

Biopower, Disability and Capitalism: Neoliberal Eugenics and the Future of ART Regulation

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Discourse around reproductive and contraceptive technology in the United States is typically organized around ideas of autonomy, privacy, and free choice. The dichotomy of “pro-choice” and “pro-life” structures all debates on the topic, and the political framework of neoliberalism channels discussion into prepackaged frameworks of cost-benefit analysis and the primacy of free market choice. However, an examination of history and present policy developments paints a different picture. This Note argues that access to and regulation around contraception, abortion, and overall reproductive health and technology has been informed by and continues to interact with ideas of biopower and both positive and negative eugenics, and that neoliberal conceptions of free reproductive choice ignore the implications of this connection.

Part II traces the history of the eugenics movement in America, exemplified by forced and coerced sterilization of people considered mentally or physically “degenerate,” particularly those confined to institutions, and explores the rhetoric in early contraceptive-focused treatises and court decisions that reflect eugenicist views. Part III analyzes the modern trends on legal access to and regulation of reproductive and contraceptive technology and its interaction with race, socioeconomic status, and, in particular, disability (one of the more anxiety-producing categories of humanity in the neoliberal era). In Part IV, the Note goes on to argue that construction of a rational and compassionate legal framework where a woman’s right to choose is preserved (or revived) and the humanity of disabled persons is also respected is not only possible, but essential.

A truly feminist reproductive framework must be built on justice, not market choice, and must respect both the agency and autonomy of pregnant women and the humanity and individual subjectivity of disabled persons. Policy strategies towards this end will not be easy, but attention to all the intersectional and overlapping factors that affect women’s reproductive decision-making, especially with regard to disability and reproductive technology, can change the way we view and value disabled personhood in our society.

I. INTRODUCTION

Contemporary discourse on reproductive technologies and the legislative and regulatory environment surrounding their production, distribution, and use tends to rely on several fundamental assumptions, mainly relating to the individual autonomy of the people using these technologies. From contraception to fertility treatments to abortion or prenatal care, society tends to structure debate

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* Duke University School of Law, J.D. expected 2019; Brown University, A.B. 2016. Many thanks to my fellow editors on the Duke Journal of Gender Law and Policy for their hard work and insights during the editing process, and to my friends and family for their support throughout.

around the idea that end users of reproductive technology make the choice between types of reproductive technology, and whether or not to engage in reproductive technology use at all. We assume that producers of reproductive technology have largely neutral objectives and are producing a product or service for a marketplace like any other.

In particular, disability and our relationship to it as a community fuels both of the major “sides” of the abortion/contraception debate. The eugenic history of our nation provides ample fuel for these arguments, as the stamping out of disability was and is one of its foundational goals.

Pro-life advocates argue for the right to life of every fetus, but are often completely ignorant¹ of the circumstances that many disabled women or disabled infants will face postpartum, and often espouse conservative financial positions that oppose calls for healthcare and welfare reform that would allow disabled mothers and children to live full and happy lives.² Pro-choice advocates do recognize these constraints but often, and worryingly, see free access to contraception, prenatal testing and abortion as a way to end disability (at least congenital disability) forever – and elevate this as a proper goal to strive for, again ignorant of the eugenicist ideals which this viewpoint espouses.³ These value judgements connected to disability affect the way we consider disabled personhood in our society, and erode disabled peoples’ rights in a very real sense – “[t]he right to bear children goes to the heart of what it means to be human. The value we place on individuals determines whether we see them as entitled to perpetuate themselves in their children.”⁴

Unfortunately, jurisprudence around contraception and abortion has focused almost exclusively on individual privacy and autonomy arguments and has largely ignored structural impediments to free reproductive choice. Current legal discourse around reproductive technology almost completely elides the eugenic roots of many of these technologies and is inattentive to the ways in which they are still abused for neo-eugenicist purposes. It is at this juncture that it becomes useful to consider the historic roots of reproductive technology and question how those foundations affect the structural landscape of reproductive technology, reproductive control, and our conception of disability at large. In the words of disability rights feminist Rayna Rapp,

[A]t the intersection of the disability rights movement and the feminist movement for reproductive rights lies a thorny problem: How is it possible to contest the eugenic and stigmatizing definition of disabilities which seems to underlie

1. I use ignorant here in its active sense of *habitually to ignore* something, rather than in the passive sense of simply existing in a state of non-knowledge.

2. For an interesting look at the history of the alliance between pro-life activism and traditional conservatism, see Eric C. Miller, *When Being Pro-Life Did Not Mean Being Conservative*, RELIGION & POL. (May 31, 2016), <https://religionandpolitics.org/2016/05/31/when-being-pro-life-did-not-mean-being-conservative/> (interviewing Daniel K. Williams, associate professor of history at University of West Georgia).

3. Sujatha Jesudason & Julia Epstein, *The Paradox of Disability in Abortion Debates: Bringing the Pro-choice and Disability Rights Communities Together*, 84 CONTRACEPTION 541, 541 (2011).

4. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 305 (1999).

[assisted reproductive technology], while still upholding the rights of individual women to determine what kind of medical care, and what sorts of pregnancy decisions, are in their own best interests?⁵

This Note argues that there is a way to construct a rational and compassionate legal framework where a woman's right to choose is preserved⁶ but the humanity of disabled persons is respected. A truly feminist legal framework built on notions of reproductive justice can and must respect the agency, autonomy, humanity, and individual subjectivity of both pregnant women and disabled persons.

II. HISTORICAL EUGENIC ROOTS OF REPRODUCTIVE CONTROL

A. Early Eugenic Thought

Early proponents of contraception and reproductive science often had eugenic motives, in that they saw reproductive technology as part of a wider objective to use genetic science to improve the "stock" of the human race.⁷ By the mid-to-late 1800s, advances in genetic technology had already led to improvements in agriculture and livestock.⁸ America was faced with an exploding population and a burgeoning industrial revolution, resulting in increased urbanization and concomitant class stratification.⁹ In the face of these new problems, many scientists saw eugenics (from the Greek words for *good* and *kin*) as a way to improve the lot of humanity overall.¹⁰

The rise of scientific methods of categorizing and regulating the natural world led to the creation of the concept of biopower, or governments becoming concerned with the regulation and control of the physical bodies of their citizenry.¹¹ Through biopower, governments "make human life 'itself,' that is, the vital processes that characterized their populations, the target of power."¹² The ruler no longer ruled by divine right or blood lineage, but through control and surveillance over the life, death, sickness, and wellness of their populace.

5. RAYNA RAPP, TESTING WOMEN, TESTING THE FETUS: THE SOCIAL IMPACT OF AMNIOCENTESIS IN AMERICA 50 (1999).

6. Or, indeed, revived – one cannot "preserve" that which does not currently exist, even nominally, for many women.

7. See Alexander Graham Bell, *How to Improve the Race*, 5 THE J. OF HEREDITY 1, 1 (1914) ("The individuals have power to improve the race, but not the knowledge of what to do. We students of genetics possess the knowledge but not the power; and the great hope lies in the dissemination of our knowledge among the people at large.").

8. *Id.* ("Living organisms have been so plastic in the hands of scientific breeders that we have learned to improve our breeds of plants and animals by suitable selection controlled by man.").

9. See generally, Allan C. Kelley & Jeffrey G. Williamson, *Population Growth, Industrial Revolutions, and the Urban Transition*, 10 POPULATION AND DEV. REV. 419 (1984); A.R. Desai, *Urbanization and Social Stratification*, 9 INDIAN SOC. SOC'Y 7 (1960).

10. See generally Bell, *supra* note 7.

11. Michel Foucault, HISTORY OF SEXUALITY: VOLUME I: AN INTRODUCTION 140 (Robert Hurley trans., Pantheon Books 1978) (1976) ("[A]n explosion of numerous and diverse techniques for achieving the subjugations of bodies and the control of population.").

12. Ladelle McWhorter, *From Scientific Racism to Neoliberal Biopolitics: Using Foucault's Toolkit, in* THE OXFORD HANDBOOK OF PHILOSOPHY AND RACE, 282, 287 (Naomi Zack ed., 2017).

Biological and medical science, and in particular the emerging fields of genetics and genealogy, were used to segment and control populations. Biopower and eugenic thought have always gone hand in hand.

Eugenics exists in two flavors – positive and negative. Positive eugenics focuses on incentivizing citizens with good genetic traits to reproduce, whereas negative eugenics disincentivizes the reproduction of genetically flawed members of the population.¹³ In the late 1800s and early 1900s, genetic fitness was quickly conflated with social class, with reformers focusing on controlling the reproduction of the poor and socially undesirable and regarding the wealthy as inherently more fit.¹⁴ This stratification of the acceptable and unacceptable body and mind – and state reactions to those different categories – is at the core of traditional Foucaultian biopolitics.¹⁵ “Social class was equated with human worth, and low-class, undesirable families—a drain upon the public coffers—were understood as a blight upon society, a burden to be relieved through mechanisms of human abatement.”¹⁶

This is not to say that early eugenicists were not met by obstacles. Eugenicists were worried about the propensity of wealthier, more educated couples to have only one or two children and wanted to encourage the societal elites to pass on more of their favorable genes. However, societal elites had evolved a set of conflicting values that made the concept of viewing their own reproduction by the same metrics as the thoroughbreds they stabled completely repugnant.¹⁷

Numerous practical scientists of the day were attuned to this problem, seeing it as a matter of “social ideals.”¹⁸ Across America, “better baby” and “fitter family” contests were held at state fairs to hold up examples of superior American bloodlines and encourage others to strive towards that ideal.¹⁹ However, scientists and policymakers bemoaned that “[t]he [ideal] classes concerned [were] outside the scope of direct legislative interference . . . [they] supported society, and [were]

13. See James Jamieson, *Alexander Graham Bell: Eugenicist*, 42 MANKIND Q. 65, 70 (2001) (“By positive eugenics we refer to measures aimed at increasing the fertility of the fit, whereas negative eugenics aims at eliminating specific defects from the gene-line.”).

14. See R.A. Fisher, *Positive Eugenics*, 9 EUGENICS REV. 206, 206 (1917) (“To increase the birth-rate in the professional classes and among the highly skilled artisans would be to solve the great eugenic problem of the present generation and to lay a broad foundation for every kind of social advance.”).

15. Kasper Simo Kristiansen, *Michel Foucault on Bio-Power and Biopolitics*, Univ. of Helsinki Faculty of Soc. Sci. 1, 34 (Apr. 2013) (Master’s thesis, University of Helsinki Faculty of Social Sciences and Moral Philosophy) (“[P]ointing precisely to the tendency of Western societies to produce hierarchies according to which people can be arranged in unequal and coercive order.”).

16. James C. Oleson, *The New Eugenics: Black Hyper-Incarceration and Human Abatement*, 5 SOC. SCI. 1, 3 (2016).

17. For example, Alexander Grand Bell, a hobbyist eugenicist,

[C]ould already see that human values which run contrary to the principles of evolution and the realities of the universe . . . only constitute a threat to the survival of humanity, for no values that run counter to reality [could] ever be fulfilled, and must work to the detriment of those whom they were intended to benefit.

Jamieson, *supra* note 13, at 68.

18. *Id.* at 65.

19. Oleson, *supra* note 16, at 3.

not supported by it," unlike the degenerate classes that the legislature was busily regulating.²⁰

They knew that though "[t]here was an underclass . . . from whom nothing could be hoped,"²¹ true eugenic betterment of society must flow from both the eradication of negative characteristics and the promotion of beneficial ones. Even progressive reformers like suffragist Victoria Woodhull latched onto the idea, proclaiming that "if superior people are desired, they must be bred," and conversely that the "unfit" must not be allowed to breed freely.²² However, positive eugenics was no match for the social mores of the day that required upper-class female sexuality (and fertility) to be closely guarded and rarely acknowledged.²³ Without a convenient entrée into the private lives and choices of the populace, scientists were at a loss on how to effect eugenic change.

In contrast, the law's intervention on the reproductive destinies of those who were "supported by [society]" was exploding.²⁴ Statutes allowing sterilization of institutionalized persons began popping up in state after state, starting in Indiana.²⁵ At the time, many advocates of sterilization saw it as an easy solution to complex problems of social welfare and poverty as well as a way to curtail certain devastating physical ailments for which there was no viable therapeutic cure.²⁶ They saw themselves as preventing a great deal of suffering – as well as a great deal of social expense.²⁷ Leaving the degenerate classes to their own immorality resulted in great taxpayer expense, since modern sensibilities prevented the governing classes from allowing the poor to starve. So, charitable handouts shifted to government-run institutions for those classes, and much notice was paid to the "gravity" of the task assumed by managers of such institutions: to restrain the "feebleminded" from "overt acts of immorality" that would only increase the population of such dependents, chiefly through isolation and institutionalization rather than education or rehabilitation.²⁸

Compared to detaining women adjudged "feebleminded" for the entirety of their childbearing years, commenters thought it seemed more humane to "give them the benefit of a milder and less severe method of attaining the desired end."²⁹

20. Fisher, *supra* note 14, at 206.

21. Jamieson, *supra* note 13, at 70.

22. HARRY BRUINIUS, *BETTER FOR ALL THE WORLD: THE SECRET HISTORY OF FORCED STERILIZATION AND AMERICA'S QUEST FOR RACIAL PURITY* 144 (2006).

23. Elizabeth Fee, *Psychology, Sexuality, and Social Control in Victorian England*, 58 *SOC. SCI. Q.* 632, 632 (1978) ("[S]exual repression characterized the bourgeoisie – at least as an ideal of conduct, if not as an exact description of reality . . .").

24. Fisher, *supra* note 14, at 206; *See* MARK A. LARGENT, *BREEDING CONTEMPT: THE HISTORY OF COERCED STERILIZATION IN THE UNITED STATES* 66–67 (2007) (discussing how many states passed compulsory sterilization laws in the late 1800s and early 1900s).

25. LARGENT, *supra* note 24, at 66.

26. *Id.* at 3.

27. *Id.*

28. BRUINIUS, *supra* note 22, at 56 (quoting Dr. Albert Priddy's 1923 Annual Report for the Virginia colony).

29. *Id.*

The “milder and less severe” method often alluded to is sterilization – at first voluntary, albeit often coerced, and then involuntary; first of men of criminal background and later, of “feebleminded” women.³⁰

The involuntary sterilization of a nineteen-year-old institutionalized girl named Carrie Buck was the procedure at issue in *Buck v. Bell*, a landmark case for the American eugenics movement.³¹ In upholding the constitutionality of Carrie Buck’s sterilization, Justice Oliver Wendell Holmes drew an allusion to other forms of biopower and state valuation of bodies that is at once startlingly prescient and disturbingly nonchalant.

We have seen more than once that the public welfare may call on the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for those lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence . . . Three generations of imbeciles are enough.³²

By the middle of the twentieth century, over 63,000 people had been coercively sterilized under laws like the one in Virginia – laws which were present in two-thirds of the States.³³

Further, American scientists and policymakers in the mid-1930s decided that American eugenic policies were ripe for export – which eventually led to much human suffering and the transformation of eugenic policy in America. The eugenic establishment targeted Germany, and to great effect. By the middle of the decade, Germany’s racial hygiene laws were in large part based on the American Model Eugenic Sterilization Laws, and American organizations like the Rockefeller Foundation had begun funding various sterilization programs there.³⁴ However, the success of eugenic rhetoric quickly produced unforeseen results.

The German programs were more politically unified and intellectually homogenous, and this single-minded focus on their eugenic goal resulted in not only the compulsory sterilization of over 500,000 people who were disabled or social misfits, but also the systematic murder of 300,000 institutionalized disabled people through a program of involuntary euthanasia known as Action T4,³⁵ and most notably Hitler’s Final Solution, better known as the Holocaust, a program of brutally efficient ethnic cleansing that detained and murdered six million Jewish, Roma, homosexual, and otherwise socially undesirable groups.³⁶ After 1945 and the liberation of the concentration camps, eugenics taken to its logical extreme horrified the American public. In the 1960s and 1970s, American eugenic movements largely lost social capital and support; a new generation of scientists decried the policies of their forbears, the sterilization laws were repealed, and both

30. *Id.* at 57.

31. *Id.* at 3–5.

32. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

33. LARGENT, *supra* note 24, at 1.

34. STEFAN KÜHL, *THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN NATIONAL SOCIALISM* 21 (1994).

35. M. Rotzoll, P. Fuchs & P. Richter et al., *Die nationalsozialistische “Euthanasieaktion T4”* [*The National Socialist “Euthanasia Action t4”*], 81 *DER NERVENARZT* 1326 (Nov. 2010).

36. LARGENT, *supra* note 24, at 129–30, 139–40.

the law and the technology of reproduction shifted to a more individualized, market-based model.³⁷

B. Evolving Reproductive Rights

Modern reproductive rights in America are a set of interlocking contentious issues that have seen massive evolutions in both legally protected interests and popular opinion. The right to access contraception and abortion has been, and continues to be, debated extensively in the courts and the legislatures on both a national and state level. However, the status quo seems to have settled on the legality of contraceptive use and abortions up to a point, contingent on the government's compelling interest in regulating abortions to protect the health of women.³⁸

In particular, *Roe v. Wade* framed the right to abortion through the fundamental right to privacy rather than through a gender equality argument, which served to narrow the agenda of reproductive rights work and limit the responsibility of the government to ensure equal access to reproductive health services.³⁹ Reproductive rights jurisprudence has instead been co-opted by a libertarian "freedom-from" unjustified government intervention, which has detrimental effects on aspects of reproductive rights that are distinct from the right of "determined middle class white girls" to pay for an abortion.⁴⁰ The legal argument that clinched *Roe's* victory also limited its prospects, since "restricting abortion decisions to the 'personal,' [or] the 'private,' also meant severing their deep connection to issues of economic and social justice."⁴¹

III. THE CURRENT LANDSCAPE – POLITICAL DEADLOCK, UNREGULATED INNOVATION

A. Neoliberalism and Reproductive Rights: A Binary Debate

In the postwar neoliberal American economic and political landscape, reproductive technology is largely a private-sector affair, with certain notable exceptions. However, eugenic pressures still affect policy choices and constrain individual decision-making with regard to reproductive choices, particularly with regard to disability. Freedom – of trade and of individual choice – is a foundational tenet of neoliberalism. Nevertheless, facial freedom without attention to the structures that all but guarantee that choice is constrained by context – access to information or resources, legal status, even geographic location – is hollow at its core. "[T]he emotional or affective registers of neoliberalism are

37. *Id.* at 124–25.

38. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

39. Andrea Smith, *Roundtable: Reproductive Technologies and Reproductive Justice*, 34 *FRONTIERS: A J. OF WOMEN'S STUD. SPECIAL ISSUE: REPROD. TECH. AND REPROD. JUST.* 102, 102–03 (2013).

40. Laura Briggs, *Roundtable: Reproductive Technologies and Reproductive Justice*, 34 *FRONTIERS: A J. OF WOMEN'S STUD. SPECIAL ISSUE: REPROD. TECH. AND REPROD. JUST.* 102, 103 (2013).

41. Rosalind Petchesky, *Roundtable: Reproductive Technologies and Reproductive Justice*, 34 *FRONTIERS: A J. OF WOMEN'S STUD. SPECIAL ISSUE: REPROD. TECH. AND REPROD. JUST.* 102, 107 (2013).

attuned to notions of ‘freedom’ and ‘choice’ that obscure systematic inequalities”⁴² and indeed “divid[e] women against each other” in the reproductive context.⁴³

Though the state has largely retreated from the field of coercive sterilization, economic and social forces affecting individuals’ reproductive choices have tended to replicate eugenic objectives. Neoliberalism as a dominant and dominating political rationality “moves to and from the management of the state to the inner workings of the subject, normatively constructing and interpellating individuals as entrepreneurial actors.”⁴⁴ Individual citizens are driven to self-police their health and bodily welfare, while at the same time “the erasure of the New Deal and the US state’s increasing divestment of the care of its citizens (including cutting programs upon which people with disabilities depend for their very survival) has produced a cultural climate of anxiety that is central to the affective realm of neoliberal governance.”⁴⁵ This constant fear that one’s inattention to one’s own health can precipitate an inexorable slide into disability and valuelessness is productive and entrenching for neoliberal society. A citizenry steeped in bodily anxiety will agitate not for more public support for non-normative bodies and lives, but for more individual access to technologies which will keep each individual body healthy, working, and valuable to the system for longer and longer periods.

Political and legal discourse around the subject of reproductive rights is designated either as pro-choice or pro-life, and few people question what values the “life” and “choice” that are being touted actually stand for, or who each group envisions as able to access that “life” and “choice.” The concept of the disabled body is used as a rhetorical device by each side, and the larger forces that control what technology is made available, and to whom, are rarely looked at through a disability studies lens. “While today’s feminists are not responsible for the eugenic biases of their fore-mothers, some of these prejudices have persisted or gone unchallenged in the reproductive rights movement today.”⁴⁶ Both positive and negative eugenic ideals and motivations have survived into the modern era: positive eugenics in our unregulated assisted reproductive technologies (hereinafter ART⁴⁷) market, and negative eugenics in the panoply of reproductive regulations present in the prison and welfare contexts.

42. DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 22 (2015).

43. RICKIE SOLINGER, *The Incompatibility of Neo-Liberal “Choice” and Reproductive Justice*, in *REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE* 77, 77 (2008) (highlighting how an individual woman’s set of choices is often dependent on another woman’s lack of choices, i.e. in giving a baby up for adoption, selling gametes, or even providing childcare).

44. Catherine Rottenberg, *The Rise of Neoliberal Feminism*, 28 *CULTURAL STUD.* 418, 420 (2014).

45. Shoshana Magnet, *Identity and The New Eugenics In The Newborn Screening Saves Lives Act*, 35 *MEDIA, CULTURE & SOC’Y* 71, 72 (2013).

46. Marsha Saxton, *Disability Rights and Selective Abortion*, *DISABILITY STUD. READER* 73, 75 (Lennard J. Davis ed., 2017).

47. See *infra* Section III.B.3 (explaining current ART dimensions).

B. The Good Old Days (Aren't Over) – State Control over Reproduction

1. Prison

In 2014, an internal investigation of sterilization in California prisons revealed that doctors coerced pregnant female prisoners to undergo tubal ligations immediately postpartum when they discovered that the women already had more than two children.⁴⁸ One of the physicians accused of pressuring women into the procedure acknowledged an underlying eugenic rationale for the sterilizations, saying that the amount paid up-front for the procedure “isn’t a huge amount of money, compared to what you save in welfare paying for these unwanted children—as [women incarcerated in California prisons] procreated more.”⁴⁹

Even outside the carceral setting, sterilization or long-term contraception can be worked into plea agreements, terms of probation, or parole hearings, even though in those coercive contexts, informed consent to any procedure, even nominally therapeutic, is nearly impossible.⁵⁰ Also in California, creative probation sentencing resulted in a woman named Darlene Johnson being ordered to have Norplant implanted as a result of her conviction for child abuse.⁵¹ This sentence, imposing a years-long reproductive penalty, raises serious questions about the motivations of the sentencing judge. “Forced contraceptive use in response to allegations of child abuse is punishment, not therapy, because it does not protect the existing children, as counseling would.”⁵² Eugenic rhetoric immediately surfaced in discourse around the sentence, with one op-ed claiming that “Norplant is the ideal contraceptive for the brainless people (of all races and socioeconomic groups) who have unprotected sex and bring unwanted children into the world only to beat them.”⁵³

In a similar case, a Wisconsin court ruled that a man convicted of nonpayment of child support could not have another child unless he could prove to the court that he had the financial ability to support that child along with the nine he already had.⁵⁴ Given his financial situation and the fact that he was already guilty of nonpayment of child support, this term of probation was a de facto ban on the defendant’s right to procreate for the duration of his probation term.

48. Rachel Roth & Sara L. Ainsworth, “If They Hand You a Paper, You Sign It”: A Call to End the Sterilization of Women in Prison, 26 HASTINGS WOMEN’S L. J. 7, 8 (2015).

49. Oleson, *supra* note 16, at 6.

50. Roth & Ainsworth, *supra* note 48, at 10; Janet Simmonds, *Coercion in California: Eugenics Reconstituted in Welfare Reform, the Contracting of Reproductive Capacity, and Terms of Probation*, 17 HASTINGS WOMEN’S L. J. 269, 276 (2006), *see also* The Marshall Project, *Sterilization of Female Defendants as Plea Deals: A Curated Collection of Links*, (last updated Feb. 07, 2018), <https://www.themarshallproject.org/records/1134-sterilization-of-female-defendants-as-plea-deals>.

51. Simmonds, *supra* note 50, at 287.

52. HARRIET A. WASHINGTON, *MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* 211 (2007). The author notes that standard policy is always to remove all children from an abusive household, and not allow more to be adopted in – however, the point remains that forced use of contraceptives does not ensure that someone will be a good parent, only that they will not be a parent at all.

53. Carolyn Hendricks, *The Norplant Sentence*, WASH. POST (Jan. 14, 1991).

54. Simmonds, *supra* note 50, at 289.

Reproductive penalties are not a bug, but rather a feature of our criminal punishment system. Incapacitation in the prison context has a prophylactic effect on human reproduction, and since Black men and women are incarcerated at disproportionate rates, this prophylaxis affects them most dramatically – as in the nineteenth century, isolating this population during their procreative years necessarily dampens the birth rate.⁵⁵ We see family creation as a privilege that can be lost via the social transgression that is criminality – our courts have explicitly decreed that the right to procreate is “fundamentally inconsistent with incarceration.”⁵⁶

Given current American jurisprudence identifying procreation as a fundamental right,⁵⁷ one would think that the state would need a compelling objective in order to require contraception as a term of probation, but sentencing judges are able to sidestep inquiry into their motives by arguing that the individual being sentenced is perfectly free to choose to go to prison instead. However, this choice is illusory, and threatens the further fracturing of the defendants’ families in each case.

2. Welfare

With the rise of contraceptive availability, subsidized medicine became a convenient locus of intervention in poor and Black women’s fertility. Contraception clinics in Black neighborhoods were more likely to recommend long-acting contraception or sterilization than those located in white neighborhoods.⁵⁸ In fact, white women were often denied sterilization altogether unless they met an arbitrary formula based on age and the number of children that woman already had.⁵⁹ “Sometimes clinic workers use feminist language to encourage women to suppress their fertility, explaining that controlling their bodies is a fundamental condition for improving women’s status.”⁶⁰ However, these same workers often prioritize targeted population control over women’s autonomy, telling themselves they are working toward a greater good.⁶¹

Welfare regulations display a similar racial stratification. Although there are more white people than Black people on welfare⁶² and social science data overwhelmingly rebuts the idea that women on welfare become pregnant for the purpose of obtaining more benefits, the archetype of the “welfare queen” in the American imagination is consistently a Black woman.⁶³ This suspect motherhood

55. Oleson, *supra* note 16, at 1.

56. Gerber v. Hickman, 291 F.3d 617, 623 (9th Cir. 2002).

57. See, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1942).

58. LORETTA ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 51–53 (2017).

59. *Id.* at 52.

60. *Id.* at 84.

61. *Id.* at 84–85 (“Nevertheless, clinic workers around the world – and also in the United States – are often trained to prioritize population control goals above women’s empowerment.”).

62. Ann C. Foster & Arcenis Rojas, U.S. BUREAU OF LABOR STAT., *Program Participation and Spending Patterns of Families Receiving Government Means-tested Assistance* (Jan. 2018).

63. See ROBERTS, *supra* note 4, at 17 (“The myths about immoral, neglectful, and domineering Black mother has been supplemented by the contemporary image of the welfare queen—the lazy mother on public assistance who deliberately breeds children at the expense of taxpayers to fatten her

has concrete effects on policy choices around provision of resources to these families. Policymakers controlling welfare distributions often define poor children – and their mothers – as “illegitimate,” suggesting that “the government itself disregarded their humanity” and found their mothers’ sexuality and reproductive choice-making eminently sanctionable.⁶⁴ A Philadelphia Inquirer editorial claimed that “[t]he main reason more black children are living in poverty is that people having the most children are the ones least capable of supporting them.”⁶⁵ This further illustrates how structural and social factors that reinforced Black poverty were elided in favor of blaming Black mothers for their own motherhood.

Further, attempts to control the fertility and sexuality of poor women by conditioning the receipt of welfare on behavior modification have been prevalent in neoliberal welfare reform.⁶⁶ These interventions have ranged from family caps⁶⁷ to implantation of long-acting contraceptives⁶⁸ to surgical sterilization.⁶⁹ The same *Inquirer* article that blamed Black poverty on Black fertility had a natural solution – it called for poor women to be paid to have Norplant (a long-acting contraceptive implanted in the upper arm) implanted to “reduce the underclass.”⁷⁰ This was not a rogue opinion of one editorialist, however. Federally funded programs like Medicaid “eagerly proffered the cost of inserting Norplant,” but if the woman undergoing the procedure experienced side effects (of which there were many), those same programs were “less forthcoming with the five-hundred-dollar removal fee.”⁷¹

Structural incentives pushed these women to give up their reproductive freedom, yet a neoliberal analysis would praise their “free” choice to do so. These are the women to whom neoliberalism has closed off certain avenues of family creation, yet it is difficult for most people to see how deeply these holdover eugenic ideals coupled with a callous denial of resources can affect these most personal decisions. On the other end of the socioeconomic spectrum, however, neoliberal society and modern eugenic thought subtly pressure women with a panoply of available technologies – ART.

monthly check.”). See Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J. L. & GENDER 151, 152 (2006) (arguing that “social science data overwhelmingly dispels the myth that women get pregnant in order to obtain welfare benefits”).

64. ROSS & SOLINGER, *supra* note 58, at 41.

65. Editorial, *Poverty and Norplant: Can Contraception Reduce the Underclass?*, PHILA. INQUIRER, Dec. 12, 1990, at A18.

66. Meredith Blake, *Welfare and Coerced Contraception: Morality Implications of State Sponsored Reproductive Control*, 34 U. LOUISVILLE J. FAM. L. 311, 311–12 (1996); see also WASHINGTON, *supra* note 52, at 206–12.

67. See Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J. L. & GENDER 151, 151 (2006).

68. WASHINGTON, *supra* note 52, at 202.

69. WASHINGTON, *supra* note 52, at 206–12.

70. See Editorial, *supra* note 65, at A18.

71. WASHINGTON, *supra* note 52, at 210.

3. The “Wild West” of ART

The commercial aspects of the U.S. market for assisted reproductive technology have been basically unregulated.⁷² For everything from gamete acquisition (sperm or egg “donation”), surrogacy, and *in vitro* fertilization (IVF), the legal system regulates on scientific and health-based concerns, but allows a market-based approach to control commercialization of assisted reproduction.⁷³ This is problematic, as the lack of any regulatory regime does not adequately recognize the risk of coercion, exploitation, and commodification that are concomitant with the commercialization of reproduction.⁷⁴ The dominant neoliberal view in the United States valorizes ART as the confluence of high-tech medicine and greater reproductive choice, and “highlights the importance and strength of individual agency as a bulwark against commercialization’s potential harms.”⁷⁵ The two factors reinforce each other – “[t]he claim to technocultural superiority over competitors allows the United States to assert that Western agency shields us all from coercion, exploitation, and commodification.”⁷⁶ However, those lofty ideals often do not translate well de facto to the commercial context.

Sperm and egg “donation” in the commercial context, while framed as an altruistic endeavor, is fundamentally a commercial transaction that displays some of the most prevalent eugenic rhetoric in modern parlance. Sperm banks and egg banks advertise the genetic pedigrees of their “product,” with specialized “superdonor” databases filled with high college achievement test scores, celebrity lookalikes, and specifications for race, ethnicity, and certain abilities.⁷⁷ Commercial surrogacy is overwhelmingly chosen by white, wealthy families who can maintain their race and class privilege through surrogacy, while those who face race and class disadvantages are economically pressured to submit to commercial surveillance in surrogacy arrangements, reifying this social hierarchy.⁷⁸ Pre-implantation embryo selection technology (ESTs) – where parents can choose from several embryos prepared *in vitro* – is also available for any number of factors, including social sex, physical characteristics, and genetic predispositions.⁷⁹

72. See Lisa C. Ikemoto, *Assisted Reproductive Technology Use among Neighbours: Commercialization Concerns in Canada and the United States, in the Global Context*, in *REGULATING CREATION: THE LAW, ETHICS AND POLICY OF ASSISTED HUMAN REPRODUCTION* 253, 253 (Trudo Lemmens et al., eds., 2017) (hereinafter Ikemoto, *Commercialization Concerns*) (noting that “the U.S. government and the states have enacted very few laws that specifically regulate the commercial aspects of ART”).

73. See *id.* (noting that a market-based approach to ART “flourishes” in the United States.).

74. See *id.* at 255.

75. *Id.* at 257.

76. *Id.* at 265.

77. *Id.* at 262; see Trudo Lemmens, *The Commodification of Gametes: Why Preventing Untrammelled Commercialization Matters*, in *REGULATING CREATION: THE LAW, ETHICS AND POLICY OF ASSISTED HUMAN REPRODUCTION* 415, 431–32 (Trudo Lemmens et al., eds., 2017) (discussing how the commercialization of gametes has led to the advertisement and auctioning of “high-quality” eggs and sperm).

78. Heather E. Dillaway, *Mothers for Others: A Race, Class, and Gender Analysis of Surrogacy*, 34 *INT’L J. SOC. FAM.* 301, 304, 318–19 (2008) (noting in particular the racial dimensions of the Anna Johnson case).

79. Ikemoto, *Commercialization Concerns*, *supra* note 72, at 262.

“One of the least controversial applications of ESTs is their use in selecting against embryos that are predisposed to develop a disease or disability, a practice sometimes known as disability screening.”⁸⁰ In several countries offering this technology, “parents are permitted to use [EST] to select against disabilities and diseases such as Down syndrome and cystic fibrosis, but not to select against non-disease traits like normal short stature.”⁸¹ Any restrictions on the use of EST would necessarily constitute interference with voluntary transactions between autonomous, consenting adults – as long as there are at least some private companies willing to provide access to ESTs, and some individuals who desire such access, our current political moment says that the forces of supply and demand will adequately regulate the field.

However, some argue that that particular neoliberal view of freedom is marked by “absolute separation” from other people, objects, and contexts around us and elevates choice as the “key moral value.”⁸² In this model, “[a]ll choices made by this atomic individual, all relations, all personal attributes . . . [are] commensurable and fungible.”⁸³ However, such nominal freedom is hollow if it promises choice but ignores the context and structures that limit that choice such as access to information or resources, legal status, or even geographic location.

A more justice-focused conception of “freedom” focuses on the value of relating to others to promote self-development while respecting personhood as fundamentally connected to other persons, objects, and contexts that have particularized, personal value not able to be captured in monetary terms.⁸⁴ Proponents of America’s current “Wild West” of ARTs argue that, out of respect for reproductive freedom, prospective parents should be granted a “wide sphere of free choice regarding” EST use.⁸⁵ However, when viewing that choice in context, it is easy to see that “[w]omen are increasingly pressured to use prenatal testing under a cultural imperative claiming that this is the ‘responsible thing to do’ . . . the underlying communication is clear: screening out disabled fetuses is the right thing, ‘the healthy thing,’ to do.”⁸⁶ This phenomenon at large is known as “stratified reproduction” – a conceptualization of the power relationships reformed and reified through ART use.⁸⁷ Arrangements between providers of genetic material and surrogacy services, and the persons paying for those services, “tap into existing social hierarchies” about race, income, and ability. Available EST choices reflect existing social value judgments and biases.⁸⁸

In the modern neoliberal context, “burden and choice are two sides of the same coin as both impose reproductive duties on women” under the auspices of

80. Christopher Gyngell & Thomas Douglas, *Selecting Against Disability: The Liberal Eugenic Challenge and the Argument from Cognitive Diversity*, 1 J. APP. PHIL. 1, 1 (2016).

81. *Id.* at 2.

82. Lemmens, *supra* note 77, at 421.

83. *Id.*

84. *Id.*

85. Gyngell & Douglas, *supra* note 80, at 2.

86. Saxton, *supra* note 46, at 78.

87. Lisa C. Ikemoto, *Egg Freezing, Stratified Reproduction and the Logic of Not*, 2 J. L. & BIOSCIENCES 112, 114 (2015).

88. *See id.* at 116 (arguing that ART arrangements between parties create social narratives).

market freedom and technological superiority.⁸⁹ “Women are expected to implement the society’s eugenic prejudices by ‘choosing’ to have the appropriate tests and ‘electing’ not to initiate or to terminate pregnancies if it looks as though the outcome will offend.”⁹⁰ It is important here to note that the disability community makes a clear distinction between their views on ESTs and those of anti-abortion groups. While pro-life groups may use disabled infants on their posters and pay lip service to the “rights” of disabled fetuses, disability advocates make clear that “anti-abortion groups have never taken up the issues of expanding resources for disabled people or parents of disabled children, never lobbied for disability legislation. They have shown no interest in disabled people after they are born.”⁹¹ Disabled people in this debate are pawns – to fully realize disabled humanity in a landscape of ART, a more nuanced approach to disability in the neoliberal context is necessary.

IV. WAYS FORWARD

A. Disability as Diversity

The libertarian position on ART and ESTs in particular relies on “beliefs about eugenics that are not merely untroubled by history but also hostile to disability.”⁹² That is, “everyone who is allowed to design a child will share a moral consensus that disability is to be avoided or eliminated.”⁹³ The neoliberal conception of disabled people as devalued, or even valueless, is central to the legal system’s reluctance to recognize a specific value in disabled humanity and the medical system’s preoccupation with preventing, avoiding, and erasing disability through even high-cost solutions. There is no sufficiently compelling direct cost-benefit analysis to combat the neoliberal argument that parents should have maximum control over the health of their future children, and almost everyone assumes that such control will ultimately benefit not only the child, but society as a whole.

Some, however, claim that disability, recast as “diversity,” provides the necessary counterbalance in the utilitarian calculus – both the repositories of genetic diversity inhering in disabilities, and the benefits of certain kinds of cognitive diversity in members of society.⁹⁴ Some of these theorists see diversity as an intrinsic good for society, whereas others take a more problematic instrumental view, celebrating the “lessons” that disabled people can teach “the

89. Betsy Hartmann, *Old Roots, New Shoots: Eugenics of the Everyday*, 47 *DIFFERENT TAKES* 1, 3 (2007).

90. RUTH HUBBARD, *THE POLITICS OF WOMEN’S BIOLOGY* 197 (1990).

91. Saxton, *supra* note 46, at 80–81. While many religious groups with anti-abortion platforms have a stated commitment to charity, the gap between providing charity care for disabled persons and lobbying for the expansion of their legal rights and recognition of their personhood is a yawning chasm that many religious anti-abortion groups intentionally elide.

92. Michael Bérubé, *Disability, Democracy, and the New Genetics*, in *DISABILITY STUD. READER* 87, 111 (Lennard J. Davis ed., 2017).

93. *Id.* at 98.

94. See generally Gyngell & Douglas, *supra* note 80, at 8 (exploring several cost-benefit arguments and concluding that “the presence of individuals with disability contributes to a property of the population – diversity – which is valuable either impersonally or for some or all of the members of the population”).

rest of us” about “the value of life and what makes a life worth living.”⁹⁵ This clearly speaks to a nondisabled audience who lives in a customary constant state of bodily anxiety, as presupposed and enabled by neoliberal society. Disability studies scholars are largely critical of this view, since it co-opts individual difference and reproduces it as monolithic “diversity,” wherein “individuals are paradoxically expected to contribute to such diversity by channeling any marker that signifies them as different towards the production of diversity.”⁹⁶ This smoothing over and eliding of difference “occurs through a process of normalization, where normalization entails not removing difference but resignifying and representing it as diversity. As such, disability as diversity figures as the route to acceptance and harmony.”⁹⁷

This simply resurrects the biopolitics of the eugenicists and repackages it as a different kind of control – any difference which is useful is subsumed. The diversity argument does not have to reach *all* difference, merely that which is acceptable and in some way useful. If biopolitics is a categorization at its core and the naming of the human biological experience affects stratification and control, then the creation of “diversity” as a positive category and the sorting of disabilities into and out of that category clearly fits the standard biopolitical mold. Advocates can jump through hoops explicating the benefits of neurodiversity in group problem solving or the importance of genetic diversity in animal populations and disease resistance,⁹⁸ but these arguments do not meaningfully challenge biopolitics. Rather, they only feed into it.

B. Reproductive Justice

Reproductive justice, a hybrid and synergistic fusion of social justice and reproductive rights, goes beyond the binary debate between pro-choice and pro-life and recognizes that the reproductive autonomy of people who can bear children is affected by myriad social and environmental factors.⁹⁹ Reproductive justice demands a holistic system that supports reproductive choices, including “(1) the right *not* to have a child, (2) the right to *have* a child; and (3) the right to *parent* children in safe and healthy environments. In addition, reproductive justice demands sexual autonomy and gender freedom for every human being.”¹⁰⁰

Reproductive justice grew from Black womanism and intersectional feminism, and thus is thoughtful and intentional about the long history of institutionalized control over Black women’s reproduction and administrative violence towards women overall.¹⁰¹ Reproductive justice advocates interrogate not

95. Gyngell & Douglas, *supra* note 80, at 8–9 (quoting J. McMahan, *The Morality of Screening for Disability*, 10 REPROD. BIOMEDICINE ONLINE 129, 129–32 (2005)).

96. Michele Friedner & Karen Weingarten, *Disability as Diversity: A New Biopolitics*, SOMATOSPHERE: INHABITABLE WORLDS (May 23, 2016), <http://somatosphere.net/2016/disability-as-diversity-a-new-biopolitics.html/>.

97. *Id.*

98. See Gyngell & Douglas, *supra* note 80, at 9–10 (arguing that disability screening will remove differences that contribute to valuable human diversity).

99. ROSS & SOLINGER, *supra* note 58, at 9.

100. *Id.*

101. *Id.* at 18–29, 70–71 (“Women of color pushed back, pointing out that both historically and in

only the binary abortion debate, but also the blithe trust in the market for ART. For example, regarding surrogacy, one of the founders of the movement asks, “[S]ince surrogacy is an expensive undertaking pursued mostly by white people, does this practice embed ideas about preserving the ‘white race’ as well as ideas about perpetuating biological, patriarchal lineage?”¹⁰² Feminist theory and lived experience acknowledge that parenting is important regardless of DNA, through any combination of nuclear or non-nuclear family arrangements including adoption, fostering, and collective parenting.¹⁰³

In contrast to the singular focus on abortion by the pro-choice movement, justice-focused work resists binaries, and finds commonalities with other social justice movements. Justice-focused work also explicitly considers social realities that may impact true access and choice, complicating the narrative of nominal “universal access” to healthcare as a panacea. The ability of any person to control their health is linked directly to the conditions in their community, which are not a matter of individual choice and access.¹⁰⁴ Our approach must address the social reality of inequality and move beyond a demand for privacy and respect for individualized decision making to include the social supports necessary for such decisions to be optimally realized. Under this framework, autonomy “unfolds itself and finds its shape in the context of supportive social structure.”¹⁰⁵ An overemphasis on nominally free decision-making actively harms women by denying their need for resources to support each choice they may make. Recognizing that “[r]eproductive freedom is a matter of social justice, not individual choice” is essential to a compassionate system of regulating both traditional contraception, abortion, and ART.¹⁰⁶ Disability scholar (and disabled woman) Marsha Saxton distills this idea beautifully:

I believe that at this point in history the decision to abort a fetus with a disability even because it ‘just seems too difficult’ must be respected. A woman who makes this decision is best suited to assess her own resources. But it is important for her to realize this ‘choice’ is actually made under duress. Our society profoundly limits the ‘choice’ to love and care for a baby with a disability. This failure of society should not be projected onto the disabled fetus or child. No child is ‘defective.’ A child’s disability doesn’t ruin a woman’s dream of motherhood. Our society’s inability to appreciate and support people is what threatens our dreams.¹⁰⁷

Reproductive justice considers the entire sphere of a woman’s life course and experience that could be affecting her decisions about reproduction.¹⁰⁸

contemporary America, ubiquitous and persistent white supremacy and population control efforts have clarified that motherhood rights of all women are not equally valued and neither are all children.”).

102. *Id.* at 208.

103. *See id.* (noting that “quality parenting can occur no matter whose DNA is in the child . . .”).

104. This approach rests on the acknowledgement that the “Vote with your feet/People can just move” argument is not a realistic policy solution for under-resourced communities.

105. Lemmens, *supra* note 77, at 421.

106. ROBERTS, *supra* note 4, at 6 (emphasis omitted).

107. Saxton, *supra* note 46, at 82.

108. *See* ROSS & SOLINGER, *supra* note 58, at 10–11 (arguing that an understanding of reproductive justice must capture “historical, legal, and technological contexts in which women have lived their

Reproductive justice concerns include environmental health, domestic violence, food security, and the carceral system.¹⁰⁹ Reproductive justice advocates realize that isolation (of people, or of issues) is an artificial state that does not accurately reflect real-world decision-making. This emphasis on the intersectionality of identity and overlapping concerns constraining decision-making speaks to why privacy-focused jurisprudence is next to useless for disabled persons; for disabled persons, “there is no realm of the private. Disability is always and everywhere a public issue, a matter for public policy”¹¹⁰

C. Interest Convergence in Regulatory Solutions

Obviously, reproductive rights in the twenty-first century are badly served by the binary debate on abortion and the reliance on free-market principles for ART regulation. Current jurisprudence that visualizes woman-as-isolated-individual and locates the right to control over the body within the right to privacy and singularity does not adequately reflect the complex webs of social relations and pressures within which decisions about reproduction are made. Litigation and case law, with its reliance on precedent, narrow construction of rights, and tendency to hew to the most elegant explanation possible, cannot and will not provide a satisfactory framework for true reproductive justice moving forward. However, the adage that one cannot legislate social change holds true for litigation as well – “it takes a mobilized social movement to change values, images, and power relations.”¹¹¹

Most importantly, the law must recognize that the crushing lack of resources available for disabled people to live full and happy lives is unquestionably part of the decision-making process for a woman carrying a fetus that she knows will be disabled. Programs which fully support the disabled persons right to be and to thrive will lead to an increased acceptance that a disabled child does not have to entail an extreme financial burden or acceptance of social stigma. The prevalence of disability in our society provides ample room for interest convergence arguments at the policymaking level – “[d]isability is an ambiguous demographic, but one that is unambiguously increasing.”¹¹² Further, making more resources available for disabled people dovetails well with current arguments surrounding health justice and broader economic equality.¹¹³ Some disability scholars argue

reproductive lives”).

109. See *id.* at 9–11 (noting that reproductive choices depend on access to fundamental community resources).

110. Bérubé, *supra* note 92, at 99.

111. Petchesky, *supra* note 41, at 107.

112. G.T. Fujiura, *Emerging Trends in Disability*, POPULATION REFERENCE BUREAU (Sept. 1, 2001), <https://www.prb.org/emergingtrendsindisability/>; see also Kate Wilson, *What Does Disability Have to do with Universal Health Coverage?*, GLOBAL HEALTH IMPACT BLOG (Aug. 8, 2017), <http://www.msh.org/blog/2017/08/08/what-does-disability-inclusion-have-to-do-with-universal-health-coverage>.

113. See Tim Faust, *The Case for Single-Payer*, JACOBIN (Oct. 03, 2017), <https://www.jacobinmag.com/2017/10/single-payer-medicare-for-all-bernie-sanders>; Susan Sherry & Michael Miller, *Advancing Health Justice: Building a Health System that Works for Everyone*, COMMUNITY CATALYST (Mar. 6, 2019), https://www.communitycatalyst.org/resources/publications/document/2019/CC_HealthJusticePaper_Final.pdf.

that longer lifespans, environmental health hazards, and near-constant military conflicts are transforming disability into a “new normal” that affects larger and larger swaths of the population.¹¹⁴ If activists could consistently highlight the probability of currently able-bodied policymakers and the people they care about “crossing over” into a disability status, they could leverage the concept of “interest convergence” to push thorough policies that benefit historically subordinated and marginalized populations.

Interest convergence, as distilled by the late Derrick Bell, is a major tenet of critical race theory. It holds that the “interests of a subordinated minority will be accommodated only when they converge with the interests of the dominant majority”¹¹⁵ As such, legal remedies and policies benefitting the subordinated group rely on policymakers “concluding that such remedies ‘will secure, advance, or at least not harm’ majority group interests.”¹¹⁶ Generally, in the disability politics sphere, interest convergence arguments concede that rhetoric around individual self-sufficiency, equality, and human dignity are inadequate to attain or maintain support for law benefitting disabled persons, and that “practical politics may require identifying and highlighting benefits to nondisabled [persons]”¹¹⁷ However, interest convergence has special relevance for policies surrounding resources for disabled persons, as it is one of the few subordinated categories into which a member of the majority can cross at any time, even involuntarily.¹¹⁸

It may seem perverse to utilize the bodily anxiety essential to neoliberal society’s rejection of the disabled as an incentive to provide resources for those populations, but it is more palatable than trying to fit disabled personhood into a neoliberal value calculation. And without policies providing adequate resources for disabled persons, we cannot hope to change the narrative of suffering around bearing and raising a disabled child. A myopic focus on “choice” without attention to the availability of resources and the presence of coercive or controlling policies allows the law to react to a woman’s “poor choice-making” with penalties and stigma. Increased resources will lead to more disabled people living full lives, participating in greater society, and bringing attention to the fact that disabled life is not inherently worse or less valuable or overwhelmed with suffering. More able-bodied people recognizing disabled humanity and realizing that it is possible to love life in a disabled body will spark a positive feedback loop of even more resource provision.

114. Friedner & Weingarten, *supra* note 96.

115. Michelle A. Travis, *Lashing Back at ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 312 (2009).

116. *Id.* at 312 (quoting Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–25 (1980)).

117. Travis, *supra* note 115, at 312.

118. The author notes that the specific categories of disability to which EST is applicable – congenital birth defects – are those that it is impossible for abled persons to “cross” into. However, the presence of congenitally disabled people provokes that intrinsic neoliberal bodily anxiety (the fear of crossing over into the “valueless” subgroup), and that anxiety can fuel either efforts to stamp out the category entirely, or a movement to use interest convergence to advocate for better conditions for the disabled people in society.

If the regulatory environment supports people with disabilities, it would communicate to women that giving birth to a child with a disability will not subject that child (and their family unit) to unadulterated suffering and stigma. This new environment would therefore afford women, especially poor women, much greater reproductive autonomy. Reproductive rights work must widen its perspective past only protecting a woman's right to *not* have a child. It must demand our government to protect a woman's right to have a child and to raise that child in a healthy and safe environment, regardless of what congenital conditions the baby may have.

V. CONCLUSION

The rights of disabled people will not be adequately protected in either a libertarian free-market system or by forming coalitions with the "pro-life" advocates. One positions disability as an insurmountable obstacle to a happy life. The other uses disabled *fetuses* as a prop and devotes no attention to the actual resources necessary for disabled *people* to thrive. We cannot allow free-market neoliberalism or ideological partisan politics to control the opportunities available through ARTs. A justice-focused regulatory system that recognizes the dangers of stratified reproduction and disability discrimination is the best hope to allow individuals to navigate the industry and safeguard their reproductive autonomy while secure in the knowledge that there will be resources available to support whichever choice they make. By supporting women in bearing and raising children with disabilities, we recognize the humanity of disabled persons as separate and distinct from the net economic value they add to society. In a neoliberal framework, this is a scary concept. This framework is so endemic and ingrained that most people do not even recognize that it is influencing their choices.

Suggesting that we reject biopolitical categorization of human life by ability and "value" may seem like suggesting that we breathe water instead of air, or that gravity is not the best idea. However, unless we are to blithely repeat the eugenic mistakes and institutionalize the dehumanizing practices of our forebears, we must carefully interrogate what we now accept: the diverse choices being offered by ARTs, how society decides which women have access to technologies and which women are barely afforded the right to reproduce at all. Most crucially, we must examine how societal factors and resource deficits direct the reproductive choices of individual women and question whether those choices are freely made, after all. We cannot continue to leave ART to regulation purely by market forces and abdicate our responsibility in this arena. Whatever regulatory framework is added must be a comprehensive effort to assure maximum reproductive autonomy to all women by assuring maximum support for the autonomy and life chances of the children they may bear, whatever genes they carry with them.