

The Reproductive Injustices of Abortion Bans for Disability

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Abstract: This article argues that state laws banning abortions for disability violate reproductive justice for parents with disabilities. These bans deprive people with disabilities of choices that may be important to their possibilities of becoming parents, including possibilities for abortion of pregnancies that have become risky to continue. Far from protecting disability civil rights, these state law bans restrict the abilities of people with disabilities to choose to have children and to parent.

This article develops a civil rights account of reproductive justice and people with disabilities. It deploys that account to criticize abortion bans, especially bans for anticipated fetal disability. *Dobbs*¹ has obvious and serious consequences for the reproductive agency of everyone. People² with disabilities who are or wish to become pregnant may experience these effects acutely. Yet, the potentially discriminatory impact of abortion bans on people with disabilities as reproductive agents has been largely absent from critiques of *Dobbs*. The omission appears even in disability-based criticisms of abortion for fetal disability and of statutes prohibiting abortion for fetal disability.³

The article begins with the era immediately before *Roe*,⁴ when advocates for abortion liberalization defended statutory proposals to permit abortion for fetal disability. It then turns to abortion-restrictive states today, where disability-based bans are coupled with other abortion restrictions. Both approaches fail to recognize important aspects of reproductive justice and people with disabilities, including whether to have children and the ability to parent. This section uses a civil rights approach to reproductive justice; a final section concludes with observations about reproductive justice and disability beyond nondiscrimination.

A preliminary note about “disability” as a term of art, defined differently for different purposes.⁵ Defi-

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nitions of disability may refer only to medical conditions,⁶ refer only to social features,⁷ or reference both in interaction.⁸ The discussion here refers to both medical and social aspects of pregnancy and disability.

Liberalizing Abortion Law Before *Roe*

In a recent article, abortion law historian Mary Ziegler describes how advocates for liberalizing abortion laws invoked images of fetal disability.⁹ Women like the Romper Room children's television show hostess Sherri Finkbine, exposed to fetotoxic thalidomide, put sympathetic faces on this advocacy. Focused on fetal disability, advocacy referenced the pregnant person only as burdened by raising the disabled child. Examples such as these were common: "women can't be forced to bear a deformed child," or "many infants

These statutes differ on important dimensions relevant to reproductive justice and pregnant people with disabilities, including scope, timing, and exceptions. Many but not all bans were adopted as incremental strategies to curtail abortion rights before *Roe*'s demise seemed possible and remain enforceable despite being overshadowed by stronger bans.

An initial difference is the scope of the ban. Some bans were enacted as part of broader prohibitions of abortions judged to be discriminatory while others are specific even to particular disabilities. Bans of broader scope may be framed as larger anti-discrimination efforts. Missouri, for example, accompanies its wider ban with legislative findings about the importance of ending histories of discrimination in the "legal, medical, social services, and human services professions"¹²

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are forced to suffer through their blighted lives, a burden to themselves, their families, and to society."¹⁰ Nor were other pre-*Roe* abortion reform proposals such as the Model Penal Code¹¹ focused on persons with disabilities as pregnant or as parents.

Ziegler presents this history as a caution to contemporary abortion rights activists opposing disability-based abortion bans. Reliance on the right to choose, she argues, does not directly address abortion opponents' point that abortion for disability may discriminate against disability. Instead, Ziegler suggests, as a matter of justice ban opponents should support social policies that reduce the likelihood of disability-based abortion, including adequate funding for home and community-based services. Although Ziegler's point about supportive social policies is well taken, I argue below that a fuller RJ perspective should center the impact of disability-based abortion bans on the reproductive or parenting capabilities of people with disabilities themselves.

Contemporary Bans on Abortion for Fetal Disability

Contemporary bans on abortion for disability likewise center the fetal disability, not the pregnant person.

Most broadly, Kentucky bans abortion on the basis of sex; race, color or national origin; Down syndrome; or any other disability.¹³ Arizona and Mississippi ban abortion for sex, race, or genetic abnormality¹⁴; and Missouri and Tennessee ban abortion for sex, race, and Down syndrome.¹⁵ North Dakota, the initial state to adopt a disability-based ban, includes sex and genetic abnormality,¹⁶ while South Dakota includes sex and Down.¹⁷ Several states specifically ban abortion for Down.¹⁸

Most disability-based bans apply throughout pregnancy. Only one state, Louisiana, explicitly incorporates a 20-week time frame into its ban on abortions for genetic anomalies;¹⁹ however, Louisiana also has a ban on abortion from conception, as do some other states.²⁰ Other states with disability-based bans now have enacted six-week bans,²¹ and Arizona has a fifteen-week ban.²² Short time frames preclude abortions for women who do not learn they are pregnant or who cannot arrange for the procedure within the requisite period. They also preclude abortions for maternal or fetal conditions discovered after the time frame has ended.

Exceptions are another difference among bans. Arkansas's disability ban permits abortions for preg-

nancies resulting from rape or incest.²³ Bans in Kentucky, Mississippi, and Tennessee build in an exception for medical emergencies²⁴ and Louisiana's ban after twenty weeks allows disability-based abortions to save the life of the pregnant person.²⁵

However, more extensive abortion prohibitions in these and other states have eclipsed disability-based bans. States passing these more extensive bans typically have not repealed their disability bans, which may remain in effect pending resolution of challenges of the more extensive bans. Nonetheless, many states that began with disability-based bans also have enacted bans with very limited exceptions. For example, near-complete bans in Arkansas and South Dakota only allow abortions to save the life of the pregnant person,²⁶ Missouri's is only for medical emergencies,²⁷ and Mississippi's is only for life or rape.²⁸ Other state bans would permit abortions only to prevent death or serious risk of substantial and irreversible impairment of a major bodily function of the pregnant person.²⁹ Bans with such narrow exceptions give clear priority to the fetus over the pregnant person, all but erasing damage to the latter in favor of protecting the former. They also are limited to death or severe physical damage, thus ignoring any mental health or social aspects of disability that might be affected by pregnancy.

Much of the discussion of current disability-based bans likewise focuses attention on the bans' impact on offspring with disabilities rather than pregnant people with disabilities. These criticisms are for the most part consistent with the criticism developed here: that disability-based bans fail to recognize important aspects of reproductive justice for people who want to become pregnant, who are pregnant, or who want to be parents. Nonetheless, devoting primary attention to the import of disability-based bans for offspring with disabilities, or even for people with disabilities more generally, risks marginalizing people most affected by abortion bans: people who might be, or who are, pregnant or parents.

To take one influential example, the Hastings Center issued a working group report about prenatal testing for disability and abortion in 1991. The report addressed multiple criticisms of testing and abortion for disabilities: that these practices medicalize disability rather than addressing disabling social conditions, express messages that harm people with disabilities, foster problematic parental attitudes about children born with disabilities, are based on inadequate information about the lives of people with disabilities, and reduce persons to their particular traits.³⁰ Perhaps understandably, because its topic was genetic testing

of potential offspring, the report did not discuss the relevance of testing to disabled people as reproducers or parents. However, it framed the issues in ways that persist today, even in discussions of reproductive justice and disability.³¹

Reproductive Justice Through a Civil Rights Frame

Reproductive justice insists that reproductive rights are inseparable from issues of social justice.³² Social conditions are unjust if they fail to support people in making choices about having children, not having children, or parenting in safe and healthy environments. Seen through a disability civil rights frame, reproductive justice requires that people with disabilities have opportunities to make reproductive choices or parent on an equal basis with others. Disability-based bans, along with other more far-reaching abortion bans, disproportionately threaten these opportunities for people with disabilities. Specifically, as the following discussion argues, these bans may increase the difficulties for people with disabilities to experience pregnancy, to choose not to be pregnant, or to parent. These bans add yet another disadvantage to social circumstances in which people with disabilities already experience discrimination in reproductive care³³ and in being able to maintain their parental rights and their children in their homes.³⁴

Choosing to Have Children

Like many others, people with disabilities may experience infertility, perhaps even at elevated rates.³⁵ For example, disabilities such as diabetes increase infertility risks. Abortion bans may impede access to forms of infertility care such as in vitro fertilization (IVF) if providers are uncertain about whether embryos come within state abortion bans.³⁶ In addition, IVF has been associated with increased risks of ectopic or heterotopic pregnancies³⁷; while many states specifically exclude ectopic pregnancies from their abortion bans,³⁸ others do not³⁹ and the status of heterotopic pregnancies may be unclear because these pregnancies involve both an ectopic and a uterine pregnancy.⁴⁰ IVF also is associated with increased risks of twin pregnancies if more than one embryo is transferred; although single embryo transfer is the preferred practice, pressures against the practice remain, such as costs per cycle and reduced likelihood of achieving pregnancy in patients with poorer prognoses. Other infertility treatments such as ovarian hyperstimulation are also associated with increased risks of multiple pregnancies.⁴¹ Yet carrying multiples increases pregnancy risks such as gestational diabetes and may

require changes in medical management to avoid increasing pregnancy risks for people with disabilities such as diabetes.⁴² State abortion bans, however, do not include pregnancy reductions as permissible abortions, unless they come within a limited exception such as to save the mother's life.

Choosing Whether to Bear a Child with a Disability

People with disabilities may — or may not — want to have children with their own conditions. Even if they identify with their disability and find their quality of life high, disabled people will have first-hand experiences of the problems associated with their conditions⁴³ and might wish to avoid them for their offspring. Autosomal dominant genetic disorders such as Ehlers Danlos have a 50% chance of transmission to offspring.⁴⁴ If people with such conditions are unable to afford IVF and testing before embryo transfer, pre-

of maternal blood sample screening for aneuploidy may be available as early 10 weeks gestational age.⁴⁷ In addition, the detailed sonogram or anatomy scan which can identify various kinds of anomalies is not done until around 18-20 weeks, well past the time limits for abortion in many restrictive states.⁴⁸

Difficulties of Avoiding Pregnancy

Some disabilities may make it more difficult for people to avoid pregnancy. For example, patients undergoing treatment for breast cancer may be advised not to use hormonal contraception.⁴⁹ If they want to preserve fertility, their options may be limited, yet pregnancy would be contraindicated for them.

People with intellectual disabilities are at higher risk for rape than people in the general population but may not wish to have sterilization as their only option to avoid pregnancy.⁵⁰ Long-acting contraception is

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natal testing and subsequent abortion may be the only practical way to avoid the birth of affected offspring. Yet, typical state abortion bans for fetal anomalies preclude this option.

Risks to the fetus also may not become apparent until after narrow windows permitted by many state statutes for abortion have closed. For example, poorly controlled diabetes during the first two months of pregnancy may cause serious fetal anomalies,⁴⁵ but short time frames such as bans after six weeks would preclude abortions for pregnancies not discovered sufficiently early. Current techniques for analyzing fetal aneuploidy or for sequencing fetal DNA will not give results until after time windows have closed, either. For example, patients at the University of California at San Francisco are informed that chorionic villus sampling for chromosomal disorders such as Down have the “main advantage ... that it is done much earlier in pregnancy, at 10 to 12 weeks...”⁴⁶ And patients at Penn Medicine are told that the results

an available alternative for many but not all. Yet the intellectual disability of the pregnant person is not an exception to abortion bans and some states no longer permit abortion in cases of rape. While on the D.C. Circuit, Justice Kavanaugh wrote an opinion holding that D.C. law did not require considering the wishes of people with intellectual disabilities about an abortion authorized by medical decisionmakers for them.⁵¹ The irony of this opinion continues to resonate with disability rights advocates.⁵²

Risks After Pregnancy Occurs

Sometimes people get pregnant without full knowledge of the risks that a pregnancy may pose. Or conditions may be diagnosed during the pregnancy. For example, someone with Turner syndrome might only learn after becoming pregnant that their aortic size index suggests risks for mortality and morbidity that the Practice Committee of the American Society for Reproductive Medicine considers an “absolute con-

traindication for attempting pregnancy.⁵³ People with preconception disabilities such as diabetes or chronic hypertension may develop cardiomyopathy during pregnancy; people with mobility disorders or neurogenic bladders may develop serious kidney infections.⁵⁴ About one in a thousand people who are pregnant are diagnosed with cancer; effects of chemotherapy or immunotherapy on continued pregnancy are largely unknown⁵⁵ and delaying treatment may significantly compromise survival prospects.

Social Dimensions of Parenting

People with disabilities remain disproportionately subject to suspicions about their capabilities as parents and to proceedings to terminate their parental rights.⁵⁶ Parenting a child with disabilities may present additional difficulties that result in judgments of unfitness to parent. In one Oregon case, two parents with mild intellectual disabilities were considered fit to parent one of their children but endured a months-long struggle to retain custody of the other with reported developmental delays. Their fight resulted in a settlement with the state to ensure nondiscrimination in dealing with parents with disabilities.⁵⁷

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Reproductive Justice and Parents with Disabilities

This article has examined how abortion bans, especially bans for disability, disproportionately impact people with disabilities planning pregnancy or parenthood. It has also described the likely discriminatory impact of *Dobbs* in states with abortion bans.

Advocates of reproductive justice demand more than non-discrimination, however. Important aspects of this advocacy are health care reform, safe and healthy environments in which to reproduce and raise children, and social policies that address poverty and inequality. Many states with the most stringent abortion bans have refused to expand Medicaid;⁵⁸ these are states in which people may lack access to health care needed to avoid infertility, have healthy pregnancies, or

have the community-based services that enable them to parent. *Dobbs* upheld the 15-week abortion ban in Mississippi, a state with notable failures to invest in infrastructure for a safe environment and with the highest rates of poverty in the country. Abortion bans, both for disability and more generally, add injustice to injustice.⁵⁹ Reproductive justice after *Dobbs* demands addressing not only how abortion bans disproportionately affect people with disabilities as reproducers and parents, but the other injustices that make these bans so damaging.

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Note

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20. La. Rev. Stat. § 40:1060; see also Ark. Code Ann. § 5-6-404(a); Ky. Rev. Stat. § 311.772(4)(a); Miss. Code § 97-3-3(1); Mo. Rev. Stat. § 188.017; S.D.C.L. § 22-17-5.1; Tenn. Code § 39-15-213(c)(2); Utah Code § 76-7a-102 (enjoined Oct. 17, 2022, see Lindsay Aerts, "Utah Supreme Court rules injunction on abortion ban to stay in place," *KSL News*, October 17, 2022, available at <<https://kslnewsradio.com/1977170/utah-supreme-court-rules-injunction-on-abortion-ban-to-remain/>> (last visited February 4, 2023)).
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29. See, e.g., La. Rev. Stat. § 1061.1.3(A)(2)(a) (banning abortion after six weeks); N.D.C. Code § 14.02.1-04.1 (banning abortion after six weeks); Ohio Rev. Code § 2919.195 (banning abortion after six weeks); Tenn. Code § 39-15-217. Utah's ban would add rape, incest, a uniformly diagnosable and lethal fetal anomaly, or a brain abnormality so severe as to leave the fetus "mentally vegetative." Utah Code § 76-7a-101(10), -102.
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