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## 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

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**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\***

CAROLE J. PETERSEN\*\*

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## I. INTRODUCTION

In 2013 North Dakota enacted House Bill 1305, which purports to prohibit doctors from performing abortions when they are aware that the abortion is sought solely for purposes of sex selection or because the fetus has been diagnosed with a “genetic abnormality or a potential for a genetic abnormality.”<sup>1</sup> At the time that H.B. 1305 was enacted, several other states had already enacted laws banning sex-selective abortions as part of a larger trend of legislation banning abortion based on the motive of the pregnant woman.<sup>2</sup> North Dakota, however, is the first state to single out women who seek to terminate a pregnancy because of a genetic anomaly,<sup>3</sup> which has sparked a debate within the disability rights movement.<sup>4</sup>

This provision in North Dakota’s statute deserves special attention and analysis, partly because it may become a model for other states, but also because it departs from the traditional legislative approach to abortion. In the past, if the law has made any distinction on the basis of fetal health it has made it easier, not harder, for a woman to obtain an abortion in situations where there is evidence of fetal impairment.<sup>5</sup> This was true in the United States before *Roe v. Wade* was decided,<sup>6</sup>

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<sup>1</sup> H.B. 1305, 63d Legis. Assemb., Reg. Sess. § 2, (N.D. 2013), <http://www.legis.nd.gov/assembly/63-2013/documents/13-0351-01000.pdf?20140813205421>.

<sup>2</sup> See BRIAN CITRO ET AL., REPLACING MYTHS WITH FACTS: SEX-SELECTIVE ABORTION LAWS IN THE UNITED STATES 1 (Sujatha Jesudason et al. eds., 2014) (noting that eight states have enacted laws prohibiting sex-selective abortion and that 21 states and the federal government have considered such legislation since 2009); see also Justin Gillette, *Pregnant and Prejudiced: the Constitutionality of Sex- and Race-Selective Abortion Restrictions*, 88 Wash. L. Rev. 645, 646 (2013).

<sup>3</sup> See Eric Eckholm, *Bill in North Dakota Bans Abortion After Heart Beat is Found*, N.Y. TIMES, Mar. 15, 2013, available at [http://www.nytimes.com/2013/03/16/us/north-dakota-approves-bill-to-ban-abortions-after-heartbeat-is-found.html?\\_r=0](http://www.nytimes.com/2013/03/16/us/north-dakota-approves-bill-to-ban-abortions-after-heartbeat-is-found.html?_r=0). Missouri also considered legislation banning abortion on the ground of “genetic abnormality” but the bill failed to pass. See H.B. 386, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013), available at <http://www.house.mo.gov/billsummary.aspx?bill=HB386&year=2013&code=R>.

<sup>4</sup> See Amy Julia Becker, *North Dakota’s Ban Is a Bad Way to Stop Selective Abortion: Culture as a Whole Needs to Change to be More Supportive of Children with Chromosomal Conditions*, THE ATLANTIC, Apr. 4, 2013, available at <http://www.theatlantic.com/sexes/archive/2013/04/north-dakotas-ban-is-a-bad-way-to-stop-selective-abortion/274676/> (summarizing opposing views of the bill within the disability rights movement); see also Alison Piepmeier, *Outlawing Abortion Won’t Help Children with Down Syndrome, Motherlode*, N.Y. TIMES, Apr. 1, 2013.

<sup>5</sup> See WORLD HEALTH ORG., SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS 93 (2d ed. 2012), available at [http://www.who.int/reproductivehealth/publications/unsafe\\_abortion/9789241548434/en](http://www.who.int/reproductivehealth/publications/unsafe_abortion/9789241548434/en); see also GUTTMACHER INST., STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS (July 1, 2014), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_OAL.pdf](http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf) (noting exceptions for “fetal abnormality” to restrictions on abortion or funding for abortion in the states of Maryland, Mississippi, Virginia, and Utah).

<sup>6</sup> See LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING 272 (2012) (noting that before *Roe v. Wade* was decided, the American Law Institute adopted a model statute that would allow abortion in certain circumstances, including “grave physical or mental defect” of

and it continues to be true in certain countries around the world that do not recognize a general right to abortion but allow it in certain circumstances.<sup>7</sup> Health professionals also routinely counsel pregnant women to undergo prenatal diagnostic testing, with the tacit understanding that she will likely elect to terminate the pregnancy if testing reveals a fetal impairment.<sup>8</sup> The underlying assumption – that it is good public policy to permit, and perhaps even encourage, prospective parents to prevent the birth of babies with disabilities – may seem self-evident to many people. Yet it is a deeply painful subject within the disability rights movement.<sup>9</sup> Thus, it is not surprising that disability rights discourse is increasingly relied upon in campaigns to restrict access to abortion in the United States, both in state legislative debates<sup>10</sup> and constitutional litigation.<sup>11</sup>

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the fetus and that the majority of Americans supported allowing abortion in these circumstances).

<sup>7</sup> Ctr. for Reprod. Rights, *Fact Sheet: The World's Abortion Laws Map 2013 Update*, REPRODUCTIVERIGHTS.ORG, [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/AbortionMap\\_Factsheet\\_2013.pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/AbortionMap_Factsheet_2013.pdf) (last visited Oct. 11, 2014) (especially columns I and II, which indicate, with the letter “F,” those countries that are considered to have restrictive abortion laws but do permit abortion on the ground of fetal impairment) [hereinafter Ctr. for Reprod. Rights, *Fact Sheet*]; see also Reed Boland, *Second Trimester Abortion Laws Globally: Actuality, Trends and Recommendations*, 2010 REPRODUCTIVE HEALTH MATTERS, NOV. 2010, at 67, 68 (reporting that approximately sixty-nine countries specifically authorize abortions in the second trimester on the ground of fetal impairment).

<sup>8</sup> See generally Dov Fox & Christopher L. Griffin, Jr., *Disability-Selective Abortion and the Americans with Disabilities Act*, 1009 UTAH L. REV. 845, 866 (2009).

<sup>9</sup> See generally Marsha Saxton, *Disability Rights and Selective Abortion*, in ABORTION WARS, A HALF CENTURY OF STRUGGLE 1950 TO 2000 374 (Rickie Solinger ed., 1998); Erik Parens et al., *The Disability Rights Critique of Prenatal Genetic Testing: Reflections and Recommendations*, HASTINGS CENTER REP., Sept.-Oct. 1999, at s1 (Supp. 1999), available at <http://onlinelibrary.wiley.com/doi/10.2307/3527746/pdf>; Adrienne Asch, Lawrence O. Gostin & Diane M. Johnson, *Respecting Persons with Disabilities and Preventing Disability: Is there a Conflict?*, in THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL, 319–46 (Stanley S. Herr, Lawrence O. Gostin & Harold Hongju Koh, eds., 2003); Steven A. Holmes, *Abortion Issue Divides Advocates for Disabled*, N.Y. TIMES, July 4, 1991.

<sup>10</sup> See *N.D. Legis. Branch Video, Senate Floor Session for HB 1305*, ND.GOV (Mar. 15, 2013), [http://video.legis.nd.gov/pb3/powerbrowser\\_Desktop.aspx?ContentEntityId=228&date=20130315&tnid=10&browser=0#agenda](http://video.legis.nd.gov/pb3/powerbrowser_Desktop.aspx?ContentEntityId=228&date=20130315&tnid=10&browser=0#agenda).

<sup>11</sup> See Brief of Amici Curiae Jerome Lejune Foundation, USA, et al. in Support of Petitioners, *Isaacson v. Horne*, 716 F.3d 1213 (2013) (No. 12-16670), available at <http://bdfund.org/wordpress/wp-content/uploads/2013/10/FILED-AmicusLeJeuneSDiDSC-BDF.pdf>. The brief notes that most abortions conducted after 20 weeks are conducted because prenatal testing revealed a fetal impairment and it argues that Arizona H.B. 2036 (2012) therefore advanced a legitimate state interest of disfavoring disability-selective abortion by prohibiting abortions after 20 weeks except in cases of medical emergency. Arizona’s law was invalidated by the Court of Appeals for the Ninth Circuit because a state cannot, under controlling precedent from the U.S. Supreme Court, prohibit a woman from terminating her pregnancy prior to viability. *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013, 1231), cert. denied 134 S. Ct. 905 (2014); see also Adam Liptak & Fernanda Santos, *Supreme Court Won't Hear Arizona Appeal on Abortion Ban*, N.Y. TIMES, Jan. 13, 2014, available at

This article argues that we should consider not only American constitutional law<sup>12</sup> but also comparative law and emerging international human rights norms, in order to navigate the difficult issue of abortion on the basis of fetal impairment. The United States is a State Party to the International Covenant on Civil and Political Rights (ICCPR)<sup>13</sup> and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>14</sup> It is also a signatory (but not a full State Party) to several other relevant treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>15</sup> the Convention on the Rights of the Child (CRC),<sup>16</sup> and the Convention on the Rights of Persons with Disabilities (CRPD).<sup>17</sup> The CRPD is particularly relevant because it rejects the medical model of disability and embraces the social model, defining disability as a form of social oppression.<sup>18</sup> The CRPD also has numerous provisions that are relevant to reproductive justice and the right to life. The U.S. Senate came close to ratifying the CRPD in December 2012,<sup>19</sup> falling just a few votes short of the

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[www.nytimes.com/2014/01/14/us/supreme-court-wont-hear-arizona-appeal-on-abortion-ban.html?\\_r=0](http://www.nytimes.com/2014/01/14/us/supreme-court-wont-hear-arizona-appeal-on-abortion-ban.html?_r=0) (providing press coverage of the U.S. Supreme Court's refusal to hear the appeal).

<sup>12</sup> See generally 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 (2013) (analyzing why a proposed federal law prohibiting disability-selective abortion would be unconstitutional).

<sup>13</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 Mar. 1976). Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> [hereinafter "ICCPR"].

<sup>14</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, G.A. Res. 39/46, UN GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85 (entered into force June 26, 1987). Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> [hereinafter "CAT"].

<sup>15</sup> Convention on the Elimination of All Forms of Discrimination against Women, adopted Dec. 18, 1979, G.A. Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981). Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> [hereinafter "CEDAW"].

<sup>16</sup> Convention on the Rights of the Child, adopted Nov. 20, 1989, G.A. Res. 44/25, annex, UN GAOR, 44<sup>th</sup> Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990). Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> [hereinafter "CRC"].

<sup>17</sup> Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007). Available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx> [hereinafter "CRPD"].

<sup>18</sup> See Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT'L L. & COM. 287 (2007); Rosemary Kaye & Philip French, *Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 5 (2008).

<sup>19</sup> Louis Jacobson, *38 Republicans vote against ratification, but treaty could still get another vote next year*, POLITIFACT (Dec. 4, 2012, 2:40 PM), <http://www.politifact.com/truth-meter/promises/obameter/promise/88/sign-the-un-convention-on-the-rights-of-persons-wi/>.

two-thirds majority that is required to ratify a treaty under the U.S. Constitution.<sup>20</sup> In August 2014, the U.S. Senate Foreign Relations Committee approved the CRPD again,<sup>21</sup> and the disability rights movement is hopeful that the full Senate will eventually ratify the treaty.<sup>22</sup> In any event, as a signatory to the treaty, the United States is already obligated to “refrain from acts that would defeat the object and purpose” of the treaty while preparing for ratification.<sup>23</sup> This is a principle of customary international law, codified in the Vienna Convention on the Law of Treaties.<sup>24</sup>

Part II of the article introduces North Dakota’s H.B. 1305 and explains why its prohibition of abortion based upon a “genetic abnormality” is potentially more significant than previous legislation purporting to prohibit only sex-selective abortions. Part III considers the relationship between the history of eugenics and the modern law of abortion, demonstrating why this is such a sensitive issue for people who either live with disabilities themselves or have reared children with disabilities.

Part IV of the article analyzes the relationship between abortion and international human rights law. This section begins by briefly summarizing the emerging jurisprudence on access to abortion under human rights treaties other than the CRPD. It then introduces the CRPD and its relevant provisions, summarizing the drafting history of the articles that are particularly relevant to the rights to life, to create a family, and to reproductive health services. This section then uses Spain and Hungary as case studies to investigate the approach that the United Nations Committee on the Rights of Persons with Disabilities (the treaty-monitoring body for the CRPD) has taken to the issue of abortion on the basis of fetal impairment, an approach that has alarmed some advocates for women’s reproductive rights. Part V concludes the article by suggesting public policy responses that would continue to respect reproductive freedom while also addressing the history of eugenics and discrimination against persons with disabilities.

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<sup>20</sup> Ironically, the small group of Senators who blocked U.S. ratification of the CRPD in 2012 often claim that the treaty is “pro-abortion,” although this is not the case. For discussion of the failure of the United States to ratify the treaty in 2012, see Carole J. Petersen, *The Convention on the Rights of Persons with Disabilities: Using International Law to Promote Social and Economic Development in the Asia Pacific*, 35 U. HAW. L. REV. 821 (2013).

<sup>21</sup> Mario Trujillo, *Foreign relations committee approves disability treaty*, THE HILL (July 22, 2014, 2:33 PM), <http://thehill.com/policy/international/212991-foreign-relations-committee-approves-disability-treaty>.

<sup>22</sup> See Press Release, Sen. Tom Harkin, Harkin Applauds Committee Approval of CRPD, Urges Full Senate Consideration (July 22, 2014), available at <http://www.help.senate.gov/newsroom/press/release/?id=6277e42e-7bf5-414e-8040-b26c751dcdbf>.

<sup>23</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 312(3) (1987).

<sup>24</sup> Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331. The Vienna Convention was adopted and opened for signature in 1969 and entered into force Jan. 27, 1980. Although the United States has not ratified the Vienna Convention, it does not dispute that Article 18 reflects customary international law and therefore binds all nations.

## II. INTRODUCING NORTH DAKOTA'S H.B. 1305: WHY THE BAN ON DISABILITY-SELECTIVE ABORTION IS MORE SIGNIFICANT THAN PREVIOUS BANS ON SEX-SELECTIVE ABORTION

H.B. 1305 is part of a package of legislation enacted in 2013 that made North Dakota's Abortion Control Act one of the most restrictive state laws in the United States,<sup>25</sup> and also set up a major challenge to *Roe v. Wade*.<sup>26</sup> The North Dakota bill that attracted the most public attention in 2013 was H.B. 1456, widely known as the "heartbeat bill" because it purports to prohibit abortion as soon as a heartbeat is detectable,<sup>27</sup> which can be as early as six weeks.<sup>28</sup> However, in the same year, the North Dakota legislature also enacted S.B. 2305, which required physicians performing abortions in the state to have admitting privileges at a hospital within 30 miles,<sup>29</sup> and H.B. 1297, which prohibited doctors from administering certain drugs in a protocol that many consider to be the standard of care for non-surgical abortions.<sup>30</sup>

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<sup>25</sup> Eric Eckholm, *Judge Blocks North Dakota's Abortion Restrictions*, N.Y. TIMES, July 22, 2013, available at <http://www.nytimes.com/2013/07/23/us/judge-blocks-north-dakota-abortion-restrictions.html>.

<sup>26</sup> See *Roe v. Wade*, 410 U.S. 113 (1973). Since *Roe v. Wade*, the Supreme Court case law concerning the right to an abortion has consistently held that a woman has a constitutional right to choose to terminate her pregnancy before the fetus is viable. While a state may regulate the mode and manner of abortion prior to fetal viability, it may not proscribe a woman from electing abortion or impose an undue burden on her choice.

<sup>27</sup> See H.B. 1456, 63d Legis. Assemb., Reg. Sess. (N.D. 2013), <http://www.legis.nd.gov/assembly/63-2013/documents/13-0304-02000.pdf?20140813210157>; see also Cheryl Wetzstein, *N.D. Bill Would Bar Most Abortions if Heartbeat Found*, WASHINGTON TIMES, Mar. 17, 2013, available at <http://www.washingtontimes.com/news/2013/mar/17/nd-bill-would-bar-most-abortions-if-heartbeat-foun/?page=all>.

<sup>28</sup> See H.B. 1456, 63d Legis. Assemb., Reg. Sess. (N.D. 2013), <http://www.legis.nd.gov/assembly/63-2013/documents/13-0304-02000.pdf?20140813210157>; see also *MKB Mgmt. Corp. v. Burdick*, No. 1:13-CV-071, 2014 WL 1653201, \*1, \*15 (D.N.D. Apr. 16, 2014) (holding the "heartbeat" bill unconstitutional). The proponents knew that the law would be held unconstitutional under *Roe v. Wade* and are hoping that the U.S. Supreme Court will eventually hear an appeal and overrule or seriously limit *Roe v. Wade*. See John Eligon & Erik Eckholm, *New Laws Ban Most Abortions in North Dakota*, N.Y. TIMES, Mar. 26, 2013, available at [http://www.nytimes.com/2013/03/27/us/north-dakota-governor-signs-strict-abortion-limits.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/03/27/us/north-dakota-governor-signs-strict-abortion-limits.html?pagewanted=all&_r=0).

<sup>29</sup> See S.B. 2305, 63d Legis. Assemb., Reg. Sess. (N.D. 2013), <http://www.legis.nd.gov/assembly/63-2013/documents/13-0796-01000.pdf?20140813210437>.

<sup>30</sup> See H.B. 1297, 62d Legis. Assemb., Reg. Sess. (N.D. 2011), <http://legis.nd.gov/assembly/62-2011/documents/11-0506-04000.pdf?20141002201500>; and Jessica Mason Pieklo, *North Dakota Supreme Court Considers Whether There Is a State Right to Abortion*, RH REALITY CHECK (Dec. 12, 2013), <http://rhrealitycheck.org/article/2013/12/12/north-dakota-supreme-court-considers-whether-a-state-right-to-abortion-exists/>; see also Heather D. Boonstra, *Medication Abortion Restrictions Burden Women and Providers—and Threaten U.S. Trend Toward Very Early Abortion*, 16(1) GUTTMACHER POLICY REVIEW (Winger 2013), pp. 18-21, <http://www.guttmacher.org/pubs/gpr/16/1/gpr160118.html> (explaining how state laws, including legislation enacted in North Dakota, seek to prevent abortion providers from following the most advanced protocols for nonsurgical abortions).

While supporters characterized these two bills as protecting women's health, the underlying goal was not to make abortion safer, but rather to make it more difficult to obtain.<sup>31</sup> Like the heartbeat bill, these two bills were drafted with the intention of reducing the incidence of abortion generally in North Dakota, regardless of the pregnant woman's motivations for seeking to terminate the pregnancy.

All three of the bills mentioned above – H.B. 1297, S.B. 2305, and H.B. 1456 – have been successfully challenged in the U.S. District Court for the District of North Dakota.<sup>32</sup> North Dakota appealed a permanent injunction of H.B. 1297 and a temporary injunction of S.B. 2305.<sup>33</sup> The state also appealed a judgment that H.B. 1456 (the heartbeat bill) is unconstitutional because it imposes an undue burden on a woman seeking an abortion.<sup>34</sup> As of July 2014, the state's appeals were pending in the Eighth Circuit Court of Appeals. The Governor of North Dakota has made it clear that he is prepared to allocate a significant amount of public money to defend these three laws in court.<sup>35</sup>

Interestingly, although it was initially named in a test case, H.B. 1305 has not yet been the subject of substantive judicial scrutiny.<sup>36</sup> H.B. 1305 is different from the other three bills that North Dakota enacted in 2013 because it does not seek to restrict abortion generally. Rather, H.B. 1305 targets abortions requested for what

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<sup>31</sup> See, e.g., Ctr. for Reprod. Rights, *Targeted Regulation of Abortion Providers* (Mar. 5, 2009), <http://reproductiverights.org/en/project/targeted-regulation-of-abortion-providers-trap> (critiquing abortion legislation that has the effect of making abortions more difficult to obtain and more risky for women).

<sup>32</sup> MKB Mgmt. Corp. v. Burdick, No. 09-2011-CV-02205 (E. Cent. Dist. Ct. N.D. July 15, 2013), available at [http://rhrealitycheck.wpengine.netdna-cdn.com/wp-content/uploads/2013/07/2013-07-15\\_MKBvBurdick\\_Perm\\_Injunction.pdf](http://rhrealitycheck.wpengine.netdna-cdn.com/wp-content/uploads/2013/07/2013-07-15_MKBvBurdick_Perm_Injunction.pdf) (Memorandum Opinion and Order For Permanent Injunction). MKB originally challenged a 2011 amendment from HB 1297 pertaining to restrictions on medication for abortions on February 2012; however, the plaintiffs amended their complaint in May 2013 and were permitted to supplement an additional challenge for SB 2305 with their complaint. Nat'l P'ship Women & Families, *In the News: MKB Management Corp. v. Burdick*, REPRO HEALTH WATCH, available at <http://go.nationalpartnership.org/site/News2?id=34416> (last visited Oct. 11, 2014).

<sup>33</sup> *Id.* The state agreed (in a negotiated settlement) that the clinic's doctors can maintain admitting privileges as long as the law requires them to do so; however, if the clinic's admitting privileges are ever revoked or not renewed, the clinic may file a new lawsuit challenging S.B. 2305. *Id.*

<sup>34</sup> MKB Mgmt. Corp. v. Burdick, No. 1:13-CV-071, 2014 WL 1653201, \*1, \*10 (D.N.D. Apr. 16, 2014).

<sup>35</sup> James MacPherson, *North Dakota Gov. Jack Dalrymple Approves 6-week Abortion Ban*, WASHINGTON TIMES, Mar. 26, 2013, available at <http://www.washingtontimes.com/news/2013/mar/26/north-dakota-gov-jack-dalrymple-approves-6-week-ab/>.

<sup>36</sup> As explained below, H.B. 1305 was initially challenged in the same lawsuit that challenged the heartbeat bill but the plaintiffs apparently reconsidered as they asked the court to dismiss the claims regarding H.B. 1305 early in the litigation. Jessica Mason Pieklo, *Red River Clinic Asks Court to Dismiss Its Legal Challenge to Sex-Selection and Fetal Anomaly Bans*, RH REALITY CHECK (Sept. 12, 2013, 1:04 PM), <http://rhrealitycheck.org/article/2013/09/12/red-river-clinic-asks-court-to-dismiss-its-legal-challenge-to-sex-and-fetal-anomaly-bans/>.

the legislature deemed to be particularly bad motivations – the desire to practice sex selection or to prevent the birth of a child with a genetic disorder.<sup>37</sup> H.B. 1305 made amendments to the definitions in North Dakota’s Abortion Control Act<sup>38</sup> and added a new section prohibiting abortion – at any time during the pregnancy – if the doctor knows that the pregnant woman is terminating the pregnancy solely because of the sex of the fetus or because the fetus “has been diagnosed with either a genetic abnormality, or a potential for a genetic abnormality.”<sup>39</sup> Supporters of H.B. 1305 argued that this provision serves an essential public interest by affirming North Dakota’s policy of prohibiting gender and disability discrimination.<sup>40</sup> Although grouped together in the same section of H.B. 1305, the two prohibitions must be analyzed separately in order to understand their potential impact on pregnant women and the doctors who serve them.

H.B. 1305’s prohibition on abortion for the purpose of sex selection is not ground-breaking, but rather is similar to laws that have been adopted in seven other states: Illinois, Pennsylvania, Arizona, Kansas, North Carolina, South Dakota, and Oklahoma.<sup>41</sup> Arizona further prohibits abortion on the ground of the race of the fetus,<sup>42</sup> something that has also been attempted at the federal level by members of the U.S. Congress.<sup>43</sup> Supporters of this type of legislation have invariably invoked the discourse of equality and nondiscrimination, portraying the legislation as protecting the civil rights of vulnerable groups.<sup>44</sup> While there is no doubt that the anti-abortion movement genuinely deplores the practice of sex-selective abortion, it appears that the movement also views the phenomena of sex selection as something that can be exploited, part of a broader strategy to dampen women’s support for *Roe v Wade*.<sup>45</sup> To quote Steven Mosher, who was at that time the President of the Population Research Institute, an American anti-abortion organization:

Banning sex-selective abortion will force supporters of abortion to publicly address a question that they will find profoundly disturbing: Is the right to abortion a license to destroy children for any and all reasons, including that of their sex? Most people of moderate persuasion, even

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<sup>37</sup> H.B. 1305, 63d Legis. Assemb., Reg. Sess. § 2 (N.D. 2013), available at <http://www.legis.nd.gov/assembly/63-2013/documents/13-0351-01000.pdf?20140813205421>.

<sup>38</sup> N.D. CENTURY CODE § 14-02.1-02 (2013).

<sup>39</sup> N.D. CENTURY CODE § 14-02.01-04.1 (2013).

<sup>40</sup> *Relating to the Prohibition on Abortions for Sex Selection or Genetic Abnormalities, Definitions and Provide a Penalty on H.B. 1305 Before the Hon. Comm. on Human Services*, 63d Legis. Assemb., Reg. Sess., 22 (N.D. 2013) (statement of Rep. Bette Grande).

<sup>41</sup> See CITRO ET AL., *supra* note 2, at 29–30.

<sup>42</sup> ARIZ. REV. STAT. ANN. § 13-3603.02 (2011) (West).

<sup>43</sup> See Prenatal Nondiscrimination Act of 2012, H.R. 3541, 112th Cong. (2012); Prenatal Non-Discrimination Act (PRENDA) of 2013, H.R. 447, 113th Cong. (2013) (as referred to H. Comm. on the Judiciary).

<sup>44</sup> See H.R. 447, 113th Cong. (2013).

<sup>45</sup> See Steven W. Mosher, *President’s Page: Let’s Ban Sex Selective Abortions*, 7 PRI REVIEW (Mar./Apr. 2007), <http://pop.org/content/presidents-page-let-us-ban-sex-selective-1340>.

those inclined to be “pro-choice,” will agree that the right of the unborn child to life should not depend on whether she (or he) possesses the requisite genitalia. Even those who believe in the absolute right to destroy the child under any and all circumstances, it is safe to predict, will be uncomfortable defending such an extreme position. This sense of contradiction will be further heightened among radical feminists, the shock troops of the abortion movement. They may believe that the right to abortion is fundamental to women’s emancipation, but many will recoil at the thought of aborting their unborn sisters in disproportionate numbers. How can they, who so oppose patriarchy and discrimination on the basis of sex, consent to the ultimate form of patriarchy and discrimination, namely, the elimination of baby girls solely on account of their sex? Many will be silent, while others will defend abortion with less conviction.<sup>46</sup>

Mosher also predicted that pro-choice advocates would be left “stammering and stuttering” because they would be unable to respond to the moral and public policy arguments against permitting sex-selective abortions.<sup>47</sup>

Mosher’s predictions proved to be somewhat exaggerated. It is, of course, deeply disturbing for feminists to consider that reproductive freedom will be used, at certain times and in certain places, to prevent female births.<sup>48</sup> Public opinion polls also indicate that a majority of the American public disapproves of abortion when sought for this purpose.<sup>49</sup> However, it does not appear that Mosher’s strategy of proposing state legislation to prohibit sex-selective abortion has made large numbers of feminists less willing to defend the right to abortion under American constitutional law.<sup>50</sup> Nor has the issue divided the American feminist movement in the way that some other contentious issues (such as laws prohibiting commercial sex or pornography) have divided the movement. Many of the organizations fighting for reproductive rights have gradually broadened their focus to include issues of reproductive justice, rather than focusing only on abortion.<sup>51</sup> Nonetheless, in general,

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<sup>46</sup> *Id.*

<sup>47</sup> Steven W. Mosher, *A New Front in the Abortion Wars: PreNDA Seeks Race and Sex-based Equality for the Unborn*, 18 *PRI REVIEW* (Nov./Dec. 2008), <http://pop.org/content/a-new-front-in-abortion-wars-prenda-seeks-1602>.

<sup>48</sup> See, e.g., April Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?*, 10 *WIS. WOMEN’S L.J.* 161 (1995) (analyzing the limits of choice as a value in the context of sex-selective abortion).

<sup>49</sup> See, e.g., Charlotte Lozier Inst., *Poll: 77% of Americans Support Ban on Sex-Selective Abortion*, *CLI PRESS RELEASES* (May 17, 2012), <http://www.lozierinstitute.org/news-room/press-releases/> (announcing results of public opinion poll of 1,016 adults).

<sup>50</sup> See, e.g., Nat’l Women’s Law Ctr., *Even More than Abortion: the Constitutional Importance of Roe v. Wade and the Right to Privacy*, *NWLC.ORG* (Jan. 18, 2013), [http://www.nwlc.org/sites/default/files/pdfs/even\\_more\\_than\\_abortion\\_factsheet\\_1-18-13.pdf](http://www.nwlc.org/sites/default/files/pdfs/even_more_than_abortion_factsheet_1-18-13.pdf).

<sup>51</sup> One such organization is “The Center on Reproductive Rights and Justice,” a social justice research center that stresses the importance of (1) the right to have a child; (2) the right not to have a child; and (3) the right to parent children. UC Berkeley Sch. of Law, Purpose: Mission Section, *BERKELYLAW*, <http://www.law.berkeley.edu/14379.htm> (emphasizing the importance of people having the social, financial, political, and legal

American feminist organizations continue to defend *Roe v. Wade*,<sup>52</sup> and feminists believe that access to abortion is an essential component of women's right to equality and bodily integrity.<sup>53</sup>

Pro-choice organizations also argue that instead of prohibiting abortion, the most effective way to discourage sex selection is to adopt laws and policies that improve the status of women in society, so that prospective parents will value male and female babies equally.<sup>54</sup> The World Health Organization and other international agencies that have studied the problems of son preference and sex selection share this view.<sup>55</sup> Additionally, recent research confirms that sex-selective abortion is far less common in the United States than has been portrayed by the anti-abortion movement.<sup>56</sup> This makes it easier for pro-choice feminists to dismiss the campaign to prohibit sex-selective abortion in the United States as the classic "red herring," a

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conditions required to make genuine choices about reproduction); *see also* Ctr. For Reprod. Rights, *Our Issues*, REPRODUCTIVERIGHTS.ORG, <http://reproductiverights.org/en/our-issues> (last visited Sept. 25, 2014) (listing access to abortion along with access to publicly funded health care to help women have safe and healthy pregnancies). The Center for Reproductive Rights also campaigns against forced sterilization. *See, e.g.*, Ctr. For Reprod. Rights, *Czech Government Apologizes to Victims of Forced Sterilization*, REPRODUCTIVERIGHTS.ORG (Nov. 25, 2009), <http://reproductiverights.org/en/press-room/czech-government-apologizes-to-victims-of-forced-sterilization> (reporting on a successful joint advocacy project of the Center for Reproductive Rights and Poradna, a Slovakian organization).

<sup>52</sup> *See, e.g.*, Nat'l Women's Law Ctr., *supra* note 50.

<sup>53</sup> *See* Terri Susan Fine, *Generations, Feminist Beliefs and Abortion Rights Support*, J. INT'L WOMEN'S STUD., May 2006, at 126, *available at* <http://vc.bridgew.edu/cgi/viewcontent.cgi?article=1465&context=jiws>.

<sup>54</sup> *See, e.g.*, Ctr. For Reprod. Rights, *Statement of Policies and Principles on Discrimination Against Women and Sex-Selective Abortion Bans*, REPRODUCTIVERIGHTS.ORG, [http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/Statement%20on%20Sex%20Selective%20Abortion%20Bans%20FIN\\_1.pdf](http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/Statement%20on%20Sex%20Selective%20Abortion%20Bans%20FIN_1.pdf) (last visited Oct. 12, 2014); Ctr. For Reprod. Rights, *U.S. House to Vote on Unconstitutional Abortion Ban*, REPRODUCTIVERIGHTS.ORG (May 30, 2012), <http://reproductiverights.org/en/press-room/us-house-to-vote-on-unconstitutional-federal-abortion-ban>.

<sup>55</sup> WORLD HEALTH ORG. ET AL., *PREVENTING GENDER-BIASED SEX SELECTION: AN INTERAGENCY STATEMENT*, WORLD HEALTH ORGANIZATION 10 (2011), *available at* <http://www.ohchr.org/Documents/Issues/Women/WRGS/PreventingGenderBiasedSexSelection.pdf> (recommending systemic changes to reduce son preference but also cautioning that efforts to manage or limit sex selection should also not hamper or limit access to safe abortion services).

<sup>56</sup> Anti-abortion legislators tend to rely upon reports that more male than female babies are born in certain communities; however these statistics do not necessarily document sex-selective abortion because prospective parents can influence the sex of their future child through other prenatal methods. For example, they can use artificial insemination and "sperm sorting," whereby only sperm that will produce the desired sex are allowed to fertilize the egg. Sex selection can also be achieved through pre-implantation genetic diagnosis: eggs are removed from a woman, fertilized outside of her body, and only the embryos of the desired sex are implanted in the uterus. These sex selection procedures are legal and provided by fertility clinics in the United States. *See* CITRO ET AL., *supra* note 2, at 7.

misuse of the discourse of equality, and a distraction from the more fundamental debate on access to reproductive health services.<sup>57</sup>

On the other hand, pro-choice organizations do not appear particularly eager to challenge the state laws that prohibit sex-selective abortion.<sup>58</sup> While this decision may arise from a need to conserve limited litigation funds, it may also reflect a desire to avoid being seen as publicly defending a right to practice sex selection in a country that clearly disapproves of it. As of this writing, constitutional challenges were being mounted against only two of the eight states with laws banning sex-selective abortions – Illinois<sup>59</sup> and Arizona.<sup>60</sup> In North Dakota, the lawsuit that successfully challenged the “heartbeat bill” originally included a challenge to H.B. 1305.<sup>61</sup> However, the plaintiffs subsequently requested a motion for dismissal of the claims regarding H.B. 1305, which was granted.<sup>62</sup> As an explanation for its decision, an attorney for the Center for Reproductive Rights stated that it was unclear whether H.B. 1305 would have a “direct impact on women seeking abortion services at the Red River Women’s Clinic at this time.”<sup>63</sup> The Red River Women’s Clinic also

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<sup>57</sup> The National Asian Pacific American Women’s Forum launched a petition against the South Dakota ban on sex-selective abortion, arguing that such bans also perpetuate negative stereotypes about Asian Americans. See Nat’l Asian Pacific Am. Women’s Forum, *Race and Sex Selective Abortion Bans: Don’t Let South Dakota Pass a Racist, Anti-immigrant Abortion Ban!*, NAPAWF, <http://napawf.org/programs/reproductive-justice-2/sex-selection/race-and-sex-selective-abortion-bans/> (last visited Oct. 12, 2014).

<sup>58</sup> See, e.g., Joshua D. Lee, *Racializing Abortion: Standing and the Equal Protection Challenge to Sex-Selective Abortion Statutes*, NYU J. LEGIS. & PUB. POL’Y QUORUM (July 10, 2014), available at <http://www.nyuajpp.org/wp-content/uploads/2013/03/Lee-2014-nyuajpp-quorum-63.pdf>.

<sup>59</sup> On March 30, 1993, the U.S. District Court for the N.D. of Illinois issued a consent decree that enjoined enforcement of Illinois’ ban on sex-selective abortions for pre-viability abortions. See *Herbst v. O’Malley*, No. 84 C 5602, 1993 WL 59142, at \*1–4 (N.D. Ill. Mar. 2, 1993).

<sup>60</sup> On May 2013, the American Civil Liberties Union (ACLU), on behalf of NAPA WF and the National Association for the advancement of Colored People (NAACP) for Maricopa County, brought a lawsuit against the Arizona Attorney General, the Arizona Medical Board, and the Executive Director of the Arizona Medical Board. The plaintiffs alleged that the Act violates the 14th Amendment because it denies equal protection by perpetuating racially discriminatory stereotypes of Black and Asian-Pacific women, as well as the Asian culture. The U.S. District Court held that the plaintiffs failed to identify any personal injury suffered by them as a consequence of the alleged constitutional error and the defendant’s motion to dismiss [12(b)(1)] was granted on Oct. 3, 2013. The plaintiffs appealed the decision and it is currently pending in the Ninth Circuit Court of Appeals. See *NAACP v. Horne*, No. CV13-01079-PHX-DGC, 2013 WL 5519514, at \*1 (D. Ariz. Oct. 2, 2013).

<sup>61</sup> See Press Release, Ctr. for Reprod. Rights, Center for Reproductive Rights Files Lawsuit in North Dakota to Block Nation’s Earliest and Most Extreme Abortion Ban (June 25, 2013), available at <http://reproductiverights.org/en/press-room/center-for-reproductive-rights-files-lawsuit-in-north-dakota-to-block-most-extreme-ban>.

<sup>62</sup> See *MKB Mgmt. Corp. v. Burdick*, 954 F. Supp. 2d 900, 902 (D.N.D. 2013).

<sup>63</sup> See James MacPhearson, *Judge Dismisses Part of N. Dakota Abortion Lawsuit*, HUFFINGTON POST (Sept. 11, 2013, 3:50 PM), available at <http://abcnews.go.com/m/story?id=20227777&sid=81>.

maintained that H.B. 1305 would not affect it because it does not conduct abortions based on genetic abnormalities or the sex of the fetus.<sup>64</sup>

These statements made on behalf of the Red River Women's Clinic are probably accurate with respect to the clause in H.B. 1305 prohibiting *sex-selective* abortions.<sup>65</sup> In fact, as opponents of North Dakota's H.B. 1305 pointed out during the legislative debates, there is no record of any abortions in North Dakota being conducted solely for the purpose of sex selection.<sup>66</sup> Moreover, even if an abortion was sought for the purposes of sex selection, a woman living in North Dakota would probably keep silent about her motive, partly out of embarrassment, but also because she might anticipate that the doctor would have ethical problems with a sex-selective abortion.<sup>67</sup> H.B. 1305 does not require the doctor to ask about a woman's motivations for requesting an abortion.<sup>68</sup> Thus, even if it could be enforced, it is unlikely that North Dakota's ban on sex-selective abortion would have any significant impact on abortion providers or on women seeking abortions in the state.

However, the same cannot be said of the other main provision in H.B. 1305, which prohibits doctors from performing abortions when they are aware that the abortion has been requested because of a "genetic abnormality or a potential for a genetic abnormality."<sup>69</sup> Unlike sex-selective abortion, a decision to terminate a pregnancy on the basis of fetal disability is widely viewed as an acceptable choice in the United States.<sup>70</sup> For example, one survey of 1,082 pregnant women found that three-quarters would consider having an abortion if they knew that their infant would be affected by a chromosomal abnormality,<sup>71</sup> while only one-quarter would do so

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<sup>64</sup> See Steven Ertelt, *Judge's Ruling Makes North Dakota First to Ban Abortions Based on Down Syndrome*, LIFE NEWS (Sept 12, 2013, 12:37 PM), <http://www.lifenews.com/2013/09/12/judges-ruling-makes-north-dakota-first-to-ban-abortions-based-on-down-syndrome/>.

<sup>65</sup> See CITRO ET AL., *supra* note 2, at 6 (showing examples of how anti-choice legislators have exaggerated the incidence of sex-selective abortion in the United States).

<sup>66</sup> See *N.D. Legis. Branch Video, Senate Floor Session for HB 1305* ND.GOV (Mar. 15, 2013), [http://video.legis.nd.gov/pb3/powerbrowser\\_Desktop.aspx?ContentEntityId=228&date=20130315&tnid=10&browser=0#agenda](http://video.legis.nd.gov/pb3/powerbrowser_Desktop.aspx?ContentEntityId=228&date=20130315&tnid=10&browser=0#agenda).

<sup>67</sup> See, e.g., *ACOG Committee Opinion No. 360, Sex Selection*, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (2007), available at <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/Sex-Selection>. Interestingly, the Opinion makes an explicit exception for sex selection when it is pursued to prevent the birth of a child with a hereditary disease.

<sup>68</sup> H.B. 1305, 63d Legis. Assemb., Reg. Sess. § 2 (N.D. 2013), available at <http://www.legis.nd.gov/assembly/63-2013/documents/13-0351-01000.pdf?20140813205421>.

<sup>69</sup> *Id.*

<sup>70</sup> See, e.g., Amy Harmon, *Genetic Testing + Abortion = ???*, N.Y. TIMES, May 13, 2007, available at [http://www.nytimes.com/2007/05/13/weekinreview/13harm.html?\\_r=0](http://www.nytimes.com/2007/05/13/weekinreview/13harm.html?_r=0) (reporting that public opinion polls indicate that 70% of Americans believe that abortion should be legal in situations of fetal impairment).

<sup>71</sup> See D. Hollander, *In Certain Circumstances, Women in Prenatal Care Would Not Rule Out Having an Abortion in the Future*, 37 PERSPECTIVES ON SEXUAL & REPRODUCTIVE HEALTH 4, GUTTMACHER INST. (Dec. 2005), available at

because of financial hardship.<sup>72</sup> It is very common for pregnant women receiving a diagnosis of fetal impairment to elect to terminate the pregnancy.<sup>73</sup> For example, recent studies of Down's syndrome, which is one of the most frequently occurring genetic anomalies,<sup>74</sup> have reported a pregnancy termination rate between 67% and 85% in the United States.<sup>75</sup> An international review published in 1999 reported an even higher rate of termination (92%) following prenatal diagnosis of Down's syndrome.<sup>76</sup> Supporters of North Dakota's H.B. 1305 emphasized these statistics during the legislative debate on the bill, arguing that fetuses with genetic anomalies are being "disproportionately targeted in the womb."<sup>77</sup>

Of course, abortions sought after women receive a diagnosis of genetic disorder still represent a minority of all abortions in the United States (because most abortions are sought by women who do not want to be pregnant).<sup>78</sup> But, there is no denying that disability-selective abortion is much more common than sex-selective abortion in the United States.<sup>79</sup> Moreover, a woman who terminates a pregnancy due to a genetic anomaly generally makes that decision after discussing the prenatal test results with one or more doctors.<sup>80</sup> Thus, her medical records may contain records of the prenatal tests and any counseling she received, making it easier for a doctor to ascertain her motive for seeking an abortion. Indeed, it would not be unusual for a pregnant woman in this situation to express deep sadness regarding the prenatal test

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<https://www.guttmacher.org/pubs/journals/3720305b.html> (citing Learman LA et al., *Abortion Attitudes of Pregnant Women in Prenatal Care*, 192 AM. J. OBSTETRICS & GYNECOLOGY 1939, 1939–47 (2005) (describing results of a sample of over a thousand pregnant women)).

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., Kenneth B. Schechtman et al., *Decision-Making for Termination of Pregnancies with Fetal Anomalies: Analysis of 53,000 Pregnancies*, 99 OBSTETRICS & GYNECOLOGY 216, 216 (Feb. 2002).

<sup>74</sup> See Jaime L. Natoli et al., *Prenatal Diagnosis of Down Syndrome: a Systematic Review of Termination Rates (1995–2011)*, 32 PRENATAL DIAGNOSIS 142, 142 (2012) available at <http://onlinelibrary.wiley.com/doi/10.1002/pd.2910/full>.

<sup>75</sup> *Id.* at 144.

<sup>76</sup> See Caroline Mansfield et al., *Termination Rates After Prenatal Diagnosis of Down Syndrome, Spina Bifida, Anencephaly, and Turner and Klinefelter Syndromes: A Systematic Literature Review*, 19 PRENATAL DIAGNOSIS 9, 808–12 (1999) available at <http://onlinelibrary.wiley.com/enhanced/doi/10.1002/%28SICI%291097-0223%28199909%2919:9%3C808::AID-PD637%3E3.0.CO;2-B/> (reporting a termination rate of 92%).

<sup>77</sup> *Hearing on H.B. 1305 Before the Hon. Comm. on Human Services*, 63d Legis. Assemb., Reg. Sess. (N.D. 2013) (testimony of Rep. Bette Grande).

<sup>78</sup> See, e.g., Gudrum Schultz, *The Real Reason Women Choose Abortion*, ACTIONLIFE.ORG, <http://www.actionlife.org/index.php/life-issues/abortion/item/124-the-real-reason-women-choose-abortion> (last visited Oct. 3, 2014).

<sup>79</sup> Schechtman et al., *supra* note 73, at 216; Cherry, *supra* note 48, at 161.

<sup>80</sup> See generally Genetics Home Reference, *Genetics Consultation*, GHR.NLM.NIH.GOV, <http://ghr.nlm.nih.gov/handbook/consult?show=all> (last visited Oct. 3, 2014) (explaining prenatal genetic testing).

results at the very time that she requests the abortion.<sup>81</sup> Thus, the doctor who ultimately performs the abortion could easily become aware (either directly from something that the woman says or indirectly from her medical records) that a diagnosed genetic anomaly was the motivation for seeking an abortion. According to the terms of North Dakota's H.B. 1305, the doctor would then have a legal obligation to refuse to perform the abortion.<sup>82</sup>

It should be noted that H.B. 1305 makes no exceptions, not even for fetal impairments that will certainly result in death, either late in pregnancy or shortly after birth.<sup>83</sup> Legislators who opposed H.B. 1305 pointed this out and objected strongly to the concept that a woman should be obligated to undergo a full-term pregnancy and childbirth after her doctor has medically determined that the fetus is likely to die within days of birth.<sup>84</sup> Nonetheless, no exceptions were written into the statute.

While North Dakota was the first state to ban disability-selective abortions, it may not be the last. Prenatal testing is rapidly becoming more sophisticated, allowing pregnant women to obtain genetic information earlier in pregnancy through non-invasive blood tests.<sup>85</sup> This may increase the incidence of prenatal genetic testing and, as a result, disability-selective abortion.<sup>86</sup> It may also create an incentive for state legislators who oppose abortion to enact laws in other states, patterned after H.B. 1305.<sup>87</sup> This kind of legislation could have serious implications for women and their families, as well as those who provide abortion services.

Given the potential impact, pro-choice organizations may feel compelled to challenge state laws that prohibit disability-selective abortion. The next section explains why a challenge to North Dakota's H.B. 1305 would likely generate strong feelings within the disability rights movement.

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<sup>81</sup> See, e.g., ELIZABETH RING-CASSIDY & IAN GENTLES, *WOMEN'S HEALTH AFTER ABORTION: THE MEDICAL AND PSYCHOLOGICAL EVIDENCE* 159 (2d ed. 2003).

<sup>82</sup> See H.B. 1305, 63d Legis. Assemb., Reg. Sess. § 2 (N.D. 2013), available at <http://www.legis.nd.gov/assembly/63-2013/documents/13-0351-01000.pdf?20140813205421>.

<sup>83</sup> *Id.*

<sup>84</sup> See *N.D. Legis. Branch Video, Senate Floor Session for HB 1305*, ND.GOV (Mar. 15, 2013), [http://video.legis.nd.gov/pb3/powerbrowser\\_Desktop.aspx?ContentEntityId=228&date=20130315&tuid=10&browser=0#agenda](http://video.legis.nd.gov/pb3/powerbrowser_Desktop.aspx?ContentEntityId=228&date=20130315&tuid=10&browser=0#agenda).

<sup>85</sup> See Victorian Clinical Genetic Servs., *Non-Invasive Prenatal Screening*, VCGS, available at [http://www.vcgs.org.au/clinical/Documents/PDF/VCGS\\_PanoramaTest\\_Brochure.pdf](http://www.vcgs.org.au/clinical/Documents/PDF/VCGS_PanoramaTest_Brochure.pdf) (last visited Oct. 12, 2014).

<sup>86</sup> See Rachel Rebouche & Karen Rothenberg, *Mixed Messages: The Intersection of Prenatal Genetic Testing and Abortion*, 55 *How. L.J.* 983, 987 (2012) (suggesting that termination of pregnancy due to fetal impairment will become a focal point of public policy debates on abortion as prenatal testing becomes more cost-effective and routine).

<sup>87</sup> See, e.g., Americans United for Life, *Order Model Legislation*, available at <http://www.aul.org/legislative-resources/order-model-legislation/> (last visited July 10, 2014) (demonstrating how it is relatively easy for legislators to obtain a template for a variety of bills restricting access to abortion).

III. THE HISTORY OF EUGENICS AND ITS RELATIONSHIP TO THE MODERN LAW AND PRACTICE OF ABORTION

Eugenics represents a particularly tragic chapter in the history of discrimination against persons with disabilities. The term “eugenic” (derived from the Greek word for “well born”) was originally coined by Francis Galton, who was a cousin of Charles Darwin and one of the founders of the English Eugenics Education Society.<sup>88</sup> While commonly associated with the extreme racist ideology of Nazi Germany, eugenic theories were actually embraced before and after World War II, and were endorsed by people from a variety of different social backgrounds, political convictions, and national affiliations.<sup>89</sup> Indeed, eugenic theories were openly promoted in the United States during the late 19th and early 20th centuries, and inspired a number of states to enact laws preventing persons with disabilities from marrying and reproducing.<sup>90</sup> The language used in one Connecticut state statute was typical; it prohibited “epileptics, imbeciles, and feeble-minded persons” from marrying or having extramarital sexual relations before the age of forty-five.<sup>91</sup> Many state legislatures also enacted laws allowing for “eugenic sterilization,” which eventually led to the sterilization of approximately 60,000 Americans.<sup>92</sup> When Virginia’s sterilization law was challenged in court, the U.S. Supreme Court upheld it in 1927 in the famous case of *Buck v. Bell*, in which Justice Oliver Wendell Holmes proclaimed, “[t]hree generations of imbeciles are enough.”<sup>93</sup> It was not until 1942 that the Supreme Court declared, in *Skinner v. Oklahoma*, that procreation is a fundamental right and thus a statute restricting it must be subjected to the “strict scrutiny” standard of constitutional review.<sup>94</sup>

Eugenic theories were also influential in Canada. For example, the provinces of Alberta and British Columbia imposed sterilization as a condition for discharging inmates from psychiatric institutions based on the assumption that it would not be

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<sup>88</sup> Ruth Hubbard, *Abortion and Disability: Who Should and Who Should Not Inherit the World?*, in THE DISABILITY STUDIES READER 75, 75 (Lennard J. Davis ed., 4th ed. 2013).

<sup>89</sup> See generally Frank Dikotter, *Race Culture: Recent Perspectives on the History of Eugenics*, 103(2) THE AMERICAN HISTORICAL REVIEW, Apr. 1998, at 467, 467 available at [http://www.frankdikotter.com/publications/race\\_culture\\_1.pdf](http://www.frankdikotter.com/publications/race_culture_1.pdf) (noting that eugenics was embraced by social reformers, intellectuals, and medical authorities from one end of the political spectrum to the other).

<sup>90</sup> See generally PAUL LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* 45 (2008).

<sup>91</sup> Robert J. Cynkar, Comment, *Buck v. Bell: ‘Felt Necessities’ v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1432 (1981).

<sup>92</sup> See Michael G. Silver, Note, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 862–63 (2004).

<sup>93</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927).

<sup>94</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that compulsory sterilization could not be imposed as a punishment for a crime, on the ground that the relevant Oklahoma law excluded white-collar crimes from carrying sterilization penalties).

safe to discharge a patient unless the “danger of procreation” could be eliminated.<sup>95</sup> Compulsory sterilization was also practiced in a range of countries across Europe, Scandinavia, and South America.<sup>96</sup> In China, eugenic theories were embraced during the Republican period and also under the Communist Party.<sup>97</sup>

Many people assume that compulsory sterilization has now been eradicated, at least in civilized nations that purport to comply with international human rights norms.<sup>98</sup> In reality, persons with disabilities (particularly women and girls) continue to be sterilized in many parts of the world.<sup>99</sup> Moreover, the question of whether sterilization is ethical continues to be debated by governments, lawyers, doctors, and family members, who often argue that sterilization is in the “best interests” of an individual living with a disability.<sup>100</sup> Interestingly, in Australia, a recent parliamentary inquiry documented many abuses associated with the practice but nonetheless stopped short of recommending a complete ban on the practice of sterilizing a person because of a disability.<sup>101</sup>

In light of this history, it is important for society to consider whether, and under what circumstances, the modern law of abortion may represent a form of eugenics. It would be uncontroversial to categorize a law as “eugenic” if it *required* pregnant women to undergo prenatal testing and to terminate a pregnancy where there is evidence of a fetal impairment.<sup>102</sup> However, no state in the United States would enact such a law today; moreover, if any state did so, the law would certainly be found unconstitutional.<sup>103</sup> The more relevant and complex question is whether society

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<sup>95</sup> See Kristen Savel, *Sex and the Sacred: Sterilisation and Bodily Integrity in English and Canadian Law*, 49 MCGILL L.J. 1093, 1114 (2004) (citing the Sexual Sterilisation Acts of Alberta and British Columbia, enacted in 1928 and 1933, respectively).

<sup>96</sup> See Dikotter, *supra* note 89, at 468.

<sup>97</sup> See generally FRANK DIKOTTER, IMPERFECT CONCEPTIONS: MEDICAL KNOWLEDGE, BIRTH DEFECTS AND EUGENICS IN CHINA 105 (1998); see also Carole J. Petersen, *Population Policy and Eugenic Theory: Implications of China's Ratification of the United Nations Convention on the Rights of Persons with Disabilities*, 8 CHINA: AN INTERNATIONAL JOURNAL 85, 95 (2010).

<sup>98</sup> See *Against Her Will: Forced and Coerced Sterilization of Women Worldwide*, OPEN SOCIETY FOUNDATIONS (Oct. 4, 2011), available at <http://www.opensocietyfoundations.org/publications/against-her-will-forced-and-coerced-sterilization-women-worldwide>.

<sup>99</sup> *Id.*

<sup>100</sup> See *Sterilization of Women and Girls with Disabilities: A Briefing Paper*, HUMAN RIGHTS WATCH (Nov. 10, 2011), <http://www.hrw.org/news/2011/11/10/sterilization-women-and-girls-disabilities>.

<sup>101</sup> See Parliament of Austl., *Special Inquiry: The Involuntary or Coerced Sterilisation of People with Disabilities in Australia*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Involuntary\\_Sterilisation](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation) (last visited Aug. 1, 2014).

<sup>102</sup> See Jon Entine, *DNA Screening is Part of the New Eugenics – and that's Okay*, GENETIC LITERACY PROJECT (July 8, 2013), <http://www.geneticliteracyproject.org/2013/07/08/dna-screening-is-part-of-the-new-eugenics-and-thats-okay/>.

<sup>103</sup> See *Against Her Will: Forced and Coerced Sterilization of Women Worldwide*, *supra* note 98.

pursues eugenics when it makes prenatal testing readily available and then allows each woman to decide whether to terminate her pregnancy if she receives a diagnosis of fetal impairment. In that case, the decision to abort does not necessarily reflect a societal policy of trying to prevent the birth of persons with disabilities. Rather, it might reflect compassion for the pregnant woman, respect for her right to physical autonomy, or recognition that she is in the best position to determine whether she should continue the pregnancy.

However, many disability rights scholars and activists would argue that society does not simply allow pregnant women to make their own decisions.<sup>104</sup> Instead, the medical profession and other powerful institutions actively encourage disability-selective abortion by recommending genetic screening and prenatal testing and then counseling prospective parents in a manner that discourages them from continuing a pregnancy if the tests reveal fetal impairment.<sup>105</sup> In 2007, the American College of Obstetrics and Gynecology amended its guidelines to recommend that all pregnant women (rather than just women over the age of 35) should be offered prenatal chromosomal screening and, if warranted by the screening, prenatal diagnostic testing.<sup>106</sup> In doing so, this professional body has arguably helped to expand and “normalize” the termination of pregnancies with genetic anomalies.<sup>107</sup> Officially, the purpose of expanding genetic screening and prenatal testing is not to pressure pregnant women or even to suggest that they should have an abortion after receiving a diagnosis of fetal impairment.<sup>108</sup> Rather, the stated purpose is simply to “prepare” prospective parents for the possibility that the child will have a disability and allow women to make informed choices.<sup>109</sup> But as there is no “cure” for chromosomal disorders, the unspoken message is always there: by recommending screening and/or testing, the doctors are providing prospective parents an opportunity to abort a fetus deemed to be genetically imperfect.<sup>110</sup> From the perspective of disability rights activists, the inevitable discursive effect of these targeted screening programs is to “convey the devaluation of the lives of persons with disabilities.”<sup>111</sup>

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<sup>104</sup> See generally Parens et al., *supra* note 9, at s4.

<sup>105</sup> See *id.*

<sup>106</sup> American College of Obstetrics and Gynecology, *ACOG’s Screening Guidelines on Chromosomal Abnormalities: What They Mean to Patients and Physicians* (May 7, 2007), available at <http://www.acog.org/About-ACOG/News-Room/News-Releases/2007/ACOGs-Screening-Guidelines-on-Chromosomal-Abnormalities>.

<sup>107</sup> Carol Bishop Mills, *Prenatal Testing, Disability, and Termination: An Examination of Newspaper Framing*, 32 *DISABILITY STUD. QUARTERLY* (2012), available at <http://dsq-sds.org/article/view/1767/3096>.

<sup>108</sup> See *id.*

<sup>109</sup> See *id.*

<sup>110</sup> See *id.*

<sup>111</sup> Janet E. Lord, *Screened Out of Existence: The Convention on the Rights of Persons with Disabilities and Selective Screening Policies*, 12 *INT’L J. DISABILITY, COMMUN., & REHABILITATION* (2012), available at [http://www.ijdc.ca/VOL12\\_02/articles/lord.shtml](http://www.ijdc.ca/VOL12_02/articles/lord.shtml); see also Adreinne Asch, *Disability Equality and Prenatal Testing: Contradictory or Compatible?* 30 *FLA ST. U. L. REV.* 315, 315–16 (2003).

The medical profession's tacit support of disability-selective abortion is also evident in the Opinion of the Ethics Committee of the American College of Obstetrics and Gynecology, which provides that it is generally unethical for a doctor to facilitate sex selection *except* where the purpose is to prevent the birth of a child with a sex-linked hereditary disease.<sup>112</sup> In other words, helping prospective parents to prevent the birth of a girl is inherently unethical, while helping parents to prevent the birth of child with a disability is perfectly ethical. Many doctors would not see the potential for discrimination in this position because they have traditionally adopted a medical view of disability and impairment.<sup>113</sup> As one commentator stated in 1999:

When physicians, public health experts, and bioethicists promote prenatal diagnosis to prevent future disability, they let disability become the only relevant characteristic and suggest that it is such a problematic characteristic that people eagerly awaiting a new baby should terminate the pregnancy and "try again" for a healthy child. Professionals fail to recognize that along with whatever impairment may be diagnosed come all the characteristics of any other future child. The health professions suggest that once a prospective parent knows of the likely disability of a future child, there is nothing else to know or imagine about who the child might become: disability subverts parental dreams.<sup>114</sup>

This purely medical approach to disability is evident in the "quality of life" assessments given to pregnant women when they receive a diagnosis of fetal impairment. Traditionally, these assessments are provided by doctors, who may pass on harmful stereotypes to prospective parents regarding the expected quality of life of a child with a disability.<sup>115</sup> This is not to suggest that parents should not have access to medical information. Certain impairments cause significant physical pain and suffering, and prospective parents have a right to know this.<sup>116</sup> However, doctors are not experts on the overall quality of life of persons living with disabilities.<sup>117</sup> Rather, individuals living with the impairment, or their families, are better qualified to offer an opinion on the expected quality of life of a future child.<sup>118</sup>

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<sup>112</sup> *Sex Selection*, ACOG Committee Opinion No. 360, American College of Obstetricians and Gynecologists (2011), available at <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/Sex-Selection>.

<sup>113</sup> See Adreinne Asch, *Prenatal Diagnosis and Selective Abortion: A Challenge to Practice and Policy*, 89 AM. J. OF PUB. HEALTH 1649, 1652 (1999), as cited in Carol Bishop Mills, *Prenatal Testing, Disability, and Termination: An Examination of Newspaper Framing*, 32 DISABILITY STUDIES QUARTERLY (2012), available at <http://dsq-sds.org/article/view/1767/3096>.

<sup>114</sup> *See id.*

<sup>115</sup> Saxton, *supra* note 9, at 382.

<sup>116</sup> Ellen Painter Dollar, *Why Prenatal Screening for Gender and For Disabilities Are Not the Same*, PATHEOS (Jan. 25, 2012), <http://www.patheos.com/blogs/ellenpainterdollar/2012/01/why-prenatal-screening-for-gender-and-for-disabilities-are-not-the-same/>.

<sup>117</sup> Lord, *supra* note 111.

<sup>118</sup> *Id.*

In recent decades, the United States has enacted extensive legislation to promote the rights of persons with disabilities, including the Americans with Disabilities Act (ADA)<sup>119</sup> and the Individuals with Disabilities Education Act (IDEA).<sup>120</sup> One might hope that these laws (and the disability rights movement generally) would help to counter the purely medical view of disability, giving doctors and prospective parents a less negative view of the prospect of raising a child with an impairment. In theory, laws that prohibit disability discrimination and require inclusive education should enhance the expected quality of life of children with disabilities and, thus, increase the likelihood that a woman would decide to continue her pregnancy after receiving a diagnosis of fetal impairment.<sup>121</sup> However, a 2012 study of the portrayal of prenatal testing in American newspapers concluded that disability is still portrayed primarily as a negative quality and that termination of a fetus with an impairment is often presented as “a matter of fact issue, with little regard to the controversy that might be embedded in such a position.”<sup>122</sup>

This may indicate that laws prohibiting disability discrimination have failed to fundamentally change society’s view of disability or to reassure prospective parents that a child born with an impairment can have a high quality of life. Indeed, one theory is that laws prohibiting disability discrimination may have done the opposite by bringing more public attention to the discrimination that is still prevalent in society and the challenges that parents will face when rearing children with disabilities.<sup>123</sup> For example, it is well known that many parents are dissatisfied with public schools’ compliance with the IDEA legislation and have felt compelled to file complaints, spawning a good deal of litigation and an entire specialty within the field of alternative dispute resolution.<sup>124</sup>

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<sup>119</sup> Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (amended 2009). The ADA was amended by the Americans with Disability Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12101 and 29 U.S.C. § 705). U.S. Dep’t of Justice Civil Rights Div., *Information and Technical Assistance on the American with Disabilities Act*, <http://www.ada.gov/> (last visited Oct. 2, 2014). The United States Department of Justice maintains a webpage devoted to the ADA, with links to agencies that enforce the law in specific fields.

<sup>120</sup> Individuals with Disabilities Education Act, 20 U.S.C §§ 1400 *et seq.* (2004). The United States Department of Education maintains a website (at <http://idea.ed.gov>) devoted to the IDEA legislation, its implementing regulations, and policy guidelines. *See generally* United States Department of Education, *Building the Legacy: IDEA 2004*, <http://idea.ed.gov/explore/home> (a general introduction to the statute and the implementing regulations).

<sup>121</sup> *See* Mills, *supra* note 107.

<sup>122</sup> *See id.*

<sup>123</sup> *See* Dov Fox and Christopher L. Griffin, Jr., *Disability-Selective Abortion and the Americans with Disabilities Act*, 2009 UTAH L. REV. 846, 863 (2009).

<sup>124</sup> *See* Tracey G. Mueller, *IEP Facilitation: A Promising Approach to Resolving Conflicts Between Families and Schools*, 41 TEACHING EXCEPTIONAL CHILDREN 60, 60 (2000); *see also* Consortium for Appropriate Dispute Resolution in Special Education (CADRE) Facilitated IEP Meetings: An Emerging Practice, DIRECTION SERVICE, *available at* <http://www.directionservice.org/cadre/pdf/Facilitated%20IEP%20for%20CADRE%20English.pdf> (last visited Oct. 12, 2014).

Public awareness of these disputes regarding inclusive education may make prospective parents wonder whether they can effectively advocate for a child with a disability, increasing the pressure that a pregnant woman feels when she receives a diagnosis of fetal impairment. She may even feel a duty to terminate her pregnancy, so as not to bring a child into the world who may require a larger share of resources from society than a “normal” child would require.<sup>125</sup> In this manner, eugenic perspectives can be conveyed to prospective parents without overt coercion, or even an official policy of encouraging disability-selective abortions.<sup>126</sup>

Moreover, in many jurisdictions, encouraging “eugenic abortions” is more than just an implied message. Rather, it is arguably an official policy – because the law makes it easier to legally terminate a pregnancy where there is evidence of fetal impairment. For example, the state of Utah enacted a ban on post-viability abortions but made an exception for cases of “fetal abnormality.”<sup>127</sup> Apparently, the legislators who approved that exception decided that the state has less of an interest in protecting fetal life when the future child is likely to be born with a disability.<sup>128</sup> The influence of eugenic thinking can also be inferred from state laws that prohibit public funding for abortion but, once again, make an exception where prenatal testing has revealed a fetal impairment.<sup>129</sup>

An official policy of encouraging disability-selective abortions is particularly evident in jurisdictions that do not recognize a woman’s “right” to an abortion at any stage of pregnancy but, instead, approach abortion from a public policy perspective and permit the termination of pregnancies based on evidence of fetal impairment.<sup>130</sup> A leading example of this approach is the United Kingdom, which has in turn influenced the laws of former British colonies.<sup>131</sup> When the United Kingdom’s law prohibiting abortion was first liberalized in 1967, Parliament chose not to recognize a “right” to access abortion;<sup>132</sup> rather, it created certain exceptions to the criminal

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<sup>125</sup> See Alison Piepmeier, *The Inadequacy of “Choice:” Disability and What’s Wrong With Feminist Framings of Reproduction*, 39 FEMINIST STUDIES 159, 168 (2013) (discussing her interviews with women who decided not to terminate their pregnancies after learning that their future child would likely have Down Syndrome, despite the fact that children with disabilities are typically defined as being a drain on parents and on public resources).

<sup>126</sup> See *id.* at 167; see also Saxton, *supra* note 9, at 383 (noting that it can be difficult for pregnant women to resist the argument that it is their duty to “save scarce healthcare dollars,” by having an abortion after prenatal testing reveals a fetal impairment).

<sup>127</sup> See GUTTMACHER INST., *supra* note 5 (noting exception for “fetal abnormality in Utah’s ban on abortions after viability).

<sup>128</sup> See *id.*

<sup>129</sup> See *id.* (noting exceptions for “fetal abnormality to restrictions on abortion or funding for abortion in the states of Maryland, Mississippi, Virginia, Utah).

<sup>130</sup> See Carole J. Petersen, *Reproduction and Family Planning: Individual Right or Public Policy?*, in HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY 261, 280 (Raymond Wacks, ed., 1993) [hereinafter Petersen, *Reproduction*].

<sup>131</sup> See *id.* at 272–80 (analyzing the British law of abortion and its influence on Hong Kong law).

<sup>132</sup> See *id.* at 273.

prohibitions on abortion.<sup>133</sup> As enacted, the 1967 Act provided that a person would not be guilty of an offense if two registered medical practitioners were of the opinion, formed in good faith:

(a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or

(b) that 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.<sup>134</sup>

Thus, a woman carrying a “normal” fetus would be required to demonstrate that the pregnancy presented some sort of danger to her physical or mental health or to that of her family. In contrast, Parliament assumed that a substantial risk that the future child would be “seriously handicapped” would justify terminating a pregnancy, without any need to demonstrate a negative impact on the pregnant woman or her family.<sup>135</sup> It has been suggested that Parliament enacted this clause in response to the disabilities caused by thalidomide, a medication once prescribed for pregnant women in the United Kingdom which was later discovered to cause severe impairments in their unborn children.<sup>136</sup> Interestingly, however, Parliament did not limit the exemption to particular impairments or make any effort to define, in the statute, what impairments would be considered sufficiently serious to justify an abortion.<sup>137</sup> That decision was left to the discretion of the woman requesting the abortion and the two certifying doctors.<sup>138</sup> This means that the statute can be relied upon to terminate a pregnancy even when the impairment is not considered incompatible with a full life.<sup>139</sup>

The time limits for abortion under British law are also revealing. Although the 1967 Act set the legal limit for most abortions at 28 weeks, this was reduced to 24 weeks in 1990 because it was recognized that premature babies can survive if born at 24 weeks.<sup>140</sup> But the 24-week time limit was only applied to abortions sought on the broad ground that the pregnancy endangers the physical or mental health of a

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<sup>133</sup> *See id.*

<sup>134</sup> Abortion Act, (1967) §1, 87 HALS. STAT. available at <http://www.legislation.gov.uk/ukpga/1967/87/section/1/enacted>.

<sup>135</sup> *See Petersen, Reproduction, supra* note 130, at 278.

<sup>136</sup> Kate Gleeson, *Persuading Parliament: Abortion Law Reform in the UK*, 22(2) AUSTRALASIAN PARLIAMENTARY REV. 23, 24, 30, 31 (2007).

<sup>137</sup> *See Petersen, Reproduction, supra* note 130, at 275.

<sup>138</sup> *See id.* at 273.

<sup>139</sup> *See PARLIAMENTARY INQUIRY, PARLIAMENTARY INQUIRY INTO ABORTION ON THE GROUNDS OF DISABILITY* 14–17 (July 17, 2013), available at <http://www.abortionanddisability.org>.

<sup>140</sup> *See id.*

pregnant woman or her family.<sup>141</sup> The law permits an abortion much later in pregnancy if it threatens the woman's life or is likely to cause "grave permanent injury" to her physical or mental health.<sup>142</sup> Late-term abortions are also permitted 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."<sup>143</sup> Indeed, assuming that the woman finds two doctors who are willing to approve it, an abortion could legally be performed on the basis of "abnormality" right up through the ninth month of pregnancy.

This aspect of British abortion law is controversial among certain members of Parliament and their constituents, generating a Parliamentary Inquiry to review the statutory provision that allows abortion on the basis of disability up until birth.<sup>144</sup> The findings were published in 2013 and noted, in the summary, that the "majority of those in medical bodies and involved in fetal medicine strongly argued that the law is right for the small number of difficult cases where parents face a late discovery of the child's disability" and that the law does not affect public attitudes towards persons with disabilities.<sup>145</sup> However, a majority of those who made submissions felt otherwise and the report recommended that "[i]f the time limit for abortions on the grounds of disability remains to birth, there should be additional written justification for abortions on the grounds of disability after 24 weeks, which should be subject to audit."<sup>146</sup>

This report does not necessarily indicate the views of Parliament generally<sup>147</sup> and it is presently unclear whether the law will be changed. Moreover, even if the recommended amendment is made, British law will still include "serious handicap" as an express and distinct ground for abortion, giving the law a decidedly eugenic tone. The public commentary on the Parliamentary Inquiry indicates that British pro-choice organizations were not moved by the testimony of those who feel that the current British abortion law discriminates based on disability.<sup>148</sup> Similarly, Marsha

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<sup>141</sup> Abortion Act, (1967) §1, 87 HALS. STAT. available at <http://www.legislation.gov.uk/ukpga/1967/87/section/1/enacted>.

<sup>142</sup> See *id.*

<sup>143</sup> See *id.*

<sup>144</sup> See PARLIAMENTARY INQUIRY, PARLIAMENTARY INQUIRY INTO ABORTION ON THE GROUNDS OF DISABILITY 14–17 (July 17, 2013), available at <http://www.abortionanddisability.org>.

<sup>145</sup> *Id.* at 3.

<sup>146</sup> *Id.*

<sup>147</sup> Pro-choice organizations have pointed out that this was an "unofficial" inquiry in the sense that the government did not sanction it and also that the members of Parliament who participated were known to be opposed to abortion. See Family Planning Ass'n (UK), Press Release: *Unofficial Parliamentary Inquiry into Abortion on Grounds of Fetal Disability* (July 17, 2013), available at <http://www.fpa.org.uk/news/unofficial-parliamentary-inquiry-abortion-grounds-fetal-disability>.

<sup>148</sup> For a sample of the testimony submitted by one mother of a child with Down Syndrome, see Hayley Golenowska, *Evidence in Parliamentary Disability Abortion Law Inquiry*, DownsSideUp.com, available at <http://www.downssideup.com/2013/02/evidence-by-downs-side-up-in.html> (last visited Sept. 21, 2014). For a sample of the pro-choice critique of the Inquiry, see, e.g., Ann Furedi, *Abortion: 'We can trust women to make decisions that are*

Saxton of the World Institute on Disability (who has written extensively on the need for greater communication between feminists and disability rights activists) has observed that American pro-choice feminists (and American society generally) have traditionally been isolated from persons with disabilities, making it difficult to fully appreciate their perspectives on abortion.<sup>149</sup> The other challenge to communication is that pro-choice organizations genuinely feel that access to safe and legal abortion services is tenuous, particularly in countries like the United Kingdom, where access to abortion has not been established as a constitutional right and thus could be taken away through the ordinary legal process.<sup>150</sup> As a result, feminists may feel that it is simply too dangerous to support any new restrictions on the legal grounds for terminating a pregnancy.<sup>151</sup>

Comparative research on access to abortion helps to illustrate this point. According to the Center for Reproductive Rights, approximately 60 countries now permit women to terminate a pregnancy, at least during early pregnancy, without regard to the reason for termination.<sup>152</sup> However, twice that number (approximately 125 countries) maintain very restrictive abortion laws.<sup>153</sup> Approximately 30 countries have liberalized their abortion laws in the past two decades.<sup>154</sup> But this does not necessarily mean that these 30 countries now recognize that a woman has a “right” to abortion. Rather, many countries have followed an approach that is conceptually similar to the British Parliament’s approach in 1967 – maintaining the general prohibition on abortion but permitting pregnancy termination in certain “exceptional” situations, including fetal impairment.<sup>155</sup> From the perspective of pro-choice feminists, this is not ideal because they would prefer that women have an unqualified right to choose whether to continue a pregnancy.<sup>156</sup> However, if a

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*right*’, The Telegraph, (Jan. 31, 2013, 3:53 PM), <http://www.telegraph.co.uk/women/womens-life/9840067/Inquiry-into-abortion-law-on-disabled-babies-We-can-trust-women-to-make-decisions-that-are-right-says-BPAS-chief-Ann-Furedi.html>.

<sup>149</sup> Saxton, *supra* note 9.

<sup>150</sup> Judith Levine, *What Human Genetic Modification Means For Women*, COMMITTEE ON WOMEN, POPULATION, AND THE ENVIRONMENT (Jan. 4, 2007), available at <http://cwpe.org/node/170>.

<sup>151</sup> *See id.*

<sup>152</sup> Ctr. for Reprod. Rights, *Fact Sheet*, *supra* note 7.

<sup>153</sup> *See* Ctr. for Reprod. Rights, *Abortion Worldwide; Seventeen Years of Reform*, REPRODUCTIVERIGHTS.ORG (Oct. 2011), <http://reproductiverights.org/en/document/abortion-worldwide-seventeen-years-of-reform>; *see also* Ctr. for Reprod. Rights, *Fact Sheet*, *supra* note 7.

<sup>154</sup> *See id.*

<sup>155</sup> *See* WORLD HEALTH ORG., *supra* note 5; *see also* Ctr. for Reprod. Rights, *Fact Sheet*, *supra* note 7 (designating, in columns I and II, with the letter “F,” those countries that are considered to have restrictive abortion laws but permit abortion on the ground of fetal impairment).

<sup>156</sup> Pro-choice organizations also know that there is a huge variation in how laws that follow this model are applied in practice. Thus, it is easier to obtain an abortion in the United Kingdom than in many states in the United States, despite the fact that there is no “right” to an abortion in the United Kingdom. *See* Reva B. Siegel, *Abortion and the “Woman Question”*: *Forty Years of Debate*, 89 IND. L.J. 1365, 1368 (2012).

national legislature is not willing to recognize a “right” to abortion, then most pro-choice feminists will probably support exceptions to the laws that criminalize abortion, including exceptions based upon fetal impairment.<sup>157</sup> From their perspective, even if these statutory exceptions reflect a eugenic tone, they are worth maintaining because they help a certain number of women to avoid illegal and unsafe abortions.<sup>158</sup>

As demonstrated in the next section of the article, international human rights law and the bodies that monitor compliance with human rights treaties have largely taken a similarly pragmatic approach to abortion and law reform. However, the introduction of the Convention on the Rights of Persons with Disabilities raises new issues and requires us to reconsider this approach to issues of reproductive justice.

#### IV. INTERNATIONAL HUMAN RIGHTS LAW AND ACCESS TO ABORTION: EMERGING NORMS AND THE POTENTIAL IMPACT OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Women’s advocacy groups have long argued that access to reproductive health services (including contraception and safe legal abortion) are an integral component of women’s rights under international human rights law.<sup>159</sup> However, the question of whether there is a right to abortion under international law continues to be contested. Subsection A briefly summarizes both sides of the debate and Subsection B analyzes, in greater detail, what the CRPD, which came into force in 2008, has added to the analysis. Subsection C then explores the approach that the Committee on the Rights of Persons with Disabilities has taken thus far, using its review of the Initial Reports of Spain and Hungary under the CRPD as examples.

##### A. *The Emerging “Right” to Abortion in International Law*

Those who argue that there is no right to abortion in international law principally rely on three general arguments: (1) the fetus has a right to life which should be protected; (2) none of the core UN human rights treaties expressly mention a right to terminate a pregnancy; and (3) international courts and treaty-monitoring bodies should not interpret other rights (such as women’s right to life, health, bodily integrity, or equality) as requiring states to legalize abortion or provide access to abortion services.<sup>160</sup>

Opponents of abortion have, however, largely lost the first argument. The core UN human rights treaties simply do not recognize a fetus as a “human” or endow the fetus with rights under international law.<sup>161</sup> This is a general principle,<sup>162</sup> one that is

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<sup>157</sup> See *id.* at 1365.

<sup>158</sup> See *id.*

<sup>159</sup> See Rebecca J. Cook, *Human Rights and Reproductive Self-Determination*, 44 AM. U. L. REV. 975, 976 (1995).

<sup>160</sup> For examples of this general line of argument, see generally *Abortion and the Unborn Child in International Law*, THE SAN JOSE ARTICLES, available at [http://www.sanjosearticles.com/?page\\_id=2](http://www.sanjosearticles.com/?page_id=2); see also Thomas A. Venzor, *Protecting the Unborn Child: The Current State of International Law Concerning the So-Called Right to Abortion and Intervention by the Holy See*, 89 NEB. L. REV. 1132 (2011).

<sup>161</sup> See generally Rhonda Copelon et al., *Human Rights Begin at Birth: International Law and the Claim of Fetal Rights*, 13 REPRODUCTIVE HEALTH MATTERS 120, 122 (2005).

consistent with the Universal Declaration of Human Rights (UDHR), which provides that “[a]ll human beings are *born* free and equal in dignity and rights.”<sup>163</sup> During the drafting of the ICCPR (one of the two treaties that translated the UDHR into binding treaty form), proposals to protect the right to life from the moment of conception were considered but ultimately rejected.<sup>164</sup> The question of fetal rights was raised again during the drafting of the Convention on the Rights of the Child (CRC).<sup>165</sup> The preamble to the CRC states that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth,” and this language arguably implies that the term “child” includes an unborn fetus.<sup>166</sup> However, Article 1 of the CRC provides the legal definition of “child” for purposes of the Convention, stating that “a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”<sup>167</sup> Thus, it is generally agreed that the enforceable provisions of the CRC “retain the historical understanding that legally protected status as a human being begins at live birth.”<sup>168</sup>

On the other hand, those who argue against a right to abortion under international law can easily win the second argument because the core UN human rights treaties also do not expressly recognize a “right” to abortion.<sup>169</sup> Indeed, advocates for women’s reproductive autonomy have frequently conceded that point.<sup>170</sup> The CEDAW treaty comes the closest to providing an express right to control one’s fertility, stating in Article 16, that:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women, the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.<sup>171</sup>

On its face, this article appears to primarily focus on a woman’s right to an equal decision-making role within her marriage and in the family. And while one can

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<sup>162</sup> See Rebecca J. Cook & Bernard M. Dickens et al., *Human Rights Dynamics of Abortion Law Reform*, 25(1) HUM. RTS. Q. 1, 24 (2003) (noting that it is generally recognized that international human rights conventions are not applicable before birth).

<sup>163</sup> Universal Declaration of Human Rights, G.A. Res. 217 (I) A, U.N. Doc. A/RES/217(I) (Dec. 10, 1948).

<sup>164</sup> Cook & Dickens, *supra* note 162, at 24.

<sup>165</sup> CRC, *supra* note 16.

<sup>166</sup> *Id.* at Preamble.

<sup>167</sup> *Id.* at Art. 1.

<sup>168</sup> Cook & Dickens, *supra* note 162, at 24.

<sup>169</sup> See generally Copelon et al., *supra* note 161, at 122.

<sup>170</sup> See *id.*

<sup>171</sup> CEDAW, *supra* note 15, at art. 16(e).

easily infer a right to control one's fertility from this provision, it still does not expressly mention abortion. Thus, while the Committee on the Elimination of Discrimination Against Women regularly recommends that governments relax restrictions on abortion,<sup>172</sup> the Committee does not try to argue that governments are obligated to recognize a general "right" to abortion because of Article 16. Indeed, it probably would be counterproductive to do so because many countries have already filed reservations to Article 16, and the CEDAW Committee would like to see governments withdraw those reservations.<sup>173</sup>

Thus, the debate regarding an emerging right to abortion in international human rights law essentially boils down to the third issue – whether such a right is implicit in other rights that are stated in the core UN human rights treaties. Here, the advocates for reproductive justice have made significant progress in recent years, relying upon a variety of provisions in the core UN human rights treaties, including those that protect women's rights to life, health, freedom from discrimination, autonomy in reproductive decision-making, and freedom from cruel, inhuman, or degrading treatment.<sup>174</sup> In general, the UN agencies and human rights treaty-monitoring bodies have been receptive to this approach.<sup>175</sup> As a result, there is now a body of international jurisprudence that recognizes certain reproductive rights, including the right to be free from unlawful state intrusion (e.g. forced abortions or sterilization) and the right to access certain reproductive health services, including contraception, maternal health services, and, where necessary, abortion.<sup>176</sup>

For example, the UN Human Rights Committee (which monitors the ICCPR, a treaty that was ratified by the United States in 1992) recognizes that laws that block access to safe and legal abortions may violate women's right to life.<sup>177</sup> This is a credible argument, given that thousands of women die annually from unsafe abortions.<sup>178</sup> The Human Rights Committee has thus requested that governments inform it of "any measures taken by the State to help women prevent unwanted

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<sup>172</sup> See, e.g., Committee on the Elimination of Discrimination Against Women, Concluding Observations: Oman, para. 41, U.N. Doc. CEDAW/C/OMN/CO/1 (2011); Committee on the Elimination of Discrimination Against Women, Concluding Observations: Paraguay, para. 31, U.N. Doc. CEDAW/C/PRY/CO/6 (2011).

<sup>173</sup> See Declarations, Reservations, Objections & Notifications of Withdrawal of Reservations Relating to the CEDAW, U.N. Doc. CEDAW/SP/2006/2 (June 23, 2006).

<sup>174</sup> The Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. (Dec. 10, 1948); Convention on the Political Rights of Women, pmbl., opened for signature Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135 (entered into force July 7, 1954); see also Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Art. 2(a), U.N. Doc. A/48/629 (1993).

<sup>175</sup> UNFPA & Ctr. Reprod. Rights, *ICPD and Human Rights: 20 Years of Advancing Reproductive Rights Through UN Treaty Bodies and Legal Reform*, UNFPA.ORG (2013), [http://www.unfpa.org/rights/docs/icpd\\_and\\_human\\_rights\\_20\\_years.pdf](http://www.unfpa.org/rights/docs/icpd_and_human_rights_20_years.pdf).

<sup>176</sup> *Id.*

<sup>177</sup> See, e.g., Concluding Observations of the Human Rights Comm.: Chile, para. 15, U.N. Doc. CCPR/C/79/Add.104 (1999).

<sup>178</sup> See WORLD HEALTH ORG., UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2008 1 (6th ed. 2011) (estimating that 47,000 women died as a result of unsafe abortions in 2008).

pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions.<sup>179</sup> The Human Rights Committee has also criticized governments that maintain a general ban on abortion or that make accessing abortion so difficult that women feel compelled to seek an illegal and unsafe abortion.<sup>180</sup>

It has also been recognized that overly restrictive abortion laws can lead to violations of the right to be free from cruel, inhuman, or degrading treatment,<sup>181</sup> arising either from the need to resort to an unsafe abortion or from being forced to carry a pregnancy to term. For example, the Committee Against Torture, the treaty-monitoring body for the CAT, observed that a woman who is compelled to continue a pregnancy after rape experiences “constant exposure to the violation committed against her,” which can lead to traumatic stress and long-lasting psychological problems.<sup>182</sup> Similarly, the European Court of Human Rights held that a woman who could not obtain an abortion in a case of severe fetal impairment “suffered acute anguish through having to think about how she and her family would be able to ensure the child’s welfare, happiness and appropriate long-term medical care.”<sup>183</sup>

Human rights treaty bodies have also analyzed abortion in the context of the right to non-discrimination. Both the ICCPR and the CEDAW obligate states to prohibit discrimination against women,<sup>184</sup> which is defined (in the CEDAW treaty) as including laws and policies that have the “purpose or effect” of preventing a woman from exercising any of her human rights or fundamental freedoms on a basis of equality with men.<sup>185</sup> The Human Rights Committee has recognized that an absolute prohibition on abortion, even in cases of rape, violates the state’s obligation to ensure that women enjoy equal civil and political rights.<sup>186</sup> Criminalizing abortion constitutes discrimination in health care because it is a procedure that is needed only by women and because forced pregnancy and childbirth expose women to gender-

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<sup>179</sup> See, e.g., Human Rights Committee, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3), 68th Sess. Mar. 29, 2000, para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

<sup>180</sup> See, e.g., Concluding Observation of the Human Rights Comm.: Nicaragua, para. 13, U.N. Doc. CCPR/C/NIC/CO/3 (2008).

<sup>181</sup> CAT, *supra* note 14, at art. 16. This treaty was ratified by the United States in 1994.

<sup>182</sup> Concluding Observations of the Comm. Against Torture: Nicaragua, para. 16, U.N. Doc. CAT/C/NIC/CO/1 (2009); see also Conclusions & Recommendations of the Comm. Against Torture: Peru, para. 23, U.N. Doc. CAT/C/PER/CO/4 (2006) (recognizing the physical and mental pain associated with being compelled by the law to seek an illegal and unsafe abortion as a form of cruel, inhuman, and degrading treatment).

<sup>183</sup> R. R. v. Poland, App. No. 27617/04, 53 E.H.R.R. 31, 159 (2011).

<sup>184</sup> ICCPR, *supra* note 13, at art. 3; see also CEDAW, *supra* note 15, at art. 1.

<sup>185</sup> CEDAW, *supra* note 15, at art. 1.

<sup>186</sup> Ctr. For Reprod. Rights, *Safe and Legal Abortion is a Woman’s Human Right*, REPRODUCTIVERIGHTS.ORG (Oct. 2011), [http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/pub\\_fac\\_safeab\\_10.11.pdf](http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/pub_fac_safeab_10.11.pdf) (citing Concluding Observations of the Human Rights Comm.: Peru, para. 20, U.N. Doc. CCPR/CO/70/PE (2000)).

specific health risks.<sup>187</sup> The potential impact of being legally compelled to continue a pregnancy was illustrated in *L.C. v. Peru*, a communication brought under the CEDAW Optional Protocol.<sup>188</sup> A teenager became pregnant as a result of sexual abuse and attempted to commit suicide by jumping from a tall building.<sup>189</sup> She required emergency surgery to address the injury to her spine and alleged that the public hospital declined to perform the surgery because it posed a risk to the pregnancy.<sup>190</sup> The hospital also refused to perform an abortion, despite the fact that “therapeutic abortion” was supposed to be legal in Peru and the pregnancy posed a danger to L.C.’s physical and mental health.<sup>191</sup> The surgery was not performed until three months later (after L.C. had spontaneously miscarried) and L.C. alleged that the delay caused her paralysis.<sup>192</sup> The CEDAW Committee decided that the refusal to terminate the pregnancy and perform the necessary surgery in a timely manner constituted a violation of Articles 2(c) and (f), 3, 5, and 12, together with Article 1 of the CEDAW treaty.<sup>193</sup>

More recently, the CEDAW Committee submitted a statement on sexual and reproductive rights to the International Conference on Population and Development (ICPD) Beyond 2014 Review.<sup>194</sup> Although the statement devotes only one full paragraph to abortion, it takes a clear position, noting that “unsafe abortion is a leading cause of maternal mortality and morbidity” and that states should therefore “legalize abortion at least in cases of rape, incest, threats to the life and/or health of

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<sup>187</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 24: Article 12 of the Convention (Women and Health), 20th Sess., 1999, U.N. Doc. A/54/38/Rev.1, chap. I (1999), *available at* <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24> (noting, in para 31(c), that states should “[p]rioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance” and that [w]hen possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion.”).

<sup>188</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (Dec. 22, 2000), *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx>.

<sup>189</sup> CEDAW, Communication No. 22/2009, *L.C. v. Peru*, 50th Sess., Oct. 18, 2009, U.N. Doc. CEDAW/C/50/D/22/2009, § 2.1 (adopted Oct. 17, 2011), *available at* <http://reproductiverights.org/sites/crr.civactions.net/files/documents/CEDAW-C-50-D-22-2009%20English%20%28clean%20copy%29.pdf>.

<sup>190</sup> *Id.* § 8.12.

<sup>191</sup> *Id.* § 6.8.

<sup>192</sup> *Id.* § 8.18.

<sup>193</sup> *Id.* § 8.17.

<sup>194</sup> CEDAW, Statement of the Committee on the Elimination of Discrimination Against Women on Sexual and Reproductive Health and Rights: Beyond 2014 ICPD Review, 55th Sess., Feb. 10–28, 2014, U.N. Doc. CEDAW/C/2014/I/CRP (2014), *available at* <http://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/SRHR26Feb2014.pdf>.

the mother, or severe fetal impairment,” as well as removing punitive measures for women who undergo abortion.<sup>195</sup>

The summary provided above is just a small sample of the many occasions in which the core UN human rights treaty-monitoring bodies have recognized that denying a woman access to an abortion when she requests one could constitute a violation of her rights under international law. These statements by the treaty bodies (generally given in the course of Concluding Observations on governments’ periodic reports or in decisions on individual communications) are not, strictly speaking, binding on all States Parties to the relevant treaties.<sup>196</sup> However, the opinions of the treaty-monitoring bodies are considered highly authoritative interpretations<sup>197</sup> and it is clear that the advocates for reproductive freedom are gaining ground in the jurisprudence of international human rights.<sup>198</sup>

The next subsection considers the approach taken in the Convention on the Rights of Persons with Disabilities, which is longer and far more detailed than previous human rights treaties and has several articles that are relevant to the right to life, the right to create a family, and the right to reproductive health services.

### B. *The Convention on the Rights of Persons with Disabilities*

The CRPD is considered historic because it rejects the outdated medical and social welfare approaches to disability.<sup>199</sup> Instead, the CRPD provides legal authority for the social and human rights models of disability.<sup>200</sup> The social model is a generic term for a theory of disability that was developed in the 1960s by British activists advocating for the right to live independently.<sup>201</sup> It distinguishes between

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<sup>195</sup> *Id.*

<sup>196</sup> Univ. Bristol & Arts & Humanities Research Council, *Implementation of UN Treaty Body Concluding Observations: The Role of National and Regional Mechanisms in Europe*, UNHR.ORG (Sept. 20 2011), [http://www2.ohchr.org/english/bodies/HRTD/docs/Summary\\_Proceedings\\_Bristol\\_Sept2011\\_24.10.2011.pdf](http://www2.ohchr.org/english/bodies/HRTD/docs/Summary_Proceedings_Bristol_Sept2011_24.10.2011.pdf).

<sup>197</sup> See Opening address by Ms Navi Pillay, High Commissioner for Human Rights to the Informal meeting, Intergovernmental process on the strengthening of the Human Rights Treaty Bodies, July 16, 2012, United Nations Headquarters, New York, at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12361&LangID=e>; and Navanethem Pillay, STRENGTHENING THE UNITED NATIONS HUMAN RIGHTS TREATY BODY SYSTEM: A REPORT BY THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (June 2012), at Foreword and p. 82.

<sup>198</sup> Isfahan Merali, *Advancing Women's Reproductive and Sexual Health Rights: Using the International Human Rights System*, 10 DEV. IN PRAC. 609, 614–20 (2010).

<sup>199</sup> Mary Crock, Ron McCallum & Christine Ernst, *Where Disability and Displacement Intersect: Asylum Seekers with Disabilities*, 24 INT’L J. REFUGEE L. 735, 735 (Sept. 2011). The medical model focused on individual “afflictions” and the need for treatment, while the welfare model focused on the need to protect and support “disabled” individuals. *Id.*

<sup>200</sup> Michael Palmer & David Harley, *Models and Measurement in Disability: An International Review*, 27 HEALTH POL’Y PLAN. 357, 359 (2011).

<sup>201</sup> See Union of the Physically Impaired Against Segregation, CTR. DISABILITY STUDIES (amended Sept. 8, 1976), <http://disability-studies.leeds.ac.uk/files/library/UPIAS-UPIAS.pdf>; see also Vic Finkelstein, *The Social Model of Disability Repossessed*, Coalition, CTR.

impairments and disability, which it defines as a form of social oppression that is perpetuated by physical and social barriers.<sup>202</sup> The human rights model is similar to the social model in that it views people who live with impairments as rights holders and recognizes that they are often more disabled by physical and attitudinal barriers than by individual impairments.<sup>203</sup> However, the human rights model expressly includes economic, social, and cultural rights (what some scholars refer to as “second generation rights”), which are necessary for many persons to live with dignity and achieve equality.<sup>204</sup>

The CRPD is also historic because of the manner in which it was drafted. Traditionally, new treaties have been drafted primarily by diplomats during closed-door meetings.<sup>205</sup> In the case of the CRPD, there was an unusually high level of input from civil society, far exceeding that for previous human rights treaties.<sup>206</sup> This was largely because the disability rights movement insisted on the right to participate.<sup>207</sup> Governments were urged to appoint citizens with disabilities to the official delegations and to actively consult disability rights organizations.<sup>208</sup> Activists also organized at the local and regional levels and submitted written comments to the Ad Hoc Committee that drafted the treaty.<sup>209</sup> The large number of submissions generated vigorous debates on the language of the CRPD.<sup>210</sup>

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DISABILITY STUDIES (Dec. 1, 2002), available at <http://www.leeds.ac.uk/disability-studies/archiveuk/finkelstein/soc%20mod%20repossessed.pdf>.

<sup>202</sup> Union of the Physically Impaired Against Segregation, *supra* note 201.

<sup>203</sup> See Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT’L L. & COM. 287, 291 (2007); Rosemary Kayess & Phillip French, *Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 2 (2008).

<sup>204</sup> See Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 93 (2007) (discussing the shortcomings of the social model and the importance of including economic and social rights in the “disability human rights” model).

<sup>205</sup> Katherine Guernsey, Marcolo Nicoli & Alberto Ninio, CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: ITS IMPLEMENTATION AND RELEVANCE FOR THE WORLD BANK I (2007).

<sup>206</sup> See HUMAN RIGHTS & DISABILITY ADVOCACY 5 (Maya Sabatello & Marianne Schulze, eds. 2014); see also U.N. Secretary-General, *Secretary-General Hails Adoption of Landmark Convention on the Rights of Persons with Disabilities*, U.N. Doc. SG/SM/10797 (Dec. 13, 2006), available at <http://www.un.org/News/Press/docs/2006/sgsm10797.doc.htm> (describing the CRPD as the first human rights treaty to emerge from lobbying conducted extensively through the internet).

<sup>207</sup> Jerry Alan Winter, *The Development of the Disability Rights Movement as a Social Problem Solver*, 23 DISABILITIES STUD. Q. 33, 46 (2003).

<sup>208</sup> Tara J. Melish, *Perspectives on the Rights of Persons with Disabilities: The UN CRPD: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 HUMAN RIGHTS BRIEF 37 (2007).

<sup>209</sup> Nicholas Caivano, *Conceptualizing Capacity: Interpreting Canada’s Qualified Ratification of Article 12 of the UN Disability Rights Convention*, 4 W. J. LEGAL STUD. 1, 6 (2014).

<sup>210</sup> See *id.* at 2; see also UNITEDNATIONSENABLE.ORG, <http://www.un.org/disabilities/default.asp?id=1423> (last visited Oct. 18, 2014) (providing

One of these debates was on the question of whether and how to define disability. Some argued that any definition that employed medical terminology would undermine the treaty's commitment to the social model.<sup>211</sup> Others argued for a detailed definition out of fear that persons with certain types of disabilities might otherwise be excluded from national laws that purported to implement the treaty.<sup>212</sup> The final version of the CRPD reflects a compromise. Although "disability" is not defined in the definitions section of the treaty, Article One states that the purpose of the CRPD is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities" and that "[p]ersons with disabilities *include those* with long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."<sup>213</sup> Thus, while the treaty expressly includes certain groups, it does not purport to define the full scope of the term "persons with disabilities," leaving the issue to be determined through activism and the continuing efforts of the disability rights movement.<sup>214</sup> It also emphasizes the core principle of the social model, that it is not simply "impairments" that create disability but the manner in which socially constructed barriers interact with individual conditions.<sup>215</sup>

In light of the history of eugenic policies, it is not surprising that the CRPD specifically addresses issues relating to the rights to life, marriage, and reproduction. Three Articles are particularly relevant. Article 10 affirms that every human being has the inherent right to life, and obligates States Parties to take all necessary measures to ensure the effective enjoyment by persons with disabilities on an equal basis with others.<sup>216</sup> Article 23 obligates States Parties to take steps to "eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships" and strongly condemns any form of state-sponsored sterilization, providing that persons with disabilities "shall retain their fertility."<sup>217</sup> Article 25, which provides for the right to health, expressly requires States Parties to provide persons with disabilities equal access to sexual and reproductive health services.<sup>218</sup> In particular, Article 25 states that persons with disabilities should be provided "with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the

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drafts of the treaty, submissions, lists of attendees, and other documents arising from the eight sessions of the Ad Hoc Committee that drafted the treaty).

<sup>211</sup> Palmer & Harley, *supra* note 200.

<sup>212</sup> Bill Frist, *Why the U.S. Must Lead on Disabilities Treaty*, REUTERS (Nov. 5 2013), <http://blogs.reuters.com/great-debate/2013/11/05/why-the-u-s-must-lead-on-disabilities-treaty/>.

<sup>213</sup> CRPD, *supra* note 17, at art. 1 (emphasis added).

<sup>214</sup> Maya Sabatello, *A Short History of the Movement*, HUMAN RIGHTS AND DISABILITY ADVOCACY 19 (Maya Sabatello and Marianne Schulze, eds., 2014).

<sup>215</sup> *Id.*

<sup>216</sup> CRPD, *supra* note 17, at art. 10.

<sup>217</sup> *Id.* at art. 23.

<sup>218</sup> *Id.* at art. 25.

area of sexual and reproductive health and population-based public health programmes.”<sup>219</sup>

The records of the Ad Hoc Committee that drafted the CRPD highlight the competing views on the appropriate wording of these articles and demonstrate that access to sexual and reproductive health services was a particularly contentious issue.<sup>220</sup> As a result, the language was substantially revised from the first draft, so as to become “far less explicit and affirmative” regarding sexuality.<sup>221</sup> The Holy See, which has observer status at the United Nations, played a significant role in this process; for example, it objected to any language referring to “sexual and reproductive health” services on the ground that some countries would include abortion services within this broad category.<sup>222</sup>

The Holy See was not entirely alone in its concern that abortion services could be conflated with a general right to sexual and reproductive health. Other participants in the drafting process were also deeply concerned by the phenomena of disability-selective abortion.<sup>223</sup> Approximately halfway through the drafting process, a working group submitted a proposal for the text of Article 8 on the “right to life”.<sup>224</sup> That draft expressly stated that “[d]isability is not a justification for the termination of life” and that States Parties to the treaty “shall undertake effective measures to the prohibition of compulsory abortion at the instance of the State based on the prenatal diagnosis of disability.”<sup>225</sup> However, this language did not make it into the final version of the treaty.<sup>226</sup> Although the working group stressed that it was not seeking to reduce the freedom of women to make their own decisions, the proposed language stating that, “disability should not be a justification for the termination of life,” raised concerns among many participants who supported women’s right to choose.<sup>227</sup>

Some of the groups that commented on the drafts of the CRPD thus sought to find language that would represent a compromise: a way to preserve a woman’s right to reproductive freedom, while also creating a state obligation to prevent compulsory abortion and a minimal duty to encourage prospective parents not to terminate a

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<sup>219</sup> *Id.*

<sup>220</sup> See Mi Yeon Kim, *Women with Disabilities*, in HUMAN RIGHTS AND DISABILITY ADVOCACY 113, 123 (Maya Sabatello and Marianne Schulze, eds., 2014).

<sup>221</sup> Marta Schaaf, *Negotiating Sexuality in the Convention on the Rights of Persons with Disabilities*, 8 SUR INT’L J. HUM. RTS. 113, 113 (2011), available at <http://www.surjournal.org/eng/conteudos/pdf/14/06.pdf>.

<sup>222</sup> *Id.* at 123. For further discussion of the Holy See’s position on international instruments that address reproductive rights, see Chad Marzen, *The Holy See’s Worldwide Role and International Human Rights: Solely Symbolic?*, 27 UNIV. OF DETROIT MERCY L. REV. 659 (2009).

<sup>223</sup> Schaaf, *supra* note 221, at 115.

<sup>224</sup> Lex Grandia, *Imagine: To Be a Part of This*, in HUMAN RIGHTS AND DISABILITY ADVOCACY 146, 152 (Maya Sabatello and Marianne Schulze, eds., 2014).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

pregnancy solely because of disability.<sup>228</sup> A coalition of Australian disability rights groups put forth the following suggestion:

This [issue] obviously presents a difficult ethical challenge, not least because of its potential impact on the choice of women in relation to pregnancy. However, it might be possible to address this issue more indirectly. For example, much of the information that is made available to parents at the time of genetic testing and immediately following the birth of a child with disability is overwhelmingly negative and inaccurate, and induces parents to opt for termination of pregnancy or withdrawal of life-sustaining treatments. It is possible to impose an obligation on States to ensure that prospective parents of a child with disability receive positive and realistic orientation to their child and its future life. This may reduce the chances that parents will opt for termination of pregnancy.<sup>229</sup>

Ultimately, however, the drafters of the CRPD agreed to describe the “right to life” in very simple terms. The provision on the “right to life” (which is numbered Article 10 in the final version of the CRPD) does not refer to “the unborn” and it does not state that life begins at conception.<sup>230</sup> Nor does it impose even a minimal obligation on governments to provide prospective parents with a positive view of the prospect of raising a child with a disability. This decision can be explained by the concern that any language referring to the status of the unborn or the procedures that should be followed before a pregnant woman can obtain an abortion would have opened a “Pandora’s box,” one that would have been extremely difficult to close because abortion is such a divisive topic.<sup>231</sup> As such, the drafters decided against including any express reference to abortion within the treaty.<sup>232</sup>

The drafters did, however, retain the language relating to the right of persons with disabilities to access reproductive health services in Article 25.<sup>233</sup> The right to decide on the number and spacing of children, first stated in Article 16 of the CEDAW treaty, also appears in Article 23 of the CRPD.<sup>234</sup> Indeed, the language is arguably stronger in the CRPD, as it provides that States Parties should ensure that: “The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the

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<sup>228</sup> United Nations Enable, UN Convention on the Rights of People With Disabilities, Fourth Session of the Ad Hoc Committee, Daily Summary of Discussions Related to Article 8: Right to Life, Aug. 4, 2004 [hereinafter *Right to Life Discussion*] <http://www.un.org/esa/socdev/enable/rights/ahc4sumart08.htm>.

<sup>229</sup> U.N. Convention on the Rights of People with Disabilities, Proposals and Amendments Submitted Electronically, Fourth Session Comments by People with Disability Australia (2006), <http://www.un.org/esa/socdev/enable/rights/ahcstata11fcomments.htm>.

<sup>230</sup> See CRPD, *supra* note 17, at art. 10.

<sup>231</sup> See *Right to Life Discussion*, *supra* note 228.

<sup>232</sup> *Id.*

<sup>233</sup> CRPD, *supra* note 17, at art. 25.

<sup>234</sup> *Id.* at art. 23.

means necessary to enable them to exercise these rights are provided.”<sup>235</sup> This is important because, contrary to stereotypes, persons with disabilities have active sexual lives.<sup>236</sup> Moreover, sexually active women who are capable of becoming pregnant generally want the ability to control their fertility at certain stages in their lives.<sup>237</sup> The Holy See responded to these drafting decisions by declining to sign the CRPD.<sup>238</sup> Although it had originally been a strong supporter of the idea of a treaty on the rights of persons with disabilities, the Holy See was unwilling to sign a document that might be interpreted as supporting a right to access contraception or abortion services.<sup>239</sup>

The debate on whether the CRPD obligates states to change their laws regarding abortion did not end with the drafting process. As discussed in the next subsection, this debate has reemerged during the international reporting process, the primary enforcement process for the CRPD and for the other core UN human rights treaties.

*C. The Approach of the Committee on the Rights of Persons with Disabilities to Abortion on the Ground of Fetal Impairment*

The international reporting process for the CRPD is overseen by the Committee on the Rights of Persons with Disabilities, a panel of independent experts on disability rights from around the world who serve in their personal capacity.<sup>240</sup> When a state ratifies the CRPD, its national government is obligated to submit a comprehensive “Initial Report” of its implementation of the treaty within two years of becoming a State Party.<sup>241</sup> The Initial Report is intended to describe both the progress toward implementation and any barriers preventing full compliance with the treaty.<sup>242</sup> Nongovernmental organizations (NGOs) often provide input as the Committee prepares its “List of Issues,” an official document seeking supplementary

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<sup>235</sup> *Id.* at art. 23(1)(d). In contrast, the CEDAW treaty only provides (at art. 16) that women should have equal rights with men to determine the number and spacing of their children.

<sup>236</sup> See WORLD HEALTH ORGANIZATION & UNITED NATIONS POPULATION FUND, PROMOTING SEXUAL AND REPRODUCTIVE HEALTH FOR PERSONS WITH DISABILITIES 7 (2009) [hereinafter WHO & UNFPA]; see generally Michael L. Perlin and Alison J. Lynch, *All His Sexless Patients: Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 258 (2014).

<sup>237</sup> WHO & UNFPA, *supra* note 236, at 7.

<sup>238</sup> Letter from H.E. Archbishop Celestino Migliore, Apostolic Nuncio, Permanent Observer of the Holy See to H.E. Sheikh Haya Rashed Al Khalifa, President of 61st General Assembly of the United Nations (Dec. 13, 2006) (on file with author).

<sup>239</sup> *Id.*

<sup>240</sup> See CRPD, *supra* note 17, at art. 34 (providing for the establishment of a Committee on the Rights of Persons with Disabilities, consisting of twelve experts of high moral standing and recognized competence and experience, to be elected by the States Parties) and art. 34(3) (providing that members serve in their personal capacity).

<sup>241</sup> CRPD, *supra* note 17, at art. 35(1).

<sup>242</sup> *Id.*

information from the State Party on topics that were not included in the Initial Report or which the Committee believes were not adequately addressed.<sup>243</sup>

NGOs also regularly submit “alternative” or “shadow reports” that comment on the official report and point out governmental failures to comply with the treaty.<sup>244</sup> When all of this documentation has been submitted, and usually published on the Committee’s website, the Committee conducts a formal public review of the state’s Initial Report and issues “Concluding Observations,” advising the government of its concerns and suggestions for implementation of the treaty.<sup>245</sup> The process is essentially a dialogue between the Committee and the government delegation representing the State Party. As such, the Committee is careful to phrase its recommendations in diplomatic language. Although the Committee cannot compel a government to comply with its recommendations, civil society can use the Concluding Observations to lobby for law and policy reforms at the domestic level.<sup>246</sup>

The Committee on the Rights of Persons with Disabilities commenced operations in 2008, shortly after the CRPD received its twentieth ratification and entered into force as a binding multilateral treaty.<sup>247</sup> Spain’s Initial Report on the implementation of the CRPD was submitted in 2010 and it became the second state report reviewed by the Committee.<sup>248</sup> Spain serves as an illustrative case study of the potential impact of the CRPD reporting process, partly because the Spanish government attempted to reduce women’s access to legal abortion soon after the Committee’s review of Spain’s Initial Report.

In 1985, Spain legalized abortion under certain circumstances, including fetal impairment.<sup>249</sup> In 2009, under the rule of the Socialist Party, the government conducted a review of the abortion law. This process led to a more liberal legislative

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<sup>243</sup> PEGGY BRETT AND PATRICK MUTZENBERG, CENTRE FOR CIVIL AND POLITICAL RIGHTS, U.N. HUMAN RIGHTS COMMITTEE PARTICIPATION IN THE REPORTING PROCESS: GUIDELINES FOR NON-GOVERNMENTAL ORGANIZATIONS 10–11 (2010).

<sup>244</sup> See Disabled Persons’ International, SHADOW REPORTING GUIDELINES ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES FOR DISABLED PEOPLES’ ORGANIZATIONS (DPO) AND CIVIL SOCIETY ORGANIZATIONS (Dec. 2012).

<sup>245</sup> CRPD, *supra* note 17, at art. 35.

<sup>246</sup> For analysis of the role of civil society in a similar process under the CEDAW, see Carole J. Petersen and Harriet Samuels, *The International Convention on the Elimination of All Forms of Discrimination Against Women: A Comparison of Its Implementation and the Role of Non-Governmental Organizations in the United Kingdom and Hong Kong*, 26 HASTINGS INT’L & COMP. L. REV. 1, 1 (2002).

<sup>247</sup> Press Release, Landmark UN Treaty on Rights of Persons with Disabilities Enters Into Force (May 3, 2008), *available at* <http://www.un.org/apps/news/story.asp?NewsID=26554#>.

<sup>248</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial Reports Submitted by States Parties in Accordance with Article 35 of the Convention: Spain*, May 3, 2010, U.N. Doc. CRPD/C/ESP/1 [hereinafter *Spain Initial Report*].

<sup>249</sup> Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, *Population Policy Data Bank: Spain 2* [hereinafter *Population Policy Data Bank: Spain*] <http://www.un.org/esa/population/publications/abortion/doc/spain.doc>.

framework, which was enacted in 2010.<sup>250</sup> Under Article 14 of the 2010 law, which is still in force, a pregnancy can be lawfully terminated within the first fourteen weeks at the request of the pregnant woman, provided that she receives counseling, pursuant to Articles 17(2) and 17(4), and waits at least three days after counseling before having the abortion.<sup>251</sup> It is estimated that 90% of all abortions since 2012 have been conducted under this provision, within the first 14 weeks of pregnancy.<sup>252</sup> However, Article 15 of the 2010 law, entitled “Termination on Health Grounds” provides that a pregnancy can also be terminated for “medical reasons” later in pregnancy, under any one of the following circumstances:

- (a) Prior to the twenty-second week of pregnancy, if the woman’s life or health is in serious risk, as confirmed in advance by a medical specialist not performing or supervising the procedure. Confirmation will not be required in emergency cases of immediately life-threatening risk.
- (b) Prior to the twenty-second week of pregnancy, provided that there is a risk of serious fetal anomalies, as confirmed in advance by two medical specialists not performing or supervising the procedure.
- (c) In case of fetal anomalies incompatible with life as confirmed in advance by a medical specialist not performing or supervising the procedure, or when the fetus is found to suffer from an extremely serious condition that is incurable at the time of diagnosis, as confirmed by a Medical Committee.<sup>253</sup>

Thus, under the 2010 law, a “risk of serious fetal anomalies” automatically extends the period of lawful abortion by an additional eight weeks. Moreover, an abortion can legally be performed at any time during the pregnancy if the Medical Committee confirms that “the fetus . . . suffer[s] from an extremely serious condition that is incurable at the time of diagnosis.”<sup>254</sup>

Although the Spanish government was drafting its Initial Report to the Committee on the Rights of Persons with Disabilities at approximately the same time that it enacted the 2010 abortion law, its Initial Report under the CRPD did not

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<sup>250</sup> Associated Press, *Spain OKs New Abortion Law, Angers Church*, NBC NEWS, Feb. 2, 2010, [http://www.nbcnews.com/id/35565952/ns/world\\_news-europe/t/spain-oks-new-abortion-law-angers-church/#.VDtHffldWSp](http://www.nbcnews.com/id/35565952/ns/world_news-europe/t/spain-oks-new-abortion-law-angers-church/#.VDtHffldWSp).

<sup>251</sup> See Organic Law of March 3 on Sexual and Reproductive Health and Voluntary Termination of Pregnancy art. 14 (2-2010) (Spain), *available at* <http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/Organic%20law%202010%20on%20SRH%20and%20voluntary%20pregnancy%20termination%20-%20English%20Translation.pdf>.

<sup>252</sup> Letter from Ana Rosa Alcalde, Managing Dir., Alianza por la Solidaridad, et al. to Minister Alberto Ruiz-Gallardón, Minister of Justice □ Spain (May 12, 2014), *available at* <http://www.hrw.org/news/2014/05/12/ngo-letter-spanish-justice-minister-abortion-bill>.

<sup>253</sup> Organic Law on Sexual and Reproductive Health and Voluntary Termination of Pregnancy, *supra* note 251, at art. 15.

<sup>254</sup> *Id.*

mention the ongoing reforms to Spain's abortion law.<sup>255</sup> Nor did Spain's Initial Report mention the exception for abortion on the ground of fetal impairment, although this had been part of Spanish law since 1985.<sup>256</sup> The issue was, however, raised by the Comité Español de Representantes de Personas con Discapacidad, an NGO appointed by the Spanish government as an independent monitoring body to promote implementation of the CRPD.<sup>257</sup> Its alternative report to the Committee on the Rights of Persons with Disabilities highlighted the 2010 law on abortion and used the term "eugenic abortion" to describe abortions that are authorized on the basis of fetal impairment.<sup>258</sup>

This alternative report was reviewed by the Committee on the Rights of Persons with Disabilities, which then used the "List of Issues" mechanism to obtain more information, asking the Spanish government to:

[P]rovide information on the new Organic Act 2/2010 of 3 March 2010 on sexual and reproductive health and the voluntary termination of pregnancy, in particular the longer time limits allowed for terminating pregnancies when the fetus has a disability. Does the Government of Spain consider this to be in line with [A]rticle 4, paragraph 1(d), of the Convention?<sup>259</sup>

It is noteworthy that the Committee did not request this information under the heading of Article 10, which provides for the right to life, but does not refer to the unborn and, as discussed above, does not address the issue of disability-selective abortion.<sup>260</sup> Rather, the Committee asked for the information under the heading of Article 4, which describes "general obligations" of the countries that ratify the CRPD.<sup>261</sup> In particular, Article 4 obligates States Parties to "undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability"<sup>262</sup> and "to refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention."<sup>263</sup> Thus, the Committee implicitly categorized a law that makes it easier to terminate a pregnancy in cases of fetal

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<sup>255</sup> Spain Initial Report, *supra* note 248, at ¶ 48 (on the right to life).

<sup>256</sup> See *Population Policy Data Bank: Spain*, *supra* note 249, at 2.

<sup>257</sup> CRPD, *supra* note 17, at art. 33 (obligating States Parties to establish or maintain one or more independent mechanisms to promote, protect and monitor implementation of the CRPD).

<sup>258</sup> Comité Español de Representantes de Personas con Discapacidad, *Human Rights and Disability: Alternative Report Spain*, ¶ 26 (Oct. 13, 2010).

<sup>259</sup> Committee on the Rights of Persons with Disabilities, *List of issues to be taken up in connection with the consideration of the initial report of Spain, concerning articles 1 to 33 of the Convention on the Rights of Persons with Disabilities*, June 20, 2011, ¶ 4.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> See CRPD, *supra* note 17, at art. 4.

<sup>263</sup> *Id.*

impairment as discriminatory, despite the absence of any reference to the unborn as “rights holders” under the treaty.

In its response, the Spanish government confirmed that an abortion could be lawfully performed much later in pregnancy in cases of fetal impairment, but also explained that a woman would have access to support services if she decided to continue the pregnancy.<sup>264</sup> The Spanish government also reminded the Committee that the CRPD does not require a government to protect life before birth.<sup>265</sup> Consistent with previous international law and practice, Article 10 of the CRPD is silent on the issue, leaving each state to determine when life begins according to its own constitution and legal principles.<sup>266</sup> However, in the eyes of the Committee members, this was apparently irrelevant -- because it was not seeking information regarding the legality of abortion generally but rather regarding the differential treatment of pregnancies on the basis of fetal impairment.

During the public hearing on Spain’s Initial Report, a member of the Committee raised the issue again, asking why the legal period of abortion was longer in cases of fetal impairment.<sup>267</sup> Not receiving a satisfactory answer, the Committee included the following statement in its Concluding Observations on Spain’s Initial Report:

The Committee takes note of Act 2/2010 of 3 March 2010 on sexual and reproductive health, which decriminalizes voluntary termination of pregnancy, allows pregnancy to be terminated up to 14 weeks and includes two specific cases in which the time limits for abortion are extended if the foetus has a disability: until [twenty-two] weeks of gestation, provided there is “a risk of serious anomalies in the foetus”, and beyond week [twenty-two] when, inter alia, “an extremely serious and incurable illness is detected in the foetus”. The Committee also notes the explanations provided by the State party for maintaining this distinction. The Committee recommends that the State party abolish the distinction made in Act 2/2010 in the period allowed under law within which a pregnancy can be terminated based solely on disability.<sup>268</sup>

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<sup>264</sup> *Respuestas del Gobierno de España a la lista de cuestiones (CRPD/C/ESP/Q/1) que deben abordarse al examinar el informe inicial de España (CRPD/C/ESP/1)* [Reply of Spain to the List of Issues of the Committee on the Rights of Persons with Disabilities, U.N. Doc. CRPD/C/ESP/Q/1/Add.1], Comité sobre los Derechos de las Personas con Discapacidad [Committee on the Rights of Persons with Disabilities], 4–5 (2011) (Spain), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fESP%2fQ%2f1%2fAdd.1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fESP%2fQ%2f1%2fAdd.1&Lang=en) [hereinafter *Reply of Spain to the List of Issues*].

<sup>265</sup> *Id.* at 9–10.

<sup>266</sup> *Id.*

<sup>267</sup> Summary record (partial)\* of the 4th meeting, Sept. 20, 2011, U.N. Doc. CRPD/C/6/SR.4, 6th Sess., at ¶ 2, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2f6%2fSR.4&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2f6%2fSR.4&Lang=en).

<sup>268</sup> Committee on the Rights of Persons with Disabilities, *Concluding Observations of the Committee on the Rights of Persons with Disabilities Spain*, Sept. 19–23, 2011, U.N. Doc. CRPD/C/ESP/CO/1, 6th Sess., ¶¶ 17–18, [http://www.ohchr.org/Documents/HRBodies/CRPD/6thsession/CRPD.C.ESP.CO.1\\_en.doc](http://www.ohchr.org/Documents/HRBodies/CRPD/6thsession/CRPD.C.ESP.CO.1_en.doc) [hereinafter *Concluding Observations Spain*].

The following year, the Committee made similar comments on Hungary's Initial Report.<sup>269</sup> However, in some ways, the Committee's comments to the Hungarian government were even stronger in that it expressly categorized a law that allows for abortions in cases of fetal impairment as a form of discrimination on the ground of disability, which is prohibited under Article 5 of the CRPD.<sup>270</sup> The Committee expressed concern that Hungary's law allows abortion "for a wider circle than in general for the fetuses deemed to have health damage or some disability, thereby discriminating on the basis of disability."<sup>271</sup> It appears that the Committee is implicitly taking the position that a fetus enjoys rights under the CRPD, despite the lack of any explicit statement to this effect in the treaty.<sup>272</sup> If this is the case, the Committee's approach marks a departure from the predominant approach in international law, which has traditionally not provided for fetal rights in human rights treaties but rather allowed each individual state to determine whether a fetus enjoys legal rights within that state's domestic legal system.<sup>273</sup> It should be noted that the right to non-discrimination is defined in the CRPD to include the right to reasonable accommodations; thus if a fetus does enjoy a right to non-discrimination under the CRPD then this would also include a right to receive reasonable accommodations by the State Party.<sup>274</sup> In this author's view, the only other possible interpretation of the Committee's recommendation that Hungary abolish all distinctions based upon disability in its abortion law is that the Committee may believe that permitting abortion on the ground of fetal impairment devalues, and therefore discriminates against, people who are already living with disabilities.

Concerned that governments may interpret the Committee's comments as an invitation to restrict access to abortion, reproductive rights advocates have criticized the Committee's recommendations to Spain and Hungary. For example, in 2013, the Center for Reproductive Rights (CRR) submitted commentary to the Committee as part of its "half-day discussion" on women and girls with disabilities.<sup>275</sup> The CRR

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<sup>269</sup> Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Periodic Report of Hungary*, Sept. 17–28, 2012, U.N. Doc. CRPD/C/HUN/CO/1, 8th Sess., ¶ 1, available at [http://www.ohchr.org/Documents/HRBodies/CRPD/8thSession/CRPD-C-HUN-CO-1\\_en.doc](http://www.ohchr.org/Documents/HRBodies/CRPD/8thSession/CRPD-C-HUN-CO-1_en.doc) [hereinafter *Concluding Observations Hungary*].

<sup>270</sup> *Id.* at ¶¶ 17–18.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at ¶¶ 15–16, 27.

<sup>273</sup> See generally, Copelon et al., *supra* note 161; Cook & Dickens, *supra* note 162.

<sup>274</sup> The CRPD's definition of discrimination in Article 2, begins by stating that "discrimination on the basis of disability" shall mean any "distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." This language is similar to the definition of discrimination in Article 1 of the CEDAW treaty. However, the CRPD goes on to state that discrimination also includes "denial of reasonable accommodation" and to define that term. CRPD, *supra* note 17, at art. 2.

<sup>275</sup> *Center for Reproductive Rights: Submission to the Committee on the Rights of Persons with Disabilities*, Half Day of General Discussion on Women with Disabilities, OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS,

pointed out that the Committee's comments to Spain and Hungary "could be interpreted to contravene" the approach that has been established by the other UN human rights treaty bodies, which has been to urge governments to liberalize abortion laws and reduce the incidence of illegal and unsafe abortions that contribute to maternal mortality.<sup>276</sup> CRR also warned the Committee that "restricting women's access to legal abortion services will not prevent them from seeking to terminate a pregnancy if they wish to do so; such restrictions will only force them to resort to clandestine and unsafe abortions, which may place their lives and health at risk."<sup>277</sup>

Recent events in Spain confirm that the CRR has good reason to be concerned by the recommendations of the Committee on the Rights of Persons with Disabilities. In 2013, the conservative Popular Party (PP), Spain's current ruling party, proposed to enact a bill prohibiting abortion in most circumstances, including cases of fetal impairment. Although the bill was titled "Anteproyecto de ley orgánica para la protección de la vida del concebido y de los derechos de la mujer embarazada" (which can be translated to English as "for the protection of the life of the fetus and the rights of pregnant women") the government's bill leaned heavily toward protection of the fetus.<sup>278</sup> Indeed, had it been enacted, the bill would have represented one of the most significant restrictions on abortion in Europe.<sup>279</sup> First introduced in December 2013, the bill proposed to reinstate the general prohibition on abortion with only two exceptions: (1) abortion would be permitted up to twelve weeks if the pregnancy was the result of sexual violence which had been reported to the police; and (2) abortion would be permitted up to twenty-two weeks if two doctors confirmed that the pregnancy endangered the mother's physical or mental health.<sup>280</sup> As initially proposed, the government's bill contained no exception for cases of fetal impairment. While it is hard to assess the impact of the Concluding Observations by the Committee on the Rights of Persons with Disabilities, the timing of the bill indicates that the Committee's views may well have influenced the government's position on this issue.<sup>281</sup>

The Spanish government's proposal to prohibit almost all abortions generated enormous anti-government protests.<sup>282</sup> The refusal to include an exception for cases of fetal impairment was particularly controversial and generated opposition even

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<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD2013.aspx> (accessed by clicking submission 24).

<sup>276</sup> *Id.* at 9.

<sup>277</sup> *Id.*

<sup>278</sup> Letter from Ana Rosa Alcalde, Managing Dir., Alianza por la Solidaridad, et al. to Minister Alberto Ruiz-Gallardón, Minister of Justice Spain (May 12, 2014), available at <http://www.hrw.org/news/2014/05/12/ngo-letter-spanish-justice-minister-abortion-bill>.

<sup>279</sup> *Id.* at 7–8.

<sup>280</sup> Press Release, Ctr. For Reprod. Rights, Spain Abortion Bill Violates Human Rights (May 12, 2014), <http://reproductiverights.org/en/press-room/spain-abortion-bill-violates-human-rights>.

<sup>281</sup> *Concluding Observations Spain*, *supra* note 268, at ¶¶ 17–18.

<sup>282</sup> Ashifa Kassam, Thousands of pro-abortion protesters gather in Spain, THE GUARDIAN, Feb. 1, 2014, <http://www.theguardian.com/world/2014/feb/01/thousands-pro-abortion-protesters-spain-madrid>.

among members of the ruling party.<sup>283</sup> The government initially attempted to address this opposition by promising to word the final legislation so that a pregnant woman could claim that her own health was endangered by a fetal impairment.<sup>284</sup> In the end, however, the Spanish government was compelled to withdraw the proposed legislation altogether,<sup>285</sup> prompting the Justice Minister to offer his resignation.<sup>286</sup> Yet opponents of abortion in other countries will very likely seize upon the Committee's comments to Spain and Hungary in order to strengthen their arguments against abortion, particularly in the second trimester of pregnancy when fetal impairments are often diagnosed.<sup>287</sup>

## V. CONCLUSION

By commenting on the legislative frameworks for abortion in Spain and Hungary, the Committee on the Rights of Persons with Disabilities has renewed the debate on the relationship between the CRPD and the laws or government policies that facilitate disability-selective abortion. This was probably inevitable given that disability rights organizations have the ability to submit alternative reports to the Committee. As more countries report to the Committee, other groups may highlight the expanding practice of prenatal testing, the laws that treat pregnancies differently on the ground of disability, and the “matter of fact” way that the medical profession and the general public have come to think about abortion on the basis of fetal impairment.

Nevertheless, in this author's opinion, the specific comments from the Committee on the Rights of Persons with Disabilities to the governments of Spain and Hungary were far too simplistic and do not adequately acknowledge the tensions between reproductive freedom and the rights of persons with disabilities. The Committee's comments imply that it would be sufficient to amend the unequal standards in the abortion laws, without suggesting more systemic ways of encouraging prospective parents to voluntarily continue a pregnancy that may lead to

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<sup>283</sup> Guy Hedgecoe, Spain's abortion legislation 'changed after protests', IRISH TIMES, June 24, 2014, <http://www.irishtimes.com/news/world/europe/spain-s-abortion-legislation-changed-after-protests-1.1842594>.

<sup>284</sup> *Id.*

<sup>285</sup> See Ashifa Kassam, Spain abandons plan to introduce tough new abortion laws, THE GUARDIAN, Sept. 23, 2014, available at <http://www.theguardian.com/world/2014/sep/23/spain-abandons-plan-introduce-tough-new-abortion-laws>.

<sup>286</sup> See David Roman and Olivia Crellin, *Spain Scraps Plan to Tighten Abortion Law*, WALL STREET JOURNAL, Sept. 23, 2014, available at <http://www.wsj.com/articles/spain-scraps-plan-to-tighten-abortion-law-1411481671>.

<sup>287</sup> The CRPD has already been cited in other contexts as authority for the position that access to later-term abortions should be curtailed. See *Parliamentary Inquiry into Abortion on the Grounds of Disability*, PARLIAMENTARY INQUIRY REPORT (July 2013), <http://www.abortionanddisability.org>; see also Brief for Jerome Lejeune Foundation USA et al. as Amici Curiae in Support of Petitioners, *Horne v. Isaacson*, 82 U.S.L.W. 3193 (U.S. Jan. 13, 2014) No. 13-402, available at <http://bdfund.org/wordpress/wp-content/uploads/2013/10/FILED-AmicusLeJeuneSDiDSC-BDF.pdf>.

the birth of a child with a disability. Ironically, Spain and Hungary could both comply with the Committee's comments by amending their laws to provide all women with unfettered access to abortion. Such amendments would address what the Committee views as the formal discrimination in the legislative framework, but would do nothing to reduce the incidence of disability-selective abortions. On the other hand, if a country moves in the opposite direction, and reduces access to abortion, it could have the effect of violating numerous human rights treaties, including the CRPD, which give persons with disabilities the right to determine the number and spacing of their children and the right to reproductive health services.<sup>288</sup> Such legislation could also motivate more women to seek illegal and unsafe abortions, which poses serious threats to their health and their right to life, as observed by the CEDAW Committee, the Human Rights Committee, and the Committee Against Torture.<sup>289</sup>

This is an opportune time for the Committee on the Rights of Persons with Disabilities to consider the relationship between abortion and disability rights because it is in the process of developing a General Comment on Article 6 of the CRPD, which will address the intersectionality of gender and disability discrimination.<sup>290</sup> With respect to abortion, the Committee on the Rights of Persons with Disabilities should examine the approach that the CEDAW Committee has taken to the practice of sex-selection. While maintaining strong support for women's right to access contraception and safe abortion services, the CEDAW Committee has also expressed concern regarding the practice of sex-selective abortion in states where it is prevalent.<sup>291</sup> The CEDAW Committee has not ruled out using laws prohibiting sex selection as a means of preventing the systematic targeting of female fetuses for abortion. For example, it has urged the Peoples' Republic of China to enforce its law against sex selection, as well as the laws prohibiting female infanticide.<sup>292</sup> For the most part, however, the CEDAW Committee has focused on the obligation of states to redress the discriminatory attitudes and practices that lead parents to prefer male children. For example, the CEDAW Committee expressed concern at the "persistence of deep-rooted

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<sup>288</sup> See CRPD, *supra* note 17, at art. 23 and 25.

<sup>289</sup> See discussion accompanying notes 175-95 above; see also *Abortion and Human Rights Government Duties to Ease Restrictions and Ensure Access to Safe Services*, CTR. FOR REPROD. RIGHTS (Oct. 2008), [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB\\_abortion\\_hr\\_revised\\_3.09\\_WEB.PDF](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB_abortion_hr_revised_3.09_WEB.PDF).

<sup>290</sup> Committee on the Rights of Persons with Disabilities, *Outline Document for the Preparation of a General Comment on Article 6*, <http://www.ohchr.org/Documents/HRBodies/CRPD/8WGSustainableDevelopmentJan2014.pdf>.

<sup>291</sup> Letter from Maju Mathew, Campaign Coordinator, Pratigya, to Committee on the Elimination of Discrimination Against Women, Office of the High Commissioner for Human Rights (June 18, 2014), [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/Ind/INT\\_CEDAW\\_NGO\\_Ind\\_17484\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/Ind/INT_CEDAW_NGO_Ind_17484_E.pdf).

<sup>292</sup> Committee on the Elimination of Discrimination Against Women, *Concluding Observations: China*, ¶ 32, U.N. Doc. CEDAW/C/CHN/CO/6 (2006).

stereotypes” that lead to sex-selective abortion in China and suggested a number of specific measures, such as textbook reform, that might help to overcome these stereotypes.<sup>293</sup>

In the context of disability-selective abortion, many commentators have suggested that there should be reforms to the nature of the counseling and the “quality of life” assessments that are provided to prospective parents after they receive a diagnosis of fetal impairment.<sup>294</sup> The Committee on the Rights of Persons with Disabilities should ask governments about these processes and offer its expertise, so as to assist States Parties to the CRPD to develop a set of best practices. Helping governments to better implement Article 24, on the right to inclusive education, and Article 27, on the right to employment, would also give prospective parents more confidence that their children will enjoy full and meaningful lives if they are born with an impairment or if they acquire an impairment during life. These are just a few examples of systemic changes that could, over the long term, reduce the incidence of disability-selective abortion -- without insisting that governments remove all distinctions based upon fetal impairment from the laws governing access to abortion.

Similarly, if the state of North Dakota is serious about preventing disability-selective abortions, then it should consider a more systemic and less coercive approach. Even if H.B. 1305 could survive constitutional scrutiny and be enforced, it would not prevent a woman from travelling outside North Dakota to obtain an abortion on the ground of fetal impairment. A more effective way of encouraging North Dakota parents to continue pregnancies where there is evidence of a fetal disability would be to provide more public funding for inclusive education.<sup>295</sup> To that end, the United States ought to ratify the CRPD and use it as an additional tool in the movement for equality. Although imperfect, the treaty represents a huge step forward in disability rights and international human rights law. United States ratification would help to change stereotypical perceptions and further implement the right to equality that was originally promised in the ADA and the IDEA. As Marsha Saxton observed many years ago, when discussing the lack of communication between pro-choice feminists and persons with disabilities, “clearly, there is work to be done.”<sup>296</sup>

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<sup>293</sup> *Id.* at ¶¶ 17–18.

<sup>294</sup> Saxton, *supra* note 9, at 382; Lord, *supra* note 111.

<sup>295</sup> Piepmeier, *supra* note 4.

<sup>296</sup> Marsha Saxton, *Disability Rights and Selective Abortion*, GENDER AND JUSTICE IN THE GENE AGE: A FEMINIST MEETING ON NEW REPRODUCTIVE AND GENETIC TECHNOLOGIES, (May 6–7, 2004), <http://www.giga.org/conference.asp?action=item&source=documents&id=17>.