>91</sup> Although Joan Williams argues that “choice rhetoric should not be abandoned in the abortion context since it helps protect abortion rights,” she recognizes that “choice always occurs within constraints.” Williams, *supra* note 7, at 1562, 1561.

<sup>92</sup> On the baseline problems that Legal Realism made apparent, see LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES* 31–38 (1996); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 *passim* (1987).

<sup>93</sup> I do not mean to deny that there are social forces that pressure women to become mothers, and that those pressures are in many if not in most cases more powerful than the pressures that lead women to have abortions. A quick glance at the literature on “repro-normativity,” Katherine Franke, *Theorizing Yes: An Article on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 183–97 (2001), or “pronatalism,” JEAN E. VEEVERS, *CHILDLESS BY CHOICE* 110–16 (1980), should demonstrate that the social pressures to have children are great indeed. Any prescriptive analysis of what constitutes “free choice” in the abortion context would have to take account of the pressures militating against, as well as those militating toward, abortion. But my goal in this Article is different. My goal is to show how the disability rights critique lends itself to being used by abortion opponents more generally, and thus to highlight some of the tensions in the thinking of disability rights critics. If my presentation of the anti-abortion arguments seems one-sided, it is for that reason and not a reflection on my personal views on those arguments or abortion rights generally.

tions on the abortion decision, their arguments would readily justify regulations under the Supreme Court's post-*Casey* jurisprudence. The tension between the disability rights critique and support for broad abortion rights is therefore greater than some of the critics seem to believe.

#### A. *Justifying Restrictions in the Name of Choice*

The Supreme Court has rooted constitutional protection of abortion rights in the guarantee of “liberty” in the Due Process Clause of the Fourteenth Amendment.<sup>94</sup> The liberty protected by the Constitution, the Court has ruled, includes freedom in making “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . .”<sup>95</sup> In what Justice Scalia later derided as the “famed sweet-mystery-of-life passage,”<sup>96</sup> the Court in *Planned Parenthood v. Casey* rested squarely on a concept of freedom of choice, stating that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”<sup>97</sup> Despite Justice Scalia’s criticisms, the Court has reaffirmed that language, as well as *Casey*’s understanding that the constitutional protection of abortion rights rests on “the respect the Constitution demands for the autonomy of the person in making these choices.”<sup>98</sup>

The disability rights critique is, as a logical matter, entirely consistent with the Supreme Court’s protection of the right of free choice. Indeed, many of the most important exponents of that critique have sworn allegiance to the right to choose. But, in a classic Legal Realist move, the disability rights critique insists that private actors can limit free choice at least as much as the government can. In each of the areas discussed in Part I, disability rights critics have emphasized the way societal stigmas and powerful social and financial pressures can effectively compel particular choices—whether the choice of a parent to withhold treatment from a newborn with a disability, the choice of an individual with a disability to exercise her “right to die,” or the choice of a pregnant woman to test her fetus for disabilities and have an abortion if a disability is discovered. To the extent that the disability rights critics have sought to regulate individuals’ choices in these areas, they have justified their regulatory proposals as serving, rather than undermining, freedom of choice. Regulation is necessary, disability rights critics have argued, to provide a counterbalance

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<sup>94</sup> See *Casey*, 505 U.S. at 846–53.

<sup>95</sup> *Id.* at 851; see also Karlan & Ortiz, *supra* note 89, at 878 (stating that *Casey* “illustrates the centrality of autonomy-talk to the standard legal defense of abortion rights”).

<sup>96</sup> *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

<sup>97</sup> *Casey*, 505 U.S. at 851.

<sup>98</sup> *Lawrence*, 539 U.S. at 574.

to the strong social forces that will otherwise lead people to accord less value to the lives and potential lives of individuals with disabilities. By counteracting a coercive social setting, regulation helps to assure that the choices made in this context are authentic exercises of an individual's will.<sup>99</sup>

Of course, this move—regulating to remove obstacles to choice—cannot be limited to matters that touch on disability. As the Legal Realists demonstrated in their successful attack on freedom of contract, the move is available whenever the reigning legal principle is one involving the liberty to choose.<sup>100</sup> And, indeed, it is a move that has played a significant role in the Supreme Court's abortion jurisprudence.<sup>101</sup>

It was abortion rights activists who first urged that constitutional doctrine should be attentive to private restrictions on choice. In the abortion funding cases,<sup>102</sup> abortion rights lawyers contended that the government's failure to fund abortions for indigent women, particularly when the government funded childbirth, coerced them into foregoing abortions.<sup>103</sup> The

<sup>99</sup> The prescription of the disability rights critics has a strong affinity with recent scholarship that proposes one or another form of avowedly paternalistic regulation that does not foreclose choice altogether, but is designed to help people avoid making choices they will regret. See, e.g., Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1212 (2003) (advocating "asymmetrically paternalistic" regulation that "creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational" on the ground that "[s]uch regulations are relatively harmless to those who reliably make decisions in their best interest, while at the same time advantageous to those making suboptimal choices"); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron,* 70 U. CHI. L. REV. 1159, 1162 (2003) (advocating "libertarian paternalism" involving "self-conscious efforts, by private and public institutions, to steer people's choices in directions that will improve the choosers' own welfare" but ensuring that "choices are not blocked or fenced off"). While the proposals for "asymmetric paternalism" and "libertarian paternalism" seek to overcome problems of bounded rationality, the proposals of the disability rights critics seek to overcome distinct (but related) problems of stigma and (perhaps subtle) coercion. However, the structure of the arguments is very similar.

<sup>100</sup> For discussions of the Legal Realist attack on freedom of contract, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 33–39, 194–98 (1992); Joseph William Singer, *Legal Realism Now,* 76 CAL. L. REV. 465, 482–95 (1988). Jack Balkin and Frances Olsen have drawn a similar connection between the Legal Realist attack on freedom of contract and recent efforts to justify prohibitions of pornography or hate speech in the name of promoting free speech. See J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment,* 1990 DUKE L.J. 375, 379–82 (1990); Frances Olsen, *Feminist Theory in Grand Style,* 89 COLUM. L. REV. 1147, 1162 (1989). And of course, feminists have applied the Legal Realist critique of choice more generally. See, e.g., CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 171–214 (1989); Tracy E. Higgins, *Democracy and Feminism,* 110 HARV. L. REV. 1657 *passim* (1997).

<sup>101</sup> Writing before the doctrinal developments I discuss in the remainder of this Section, Mike Seidman noted the basic problem: "*Roe v. Wade* suggests that a woman's decision whether to terminate her pregnancy should be her own. Merely leaving the decision in the private sphere, however, does not necessarily mean that it will be autonomous." Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law,* 96 YALE L.J. 1006, 1046 (1987).

<sup>102</sup> See *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

<sup>103</sup> See, e.g., *Maher*, 432 U.S. at 483 (Brennan, J., dissenting) ("Th[e] disparity in funding by the State [i.e., funding childbirth but not abortion] clearly operates to coerce indigent

Court, however, rejected the argument. Although the Court acknowledged that *Roe v. Wade* had recognized “a constitutionally protected interest ‘in making certain kinds of important decisions’ free from governmental compulsion,”<sup>104</sup> it held that the state’s failure to fund abortion did not constitute compulsion. Rather, the Court concluded that any constraint on the woman’s exercise of free choice resulted from her indigency, a condition that is neither attributable to the government nor one that the government has a constitutional obligation to alleviate.<sup>105</sup> The Due Process Clause, the Court held, protects against “unwarranted government interference with freedom of choice” but “does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.”<sup>106</sup>

Although the abortion funding cases rejected the conclusion that indigency imposed the kind of constraint on free choice that *requires* the state to counteract it, the Court accepted a more modest understanding of the Legal Realist point in *Casey*. There, the Court held that states *may* adopt regulations that are “calculated to inform the woman’s free choice, not hinder it.”<sup>107</sup> Indeed, the central aspect of *Casey*’s retooling of the Court’s post-*Roe* abortion jurisprudence was the case’s explicit recognition that states may “tak[e] steps to ensure that [the woman’s] choice is thoughtful and informed” and may “enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning”:<sup>108</sup>

Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adop-

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pregnant women to bear children they would not otherwise choose to have, and just as clearly, this coercion can only operate upon the poor, who are uniquely the victims of this form of financial pressure.”). For an academic argument pursuing a similar vision of government responsibility to provide women the means to make autonomous reproductive choices, see Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1479 (1991) (arguing for a “concept of privacy” that “includes not only the negative proscription against government coercion, but also the affirmative duty of government to protect the individual’s personhood from degradation and to facilitate the processes of choice and self-determination”).

<sup>104</sup> *Maher*, 432 U.S. at 473 (quoting *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)).

<sup>105</sup> See *Harris*, 448 U.S. at 316 (“[A]lthough government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.”); *Maher*, 432 U.S. at 474 (“The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.”).

<sup>106</sup> *Harris*, 448 U.S. at 317–18.

<sup>107</sup> *Casey*, 505 U.S. at 877.

<sup>108</sup> *Id.* at 872–73.

tion of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.<sup>109</sup>

*Casey* thus recognized that states may constitutionally remove private restrictions on free choice, even if they impose new restrictions in doing so. *Casey* thus adopted what might be thought of (perhaps ironically) as a “pro-choice” rationale for regulation.<sup>110</sup>

The *Casey* joint opinion applied these principles to uphold a number of significant restrictions on abortions. One such restriction was the so-called “informed consent” provision, which required a physician, twenty-four hours in advance of performing an abortion, to provide the woman with information about the fetus’s gestational age and the risks of abortion and childbirth; the state also required the physician to make available printed materials “describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion.”<sup>111</sup> As Justice Stevens highlighted, the printed materials seemed “clearly designed to persuade [a woman] to choose not to undergo the abortion.”<sup>112</sup> Also, the twenty-four-hour waiting period imposed significant restrictions on the ability to obtain an abortion in a state with a limited number of abortion clinics, some of which were open only a few days a week.<sup>113</sup> But the Court nonetheless upheld the provision as (in the words of the lead opinion) one that “facilitates the wise exercise” of the “right to decide to terminate a pregnancy.”<sup>114</sup>

The lead opinion appeared to presume that, absent the “informed consent” law, many women would decide precipitously, without full information about the alternatives to abortion or consequences of abortion on the woman and fetus. The opinion concluded that “attempting to ensure that a woman apprehend[s] the full consequences of her decision” serves legitimate inter-

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<sup>109</sup> *Id.* at 872. Professors Karlan and Ortiz read this aspect of *Casey* as incorporating some of the aspects of relational or “different voice” feminism by insisting on the pregnant woman’s connectedness and communication with a broader community. See Karlan & Ortiz, *supra* note 89, at 882–85. Michael Dorf reads this aspect of *Casey* as telling us something about the content of the right to choose abortion—that it is a right the exercise of which is thought to be “almost always regrettable.” Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1224–26 (1996). Those points seem right as far as they go, but they do not highlight the way in which *Casey* justifies regulation as promoting free choice, which is the aspect of *Casey* on which I focus here.

<sup>110</sup> Cf. Chris Whitman, *Looking Back on Planned Parenthood v. Casey*, 100 MICH. L. REV. 1980, 1988 (2002) (arguing that *Casey* “turns the ‘pro-choice’ rhetoric of Roe supporters against a sympathetic interpretation of the right recognized in that opinion”).

<sup>111</sup> *Casey*, 505 U.S. at 881 (opinion of O’Connor, Kennedy, & Souter, JJ.).

<sup>112</sup> *Id.* at 917 (Stevens, J., concurring in part and dissenting in part); see Karlan & Ortiz, *supra* note 89, at 885 (noting that states that enact notice and informed consent laws in the abortion context “normally implant them within regulatory schemes that are clearly intended to dissuade women from choosing abortion”).

<sup>113</sup> See *Casey*, 505 U.S. at 885–86.

<sup>114</sup> *Id.* at 887 (opinion of O’Connor, Kennedy, & Souter, JJ.).

ests in “reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.”<sup>115</sup> It also concluded that the twenty-four-hour waiting period helps to ensure that the abortion decision “will be more informed and deliberate” by requiring “some period of reflection.”<sup>116</sup>

If one believes that the decisions of individual women typically are informed, deliberate, and not influenced by social pressures to have abortions, then the “informed consent” restrictions upheld in *Casey* appear as nothing more than gratuitous interference with the right to choose abortion.<sup>117</sup> And the interference may be severe: the restrictions upheld in *Casey* may have a powerful effect on the practical ability of women to have abortions.<sup>118</sup> But the justices who jointly wrote the lead opinion in *Casey* evidently thought otherwise. Some insight into their thinking can be found in the dissent of Justice Kennedy (one of the three authors of the *Casey* joint opinion) in *Hill v. Colorado*.<sup>119</sup> *Hill* involved a state law that imposed an eight-foot floating buffer zone around people within 100 feet of a

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<sup>115</sup> *Id.* at 882 (opinion of O’Connor, Kennedy, & Souter, JJ.). The joint opinion’s analysis on this point might draw some support from advocates of “asymmetric” and “libertarian” paternalism. Those advocates contend that individuals “are especially prone to making choices that they will regret” when they “are making decisions that they make infrequently and for which they therefore lack a great deal of experience” and when “emotions are likely to be running high.” Sunstein & Thaler, *supra* note 99, at 1188; see Camerer et al., *supra* note 99, at 1238–39. Abortion decisions readily seem to fit that paradigm.

<sup>116</sup> *Casey*, 505 U.S. at 885 (opinion of O’Connor, Kennedy, & Souter, JJ.). Waiting or “cooling off” periods are a standard form of regulation designed to induce reflection and protect people against making hasty choices they will regret. See Camerer et al., *supra* note 99, at 1238–47; Sunstein & Thaler, *supra* note 99, at 1187–88. But they also impose costs—which, as I discuss in the text—may be significant in the abortion context. Advocates of “asymmetric” or “libertarian” paternalism would take account of those costs before deciding to impose waiting periods like that the Court upheld in *Casey*. See Camerer et al., *supra* note 99, at 1239; Sunstein & Thaler, *supra* note 99, at 1190–93.

<sup>117</sup> Justices Stevens and Blackmun made this argument in separate opinions dissenting from *Casey*’s judgment upholding the informed consent provisions. See *Casey*, 505 U.S. at 918–19 (Stevens, J., concurring in part and dissenting in part); *id.* at 934–38 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). For academic statements of the point, see DWORKIN, *supra* note 65, at 173–74; Jane Maslow Cohen, *A Jurisprudence of Doubt: Deliberative Autonomy and Abortion*, 3 COLUM. J. GENDER & L. 175, 231–43 (1992); Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 141–45 (1992).

<sup>118</sup> See, e.g., *A Woman’s Choice—East Side Women’s Clinic v. Newman*, 305 F.3d 684, 685 (7th Cir. 2002) (upholding Indiana “informed consent” requirements that paralleled those upheld in *Casey*, notwithstanding the district court’s undisturbed finding that the requirements would raise the effective cost of abortion, and that “the higher cost will reduce by 10% to 13% the number of abortions performed in Indiana”), *cert. denied*, 537 U.S. 1192 (2003); Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2082–84 (1994) (detailing burdens imposed by the restrictions upheld in *Casey*); Katherine C. Sheehan, *Toward a Jurisprudence of Doubt*, 7 UCLA WOMEN’S L.J. 201, 236–37 (1998) (similar); see also Sylvia A. Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 931 (arguing that *Casey*’s broadening of permissible regulation of abortion “hits hardest those women who are most vulnerable, i.e. the poor, the unsophisticated, the young, and women who live in rural areas”); McClain, *supra* note 117, at 120 (same).

<sup>119</sup> *Hill v. Colorado*, 530 U.S. 703, 765–92 (2000).

health care facility; the Court rejected the claim by a number of anti-abortion “sidewalk counselors” that the statute violated their First Amendment rights. Dissenting from that ruling, Justice Kennedy urged that the majority’s opinion not only “undermin[ed] established First Amendment principles” but also “conflict[ed] with the essence of the joint opinion in [*Casey*].”<sup>120</sup>

In explaining the latter point, Justice Kennedy made clear his view that women seeking abortions often have not fully reflected on or obtained information about the decision. He referred to “the argument[ ] by proponents of abortion” that “a young woman might have been so uninformed that she did not know how to avoid pregnancy,” and contended that anti-abortion counselors merely “seek to ask the same uninformed woman . . . to understand and to contemplate the nature of the life she carries within her.”<sup>121</sup> Justice Kennedy emphasized “the profound difference a leaflet can have in a woman’s decisionmaking process.”<sup>122</sup> He quoted extensively from “the account of one young woman who testified before the Colorado Senate.”<sup>123</sup> That woman, who decided not to have an abortion after being presented with a pamphlet by sidewalk counselors, testified that before she received the pamphlet she thought “abortion [was] the only way out because of [*sic*] it’s all I knew.”<sup>124</sup> If the buffer zone law had been in effect when she was pregnant, she said, “I would not have got any information at all and gone through with my abortion because the only people on my side were the people at the abortion clinic” who “knew exactly how I was feeling and what to say to make it all better.”<sup>125</sup> But receiving the pamphlet from the anti-abortion counselors, she said, “helped me make my choice. I got an informed decision, I got information from both sides, and I made an informed decision that my son and I could both live with.”<sup>126</sup>

Especially when read in the light of Justice Kennedy’s argument in *Hill*, it is apparent that the *Casey* joint opinion’s rationale for upholding the “informed consent” requirement had exactly the same structure as the

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<sup>120</sup> *Id.* at 765 (Kennedy, J., dissenting).

<sup>121</sup> *Id.* at 789.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 790.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* Writing from an avowedly feminist perspective, Ruth Colker argues that women’s abortion decisions are often driven by “what their parents, boyfriend, or social workers told them to do” rather than any meaningful reflection, and that those decisions are therefore “often made under conditions of coercion.” Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011, 1064, 1066 (1989); see also Williams, *supra* note 7, at 1584 (“Yet choice rhetoric is not the simple, unadulterated truth of women’s lives: many aborting women feel they have no choice but to abort.”); Garance Franke-Ruta, *Multiple Choice*, NEW REPUBLIC, Nov. 28, 2005, at 14 (“[A] lot of women getting abortions are doing so precisely because they *don’t* have control over their destinies, and perhaps never did.”).

disability rights critique discussed in Part I. Both arguments can be used to justify government restrictions on choice, but neither argument rejects choice as the governing principle. To the contrary, both openly embrace the view that the Constitution protects freedom of choice. They simply assert that the government is not the only—or perhaps even the most important—threat to free choice. Both the disability rights critics and the *Casey* joint opinion point instead to social pressures and the lack of information as significant obstacles to free choice. Although government regulation may in some ways restrict choice, it does so in an effort to remove even greater obstacles to free choice.<sup>127</sup>

The obvious problem for abortion rights advocates is the same one confronted by advocates of freedom of contract in the face of the Legal Realist critique. If the only basis for abortion rights is individual autonomy, and government can regulate to remove private or societal threats to free choice, then courts can be expected readily to defer to any number of restrictions on abortion.<sup>128</sup> At the limit, such an argument could even justify a rule that flatly prohibits abortions. Many women who have abortions do so because of social pressures (such as stigmas against unwed motherhood) or financial pressures. It is easy enough, applying the Legal Realist logic, to say that an abortion chosen under the influence of such pressures may not reflect the woman's "true" or "uncoerced" choice. If most abortions occur under such conditions,<sup>129</sup> autonomy may be best served by prohibiting abortion entirely—particularly if the pressures that operate on a woman's choice are subtle and hard to detect in any particular instance.<sup>130</sup>

That argument may seem farfetched, if not Orwellian. *Casey* seems clearly to say that although states can regulate abortion, they cannot pro-

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<sup>127</sup> Again, Ruth Colker makes a similar point from a feminist perspective. She contends that "[s]ince the feminist position is 'pro-choice' rather than 'pro-abortion,' feminists do not purport to know the correct decision for each individual woman facing an abortion decision," that women making abortion decisions often "face a problem of consciousness" that may limit their insight into what they truly want, and therefore that "[r]ather than simply acquiescing to any abortion decision made by a woman, we might want to consider how to improve her qualitative judgment." Colker, *supra* note 126, at 1063; cf. Susan Frelich Appleton, *When Welfare Reforms Promote Abortion: "Personal Responsibility," "Family Values," and the Right to Choose*, 85 GEO. L.J. 155, 186–87 (1996) ("Although the term 'prochoice' has acquired scars from its service as a politically charged slogan, its core meaning continues to express support for reproductive self-determination, according equal respect to whatever option an individual freely selects.") (footnotes omitted).

<sup>128</sup> See Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 724–27 (1992) (arguing that the Legal Realist critique of voluntariness and coercion, as assimilated in New Deal jurisprudence, led New Dealers to defer to political decisions about what regulations were necessary to overcome coercion and thus broadly to uphold regulations).

<sup>129</sup> This is not to say that most abortions do. See *supra* note 93. It is only to say that anti-abortion activists might seek to make that case.

<sup>130</sup> Indeed, an early version of the recently enacted South Dakota ban on virtually all abortions relied on "evidence" that "abortions are performed without a truly informed or voluntary consent or knowing waiver of the woman's rights and interests." H.B. 1191, 2004 Leg. Assem., 79th Sess. § 3 (S.D. 2004).

hibit it entirely or even place an “undue burden” on it<sup>131</sup>—permit but discourage, as Roger Rosenblatt described Americans’ views on abortion at around the time the case was decided.<sup>132</sup> But the seemingly perverse argument for banning abortion in the name of choice would parallel the argument made by disability rights critics of assisted suicide. Those critics accept that autonomy is the basic goal of the disability rights movement, and many agree that an autonomous choice to commit suicide should, in principle, be protected. But they contend that if assisted suicide is allowed at all the pressures will be so powerful that many people with disabilities will be forced to “choose” to end their lives—and that the pressures will be so subtle that they will not be reliably detected in any individual case. In those circumstances, disability rights critics argue, autonomy is best served by prohibiting assisted suicide altogether.<sup>133</sup>

Justice Souter—another author of the *Casey* joint opinion—adopted that very reasoning in his concurring opinion in the *Glucksberg* case.<sup>134</sup> The plaintiffs had argued that Washington’s prohibition on assisted suicide denied individuals with terminal illness the right, guaranteed by *Casey*, to make choices concerning major life decisions. In rejecting that claim, Justice Souter agreed with the plaintiffs that the Constitution accords some protection to the choice of a patient with terminal illness regarding when and how to die.<sup>135</sup> But he concluded that the state’s interest in, among other things, “protecting patients from mistakenly and involuntarily deciding to end their lives” was sufficient to justify the flat prohibition on assisted suicide.<sup>136</sup> Justice Souter argued that the recognition of such a state interest was fully consistent with the autonomy principle that underlay the plaintiffs’ claims—it did not reflect “a moral judgment contrary to” that asserted by the plaintiffs.<sup>137</sup> Rather, it reflected an empirical view (which Justice Souter believed to be well grounded) that the legalization of

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<sup>131</sup> See *Casey*, 505 U.S. at 871–78 (opinion of O’Connor, Kennedy, & Souter, JJ.).

<sup>132</sup> See ROGER ROSENBLATT, *LIFE ITSELF: ABORTION IN THE AMERICAN MIND* 138 (1992) (“What most Americans want to do with abortion is to permit it but discourage it also.”); see Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 100 (1992) (“Commentators noted the ‘coincidence’ that the [*Casey*] joint opinion tracked the public ambivalence about abortion: ‘permit but discourage.’”).

<sup>133</sup> See *supra* text accompanying notes 60–61. For academic statements of that position, see CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 116 (1999) (arguing that a “state could decide, with sufficient reason, that a ban on physician-assisted suicide actually promotes the autonomy of many or most people” and drawing the “general lesson” that “[i]n some circumstances, a decision to override choice can actually enhance freedom”); Kreimer, *supra* note 46, at 820 (“If the prohibitions are necessary to avoid the death of those who actually have not chosen to die, there is not conflict of principle between the State’s justification for the prohibitions and its obligation to respect its citizens’ choices.”).

<sup>134</sup> *Washington v. Glucksberg*, 521 U.S. 702, 752 (1997) (Souter, J., concurring in the judgment).

<sup>135</sup> *Id.* at 782.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

assisted suicide in any form would inevitably lead many people to “choose” to die under coercive circumstances—a result that even strict regulation could not prevent.<sup>138</sup> The state’s ban on assisted suicide thus did not reflect disrespect for the principle of autonomy. Even though a ban necessarily impinges on autonomy in cases where an individual would truly voluntarily choose to end her life, the failure to adopt a ban impinges on autonomy in cases where an individual’s “choice” to die reflects coercion. If, as disability rights critics believe, coerced suicide reflects the greater threat, then a ban on the practice is the policy most consistent with promoting autonomy.

The same kind of analysis could readily be applied to abortion. Although many who have articulated the disability rights critique have pointedly disavowed governmental regulation of the abortion decision, their arguments lend themselves to being used in support of such abortion restrictions. If the goal is free choice, and stigma against people with disabilities filtered through powerful professional culture makes choice unfree, regulation to overcome those powerful private forces is a straightforward response. As the discussion above demonstrates, it is a response that could easily be blessed under the Supreme Court’s post-*Casey* abortion doctrine.

#### *B. Are There Limits on “Pro-Choice” Regulation?*

Pro-choice advocates may be tempted to say—as the dissenters said in *Casey*—that regulations like the “informed consent” requirements do not really promote choice; all they do is prevent free choices from being implemented.<sup>139</sup> But the disability rights critique shows that the notion of “free choice” is not helpful in determining whether such regulations should be upheld. Those regulations remove some private constraints on individual choice, while at the same time imposing some governmental constraints on individual choice. The “informed consent” requirements upheld in *Casey*, for example, counteract the barriers to free choice imposed by both social pressures to have abortion and ignorance about alternatives. But they do so at the price of making abortion a more cumbersome, expensive, time-consuming, emotionally fraught, and perhaps physically dangerous process. Whether the result is to promote or impede free choice on balance depends in part on empirical questions. For example, how ignorant are pregnant women about alternatives to abortion? What is the extent and direction of the social pressures such women face? But the answer mostly depends on a normative question: What kinds of (publicly or privately imposed) constraints are we going to treat as rendering a choice

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<sup>138</sup> See *id.* at 782–87.

<sup>139</sup> See *supra* text accompanying notes 117–118.

unfree? The abstract notion of “autonomy” is not of much help in answering that question.<sup>140</sup>

The abortion funding cases illustrate the point from the opposite direction. In the absence of public funding, a poor woman who becomes pregnant may find that she is unable, as a practical matter, to choose to have an abortion. But the Supreme Court did not treat that practical effect of the denial of funding as intruding on the free choice guaranteed by *Roe v. Wade*. All of us make choices under constraints—including financial ones. In a capitalist society in which the government has no general affirmative obligation to provide for its citizens,<sup>141</sup> it is hardly surprising that indigency-related financial pressures, which do not intrude on any baseline entitlement, are held not to impinge on free choice.

The foregoing suggests that in the absence of a normative principle independent of autonomy, there is nothing to stop states from adopting—and courts from approving—ever more stringent restrictions on abortion in the name of choice. Informed consent requirements could demand longer waiting periods or the presentation of more powerful arguments against abortion. Classes of abortions that could be said to reflect social pressure to abort could be banned; disability-selective and sex-selective abortions are the most obvious cases, and abortions by minors are another. The precedent requiring a “health of the mother” exception to abortion prohibitions<sup>142</sup> could also be undermined: such an exception, particularly when extended to mental health, gives physicians a great deal of power in the abortion process, which they may use to encourage women to have abortions.<sup>143</sup> The no-affirmative-duties principle of the abortion funding cases will effectively limit the degree to which the government is *required* to overcome private obstacles to free choice. But *Casey*’s Legal Realist autonomy analy-

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<sup>140</sup> This, of course, is a general problem with making legal results turn on whether a person acts autonomously. See, e.g., Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 886, 889 (1994) (arguing that the degree to which a person has “descriptive autonomy”—the kind of autonomy that is treated as a measurable, empirical concept—depends on “(i) critical and self-critical ability, (ii) competence to act, (iii) sufficient options, and (iv) independence of coercion and manipulation,” and noting that coercion and manipulation, in particular, are difficult to define “in a principled way”). It is a problem the Legal Realist move makes especially acute.

<sup>141</sup> See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (“As a general matter, a State is under no constitutional duty to provide substantive services for those within its border.”).

<sup>142</sup> See *Stenberg v. Carhart*, 530 U.S. 914, 930–31 (2000).

<sup>143</sup> On the importance of the views of medical professionals in the operation of pre-*Roe* abortion laws that contained medical necessity exceptions, see LUKER, *supra* note 63, at 77–82; cf. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1020 (1984) (“A privacy right that demands that ‘the abortion decision . . . be left to the medical judgment of the pregnant woman’s attending physician,’ gives doctors undue power by falsely casting the abortion decision as primarily a medical question.”) (footnote omitted) (quoting *Roe*, 410 U.S. at 164); Elizabeth Reilly, *The “Jurisprudence of Doubt”: How the Premises of the Supreme Court’s Abortion Jurisprudence Undermine Procreative Liberty*, 14 J.L. & POL. 757, 774–80 (1998).

sis suggests that states will have broad latitude to *choose* to adopt laws to overcome those obstacles.

There is an obvious candidate for a principle to give content to the notion of “free choice” that is central to the Supreme Court’s abortion jurisprudence. That principle is gender equality. A number of commentators argue that equality, not autonomy—and hence the Equal Protection Clause, not the Due Process Clause—should be regarded as the basis of the constitutional right to abortion. Restrictions on abortion, they contend, impose on women the obligation to carry a fetus to term—a massive imposition on the woman’s body, and one unlike any burden imposed on men.<sup>144</sup> Moreover, they urge that by conscripting women into motherhood, abortion restrictions enforce and reinforce longstanding stereotypes about the appropriate social roles of men and women<sup>145</sup>—a major concern of the Supreme Court’s sex discrimination jurisprudence.<sup>146</sup> Writing before *Casey*, and thus before the doctrinal consequences discussed in this Article came into full view, Cass Sunstein explicitly defended the equality-based argument for abortion rights on the ground that it would avoid the baseline problems inherent in treating the abortion decision as reflecting “a pri-

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<sup>144</sup> See Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 *passim* (1979); cf. Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 484 (1990) (arguing that abortion prohibitions “violate the [Thirteenth] amendment’s guarantee of equality, because forcing women to be mothers makes them into a servant caste, a group which, by virtue of a status of birth, is held subject to a special duty to serve others and not themselves”). For the classic argument against abortion prohibitions on the ground that they impose on women a Good Samaritan obligation that is not imposed on others in similar situations, see Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971). For some objections to the Samaritan argument for abortion, see David A. Strauss, *Abortion, Toleration, and Moral Uncertainty*, 1992 SUP. CT. REV. 1, 10–14.

<sup>145</sup> See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 382–83 (1985); Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57–59 (1977); Law, *supra* note 143, at 1017–20; Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311–24 (1991); Frances Olsen, *The Supreme Court 1988 Term Comment: Unraveling Compromise*, 103 HARV. L. REV. 105, 120 (1989); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 347–80 (1992); Strauss, *supra* note 144, at 18–22; see also Colker, *supra* note 126, at 1050 (“A woman, in my view, has the right to seek an abortion to protect the value of her life in a society that disproportionately imposes the burdens of pregnancy and child care on women and does not sufficiently sponsor the development and use of safe, effective contraceptives.”) (footnote omitted); cf. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 791 (1989) (“Even if the propensity of anti-abortion laws to exert power over the body and to instrumentalize women is discounted, it remains the case that such laws radically and affirmatively redirect women’s lives. Indeed, it is difficult to conceive of a particular legal prohibition with a more total effect on the life and future of the one enjoined.”).

<sup>146</sup> See *United States v. Virginia*, 518 U.S. 515, 541–42 (1996); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 138–40 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982).

vate, natural, and largely unproblematic sphere of sexual and reproductive autonomy.”<sup>147</sup>

Although the matter is complex, there are substantial doctrinal obstacles to grounding protection for abortion rights in the Equal Protection Clause.<sup>148</sup> But a far stronger basis exists to use equality concerns as a means of determining what sorts of burdens on the due process right to choose abortion are “undue.” Indeed, the Court appeared to do just that in *Casey*. Although the Court upheld the “informed consent” requirements Pennsylvania imposed, it invalidated a separate regulation that required married women to notify their husbands before having an abortion.<sup>149</sup> In striking down the spousal notification provision, the lead opinion (here speaking for the Court) emphasized that the provision “embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution.”<sup>150</sup>

Nor was the *Casey* Court’s use of equality concerns to flesh out the limits imposed by the Due Process Clause aberrational. In *Lawrence v. Texas*, the Court’s determination that the Clause protects the right to engage in consensual sodomy was driven in large part by equality concerns.<sup>151</sup>

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<sup>147</sup> Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 31 (1992).

<sup>148</sup> The Supreme Court has never endorsed the Equal Protection Clause as a basis for the right to abortion, although the opinion in *Casey* contains some language that indicates that equality concerns influenced the Court’s analysis. See Strauss, *supra* note 144, at 2 (stating that “[t]he status of women played a larger role in *Casey* than in any previous opinion of the Court’s dealing with abortion” but recognizing that the Court rested “on the ‘liberty’ guaranteed by the Fourteenth Amendment, not—as some have suggested—on the premise that restrictions on abortion are suspect because they discriminate against women”) (footnote omitted). And the Court has held that discrimination on the basis of pregnancy is not sex discrimination that triggers heightened scrutiny under the Equal Protection Clause. See *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974). According to that precedent, a law discriminating on the basis of pregnancy does not discriminate between men and women, but between pregnant and nonpregnant persons. See *id.* at 496 n.20. Although this doctrine has been much criticized—and Congress adopted a law to overturn the Court’s use of a similar doctrine in interpreting the sex discrimination prohibition in Title VII of the Civil Rights Act of 1964, see *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676–82 (1983)—the Court has reaffirmed it. See *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 271–73 & n.3 (1993). Because an abortion restriction directly discriminates only on the basis of pregnancy, and a disparate impact on women does not trigger heightened scrutiny under the Equal Protection Clause, see *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979), the equality argument for abortion rights is a poor fit with current doctrine. To be sure, the Court’s decision in *Nev. Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003), which postdates *Casey*, does suggest a broader understanding of equal protection than that endorsed in the pregnancy discrimination cases. See *id.* at 737 (upholding universal family leave requirement of the Family and Medical Leave Act as a congruent and proportional response to sex discrimination). But it is far too soon to treat *Hibbs* as overruling those cases.

<sup>149</sup> See *Casey*, 505 U.S. at 887–98.

<sup>150</sup> *Id.* at 898.

<sup>151</sup> *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both inter-

Indeed, equality concerns are an underappreciated tool for determining the scope of a constitutionally protected liberty generally.<sup>152</sup>

In the immediate future, when *Casey* is the law and Justice Kennedy—who seems strongly to believe in “pro-choice” regulation<sup>153</sup>—is the swing vote in abortion cases, abortion rights advocates are likely to confront an increasing number of regulations justified as promoting free choice. Notions of equality will offer a crucial tool for arguing that (at least some of) those regulations are in fact coercive, and that they hinder rather than promote free choice.<sup>154</sup>

But equality cannot magically solve the problem *Casey*’s Legal Realist autonomy analysis poses for abortion rights advocates. For one thing, a number of abortion restrictions may themselves be justified in the name of equality. A prohibition on sex-selective abortions could readily be justified on those grounds, as, indeed, could a prohibition on disability-selective abortions. At least some anti-abortion commentators believe that regulations like those could achieve the lion’s share of the pro-life agenda.<sup>155</sup> On an even broader scale, those who consider themselves pro-life feminists believe that most abortions are the result of the subordination of women, who are used for sex, perhaps abused by their partners, deprived of opportunities, and unfairly forced to choose between parenthood and an independent economic identity.<sup>156</sup> Pro-choice feminists may agree with the diag-

ests.”). A number of commentators have called attention to the way the *Lawrence* Court uses equality concerns as a way of fleshing out the liberty protected by the Due Process Clause. See Pamela S. Karlan, *Loving Lawrence*, 102 MICH. L. REV. 1447, 1450–58 (2004); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 30; Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1894, 1902–07 (2004).

<sup>152</sup> See generally Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491 (2002); cf. Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POL’Y 419, 420 (1995) (“A constitutional jurisprudence of abortion that expressly draws on the Fourteenth Amendment’s language of ‘liberty’ and ‘equal protection’ would meld with the reality that many of the root concerns behind privacy arguments are not different from, or in opposition to, the root concerns of the gender equality arguments.”).

<sup>153</sup> See *supra* text accompanying notes 119–126.

<sup>154</sup> Cf. *Casey*, 505 U.S. at 877 (opinion of O’Connor, Kennedy, & Souter, JJ.) (“[T]he means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.”).

<sup>155</sup> See, e.g., Hadley Arkes, *A Tale of Two Ediths: Some Lessons Can Best Be Taught By a Woman*, NAT’L REV. ONLINE, July 11, 2005, <http://www.nationalreview.com/arkes/arkes200507110959.asp> (a decision upholding the federal Partial Birth Abortion Ban Act “would virtually bring to an end the *Roe v. Wade* regime. For it would send up a signal to legislatures throughout the country that the Court was now open for business in sustaining many varieties of restriction on abortion. They might be measures to require the method of abortion most likely to preserve the life of the child, or measures actually to bar abortions late in pregnancy, or abortions ordered up because of the likely disabilities or afflictions of the child (e.g., Down syndrome, spina bifida). Just whether or when *Roe v. Wade* is actually, explicitly overturned may cease to matter quite as much.”).

<sup>156</sup> See, e.g., Jane Thomas Bailey, *Feminism 101: A Primer for Pro-life Persons*, in PRO-LIFE FEMINISM, *supra*, at 159, 163; Clair de Jong, *The Feminist Sell-Out*, in PRO-LIFE FEMINISM, *supra*, at 171, 172–73; Mary Krane Derr et al., *Introduction*, in PRO-LIFE FEMINISM

nosis, but they contend that when a woman feels the need to abort because of these instantiations of subordination, denying her the right to abort merely punishes her twice.<sup>157</sup> The crucial point, however, is that both opponents and supporters of abortion can (at least some significant portion of time) ride under the banner of equality.

Similarly, it may be self-evident to many feminists that regulations like the “informed consent” requirements in *Casey* reflect a gender-based paternalism toward women.<sup>158</sup> Those requirements, after all, go well beyond the informed consent disclosures required for other medical procedures, even those that carry serious risks.<sup>159</sup> But the lead opinion in *Casey* disagreed. To the three justices joining that opinion, abortion is a unique medical procedure, with unique consequences,<sup>160</sup> so the mere fact that unique burdens are imposed on that procedure does not mean that anyone is denied equal treatment. The differential treatment of differently situated people is usually thought not to offend principles of equality.

It may be an uphill battle to convince today’s Court—which is more conservative than the one that upheld the informed consent requirements in *Casey*—that the imposition of unique burdens on the abortion choice reflects paternalism. Abortion rights activists will need, at the very least, to highlight the connections between the *specific* restriction a state has imposed on abortion—not the idea of imposing abortion restrictions in general—and the broader history of discrimination against and subordination of women. That is the approach that invalidated the spousal notice provision

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YESTERDAY AND TODAY 141, 144–45 (Mary Krane Derr et al. eds., 1995); Leslie Keech, *Better Living (for men) Through Surgery (for women)*, in *PROLIFE FEMINISM*, *supra*, at 238, 238–40; Daphne Frederica Mathewes-Green, *The Bitter Price of “Choice,”* in *PROLIFE FEMINISM*, *supra*, at 181, 182; Elizabeth McAlister, *A Letter From a Women’s Prison*, in *PROLIFE FEMINISM*, *supra*, at 212, 213. For a critique of one version of pro-life feminism, see Susan Frelich Appleton, *Unraveling the “Seamless Garment”: Loose Threads in Pro-Life Progressivism*, 2 U. ST. THOMAS L.J. 295 (2005).

<sup>157</sup> See, e.g., Olsen, *supra* note 145, at 126 (considering it “horrible” that women are “coerced or brainwashed into selectively aborting pregnancies that would result in new members of their own sex” but arguing that “efforts to regulate this behavior directly run the risk of further oppressing women”).

<sup>158</sup> See, e.g., Cohen, *supra* note 117, at 235 (arguing that the informed consent requirements upheld in *Casey* “demonstrate[ ] disrespect for women as the bearers of” the abortion right “through distrust of their capacities as deliberators”); McClain, *supra* note 117, at 144 (“The Court’s analysis of informed consent and women’s health is patronizing, selective, and in part contrary to fact.”). The *Casey* dissenters emphasized this point. See *Casey*, 505 U.S. at 918 (Stevens, J., concurring in part and dissenting in part); *id.* at 937–38 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>159</sup> See *Casey*, 505 U.S. at 936 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>160</sup> See *Casey*, 505 U.S. at 852 (“Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one’s beliefs, for the life or potential life that is aborted.”).

in *Casey*,<sup>161</sup> and it may work in other cases as well. But the Legal Realist autonomy analysis that governs abortion law will frequently put abortion rights activists on the defensive in responding to new regulations. And the disability rights critique provides one significant model for anti-abortion activists in crafting and justifying those regulations.

### III. ASSESSING THE DISABILITY RIGHTS CRITIQUE

In Part I, I introduced the arguments of the disability rights critics in the areas of selective nontreatment of infants with disabilities, assisted suicide, and prenatal testing followed by selective abortion. In each of these areas, the critics identify powerful social biases that may significantly constrain people's choices. But their policy prescriptions are very different in the different areas. For selective nontreatment and assisted suicide, the critics believe that government action—in the form of a flat ban on those practices—is the only way to protect people from coercion. For selective abortion, however, the critics urge a nonregulatory path of changing social norms. As I showed in Part II, however, the arguments of the disability rights critics could readily justify restrictions on selective abortion under the Supreme Court's current abortion jurisprudence. In this Part, I examine the disability rights critique in the light of the legal implications discussed above. In particular, I focus on the following question: Is the support of disability rights critics for a laissez-faire approach to selective abortion compatible with their critique, and particularly their prohibitory approach to assisted suicide? I am skeptical.

It is certainly logically possible to endorse the disability rights critique while at the same time adhering to support for broad abortion rights. One could believe, as the disability rights critics do, that many abortions that result from prenatal testing are effectively coerced by social stigmas filtered through powerful professional cultures, but still think that regulation to prohibit disability-selective abortion is the wrong response. If one believes that a broad right to abortion is essential to women's equality, one might think that any prohibition of a particular class of abortion will be abused to harass women who seek abortions more generally. Such a prohibition might also chill doctors from performing abortions, particularly if its terms are vague. If those risks outweigh the risk that disability-selective abortions will occur and harm disability equality—or if nonregulatory means such as public education can effectively address the harms caused by such abortions—then abortion should not be regulated, even if one accepts the critique.

Moreover, an adherent to the disability rights critique might well believe that disability-selective abortions are just a symptom of broader social stigma against disability. Using the law to force women to bear children

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<sup>161</sup> *Id.* at 887–94.

with disabilities (when they do not want to do so) will fail to solve that broader stigma, and may even be counterproductive.<sup>162</sup> At any rate, forcing the woman to carry an unwanted fetus to term does impose on her what may seem like a cruel sacrifice to solve a broader societal problem.<sup>163</sup>

Still, these defenses seem a bit awkward. Recall that disability rights critics do not believe that selective abortion merely reflects or is the result of societal bias. They contend that selective abortion entrenches that bias, by reducing the visibility of people with disabilities and shrinking the political coalition for disability rights.<sup>164</sup> If that is true, it is not a complete answer to say that the only way to eliminate disability-selective abortion is to change the culture. According to the disability rights critique, selective abortions are an important force in shaping and maintaining that culture. Therefore, it is to be expected that in the political and legal landscape on which the issue currently operates in the United States, the disability rights critique will readily be used—notwithstanding the intent of the critics—to justify legal restrictions on abortion. Part II demonstrated the point. Under current doctrine, the disability rights critique could justify extensive “informed consent” requirements that significantly hinder the practical ability of women to obtain abortions, and it could justify an outright ban on disability-selective abortion. Given the shape of post-*Casey* abortion law—and particularly its approval of regulations designed to remove private or social obstacles to free choice—there is a strong chance that the courts would uphold such regulations. Thus, there is a far greater tension between the disability rights and abortion rights commitments of the disability rights critics than those critics are willing to admit.

The tension is evident in the comparison between the disability rights critics’ position on abortion and their position on assisted suicide. In the abortion context, as I have just discussed, the critics accept that the government should not even regulate—much less ban—disability-selective abortions, even though they argue strenuously that those abortions are frequently coerced by bias filtered through powerful professional cultures. Yet in the assisted suicide context, the disability rights critics do not ac-

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<sup>162</sup> See, e.g., Dolgin, *supra* note 86, at 347 (reporting views of Adrienne Asch, a leading exponent of the disability rights critique: “In fact, she would prefer that someone, convinced that he or she would be unable adequately to raise a disabled child, abort a disabled fetus than give birth to a child about whom the parent might remain ambivalent and whose needs the parent might not be able or ready to meet.”).

<sup>163</sup> See, e.g., RAYNA RAPP, TESTING WOMEN, TESTING THE FETUS: THE SOCIAL IMPACT OF AMNIOCENTESIS IN AMERICA 254 (1999) (arguing that efforts to keep women from aborting fetuses with disabilities “are, of course, punitive; under the guise of upholding ‘disability acceptance’ they also attempt to coerce women into continuing pregnancies which they have already decided to end”). Of course, disability law frequently calls upon individual persons or businesses to bear some burden to avoid contributing to disability subordination. See Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 869–70 (2003). But the burden of carrying a fetus to term is truly unique. See, e.g., Rubinfeld, *supra* note 145, at 791.

<sup>164</sup> See *supra* text accompanying notes 74–78.

cept a laissez-faire approach. Indeed, they do not even accept mere regulation of assisted suicide decisions. They contend that, because of bias filtered through powerful professional cultures, coercion is so certain to occur under a system that permits assisted suicide in any form that the only way to protect against it is to ban the practice entirely. Given that the disability rights critiques of the two practices are so similar, it is unclear why the critics believe such radically different legal regimes should apply to them.<sup>165</sup>

There are two obvious justifications for the difference, but they are not entirely satisfactory. To those who do not believe that a fetus is a “person” in the same way as a live-born child—a group that presumably includes the disability rights critics who support abortion rights—one obvious difference between abortion and assisted suicide is that the latter procedure ends a person’s life, while the former does not.<sup>166</sup> Another obvious difference to abortion rights supporters is that a right to abortion serves the cause of women’s equality, while a right to assisted suicide does not seem to promote equality at all.<sup>167</sup>

Those differences do suggest that the arguments for prohibiting assisted suicide are stronger than the arguments for prohibiting disability-selective abortion. But the differences between abortion and assisted suicide can also cut the other way. In the assisted suicide context, at least in the absence of coercion, it is the person with a disability herself who decides to end her own life. In the selective abortion context, the decision not to bring a person with a disability into the world is made by the mother, who typically has no disability.

Disability rights critics would say that coercion is always present when a person with a disability chooses to end her life. When a person with a disability seeks out assisted suicide, they would argue, she does so because society is hostile to disability and does not support people with disabilities, and perhaps because she has internalized the stigma associated

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<sup>165</sup> Martha Minow, who endorses the disability-rights critique of assisted suicide without (so far as I know) taking a position on selective abortion, backhandedly makes this point. In arguing that no “line would remain between abuse and nonabuse in a regime permitting assisted suicide,” she argues that such a regime “would turn the continuation of living into a question, open for debate, doubt, and persuasion.” Minow, *supra* note 56, at 22. In explaining the point, she treats end-of-life and abortion decisions as raising equivalent concerns: “Exits change what it means to be here. A right to terminate treatment makes continuing treatment a daily choice. A right to abort a pregnancy makes continuing the pregnancy a deliberate act.” *Id.* To the extent that Minow’s argument is fundamentally about the effects of permitting assisted suicide on what has come to be called a “culture of life,” rather than about the harm to disability rights interests, this point does not undermine her argument. However, it certainly undermines the arguments of disability rights critics who believe that selective abortion should be unregulated while assisted suicide should be banned.

<sup>166</sup> For examples of scholars taking this position, see Kreimer, *supra* note 46, at 813; Marc Spindelman, *Are the Similarities Between a Woman’s Right to Choose an Abortion and the Alleged Right to Assisted Suicide Really Compelling?*, 29 U. MICH. J.L. REFORM 775, 816 (1996).

<sup>167</sup> See Kreimer, *supra* note 46, at 850; Spindelman, *supra* note 166, at 821.

with disability. In this view, allowing people with disabilities to kill themselves is just an easy way out for a society that does not wish to accommodate people with disabilities, and, indeed, responds to disability with fear, if not hate.<sup>168</sup>

But that argument goes so far to protect people with disabilities from coercion that it denies them any agency in the end-of-life decision. In so doing, it runs headlong into a bedrock commitment of most American disability rights advocates—opposition to paternalism.<sup>169</sup> Paternalism has been one of the most significant historical means of oppression and subordination for people with disabilities. The state and medical professionals have frequently denied people with disabilities the opportunity to make their own choices, based on the view that they are incapable of making wise choices on their own. It would be ironic if an effort to protect people with disabilities from the paternalism of doctors who encourage them to end their lives resulted in a regime that denies people with disabilities all choice, based on a conviction that they would inevitably succumb to the influence of others.<sup>170</sup>

One might suggest, however, that while paternalism informs the prohibition against assisted suicide, it is not *disability-specific* paternalism. We might prohibit suicide simply because people make decisions to kill themselves during times of stress and tumult in their lives—whether the stresses relate to disability or not—and that decisions made under such conditions do not reflect the preferences individuals will have when emotions settle.<sup>171</sup> But similar points could be made about the abortion decision. And, as applied to assisted suicide, it is hard to see why “concerns about impulsive hot-state behavior” cannot be satisfied by “a mandatory cooling-off period” or other soft forms of paternalism rather than the flat ban the disability rights critics propose.<sup>172</sup>

There is yet another disability-neutral paternalistic argument for banning assisted suicide. We might prohibit suicide not because people with disabilities are particularly likely to make an erroneous choice to take their own lives, but because *anyone’s* choice to take his or her own life is necessarily erroneous. To the extent that this is true, however, it must rest on a notion that life is always preferable to no life, or simply that life is sa-

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<sup>168</sup> See *supra* text accompanying notes 47–61.

<sup>169</sup> See Samuel R. Bagenstos, *The Supreme Court, the Americans with Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923, 932 n.70 (2004); Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 1010–12 (2003).

<sup>170</sup> See NAT’L COUNCIL ON DISABILITY, *supra* note 44, at 11 (noting this view). For a prominent example of disability rights activists making the antipaternalistic argument against banning assisted suicide, see Batavia, *supra* note 44, at 557–58; Autonomy Brief, *supra* note 44, *passim*.

<sup>171</sup> For a sense of the complexity of an argument like this, see JOEL FEINBERG, HARM TO SELF 354–67 (1986).

<sup>172</sup> See Camerer et al., *supra* note 99, at 1245.

cred.<sup>173</sup> This is a powerful view, one that has many adherents. For my purposes, however, what is significant is that it is decidedly *not* the view taken by most of the disability rights advocates I discuss in this Article. They argue that physician-assisted suicide rests on and reinforces the stigma attached to disability—*not* that assisted suicide is inconsistent with respect for the sanctity of life. And disability-selective abortion raises exactly the same concerns.

For these reasons, it is difficult to square the disability rights critics' position that abortion should remain unregulated with their position that assisted suicide should be not merely regulated but banned. Selective abortion and assisted suicide have similar effects on societal attitudes about disability, and they may be coerced by similar private and social pressures. There is no basis in the principles of the disability rights critique to take a laissez-faire position for one of those decisions and a prohibitory position for the other. If a nonregulatory response that seeks to change the culture sufficiently serves disability rights interests in the abortion context, then the same sort of nonregulatory response ought to be sufficient in the assisted suicide context. Conversely, if a ban on assisted suicide is truly the only way to ensure that disability rights interests are protected, then a ban on abortion of fetuses with disabilities is necessary as well. A middle position is also possible: disability rights interests could be served by permitting, but regulating, both assisted suicide and selective abortion.<sup>174</sup>

Disability rights critics thus should reconsider their prohibitory position on assisted suicide, their laissez-faire position on selective abortion, or both. But it is important to emphasize that, whatever one thinks about the disability rights critiques of assisted suicide or selective abortion, none of the foregoing discussion calls into question the critique of the nontreatment of infants with disabilities. Infants, unlike fetuses, are clearly "persons,"<sup>175</sup> but unlike adults who seek assistance in suicide they have no say over the nontreatment decision. There is therefore no inconsistency in permitting disability-selective abortions while at the same time prohibiting selective nontreatment of infants with disabilities.<sup>176</sup> Nor, obviously,

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<sup>173</sup> See, e.g., DWORKIN, *supra* note 65, at 192–96.

<sup>174</sup> Which of these three options disability rights advocates should pursue necessarily turns to a large degree on empirical questions, see Susan M. Wolf, *Pragmatism in the Face of Death: The Role of Facts in the Assisted Suicide Debate*, 82 MINN. L. REV. 1063 (1998), but the crucial point is that the issues of selective abortion and assisted suicide are not as different in this regard as those advocates seem to believe.

<sup>175</sup> Some, most notably Peter Singer, disagree, see HELGA KUHSE & PETER SINGER, SHOULD THE BABY LIVE? THE PROBLEM OF HANDICAPPED INFANTS 129–39 (1985); PETER SINGER, PRACTICAL ETHICS 169–74 (2d ed. 1993), but theirs is at best a fringe view in our legal and political culture. For a great account by a lawyer with a disability of her debate with Singer regarding his views on infanticide for disabled newborns, see HARRIET MCBRYDE JOHNSON, TOO LATE TO DIE YOUNG: NEARLY TRUE TALES FROM A LIFE 201–28 (2005).

<sup>176</sup> Martha Field made this point over a decade ago, but it bears repeating: "True, the spokes-persons for the 'handicap rights position' are often the same right-to-life groups that oppose abortion. Nonetheless, support of a 'right to life' for newborns with handicaps

is there any inconsistency between banning assisted suicide for adults with disabilities and banning the nontreatment of infants with disabilities. And even if disability rights critics were to believe that assisted suicide should be permitted under some circumstances, there would still be no inconsistency in flatly banning selective nontreatment of infants with disabilities. Permitting assisted suicide arguably allows adults with disabilities to choose how and when to end their lives, while permitting selective nontreatment allows (typically nondisabled) parents to choose whether to end the lives of their disabled children. Although the disability rights critique of selective nontreatment has the same structure as the critiques of assisted suicide and selective abortion—and it has a similar resonance with right-to-life advocates—the selective nontreatment critique stands on its own. Unfortunately, the “Baby Doe” issue has become so firmly associated with abortion politics<sup>177</sup> that it is often hard for judges to dissociate the two.<sup>178</sup>

The disability rights critique calls attention to the ways in which decisions on the life-and-death issues that occupy the pro-choice and pro-life movements can have a significant effect in reflecting, shaping, and entrenching the subordinate status of people with disabilities. Disability rights critics have particularly focused on the powerful role of private, social, and professional pressures—and not just government decisions—in constraining free choice over those decisions. Those are important points, and the critics have achieved a measure of success in educating the public about them. But the policy prescriptions of the disability rights critics remain a bit confused, largely because of the tension between the avowed support of the critics for abortion rights and their emphasis, in the assisted suicide area in particular, on the need for government regulation—even prohibition—to overcome coercion.

#### CONCLUSION

This Article has had two goals. The first was to illuminate the distinctive disability rights critique of right-to-life/right-to-die issues. That critique, shared by many but not all disability rights activists, asserts that, where disability is concerned, powerful social pressures effectively compel certain “choices” to terminate (actual or potential) lives of individuals with disabilities. Without confronting that disability rights critique, one cannot fully understand the scope of what was at issue in the Theresa

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is consistent with belief in a broad right to choose abortion.” Field, *supra* note 29, at 79.

<sup>177</sup> Cf. Schneider, *supra* note 34, at 168 (arguing that political liberals have defended “parental freedom to choose neonatal euthanasia” based on a fear that “to countenance doubts about the parents’ right to choose neonatal euthanasia is to encourage doubts about women’s right to choose abortion”).

<sup>178</sup> See *supra* text accompanying note 22 (noting that the opinion rejecting the Reagan administration’s “Baby Doe” regulations was joined by four justices who strongly supported abortion rights).

Schiavo case. I have shown, however, that the policy prescriptions of disability rights critics are in a significant sense contradictory—and that the contradiction is a natural result of the abortion politics in which the disability rights critique operates.

My second goal was to show how the disability rights critique highlights an underappreciated aspect of the Supreme Court's current abortion jurisprudence. The disability rights critics endorse the principle of choice in the abstract but argue that private constraints on choice are especially significant. The Supreme Court's post-*Casey* abortion jurisprudence similarly focuses on private obstacles to free choice. The *Casey* Court swore allegiance to the woman's right to choose abortion, but it endorsed regulations—even those that make it more difficult to obtain abortions—designed to overcome those obstacles and thus promote free choice. If, as many commentators believe, the Supreme Court is likely to approve an increasingly wide range of regulations on abortion without overruling *Roe v. Wade*, the regulation-to-promote-choice model of the disability rights critique offers one template for how the Court might achieve that result. More generally, if the Court does follow the path of upholding abortion restrictions without overruling *Roe*, questions like those addressed in this Article will become of central importance to understanding the practical implications of the Court's rulings. Instead of endlessly debating the broad question of whether and why the Constitution should be read to protect abortion rights, scholars will have to focus on the narrower-gauge questions of what kinds of restrictions on abortion will be upheld, and on what theory. Those questions may not be as exciting, but they are likely to be of enormous practical importance.

