

The Dysgenic State: Environmental Injustice and Disability-Selective Abortion Bans

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Disability-selective abortion bans are laws that prohibit individuals from terminating a pregnancy because the fetus has been diagnosed with a health impairment. Many environmental toxins—to which low-income people and people of color disproportionately are exposed—are known to cause impairments in fetuses. When the fact of environmental injustice is read together with disability-selective abortion bans, we see that in one moment, the state fails to protect its citizens from toxins that impair fetal health, while in another moment, that same government compels its citizens to give birth to health-impaired fetuses. This Article identifies these two moments as the dysgenic state. Whereas the eugenic state of the early twentieth century sought to remove impairments from the population, the dysgenic state of the early twenty-first century seems committed to producing an impaired citizenry.

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INTRODUCTION

North Dakota is the home of a sizeable portion of the country's oil and gas industry. Indeed, if oil companies doing business in the state maximized use of their equipment, the state could produce more than 12 percent of the nation's oil.¹ As a direct consequence of North Dakota's oil and gas industry, the state's residents have had to contend with some significant air pollution. "According to EPA's data for 2011, over 2,200 tons of hazardous toxic air pollution—benzene, formaldehyde, and acetaldehyde—were emitted by oil and gas companies in North Dakota."² More than eleven thousand residents live within a half-mile of these operations³—a distance that puts them at an increased risk of health impairments. While formaldehyde and acetaldehyde are certainly toxic, studies have shown a relationship between solvents like benzene, specifically, and fetal impairments.⁴ The fetal harms that have been linked to benzene and other solvents include neural tube impairments (like spina bifida and anencephaly), eye and ear impairments, and chromosomal anomalies, namely Down syndrome.⁵

North Dakota has also welcomed hydraulic fracturing, or fracking—an unconventional method of drilling for oil and gas that involves injecting large quantities of pressurized liquid into the ground.⁶ Indeed, because of fracking, North Dakota has become the second-largest producer of crude oil in the United States.⁷ Fracking produces an incredible amount of wastewater.⁸ One research group "calculate[d] that in 2018 alone, the fracking boom [in North Dakota] generated 460 million barrels of waste water—one barrel for each barrel of oil crude produced. That totals 19 billion gallons, or enough waste water to fill the bathtub in every household of North Dakota 623 times."⁹ Significantly, this wastewater contains an alphabet soup of toxic chemicals—including radioactive

1. JOHN GRAHAM & DAVID MCCABE, CLEAN AIR TASK FORCE, HEALTH RISKS IN NORTH DAKOTA FROM OIL AND GAS AIR POLLUTION (2017), http://www.catf.us/wp-content/uploads/2017/02/CATF_FactSheet_HealthEffects_ND.pdf [https://perma.cc/L9UG-WRJQ].

2. *Id.*

3. See *Threat Map: North Dakota*, OIL & GAS THREAT MAP, <https://oilandgasthreatmap.com/threat-map/north-dakota/> [https://perma.cc/FTT8-DPHH].

4. See Helen Dolk & Martine Vrijheid, *The Impact of Environmental Pollution on Congenital Anomalies*, 68 BRIT. MED. BULL. 25, 33–34 (2003).

5. *See id.*

6. Christina Nunez, *How Has Fracking Changed Our Future?*, NAT'L GEOGRAPHIC (May 4, 2021), <https://www.nationalgeographic.com/environment/energy/great-energy-challenge/big-energy-question/how-has-fracking-changed-our-future/> [https://perma.cc/2STV-JJKH].

7. AMY MALL & MELISSA TROUTMAN, EARTHWORKS, NORTH DAKOTA FRACK WASTE REPORT 4 (2020), <https://earthworks.org/publications/north-dakota-frack-waste-report/> [https://perma.cc/59MF-UFBJ].

8. *See id.* at 8.

9. Press Release, Earthworks, New Report Finds Increased Threat from Radioactive Oil & Gas Waste in North Dakota (June 18, 2020), <https://earthworks.org/media-releases/new-report-finds-increased-threat-from-radioactive-oil-gas-waste-in-north-dakota/> [https://perma.cc/SR6J-Z677].

materials, heavy metals, and hydrocarbons—as well as chemicals that are unknown because companies fail to identify them.¹⁰

Because North Dakota has taken a permissive approach to regulating fracking—“allow[ing] the spreading of wastewater on roads, on-site burial, and . . . storage in often-leaky pits rather than more secure holding tanks”¹¹—wastewater has contaminated the communities that are proximate to fracking sites.¹² Many indigenous people live in these communities.¹³ One watchdog organization interviewed an indigenous woman, who reported:

“Living on the front lines of oil and gas in the Bakken, we live the impacts from spills, flaring and venting every day,” said Lisa DeVille, a resident of Mandaree on the Fort Berthold Reservation and Board Member of the Dakota Resource Council. “We don’t know if our water is safe to drink. We have had many oil and gas production waste spills, including one of the largest in North Dakota, five miles north of Mandaree—one million gallons of wastewater brine spilled by Crestwood.”¹⁴

Notably, studies have shown a correlation between the chemicals used and produced in fracking processes and impairments in fetuses. These chemicals include benzene and other solvents—which, as noted above, have been linked to a number of impairments in fetuses—as well as endocrine-disrupting chemicals, which have been associated with congenital heart defects.¹⁵

At the same time that North Dakota has welcomed, and refused to competently regulate, an industry that inundates its residents with chemicals known to injure fetuses, the state has seen fit to pass HB 1305. Signed into law by Governor Jack Dalrymple, HB 1305 provides:

Notwithstanding any other provision of law, a physician may not intentionally perform or attempt to perform an abortion with knowledge that the pregnant woman is seeking the abortion solely . . . [b]ecause the unborn child has been diagnosed with either a genetic abnormality or a potential for a genetic abnormality.¹⁶

10. See MALL & TROUTMAN, *supra* note 7, at 4, 7.

11. Earthworks, *supra* note 9.

12. See MALL & TROUTMAN, *supra* note 7, at 8–9.

13. See, e.g., Ashley Kelly, *Tribes/First Nations: Fort Berthold & Oil*, FOSSIL FUEL CONNECTIONS, <http://www.fossilfuelconnections.org/fort-berthold-oil-fracking> [https://perma.cc/FWH9-GRQA] (noting fracking beneath Fort Berthold Indian Reservation—the home to the Mandan, Arikara, and Hidatsa tribes); Sarah Van Gelder, *In North Dakota’s Booming Oil Patch, One Tribe Beat Back Fracking*, YES! MAG. (Jan. 21, 2016), <https://www.yesmagazine.org/environment/2016/01/21/in-north-dakotas-booming-oil-patch-one-tribe-beat-back-fracking> [https://perma.cc/E4XX-N94Y] (observing how fracking on Fort Berthold reservation was expected to expand to Turtle Mountain Reservation).

14. Earthworks, *supra* note 9.

15. See Ellen Webb, Sheila Bushkin-Bedient, Amanda Cheng, Christopher D Kassotis, Victoria Balise & Susan C Nagel, *Developmental and Reproductive Effects of Chemicals Associated with Unconventional Oil and Natural Gas Operations*, 29 REV. ENV’T HEALTH 307, 307–08, 312 (2014).

16. N.D. CENT. CODE § 14-02.1-04.1(1)(b) (2013).

The regulation makes it a crime for a physician to perform an abortion under these circumstances.¹⁷

In one moment, the government of North Dakota fails to protect its citizens from toxins that impair fetal health. In another moment, that same government compels its citizens to give birth to health-impaired fetuses. This Article identifies these two moments—which are present not just in North Dakota, but rather can be found across the country more broadly—as the *dysgenic state*. Whereas the eugenic state of the early twentieth century sought to remove impairments from the population, the dysgenic state of the early twenty-first century seems committed to producing an impaired citizenry.

This Article makes two important interventions into the existing literature. First, the Article intervenes simply to identify the dysgenic state—to call out the processes that harm the health of fetuses and then compel pregnant people to carry these pregnancies to term.¹⁸ Second, the Article intervenes to analyze the racial stakes of the dysgenic state. What is the significance of the empirically documented fact that people of color are disproportionately exposed to environmental toxins? What does it mean that because people of color also disproportionately bear the burdens of poverty, they are the least able to avoid the constraints of abortion regulations like HB 1305? What does it mean, then, that the state produces impairments not in its citizenry generally, but *in its nonwhite citizenry specifically*? This is the puzzle that this Article sets out to describe and then analyze.

The analysis proceeds in five parts. Part I provides the context, historical and contemporary, for an investigation of the dysgenic state. It begins with a short history of the eugenics movement in the United States, which enlisted the state in its efforts to protect and ensure white racial purity in the early 1900s. It then pivots to the present day, describing studies that have documented that low-income people and people of color are exposed to environmental toxins in their homes, schools, communities, and workplaces more than their affluent and white counterparts. These studies show that race matters, as race is more important than class in predicting whether a community will bear the burdens of pollution.

Part II offers a clear articulation of the dysgenic state. It begins by establishing that many environmental toxins—to which low-income people and people of color disproportionately are exposed—are known to cause impairments in fetuses. This Part argues that in failing to protect its citizens from

17. *Id.* § 14-02.1-04.1(2).

18. Of course, many processes harm the health of fetuses. For example, researchers have long established that poverty is exceedingly injurious to the fetus. See Charles P. Larson, *Poverty During Pregnancy: Its Effects on Child Health Outcomes*, 12 PAEDIATRICS & CHILD HEALTH 673, 674–75 (2007) (documenting the adverse effects that poverty has on the children exposed to it in utero); DARLA BISHOP, LIZ BORKOWSKI, MEGAN COUILLARD, AMY ALLINA, SUSANNAH BARUCH & SUSAN WOOD, JACOBS INST. OF WOMEN'S HEALTH, PREGNANT WOMEN AND SUBSTANCE USE: OVERVIEW OF RESEARCH & POLICY IN THE UNITED STATES 8, 13 (2017) (providing evidence that poverty causes babies exposed to it in utero to experience negative health outcomes).

impairment-causing environmental hazards, the state is complicit in creating disability. But then, through disability-selective abortion bans, the state compels pregnant individuals to give birth to health-impaired fetuses. The state's dual role in injuring fetuses, and then forcing individuals to give birth to injured children, is what makes the state dysgenic.

Part III then introduces reasons-based abortion bans—regulations that prohibit abortion when a person seeks to terminate a pregnancy for reasons that the legislature has proscribed. After briefly discussing race- and sex-selective abortion bans, it introduces disability-selective abortion bans. Part IV then engages in a deeper examination of disability-selective abortion bans. At least part of the reason abortion opponents favor these bans is that they estrange two groups on the political left: disability rights activists and abortion rights activists. Disability rights activists and abortion rights activists have a long and troubled history, which this Part sets out. The Part then goes on to discuss the legality of disability-selective abortion bans, laying out the arguments for and against the laws' constitutionality. The Part next describes how supporters of disability-selective abortion bans have styled them as “anti-eugenic”—a styling that got its most thorough treatment in Justice Clarence Thomas's concurrence in *Box v. Planned Parenthood*, in which the Court decided to wait until a later day to evaluate the constitutionality of reasons-based abortion bans.

Part V concludes the analysis by comparing the racial politics of the eugenic state of the early twentieth century with the racial politics of the dysgenic state of the early twenty-first century. This Part observes that while the eugenic state (which sought to eliminate disability) and the dysgenic state (which manufactures disability) appear to be polar opposites, they are actually closely aligned. Whereas in the time of eugenics, the state attempted to manufacture white racial purity by removing impairments from the white race, in the time of dysgenics, the state manufactures a “purity” among affluent and white people by producing nonwhite and poor communities as the site for impairments. This Part ends by observing another parallel between the eugenic state and the dysgenic state: both contexts affirm the myth of biological race. The myth of biological race proposes that not only are races biologically distinct from one another, but, by virtue of this biological distinction, deficiencies and dysfunctions can be found in some races (i.e., the nonwhite ones) and not others (i.e., the white race). While the myth of biological race provided the foundational assumption of the eugenics movement, the racial politics of the dysgenic state operate in such a way that they make the myth appear true, functioning to locate deficiencies and dysfunctions—that is, impairments—in nonwhite people at birth. A brief conclusion follows.

Before beginning, it is valuable to identify three theoretical frameworks that animate the ensuing analysis: critical disability studies, reproductive justice, and environmental justice.

The foundational insight of critical disability studies is that disability¹⁹ is socially constructed. People with disabilities may have physical, mental, or cognitive characteristics that make it difficult—and, in many cases, impossible—for them to live full, productive, independent lives; however, critical disability studies observes that the difficulties and impossibilities that people with disabilities face are not products of their physical, mental, or cognitive characteristics, but rather a result of the way that we have organized society.²⁰ Critical disability studies proposes a “social model of disability,” a paradigm that posits that societal choices are the actual font of the limitations that people with disabilities encounter.²¹ According to the social model of disability, if the person with paraplegia cannot traverse her physical environment, it is because we have decided to build an environment with stairs, as opposed to ramps that people can navigate with wheelchairs. If the person with clinical depression cannot hold down a job, it is because we have created norms around “productivity” and what it means to be a “good” employee that render people with mental illnesses unemployable. If we believe the person with an intellectual disability cannot enjoy a meaningful life, it is due to our constrained definitions of what makes a life “meaningful.” Framed in the way the social model of disability proposes, the solution to disability does not involve “fixing” the physical, mental, or cognitive characteristics of individuals that place them at a disadvantage²²—a solution that relieves society of responsibility

19. The World Health Organization defines disability as “an umbrella term for impairments, activity limitations and participation restrictions.” WORLD HEALTH ORG., INTERNATIONAL CLASSIFICATION OF FUNCTIONING, DISABILITY AND HEALTH 8, 10 (2013). As scholars and activists Sujatha Jesudason and Julia Epstein explained, “This definition covers a range of conditions that have mild to severe impacts on daily life. So mild autism, such as Asperger’s Syndrome, is not definitionally distinct from a fatal condition such as anencephaly, except in degree of severity.” 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).

20. See Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391, 400 (2001) (arguing that the problems that people with disabilities face are due to social institutions’ having been designed “to deal with a narrower range of variation than is in fact present in any given population”).

21. See Debora Diniz, Livia Barbosa & Wederson Rufino dos Santos, *Disability, Human Rights and Justice*, 11 SUR INT’L J. HUM. RTS. 61, 63 (2009) (“[T]he social barriers are the ones that, by ignoring the bodies with impairments, force the experience of inequality. Oppression is not an attribute of the impairment itself but the result of non-inclusive societies.”); Maneesha Deckha, (*Not*) *Reproducing the Cultural, Racial and Embodied Other: A Feminist Response to Canada’s Partial Ban on Sex Selection*, 16 UCLA WOMEN’S L.J. 1, 19 (2007) (“[T]he problems many families and persons with disabilities experience arise not from the disability itself, but from . . . poor social arrangements [that are] unable to accommodate different capacities and levels of functioning.”). *But see* Adam M. Samaha, *What Good is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1252–53 (2007) (arguing that the social model of disability is of little value because “[d]eciding how to respond to ‘disability’ depends on a normative framework that cannot be supplied by the model”).

22. See Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, 29 HARV. J.L. & GENDER 425, 436 (2006) [hereinafter Bagenstos, *Life, Death*] (“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 . . .”).

for the marginalization of people with disabilities.²³ Rather, the solution involves reorganizing society so that people with disabilities can fully engage with it and contribute to it.²⁴

One point of contestation within the field of critical disability studies involves the role of medicine.²⁵ Because the institution of medicine has conceptualized disability, or health impairments,²⁶ as something to be avoided, fixed, and eliminated, it tends to think of health-impaired individuals as suffering as a matter of course—as living a diminished, tortured life.²⁷ This understanding of disability, which conceptualizes people with health impairments as having something wrong with them, has worked to subjugate and oppress people with impairments. As a consequence, scholars, activists, and advocates have been wary of medicine as an institution.²⁸ There has been a sense that people with health impairments ought to reject medicine outright. They ought not to want what medicine has to offer. They ought not to want a cure.²⁹ However, the

23. See Arlene S. Kanter, *The Law: What's Disability Studies Got to Do With It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 420 (2011) (noting that the medical model of disability, which frames a person with a disability as ailing and in need of treatment, lets society “off the hook” and relieves it of any “obligation to look at how it, itself, is structured[,] how it creates barriers to inclusion[,] and how it shares in the responsibility to eliminate the legal, attitudinal, and physical barriers that exclude people with disabilities from our schools, workplaces and neighborhoods”).

24. See Kathleen R. Bogart & Dana S. Dunn, *Ableism Special Issue Introduction*, 73 J. SOC. ISSUES 650, 652 (2019) (noting that the social model of disability “places the onus of change on society, rather than the individual or specialists seeking to change the individual”); Kanter, *supra* note 23, at 410 (proposing a paradigm that “aims to ‘fix’ systems to be accessible to and usable by people with disabilities in contrast to the traditional paradigm that focuses on ‘fixing’ the individual so that he or she can better fit into existing systems”).

25. See generally SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009).

26. While this Article uses “disabilities” and “impairments” interchangeably, it may be important to note that the social model of disability distinguishes the two. Impairments are the physical, mental, or cognitive characteristics possessed by individuals who deviate from a constructed norm; these impairments become *disabilities* only when they interact with a hostile social environment. See Diniz et al., *supra* note 21, at 68 (proposing that disability “is the negative outcome of the insertion of a body with impairments into social environments that are insensitive to people’s physical diversity”); Kanter, *supra* note 23, at 426 (distinguishing between an impairment, which is “the physical fact of lacking an arm or leg,” and disability, which is “the social process that turns impairment into a negative by creating barriers to access”).

27. See Deckha, *supra* note 21, at 15 (arguing that the medical model’s understanding of disability “as an intensely negative experience exaggerates the biological realities of certain human disorders”); see also Fiona A. K. Campbell, *Inciting Legal Fictions: ‘Disability’s’ Date with Ontology and the Ableist Body of the Law*, 10 GRIFFITH L. REV. 42, 43 (2001) (describing a conception of disability that figures it “as negative ontology, a malignancy, a body constituted by what Michael Oliver terms ‘the personal tragedy theory of disability,’ wherein disability cannot be spoken about as anything other than an anathema”).

28. See Rosemarie Garland-Thomson, *Disability Studies: A Field Emerged*, 65 AM. Q. 915, 915–16 (2013) (describing critical disability studies scholars’ repudiation of the idea that disability is “a medical problem needing a medical solution”).

29. See ALISON KAFER, *FEMINIST, QUEER, CRIP* 7 (2013) (describing a political position about disability that “casts cure out of our imagined futures” and presents cure as a “future no self-respecting disability activist or scholar wants”); see also John Swain & Sally French, *Towards an Affirmation Model of Disability*, 15 DISABILITY & SOC’Y 569, 573 (2000) (stating that although people without

relationship that health-impaired people have with medicine can be, and often is, more nuanced. Some scholars have articulated a middle position that recognizes that impairments are things that can and should be celebrated—a fact that the institution of medicine has denied in its quest to eliminate them³⁰—while, at the same time, acknowledging that impairments can be painful and life-shortening. Consequently, while impairments can create community and represent the marvelous range of human variation, the interventions that medicine offers to address some impairments—interventions that can sometimes alleviate pain and extend life—can be very much desired and, sometimes, needed.³¹

This Article stages its intervention at this middle position. It recognizes disability as worthy of celebration inasmuch as it reflects awe-inspiring variations among humans. Simultaneously, it recognizes something brutal about a state that is complicit in producing disability in the citizenry that it is supposed to protect. Moreover, it recognizes something *particularly* vicious about a state that would produce disability such that it is concentrated among already vulnerable and marginalized people. The tension that this Article occupies, then, is its belief that disabilities have value and deserve respect, and its critique of the state for producing the same.³²

The second framework that animates this Article’s analysis is reproductive justice (RJ), which emerged in the 1990s as a response to traditional approaches of conceptualizing and protecting reproductive freedom.³³ The women of color whose intellectual energies generated the RJ framework observed that most mainstream organizations that were fighting for “reproductive rights” at the end

disabilities assume that people with disabilities “want to be ‘normal,’” this sentiment “is rarely voiced by disabled people themselves who know that disability is a major part of their identity”).

30. See John F. Muller, *Disability, Ambivalence, and the Law*, 37 AM. J.L. & MED. 469, 470 (2011) (“[A]dherents of the social model tend to cast disability as a difference we should celebrate, and . . . adherents of the medical model tend to cast disability as a difference we should eliminate.”).

31. See KAfer, *supra* note 29, at 6 (recognizing “the possibility of simultaneously desiring to be cured of chronic pain and to be identified and allied with disabled people”); Nicole Buonocore Porter, *Relieving (Most of) the Tension: A Review Essay of Samuel R. Bagenstos*, *Law and the Contradictions of the Disability Rights Movement*, 20 CORNELL J.L. & PUB. POL’Y 761, 768 (2011) (“Anytime someone is diagnosed with cancer or multiple sclerosis, or has a skiing accident that leaves her paralyzed, the person is likely to see it as a ‘personal tragedy’ and a terrible chance event, and will want to seek medical treatment, to make her body function as ‘normally’ as is possible.”).

32. Kafer captured this tension stunningly when she wrote:

As much joy as I find in communities of disabled people, and as much as I value my experiences as a disabled person, I am not interested in becoming more disabled than I already am. I realize that position is itself marked by an ableist failure of imagination, but I can’t deny holding it. Nor am I opposed to prenatal care and public health initiatives aimed at preventing illness and impairment, and futures in which the majority of people continue to lack access to such basic needs are not futures I want. *But there is a difference between denying necessary health care, condoning dangerous working conditions, or ignoring public health concerns (thereby causing illness and impairment) and recognizing illness and disability as part of what makes us human.*

KAfer, *supra* note 29, at 4 (emphasis added).

33. See Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 497–98 (2008).

of the twentieth century were singularly concerned with protecting the right to an abortion.³⁴ While the founders of RJ understood that the right to terminate an unwanted pregnancy was absolutely essential and well worth fighting tooth and nail for, they also understood that the right to an abortion did not encompass the entire universe of reproductive concerns.³⁵ They believed that the reason most mainstream reproductive rights organizations focused on the abortion right to the exclusion of all of the other constraints, challenges, and coercions that people with the capacity for pregnancy face was that compelled motherhood—the consequence of the failure to protect abortion rights—was the primary constraint, challenge, or coercion faced by the wealthier, white, cisgender women who helmed and funded such organizations.³⁶ While poor people and people of color, like their affluent and white counterparts, faced the threat of compelled motherhood, they were also frequently *denied* the ability to become mothers.³⁷ Additionally, marginalized people were also deprived of the ability to parent the children that they had in humane, dignity-respecting, life-affirming conditions.³⁸ The RJ framework, then, proposes that in order to protect the reproductive freedom of *all* people with the capacity for pregnancy—and not just those who enjoy race and class privilege—we need to struggle for the realization of a three-part program: 1) the right *not* to become a parent; 2) the right *to* become a parent; and 3) the right to parent one’s children with dignity.³⁹

The RJ framework informs this Article inasmuch as it recognizes that it is a manifest injustice to be obliged to give birth to a health-impaired child. Being forced to give birth to a child—health-impaired or not—is a clear violation of the RJ tenet that a competent, humane government respects the right not to become a parent. Nevertheless, there is something especially cruel about a government that forces people to give birth to children whose health has been impaired by toxic environments that the state is complicit in creating. This is precisely what the dysgenic state does.

The third theoretical framework animating this Article’s analysis is environmental justice.⁴⁰ The environmental justice movement is a response to

34. See Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 BERKELEY J. AFR.-AM. L. & POL’Y 71, 75 (2011).

35. See *id.*

36. See Loretta Ross, *Understanding Reproductive Justice: Transforming the Pro-Choice Movement*, 36 OFF OUR BACKS 14, 15–16 (2006).

37. See Jael Silliman, Marlene Gerber Fried, Loretta Ross & Elena R. Gutiérrez, *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE* 7 (2004) (“For women of color, resisting population control while simultaneously claiming their right to bodily self-determination, including the right to contraception and abortion or the right to have children, is at the heart of their struggle for reproductive control.”).

38. See Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327, 340–42 (2013).

39. See *id.* at 343.

40. Most observers put the genesis of the environmental justice movement with the protests that were sparked in Warren County, North Carolina in 1982 after the state decided that a poor, predominately black neighborhood would be an appropriate site for a landfill for soil contaminated by polychlorinated biphenyls (PCBs) that had been illegally dumped along the side of a road. See Jedediah

the insufficiency of the mainstream environmental protection movement, which historically has ignored the concerns of people of color—in part because people of color have been largely absent from mainstream organizations due to the tendency of these organizations to hire white people exclusively.⁴¹ Tellingly, the demographics of the environmental protection movement have not changed significantly since those who incited the development of the environmental justice movement first made their critique.⁴² While traditional environmentalism has centered the preservation of wildlife and wilderness,⁴³ environmental justice has expanded the list of pressing environmental issues to include phenomena that more directly affect marginalized people, including occupational hazards, lead

Purdy, *The Long Environmental Justice Movement*, 44 *ECOLOGY L.Q.* 809, 820 (2018). The protests, which lasted over six weeks, raised national awareness about the environmental burdens with which poor communities of color were disproportionately saddled. *See id.* A year after the Warren County protests, the Government Accounting Office (GAO) released a study that showed that, even though black people comprised only 20 percent of the population in eight states in the south, 75 percent of the hazardous waste landfills in those states were located in predominately black communities. *See* ROBERT D. BULLARD, *ENVIRONMENT AND MORALITY: CONFRONTING ENVIRONMENTAL RACISM* 4 (2001). A few years following the GAO report, the Commission for Racial Justice of the United Church of Christ reported that three out of five people of color lived in a community with a toxic waste facility; further, the race of a neighborhood's residents—and not their class—was the most important characteristic in predicting whether a neighborhood would have a hazardous waste facility. *See* Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 *KAN. J.L. & PUB. POL'Y* 69, 69 (1991). Convening in 1991, the First National People of Color Environmental Leadership Summit congealed the agitation into a movement. *See* BULLARD, *supra*, at 5. It was at this meeting that the focus of environmental justice broadened “beyond its anti-toxics focus to include issues of public health, worker safety, land use, transportation, housing, resource allocation and community empowerment.” *Id.*

41. *See* Austin & Schill, *supra* note 40, at 77. In 1990, at the dawn of the environmental justice movement, the SouthWest Organizing Project sent a letter to ten of the largest environmental organizations condemning this very aspect of the movement. Letter from SouthWest Organizing Project to “Group of Ten” National Environmental Organizations (Mar. 15, 1990), <https://www.ejnet.org/ej/swop.pdf> [<https://perma.cc/5EMQ-9PBT>]. The letter indicted the organizations for

continu[ing] to support and promote policies which emphasize the clean-up and preservation of the environment on the backs of working people in general and people of color in particular. In the name of eliminating environmental hazards at any cost, across the country industrial and other economic activities which employ us are being shut down, curtailed or prevented while our survival needs and cultures are ignored. We suffer the end results of these actions, but are never full participants in the decision-making which leads to them.

Id. at 1–2.

42. *See* Linda Villarosa, *Pollution Is Killing Black Americans. This Community Fought Back.*, *N.Y. TIMES MAG.* (July 28, 2020), <https://www.nytimes.com/2020/07/28/magazine/pollution-philadelphia-black-americans.html> [<https://perma.cc/NF8C-P8X6>] (referencing a study that “found that white people made up 85 percent of the staffs and 80 percent of the boards of 2,057 environmental nonprofits” and another report that “showed that people of color made up only 20 percent of the staffs of 40 environmental nongovernmental organizations”); *see also* Claudia Polsky, *A Black Staffer’s Noisy Exit from a Green NGO*, *LEGALPLANET* (June 19, 2020), <https://legal-planet.org/2020/06/19/a-black-staffers-noisy-exit-from-a-green-ngo/> [<https://perma.cc/WF49-2QB5>] (noting that only “in some enlightened NGO pockets (such as particular local or regional offices of national organizations), [are] BIPOC . . . truly included, elevated, and celebrated, rather than simply represented”).

43. *See* Austin & Schill, *supra* note 40, at 72 (observing the “narrowness of the mainstream movement, which appears to be more interested in endangered animal (nonhuman) species and pristine undeveloped land than at-risk humans”).

in soil and older housing, and unprivileged people's lack of voice in decisions regarding land use in their communities, among a plethora of other concerns.⁴⁴ Moreover, environmental justice problematizes an issue that traditional environmentalism wholly ignored: the distributional injustices surrounding the location of hazardous facilities, with unprivileged people's communities disproportionately bearing the burdens of these universally unwanted products of industry.⁴⁵

The environmental justice framework animates this Article because the framework is concerned about the disproportionate environmental harms inflicted upon marginalized people. This Article reads this concern in light of studies that show that toxins in the places where marginalized people live, work, and play cause health impairments in fetuses. Thus, the state not only fails to protect marginalized people from toxic environments, but it forces them to give birth to children that bear the marks of those toxic environments. This is the cruelty that motivates this Article's analysis.

One additional note before beginning: although this Article might be described as putting reproductive justice and environmental justice in conversation with one another, this description may misrepresent the two frameworks. That is, reproductive justice fits under its umbrella of concerns everything that impacts an individual's ability to become a parent, to avoid parenthood, and to parent the children that she has with dignity. Because environmental degradation impacts a person's ability to become a parent (inasmuch as toxins cause infertility, miscarriages, and stillbirths⁴⁶), environmental justice is already included within the ambit of the reproductive justice framework. This is to say that environmental justice does not need to be put "in conversation with" reproductive justice: it is already a part of the framework.⁴⁷ Similarly, because environmental justice is concerned not only with the fact that subordinated people disproportionately bear the burdens of environmental degradation, but also the range of harms that this environmental degradation inflicts on subordinated peoples—including reproductive harms—reproductive justice is already included within the ambit of the environmental justice framework.⁴⁸

44. See BULLARD, *supra* note 40, at 6–7.

45. See Purdy, *supra* note 40, at 814 ("Environmental justice advocates charged mainstream environmentalism with indifference to the distributive consequences of environmental policy, especially where the burdens of pollution and other harms followed familiar racial and socioeconomic lines of vulnerability and marginalization . . ."). For a full discussion of this issue, see *infra* Part I.B.

46. See discussion *infra* notes 142–163 and accompanying text.

47. See, e.g., NAT'L WOMEN'S LAW CTR. & LAW STUDENTS FOR REPROD. JUST., IF YOU REALLY CARE ABOUT ENVIRONMENTAL JUSTICE, YOU SHOULD CARE ABOUT REPRODUCTIVE JUSTICE! (2015), <https://nwl.org/wp-content/uploads/2015/08/FactSheetEnvironmentalJusticeandReproJustice.pdf> [<https://perma.cc/E4G4-F68X>] ("Reproductive justice . . . demands that the decision of whether or not to have a child and the right to raise that child not be impeded by the inequitable distribution of environmental burdens.").

48. See, e.g., Alice Kurima Newberry, *Why We Can't Have Environmental Justice Without Reproductive Justice*, GREENPEACE (May 31, 2019),

I.

RACIAL DISENFRANCHISEMENT: PAST AND PRESENT

This Part provides an overview of two forms that racial disenfranchisement has taken—both of which are relevant to an analysis of the dysgenic state. The first is the fact of the eugenics movement, which endeavored to purify and perfect the white race at the turn of the twentieth century. The second is the fact that, currently, people of color disproportionately bear the burdens of environmental harms.

A. *A Short History of Eugenics*

Eugenics, which originated in Europe in the late nineteenth century before making its way to the United States shortly thereafter, is a pseudoscience that proposes that society can be improved through the purposeful elimination of problematic genes and the purposeful proliferation of desirable genes.⁴⁹ Eugenics puts the Social Darwinist credo that the strong will survive in conversation with genetic determinism.⁵⁰ The basic assumption behind eugenics is that the nation's social hierarchy simply reflects the genes of those within the various strata of the hierarchy.⁵¹ Accordingly, those who are succeeding within society—the wealthy, the powerful—occupy their social stations because their superior genes have led to their inexorable triumph. Conversely, the inferior genes of those who are not wealthy and powerful have led them, inevitably, to their subordinated place in society.

According to eugenicists, the existential threat to the nation—and the globe—was the overtaking of good genes by bad genes.⁵² According to eugenics, if the United States enjoyed wealth and global power, it was due to the simple fact that good genes predominated in the body politic.⁵³ If bad genes multiplied

<https://www.greenpeace.org/usa/envirojusticexreprojustice/> [https://perma.cc/X9ZT-ZAE3] (“Environmental justice demands self-determination for individuals and all communities which includes the right to live in a safe environment needed to raise children.”).

49. See Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL’Y 1, 2–3 (1996) [hereinafter Lombardo, *Medicine*].

50. See MICHAEL B. KATZ, THE UNDESERVING POOR: AMERICA’S ENDURING CONFRONTATION WITH POVERTY 32 (2013), as excerpted in Michael B. Katz, *The Biological Inferiority of the Undeserving Poor*, 11 SOC. WORK & SOC’Y INT’L ONLINE J. 1, 3 (2013) (describing eugenics as a combination of Social Darwinism and its commitments to “the heritability of socially harmful traits”).

51. See MATT WRAY, NOT QUITE WHITE: WHITE TRASH AND THE BOUNDARIES OF WHITENESS 69 (2006); Victoria Nourse, *Buck v. Bell: A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 101, 105 (2011).

52. See FRANCIS GALTON, HEREDITARY GENIUS: AN INQUIRY INTO ITS LAWS AND CONSEQUENCES 410 (Cosimo Classics 2005) (1892) (calling it “monstrous that the races best fitted to play their part on the stage of life, should be crowded out by the incompetent, the ailing, and the desponding”).

53. See Randall Hansen & Desmond King, *Eugenic Ideas, Political Interests, and Policy Variance: Immigration and Sterilization Policy in Britain and the U.S.*, 53 WORLD POL. 237, 252 (2001) (quoting a eugenicist as saying that “the character of a nation is determined primarily by its racial qualities: that is, by the hereditary physical, mental, and moral or temperamental traits of its people”).

and spread unchecked, then the United States' decline was promised.⁵⁴ Significantly, the people whom eugenicists identified as having undesirable genes were a model of diversity—a true motley crew.⁵⁵ Consider an itemization of the “socially inadequate” provided by Harry Laughlin, one of the biggest proponents of eugenics in the early twentieth century.⁵⁶ Laughlin noted that those whose genetic compositions rendered them a danger to the nation's future included “the feeble-minded, the insane, the criminalistic, the epileptic, the inebriated or the drug addicted, the diseased—regardless of etiology[—]the blind, the deaf, the deformed and dependents (an extraordinarily expansive term that embraced orphans, ‘ne’er-do-wells,’ tramps, the homeless, and paupers).”⁵⁷

Eugenics was a profoundly racist movement.⁵⁸ Thus, it goes without saying that nonwhite people, as well as white people who could not trace their ancestry back to Nordic/Anglo-Saxon peoples, were deemed to have undesirable genes.⁵⁹ Also in possession of undesirable genes were those with physical and mental impairments—the blind, deaf, epileptic, paralyzed, mentally ill, cognitively delayed, substance dependent, etc.⁶⁰ Also on this list were those who had not managed to succeed in capitalism—the poor.⁶¹ Included as well were those who transgressed the criminal law (i.e., criminals) and social norms (e.g., women who engaged in sex outside of marriage, unwed mothers).⁶² In this way, eugenicists

54. See *id.* at 249 (noting how the United States' fear of the increasing population of “inferior” races “evolved into a coherent, respectable ideology proffering clear prescriptions for fending off genetic and national weakness”).

55. See Lennard J. Davis, *Constructing Normalcy: The Bell Curve, the Novel, and the Invention of the Disabled Body in the Nineteenth Century*, in *THE DISABILITY STUDIES READER* 8–9 (Lennard J. Davis ed., 2d ed. 1997) (noting that when eugenicists listed those with “undesirable” genes, “criminals, the poor, and people with disabilities might be mentioned in the same breath”).

Davis made the stunning point that the hodgepodge nature of the eugenicist's itemization of those with undesirable genes continues to have harmful effects on people with disabilities. He argued that because eugenics grouped people with disabilities together with those who had committed crimes and those who had violated sexual norms (e.g., unwed mothers), society still associates people with disabilities with criminality and sexual perversion. See *id.* at 9 (“The loose association between what we would now call disability and criminal activity, mental incompetence, sexual license, and so on established a legacy that people with disabilities are still having trouble living down.”).

56. See Lombardo, *Medicine*, *supra* note 49, at 3.

57. *Id.* at 3.

58. See *id.* at 5.

59. See *id.* (stating that President Calvin Coolidge supported the immigration laws that eugenicists had crafted and proposed because he believed that “biological laws show . . . that Nordics deteriorate when mixed with other races”).

60. See Davis, *supra* note 55, at 7 (explaining that eugenics placed “disabled people along the wayside as evolutionary defectives to be surpassed by natural selection” and that included among those considered “defective[.]” were “the deaf, the blind, the physically defective, and so on”).

61. See Lombardo, *Medicine*, *supra* note 49, at 3 (noting that eugenicists placed “tramps, the homeless, and paupers” on the list of those with undesirable genes).

62. See Daniel J. Kevles, *Eugenics and Human Rights*, 319 *BMJ* 435, 435 (1999) (“Feeble-minded women were held to be driven by a heedless sexuality, the product of biologically grounded flaws in their moral character that led them to prostitution and producing illegitimate children.”).

explained all manner of social problems, including the “problem” of nonwhite people, in terms of genes.⁶³

Eugenicists devised a three-part program to save the country from the tide of bad “germ-plasm”⁶⁴ that threatened to engulf it in the coming generations. First, they sought the passage of anti-miscegenation laws, which would prevent white people’s racially advantageous genes from mixing with nonwhite people’s racially benighted genes.⁶⁵ Second, they pursued immigration reform with the aim of reducing immigration from countries with bad genes.⁶⁶ To be precise, eugenicists successfully sought to reduce the number of immigrants who eugenicists considered to be only marginally white.⁶⁷ And third, eugenicists pursued a program of coerced sterilization, which, they asserted, would prevent the proliferation of the problematic genes that were already inside of the nation’s borders.⁶⁸ The plan was to prevent people with undesirable genes from having children so that their genes would not persist beyond their holders’ lifetimes.

The legality of forced sterilization was uncertain until the Virginia State Colony for Epileptics and Feeble-minded designed a case that would pose the question of whether the practice was consistent with the Constitution.⁶⁹ The Supreme Court ultimately answered that question in the affirmative in *Buck v. Bell*, asserting that the government could force an institutionalized individual to submit to a sterilization procedure without running afoul of any constitutional

63. See Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421, 423 (1988) [hereinafter Lombardo, *Miscegenation*] (explaining that “[e]ugenicists believed that most human ills are hereditary”).

64. “Germ plasm” was a term that eugenicists used to refer to a population’s genetic inheritance. See Kevles, *supra* note 62, at 435.

65. See Lombardo, *Miscegenation*, *supra* note 63, at 423 (explaining that eugenicists supported anti-miscegenation laws “on the grounds that racial mixing was scientifically unsound and would ‘pollute’ America with mixed-blood offspring”). Lombardo was careful to note that while many people found miscegenation laws desirable because they were convinced that “science” demanded as much, others found miscegenation desirable because they were simply white supremacists. The legitimacy that eugenics gave to their white supremacy-informed policies was welcomed, but not a prerequisite for their support of the policies. See *id.* at 425 (“An investigation of the people who laid the groundwork for Virginia’s miscegenation law reveals that the pseudo-science of eugenics was a convenient facade used by men whose personal prejudices on social issues preceded any ‘scientific theory.’”).

66. See Hansen & King, *supra* note 53, at 252–54.

67. See Lombardo, *Medicine*, *supra* note 49, at 5 (noting that the Federal Immigration Restriction Act of 1924 “was meant to combat the ‘rising tide of defective germ-plasm’ carried by suspect groups migrating from Southern and Eastern Europe, most notably Jews and Italians”); Lombardo, *Miscegenation*, *supra* note 63, at 423 (stating that Congress passed eugenics-informed legislation reforming immigration “after testimony on the dangers of America being flooded by ‘weakened’ Europeans”); Kevles, *supra* note 62, at 436 (noting that eugenicists wanted to reduce immigration from eastern and southern Europe because people from these regions were considered “racially different” from and “inferior to the Anglo-Saxon majority”).

68. See *id.*

69. See ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* 91–92, 98 (2017).

due process rights or guarantees of equal protection.⁷⁰ As Justice Oliver Wendell Holmes infamously wrote for the eight-Justice majority,

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.⁷¹

After the Court gave its imprimatur to forced sterilization, states rapidly passed their own eugenic sterilization laws.⁷² Ultimately, over thirty states passed such legislation,⁷³ and tens of thousands of individuals fell victim to the eugenicists' knife between 1900 and the 1940s.⁷⁴

The eugenics movement in the United States—which became powerful enough to influence other countries, including Germany⁷⁵—was incredibly popular during its heyday, counting as subscribers powerful public figures⁷⁶ as

70. 274 U.S. 200 (1927). Importantly, while forced sterilization laws discriminated against people with disabilities, who were targeted by these laws, they also discriminated against *poor* people. This is because the laws only provided for the forced sterilization of people who had been institutionalized. Poor people with disabilities were more likely than their affluent counterparts to be cared for in institutions than in private homes or private facilities. See Kevles, *supra* note 62, at 436 (“Almost everywhere they were passed, . . . the laws reached only as far as the inmates of state institutions for the mentally handicapped or mentally ill. People in private care or in the care of their families escaped them. Thus, the laws tended to discriminate against poorer people . . .”).

71. *Buck*, 274 U.S. at 207. As Adam Cohen, who wrote a history of *Buck v. Bell*, noted, the Court’s opinion in the case “wasn’t just a decision that said, ‘Well, we’re not going to intrude on the right of states,’ or anything like that. This was a rousing, clarion call saying, ‘Yeah, Virginia should sterilize her, and we need to sterilize more of these people. There’s a tide of unfit people [who] are coming and are going to overwhelm the country, we need more eugenics.’” See Dahlia Lithwick, *Why Clarence Thomas Is Trying to Bring Eugenics into the Abortion Debate*, SLATE (June 17, 2019), <https://slate.com/news-and-politics/2019/06/clarence-thomas-eugenics-abortion-debate-roe-v-wade.html> [<https://perma.cc/5257-EHW7>].

72. See Lombardo, *Medicine*, *supra* note 49, at 12. Indiana—which passed a disability-selective abortion ban, the legal challenge of which led to Justice Thomas’s disquisition on eugenics and abortion in *Box v. Planned Parenthood*—was the first state to pass a coercive sterilization law in 1907. See Michael J. Malinowski, *Choosing the Genetic Makeup of Children: Our Eugenics Past—Present, and Future?*, 36 CONN. L. REV. 125, 139 (noting that Indiana passed the first sterilization law in 1907).

73. See Lombardo, *Medicine*, *supra* note 49, at 12.

74. See ALEXANDRA MINNA STERN, *EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA* 115 (2d ed. 2016) (noting that in the first half of the twentieth century, eugenic sterilization laws prompted approximately sixty thousand sterilizations).

75. See Malinowski, *supra* note 72, at 141 (noting that the “United States was the envy of many eugenicists abroad who pointed to United States law and policy as precedent, even paradigms, for their domestic reforms” and that “[i]n addition to becoming an exporter of eugenics, the United States also directly supported foreign eugenics” including research in Germany); Katz, *supra* note 50, at 2–3 (stating that the “American Eugenics Society praised Hitler’s 1933 sterilization law while German eugenicists flattered their American counterparts by pointing out the debt they owed them, and the Nazi regime welcomed and honored prominent American eugenicists”).

76. See Lombardo, *Medicine*, *supra* note 49, at 1 (“Every president from Theodore Roosevelt to Herbert Hoover was a member of a eugenics organization, publicly endorsed eugenic laws, or signed eugenic legislation without voicing opposition.”).

well as wealthy private donors.⁷⁷ It ultimately fell out of favor in the United States—in large part because Nazi Germany showed the horrors that were its logical conclusion,⁷⁸ and in smaller part because geneticists managed to convince observers that the “science” behind eugenics was hardly that.⁷⁹

It is imperative to underscore that the eugenics movement was profoundly ableist, profoundly classist, and profoundly racist. It was ableist in that it considered disability, broadly construed, to be exceedingly unwanted. The best way to deal with disability, according to eugenicists, was to prevent the existence of people with disabilities. Eugenics was profoundly classist in that it was willing to run roughshod over impoverished people’s rights to prevent them from perpetuating their imagined poverty-causing genes. Moreover, it individualized the causes of poverty—seeing poverty’s origins not in the way that we have organized our economy nor in the design of our institutions, but rather in the poor person’s genes.⁸⁰ Indeed, eugenics represented a “biologizing of poverty,” finding poverty’s source (as well as its solution) in individuals’ biology.

Finally, eugenics was profoundly racist because it proposed that *all* the people in that precious small population that was in possession of desirable genes were white. To be clear, eugenics did not claim that *all* white people had desirable genes. Again, it was deeply classist (i.e., it excluded poor white people) and ableist (i.e., it excluded white people with disabilities). Indeed, the universe of white people with good genes, as imagined by eugenicists, excluded many (if not most) white people. Nevertheless, eugenics was a racist pseudoscience and movement because if one was nonwhite, one was disqualified from being included in the blessed society of those with desirable genes. The *only* people with desirable genes were white.

As eugenics biologized poverty, it biologized race. (Indeed, eugenics assumed that *all* forms of difference were biologically determined—explaining class differences, differences in the embrace of social norms, and differences in ability.) This is to say that *racial differences were explained in terms of biology*.

77. See Malinowski, *supra* note 72, at 135 (noting that the Carnegie Institute of Washington donated \$10 million to eugenics research and that at the time, this amount “surpassed the total endowment for research in United States universities”).

78. See *id.* at 145 (describing Nazi Germany’s progression through a eugenics-informed agenda that began with coerced sterilization, moved on to euthanasia of the mentally ill and cognitively impaired, and culminated in “‘racial purification’ via genocide” of Jewish people); Katz, *supra* note 50, at 2 (stating that the “rise of the Nazis” functioned “to drive eugenics into eclipse and disrepute”); Kevles, *supra* note 62, at 438 (“The revelations of the holocaust strengthened the moral objections to eugenics . . .”).

79. See Katz, *supra* note 50, at 2 (stating that the “more research revealed about the complexity of human genetics, the less defensible even reform genetics appeared”); Kevles, *supra* note 62, at 437 (stating that geneticists eventually showed that “many mental disabilities have nothing to do with genes; that those which do are not simple products of genetic make up [sic]” and that “most human behaviours (including deviant ones) are shaped by environment at least as much as by biological heredity, if they are fashioned by genes at all”).

80. See Kevles, *supra* note 62, at 435 (explaining that eugenics “attributed poverty . . . to bad genes rather than to flaws in the social corpus”).

Thus, eugenics proposed that the white race was biologically distinct from nonwhite races. Moreover, eugenics also proposed the hierarchical ordering of the races, with the white race enjoying a biologically determined superiority over all other races.

It is important to underscore that the overriding goal of the eugenics movement was white racial improvement.⁸¹ It sought to rid the white race of all of the things that kept it from attaining the greatness that was its racial destiny. Thus, the eugenics movement endeavored to cleanse the white population in the United States of nonwhiteness (through anti-miscegenation laws), marginal whiteness (through immigration reform), physical and mental impairments (though forced sterilization of institutionalized persons), and poverty (through the eventual overwhelming of poor white people's poverty-causing genes by affluent white people's poverty-resistant genes). This is to say that the *eugenics movement sought to produce the white population as pathology-free*. If pathology was to exist in the United States, it was to be found among nonwhite people and, until the ultimate triumph of affluent white people's poverty-resistant genes, poor white people. Eugenics sought to achieve this white racial purity through *removing* pathology from the white race.

B. Environmental Injustice, or the (Environmental) Burdens of Being Poor and Nonwhite

The communities in which poor people and people of color live are more polluted than the communities that their affluent and white counterparts call home.⁸² The range of environmental harms that disproportionately impact marginalized people is truly vast—almost comprehensive.⁸³ Studies have documented that poor people and people of color are more frequently exposed

81. See Alexandra Minna Stern, *Making Better Babies: Public Health and Race Betterment in Indiana, 1920-1935*, 92 AM. J. PUB. HEALTH 742 (2002) (exploring eugenicists' understanding of the role of public health, positive eugenics, and racial hygiene in white racial improvement).

82. See Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 620, 624 (1992) (noting that "poor people bear the brunt of environmental dangers—from pesticides to air pollution to toxics to occupational hazards" and noting that the corollary to this fact is "people of color are exposed to more environmental dangers than white people"); Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 731 (1993) (noting that "racial minority communities are more likely than their majority counterparts to live near housing with lead-based paint and near freeways, sewer treatment plants, municipal and hazardous waste landfills, air pollution, and other environmental and health hazards"); BULLARD, *supra* note 40, at iv (noting that "low-income and people of colour communities are disproportionately impacted by waste facilities and 'dirty' industries"); Mike Ewall, *Legal Tools for Environmental Equity vs. Environmental Justice*, 13 SUSTAINABLE DEV. L. & POL'Y 4, 4 (2012-2013) (noting that the "vast majority" of studies "have shown a trend toward low-income communities and especially communities of color being unfairly burdened with excessive pollution from a variety of polluting industries and chemical exposures").

83. See Cole, *supra* note 82, at 622 (explaining that the claim that "the poor suffer disproportionately from environmental hazards . . . is confirmed in local and national studies of the impacts of toxics production and disposal, garbage dumps, air pollution, lead poisoning, pesticides, occupational hazards, noise pollution and rat bites").

to lead in their housing and neighborhoods.⁸⁴ Low-income people and people of color are much more likely to live in neighborhoods with poor air quality.⁸⁵ The neighborhoods that poor people and people of color call home are more likely to be proximate to hazardous sites, incinerators, polluting factories, and brownfields.⁸⁶ The water that poor people and people of color use for drinking, washing their food, cleaning their clothes, and bathing and showering is more likely to be tainted with harmful chemicals.⁸⁷ These are incontrovertible truths.

Perhaps we might more easily forgive the excessive pollution found in poor communities and communities of color if these communities were reaping the benefits of the industries that were polluting them. If oil refineries, for example, created jobs for the people in the communities that were on the receiving end of their toxin-generating processes, then we might feel that communities have traded a cost (i.e., their health) for a benefit (i.e., employment). However, all too frequently, industrial facilities do not employ people from the communities in which they are located. As environmental justice pioneer Robert Bullard explained:

There is little or no correlation between proximity of industrial plants in communities of colour and employment opportunities of nearby residents. Having industrial facilities in one's community does not automatically translate into jobs for nearby residents More often than not, communities of colour are stuck with the pollution and poverty, while other people commute in for the industrial jobs.⁸⁸

84. See BULLARD, *supra* note 40, at 8 (stating that “African-American children are five times more likely to suffer from lead poisoning than white children”); see also *id.* at 25 (explaining that “the greatest risk factors for high lead levels were older housing, poverty, age, and being non-Hispanic black”).

85. See *id.* at 8 (discussing a study that showed that “57 per cent of whites, 65 per cent of African-Americans and 80 per cent of Hispanics live in 437 counties with substandard air quality”); Robert D. Bullard, Glenn S. Johnson, Denae W. King & Sheri Smith, *People of Color on the Frontline of Environmental Assault*, in UNDERPRIVILEGED SCHOOL CHILDREN AND THE ASSAULT ON DIGNITY 19, 33 (Julia Hall ed., 2014) (noting that more than 68 percent of African Americans, 56 percent of white people, and 39 percent of Latinx people “live within 30 miles of a coal-fired power plant—the distance within which the maximum effects of the smokestack plume are expected to occur”); LESLEY FLEISCHMAN & MARCUS FRANKLIN, FUMES ACROSS THE FENCE-LINE: THE HEALTH IMPACTS OF AIR POLLUTION FROM OIL & GAS FACILITIES ON AFRICAN AMERICAN COMMUNITIES 6 (2017), <https://cdn.catf.us/wp-content/uploads/2017/11/21092330/catf-rpt-naacp-4.21.pdf> [<https://perma.cc/8UV9-XH7U>] (stating that “African Americans are exposed to 38 percent more polluted air than Caucasian Americans, and they are 75 percent more likely to live in . . . communities . . . that are next to a company, industrial, or service facility and [to be] directly affected in some way by the facility’s operation (e.g. noise, odor, traffic, and chemical emissions)”).

86. See BULLARD, *supra* note 40, at 8–9 (noting that “[n]ationally, three out of five African-Americans and Latino-Americans live in communities with abandoned toxic waste sites” and that most brownfields “are located in or near low-income, working class and people of colour communities”).

87. See, e.g., Purdy, *supra* note 40, at 858 (observing that the animal waste from concentrated animal feeding operations, which are more likely to be in locations where “there are many nonwhite people and relatively few wealthy or highly-educated individuals,” is known to contaminate surface and groundwater).

88. BULLARD, *supra* note 40, at 21.

Indeed, poor communities and communities of color often trade their health not for jobs, but for naught.⁸⁹

Even though low-income people and people of color often are not the beneficiaries of the industries that pollute their communities, they nevertheless are more likely to be exposed to toxic chemicals while performing the jobs that they do perform. To be precise, the jobs that people of color more frequently perform—farmworker, nail technician, sanitation worker, etc.—require that they come into contact with harmful substances.⁹⁰ The result is that numerous substances from numerous arenas compromise marginalized people's health. As environmental justice lawyer Luke Cole explained, "Poor people are . . . more likely than others to have multiple exposures to environmental dangers, facing more severe hazards on the job, in the home, in the air they breathe, in the water they drink, and in the food they eat."⁹¹ Indeed, it may be more accurate to say that poor people and people of color oftentimes find environmental dangers impossible to avoid.

Many people might assume that the excessive exposure to environmental harms that people of color face is *solely* a function of the disproportionate poverty that they bear. However, this is not true. *Even when one controls for class, people of color are more likely to be exposed to environmental harms in their communities.*⁹² As environmental justice lawyer Mike Ewall helpfully

89. In addition to disproportionately being the sites of environmental harms, the neighborhoods that poor people and people of color call home are less likely to have *desirable* land uses. See Hari M. Osofsky, Kate Baxter-Kauf, Bradley Hammer, Ann Mailander & Brett Mares, *Environmental Justice and the BP Deepwater Horizon Oil Spill*, 20 N.Y.U. ENV'T L.J. 99, 104 (2012) (noting that many have observed that poor communities of color are disproportionately shut off from "environmental benefits, such as open space and parks and recreation" and that "undesirable land uses—such as drug dealing or detention centers" have been concentrated in these communities).

90. See BULLARD, *supra* note 40, at 9 (noting that farmworkers are exposed to dangerous doses of harmful chemicals, usually in the form of agricultural pesticides); Aaron Lamplugh, Megan Harries, Feng Xiang, Janice Trinh, Arisneh Hecobian & Lupita D. Montoya, *Occupational Exposure to Volatile Organic Compounds and Health Risks in Colorado Nail Salons*, 249 ENV'T POLLUTION 518 (2019) (analyzing nail salon technicians' chronic exposure to health-harming volatile organic compounds (VOCs)); DAVID M. NEWMAN, N.Y. COMM. FOR OCCUPATIONAL SAFETY & HEALTH, DIRTY AND DANGEROUS: WORKER SAFETY AND HEALTH IN NEW YORK CITY'S SCOFFLAW COMMERCIAL WASTE INDUSTRY 19–25 (2016), http://nycosh.org/wp-content/uploads/2016/05/DirtyDangerous_FullReport_Final.pdf [https://perma.cc/EC3R-WW4P] (noting the many chemical hazards facing sanitation workers, from diesel exhaust to odor control chemical products).

Ironically, the acute harms that present-day farmworkers encounter are a consequence of the successes of traditional environmental law. As Regina Austin and Michael Schill explained, environmentalists fought to stop industry from using pesticides, like DDT, that persisted in the environment for long periods of time. See Austin & Schill, *supra* note 40, at 78. The environmentalists won. However, DDT and like pesticides "have been replaced by pesticides that degrade rapidly, but are more acutely toxic (like parathion). The substitutes . . . pose a greater risk to farmworkers and their offspring, who are for the most part people of color." *Id.*

91. Cole, *supra* note 82, at 631.

92. See BULLARD, *supra* note 40, at 8 ("[R]ace has been found to be independent of class in the distribution of air pollution; location of municipal landfills, incinerators and abandoned toxic waste dumps; clean-up of superfund sites; and incidence of lead poisoning in children."); CHARLES LEE, COMM'N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE

explained, “if one were to compare a middle-class community of color to a low-income white community, and look at which community is more likely to have a hazardous waste facility sited there, the middle-class community of color would have a greater chance of being targeted for such a facility.”⁹³ Bullard observed a similar phenomenon when it comes to air quality: “black households with incomes of \$50,000 to \$60,000 live in neighborhoods that are, on average, more polluted than neighborhoods of white households with incomes less than \$10,000.”⁹⁴ In light of this, activists and scholars have used the term “environmental racism” to refer to the specifically race-based nature of the injury that has been inflicted on communities of color.⁹⁵

Nor are black people the only nonwhite group that environmental racism has harmed. Latinx communities across the country have been forced to call polluted neighborhoods home and to find employment in hazardous occupations.⁹⁶ Likewise, indigenous communities have been, and continue to be, victims of horrific environmental injustices.⁹⁷ For example, many reservations where indigenous communities live have been chosen as sites for petrochemical

UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 15 (1987), <https://www.nrc.gov/docs/ML1310/ML13109A339.pdf> [<https://perma.cc/2AJJ-EG2G>] (noting that the race of a community, independent of the socioeconomic status of the community, was the best predictor of whether a hazardous waste facility would be sited there).

93. See Ewall, *supra* note 82, at 4.

94. See Bullard et al., *supra* note 85, at 28; see also Ihab Mikati, Adam F. Benson, Thomas J. Luben, Jason D. Sacks & Jennifer Richmond-Bryant, *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480, 480 (2018) (finding that black people were exposed to higher levels of air pollution than their white counterparts *at every income level*).

95. See Foster, *supra* note 82, at 731 (explaining that “environmental racism” refers to the fact that “racial minority communities are disproportionately exposed to a variety of environmental hazards” and that the “racism is deemed inherent in the disparate or inequitable outcomes (i.e., exposure)”).

96. See generally ADRIANNA QUINTERO-SOMAINI & MAYRA QUIRINDONGO, NAT’L RES. DEF. COUNCIL, HIDDEN DANGER: ENVIRONMENTAL HEALTH THREATS IN THE LATINO COMMUNITY (2004), https://www.nrdc.org/sites/default/files/latino_en.pdf [<https://perma.cc/2Y8B-9EUG>] (overviewing the poor environmental conditions that burden Latinx communities across the country).

97. See Elizabeth Hoover, Katsi Cook, Ron Plain, Kathy Sanchez, Vi Waghiyi, Pamela Miller, Renee Dufault, Caitlin Sislín & David O. Carpenter, *Indigenous Peoples of North America: Environmental Exposures and Reproductive Justice*, 120 ENV’T HEALTH PERSPS. 1645, 1646 (2012) (explaining that “[i]n addition to deposition of petrochemical and military waste, mining tends to heavily impact native communities”); ENV’T JUST. WORK GRP., REPORT: MICHIGAN AS A GLOBAL LEADER IN ENVIRONMENTAL JUSTICE 23 (2018), https://www.michigan.gov/documents/snyder/Environmental_Justice_Work_Group_Report_616102_7.pdf [<https://perma.cc/EY4F-XXUZ>] (explaining that “[m]any native people, due to racism, poverty and other forms of discrimination and inequality, are at greater risk for environmental risks relative to other populations”). Unfortunately, this is also the case internationally. See Leyland Cecco, *UN Expert: Canada’s Toxic Waste Policy Shows Disdain for Indigenous Rights*, GUARDIAN (June 7, 2019), <https://www.theguardian.com/world/2019/jun/07/canada-un-human-rights-toxic-waste-baskut-tuncak> [<https://perma.cc/5TRP-XT4P>] (reporting that “a common element in many of the most troubling areas of contamination [in Canada] was their proximity to Indigenous communities” and noting that “[n]umerous communities were unable access to clean drinking water, while others had elevated levels of toxins in the water and soil”).

and military waste.⁹⁸ Further, many reservations in southwestern states, specifically, have been mined extensively for uranium—a metal that is radioactive, toxic, increases the risk of “cancer, birth defects, and kidney disease,” and has found its way into drinking water and groundwater as a result of mining.⁹⁹ Activists have “cited the high rates of miscarriage and reproductive cancers among Lakota women as evidence of the adverse effects of uranium contamination.”¹⁰⁰ Environmental toxins on other reservations have increased the incidence of fetal impairments and reduced the age at which young people in the community begin to menstruate.¹⁰¹ Additionally, low-income Asian communities are also bearers of disproportionate environmental burdens. Activists have organized workers in nail salons—many of whom are people of Asian descent—to try to reduce the amount of the harmful chemicals to which they are exposed.¹⁰² A representative of Asian Communities for Reproductive Justice (ACRJ) explained, “Corporations have not only been spewing greenhouse gases and toxins into the earth, they have been relying on women as low-wage workers to manufacture and use these products that are also big contributors to global warming”¹⁰³ ACRJ ultimately concluded that it was not enough to attempt to protect workers’ health by pursuing regulations that would ensure that nail salons are properly ventilated. Rather, the organization sought to ban the use of the harmful chemicals entirely. “[T]he production, distribution, use, and disposal of these chemicals was the root issue. No amount of ventilation will solve the problem; harmful chemicals themselves need to be eliminated or made unprofitable.”¹⁰⁴

Why exactly have low-income people and people of color come to bear the brunt of environmental injustices? There are several answers to this question.

At times, polluting industries seek to site themselves specifically in low-income communities.¹⁰⁵ Poor communities might be particularly attractive because their land is cheap and their population is sparse.¹⁰⁶ Moreover, decision makers at corporations likely understand that the poverty in a low-income

98. See Hoover et al., *supra* note 97, at 1646.

99. See *id.*

100. *Id.*

101. See *id.* at 1647–48.

102. See KRISTEN ZIMMERMAN & VERA MIAO, MOVEMENT STRATEGY CTR., FERTILE GROUND: WOMEN ORGANIZING AT THE INTERSECTION OF ENVIRONMENTAL JUSTICE AND REPRODUCTIVE JUSTICE (2009), <https://www.racialequitytools.org/resourcefiles/zimmerman.pdf> [<https://perma.cc/F4KJ-XELQ>].

103. *Id.* at 22–23.

104. *Id.* at 23.

105. See Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 399 (1991) (explaining that many commentators have argued that “minority communities are targeted for hazardous waste facilities and other environmental hazards by waste-management firms”).

106. See Austin & Schill, *supra* note 40, at 70 (explaining that areas with low population density are attractive to companies looking for a site for their facilities and that “a sparse concentration of inhabitants is correlated with poverty which is in turn correlated with race”); Cole, *supra* note 82, at 628 (noting that “industry’s tendency to seek inexpensive land” is a factor that contributes to poor communities and communities of color bearing disproportionate numbers of environmental hazards).

community renders the people bereft of the political power that they need to fight siting decisions.¹⁰⁷ Thus, it might be cheaper and easier for corporations to target low-income communities for undesirable facilities.

Once a dirty facility invades a low-income community, the people who live there, because they are poor, often lack the ability to move to a less polluted place.¹⁰⁸ In essence, their poverty renders them immobile. Further still, when the people in these communities are nonwhite, *race* may leave them immobile as well. The same race-based constraints that make it difficult for people of color to escape segregated neighborhoods of color make it difficult for people of color to escape polluted neighborhoods.¹⁰⁹

Even when corporations do not specifically target marginalized communities for environmentally hazardous facilities, these facilities may nevertheless end up in these communities because of subordinated people's relative lack of political power.¹¹⁰ If a company attempts to site a pollution-generating facility in a more affluent community, that community is more likely to have the political wherewithal to defeat the company's plans. While the Not-In-My-Backyard (NIMBY) impulse might be universally shared—indeed, *no* community may want a toxin-producing facility sited close by—the community with the least political power will be the community that is unable to make decision makers respect their NIMBY desires.¹¹¹ These politically powerless communities are often poor and populated with people of color.¹¹²

107. See Godsil, *supra* note 105, at 399 (describing the possibility that poor communities and communities of color might be targeted for polluting facilities “because their residents are more likely to be poor and politically powerless” and that “[w]aste-management firms, therefore, find it politically expedient to site hazardous waste facilities in minority communities”).

108. See Cole, *supra* note 82, at 630 (“Poor people and people of color . . . have the least mobility, both in terms of employment and residence, and thus, even in the face of toxic exposure, they usually cannot find new jobs or homes.”).

109. See BULLARD, *supra* note 40, at 20–21 (“The ability of an individual to escape a health-threatening physical environment is often related to affluence, but racial and ethnic barriers further complicate this process. . . . Whites and people of colour do not have the same opportunities to ‘vote with their feet’ and escape undesirable physical environments.”).

110. See Cole, *supra* note 82, at 628 (explaining that “poor peoples’ lack of political and economic power in resisting” corporations that seek to site polluting facilities in poor people’s neighborhoods contributes to the disproportionate number of environmental harms found in these neighborhoods).

111. Foster explained the process as follows:

The NIMBY syndrome consists of public opposition from more vocal, and politically powerful, middle and upper income communities to the siting of a toxic facility, or other “Locally Unwanted Land Use” (LULU) in their neighborhoods. As more affluent communities become increasingly vocal in their opposition, calling for the facilities to be sited ‘somewhere else,’ private industries have shifted their siting efforts toward other communities. [“Somewhere else”] often ends up being . . . poor, powerless, minority communities.

Foster, *supra* note 82, at 728.

112. See *id.* (explaining that “[s]ince ‘[m]inority communities do not have the resources, or [government and industry] contacts, to initiate or sustain the proactive behavior found in more affluent communities,’ toxic facilities and other environmental hazards end up in those communities” (alterations in original)).

Political powerlessness also explains why marginalized communities are often zoned in ways that ensure that polluting facilities will be sited there and not in the more affluent community across the train tracks. Zoning decisions are profoundly local and profoundly political.¹¹³ Local government bodies have power to decide which areas will be zoned for residential uses and green spaces and which areas will be “zoned for garbage.”¹¹⁴ People marginalized by race and class are oftentimes unable to influence the zoning boards that ultimately decide whether their communities will be spared from, or inundated with, pollution.¹¹⁵ Further, zoning also explains why polluted communities are often the sites of multiple types of pollutants. This is the principle of “pollution attracting pollution.”¹¹⁶ Once an area is marked for industrial use, it opens the door for all industries to set up shop. The result is that the people living in these areas oftentimes get exposed to a true cornucopia of hazards.

Studies also show that environmental laws are more likely to go unenforced in poor neighborhoods of color.¹¹⁷ One study conducted in the early 1990s examined over one thousand Superfund sites and concluded that “penalties under hazardous waste laws assessed at sites having the greatest white population were about 500 percent higher than penalties at sites with the greatest minority population.”¹¹⁸ It also calculated that for “all the federal environmental laws aimed at protecting citizens from air, water and waste pollution, penalties in

113. See, e.g., SOLOMON GREENE & INGRID GOULD ELLEN, *URB. INST., BREAKING BARRIERS, BOOSTING SUPPLY: HOW THE FEDERAL GOVERNMENT CAN HELP ELIMINATE EXCLUSIONARY ZONING* 2–4 (2020), https://www.urban.org/sites/default/files/publication/102963/breaking-barriers-boosting-supply_1.pdf [<https://perma.cc/REG8-ZBQK>].

114. See Bullard et al., *supra* note 85, at 24–25 (explaining how zoning operates to protect some communities from environmentally harmful land uses while ensuring that other communities become sites for industrial use).

115. See *id.* at 24.

116. See Austin & Schill, *supra* note 40, at 70 (explaining that when it comes to toxic waste disposal, “[p]ollution tends to attract other sources of pollutants” and that “minority communities represent a ‘least cost’ option for waste incineration . . . because much of the waste to be incinerated is already in these communities” (alteration in original)).

Perhaps one of the most extreme examples of pollution attracting pollution is the case of Chester, Pennsylvania:

The mostly African-American City of Chester, Pennsylvania is home to the nation’s largest trash incinerator, a sewage treatment plant that burns the county’s sewage sludge, a paper mill that burns waste coal, numerous chemical plants and toxic waste sites, and formerly hosted the nation’s largest medical waste autoclave. It is surrounded on either side by oil refineries and coal, oil and gas-fired power plants.

Ewall, *supra* note 82, at 6. Chester became the subject of litigation after residents sued the Pennsylvania Department of Environmental Protection for approving the construction of a facility that would burn soil that had been contaminated with oil. See *id.* “This ‘soil burner’ facility would have been sandwiched between the trash and sewage sludge incinerators.” *Id.*

117. See Candice Youngblood, Note, *Put Your Money Where Their Mouth Is: Actualizing Environmental Justice By Amplifying Community Voices*, 46 *ECOLOGY L.Q.* 455, 471–72 (2019) (“[S]tudies show that enforcement of environmental laws is significantly lower in low-income communities and communities of color than in white or affluent communities.”).

118. Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice’s Place in Environmental Regulation*, 26 *HARV. ENV’T L. REV.* 1, 6 (2002).

white communities were 46 percent higher than in minority communities.”¹¹⁹ Inadequate enforcement of environmental laws in the neighborhoods in which subordinated people live undoubtedly contributes to the excessive pollution found there.

Yet another explanation for the disproportionate siting of hazardous facilities in marginalized communities is that the vulnerable people in these communities might agree to host the facility because they hope that it will bring jobs.¹²⁰ Indeed, corporations may “environmentally blackmail” them, promising them jobs in exchange for their toleration of an undesirable facility.¹²¹ But these hopes all too often go unfulfilled.¹²²

Still another explanation for the disproportionate siting of hazardous facilities in marginalized communities is that, at times, marginalized people come to the polluter. That is, an undesirable facility may be sited in an area where, at least initially, more privileged people live.¹²³ However, people who are unprivileged along the lines of class or race may gravitate to the area because the area’s undesirability—an undesirability that frequently is a direct result of the facility and the pollution that it generates—has made it affordable to live there.¹²⁴ As legal scholars Regina Austin and Michael Schill explained, “In some cases, the residential communities where poor minorities live were originally the homes of whites who worked in the facilities that generate toxic emissions. . . . Whites vacated the housing (but not necessarily the jobs) for better shelter as their socioeconomic status improved, and poorer black and brown folk who enjoy much less residential mobility took their place.”¹²⁵

Because unprivileged people sometimes come to polluters, some observers claim that disproportionate placement of hazardous facilities in communities of color is not an instance of “environmental racism.”¹²⁶ For example, one scholar has proposed that when poor communities of color form around a polluter that

119. *Id.*

120. See Austin & Schill, *supra* note 40, at 70 (“Poor minority citizens are traditionally more likely than others to tolerate pollution generating commercial development in the hope that economic benefits will inure to the community in the form of jobs, increased taxes, and civic improvements.”); Foster, *supra* note 82, at 728 (explaining that poor communities of color sometimes believe that “the existence of noxious facilities and other hazards in minority communities constitutes an economic tradeoff for having jobs near ‘poverty pockets’”).

121. See Foster, *supra* note 82, at 728 (describing “environmental blackmail” as a phenomenon in which “[c]ommunities that agree to host hazardous waste and other noxious facilities are promised compensation in an amount such that the perceived benefits outweigh the risks”).

122. See BULLARD, *supra* note 40, at 21 (“Having industrial facilities in one’s community does not automatically translate into jobs for nearby residents. Many industrial plants are located within walking distance of the communities. More often than not, communities of colour are stuck with the pollution and poverty, while other people commute in for the industrial jobs.”).

123. See Austin & Schill, *supra* note 40, at 69.

124. See *id.* at 69–70.

125. *Id.*

126. See Foster, *supra* note 82, at 732–33 (explaining the argument that “if a community was not predominantly minority at the time a siting decision was made, then the result—that the community then became minority—is not racist,” but rather “reflect[s] the dynamics of a ‘free market’”).

was in the area first, the problem is not one of racism, but rather one of “unfair market forces.”¹²⁷ The supposition appears to be that we should only identify as “racism” phenomena that are the result of race-conscious decisions and/or intentional actions that are designed to produce a racially burdensome result. The logical conclusion of this assumption is that racism is only in operation if polluters have *targeted* poor communities of color *because* they are poor communities of color. According to this understanding, race-neutral processes that have a disparate harmful impact on people of color, like “market forces,” would be improperly identified as “racism.”

Progressive activists and scholars, many of whom would identify with the environmental justice movement, reject this analysis. First, many reject the claim that the disproportionate siting of hazardous facilities in poor communities of color is largely a result of these communities having come to the polluter. As Bullard argued:

The “chicken or egg” waste facility siting debate has nearly been put to rest because recent evidence shows disproportionately high percentages of minorities and low income populations were present at the time the commercial hazardous waste facilities were sited. Hundreds of empirical studies have found race and class disparities in the location of polluting facilities. It has been found over a 30-year period polluting facilities were deliberately sited in existing minority communities in the Los Angeles Basin rather than caused by geographic shifts in minority populations. Likewise in Michigan during the last 30 years, commercial hazardous waste facilities were sited in neighborhoods that were disproportionately poor and disproportionately nonwhite at the time of siting.¹²⁸

Second, many observers believe that they are right to identify the phenomenon of poor communities of color coming to the polluter as *racism*. These observers reject the claim that it is *not* racism when poor communities form around a polluter because the claim relies upon a narrow, politically-motivated definition of racism that would reduce the universe of racist acts to those perpetrated by individual, animus-filled actors who have an intent to

127. See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1388–90 (1994).

128. Bullard et al., *supra* note 85, at 29.

Defenders of the status quo would likely argue that even if a poor community of color was located in an area prior to a siting decision, the decision is not *racist* unless it was motivated by animus. If we followed this account, likely *no* siting decision is racist. The people making those decisions very rarely identify hate of the race of the people in the surrounding community as the motivation behind the decision. Instead, the reasons that decision makers often give for locating a facility in an area populated by poor people of color include “low-cost land, sparse populations, and desirable geological attributes.” Foster, *supra* note 82, at 729. Nevertheless, progressive scholars and activists are comfortable in concluding that these decisions are racist: they harm nonwhite people, who have been historically disadvantaged on account of race, after all. As Foster explained, “In pointing to siting decisions as evidence of ‘racism,’ environmental justice advocates have begun to draw a connection between such race-neutral factors and their racial implications.” *See id.*

harm.¹²⁹ A broader definition of racism proposes that we do not err when we understand as racism those acts that may be race-neutral, but that nevertheless (and often predictably) have the effect of disadvantaging people of color.¹³⁰ “The market” very well may push poor people to areas surrounding toxic waste sites. Further, because people of color have higher rates of poverty than their nonwhite counterparts, people of color may come to inhabit the areas surrounding toxic waste sites more frequently than their nonwhite counterparts. Be that as it may, the broader definition of racism that progressive-minded thinkers accept counsels that we are not wrong to identify as racist the fact that people of color disproportionately bear the burdens of poverty. We, as a country, have embraced laws and policies—including the nation’s decision to fund public schools through property taxes,¹³¹ the nation’s choice to deploy the criminal legal system and incarceration as the means for attempting to address every perceived social problem that it encounters,¹³² the nation’s production of a population of undocumented (and, consequently, exploitable) laborers through its immigration laws,¹³³ and many, many others—that result in the disproportionate impoverishment of people of color. Simply saying that “market forces” are to blame for nonwhite people’s disproportionate residence near toxic facilities elides the race-informed—and yes, *racist*—processes that have interacted to produce that very result.¹³⁴

Ultimately, this Article’s claim does not hinge on whether it is proper to call racist the disproportionate environmental harms that people encounter in their homes, neighborhoods, schools, and workplaces. It is enough to simply observe that this fact is undeniably true.

The next Part introduces research that shows that many toxins that the state has permitted to be released into the environment—pollutants to which people of color are disproportionately exposed—are known to harm fetuses. When state-sanctioned pollution intersects with abortion regulations that prohibit people from terminating a pregnancy because of a fetal impairment, the dysgenic state

129. See KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 147–50 (2018) (providing a definition of institutional racism).

130. See *id.*

131. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17, 54–55 (1973) (holding that a system of financing public school districts based on local property taxes did not violate the Fourteenth Amendment, regardless of significant funding disparities between districts).

132. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (chronicling the modern rise of mass incarceration as a caste-like racial system).

133. See, e.g., Nicholas De Genova, *The Legal Production of Mexican/Migrant “Illegality,”* 2 *LATINO STUD.* 160 (2004) (describing how the United States’ immigration laws render Mexican migrants vulnerable to exploitation).

134. See Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 *U. COLO. L. REV.* 839, 840 (1992) (“[W]hen we label an environmental practice as an example of environmental racism we are saying that the predictable distributional impact of that decision contributes to the structure of racial subordination and domination that has similarly marked many of our public policies in this country.”); Foster, *supra* note 82, at 738 (arguing that “racially disparate environmental outcomes . . . are a manifestation of the history of the structural oppression of people of color in this society”).

emerges. The next Part articulates the emergence of the dysgenic state and identifies particular dysgenic offenders.

II.

THE DYSGENIC STATE: READING ENVIRONMENTAL INJUSTICE AND DISABILITY-SELECTIVE ABORTION BANS TOGETHER

A. *Environmental Injustices and Reproductive Harms*

If we approach reproductive issues through an environmental justice frame—and if we approach environmental issues through a reproductive justice lens—we see that because marginalized communities disproportionately bear environmental burdens, the people in these communities more frequently suffer reproductive harms that more affluent people living in less polluted areas can and do avoid.

The toxins found in pollution cause a range of reproductive harms, including reproductive cancers (e.g., cancers of the cervix, ovary, uterus, breast, prostate, and testes), miscarriages, infertility, low birth weight, preterm birth, and infant mortality.¹³⁵ While these are devastating harms, they are not the immediate concern of this Article. Instead, this Article is specifically concerned with the relationship between pollution and *fetal impairments*. Now, although the science is far from unequivocal, it is safe to conclude that the toxins found in pollution can injure fetuses.

There are several constraints that have made it difficult to determine with certainty the effects that environmental toxins have on fetal health. The most important constraint is that it is impossible to construct an experiment that could clearly establish a causal relationship between a particular pollutant and a particular fetal impairment. Such an experiment would involve exposing a group of pregnant people to a toxin and comparing the health of their infants with the infants birthed by a control group who was not exposed. That investigators would conduct such an experiment is, thankfully, unimaginable in light of present

135. See, e.g., Bullard et al., *supra* note 85, at 32 (noting that the chemicals and fine particles “emitted from dirty coal-fired power plants along with diesel- and gasoline-powered vehicles all have been linked to infant mortality [and] lower birth weight”). See generally Alexandra Grippo, Jun Zhang, Li Chu, Yanjun Guo, Lihua Qiao, Ajay A. Myneni & Lina Mu, *Air Pollution Exposure During Pregnancy and Spontaneous Abortion and Stillbirth*, 33 REV. ENV’T HEALTH 247 (2020) (finding associations between certain air pollutants and stillbirth and spontaneous abortion); Joseph Pizzorno, *Environmental Toxins and Infertility*, 17 INTEGRATED MED. (ENCINITAS) 8 (2018) (explaining that air pollutants, heavy metals, and other environmental toxins cause infertility); *Reproductive and Birth Outcomes*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 21, 2020), <https://ephracking.cdc.gov/showRbBirthOutcomeEnv> [<https://perma.cc/2B23-LMX9>] (describing that exposure to air pollution may be related to both low birth weight and preterm birth, even at low levels); Rohit V. Bhatt, *Environmental Influence on Reproductive Health*, 70 INT’L J. GYNECOLOGY & OBSTETRICS 69, 73 (2000) (suggesting a relationship between environmental factors like pollutants and reproductive cancers like breast, prostate, and testicular cancers).

commitments to protecting human subjects in research.¹³⁶ In the absence of experimental data, researchers have had to infer causal relationships between toxins and fetal impairments through observational studies.¹³⁷ The conclusions that can be drawn from these studies are less definitive, as researchers have had to depend on individuals' self-reports of exposure to toxins¹³⁸ and measure the amount of an individual's exposure to a toxin through indirect means (i.e., distance of residence from a hazardous facility, time worked at a farm that uses pesticides).¹³⁹ Both of these necessities hinder the validity of the conclusions that these studies can reach.

Another limitation on efforts to investigate the relationship between environmental toxins and fetal impairments is that due to the nature of observational studies, it is impossible to isolate confounding factors.¹⁴⁰ Importantly, poverty may be a confounding factor, as poverty both determines whether an individual will live close to or work at a polluting facility as well as contributes to impairments in fetuses and children.¹⁴¹

Yet another, more heartbreaking, limitation on studies seeking to establish the effects that environmental toxins have on fetal health is that it seems clear

136. See generally Margaret R. Moon & Felix Khin-Maung-Gyi, *The History and Role of Institutional Review Boards*, 11 AM. MED. ASS'N J. ETHICS 311 (2009) (discussing policies and practices that endeavor to protect human subjects in research).

137. See INST. WORK & HEALTH, WHAT RESEARCHERS MEAN BY: EASY-TO-UNDERSTAND DEFINITIONS OF COMMON RESEARCH TERMS IN THE HEALTH AND SOCIAL SCIENCES 27 (Cindy Moser & Uyen Vu eds., 2016), https://www.iwh.on.ca/sites/iwh/files/iwh/tools/what_researchers_mean_by_2017.pdf [<https://perma.cc/2B6A-HGYT>] (“Observational studies are ones where researchers observe the effect of a risk factor, diagnostic test, treatment or other intervention without trying to change who is or isn’t exposed to it,” while “[e]xperimental studies are ones where researchers introduce an intervention and study the effects.”).

138. See Charikleia Kalliora, Charalampos Mamoulakis, Eleni Vasilopoulos, George A. Stamatiades, Lydia Kalafati, Roza Barouni, Triantafyllia Karakousi, Mohammad Abdollahi & Aristidis Tsatsakis, *Association of Pesticide Exposure with Human Congenital Abnormalities*, 346 TOXICOLOGY & APPLIED PHARMACOLOGY 58, 63 (2018) (noting that many studies of the relationship between environmental toxins and fetal impairment rely on self-report of exposure).

139. See *id.* at 64 (noting that some studies of the relationship between pesticides and fetal impairment have had to use “[d]istance from residence to pesticide use sites as a proxy for exposure”).

140. See Peter Jepsen, Søren Paaske Johnsen, Matthew W. Gillman & Henrik Toft Sørensen, *Interpretation of Observational Studies*, 90 HEART 956, 958–60 (2004) (describing methods to mitigate confounding while acknowledging it is impossible to completely avoid it); Mette Nørgaard, Vera Ehrenstein & Jan P. Vandenbroucke, *Confounding in Observational Studies Based on Large Health Care Databases: Problems and Potential Solutions – A Primer for the Clinician*, 9 CLINICAL EPIDEMIOLOGY 185 (2017) (acknowledging and attempting to solve problems related to inevitable confounding in observational studies).

141. See, e.g., Dolk & Vrijheid, *supra* note 4, at 30 (explaining that research suggests that “more socio-economically deprived groups have higher non-chromosomal congenital anomaly rates, and part of this may be explained by nutritional status” and stating that “we have to take this into account when interpreting an association between, for example, residence near an incinerator and a raised prevalence of congenital anomaly, as a causal effect of incinerator releases”).

Interestingly, while there is usually a positive association between poverty and fetal impairment, there is a negative association between the two in the case of Down syndrome. This is because advanced maternal age increases the likelihood that a fetus will have Down syndrome, and more affluent people tend to become pregnant at older ages. See Dolk & Vrijheid, *supra* note 4, at 30.

that environmental toxins often produce fetal *death* as opposed to fetal impairment.¹⁴² There have been a number of studies that show a *negative* association between toxic exposures and congenital anomalies.¹⁴³ The conclusion that researchers have drawn is not that toxins reduce the number of children born with congenital anomalies because toxins are *good* for fetuses, but rather that toxins reduce the number of children born with congenital anomalies because affected pregnancies more frequently end in miscarriage.

Though observational studies come with important limitations, the scientific literature offers sufficient evidence that a number of environmental toxins produce fetal impairments.

-Lead, which can be found in the paint of older homes, in the soil close to older roads, and in the air surrounding facilities engaging in smelting or recycling¹⁴⁴—is known to cause impairments in fetuses (as well as children).¹⁴⁵ Questions remain about the exact degree of *likelihood* that a child will be born with an impairment if she is exposed to lead prenatally.¹⁴⁶ But, there is little doubt that lead is a toxin that is harmful to fetuses. The impairments produced by prenatal exposure to lead include heart defects, oral clefts, and disorders involving the body's muscles and skeleton.¹⁴⁷

-Mercury, which is emitted into the air when fossil fuels and wastes are burned and persists in the environment for extremely long periods of time by cycling between air and soil, is also well known to cause impairments in fetuses.¹⁴⁸ Pregnant people who are exposed to high levels of mercury have given birth to children with cerebral palsy, cognitive disabilities, and microcephaly.¹⁴⁹

-Nitrates, which enter the soil through fertilizers and animal manure and can contaminate water, are suspected to increase the risks of neural tube impairments (which affect the brain, spine, and spinal cord and include

142. See Dolk & Vrijheid, *supra* note 4, at 28 (“Many embryos and fetuses with a congenital anomaly are lost as spontaneous abortions, and indeed many chromosomal anomalies are never seen at birth as the malformations are not compatible with continuing *in utero* life.”); BETTY MEKDECI & TED SCHEITTLER, COLLABORATIVE ON HEALTH & ENV’T, BIRTH DEFECTS: PEER-REVIEWED ANALYSIS 2 (2004), <https://www.birthdefects.org/peer-reviewed-analysis/> [<https://perma.cc/ZCU6-EMMG>] (“Many pregnancies that are adversely affected end in a miscarriage or a stillborn baby instead of the birth of a child with a structural or functional birth defect.”).

143. See Dolk & Vrijheid, *supra* note 4, at 28 (referencing these studies).

144. See *Learn about Lead*, U.S. ENV’T PROT. AGENCY (July 15, 2021), <https://www.epa.gov/lead/learn-about-lead> [<https://perma.cc/B6KE-9KJ5>].

145. See Dolk & Vrijheid, *supra* note 4, at 33.

146. See Youngblood, *supra* note 117, at 457 (“The health implications of consistent, low exposure to lead are severe: learning disabilities, behavioral problems, growth impairment, hearing and visual impairment, and other brain and nervous system damage.”).

147. See Dolk & Vrijheid, *supra* note 4, at 33.

148. See Bullard et al., *supra* note 85, at 33 (noting that mercury is a “neurotoxin especially harmful to . . . developing fetuses”); Dolk & Vrijheid, *supra* note 4, at 39 (“Methyl mercury is an established teratogen.”).

149. See Dolk & Vrijheid, *supra* note 4, at 39.

spina bifida and anencephaly) and musculoskeletal impairments.¹⁵⁰

-Solvents, like trichloroethylene and benzene, serve a variety of uses in industrial processes, like cleaning parts and equipment.¹⁵¹ Studies have shown a relationship between solvents and fetal impairments, including neural tube impairments, impairments involving the eyes and ears, and chromosomal anomalies (primarily Down syndrome).¹⁵²

-Carbon monoxide and nitrogen oxide are pollutants “emitted by cars, power plants, industrial boilers, refineries, chemical plants, and other sources.”¹⁵³ When nitrogen oxide interacts with volatile organic compounds in the presence of sunlight, the chemical reaction produces ozone.¹⁵⁴ Researchers have proposed that carbon monoxide and ozone, while harmful to people as a general matter, can also cause impairments in fetuses. One study showed that “[p]regnant women living in areas with higher levels of ozone and carbon monoxide pollution were as much as three times more likely to have had babies with serious birth defects, and the greater a mother’s exposure to these pollutants in the critical second month of pregnancy, the greater the chance that the baby would have a serious cardiac defect.”¹⁵⁵ Another study found an association between traffic pollution and fetal impairments involving the brain, spine, and spinal cord.¹⁵⁶ The study showed that “women who breathed the highest levels of carbon monoxide were nearly twice as likely to have a baby with spina bifida or anencephaly as those with the lowest carbon monoxide exposure [W]omen with the highest nitrogen oxide exposure had nearly three times the risk of having a pregnancy affected by anencephaly than those with the lowest exposure”¹⁵⁷

-Pesticides are used in agriculture to kill insects or other organisms that could harm crops.¹⁵⁸ Many studies have reported an association between

150. *See id.* at 33.

151. *See generally* E. Rsch. Grp., *Solvent Cleaning*, in 3 EMISSIONS INVENTORY IMPROVEMENT PROGRAM: AREA SOURCES AND AREA SOURCE METHOD ABSTRACTS ch. 6.2-1 (1997), <https://www.epa.gov/sites/production/files/2015-08/documents/iii06fin.pdf>. [<https://perma.cc/9VVK-DDZF>] (explaining some of the uses of solvents).

152. *See* Dolk & Vrijheid, *supra* note 4, at 33–34.

153. *See* *Ground-Level Ozone Basics*, U.S. ENV’T PROT. AGENCY (May 5, 2021), <https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics#formation> [<https://perma.cc/H2ZB-9VDB>].

154. *Id.*

155. *See* PAUL A. LOCKE, SUDHA KODURU, MARGO EDMUNDS, ELLIS YINGVORAPANT, ANNA DILLINGHAM & AMY GOFFE, BIRTH DEFECTS TRACKING AND PREVENTION: TOO MANY STATES ARE NOT MAKING THE GRADE 8 (2002), <https://www.tfah.org/wp-content/uploads/archive/reports/birthdefects02/bdtechnical.pdf> [<https://perma.cc/A3MS-S3XW>].

156. *See* Erin Digitale, *Air Pollutants Linked to Higher Risk of Birth Defects, Researchers Find*, STAN. UNIV. MED. SCH. (Mar. 28, 2013), <https://med.stanford.edu/news/all-news/2013/03/air-pollutants-linked-to-higher-risk-of-birth-defects-researchers-find.html> [<https://perma.cc/56NJ-9NWW>].

157. *Id.*

158. *Why We Use Pesticides*, U.S. ENV’T PROT. AGENCY (May 5, 2021), <https://www.epa.gov/safepestcontrol/why-we-use-pesticides> [<https://perma.cc/SM8B-Z4PU>].

pesticide exposure and fetal impairment.¹⁵⁹ The National Research Council released a study on pesticides and infants' diets in which it reported that "exposure to neurotoxin compounds [found in pesticides] at levels believed to be safe for adults could result in permanent loss of brain function if it occurred during the prenatal and early childhood period of brain development."¹⁶⁰ Moreover, researchers propose that some pesticides impair fetal health *before* conception by producing changes in the sperm and ova of farmworkers who, due to their occupations, are exposed to high doses of the chemicals.¹⁶¹ The data suggest that the impairments likely caused by pesticides include musculoskeletal abnormalities, neural tube defects, and cardiovascular abnormalities.¹⁶²

-Polychlorinated biphenyls, or PCBs, were commonly used in industrial processes before they were banned in 1979.¹⁶³ Although they have not been used in the U.S. for several decades, they are still released into the environment through poorly maintained hazardous waste sites, improper disposal of products that contain PCBs, and the incineration of some wastes.¹⁶⁴ Research shows that PCBs are harmful to fetuses, disrupting embryonic and fetal development without causing genetic mutations.¹⁶⁵

Thus, a cornucopia of chemicals has been linked to fetal injuries. The next Section identifies particular states that not only are the sites of facilities that

159. See Kalliora et al., *supra* note 138, at 59 ("[E]pidemiological studies have revealed associations of pre- and post-natal exposure to pesticides with . . . birth defects."). *But see id.* at 63 ("Many studies have reported no increased risk of [congenital abnormalities] in offspring residing in areas with pesticide use.").

160. NAT'L RSCH. COUNCIL, PESTICIDES IN THE DIETS OF INFANTS AND CHILDREN 61 (1993), <https://www.nap.edu/catalog/2126/pesticides-in-the-diets-of-infants-and-children> [<https://perma.cc/56VA-HB4C>].

161. See Dolk & Vrijheid, *supra* note 4, at 37 (noting "growing evidence that occupational exposure to some pesticides may be teratogenic"); Alicia L. Salvatore, Asa Bradman, Rosemary Castorina, José Camacho, Jesús López, Dana B. Barr, John Snyder, Nicholas P. Jewell & Brenda Eskenazi, *Occupational Behaviors and Farmworkers' Pesticide Exposure: Findings from a Study in Monterey County, California*, 51 AM. J. INDUS. MED. 782, 782 (2008) ("Pesticide exposure is a significant occupational risk facing . . . farmworkers employed in U.S. agriculture.").

162. See generally Kalliora et al., *supra* note 138, at 64.

163. See Nat'l Oceanic & Atmospheric Admin., *What are PCBs?*, NAT'L OCEAN SERV. (Apr. 5, 2021), <https://oceanservice.noaa.gov/facts/pcbs.html> [<https://perma.cc/S52N-VCSQ>].

164. *Learn about Polychlorinated Biphenyls (PCBs)*, U.S. ENV'T PROT. AGENCY (May 13, 2021), <https://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls-pcbs#release> [<https://perma.cc/ZV8V-ZBP3>].

165. See MEKDECI & SCHETTLER, *supra* note 142; see also ILL. DEP'T PUB. HEALTH, ENVIRONMENTAL HEALTH FACT SHEET: POLYCHLORINATED BIPHENYLS (PCBs) (2009), <http://www.idph.state.il.us/envhealth/factsheets/polychlorinatedbiphenyls.htm> [<https://perma.cc/BGK7-WZ77>] ("Birth defects have been linked to mothers who have been exposed to PCBs. Developing fetuses and young children are the most vulnerable to PCBs, therefore, children and women who may become pregnant, are pregnant, or nursing should limit their exposure to PCBs."). *But see* AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, DEP'T HEALTH & HUM. SERVS., PUBLIC HEALTH STATEMENT: POLYCHLORINATED BIPHENYLS (PCBs) 5 (2000), <https://www.atsdr.cdc.gov/ToxProfiles/tp17-c1-b.pdf> [<https://perma.cc/PP42-ERSX>] (stating that "PCBs are not known to cause birth defects").

produce substances that injure fetuses, but also compel the birth of injured fetuses through disability-selective abortion bans.

B. Particular Dysgenic Offenders

This Article proposes that the dysgenic state is a state that compels its citizens to give birth to children whose health has been impaired by environmental toxins from which the state has not protected them.¹⁶⁶ Thus, in order for a state to be dysgenic, it must not only compel the birth of health-impaired infants, but it must also be the site of environmental harms that the state has not seen fit to prevent or correct.

It would be quite remarkable if the states that have passed disability-selective abortion bans were free from environmental hazards that cause fetal impairments. But this is not at all true. Indeed, not only do the states that have passed disability-selective abortion bans feature these toxic banalities, but many are also the sites of more spectacular forms of environmental degradation.

Consider Indiana, whose disability-selective abortion ban provided Justice Thomas with the opportunity to wax philosophically about eugenics in *Box v. Planned Parenthood*, discussed below.¹⁶⁷ The state has over 6,600 oil and gas facilities, with almost eighty thousand people living within a half-mile of the facilities—a range that puts them at risk of harm from oil and gas pollution.¹⁶⁸ Indiana is also the home of a disproportionate number of Superfund sites,¹⁶⁹ which are “contaminated sites [that] exist nationally due to hazardous waste being dumped, left out in the open, or otherwise improperly managed.”¹⁷⁰ Further still, investigators have documented widespread lead poisoning of children in South Bend, Indiana—more expansive and severe lead poisoning than that found in Flint, Michigan after the crisis in that city unfolded.¹⁷¹ Cuts to

166. This Article proposes that the state is responsible for fetal impairment through its failure to prevent health-impairing pollutants from entering the environment and harming its citizens. Of course, the state is also responsible for fetal impairment when it is the party that exposes its citizens to health-impairing pollutants in the first instance, as is the case of lead poisoning in Flint, Michigan. *See generally* Melissa Denchak, *Flint Water Crisis: Everything You Need to Know*, NAT. RES. DEF. COUNCIL (Nov. 8, 2018), <https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know> [<https://perma.cc/Z8WZ-DFU6>].

167. *See* 139 S. Ct. 1780, 1782–93 (2019) (Thomas, J., concurring).

168. *Threat Map: Indiana*, OIL & GAS THREAT MAP, <https://oilandgasthreatmap.com/threat-map/indiana/> [<https://perma.cc/GL34-TVDM>].

169. *See Search for Superfund Sites Where You Live*, U.S. ENV'T PROT. AGENCY (Sept. 15, 2021), <https://www.epa.gov/superfund/search-superfund-sites-where-you-live> [<https://perma.cc/GCC8-EYJN>] (tracking the number of Superfund sites in each state and allowing comparison to other states).

170. *See What is Superfund?*, U.S. ENV'T PROT. AGENCY (Nov. 19, 2021), <https://www.epa.gov/superfund/what-superfund> [<https://perma.cc/AHY9-VR3X>].

171. *See* M.B. Pell & Joshua Schneyer, *Thousands of U.S. Areas Afflicted with Lead Poisoning Beyond Flint's*, SCI. AM. (Dec. 19, 2016), <https://www.scientificamerican.com/article/thousands-of-u-s-areas-afflicted-with-lead-poisoning-beyond-flints/> [<https://perma.cc/E7KD-CBQR>].

its public health budget stymied efforts to address the city's lead poisoning problem.¹⁷²

Consider another example, Ohio, whose disability-selective abortion ban was upheld by the Sixth Circuit sitting *en banc*.¹⁷³ The state has over *one hundred thousand* oil and gas facilities, with almost *3.3 million people* living close enough to the facilities to be at risk for health impairments.¹⁷⁴ Further, there has been extensive lead poisoning of children in Cleveland, Ohio that has persisted over decades.¹⁷⁵ Indeed, “[i]n the city’s east side St. Clair-Superior area, nearly half of kids tested in the last decade had elevated lead.”¹⁷⁶ As a toxic cherry on top, Ohio is also the home of a disproportionate number of Superfund sites.¹⁷⁷

Consider Louisiana, whose legislature passed a disability-selective abortion ban that was later enjoined¹⁷⁸—a ban that would spring back to life if the Court holds that reasons-based abortion bans do not run afoul of the Constitution. Louisiana serves as the home of truly breathtaking environmental degradation. The state is the site of over forty-five thousand oil and gas facilities, with over 325,000 people living close enough to the facilities to be at risk of harm from air and oil pollution.¹⁷⁹ Indeed, Louisiana is the home of “Cancer Alley”¹⁸⁰—a corridor along the Mississippi River between Baton Rouge and New Orleans that is the site of “over 300 industries, including 175 petrochemical and heavy industrial plants and seven oil refineries”¹⁸¹

Not satisfied with simply being the site of polluting industry, Louisiana is also the site of environmental disasters—most of which involve oil spills. In 2010, BP’s *Deepwater Horizon* oil well famously exploded in the Gulf of

172. *See id.*

173. *See* *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 516 (6th Cir. 2021) (*en banc*) (finding that challengers to the state’s disability-selective abortion ban were unlikely to succeed and reversing the district court’s grant of a preliminary injunction).

174. *See Threat Map: Ohio*, OIL & GAS THREAT MAP <http://oilandgasthreatmap.com/threat-map/ohio/> [<https://perma.cc/DX3D-KB3M>].

175. *See* Pell & Schneyer, *supra* note 171.

176. *Id.*

177. *See Search for Superfund Sites Where You Live*, *supra* note 169.

178. Guttmacher Inst., *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, GUTTMACHER INST. (Jan. 1, 2022) [hereinafter Guttmacher Inst., *Abortion Bans*], <https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly> [<https://perma.cc/YFH9-5U92>].

179. *Threat Map: Louisiana*, OIL & GAS THREAT MAP, <http://oilandgasthreatmap.com/threat-map/louisiana/> [<https://perma.cc/5KFE-XXLW>].

180. Organizers in the region recently decided to rename the area “Death Alley” in order to better reflect the extreme toxicity of the region. *See Our Coalition*, COAL. AGAINST DEATH ALLEY, <https://www.enddeathalley.org/our-coalition> [<https://perma.cc/3AZG-27QK>] (“Communities along the Mississippi River from New Orleans to Baton Rouge are experiencing high rates of death not just from cancer, but also respiratory and autoimmune diseases That’s why leaders and residents in the affected communities decided to rename the region ‘Death Alley.’”).

181. *See* ZIMMERMAN & MIAO, *supra* note 102, at 20.

Mexico, killing eleven people and releasing over two hundred million gallons of oil.¹⁸² This tragedy is the largest marine oil drilling spill in history.¹⁸³

The Deepwater Horizon oil spill was only the most recent of this type of environmental catastrophe to befall Louisiana. Other oil spills include the one occasioned by the rupture of the Cypress Pipe Company's pipeline in 2010, which released eighteen thousand gallons of oil;¹⁸⁴ a collision between a barge and tanker on the Mississippi River in 2008, which released hundreds of thousands of gallons of oil;¹⁸⁵ an accident at a CITGO refinery in 2006, which released seventy-one thousand barrels of waste oil into the Calcasieu River;¹⁸⁶ and the Westchester tanker's running aground in the Mississippi River in 2000, which released almost six hundred thousand gallons of crude oil.¹⁸⁷

Notably (and, sadly, unsurprisingly) Louisiana's environmental toxicity has disparately impacted people of color. "Cancer Alley"-cum-"Death Alley" "disproportionately impacts 80% of the total African American community residing in the nine parishes (counties) that make up the corridor."¹⁸⁸ Further, poor communities of color bore most of the environmental burdens of the clean-up from the Deepwater Horizon oil spill. Bullard found that "[w]hile people of color make up just 26% of the coastal counties in Alabama, Florida, Mississippi, and Louisiana, . . . 55.4% of the BP *Deepwater Horizon* Oil Spill waste was dumped in communities that are comprised predominantly of people of color . . . '[m]ore than 80 percent of the oil waste was disposed in communities where the percent [of] people of color exceeded the percent in the county.'"¹⁸⁹

The above itemizes a smattering of the environmental harms in Indiana, Ohio, and Louisiana that are more spectacular than most. It seems eminently reasonable to assume that these states—in addition to Arkansas, Kentucky,

182. See U.S. COAST GUARD, ON SCENE COORDINATOR REPORT: DEEPWATER HORIZON OIL SPILL 33 (2011), https://homeport.uscg.mil/Lists/Content/Attachments/119/DeepwaterHorizonReport%20-31Aug2011%20-CD_2.pdf [<https://perma.cc/E7GS-GZAA>] (stating that the explosion released 4.9 million barrels of oil); Meena Hartenstein, *BP Leak Dumped 4.9 Million Barrels of Oil into Gulf: 53,000 Gallons per Day Before Well Was Capped*, DAILY NEWS (Aug. 2, 2010), <https://www.nydailynews.com/news/national/bp-leak-dumped-4-9-million-barrels-oil-gulf-53-000-gallons-day-capped-article-1.200217> [<https://perma.cc/KNX7-PLEW>] ("BP's well dumped roughly 4.9 million barrels of oil into the Gulf. That's about 205 million gallons – making it the largest accidental oil spill of all time."); Associated Press, *The 11 Workers Who Died on the Deepwater Horizon*, ADVOC. (Nov. 15, 2012), https://www.theadvocate.com/nation_world/article_480e3945-7bd0-5278-a01d-c6e8f43f8aaa.html [<https://perma.cc/MX2L-S7LD>].

183. See *Deepwater Horizon – BP Gulf of Mexico Oil Spill*, U.S. ENV'T PROT. AGENCY (Jan. 14, 2022), <https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill> [<https://perma.cc/B2N2-GY2Z>].

184. See *Major Oil Spills in the Gulf and Other U.S. Waters*, CTR. FOR BIOLOGICAL DIVERSITY, https://www.biologicaldiversity.org/programs/public_lands/energy/dirty_energy_development/oil_and_gas/gulf_oil_spill/oil-spill_timeline.html [<https://perma.cc/2LDZ-E7NP>].

185. *Id.*

186. *Id.*

187. *Id.*

188. ZIMMERMAN & MIAO, *supra* note 102, at 20.

189. Osofsky et al., *supra* note 89, at 116.

Missouri, North Dakota, Tennessee, and Utah, which have also passed disability-selective abortion bans, as well as states that inevitably will pass similar bans if the Court signs off on their constitutionality—are also sites of more quotidian environmental harms. One can most assuredly find landfills, incinerators, highways, agriculture, industry, processing plants, and hazardous waste facilities in these places. This is the dysgenic state.

Moreover, there is no reason to think that the states that have decided or will decide to pass disability-selective abortion bans are exceptions to the general rule that poor people and people of color disproportionately bear environmental burdens. In these states, and all others, poor people and people of color live close to highways. Poor people and people of color work on the farms and are exposed to pesticides. Poor people and people of color have their homes within spitting distance of hazardous waste facilities, factories, and landfills. And while poor people and people of color are most exposed to the toxins that are known to cause fetal impairments, poor people and people of color will find it hardest to avoid the constraints imposed by disability-selective abortion bans. These are the racial and class politics of the dysgenic state, upon which Part V elaborates most expansively. Before getting to that analysis, however, the next two Parts introduce reproductive policy into the analysis, describing states' recent attempts to police people's reasons for terminating a pregnancy.

III.

REASONS-BASED ABORTION BANS

This Part describes the latest effort in the battle to diminish—and ultimately overturn—the constitutional right to abortion: reasons-based abortion bans. The first Section describes regulations that aim to prohibit persons from terminating a pregnancy on account of the fetus's race or sex. The following Section describes regulations that aim to prohibit persons from terminating a pregnancy on account of an unwanted fetal diagnosis.

A. Race- and Sex-Selective Abortion Bans

The first iterations of reasons-based abortion bans endeavored to prevent abortions that were sought because of the fetus's sex or race. Fourteen states have passed sex-selective abortion bans, with eleven of these policies in effect,¹⁹⁰ while six states have passed race-selective abortion bans, with four of these policies in effect.¹⁹¹ Although legislation often couples prohibitions on sex-

190. See Guttmacher Inst., *Abortion Bans*, *supra* note 178. Pennsylvania passed one of the first sex-selective abortion bans in 1982. See Jennifer Chou & Shivana Jorawar, *Silently Under Attack: AAPI Women and Sex-Selective Abortion Bans*, 22 *ASIAN AM. L.J.* 105, 107–08 (2015). The state's abortion regulations were challenged in the litigation that culminated in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Interestingly, litigators chose not to test the constitutionality of the state's ban on sex-selective abortion. See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring).

191. See Guttmacher Inst., *Abortion Bans*, *supra* note 178.

selective abortions with prohibitions on race-selective abortions,¹⁹² the behavior that the legislation seeks to regulate in the context of sex and race is not perfectly analogous. Sex-selective abortions endeavor to prevent *pregnant people* from terminating their pregnancies because the fetus that they carry would be assigned female at birth;¹⁹³ meanwhile, race-selective abortions endeavor to prevent *abortion providers and other third parties* from seeking to terminate the pregnancies of black people because they are black people who are presumably carrying black children.¹⁹⁴

Legislators who have proposed and voiced support for race-selective abortion bans usually claim that they are motivated by black people's disproportionate receipt of abortion care.¹⁹⁵ While black women comprise 12.9 percent of women nationwide, they constitute 38 percent of women who receive abortions.¹⁹⁶ Commentators with more critical lenses have explained that black women's disproportionate reliance on abortion care is due to their higher rate of unintended pregnancies.¹⁹⁷ Moreover, black people with the capacity for pregnancy have higher rates of unintended pregnancies because they more frequently encounter constraints that make it extremely difficult to fully control their reproductive lives, e.g., poverty, sexual violence, inaccessibility of reliable contraception, lack of sex education in public schools.¹⁹⁸ Because black people

192. While an increasing number of states are coupling race- and sex-selective abortion bans with disability-selective abortion bans, some states have made exceptions to sex-selective abortion bans that reveal legislators' beliefs that although it is unacceptable to terminate a pregnancy because the fetus would be assigned female at birth, it is perfectly acceptable to terminate a pregnancy because the fetus has a disability. See Jaime Staples King, *Not This Child: Constitutional Questions in Regulating Noninvasive Prenatal Genetic Diagnosis and Selective Abortion*, 60 UCLA L. REV. 2, 28 (2012) (noting that although an Oklahoma statute prohibits sex-selective abortion, it "specifically permits the performance of a sex-selective abortion sought because the unborn child has an elevated risk of developing a sex-linked genetic disease").

193. See, e.g., Sital Kalantry, *Sex Selection in the United States and India: A Contextualist Feminist Approach*, 18 UCLA J. INT'L L. & FOREIGN AFFS. 61 (2013) (discussing anti-abortion groups' professed concern that pregnant people in the United States seek to abort female fetuses due to a preference for sons).

194. See, e.g., Shyrisa Dobbins-Harris, *The Myth of Abortion as Black Genocide: Reclaiming our Reproductive Cycle*, 26 NAT'L BLACK L.J. 85, 86–87 (2017) (unpacking abortion opponents' argument that abortion is a tool "used to commit genocide against the Black race").

195. See April Shaw, *How Race-Selective and Sex-Selective Bans on Abortion Expose the Color-Coded Dimensions of the Right to Abortion and Deficiencies in Constitutional Protections for Women of Color*, 40 N.Y.U. REV. L. & SOC. CHANGE 545, 566–67 (2016) (explaining that Arizona's race-selective abortion ban "was driven by the higher rate of abortions among black women as compared to white women").

196. Tara C. Jatlaoui, Lindsay Eckhaus, Michele G. Mandel, Antoinette Nguyen, Titilope Oduyebo, Emily Petersen & Maura K. Whiteman, *Abortion Surveillance—United States, 2016*, 68 MORBIDITY & MORTALITY WKLY. REP. 8 (Nov. 29, 2019); see also *Quick Take: Women of Color in the United States*, CATALYST (Feb. 1, 2021), <https://www.catalyst.org/research/women-of-color-in-the-united-states/> [https://perma.cc/2YCQ-RMBS].

197. Christine Dehlendorf, Lisa H. Harris & Tracy A. Weitz, *Disparities in Abortion Rates: A Public Health Approach*, 103 AM. J. PUB. HEALTH 1772, 1773–74 (2013) (connecting racial disparities in abortion rates with racial disparities in unintended pregnancy).

198. See *id.* at 1772 (addressing disparities in abortion rates by socioeconomic status); ASHA DUMONTHIER, CHANDRA CHILDERS & JESSICA MILLI, *THE STATUS OF BLACK WOMEN IN THE*

with the capacity for pregnancy more frequently find themselves facing unintended and unwanted pregnancies, they more frequently rely on abortion care to control the number and spacing of their children.¹⁹⁹ Despite data supporting this particular explanation of the statistics documenting black people's overrepresentation among those who have undergone abortions, supporters of race-selective abortion bans propose instead that these statistics are due to abortion providers' having sought out black women for abortion care.²⁰⁰ Black people more frequently get abortions, they say, because abortion providers are targeting them as part of a nefarious, well-funded plan to prevent black children from being born.²⁰¹ Race-selective abortion bans are offered as a tool to prevent a modern-day genocide from being committed against black people.²⁰²

On the other hand, lawmakers who have proposed and voiced support for sex-selection abortion bans claim to be motivated by the widespread practice of sex-selection abortion in other parts of the globe.²⁰³ In several countries—many of which are in Asia—a combination of economic, political, and social forces has produced a preference for sons.²⁰⁴ This preference, when it has intersected with the easy availability of ultrasound technology permitting the fetus's genitalia to be imaged, has resulted in the frequent practice of terminating pregnancies when the fetuses that will be born would be identified at birth as

UNITED STATES 120–21 (2017) (stating that black women are likelier to be victims of rape in their lifetimes than women of other races); Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, GUTTMACHER POL'Y REV., Summer 2008, at 1, 2–4 (discussing the barriers that prevent black women from accessing safe, effective contraception); Risha K. Foulkes, *Abstinence-Only Education and Minority Teenagers: The Importance of Race in a Question of Constitutionality*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 3, 51 (2008) (exploring the disproportionate impact of abstinence-only education on students of color).

199. Cohen, *supra* note 198, at 3.

200. See Shaw, *supra* note 195, at 548–49 (noting that supporters of Arizona's race-selective abortion ban asserted that the higher rates of abortion among black women “was the result of a desire to reduce the population of black people” and that abortion providers “were accused of ‘targeting’ black women for abortions”).

201. See Mary Ziegler, *Roe's Race: The Supreme Court, Population Control, and Reproductive Justice*, 25 YALE J.L. & FEMINISM 1, 5–6 (2013) [hereinafter Ziegler, *Roe's Race*] (noting that the legislative debate on Arizona's race-selective abortion ban “turned on whether or not there was evidence that abortion providers associated with or were themselves racists, and proponents of the bill stressed the supposed financial connections of Planned Parenthood to individuals seeking to reduce the size of minority populations”).

202. See Shaw, *supra* note 195, at 568 (stating that proponents of race-selective abortion bans frame “the higher rate of abortion among black women . . . as black women committing ‘black genocide’”).

203. See Kalantry, *supra* note 193, at 73 (citing a report by the Judiciary Committee of the House of Representatives that argued in favor of a sex-selective abortion ban because such sex-selective abortions “are common outside of the United States” and that “the evidence reveals that female feticide is also occurring in the United States”).

204. See Deckha, *supra* note 21, at 14 (arguing that the preference for males that has resulted in skewed sex ratios in some Asian countries is “a complicated phenomenon occasioned by gendered economic, educational, and cultural norms”).

girls.²⁰⁵ As a consequence of this practice, sex ratios in some countries have become enormously skewed.²⁰⁶ If these statistics are correct, then sex-selective abortions have prevented the birth of 160 million girls and women across the globe.²⁰⁷

Supporters of sex-selective abortion bans in the U.S. claim that there is a real danger that the practice of sex-selective abortion will be imported into the nation.²⁰⁸ They say the vector for this importation is Asian people²⁰⁹—although, in reality, high numbers of sex-selective abortions can also be counted in countries where the people have been racialized as white.²¹⁰ Ignoring the fact that we can find son preference and, consequently, sex-selective abortion, in many white nations, proponents of these bans insist that when women from *Asian* countries immigrate to the United States, they bring their cultural practices with

205. See King, *supra* note 192, at 58 (“Improvements in technology, mainly the availability of cheap, easily transportable ultrasound machines, have made nonmedical sex selective abortion possible everywhere from rural towns and villages to major metropolitan areas.”).

206. Therese Hesketh, Li Lu & Zhu Wei Xing, *The Consequences of Son Preference and Sex-Selective Abortion in China and Other Asian Countries*, 183 CAN. MED. ASS’N J. 1374 (2011) (discussing the impact of prenatal technology access on the sex ratio in China, South Korea, and parts of India).

207. See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1790–91 (2019) (Thomas, J., concurring) (citing this figure in defense of sex-selective abortion bans).

208. See, e.g., Anna Higgins, Charlotte Lozier Inst., *Sex-Selection Abortion: The Real War on Women*, 11 AM. REPS. SERIES (Apr. 2016), https://s27589.pcdn.co/wp-content/uploads/2016/04/Higgins-Sex-Selective-Abortion-paper_April12_FINAL_April122016_1.pdf [<https://perma.cc/4V49-S5EM>] (“Sex selection in favor of males is practiced in some Asian immigrant communities within the U.S. . . . Current research shows that just a generation ago, sex ratios at birth within certain ethnic communities (specifically ‘Asian-Pacific’) in the U.S. . . . were within the normal range. Within the last twenty years, the ratio has climbed sharply, resulting in highly unbalanced ratios in favor of males. Such a noticeable change in recent decades implicates the increased use of sex selective abortion.”). Of note, many Asian countries now prohibit the practice. See BRIAN CITRO, JEFF GILSON, SITAL KALANTRY & KELSEY STRICKER, *REPLACING MYTHS WITH FACTS: SEX-SELECTIVE ABORTION LAWS IN THE UNITED STATES* 7, 10 (Sujatha Jesudason et al. eds., 2014), <https://www.napawf.org/our-work/content/replacing-myths-with-facts> [<https://perma.cc/6K5Z-X2X9>] (noting China, Kosovo, Nepal, and Vietnam explicitly prohibit sex-selective abortion).

209. See Shaw, *supra* note 195, at 548 (“[S]ex-selective laws have been justified by a racial narrative that ties an alleged rise of ‘gendercide’ in the United States to the transmission of so-called ‘Asian’ values purportedly resulting from an increase in migration and multiculturalism.”); *Box*, 139 S. Ct. at 1791 (Thomas, J., concurring) (noting that there is “widespread sex-selective abortions” in Asia and citing a report that concluded that “Chinese and Asian-Indian families in the United States ‘show a tendency to sex-select boys’” to support the claim that “recent evidence suggests that sex-selective abortion of girls are common among certain populations in the United States as well”); see also Chou & Jorawar, *supra* note 190, at 108 (noting that “[m]ost of the states where sex-selective abortion bans have passed are among those with the largest and fastest-growing AAPI [or Asian American and Pacific Islander] populations” and that “[t]welve of the fifteen states with the largest AAPI populations and ten of the fifteen states with highest AAPI growth rates have proposed the ban”).

210. See King, *supra* note 192, at 58 (stating that “[w]hile sex selection practices in China and India have long been known, demographic data demonstrating significant gender imbalances due to sex selection have also been reported in Armenia, Azerbaijan, [and] Georgia”); see also Deckha, *supra* note 21, at 14 (“[F]eminists need to be especially wary of conceptualizing sex selection as a cultural practice of ‘ethnic’ minorities in the West; rather, they should emphasize the preference for males at every stage and in many facets of life (work, family, play) as the global phenomenon that it is.” (emphasis omitted)).

them.²¹¹ They say sex-selective abortion bans are a means to prevent the United States from becoming plagued by the problematic cultural traditions that have, until this point, only been found “over there”—in the nonwhite, nonwestern world.²¹²

Proponents of race- and sex-selective abortion bans avow that they are simply trying to prevent racist and sexist practices from taking place in abortion clinics across the nation. However, opponents of these bans deny that these laws have been prompted by a genuine interest in black people or Asian girls and women.²¹³ Instead, opponents see these laws as an opportunity to chip away at abortion rights,²¹⁴ as well as a thinly-veiled effort to cause infighting among feminists.²¹⁵ They argue that the end game for these bans is the overturning of

211. See Shaw, *supra* note 195, at 560, 562 (noting that advocates of these bans argue that “the practice of sex-selective abortions has ‘become more common with Indian, Chinese, Vietnamese, and Korean immigrants coming on shore’” and that a South Dakota state representative who supported a sex-selective abortion ban stated that “[m]any of you know I spent 18 years in Asia[, a]nd sadly, I can tell you that the rest of the world does not value the lives of women as much as I value the lives of my daughters”).

Deckha observes the racism involved in conceptualizing the preference for sons in some Asian countries as “cultural” while refusing to similarly conceptualize as “cultural” white people’s desires for their children to be of a particular sex. See Deckha, *supra* note 21, at 12 (noting that using reproductive technologies to produce a child of a particular sex “is innocuously termed ‘family completion’ or ‘family balancing’ when white [people] engage in it,” but that “[t]he practice loses its benign status and transforms into ‘sex selection’ and gets explained as a ‘cultural’ problem when the participants are marked as non-Western individuals because of their race and/or culture”).

212. Many commentators have emphasized that although bans on sex-selective abortion purport to prevent a *sexist* practice, they rely on anti-Asian *racism*. See Chou & Jorawar, *supra* note 190, at 110 (arguing that sex-selective abortion bans perpetuate “harmful stereotypes about AAPI women and the AAPI community more broadly by relying heavily on xenophobic rhetoric that suggests that AAPIs import backwards, gender-biased cultures from Asian countries”); Shaw, *supra* note 195, at 562 (“The underlying logic of these laws is that Asian women are a threat to gender equality because of their inferior ‘cultural’ values . . . This narrative is nothing new as it draws upon a history of colonialist representations in which non-whites and non-Westerners are perpetually lagging behind Western countries.”); Deckha, *supra* note 21, at 9 (“As postcolonial feminists have shown, sex selection appears in the parade of (bodily) horrors relating to non-Western women that Westerners, including Western feminists, have historically used to demonstrate the supposed inherent misogyny and gender backwardness of non-Western cultures.”).

213. With regard to sex-selective abortion, commentators have noted that although those who seek to ban this practice profess to be concerned about its apparent sexism, they rarely support efforts to achieve sex equality. See Chou & Jorawar, *supra* note 190, at 109 (noting the “hypocrisy” of those who vote in favor of sex-selective abortion bans inasmuch as they “regularly oppose . . . policies like pay equity, health care access, funding safety net benefits that support women and children, and sexual and domestic violence prevention laws that would give women more agency and power in their lives”); see also Kalantry, *supra* note 193, at 71 (arguing that if proponents of sex-selective abortion bans “were truly concerned with women’s equality, then they would also focus on preimplantation methods of sex selection . . . [.] such as sperm-sorting and pre-implantation genetic diagnosis” and noting that antiabortion groups “are not making any efforts on adopting bans on pre-implantation sex selection in the United States”).

214. See Chou & Jorawar, *supra* note 190, at 109–10 (stating that “sex-selective abortion bans are part of a broader anti-abortion strategy” that has been included “in Americans United for Life’s annual ‘playbook’ of model legislation—literally an anti-abortion agenda”).

215. This is especially true with respect to sex-selective abortion bans. See Kalantry, *supra* note 193, at 64 (“The issue of sex selection is dividing people who consider themselves pro-choice in the United States because equality for women appears on both sides of the argument.”).

Roe v. Wade.²¹⁶ These opponents argue that reasons-based abortion bans allow opponents of abortion rights to inch closer to the death of *Roe*—or, at least, to the decision’s narrowing²¹⁷—by permitting third parties to police the motivations behind a person’s decision to terminate a pregnancy.²¹⁸ A reasonable interpretation of existing abortion jurisprudence disallows this policing.²¹⁹

Moreover, opponents of reasons-based abortion bans argue that these bans restrict the universe of “permissible” reasons for a person’s decision to undergo an abortion²²⁰ and, perhaps most importantly, give legal effect to that restriction.²²¹ They also argue that insofar as these bans have been framed as “antidiscrimination” measures, they discursively construct fetuses as entities that, like persons who have been born, can be victims of discrimination.²²² In so doing, they lay the groundwork for claims of fetal personhood²²³—a groundwork

216. See Tali R. Leinwand, *Strange Bedfellows: The Destigmatization of Anti-Abortion Reform*, 30 COLUM. J. GENDER & L. 529, 541 (2016) (finding support for the argument that reasons-based abortion bans are intended to lead to a reversal of *Roe v. Wade* in a conservative legal scholar’s statement that “[t]he key to eroding *Roe v. Wade* . . . is to pass a number of state or federal laws that restrict abortion rights in ways approved of by at least fifty percent of the public,’ such as ‘a ban on abortion for sex selection’”).

217. Supporters of reasons-based abortion bans assert that a decision upholding the constitutionality of these laws would not represent a narrowing of *Roe* because *Roe*, and the Court’s subsequent abortion cases, did not at all speak to the permissibility of laws that ban abortions on account of the reasons behind the abortion decision. See discussion *infra* note 319.

218. See Ziegler, *Roe’s Race*, *supra* note 201, at 44 (stating that the reasons-based abortion ban in Arizona and the federal bill that would ban race- and sex-selective abortions “would require abortion providers to interrogate women about their reasons for choosing an abortion”). Indeed, Oklahoma’s law requires abortion providers to ask their patients their reasons for undergoing an abortion and to document the answer on an official form. See King, *supra* note 192, at 28–29 (noting that providers in Oklahoma are required to send the government an “Individual Abortion Form” that “lists over forty reasons why a woman might seek an abortion and encourages providers to ‘check all applicable’” and stating that these reasons include “Mother wanted a child of a different sex” and “There may be [a] possible problem affecting the health of the fetus”).

219. See, e.g., King, *supra* note 192, at 21 (“Since *Roe*, legal scholars and judges have concluded that the Fourteenth Amendment’s Due Process Clause protects a woman’s liberty to decide to have an abortion prior to viability, regardless of her reason. Under this liberty-based approach, constitutional protection attaches to the decision to abort, and a woman’s reason for making the decision is entirely secondary.”).

220. See Chou & Jorawar, *supra* note 190, at 115 (arguing that sex-selective abortion bans “set a dangerous precedent for defining what reasons are or are not acceptable for women seeking an abortion”).

221. Of course, since the Court upheld the constitutionality of the Hyde Amendment in 1980 in *Harris v. McRae*, indigent women have had to articulate their reasons for seeking an abortion if they hope for their health insurance to cover the cost of the procedure (which, for many indigent women, is the only way for them to access the procedure). See 448 U.S. 297 (1980) (upholding the Hyde Amendment, which permits the use of federal funds to reimburse the costs of abortions under the Medicaid program only in cases involving rape or incest or when continuation of the pregnancy will endanger the life of the pregnant person).

222. See KATRINA ANDERSON, CTR. FOR REPROD. RTS., SHIFTING THE FRAME ON DISABILITY RIGHTS FOR THE U.S. REPRODUCTIVE RIGHTS MOVEMENT 29 (2017), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Disability-Briefing-Paper-FINAL.pdf> [<https://perma.cc/PFW2-NELX>] (noting that “[a]bortion opponents have used the language of anti-discrimination laws” when describing reasons-based abortion bans).

223. See *id.* (“Rhetorically calling abortion a form of . . . discrimination is another strategic move by abortion opponents to build support for fetal personhood”).

that is designed to lead to the reversal of *Roe v. Wade* and the wholesale criminalization of abortion.²²⁴

B. Disability-Selective Abortion Bans

Fourteen states have passed laws that prohibit abortions that are sought because the child will be born with a disability.²²⁵ The bans in five of these states have been temporarily or permanently enjoined.²²⁶ Utah's ban "will only take effect if a court decision allows states to ban abortion in these cases."²²⁷ Meanwhile, Missouri, North Dakota, and Ohio, among other states, have bans that are currently in effect.²²⁸ (The Sixth Circuit, sitting *en banc*, upheld Ohio's ban in April 2021.²²⁹) While some of the laws seek to ban abortions only when a fetus has specifically been diagnosed with Down syndrome,²³⁰ other laws ban abortions when the fetus has been diagnosed with a disability of any kind.²³¹

224. See Jeannie Suk Gersen, *How Fetal Personhood Emerged as the Next Stage of the Abortion Wars*, NEW YORKER (June 5, 2019), <https://www.newyorker.com/news/our-columnists/how-fetal-personhood-emerged-as-the-next-stage-of-the-abortion-wars> [<https://perma.cc/NP6Y-RRGR>].

225. See Guttmacher Inst., *Abortion Bans*, *supra* note 178.

Banning abortion is just one regulatory approach that states have taken with regard to pregnancies involving fetuses that have an impairment of some sort. Three states currently require people who have been told that an impairment will cause their child to die shortly after birth to undergo counseling on perinatal hospice services. *Id.* Other states require persons whose fetus is diagnosed with an impairment to receive information about the condition. *Id.* However, some abortion rights advocates have been wary of the latter types of regulations, inasmuch as the information that some states require healthcare providers to give is not impartial, but rather designed to convince the pregnant person not to terminate the pregnancy. See ANDERSON, *supra* note 222, at 31 ("In recent years, abortion opponents have tried to co-opt these 'pro-information' bills by introducing language that would seek to deter pregnant patients from receiving information about abortion as one of the options following a prenatal diagnosis of Down syndrome or another genetic condition."). For example, a Louisiana law makes it illegal for a health care provider to "engage in discrimination based on disability or genetic variation by explicitly or implicitly presenting pregnancy termination as a neutral or acceptable option when a prenatal test indicates a probability or diagnosis that the unborn child has Down syndrome or any other health condition." LA. STAT. ANN. § 40:1109.2 (2015). That said, laws that provide prospective parents with information about a health impairment that a prenatal test suggests will likely affect their child once born seem unobjectionable if the information provided is truly impartial. See, e.g., Stefanija Giric, *Strange Bedfellows: Anti-Abortion and Disability Rights Advocacy*, 3 J.L. & BIOSCIENCES 736, 740 (2016) (describing a Pennsylvania law that requires that a pregnant person whose fetus is diagnosed with Down syndrome to receive "up-to-date, evidence-based information about Down syndrome that has been reviewed by medical experts and national Down syndrome organizations").

226. Guttmacher Inst., *Abortion Bans*, *supra* note 178.

227. *Id.*

228. See *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, 408 F. Supp. 3d 1049, 1053 (W.D. Mo. 2019) (enjoining Missouri's disability-selective abortion ban only "insofar as it relates to non-viable fetuses"); N.D. CENT. CODE § 14-02.1-04.1 (2013). Notably, North Dakota's ban does not provide an exception for cases involving an impairment that will be fatal to the child once born. *Id.*

229. *Preterm-Cleveland v. McCloud*, 994 F.3d 512 (6th Cir. 2021) (en banc).

230. See OHIO REV. CODE ANN. § 2919.10 (Supp. 2018).

231. See N.D. CENT. CODE § 14-02.1-04.1 (2013) (prohibiting abortion when the fetus "has been diagnosed with either a genetic abnormality or a potential for a genetic abnormality"); *id.* § 14.02.1-02 (noting that "genetic abnormality" includes "any defect, disease, or disorder that is inherited genetically" as well as "any disfigurement, scoliosis, dwarfism, Down syndrome, albinism, amelia, or any other type of physical or mental disability, abnormality, or disease").

Proponents of these laws assert that the laws are necessary because all life—even life that is health impaired—is valuable and ought to be protected.²³² Further, they say, they are disturbed by the reality that many people choose to terminate pregnancies when they discover that the fetus they carry has an impairment.²³³ Specifically, proponents of laws that ban abortion when a fetus has been diagnosed with Down syndrome often cite statistics that show that *most* people terminate a pregnancy after such a diagnosis.²³⁴ While it is difficult to get accurate numbers on the phenomenon, it appears that anywhere from two-thirds to 90 percent of pregnant people in the U.S. choose to terminate a pregnancy following a fetal diagnosis of Down syndrome.²³⁵ The termination rates for pregnancies involving other disabilities are high as well. Studies show that the termination rates following a diagnosis of spina bifida, Turner syndrome, and anencephaly are as high as 67 percent, 75 percent, and 86 percent, respectively.²³⁶

Disability-selective abortion bans are interesting for many reasons, one of which is that they represent a reversal of public sentiment about the legitimacy of abortion in cases involving a child who will be born with a health impairment. Not too long ago, in many circles (including medical ones²³⁷), it was true that the

232. See AMS. UNITED FOR LIFE, DEFENDING LIFE 2020 247–52 (2019), https://aul.org/wp-content/uploads/2019/12/Defending-Life-2020.pdf?mc_cid=fde20de248&mc_eid=0198b59786 [<https://perma.cc/3M9B-YAEC>] (“With regard to abortion and genetic abnormalities: . . . Persons with physical or mental deformities or handicaps possess the same fundamental human rights as all other human beings.”).

233. See *Hearing on H.B. 1305 Before the H. Human Servs. Comm.*, 63rd Leg., Reg. Sess. (N.D. 2013) (meeting minutes) (statement of a father of a child with a disability who argued that a disability-selective abortion ban was necessary because children with disabilities were being “systematically exterminated before birth”).

234. See Marc Spindelman, *On the Constitutionality of Ohio’s “Down Syndrome Abortion Ban,”* 79 OHIO ST. L.J. FURTHERMORE 19, 59 (2018) (stating that during discussion of Ohio’s ban on Down syndrome-selective abortions, supporters expressed dismay about Iceland’s high rate of abortion following a Down syndrome diagnosis).

235. See Carole J. Petersen, *Reproductive Justice, Public Policy, and Abortion on the Basis of Fetal Impairment: Lessons from International Human Rights Law and the Potential Impact of the Convention on the Rights of Persons with Disabilities*, 28 J.L. & HEALTH 121, 133 (2015) [hereinafter, Petersen, *Reproductive Justice*] (citing studies that show that anywhere from 67 percent to 85 percent of people terminate their pregnancies following a diagnosis of Down syndrome); Hayley White, *A Critical Review of Ohio’s Unconstitutional “Right to Life Down Syndrome Non-Discrimination” Bill*, 29 GEO. MASON U. C.R. L.J. 87, 88 (2018) (placing the percentage of persons who chose to terminate a pregnancy following a diagnosis of Down syndrome in the fetus at 90 percent). Ohio’s disability-selective abortion ban, which prevents abortion in cases of a diagnosis of Down syndrome specifically, seemed to be prompted by a report documenting that Iceland has an almost 100 percent pregnancy termination rate following a diagnosis of Down syndrome. See *id.* at 96 (stating this and noting that “Denmark has a termination rate of 98 percent” while “France has a termination rate of 77 percent”).

236. See Greer Donley, *Does the Constitution Protect Abortions Based on Fetal Anomaly?: Examining the Potential for Disability-Selective Abortion Bans in the Age of Prenatal Whole Genome Sequencing*, 20 MICH. J. GENDER & L. 291, 296 (2013).

237. See Petersen, *Reproductive Justice*, *supra* note 235, at 138 (reporting that the American College of Obstetrics and Gynecology [ACOG], the body that sets standards for the practice of obstetrics and gynecology in the United States, issued an opinion in which it provided that “it is generally unethical for a doctor to facilitate sex selection except where the purpose is prevent the birth of a child with a sex-linked hereditary disease” and concluding that ACOG’s provision reflects the organization’s sense that

discovery that a child would have a disability was considered a “good” reason for having an abortion.²³⁸ The entire premise of the genetic counseling industry is that parents have a legitimate interest in avoiding the birth of a health-impaired child.²³⁹ A profession emerged to serve this interest.²⁴⁰ Indeed, many of those who oppose abortion as a general matter (as indicated by a refusal to identify as “pro-choice”) once supported it in cases involving a fetus with a health impairment. As one commentator reported, “[i]n 2007, 70% of Americans polled indicated that they believed women should be permitted to obtain an abortion ‘if there is a strong chance of a serious defect in the baby.’ That is compared with

“helping prospective parents to prevent the birth of a girl is inherently unethical, while helping parents to prevent the birth of a child with a disability is perfectly ethical”); Mary Ziegler, *The Disability Politics of Abortion*, 2017 UTAH L. REV. 587, 592 (2017) [hereinafter Ziegler, *Disability Politics*] (noting that “in 1936, a committee chartered by the British Medical Association agreed that abortion should be legal when there ‘is reasonable certainty that serious disease will be transmitted to the child,’ including in cases of hereditary blood disorders and mental illness”).

Indeed, before Oklahoma revised its law to make it unlawful for providers to perform disability-selective abortions, the state embraced a regulatory scheme that was identical to ACOG’s determination that it is improper to use technologies to select for sex, but proper to use technologies to select against disability. Oklahoma law used to prohibit providers from performing “an abortion with knowledge that the pregnant female is seeking the abortion solely on account of the sex of the unborn child.” OKLA. STAT. tit. 63, § 63-1-731.2 (2016). However, the statute “specifically permit[ed] the performance of a sex-selective abortion sought because the unborn child has an elevated risk of developing a sex-linked genetic disease.” King, *supra* note 192, at 28.

238. See Petersen, *Reproductive Justice*, *supra* note 235, at 122, 140 (noting that the law used to make “it easier, not harder, for a woman to obtain an abortion in situations where there is evidence of fetal impairment” and finding proof in “state laws that prohibit public funding for abortion but . . . make an exception where prenatal testing has revealed a fetal impairment”); Carole J. Petersen, *Reproductive Autonomy and Laws Prohibiting “Discriminatory” Abortions: Constitutional and Ethical Challenges*, 96 UNIV. DETROIT. MERCY L. REV. 605, 615–16 (2019) [hereinafter Petersen, *Reproductive Autonomy*] (noting that the American Law Institute’s Model Penal Code and the Conference of Commissioners on Uniform State Laws’ Uniform Abortion Act both “categorized a ‘substantial risk’ that the child would be born with a ‘grave physical or mental defect’ as one of the situations in which abortion would be permitted”).

Petersen observed that some countries’ regulatory schemes make apparent that they consider terminating a pregnancy because a child will (or may) be born with a disability to be a “good” reason for undergoing an abortion. She noted that the United Kingdom does not recognize a general right to an abortion, but rather outlines specific circumstances in which having an abortion is not a criminal offense. One of those circumstances is when “there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.” Petersen, *Reproductive Justice*, *supra* note 235, at 141 (quoting Abortion Act 1967, c. 87, § 1(d) (UK)). Providing that abortion is criminal except when it is used to select against disability makes apparent the state’s sense that preventing the birth of health-impaired children is a legitimate reason for terminating a pregnancy. In addition, Petersen noted that British law makes an exception to its ban on abortions after twenty-four weeks of pregnancy in cases where “there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.” *Id.* at 142 (quoting Abortion Act 1967, c. 87 § 1(d) (UK)); see also Muller, *supra* note 30, at 486 (noting that “[a] small minority of states allows third trimester abortions in cases of fetal disability”). Again, the exception to the general provision reveals the state’s sense that selecting against disability is a “good” reason for an abortion.

239. See Sheldon C. Reed, *A Short History of Genetic Counseling*, 21 SOC. BIOLOGY 332, 336–37 (1974) (describing how increased understanding of genetic conditions and the development of prenatal screening allow for “the detection of both chromosomal and biochemical defects in the fetal cells and provides the option of a therapeutic abortion for those who wish to exercise the option”).

240. See *id.*

the 49% of Americans who self-identified as pro-choice in 2007.”²⁴¹ Similarly, most states choose to follow the funding scheme set out in the Hyde Amendment, which prohibits federal funding for abortion services in most cases.²⁴² These states refuse to cover the costs of abortion care in their state Medicaid programs—electing only to pay for abortion care when the pregnancy is the result of rape or incest or when continuation of the pregnancy will endanger the life of the pregnant person.²⁴³ However, a number of states have made an exception to this funding scheme—electing to cover abortion costs in cases involving a fetus that has been diagnosed with a severe health impairment.²⁴⁴ In this vein, although the Court’s abortion jurisprudence permits states to completely prohibit abortions after fetal viability, some states permit post-viability abortions in cases involving a severely health-impaired fetus.²⁴⁵ Disability-selective abortion bans represent a moral and ethical about-face from this formerly widespread sense that it is legitimate to use abortion to prevent the birth of a child with a disability. These bans codify a polar opposite sense: the discovery that a child will have a disability is a particularly “bad” reason for undergoing an abortion.²⁴⁶

While disability-selective abortion bans are like race- and sex-selective abortion bans in that all of these bans police the motivations behind a particular decision to terminate a pregnancy, there are also important differences. While race- and sex-selective abortion bans appear to be a solution in search of a problem—there really is no evidence that anyone is targeting black women for abortions, nor is there evidence that sex-selective abortions are occurring with any frequency in the United States²⁴⁷—the same cannot be said about disability-selective abortion bans.²⁴⁸ It seems patently true that, with some degree of

241. Donley, *supra* note 236, at 296.

242. Pub. L. No. 103-112, 107 Stat. 1082 (1993) (codified at 42 U.S.C. § 300a-6).

243. Guttmacher Inst., *State Funding of Abortion Under Medicaid*, GUTTMACHER INST. (Jan. 1, 2022), <https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicicaid> [<https://perma.cc/X89T-FPL4>].

Interestingly, when the Court upheld the constitutionality of the Hyde Amendment in *Harris v. McRae*, Justice Marshall wrote a dissent in which he argued that the law was unwise for many reasons, one of which was that it did not make exceptions for people seeking to terminate a pregnancy because of a diagnosis of severe fetal impairment. See 448 U.S. 297, 340 (1980) (Marshall, J., dissenting).

244. Guttmacher Inst., *State Funding of Abortion Under Medicaid*, *supra* note 243 (indicating that Iowa, Mississippi, Virginia, and West Virginia fund abortion costs in cases of fetal impairment).

245. See, e.g., VA. CODE ANN. § 32.1-92.2 (2021); W. VA. CODE § 9-2-11 (2022).

246. Indeed, before Utah revised its law to ban disability-selective abortions, it used to *facilitate* disability-selective abortions. See Petersen, *Reproductive Justice*, *supra* note 235, at 140 (explaining that Utah once “enacted a ban on post-viability abortions but made an exception for cases of ‘fetal abnormality’” and concluding that “the legislators who approved that exception decided that the state had less of an interest in protecting fetal life when the future child is likely to be born with a disability”).

247. See Donley, *supra* note 236, at 293 (“While race- and sex-selective abortion bans are also being proposed, there is little to no evidence that such abortions are actually occurring in the United States.”).

248. See *id.* (“The disability angle, as opposed to sex or race, is the most compelling given the evidence that most fetuses with genetic abnormalities are aborted when women learn that they will have one of the few disabilities traditionally tested for with prenatal genetic testing.”); Muller, *supra* note 30,

regularity, people do choose to terminate pregnancies when they learn that their child will be born with an impairment.²⁴⁹

Although the phenomenon that disability-selective abortion bans regulate is real, the criticisms that opponents launch against them are similar to the criticisms that opponents launch against race- and sex-selective abortion bans. Critics argue that proponents of these bans are not *really* interested in protecting people with disabilities. These critics say that if these bans' supporters were genuinely concerned about people with disabilities, they would support measures that are known to improve the quality of the lives of people with disabilities. Such measures include ensuring that people with disabilities can access the healthcare that they need²⁵⁰ and expanding social safety net programs so that beneficiaries with disabilities are not disincentivized from (or punished for) working outside of the home.²⁵¹ They also include increasing funding for programs that allow children with disabilities to obtain adequate educations in public schools,²⁵² adding the United States as a signatory to international treaties that obligate states to protect people with disabilities,²⁵³ and sundry other efforts.²⁵⁴ Proponents of disability-selective abortion bans, whose politics tend

at 479 (“The threat to disability rights from disability-selective abortion . . . is arguably greater than the threat to women’s rights from sex-selective abortion; the rate of disability-selective abortion is in a different league.”).

249. See Donley, *supra* note 236, at 293.

250. See Samuel R. Bagenstos, *Disability and Reproductive Justice*, 14 HARV. L. & POL’Y REV. 273, 282 (2020) [hereinafter Bagenstos, *Disability*] (noting that “Medicaid, which provides key services for many disabled [people], is constantly at risk of cuts”).

251. See Ziegler, *Disability Politics*, *supra* note 237, at 629 (observing the “perverse incentive” that people with disabilities face, whereby any “additional income or resources above the asset limit may jeopardize the receipt of SSI [Supplemental Security Income] benefits” and calling for an “updating of SSI limits”).

252. See Bagenstos, *Disability*, *supra* note 250, at 282 (“The Individuals with Disabilities Education Act (IDEA) has, since 1975, promised children with disabilities a free appropriate public education in the least restrictive environment. But Congress has never appropriated funds that would come close to fully funding the federal government’s share of the cost of implementing that law.”).

253. See Petersen, *Reproductive Autonomy*, *supra* note 235, at 621 (noting that the United States has never ratified the Convention on the Rights of Persons with Disabilities, which is designed to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity” (quoting Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3; G.A. Res. 61/106, annex I (Jan. 24, 2007) (adopting the Convention))).

254. Ziegler’s work points to additional efforts that the government might undertake to improve the quality of life for people with disabilities. See Ziegler, *Disability Politics*, *supra* note 237, at 628. She noted that we could increase funding under the Workforce Innovation and Opportunity Act, which “provides expanded access to training, education, and vocational rehabilitation for disabled individuals transitioning from school to work.” *Id.* Congress might also increase the limits under the Achieving Better Life Experience Act, which currently “allows disabled individuals to save up to \$14,000 in a tax-free account without jeopardizing existing federal benefits.” *Id.* Moreover,

[b]ecause of inadequate funding for transportation initiatives like the Section 5310 transportation for elderly persons and persons with disabilities program, many disabled Americans face multi-hour commutes that prevent some individuals from taking certain jobs. Disabled workers may have to take medical leave more often than their counterparts without a work limitation. Although the federal Family Medical Leave Act (FMLA) allows for 3 months of unpaid leave for qualifying workers, not all disabled workers are covered by the

to be right of center, typically do not lend their support to these measures.²⁵⁵ Because these bans' proponents seem to be interested in protecting people with disabilities *only* in the context of abortion, opponents say that the bans do not reflect a genuine concern about people with disabilities.²⁵⁶ Instead, the bans reflect an interest in narrowing and, ultimately, overturning *Roe v. Wade*.²⁵⁷ Moreover, critics argue that disability-selective abortion bans are nothing more than thinly-veiled efforts to cause infighting among those on the left—in this case, disability rights activists and abortion rights activists.²⁵⁸

IV.

ANALYZING DISABILITY-SELECTIVE ABORTION BANS

This Part conducts a deeper dive into disability-selective abortion bans, analyzing various aspects of these regulations. It first describes how abortion

Act, including those employed at smaller businesses or in part-time positions. Even those covered by the FMLA may not be able to afford to take unpaid leave . . . [M]any disabled workers require attendant services to achieve independence at home and at work. Most personal insurance policies do not cover these services. For those who do not qualify for Medicaid, attendant services and employment may be out of reach.

Id. at 628–29.

255. See ANDERSON, *supra* note 222, at 34 (observing “the hypocrisy of lawmakers who propose anti-abortion legislation in the name of supporting disability rights, yet refuse to back measures that would lead to genuine improvements in the lives of people with disabilities”); Jesudason & Epstein, *supra* note 19, at 542 (“Anti-choice advocates tend to idealize disability while opposing the entitlement programs and government funding of social services, such as state developmental disability programs, funding for the Individuals with Disabilities Education Act, and the access mandates of the Americans with Disabilities Act, that would make raising a child with a disability more possible.”). Importantly, Jesudason and Epstein’s critique is bi-directional, as they also criticized pro-choice advocates who fight “for social services and family support policies such as early intervention programs, special education services, family resource centers, respite care, and developmental disability services” while, in the context of abortion, “sometimes negatively fram[ing] the issue of disability in prenatal diagnosis . . .” *Id.*

256. See Spindelman, *supra* note 234, at 64–65 (noting that a proposed amendment to Ohio’s Down syndrome-selective abortion ban, which would have provided publicly funded care to persons with Down syndrome, was defeated and concluding that the ban “is not actually about declaring and vindicating the equal dignity and worth of persons with Down syndrome so much as it is about using that idea, and hence persons with Down syndrome, as instruments, as pawns, as objects, in a larger pro-life campaign”).

257. See Giric, *supra* note 225, at 739 (arguing that “restricting abortion in the name of affirming the dignity of and protecting individuals with disabilities . . . without actually providing tangible support for individuals with disabilities to succeed in a world that is not amenable, and oftentimes hostile, to their disabilities after their birth” does nothing more than provide “pro-life activists an easy way to galvanize support for further restrictions on abortion”).

258. See Judith Levine, *Opinion: Disability and the Politics of Abortion*, SEVEN DAYS (Sept. 9, 2015), <https://www.sevendaysvt.com/vermont/disability-and-the-politics-of-abortion/Content?oid=2868452> [<https://perma.cc/Y2C7-FCDR>] (“These laws are also meant to drive a wedge between reproductive-rights and disability-rights activists.”); s.e. smith, *Disabled People Are Tired of Being a Talking Point in the Abortion Debate*, VOX (May 29, 2019), <https://www.vox.com/first-person/2019/5/29/18644320/abortion-ban-2019-selective-abortion-ban-disability> [<https://perma.cc/AZ6Q-MP2X>] (arguing that “[u]sing disablism to sneak past an abortion ban or put abortion advocates in an uncomfortable position is a brilliant tactic, and one advocates must not fall for”). Disability rights activists and abortion rights activists have a long history of conflict. See discussion *supra* Part III.

rights activists historically have sought to generate support for abortion access by deploying the figure of the disabled child. In this campaign for political support, abortion rights activists have conceptualized babies and children with disabilities as inevitably unwanted and a circumstance to be avoided—a stance that allows abortion rights opponents to position themselves as champions of people with disabilities. This Part then explores the harms of disability-selective abortion before turning to an exploration of the constitutionality of laws that would prohibit the practice, laying out the argument that the established doctrine, as articulated in *Planned Parenthood v. Casey*, clearly prohibits such regulations. It concludes with a discussion of the framing of disability-selective abortion bans as “anti-eugenic”—a rhetoric that got its highest elevation in Justice Clarence Thomas’s concurring opinion in *Box v. Planned Parenthood*.

A. Disability and the Problematic History of Abortion Rights Activism

As discussed above, many abortion rights activists believe that at least part of the interest that opponents of abortion access have had in disability-selective abortion bans is that the bans represent a fantastic opportunity to create a rift between two groups on the political left—disability rights advocates and abortion rights advocates.²⁵⁹ Disability rights activists tend to have progressive politics because they believe in a state that actively supports its most vulnerable citizens—disbelieving that the “market” or private actors ought to or will provide the physical and financial assistance that people with disabilities require.²⁶⁰ At the same time, those who back abortion rights tend to have progressive politics as well, as the political left has generally been home to those who believe that the state ought not to exert reproductive control over its citizens.²⁶¹ The practice of disability-selective abortion has the potential to create a conflict between the disability rights camp and the abortion rights camp. People in the former camp tend to believe that the practice of disability-selective abortion is incredibly problematic, premised as it is on the myth that people with disabilities have lives that, objectively speaking, are not worth living.²⁶² On the other hand, people in the latter camp historically have found the practice of disability-selective abortion morally unobjectionable—perhaps even morally *right*.²⁶³ Although

259. See *supra* note 258 and accompanying text.

260. See Ari Ne’eman, *Disability Politics: Liberals, Conservatives, and the Disability-Rights Movement*, NEW ATLANTIS, Spring 2009, <https://www.thenewatlantis.com/publications/disability-politics> [<https://perma.cc/RF7Z-TRAD>] (“Generally speaking, the disability-rights movement has been associated with the progressive political tradition.”).

261. See Anna North, *How Abortion Became a Partisan Issue in America*, VOX (Apr. 10, 2019), <https://www.vox.com/2019/4/10/18295513/abortion-2020-roe-joe-biden-democrats-republicans> [<https://perma.cc/TQC6-GRZR>].

262. See Pasquale Toscano & Alexis Doyle, *Legal Abortion Isn’t the Problem to Be Solved*, ATLANTIC (June 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/selective-abortion-bans-treat-disability-tragedy/592000/> [<https://perma.cc/M9NX-VX2B>].

263. See Ziegler, *Disability Politics*, *supra* note 237, at 595 (noting that abortion rights proponents have “framed disability-based abortions as obviously moral and medically necessary”);

abortion rights activists increasingly have recognized the morally problematic nature of disability-selective abortion, the introduction of disability-selective abortion bans into legislatures, and the ensuing legal challenges to these bans in the courts, present marvelous occasions for disability rights activists and abortion rights activists to clash. Now, it is important to recognize that although disability rights activists are extremely wary of disability-selective abortion, it is also true that many support broad abortion rights.²⁶⁴ This is due to the history that people with disabilities have had with reproductive control, with third parties (i.e., family members, guardians, governments) claiming the power to make decisions about the trajectory that the reproductive lives of people with disabilities will take.²⁶⁵ Laws permit people with disabilities to be forcibly sterilized, subjected to forced abortions, denied assisted reproductive technologies, coerced into contraceptive use, and to undergo procedures that affect their reproductive organs without their consent.²⁶⁶ Moreover, people with disabilities frequently lose custody of their children, with state legislatures and dependency courts assuming that a parent's disability makes them unfit to care for a child.²⁶⁷ Because people with disabilities are intimately familiar with the horrors and indignities of reproductive control, many are loath to allow states to prohibit abortion and, in so doing, exert reproductive control by coercing people with the capacity for pregnancy into motherhood.

The advent of disability-selective abortion bans is not the first time that supporters of disability rights and supporters of abortion rights have been at odds

Muller, *supra* note 30, at 485 (stating that abortion rights advocates have “presented instances of fetal disability among the least morally ambiguous cases for abortion”).

It might be fair to say that, for the most part, abortion rights activists have not engaged in a nuanced, intelligent interrogation of the ethics and morality of disability-selective abortion. This may be owed to abortion rights activists' failure to consider people with disabilities to be members of the group that they—and the reproductive rights movement, more generally—represent. See ANDERSON, *supra* note 222, at 18 (“Despite the fact that 20 percent of U.S. women, or approximately 27 million women, are living with a disability, the U.S. reproductive rights movement has largely overlooked the concerns of this constituency.”).

264. See Bagenstos, *Life, Death*, *supra* note 22, at 426.

265. See Bagenstos, *Disability*, *supra* note 250, at 285 (observing that people with disabilities have fought against “the paternalistic control of disabled people's bodies by nondisabled people” and that “regulating disabled people's reproductive choices has been a central aspect of disability oppression in America”).

266. See *id.* at 276 (“Disabled people are frequently denied their own rights to conceive, bear, and parent children, whether through forced sterilization or abortion, the denial of assisted reproduction, or the denial of parental rights once their children are born.”); ANDERSON, *supra* note 222, at 21 (noting that “coercive policies and practices . . . are based on harmful stereotypes about people with disabilities in regards to their decision-making capacities, their perceived ability to parent, and assumptions that women and girls with disabilities are asexual or that sterilization will protect them from sexual abuse”).

267. See Bagenstos, *Disability*, *supra* note 250, at 290 (“Laws authorizing termination of parental rights (TPR) often explicitly list disability as a ground for termination. And judges adjudicating TPR cases often rule based on their own negative preconceived notions about the ability of disabled people to parent.”); ANDERSON, *supra* note 222, at 25 (noting that “[t]wo-thirds of states . . . allow courts to find a parent unfit based solely on their disability” and explaining that “all states allow courts to consider disability in determining a child's custody arrangements without necessarily demonstrating how a parent's disability harms their child”).

with one another. In truth, the two groups have a long, fraught history of conflict. This history is owed to abortion rights advocates' use of the specter of disability to garner public support for abortion rights.

Law professor Mary Ziegler has provided the most comprehensive history of this conflict.²⁶⁸ She wrote that the 1950s witnessed the thalidomide scare, in which doctors had prescribed the drug to treat nausea during pregnancy without knowing that it caused fetal impairments.²⁶⁹ Further, in the 1960s, the United States was hit with an epidemic of rubella; the children of persons who had been infected during their first trimester of pregnancy were often born with physical and cognitive impairments.²⁷⁰ Advocates for abortion rights leveraged these events in their campaign for the decriminalization of abortion. They argued that pregnant people whose fetuses had been "damaged" by thalidomide, rubella, or other environmental or genetic causes ought to have access to abortion to prevent the birth of health-impaired children.²⁷¹ Advocates for abortion rights also argued that a government that would compel people to birth children with "defects" was a heartless one.²⁷² They argued that the humane thing for the government to do was to permit abortion for prospective parents facing such a "horror."²⁷³ Significantly, many people agreed, and public opinion around abortion became more favorable.²⁷⁴

Eventually, abortion rights supporters' arguments shifted: they stopped contending that abortion ought to be widely available to prevent the birth of health-impaired children, contending instead that the ability to terminate a pregnancy was a constitutional right.²⁷⁵ *Roe v. Wade*, of course, was decided on these alternative grounds.²⁷⁶ Nevertheless, abortion rights supporters never completely stopped describing abortion as *especially* necessary in cases of fetal

268. See generally Ziegler, *Disability Politics*, *supra* note 237.

269. See *id.* at 590.

270. See *id.*

271. See *id.* at 595 (noting that "[i]n the aftermath of the thalidomide and rubella controversies, family-planning organizations and physicians more often used disability as a justification for legalizing abortion").

272. See *id.* (stating that abortion law reformers in the 1960s "used bans on abortion in cases of fetal defect to showcase the irrationality and cruelty of broad abortion bans").

273. Some of the language that proponents of abortion rights used to describe fetuses with impairments was truly appalling. Ziegler wrote that a leader of NARAL [National Abortion Rights Action League, an abortion rights organization] advised those at the organization: "When they bring up innocent fetal life, . . . keep hammering on . . . the deformed and unwanted infant, . . . the horror of bringing a deformed child into the world with half a head, no arms, etc." See *id.* at 599. Ziegler also cited a pamphlet produced during this time that stated: "Legal abortion means . . . women can't be forced to bear a deformed child. Which do you prefer . . . legal abortion? Or an anencephalous 'baby'?" *Id.* at 600 (alterations in original).

274. See Bagenstos, *Life, Death*, *supra* note 22, at 437 (noting that the controversies involving the health-impairing effects that thalidomide and rubella had on fetuses "catalyzed public support for the liberalization of abortion laws").

275. See Ziegler, *Disability Politics*, *supra* note 237, at 597 (describing this shift in argumentation).

276. 410 U.S. 113, 153 (1973) (locating the abortion right in "the Fourteenth Amendment's concept of personal liberty").

impairment; indeed, they continued to describe such a diagnosis as a tragedy befalling prospective parents who had wished, in vain, for a “healthy”²⁷⁷ baby.

More recent controversies over legislation that bans abortion in the second half of pregnancy—frequently called “late-term” abortion—have continued this discursive tradition.²⁷⁸ After several state legislatures passed regulations that prohibit abortion after twenty weeks of pregnancy, abortion-rights proponents often responded that prospective parents need the right to terminate a pregnancy beyond the time limit provided in the legislation because fetal “anomalies” are often diagnosed later in pregnancy.²⁷⁹ “Late-term” abortion bans would have the effect of compelling pregnant people, who had received unexpected and unwanted news about their fetuses, to carry a pregnancy to term. As two commentators remarked:

Disability in the context of a termination decision for a wanted pregnancy has been described as a “tragedy” and a “defect”—using the language of pain, suffering, and devastation. The focus is on the potential suffering a child with a disability will allegedly experience and inevitably bring on parents and other siblings.²⁸⁰

Disability rights proponents have criticized this rhetoric, arguing that it problematically “reinforce[s] the misconception that the diagnosis of a genetic disability is a ‘tragedy’ and will be ‘inimical to a rewarding life’ for both the child and their parents.”²⁸¹

Ziegler wrote that while abortion-rights supporters presented themselves as compassionate advocates for people facing a tragic diagnosis, opponents of abortion rights began presenting themselves as the *truly* compassionate ones who were interested in social justice.²⁸² *They* were the ones who were concerned about the most vulnerable parties involved: the fetuses-cum-babies who would be “killed” on account of their disabilities. Disability-selective abortion bans are

277. If disability is understood as part of the spectrum of human variation, then a person with a disability is not “unhealthy,” but rather simply embodies a nonnormative state of health. See Jesudason & Epstein, *supra* note 255, at 543.

278. Controversies over congressional prohibition of intact dilation and extraction as a technique for third-trimester abortions—ultimately upheld in *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007)—also presented an occasion for abortion-rights advocates to frame disability as inevitably tragic. See Ziegler, *Disability Politics*, *supra* note 237, at 610 (explaining that abortion rights advocates treated intact dilation and extraction “as a measure of last resort, available only in the most readily justifiable abortions” and quoting the leader of NARAL who argued that permitting the procedure evidenced “compassion and concern for families facing medical tragedies”).

279. See ANDERSON, *supra* note 222, at 34 (explaining that “when the state of Nebraska enacted a law limiting access to abortion from 24 to 20 weeks,” reproductive rights organizations argued that the laws were bad policy by “center[ing] the experiences of women who had received a diagnosis of a fetal impairment after 20 weeks in their advocacy efforts”).

280. Jesudason & Epstein, *supra* note 19, at 541.

281. See ANDERSON, *supra* note 222, at 34.

282. See Ziegler, *Disability Politics*, *supra* note 237, at 600, 601 (noting that abortion-rights opponents proposed that they, and “not those on the other side, stood up for civil rights” and explaining that “pro-life organizations identified with social movements championing the rights of the helpless and defenseless”).

the legacy of abortion-rights opponents' having framed themselves as the true champions of the defenseless.²⁸³

B. The Harms of Disability-Selective Abortion

Even if one generally is supportive of abortion rights—understanding them as tools that allow people with the capacity for pregnancy to exert some measure of control over the course and content of their lives—one should recognize that disability-selective abortions can be extremely problematic. One does not have to believe that the fetus is a “life”²⁸⁴ or is morally significant to conclude that disability-selective abortion possesses some extremely disquieting characteristics.

To begin, there is the possibility that many people terminate a pregnancy following a diagnosis of fetal impairment without receiving truthful information about the effect that the impairment would have on their child should they choose to carry the pregnancy to term. Scholars and activists have raised the possibility that healthcare providers do not provide accurate, evidence-based information to prospective parents.²⁸⁵ They have argued that providers frequently underestimate the quality of life that the child can expect to have while overestimating the pain or other limitations associated with the condition.²⁸⁶ If true, then many decisions to terminate a pregnancy following a diagnosis of impairment may be ill-informed or uninformed.²⁸⁷ If it is built upon a scaffolding of misinformation, disability-selective abortion is a disquieting practice.

283. See *id.* at 612 (noting that disability-selective abortion bans are the result of abortion opponents' having “translat[ed] arguments against disability-based abortion into concrete legal prohibitions”).

284. See generally Khiara M. Bridges, “Life” in the Balance: *Judicial Review of Abortion Regulations*, 46 UC DAVIS L. REV. 1285 (2013) (elaborating the concept of fetal “life,” understood as a cultural idea of the fetus’s moral significance that renders the fetus much weightier, morally speaking, than simple biological life).

285. See, e.g., Bagenstos, *Life, Death*, *supra* note 22, at 433 (describing disability-rights activists’ arguments that “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,’ and by ‘resorting to medical nomenclature to disguise the nonmedical grounds of the recommendation’” to terminate the pregnancy (alteration in original)).

286. See *id.* at 440 (observing that disability-rights advocates often contend that “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 the family, school and community’”).

287. See Porter, *supra* note 31, at 785 (noting the claim that many decisions to terminate a pregnancy following a prenatal diagnosis of disability are “misinformed”).

In order to reduce the likelihood that a prospective parent’s decision to undergo an abortion following a diagnosis of fetal impairment will be ill-informed, Congress in 2008 passed the Prenatally and Postnatally Diagnosed Conditions Awareness Act (PPDCA), which was intended to empower the government to provide prospective parents with accurate information about impairments “so that they could make thoughtful decisions about raising children with certain genetic disorders.” Seema Mohapatra, *Law in the Time of Zika: Disability Rights and Reproductive Justice Collide*, 84 BROOK. L. REV. 325, 359–60 (2019). However, Congress has never allocated sufficient funds to the PPDCA to make the legislation meaningful. See *id.* at 360. “Originally envisioned with a ‘\$5 million [base] of funding to support its objectives,’ the PPDCA passed with no funding provisions. It has been

Further, some scholars have argued that disability-selective abortion is harmful to people *living* with disabilities. They say that such abortions send a hurtful, hateful message that people with disabilities never should have been born—that their lives are not worth living.²⁸⁸ Moreover, these abortions might sanction bias and discrimination, affirming the sentiment that people with disabilities are rightly shunned and avoided.²⁸⁹ This might also perpetuate and normalize the belief that technology *ought* to be used to diminish disability—a phenomenon that has implications for how we think about and use technology.

Finally, there is the very real concern that if prospective parents use abortion to prevent the birth of people with disabilities, then the likelihood that people *without* disabilities will come to encounter those *with* disabilities will diminish.²⁹⁰ Consequently, occasions for reevaluating concepts like “health,” “dignity,” and “humanity”—concepts that we may desperately need to reconsider—will disappear.²⁹¹ Further, on a more pragmatic level, if disability-selective abortion significantly reduces the number of people with disabilities, then we may feel no need to reorganize our society to allow those with impairments to meaningfully participate.²⁹² We will continue to recreate a

underfunded since it passed, and thus the goal to provide women with information prenatally and postnatally has not been met.” *Id.*

288. See *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 888 F.3d 300, 315 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part) (arguing that “[p]ermitting women who otherwise want to bear a child to choose abortion because the child has Down syndrome perpetuates the odious view that some lives are worth more than others”), *reh’g en banc granted, vacated in part*, 727 F. App’x 208 (7th Cir. 2018) (mem.), *vacated*, 917 F.3d 532 (7th Cir. 2018), *cert. granted in part, rev’d in part sub nom.* *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (per curiam); Deckha, *supra* note 21, at 16 (describing an “expressivist” argument that “maintains that by counseling and otherwise engaging the testing and subsequent termination of prenatal life on the discovery of an ‘abnormal’ fetus, . . . prenatal professionals send a discriminatory and demoralizing message to persons already living with disabilities that it would have been better for all concerned had they not been born”).

289. See Dov Fox, *Prenatal Screening Policy in International Perspective: Lessons from Israel, Cyprus, Taiwan, China, and Singapore*, 9 YALE J. HEALTH POL’Y L. & ETHICS 471, 480 (2009) (observing that disability-selective abortion may “transmit a message that people with disabilities are ‘less worthy of toleration or respect than of aversion and surgical repair’”); Bagenstos, *Life, Death*, *supra* note 22, at 439–40 (noting the argument that “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 been avoided) and that disabled people are therefore justifiably marginalized’”).

290. See Bagenstos, *Disability*, *supra* note 250, at 280 (noting the argument that “if selective abortion succeeds in reducing the number of disabled people who are born . . . it will increase disability prejudice by reducing the opportunities for intergroup contact”).

291. See Elizabeth R. Schiltz, *Hauerwas and Disability Law: Exposing the Cracks in the Foundations of Disability Law*, 75 LAW & CONTEMP. PROBS. 23, 50 (2012) (arguing that “dwindling numbers of people with cognitive disabilities in the world will render their crucial witness to the inadequacy of the presumptions of modern humanism ever fainter”).

292. See Fox, *supra* note 289, at 480 (“[D]isability-selective abortion might encourage an unwillingness to accommodate, care for, or find ways to improve the lives of those whose abilities fail to meet the demands of modern society.”); Bagenstos, *Life, Death*, *supra* note 22, at 439 (noting the argument that “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”); see also *Planned Parenthood*

society that marginalizes people with impairments, exacerbates their vulnerability, and reduces them to second-class citizens.

Of course, we might be convinced that disability-selective abortion can be harmful, but nevertheless conclude that it should not be banned. We might believe that it is callous to compel the birth of children with disabilities in a society that refuses to adequately support parents who care for these children.²⁹³ This callousness is intensified when the parent is poor and unable to provide for the child's needs without assistance. We may conclude that the most humane thing that we can do is not to ban disability-selective abortion, but rather to engage in practical efforts that will make the country more hospitable for, and less unkind to, people with disabilities. We may conclude that in addition to this work, we ought to make the country more supportive of families, generally, and families caring for people with disabilities, specifically. Until this transformative work is accomplished, we may feel that it is necessary, and morally right, to allow pregnant people to decide whether or not they are capable of undertaking the challenges associated with parenting a health-impaired child.²⁹⁴

We may likewise disfavor regulating disability-selective abortion because such regulation creates a terrifyingly powerful state that polices its citizens' reasons for engaging in deeply intimate practices.

C. *The Constitutionality of Disability-Selective Abortion Bans*

Existing Supreme Court precedent creates a hostile terrain for disability-selective abortion bans, and reasons-based abortion bans more generally. If these prohibitions are to survive review, it will be because the Court has overruled some of its precedent. This is precisely the result for which these bans' proponents hope. Further, with the appointment of Justice Amy Coney Barrett to the Court, the composition of the Court has shifted enough to make the overruling of abortion precedent very likely.²⁹⁵

of Ind. & Ky., 888 F.3d at 315 (arguing that permitting people to terminate a pregnancy because of a Down syndrome diagnosis “disincentivizes research that might help [people with Down syndrome] in the future”).

293. See Giric, *supra* note 225, at 741 (noting that disability-selective abortion bans typically do not “include any provisions that will provide the disabled individuals they wish to prevent from being aborted or their families with the tools necessary to ensure their well-being or the social support necessary for them to flourish in their respective communities”).

294. As Deckha poignantly described it, although we may aspire to value all people equally, people may still select against disability “because they do not want to or cannot assume the extra caregiving and financial responsibilities or concerns that they forecast will be involved, and the pressures they anticipate these responsibilities will place on their existing relationships.” See Deckha, *supra* note 21, at 28. She described pregnant people confronting a prenatal diagnosis of disability as having been placed in a “fraught . . . choice matrix.” *Id.* She suggested that it is reasonable to conclude that “we do not want our decisions about ability selection deemed criminal or immoral because they are complicated ones to make in a less than egalitarian social order . . .” *Id.* at 29.

295. Everything that we know about Justice Barrett suggests that she is hostile to abortion rights. At the very least, we have no evidence that Justice Barrett is in any way supportive of abortion rights. See Letter from Amy Coney Barrett to Sen. Lindsey Graham, Chairman, Comm. on the Judiciary, and Sen. Dianne Feinstein, Ranking Member, Comm. on the Judiciary (Oct. 9, 2020),

Planned Parenthood v. Casey affirmed *Roe v. Wade*'s holding that the Constitution protects the right to terminate a pregnancy before fetal viability, but it replaced *Roe*'s trimester framework with a new test for evaluating the constitutionality of abortion regulations—the undue burden standard.²⁹⁶ The standard allows states to regulate abortion to promote fetal life and protect pregnant people's health throughout the entirety of pregnancy—including prior to fetal viability.²⁹⁷ If a regulation places a “substantial obstacle” in a pregnant person's path to an abortion, however, the regulation poses an undue burden on the abortion right and, consequently, is unconstitutional.²⁹⁸ *Casey* explained that to avoid being an undue burden, abortion regulations must be “calculated to inform the woman's free choice, not hinder it.”²⁹⁹ Accordingly, *Casey* upheld laws that require that pregnant people receive certain information (about the fetus's moral status, or the availability of state benefits or adoption services) prior to the abortion procedure, or that impose waiting periods that purport to ensure that a pregnant person has time to contemplate information received.³⁰⁰ Although these regulations make abortion more inaccessible for the most vulnerable people—because they increase the financial (and, perhaps, emotional) costs of the procedure—they do not impose an undue burden under *Casey* because, according to the Court, they ensure that the decision to terminate a pregnancy is fully informed.³⁰¹

In *Whole Woman's Health v. Hellerstedt*, the Court added some gloss to the undue burden standard.³⁰² There, the Court clarified that the standard requires reviewing courts to weigh the costs and the benefits of a regulation.³⁰³ The Court stated that a regulation does *not* pose an undue burden if the benefits that a

<https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney%20Barrett%20Senate%20Questionaire%20Supplement.pdf> [<https://perma.cc/X5DF-KD6R>] (a letter, which Barrett signed as a law professor at the University of Notre Dame, that blames *Roe* for the “over 55 million unborn children [who] have been killed by abortions,” laments the Court's “infamous” decision in *Roe*, and “renews [the] call for the unborn to be protected in law”); *Comm'r of Ind. State Dep't of Health v. Planned Parenthood of Ind. & Ky., Inc.*, 917 F.3d 532 (7th Cir. 2018) (Easterbrook, J. dissenting) (dissenting from the Seventh Circuit's decision not to rehear *en banc* a challenge to Indiana's reasons-based abortion ban, joined by then-Judge Barrett).

296. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion). Interestingly, while many provisions of the Pennsylvania abortion law were challenged in *Casey*, litigators chose not to challenge its sex-selective abortion ban. See Brief for Respondents at 4, *Casey*, 505 U.S. 833 (Nos. 91–744, 91–902), 1992 WL 12006423.

297. *Casey*, 505 U.S. at 878 (“To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.”).

298. *Id.* at 846.

299. *Id.* at 877.

300. *Id.* at 872, 885–86.

301. *Id.* at 872 (stating that states may “tak[e] steps to ensure that [a pregnant person's] choice is thoughtful and informed”).

302. 136 S. Ct. 2292 (2016).

303. *Id.* at 2309 (“The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”).

regulation produces (for example, it makes the abortion procedure safer) outweigh the burdens (for example, it reduces the number of facilities that provide abortion services, making the procedure more difficult to access).³⁰⁴ Regulations that impose significant burdens without generating countervailing benefits are unconstitutional.

Disability-selective abortion bans are unconstitutional under the Court's existing abortion jurisprudence.³⁰⁵ As pre-viability abortion bans, they fly in the face of *Casey*'s directive that regulations must be "calculated to inform the woman's free choice, not hinder it."³⁰⁶ Indeed, *Casey* explicitly held that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."³⁰⁷ But, that is precisely what pre-viability disability-selective abortion bans do: they prohibit the pregnant person from making the ultimate decision to terminate their pregnancy before viability. A regulation requiring that a person carrying a fetus with an impairment receive information about parenting a child with a disability before an abortion would be on more solid constitutional ground.³⁰⁸ A regulation that, like most states' disability-selective abortion bans, *completely* prevents pre-viability abortions based on fetal impairment would be more clearly *unconstitutional*. Most lower and appellate courts that have reviewed these bans have adopted this line of reasoning.³⁰⁹

304. *Id.* at 2310. *June Medical Services v. Russo* has called into question whether the cost-benefit rendering of the undue burden standard is proper. 140 S. Ct. 2103 (2020) (five Justices rejected the cost-benefit standard, one in concurrence and four in dissents).

305. See Joanna L. Grossman & Lawrence M. Friedman, *Junk Science, Junk Law: Eugenics and the Struggle Over Abortion Rights*, VERDICT (June 25, 2019), <https://verdict.justia.com/2019/06/25/junk-science-junk-law-eugenics-and-the-struggle-over-abortion-rights> [<https://perma.cc/LAW5-Z9EK>] ("There is no question that under existing law, [Indiana's reasons-based abortion ban] is unconstitutional . . . If the Court granted review, it would have to either admit that or overrule some of its prior decisions."); Spindelman, *supra* note 234, at 30, 40 (arguing that Ohio's disability-selective abortion ban "amounts to a previability abortion ban in flat contradiction of *Planned Parenthood v. Casey*'s understanding of the Fourteenth Amendment" and that if the Court upholds such a ban, "the consistent structure of the right to abortion since *Roe* and since *Casey* . . . ceases to be what it was"); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r Ind. State Dep't of Health*, 265 F. Supp. 3d 859, 867 (S.D. Ind. 2017) (arguing that to uphold Indiana's reasons-based abortion ban would require the court "to recognize an exception where none have previously been recognized"), *aff'd sub nom.* *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300 (7th Cir. 2018), *reh'g en banc granted, vacated in part*, 727 F. App'x 208 (7th Cir. 2018) (mem.), *vacated*, 917 F.3d 532 (7th Cir. 2018), *cert. granted in part, rev'd in part sub nom.* *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (per curiam).

306. *Casey*, 505 U.S. at 877.

307. See *id.* at 879.

308. See Donley, *supra* note 236, at 323 (arguing that "'informed-consent' provisions that require women to be educated about the productive life that a disabled person could lead, mandated counseling with parents of disabled children, or extensive waiting periods before obtaining the abortion[] would all likely be found constitutional given the current state of the law").

309. See, e.g., *Planned Parenthood of Ind. & Ky., Inc.*, 265 F. Supp. 3d at 866 (holding that Indiana's reasons-based abortion ban is "clearly" unconstitutional because it "prevent[s] women from obtaining abortions before fetal viability" and stating that the "woman's right to choose to terminate a pregnancy pre-viability is categorical: 'a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability'"); *Planned Parenthood of Ind. & Ky., Inc.*, 888

Nevertheless, the bans' proponents argue that *Casey* does not foreclose these regulations. They say that the question of whether states can regulate reasons-based abortion has never been before the Court.³¹⁰ Accordingly, any language in *Casey* that suggests these bans' unconstitutionality is inapt. Defenders of these bans argue that the abortion right that *Casey* articulated—and the undue burden standard that it established to test the constitutionality of regulations that affect the abortion right—applies to people who wish to carry *no* pregnancy to term.³¹¹ Essentially, *Casey* protects pregnant people's ability to say "I do not want to have *any* child." Defenders of reasons-based abortion bans say, however, that *Casey* does not protect pregnant people's ability to say "While I want to have a child, I do not want to have *this* particular child."³¹² This argument has been persuasive to only a few judges, most of whom were writing in dissent.³¹³ Notably, Justice Thomas, writing in concurrence in *Box v. Planned Parenthood*, made clear that he believed that this argument possessed a certain soundness.³¹⁴

F.3d at 306 (holding that Indiana's reasons-based abortion ban "clearly violate[s] . . . well-established Supreme Court precedent" and that the ban is "far greater than a substantial obstacle; [it is an] absolute prohibition[] on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State"), *reh'g en banc granted, vacated in part*, 727 F. App'x 208 (7th Cir. 2018) (mem.), *vacated*, 917 F.3d 532 (7th Cir. 2018), *cert. granted in part, rev'd in part sub nom.* *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (per curiam); *Planned Parenthood of Ind. & Ky., Inc.*, 917 F.3d at 533 (denying *en banc* review) (explaining that in order to uphold the state's reasons-based abortion ban, the Supreme Court would need to get involved, as "only the U.S. Supreme Court has the power to change the rule of [*Casey*], which holds unequivocally that 'a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability'"); *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746, 749 (S.D. Ohio 2018) (striking down Ohio's disability-selective abortion ban because "federal law is crystal clear: 'a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability'"), *aff'd*, 940 F.3d 318 (6th Cir. 2019), *reh'g en banc granted, vacated*, 944 F.3d 630 (6th Cir. 2019), *rev'd sub nom.* *Preterm-Cleveland v. McCloud*, 994 F.3d 512 (6th Cir. 2021).

310. See *Box*, 139 S. Ct. at 1792 (Thomas, J., concurring) ("[*Casey*] addressed the constitutionality of only 'five provisions of the Pennsylvania Abortion Control Act of 1982' that were said to burden the supposed constitutional right to an abortion. None of those provisions prohibited abortions based solely on race, sex, or disability.").

It is true that the Court has never considered a regulation that policed people's reasons for arriving at the decision to terminate a pregnancy. Most abortion regulations that have come before the Court have involved "the gestational age of the fetus, the information women must receive in order to receive an abortion, the types of facilities that are permitted to provide abortions, or the type of procedure performed." Donley, *supra* note 236, at 293 n.1. Spousal and parental notification/consent laws represent an additional species of law that the Court has considered. See *Casey*, 505 U.S. at 893, 895.

311. See *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 306 (describing the state's defense of its reasons-based abortion ban, which relied on the theory that *Casey* protects a person's decision to decide that she "does not want to bear a child at all").

312. See *Preterm-Cleveland*, 294 F. Supp. 3d at 755 (describing the state's argument that "women only have the right to choose whether to have a child, not the right to decide whether to have a particular child"); *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 306 (describing the state's argument that *Casey* does not protect the "right to terminate the pregnancy if [a person] determines *after* becoming pregnant that she does not want a particular child").

313. *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 310 (Manion, J., concurring in part and dissenting in part); *Planned Parenthood of Ind. & Ky., Inc.*, 917 F.3d at 536–37 (Easterbrook, J., dissenting).

314. See *Box*, 139 S. Ct. at 1787, 1792 (Thomas, J., concurring).

In *Box*, the Court decided against ruling on the constitutionality of Indiana’s reasons-based abortion ban—determining that since the Seventh Circuit was the only circuit to have considered the question, it would follow its usual practice and wait for a circuit split before speaking on the issue.³¹⁵ Notably, the Sixth Circuit upheld Ohio’s disability-selective abortion ban in 2021³¹⁶—setting the stage for the Court to take up the question and determine the scope of the abortion right.

The Court may sign off on the constitutionality of disability-selective abortion bans in a more indirect—but equally devastating—manner. In *Dobbs v. Jackson Women’s Health Organization*, petitioners have asked the Court to overrule *Roe v. Wade* altogether.³¹⁷ If the Court grants the petitioners’ request, then disability-selective abortion bans, and all other abortion bans, will pose no constitutional problem.

D. Disability-Selective Abortion Bans as “Anti-Eugenic”

For years, critics of disability-selective abortion have described the practice as a “eugenic” tool that permits prospective parents to prevent the birth of “undesirable” children.³¹⁸ Proponents of disability-selective abortion bans, accordingly, describe legislation that prohibits this practice as “anti-eugenic.”³¹⁹ This discourse was rife in the litigation surrounding Indiana’s reasons-based abortion ban, with judges sympathetic to the ban vilifying reasons-based abortion

315. See *id.* at 1782 (stating that the Court would not express a view on the constitutionality of reasons-based abortion bans because it was choosing to follow its “ordinary practice of denying petitions insofar as they raise[d] legal issues that have not been considered by additional Courts of Appeals”).

The Court in *Box* did reverse the Seventh Circuit’s decision to strike down the law’s requirement that fetal tissue be disposed of in a manner that is more “respectful” of fetal life. The law’s challengers had argued, strategically, that the fetal disposition regulation did not implicate the abortion right and, as such, should be reviewed using only rational basis review. The Seventh Circuit held that the law did not pass even this low level of review. The Supreme Court disagreed and upheld the regulation under rational basis review. *Id.* at 1782. The Court was clear that its holding that the regulation survived rational basis review said nothing about the question of the regulation’s constitutionality under the undue burden standard. See *id.* Of note, lower courts reviewing similar regulations have found that they fail under this test. See *Whole Woman’s Health v. Smith*, 338 F. Supp. 3d 606, 643 (W.D. Tex. 2018) (enjoining a Texas fetal disposition regulation under the undue burden standard after finding that the law will increase the cost of abortion care and impose other obstacles that will make many providers unable to provide abortion services).

316. See *Preterm-Cleveland v. McCloud*, 994 F.3d 512 (6th Cir. 2021) (en banc).

317. Brief for Petitioners at 1–5, *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021) (mem.) (No. 19-1392), 2021 WL 3145936, *cert. granted*.

318. See, e.g., Muller, *supra* note 30, at 487 (describing a critique of disability-selective abortion that proposes that it is “the new eugenics” and is like the “old eugenics” inasmuch as it “obscures common humanity and dignity in its pursuit of an elusive and oppressive perfection”); Kanter, *supra* note 23, at 438–39 (writing that “Disability Studies scholars have begun to pay attention to the eugenics movement not only because of its place in history, but because of its modern day equivalents, which . . . [include the] abortion of fetuses with abnormalities”).

319. See, e.g., *Planned Parenthood of Ind. Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (denying *en banc* review) (Easterbrook, J., dissenting), *and cert. granted in part, rev’d in part sub nom. Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (per curiam).

as a form of modern-day “eugenics.”³²⁰ For example, Judge Easterbrook, dissenting from the Seventh Circuit’s denial of a rehearing *en banc*, agreed with the state’s argument that the constitutionality of reasons-based abortion bans is undecided, writing that “*Casey* did not consider the validity of an anti-eugenics law.”³²¹ Of note, Justice Barrett, then a judge on the Seventh Circuit, joined Easterbrook’s dissent.³²²

The claim that terminating a pregnancy because the child will be born with a disability is “eugenic” got its loudest, most thorough exposition in Justice Thomas’s concurrence in *Box v. Planned Parenthood*, in which the Court decided not to take on the question of whether Indiana’s reasons-based abortion ban was constitutional.³²³ Indeed, Thomas’s concurring opinion repeated the word “eugenic” more than one hundred times—a fact made more striking when one considers that the parties had not even briefed the issue of eugenics.³²⁴

In the opinion, Thomas tied the eugenics movement in the United States to the movement that sought to legalize birth control—asserting that many eugenicists were also avid proponents of birth control.³²⁵ He specifically

320. See *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 888 F.3d 300, 311 (7th Cir. 2018) (Ho, J., concurring) (arguing that Indiana’s reasons-based abortion ban is unconstitutional because “[s]urely, Indiana has a compelling interest in attempting to prevent this type of private eugenics”), *reh’g en banc granted, vacated in part*, 727 F. App’x 208 (7th Cir. 2018) (mem.), *vacated*, 917 F.3d 532 (7th Cir. 2018), *cert. granted in part, rev’d in part sub nom.* *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (per curiam); see also *Preterm-Cleveland*, 994 F.3d at 538 (Griffin, J., concurring) (writing separately “to emphasize Ohio’s compelling state interest in prohibiting its physicians from knowingly engaging in the practice of eugenics”).

321. *Planned Parenthood of Ind. & Ky.*, 917 F.3d at 536 (Easterbrook, J., dissenting). Easterbrook also referred to the provision of the Indiana law that prohibits abortion on the basis of race, sex, and disability as “the eugenics statute” and argued that “[u]sing abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered.” *Id.* Easterbrook’s dissent argued that *Casey*’s undue burden standard may be relevant only when reviewing courts endeavor to balance the pregnant person’s interest in terminating a pregnancy against the state’s interest in promoting fetal life and the health of the pregnant person. See *id.* The dissent argued that because the Court in *Casey* did not consider the state’s interest in preventing the use of abortion “to promote eugenic goals,” *Casey* was inapplicable to laws, like the one at issue, that pursued antidiscrimination goals. See *id.* Thus, *Casey*’s blanket prohibition of pre-viability abortion bans may be inapplicable. See *id.*

322. See *id.*

323. See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (Thomas, J., concurring).

324. See *Lithwick*, *supra* note 71 (noting that the history of eugenics was not briefed in the litigation over Indiana’s reasons-based abortion ban).

325. See *Box*, 139 S. Ct. at 1788 (Thomas, J., concurring) (quoting Margaret Sanger when she argued that “the campaign for Birth Control [was] not merely of eugenic value, but [was] practically identical in ideal with the final aims of Eugenics”).

Historian Adam Cohen, whose history of the American eugenics movement served as a source for many of Justice Thomas’s claims in his *Box* concurrence, helpfully described Thomas’s argumentation in the opinion as one of “guilt-by-association.” Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, ATLANTIC (May 29, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455/> [<https://perma.cc/UT4H-CR3G>]. According to Thomas, because the foundation for abortion rights comes from birth control rights, and because birth control proponents were sometimes sympathetic to eugenics, then abortion rights are inextricable from eugenics. See *id.*

identified Margaret Sanger, the well-known birth control activist, as a sympathizer to, if not a full-fledged member of, the American eugenics movement.³²⁶ He argued that because the eugenics movement was racist, many eugenicists-cum-birth control proponents operationalized their racism by foisting birth control on unsuspecting black people.³²⁷ Thomas looked to Sanger's work to establish birth control clinics in black communities as damning evidence of the anti-blackness of the birth control movement.³²⁸

After endeavoring to establish that birth control has “eugenic potential” insofar as some turn-of-the-century birth control supporters wanted to use it to prevent “undesirable” people from reproducing, Thomas argued that abortion has even *more* eugenic potential: abortion could be used to prevent existing, identified “undesirable” fetuses from being born.³²⁹ Thomas argued that contemporary abortion continues to reflect the racism harbored by eugenicists who, although never advocating for the availability of abortion,³³⁰ advocated for the availability of birth control—a cousin of sorts to abortion. Thomas supported the claim that modern abortion furthers the racist eugenic goal of preventing nonwhite reproduction with statistics documenting the disproportionate rate at which black people currently undergo abortions.³³¹ Moreover, Thomas relied on statistics documenting that people frequently terminate pregnancies after a

326. See *Box*, 139 S. Ct. at 1787 (Thomas, J., concurring) (arguing that Sanger proposed that “birth control advocates and eugenicists were ‘seeking a single end’—‘to assist the race toward the elimination of the unfit’”). For a more complete history of Margaret Sanger and her relationship with the eugenics movement, see Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2038–40 (2020). Murray argued that Justice Thomas's endeavor to excavate the racial salience of abortion is part of a strategy to undermine abortion rights altogether. See *id.* at 2029 (“[R]ather than surfacing race as a means of promoting greater reproductive autonomy and access in service of *Roe v. Wade* . . . the *Box* concurrence integrates racial injustice into the history of abortion for the purpose of destabilizing abortion rights.”).

327. See *Box*, 139 S. Ct. at 1790 (Thomas, J., concurring) (describing family planning organizations' efforts to make contraceptives available to black communities and noting that some black people were wary of the possibility that contraceptives represented a means to inflict racial “genocide”). For a history of the claim that abortion is a tool of black genocide, see Murray, *supra* note 326, at 2041–45 (discussing arguments made by proponents of the claim as well as those who opposed the claim).

328. See *Box*, 139 S. Ct. at 1788 (Thomas, J., concurring) (referencing Sanger's work to make birth control available in impoverished black communities).

329. See *id.* at 1784 (“Technological advances have only heightened the eugenic potential for abortion, as abortion can now be used to eliminate children with unwanted characteristics, such as a particular sex or disability.”); *id.* at 1787 (noting that “arguments about the eugenic potential for birth control apply with even greater force to abortion, which can be used to target specific children with unwanted characteristics”).

330. Notably, Thomas connected eugenics to abortion more directly, arguing that some eugenicists argued that abortion should be legal. See *id.* at 1784, 1789 (Thomas, J., concurring) (stating that “[m]any eugenicists . . . supported legalizing abortion” and that “some eugenicists believed that abortion should be legal for the very *purpose* of promoting eugenics”). Importantly, a chorus of historians have denied that eugenicists supported legalizing abortion. See discussion *infra* notes 335–339 and accompanying text.

331. See *Box*, 139 S. Ct. at 1791 (Thomas, J., concurring) (noting that black women undergo abortion at three and a half times the frequency at which white women undergo abortion and stating that “there are areas of New York City in which black children are more likely to be aborted than they are to be born alive—and are up to eight times more likely to be aborted than white children in the same area”).

diagnosis of fetal impairment to support the claim that modern abortion furthers the ableist eugenic goal of preventing the birth of “defective” children.³³² Thomas’s analysis concluded with the declaration that *Casey* said nothing about the constitutionality of laws that blunted abortion’s “eugenic potential.”³³³

Critiques of Thomas’s concurrence are plentiful, with most historians who have weighed in denouncing his opinion as historically inaccurate.³³⁴ They emphasize that the eugenics movement and the movement for legal birth control might have been contemporaneous, but they were not one and the same.³³⁵ Moreover, while some eugenicists might have thought that legalizing contraceptives would function to prevent the reproduction of undesirable people, other eugenicists were cagier about contraception—fearful that *desirable* people might use it and diminish the rates at which they perpetuate their coveted genes into the following generation.³³⁶ Indeed, eugenicists were wary about birth control because they believed that the easy availability of contraceptives would undermine the pronatalist efforts that they directed towards “well-born” white people. However, the point that most historians underscore, time and again, is that *the most influential eugenicists and eugenics organizations did not support abortion.*³³⁷ Abortion was criminalized during the heyday of the eugenics movement, and the eugenics movement did not advocate for its legalization. In fact, abortion repulsed many eugenicists. Indeed, Margaret Sanger, who Thomas accused of being a eugenicist, called abortion “sordid,” “abnormal,” a “disgrace,” and a “horror[.]”³³⁸

332. See *id.* 1790–91 (noting the high rates of abortion following a prenatal diagnosis of Down syndrome in many countries).

333. See *id.* at 1792 (“Whatever else might be said about *Casey*, it did not decide whether the Constitution requires States to allow eugenic abortions.”).

334. See Eli Rosenberg, *Clarence Thomas Tried to Link Abortion to Eugenics. Seven Historians Told The Post He’s Wrong.*, WASH. POST (May 30, 2019), <https://www.washingtonpost.com/history/2019/05/31/clarence-thomas-tried-link-abortion-eugenics-seven-historians-told-post-hes-wrong/> [https://perma.cc/8PR9-A4DA] (noting that seven historians who were interviewed for a story about Thomas’s *Box* concurrence opined that he got the history of the eugenics movement wrong).

335. See Cohen, *supra* note 325 (noting that the birth control movement developed *alongside* the eugenics movement at the turn of the twentieth century).

336. See, e.g., Alexandra Minna Stern, *Clarence Thomas’ Linking Abortion to Eugenics Is as Inaccurate as It Is Dangerous*, NEWSWEEK (May 31, 2019), <https://www.newsweek.com/clarence-thomas-abortion-eugenics-dangerous-opinion-1440717> [https://perma.cc/N8QL-274H] (noting that many eugenicists “were wary of birth control because they worried it would impede breeding among white middle-class women”).

337. See *id.* (stating that “there is no evidence that any prominent eugenicists actively supported abortion”); Cohen, *supra* note 325 (“The most prominent American eugenicists did not support abortion.”); Rosenberg, *supra* note 334 (“[L]eading eugenicists and organizations of the day were largely opposed to abortion and birth control . . .”).

338. *Box*, 139 S. Ct. at 1789 (Thomas, J., concurring). To his credit, Thomas did admit that Sanger opposed abortion. See *id.* at 1784, 1788–89 (observing that Sanger “recognized a moral difference between ‘contraceptives’ and other, more ‘extreme’ ways for ‘women to limit their families,’ such as ‘the horrors of abortion and infanticide’”). Yet, the admission did not stop him from proposing that Sanger’s espousal of eugenic ideals, when coupled with her support of abortion, comfortably aligned eugenics and eugenicists with abortion.

Other critiques of Thomas's opinion emphasize that Thomas omitted the forcible nature of eugenics.³³⁹ These critiques underscore that eugenics programs used *coercive* means to prevent the reproduction of people whom it considered undesirable.³⁴⁰ In stark contrast, no one *forces* an abortion on the prospective parent who decides to terminate a pregnancy because of a diagnosis of a fetal impairment.³⁴¹ Similarly, no one forces the black people who undergo abortions at disproportionate rates to terminate their pregnancies. Rather, black people choose abortion at disproportionate rates because poverty, violence, inadequate sex education, and inaccessible healthcare have constrained their ability to avoid unwanted pregnancies.³⁴² As a result, for marginalized black people, abortion figures not as a weapon in the eugenicist's arsenal, but rather as a tool that black people use to help them navigate the structural constraints on their reproductive lives, and their lives generally.³⁴³

Scholars have also argued that Thomas's likening of contemporary practices of disability-selective abortion to eugenics is erroneous because people who terminate a pregnancy following a diagnosis of fetal impairment do not make that reproductive decision because of anxiety about the country's gene pool—the concern of the eugenics movement in the early twentieth century.³⁴⁴ Rather, people who terminate a pregnancy after discovering that the child will be born with a disability do so because they have decided that taking that path is the right choice for them.³⁴⁵ The latter decision is profoundly *individualist* in the

339. See Rosenberg, *supra* note 334.

340. See Cohen, *supra* note 325 (noting that in “eugenic sterilization, the state decides who may not reproduce”).

341. See Petersen, *Reproductive Autonomy*, *supra* note 238, at 609–10 (arguing that the term “eugenics” “should be reserved for restrictions on reproduction imposed upon individuals by the state or some other powerful institution”); Grossman & Friedman, *supra* note 305 (“[Women forced to submit to eugenic sterilization] had no choice. But the women who go to Planned Parenthood have made a personal (and sometimes difficult) decision to terminate a pregnancy voluntarily. No government is forcing them.”).

342. See Brief of Amici Curiae Reproductive Justice Scholars Supporting Petitioners–Cross-Respondents at 13, *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460), 2019 WL 6609232.

343. See *id.* at 17.

344. See Cohen, *supra* note 325 (noting that the state, in pursuit of eugenic goals, “acts with the goal of ‘improving’ the population” while the woman who chooses abortion “decides not to reproduce[] for personal reasons related to a specific pregnancy”); Lithwick, *supra* note 71 (denying that people who engage in disability-selective abortion do so because of concern about the country's gene pool).

345. See Petersen, *Reproductive Autonomy*, *supra* note 238, at 610 (“When an individual woman decides to terminate her own pregnancy, she weighs intensely personal factors and does not base her decision on some grand plan for improving the quality of the population.”); Dov Fox, *Abortion, Eugenics and Personhood in the Supreme Court*, FERTILITY & STERILITY (Jan. 25, 2020), <https://www.fertsterdialog.com/users/16110-fertility-and-sterility/posts/58704-fox-consider-this> [<https://perma.cc/RQP4-5ZTM>] (“When hopeful parents . . . opt to end an otherwise-wanted pregnancy, they aren’t trying to weed out people with disabilities from the next generation, or to propagate a superior race. Most are making heart-rending decisions about whether their family unit has the wherewithal and fortitude that they expect they’d need to care for a child with potentially serious medical needs.”); Cohen, *supra* note 325 (“A woman in Indiana who has an abortion because the child will be born with a severe disability is not acting eugenically—she is not trying to uplift the human race. She is simply deciding

sense that it reflects what an individual believes to be right for themselves and their family. Meanwhile, the reproductive programs of eugenicists were wholly *collectivist* in the sense that eugenicists pursued them because they believed them to be good for the nation (and the world).³⁴⁶

In short, Thomas's likening of the contemporary practice of abortion to the eugenics movement of the early twentieth century fully, and opportunistically, misread history.³⁴⁷ Moreover, we ought to be wary of the selective compassion that Thomas demonstrates in his thought. Regarding disability, Thomas's *Box* concurrence evidenced a deep concern about *fetuses* with disabilities—fetuses that may never be born on account of the easy availability of abortion. However, Thomas has evidenced little concern about *people* with disabilities. Indeed, he has joined a number of opinions that argued in favor of narrowing the reach of the Americans with Disabilities Act, thus reducing the ability of the landmark legislation to reorganize society such that people with disabilities can meaningfully participate in it.³⁴⁸ Additionally, we would not be unreasonable if we suppose that his well-documented political conservatism would lead him to oppose the “big government” efforts—like expanding state-sponsored

that she does not want to give birth to a child who, for example, would die in infancy after a brief life of extreme pain.”).

346. See discussion *supra* Part I.A.

347. Of course, this is not the first time that Thomas opportunistically misread history. Perhaps the most egregious misreading of history that Thomas conducted is when he quoted Frederick Douglass in his dissent in *Grutter v. Bollinger* and suggested that Douglass believed that third parties, like the state, ought not to help black people navigate a society in which chattel slavery had recently ended. 539 U.S. 306, 349, 349–350 (2003) (Thomas, J., dissenting) (excerpting a speech by Douglass as a prelude to his argument that the Constitution prohibits race consciousness in college admissions). He quoted Douglass as saying:

The American people have always been anxious to know what they shall do with us . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . . [Y]our interference is doing him positive injury.

Id. The full quote from Douglass reveals that Douglass was asking white people not to assault and murder black people, nor interfere with their civil and political rights. He was not at all making an argument that the government ought not to help people recently freed from enslavement.

And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! If you see him on his way to school, let him alone, — don't disturb him! If you see him going to the dinner-table at a hotel, let him go! If you see him going to the ballot-box, let him alone, — don't disturb him! (Applause.) If you see him going into a work-shop, just let him alone, — your interference is doing him a positive injury.

Frederick Douglass, *What the Black Man Wants*, in THE EQUALITY OF ALL MEN BEFORE THE LAW 34, 39 (Bos., Press of Geo. C. Rand & Avery 1865).

348. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (joining the majority opinion, which held that the Eleventh Amendment bars suits by state employees to recover money damages for the state's failure to comply with the Americans with Disabilities Act); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 411 (2002) (Scalia, J., dissenting) (joining Scalia's dissenting opinion, which argued that the Americans with Disabilities Act does not mandate any exceptions to an employer's seniority system).

healthcare,³⁴⁹ regulating the market for private health insurance and requiring insurance policies to cover the attendant services that people with disabilities need to work outside of the home, increasing the income limits of social safety net programs, and signing international treaties that obligate nations to protect people with disabilities—that disability rights activists insist are necessary to enable people with disabilities to live fulfilling lives.

Thomas also exhibits selective compassion when it comes to race. Thomas's *Box* concurrence evidenced a deep concern about the *fetuses* that black people gestate—fetuses that may never be born on account of the disproportionate rates at which black people turn to abortion care. But Thomas never evidenced a concern for the *black people who gestate those fetuses*. Had he contemplated these folks, he would have seen that activists like Margaret Sanger did not foist contraception upon them; they did not dupe black people into using contraception as part of a diabolical genocidal plot. Instead, black people with the capacity for pregnancy desperately wanted contraception so that they could exert some control over whether they would become pregnant.³⁵⁰

Further, when it comes to abortion in the modern era, Thomas explained black people's disproportionate reliance on abortion care in terms of *individual racists* who are targeting black pregnant people for abortion. He ignored the fact that *structural racism*—in the form of laws and policies that result in black people's coming to bear disproportionate burdens of poverty, as well as laws and policies that deny impoverished people access to basic healthcare, including contraception—provides a better explanation of black peoples' disproportionate reliance on abortion care.³⁵¹ Again, we are not unreasonable if we suppose that Thomas's well-documented political conservatism, as well as his commitment to “muscular self-help” as the pathway to racial justice,³⁵² would lead him to oppose efforts to dismantle structural racism.³⁵³

While this Part has endeavored to show that disability-selective abortions are not “eugenic,” this Article has argued that disability-selective abortion *bans*—when operating in the context of environmental injustices—are *dysgenic*. Indeed, while the eugenic state no longer exists, the dysgenic state is alive and well. The final Part concludes the analysis with a focus on the racial and class

349. Of course, Justice Thomas voted to strike down the largest expansion of state-sponsored healthcare in the modern era—the Affordable Care Act. See *Nat'l Fed'n Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

350. See, e.g., Murray, *supra* note 326, at 2040 (“[S]cholars have noted that increased access to birth control was not simply thrust upon the Black community in an unwelcome attempt to reduce the Black birthrate . . .”).

351. See Khiara M. Bridges, *Beyond Torts: Reproductive Wrongs and the State*, 121 COLUM. L. REV. 1017, 1049–51 (2021).

352. See Kendall Thomas, *Reading Clarence Thomas*, 18 NAT'L BLACK L.J. 224, 236 (2005) (stating that Justice Thomas embraces a “vision of muscular self-help as the royal road to racial uplift in the post-civil rights era”).

353. Indeed, Thomas has expressed skepticism about the very existence of structural racism. See *Grutter v. Bollinger*, 539 U.S. 306, 377 (2003) (Thomas, J., dissenting) (referring to “institutional racism” as a belief that “conspiracy theorists” hold).

politics of the dysgenic state. It shows that the dysgenic state, like the eugenic state, similarly functions to produce the white population as pathology-free, with pathology being found mostly among nonwhite people and the poor. The dysgenic state, however, achieves this modernized version of white racial purity through a combination of environmental neglect and reproductive coercion that functions to generate and concentrate pathology among the nonwhite and the poor. The Part then shows that the racial and class politics of the dysgenic state are such that it problematically reinforces the myth of biological race—a myth that proposes that the biology of people of color explains why they are sicker and die earlier than their white counterparts.

V.

THE RACIAL AND CLASS POLITICS OF THE DYSGENIC STATE

A. Dysgenics and the Production of Eugenic Results

While the dysgenic state appears to be the inverse of the eugenic state, it actually functions to produce results that are virtually indistinguishable from the goals of the eugenic state. More precisely, while the eugenic state worked to produce a citizenry that was free of impairment, and while the dysgenic state produces an impaired citizenry, the societies that result from the two states' operations are essentially the same.

As discussed above, the assumptions that undergirded the eugenics movement in the United States at the turn of the century were racist, classist, xenophobic, and ableist.³⁵⁴ These assumptions coalesced in the eugenic affirmation that non-poor, native-born, non-disabled white people were collectively in possession of the genes that would save the country, and the world, from falling into disrepair.³⁵⁵ The future that eugenics sought to realize—through the action of a competent state that incentivized the reproduction of the desirable and forcibly constrained the reproduction of the undesirable—was one in which wealthier white people predominated. The genetic heritage of this group destined them to be free of the pathologies of poverty, nonwhiteness, and, importantly, physical and mental impairments.³⁵⁶ Differently stated, in the eugenic imaginary, wealthier white people would be free of all pathology—including the pathology of health impairment—subsequent to the application of precise reproductive controls. If impairment was to be found in the future that the eugenics movement desperately endeavored to engineer, it would be located in the smaller populations of nonwhite people and poor people who remained, resolutely, within the nation's borders.

It bears repeating: through a number of different mechanisms, *including reproductive control*, the eugenics movement sought to facilitate the realization

354. See *supra* Part I.A.

355. See *supra* Part I.A.

356. See *supra* Part I.A.

of a racial destiny in which wealthier white people were inevitably impairment-free while impairment would only be found in remaining populations of nonwhite people and poor people.

Fascinatingly, the racial and class politics of the present dysgenic state produce a topography of race and disability that is similar to the topography found in the society that the eugenics movement pursued. That is, the dysgenic state, like the eugenic state, results in a society in which impairments are concentrated among those who are nonwhite or poor, while wealthier white people remain comparatively free of impairments. How exactly does the dysgenic state produce this situation? As explained above, the empirically documented fact of environmental injustice means that low-income people and people of color disproportionately bear the burdens of environmental toxins, many of which produce impairments in fetuses.³⁵⁷ This fact, alone, would propel our nation towards a future in which disability would be found more frequently among the nonwhite and the poor and less frequently among the white and affluent. However, the application of precise reproductive controls, this time in the form of the disability-selective abortion ban, operates to ensure the concentration of impairment among the disadvantaged. This is simply because wealth and whiteness allow those in possession of them to circumvent reproductive controls—especially abortion regulations.

This was certainly true in the era before *Roe v. Wade*, when wealthier white women could evade the constraints of criminal abortion laws by acquiring the abortion services that they desired and needed in private doctor's offices. As historian David Garrow noted, "there were hundreds upon hundreds of doctors in this country who secretly performed abortions for women whom they knew and who could pay."³⁵⁸ Poor women could not avail themselves of these doctors' services, as they had neither the money to pay for the care nor the social connections to locate these doctors.³⁵⁹ Which is to say that before *Roe*, poor women could not get around criminal abortion laws. While their counterparts with class privilege (and, more often than not, race privilege) could dodge reproductive controls, poor women (who were often of color) were forced to either carry their pregnancies to term or to attempt to terminate their pregnancies under unsafe conditions.³⁶⁰

Very little has changed subsequent to *Roe*. While *Roe* is still good law and the Constitution, at least as a formal matter, still protects the right to an abortion,

357. See *supra* Part I.B. and II.A.

358. David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 834 (1999).

359. See *id.*

360. LESLIE REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND THE LAW IN THE UNITED STATES, 1867-1973 138 (1997) ("A study . . . in the 1930s found . . . [a]ccess to physician-induced abortions and reliance upon self-induced methods for abortion varied greatly by class and race. Most affluent white women went to physicians for [illegal] abortions, while poor women and black women self-induced them.").

states continue to exert reproductive control with regard to abortion. That is, states still endeavor to compel motherhood by preventing people from terminating their pregnancies. The way that they do this post-*Roe* is subtler, but nevertheless effective vis-à-vis marginalized people. Three particularly effective avenues of reproductive control are the Hyde Amendment, informed consent requirements (namely waiting periods), and targeted regulations of abortion providers.

First, the Hyde Amendment prohibits federal funds from being spent in the Medicaid program to cover the cost of abortion, except in cases of rape, incest, or when continuation of the pregnancy poses a threat to the life of the pregnant person.³⁶¹ The Hyde Amendment means that indigent people cannot rely on their health insurance for abortion care. The result is that the poorest, most vulnerable, Medicaid-dependent people who cannot afford to pay out-of-pocket for abortion care are forced to carry unwanted pregnancies to term.³⁶² In this way, the Hyde Amendment is a means for the state to make poor people's bodies do what it wants them to do. At the same time, wealthier women remain untouched by this form of reproductive control.

Second, informed consent regulations, particularly those that require pregnant people to wait a designated period of time before undergoing an abortion, similarly allow the state to make poor people's bodies do what it wants them to do.³⁶³ Waiting periods—which are typically anywhere between twenty-four and seventy-two hours³⁶⁴—increase the cost of abortion care because they can require pregnant people to make several trips to an abortion provider. This often means that a pregnant person will have to take more time off from work, pay more for childcare and transportation, or cover the cost of a hotel room in the city or town where the abortion provider is located.³⁶⁵ While more affluent people can absorb these costs, poorer people cannot. Consequently, poor people's bodies get subscribed into performing the labor that the state wants them to perform.

361. Pub. L. No. 103-112, 107 Stat. 1082 (1993).

362. See *Public Funding for Abortion*, ACLU, <https://www.aclu.org/other/public-funding-abortion> [<https://perma.cc/35CS-Z43P>] (“Studies have shown that from 18 to 35 percent of Medicaid-eligible women who want abortions, but who live in states that do not provide funding for abortion, have been forced to carry their pregnancies to term.”).

363. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887 (1992).

364. See Guttmacher Inst., *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Jan. 1, 2022), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> [<https://perma.cc/9MKN-YVE5>].

365. See RACHEL K. JONES, ELIZABETH WITWER & JENNA JERMAN, GUTTMACHER INST., *ABORTION INCIDENCE AND SERVICE AVAILABILITY IN THE UNITED STATES, 2017* 7 (2019), https://www.guttmacher.org/sites/default/files/report_pdf/abortion-incidence-service-availability-us-2017.pdf [<https://perma.cc/3ZA9-DB56>] (“In 2017, 89% of U.S. counties did not have a clinic facility that provided abortion care”); K.K. Rebecca Lai & Jugal K. Patel, *For Millions of American Women, Abortion Access Is Out of Reach*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/interactive/2019/05/31/us/abortion-clinics-map.html> [<https://perma.cc/9W9S-BG5D>] (“[M]ore than 11 million women in the United States live more than an hour’s drive from an abortion facility”).

Third, targeted regulations of abortion providers, or TRAP laws—which treat abortion care differently from other species of healthcare and single out abortion providers and abortion clinics for onerous requirements—have the effect (and likely the purpose) of shuttering abortion clinics.³⁶⁶ For example, Texas House Bill 2, which required abortions to be performed in ambulatory surgical centers and required physicians who perform abortion to have admitting privileges at a local hospital, would have closed three-quarters of the abortion clinics in Texas.³⁶⁷ Even after the Supreme Court struck down the law as inconsistent with *Roe* and *Casey*, many of the clinics remained shuttered, unable to absorb the shock of having to close for the short period of time during which the law was in effect before being enjoined.³⁶⁸ Inasmuch as TRAP laws close clinics, they make abortion inaccessible to poor people, who will be unable to travel increased distances to the clinics that remain open.³⁶⁹

We should have little doubt that things would be the same in the context of a disability-selective abortion ban. Wealthier people carrying a fetus with an impairment who live in a state with a disability-selective abortion ban will be able to travel to a state that has decided not to restrict abortion in this way.³⁷⁰ Or, they will be able to find a private doctor—perhaps a gynecologist or obstetrician with whom they have a longstanding relationship—to perform an abortion for them despite the legal restriction.³⁷¹ At the same time, low-income people carrying a fetus with an impairment will find the state’s disability-selective

366. Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman’s Health*, 126 YALE L.J.F. 149, 151 (2016).

367. See *id.* at 151–52 n.19.

368. See Ashley Lopez, *Three Years After Supreme Court Strikes Down Abortion Law, Half of Texas’ Clinics Still Closed*, KUT 90.5 (June 27, 2019), <https://www.kut.org/health/2019-06-27/three-years-after-supreme-court-strikes-down-abortion-law-half-of-texas-clinics-are-still-closed> [<https://perma.cc/N9LE-PKGQ>].

369. See Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, GUTTMACHER POL’Y REV., Winter 2014, at 9, 12–13 (“[W]ith clinics closing in many states, locating and getting to an abortion provider are becoming increasingly difficult. . . . Unquestionably, abortion restrictions fall hardest upon the poorest women . . .”).

370. The phenomenon of more privileged people traveling long distances to obtain the abortion care that they want is not at all new. In 1962, television personality Sherri Finkbine sought an abortion in her home state of Arizona after she discovered that a medication that she had taken contained thalidomide and her fetus was at an increased risk for developing impairments. *On This Day 1950-2005: 26 August 1962: Abortion Mother Returns Home*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/august/26/newsid_3039000/3039322.stm [<https://perma.cc/62BQ-JFWN>].

After the supreme court in Arizona denied her request for an abortion, which was otherwise criminalized in the state, Finkbine flew to Sweden and underwent a safe and legal abortion there. See *id.*

371. Oftentimes, low-income people, especially Medicaid-receiving people who get their care from public hospitals or clinics, do not have “their own” doctor; instead, they receive care from whomever is working in the hospital or clinic on the day of their appointment. See, e.g., KHIARA M. BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* 31–32 (2011) (explaining that in the obstetrics clinic of the public hospital studied, Medicaid recipients receive their prenatal care from a rotating cast of residents who work in the clinic, while private patients in the private hospital nearby typically see their doctors in the doctor’s private office).

abortion ban practically impossible to negotiate. With this group, the bans are much more likely to work as the legislatures intend: they will force low-income people to carry pregnancies to term.

Thus, the fact of environmental injustice means that wealthier people, who are disproportionately white, will encounter fewer fetal impairments caused by environmental toxins. Moreover, the way that class privilege has always operated with respect to abortion rights and access allows us to predict that when wealthier people find themselves pregnant with a health-impaired fetus, they will be able to circumvent the abortion regulation that would otherwise compel them to give birth to a health-impaired child. Simultaneously, the fact of environmental injustice means that low-income people, who are disproportionately nonwhite, will encounter many more fetal impairments that are caused by environmental toxins. And the way that class *unprivilege* has always operated with respect to abortion rights and access allows us to predict that disability-selective abortion bans will successfully compel these racially- and socioeconomically unprivileged people to give birth to a health-impaired child. The result is a concentration of impairment among nonwhite and low-income populations with a simultaneous purging of impairment from white and affluent populations. This is precisely what the eugenic state endeavored to produce in the United States at the turn of the twentieth century.

An interesting reversal, though: whereas in the time of eugenics, the state attempted to manufacture white racial purity by removing impairments from the white race, in the time of dysgenics, the state manufactures a “purity” among affluent and white people by producing nonwhite and poor communities as the site for impairments.

In this way, we may think of the dysgenic state as a successor to the eugenic state—as an entity that addresses the eugenic state’s unfinished business. Of course, the element of intentionality is absent from the dysgenic state: whereas the eugenic state consciously endeavored to produce white racial purity, the dysgenic state produces a version of the same without the conscious motivation of actors.³⁷² However, the absence of intent does not make the resulting racial geography of disability any less cruel.³⁷³

B. Dysgenics and the Reaffirmation of the Myth of Biological Race

One of the foundational propositions of eugenic pseudoscience was that there are distinct, clear-cut, nonnegotiable differences between the races.³⁷⁴

372. Indeed, there is no evidence that proponents of disability-selective abortion bans have any awareness of how these bans will cause disability to be distributed among races and classes.

373. See generally ALEXANDER, *supra* note 132 (showing that mass incarceration has acted as a successor to chattel slavery inasmuch as it has functioned to produce a caste of black people as second-class citizens and denying that a set of nefarious actors consciously produced this result).

374. Hansen & King, *supra* note 53, at 252 (quoting a eugenicist saying that “the character of a nation is determined primarily by its racial qualities: that is, by the hereditary physical, mental, and moral or temperamental traits of its people”).

Moreover, eugenics asserted that these racial differences were biological in nature.³⁷⁵ (Indeed, eugenics asserted that *all* differences were biological in nature. Hence the supposition that class differences were an effect of genetic differences between the rich and the poor—which led to the conclusion that the most surefire way to eradicate poverty was to prevent the reproduction of the poor.) According to eugenics, it was biology that distinguished the white race from the black race from the Asian race from the American Indian race. This is the myth of biological race: the idea that the races are biologically distinct from one another, with the biological processes of the members of one racial group being similar to one another, but different from the biological processes of members of other racial groups.³⁷⁶

Of course, eugenics was not content to simply propose that the races were genetically distinct from one another. Rather, eugenics proposed that there was a hierarchy of racial difference, with nonwhite races being biologically *inferior* to the white race.³⁷⁷ Pushing the analysis further, it would not be an error to say that eugenics proposed that nonwhite people were *impaired*, as they deviated from the norms that the white race established. Indeed, the institution of chattel slavery in the United States was justified on this very premise: black people's biology rendered them not intelligent enough, industrious enough, and noncriminal enough to assume the august task of freedom.³⁷⁸ Of course, the institution of chattel slavery in the United States predates the eugenics movement—demonstrating only that eugenics did not give rise to the myth of biological race, but rather simply expanded and deepened it by endeavoring to give it scientific legitimacy.

Crucially, the myth of biological race is just that: a myth. The weight of good science that has accumulated in the eighty years since the decline of the

375. *Id.*

376. See, e.g., WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550–1812* (1968); Garland E. Allen, *Eugenics and Modern Biology: Critiques of Eugenics, 1910–1945*, 75 *ANNALS HUM. GENETICS* 314, 314 (2011).

377. See Hansen & King, *supra* note 53, at 249.

378. See, e.g., Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, in *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* 33, 38 (Paul K. Longmore & Lauri Umansky eds., 2001) (discussing Dr. Samuel Cartwright's research of drapetomania). Cartwright's studies led him to the conclusion that enslaved black people ran away from the people who purported to own them because black people had a mental impairment: drapetomania. Quoting Cartwright, historian Douglas Baynton explained that drapetomania was imagined to be

“as much a disease of the mind as any other species of mental alienation” [and] was common among slaves whose masters had “made themselves too familiar with them, treating them as equals.” The need to submit to a master was built into the very bodies of African Americans, in whom “we see ‘*genu flexit*’ written in the physical structure of his knees, being more flexed or bent, than any other kind of man.”

Id. “[T]he disease of the mind” from which black people suffered when treated humanely, as well as the hopelessly bent knees that led black people to feel more comfortable kneeling than standing, were *impairments*, as they would have greatly disadvantaged white people—whose equality with one another was written into the country's founding documents and who were expected to serve no one. Conveniently, the impairments that afflicted black people rendered them woefully unfit for freedom but superbly suited for enslavement. *Id.*

eugenics movement has established that the groups that societies call races are genetically arbitrary groupings of individuals.³⁷⁹ That most good science has concluded that races are biologically arbitrary collections of individuals, however, has not stopped researchers from searching for genes that they expect will explain the fact that people of color have higher rates of every major common illness and poor health outcome—including hypertension, infant mortality, maternal mortality, diabetes, asthma, and heart disease.³⁸⁰ This point bears repeating: we should understand the elusive search for the gene that causes black people to die from *everything* at higher rates than white people to be a modernized version of the claim that nonwhite people are impaired by virtue of their biological difference.³⁸¹

Thus, the eugenics movement *racialized disability*—positing nonwhite bodies as the site of impairments—when it deployed the myth of biological race to assert that nonwhite people were biologically distinct from, and inferior to, white people. Further, we *racialize disability* today—positing nonwhite bodies as the site of impairments—when we deploy the myth of biological race to justify spending tens of millions of dollars searching for the fantasied genes that we imagine cause nonwhite people to be sicker and die earlier than their white counterparts.

Yet another contemporary mode of racializing disability—of positing nonwhite bodies as the site of impairments—may be through *actually* locating impairments in nonwhite people’s bodies. That is, the racialization of disability in modern times may occur through, truly, disabling the bodies of nonwhite people.

This is an analysis that scholars Ivan Eugene Watts and Nirmala Erevelles suggested when they observed

how the predominance of asthma and lead poisoning among poor children contributes to neurological damage that manifests itself as mild disabilities and behavioral disorders in schools. . . . In terms of race, 36.7% of African American children, as opposed to 17% of Latino children and 6.1% [of] White children, have been identified as experiencing lead poisoning. Such statistics point to environmentally

379. See Troy Duster, *Buried Alive: The Concept of Race in Science*, in *GENETIC NATURE/CULTURE: ANTHROPOLOGY AND SCIENCE BEYOND THE TWO-CULTURE DIVIDE* 258, 265 (Alan H. Goodman, Deborah Heath & M. Susan Lindee eds., 2003).

380. Dorothy E. Roberts, *What’s Wrong with Race-Based Medicine?: Genes, Drugs, and Health Disparities*, 12 *MINN. J.L. SCI. & TECH.* 1, 15 (2011) (“It is implausible that one race of people evolved to have a genetic predisposition to heart failure, hypertension, infant mortality, diabetes, and asthma. There is no evolutionary theory that can explain why African ancestry would be genetically prone to practically every major common illness.”).

381. See Allison Aubrey, *Who’s Hit Hardest by COVID-19? Why Obesity, Stress and Race All Matter*, NPR (Apr. 18, 2020), <https://www.npr.org/sections/health-shots/2020/04/18/835563340/whos-hit-hardest-by-covid-19-why-obesity-stress-and-race-all-matter> [<https://perma.cc/FB8R-ZCDZ>] (quoting a researcher who proposes that black people have higher COVID-19 mortality rates than other racial groups because black people may have “genetic risk factors that make them more salt-sensitive,” thus increasing their rates of hypertension, which itself increases the risk that COVID-19 will be deadly).

induced damage . . . resulting directly from the lack of adequate housing, health care, clean air, and other basic necessities.³⁸²

This is the racialization of disability in modern times. Unlike the days of eugenics, when racial minorities were *imagined* to be impaired, the racialization of disability today occurs when racial minorities actually *become* impaired due to environmental injustice and reproductive control. To be precise, the dysgenic state—which fails to protect its disproportionately nonwhite citizens from impairment-producing environmental toxins and then coerces those same citizens to give birth to health-impaired children—*racializes disability* by creating a set of circumstances in which nonwhite people come to bear health-impaired children more frequently than their white counterparts.

This is an injustice in and of itself. But it may be even more lamentable because it creates a racial geography of disability wherein the myth of biological race appears true. The racial politics of the dysgenic state makes it appear that there is just *something* about nonwhite people that causes them to be born more frequently with anencephaly, heart defects, oral clefts, musculoskeletal impairments, spina bifida, cognitive disabilities, etc.—the entire range of impairments that environmental toxins produce in fetuses. As the myth of biological race currently serves as a vehicle for explaining racial disparities in health outcomes generally, we should have little doubt that it will serve as a tool for understanding the dysgenic state's yield: higher frequencies of impairments among nonwhite babies and people.

CONCLUSION

The dysgenic state is what happens when the impulse to save fetuses coincides with a failure to protect citizens from environmental toxins. That is, the dysgenic state is a marriage between two distinct interest groups: while one interest group insists upon protecting fetuses from abortion, another interest group reminds that it is *expensive* to protect certain communities from environmental harms. Indeed, regulating toxic industries costs money: it threatens the profits of the corporations that would be forced to internalize the costs of the externalities that they impose on vulnerable people and communities. To protect coffers, the state has decided to let capitalism go unregulated—to let the free market operate freely. The intersection of free market enterprise with the struggle to ensure that every fetus that is conceived is carried to term has given us the dysgenic state.

As this Article makes clear, the dysgenic state functions as a successor of sorts to the eugenic state of a century ago: like its twentieth-century counterpart, dysgenics operates to generate a white racial purity against a backdrop of nonwhite impairment. The analysis in this Article, then, disproves the claim that disability-selective abortion bans are “anti-eugenic.” In fact, when such bans are

382. Ivan Eugene Watts & Nirmala Erevelles, *These Deadly Times: Reconceptualizing School Violence by Using Critical Race Theory and Disability Studies*, 41 AM. EDUC. RSCH. J. 271, 290 (2004).

set in a context of environmental injustice, they are profoundly eugenic, producing results that would make eugenicists of the early twentieth century smile. We might remind these bans' proponents that there is an irony—and cruelty—involved in compelling the births of fetuses with disabilities without simultaneously eliminating the processes that disable fetuses. Indeed, there is an inhumanity involved in struggling to save fetuses with impairments without also struggling against the industrially sponsored, state-supported production of fetal impairment.

We could interrupt the operation of the dysgenic state by battling disability-selective abortion bans, working to ensure that they are struck down in court or repealed by legislatures. But, as this Article makes clear, success on this front would do nothing to protect fetuses—and people—from the injury that degraded environments inflict. So, in order to make dysgenics—and eugenics—a phenomenon of the past, we need to fight for environmental justice as well. We must not settle for partial victories.