

THE IDEOLOGICAL CONTEXT OF THE DISABILITY RIGHTS CRITIQUE: WHERE MODERNITY AND TRADITION MEET

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Erik Parens and Adrienne Asch have summarized the disability rights critique of prenatal testing in two broad claims:¹ “that prenatal genetic testing followed by selective abortion is morally problematic, and that it is driven by misinformation.”² These claims, though consonant with assertions of many pro-life groups, are intended to serve different ends. Parens and Asch explain that most authors associated with the disability rights critique are feminists who support a woman’s right to abortion.³ In contrast, pro-life adherents predicate differences between women and men on inexorable natural truths and define their position about abortion as an inevitable correlate of

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1. The term “critique” as used in this Article refers to the disability rights critique of prenatal testing, embryo selection and selective abortion. This Article discusses the work of Professor Adrienne Asch and others who have contributed to the development of the disability rights critique of prenatal genetic testing, embryo selection and selective abortion. The Article focuses on the work of Adrienne Asch because she participated in the Symposium from which this issue of the Law Review developed. See Adrienne Asch, *Disability Equality and Prenatal Testing: Contradictory or Compatible?*, 30 FLA. ST. U. L. REV. 315 (2003). Often, the Article speaks broadly about the work of the disability rights critique. Limitations of space preclude detailed discussion of differences among those associated with the work of the critique. Such differences do exist.

2. Erik Parens & Adrienne Asch, *The Disability Rights Critique of Prenatal Genetic Testing: Reflections and Recommendations*, in PRENATAL TESTING AND DISABILITY RIGHTS 3, 13 (Erik Parens & Adrienne Asch eds., 2000). Parens and Asch further describe the critique through three broad assertions: first, that discrimination is the central problem for disabled people and for their families; second, that those who abort a “desired child” because of a disability diagnosed through prenatal testing “suggest that they are unwilling to accept any significant departure from the parental dreams that a child’s characteristics might occasion”; and third, that selective abortion constitutes an “unfortunate, often misinformed decision that a disabled child will not fulfill what most people seek in child rearing.” *Id.* at 12-13.

3. *Id.* at 12 (naming Adrienne Asch, Martha Saxton, Anne Finger, and Deborah Kaplan).

a world in which women and men enjoy different statuses and perform different roles.⁴ Yet, pro-life activists would seem further to echo adherents of the disability rights critique in categorizing abortion of “‘damaged’ embryos” as the “most offensive” of all abortions.⁵ Again, however, these concrete similarities are belied by each group’s encompassing goals. Adherents of the critique do not argue that selective abortion is problematic *because* abortion is problematic. Moreover, the “misinformation” to which Parens and Asch refer does not refer expressly to the ontological status of the fetus.⁶ Rather, they refer to misinformation about “what life with disability is like for children with disabilities and their families.”⁷ To adherents of the critique, its basic propositions are not concerned centrally with abortion. Rather these propositions concern attitudes toward disability and “toward children, parenthood, and ultimately ourselves.”⁸

The critique’s platform and analysis situate its adherents in the middle of a much wider discourse within American society about the scope and meaning of family. That discourse incorporates a series of related debates about reproduction (including abortion) and about the shifting contours of the relationship between parents and children.

The work of those associated with the disability rights critique—which seems often to belie social expectations about visions of family from the “left” and visions of family from the “right”—provides an unusual context within which to explore the dimensions of a broad

4. See KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 201 (1984). Luker explains that “abortion has become a symbolic marker between those who wish to maintain this division of labor [based on gender] and those who wish to challenge it.” *Id.* This claim is representative, not comprehensive. It does not apply to all of those who oppose abortion. See, e.g., Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011, 1074 (1989) (suggesting that we “give more credence both to arguments about how women’s well-being is affected by abortion legislation and to arguments about how our valuation of life is affected by abortion policy” and attempting to “understand more fully the arguments of both the pro-choice and pro-life advocates”).

5. LUKER, *supra* note 4, at 207. Luker reports that for pro-life activists to defend “‘damaged’ embryos” is particularly praiseworthy because it is to defend “the weakest of the weak, and most pro-life people we interviewed were least prepared to compromise on this category of abortion.” *Id.* at 207-08.

6. Marsha Saxton speaks about a disability activist who identified fetuses as “our people.” Marsha Saxton, *Disability Rights and Selective Abortion*, in ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000, at 374, 383 (Rickie Solinger ed., 1998). Saxton comments:

Are those in the disability rights movement who question or resist selective abortion trying to save the “endangered species” of disabled fetuses? When this metaphor first surfaced, I was shocked to think of disabled people as the target of intentional elimination, shocked to realize that I identified with the fetus as one of my “species” that I must try to protect.

Id.

7. Parens & Asch, *supra* note 2, at 20.

8. *Id.* at 19.

ideology⁹ of personhood in terms of which Americans contemplate the shifting contours of family and of relationships between individuals and community more broadly. Those who have developed the critique oppose embryo selection and selective abortion while working to safeguard the right to abortion in general.¹⁰ They remain committed to autonomous individuality and choice, and they work to delineate the meaning of community. However, for those who favor a pro-choice position, these propositions present hard questions. Moreover, as Adrienne Asch has suggested, the questions are not easily entertained by law or the political process.¹¹

This Article explores the ideological implications of sustaining a pro-choice position with regard to abortion generally alongside a position that frowns on abortion for the specific purpose of selecting against an embryo or fetus identified as carrying disabling traits. The exploration aims to contextualize each position within a broader social debate about the parameters of family life. It begins by presuming that the specific debate about prenatal testing and abortion may prove valuable to a society increasingly anxious to re-construct the domestic arena and largely relegated to the institutions and language of the law for advancing that agenda.

Part I of this Article considers the limitations of contemporary legal and political processes in exploring the implications of prenatal genetic testing. Part II outlines the parameters of a debate related to the central concerns of the disability rights critique—a debate about family, generally, and about abortion, in particular—and considers the law's role in that debate. Finally, Part III suggests that the factors that make it difficult to effect the agenda of the disability rights critique through legal channels are the same factors that establish the critique's unusual significance for those concerned to understand the socio-cultural parameters of the debate about abortion and the

9. The term "ideology" and the related term "ideological" are not used in this Article to refer to a system of political beliefs but rather to refer to the pervasive, often articulated, forms in terms of which people understand what it means to be a person. Janet L. Dolgin & JoAnn Magdoff, *The Invisible Event*, in *SYMBOLIC ANTHROPOLOGY* 351, 363 n.7 (Janet L. Dolgin et al. eds., 1977). This definition is similar to that of the French anthropologist Louis Dumont who wrote:

Our definition of ideology thus rests on a distinction that is not a distinction of matter but one of point of view. We do not take as ideological what is left out when everything true, rational, or scientific has been preempted. We take everything that is socially thought, believed, acted upon, on the assumption that it is a living whole, the interrelatedness and interdependence of whose parts would be blocked out by the a priori introduction of our current dichotomies.

LOUIS DUMONT, *FROM MANDEVILLE TO MARX: THE GENESIS AND TRIUMPH OF ECONOMIC IDEOLOGY* 22 (1977).

10. Marsha Saxton suggests that "the reproductive rights movement emphasizes the right to have an abortion; the disability rights movement, the right *not to have* an abortion." Saxton, *supra* note 6, at 375.

11. See discussion *infra* Part I.

related, more widespread social debate about family.

I. BEYOND THE LAW: THE ABORTION DEBATE AND DISABILITY RIGHTS

Almost two decades ago Adrienne Asch wrote that the debate about abortion would be furthered were it more widely conducted *outside* the universe of “politics and the courts.”¹² Asch is not a lawyer or a law professor. It is thus unsurprising that her work, though read by lawyers and legal academics among others, is not for the most part aimed at transforming the *law’s* responses to abortion, prenatal embryo selection or other matters.¹³ Yet, her express preference for considering abortion outside contexts defined by courts of law or by the political process¹⁴ is more than a simple statement of professional affiliation.

Asch’s preference was predicated on her sense that “rational discussion”¹⁵ about abortion and related matters is more likely to be facilitated in non-legal, non-political contexts. Law and politics, she implies, do not encourage people to listen carefully to the others’ positions and thus do not encourage people to re-consider, and perhaps amend, the nuances of their own positions. In contrast, judicial and political contexts stress practical results and foster a vision in which one either wins *or* one loses. Neither the courts nor the political process have the luxury of facilitating the sort of intellectual debate which, effected in good faith, may carry its own rewards in facilitating clarification and enlightenment.

Even more, the law is not, at present, likely to provide a felicitous arena for effecting the central goals of the disability rights critique. In struggling to resolve disputes about abortion and about family relationships more broadly, the law has relied on two competing assumptions. The disability rights critique elides the first and rejects

12. Adrienne Asch, *Abortion in Context*, WOMEN’S REV. BOOKS, Nov. 1985, at 12 (reviewing ABORTION: UNDERSTANDING DIFFERENCES (Sidney Callahan & Daniel Callahan eds., 1984)).

13. Having said this, it must be noted that Asch has published in law reviews and has sometimes argued, much as any legal scholar might, for particular legal responses and against others. See, e.g., Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391, 423 (2001) (arguing for an interpretation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (1994), that provides greater “equality, more inclusivity, and greater appreciation of the complexity of humanity in all its variability”). More specifically, Asch argues that more people should be allowed to file claims under the ADA even if their claims are later rejected by courts. *Id.* at 405.

14. In the American setting, as de Tocqueville realized over a century and a half ago, there often is only a thin space between political concerns and judicial responses. De Tocqueville opined: “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.” 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 248 (J.P. Mayer et al. eds., 1966) (1835).

15. Asch, *supra* note 12, at 13.

the second. First, and most widely, the law has presumed the autonomous individuality of family members, especially in contexts that do not implicate the scope of the parent-child relationship.¹⁶ Increasingly since the middle of the twentieth century, American law has safeguarded the right of adults within families to negotiate their own realities and effect their own choices. The disability rights critique aims to temper, though not to preclude, choice. Second, especially in the context of contentions about abortion, the law has modulated its commitment to preserving the choices of autonomous individuals by limiting the right to abortion in light of the ontological status of the fetus. So, for instance, in *Webster v. Reproductive Health Services*,¹⁷ the Supreme Court found that Missouri's abortion law did not violate the right delineated in *Roe*¹⁸ in its express assertion that "[t]he life of each human being begins at conception."¹⁹ Adherents of the disability rights critique generally reject contentions of this sort.

In general, those who have developed the disability rights critique are more concerned with the implications of prenatal genetic testing for the society as a whole than with individual decision-making. Adrienne Asch, for instance, does not oppose the right of a prospective parent to undergo prenatal testing and to abort a fetus.²⁰ In fact, she would prefer that someone, convinced that he or she would be unable adequately to raise a disabled child, abort a disabled fetus than give birth to a child about whom the parent might remain ambivalent and whose needs the parent might not be able or ready to meet.²¹ Asch would thus favor responses that generally lie beyond the law's capacity to design.

Asch's preference—or more actually, perhaps, her plea—that the social debate about abortion (and, by implication, disability rights and prenatal testing) be entertained, at least some of the time, outside legal and political settings would seem to reflect other more subtle concerns. These concerns are worth exploring. The exploration holds implications for the larger ideological context within which legal and political responses to abortion and disability rights are being constructed and transformed.

In the two decades since Asch expressed a preference for discussing the implications of abortion outside legal and political contexts,

16. See *infra* notes 32-34 and accompanying text.

17. 492 U.S. 490, 504 n.4 (1988).

18. *Roe v. Wade*, 410 U.S. 113 (1973).

19. *Id.* at 506. Justice Rehnquist explained that the statement, found in the state statute's preamble, could be read merely to delineate a value judgement. *Id.*

20. Telephone interview with Adrienne Asch, Henry R. Luce Professor of Biology, Ethics, and the Politics of Human Reproduction, Wellesley College (June 5, 2002).

21. *Id.*

the disability rights critique has focused its agenda and concerns around a series of issues involving reproduction and the avoidance of reproduction that American society has largely left to the law and the political process to frame and to resolve.²² In considering these issues, the law has constructed a morality of choice that values autonomous individuality at the expense of community. Secondly it has relied, in a few limited contexts, on a “traditional” morality that presumes communities defined through inequality and hierarchy (as in the relationship between parents and children). The law has not, however, produced a coherent morality of “modernity” that aims to safeguard community *and* autonomy.

Asch’s preference for furthering the debate about abortion outside legal and political contexts may encourage innovative responses, not constrained by familiar *legal* presumptions about personhood and community. The remainder of this Article examines responses—many legal, some not—to abortion and disability rights in order better to understand the ideological context within which law and society respond to the related concerns in American society about families, abortion and prenatal testing.

II. MATTERS OF MORALS / MATTERS OF LAW

A. *The Ideological Context of Debate*

Questions about abortion and prenatal testing are encompassed within a broader debate in contemporary American society about the scope and parameters of family (and of personhood and community). That debate has garnered widespread attention since the second half of the twentieth century. This Part of the Article delineates the contours of that debate, suggests that the debate has largely been left to the law because of the erosion of alternative institutional arbiters, and briefly indicates the tenor of the law’s response. That response suggests the need,²³ as Asch intuited more than twenty years ago, for alternative arenas encouraging discourse about families, disabilities, and personhood.

22. There are, of course, other contexts within which discourse about society’s treatment of disabled people is furthered. For the most part, the discourse has been channeled by appeal to the legal and political processes. Among the most important successes of that appeal to law and politics was the promulgation of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000).

23. Despite the apparent need for alternative institutional arbiters of moral questions, almost none are available in the contemporary American context outside small, generally marginal, and often isolated religious communities.

B. The Ideological Context: The Debate About Family

The roots of the contemporary debates about abortion and family life lie in the history of the American family. The so-called “traditional” family appeared at the end of the eighteenth and start of the nineteenth centuries in response to the needs and pressures of the Industrial Revolution. This family replaced the larger²⁴ colonial family that functioned as an interconnected part of local communities.²⁵

By the nineteenth century, American society envisioned the ideal family as contrasting in almost every regard with the marketplace.²⁶ In the marketplace, putatively equal autonomous individuals were expected, in theory though far less often in fact, to negotiate the terms of their own bargains. In contrast, the family was understood as a hierarchical whole, defined through love rather than through money.²⁷ Moreover, within families roles depended on gender. The home was associated with women and children and the marketplace with men. Society envisioned the nineteenth century home as a haven from within which to escape the harsh tensions of the marketplace. At home, wives and mothers were expected to provide caring sanctuary to their working husbands and treasured children.²⁸ Thus throughout the nineteenth and first half of the twentieth centuries, the home was differentiated from the marketplace as an arena that valued status more than achievement, hierarchy more than equality, and the social whole more than individual autonomy. State law regu-

24. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 6 (1985) (attributing decline in family size after the colonial period to shifts in fertility patterns).

25. As John Demos explained, colonial families were “continuous” with the larger social world both socially and economically. JOHN DEMOS, *PAST, PRESENT AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY* 28 (1986).

26. See GROSSBERG, *supra* note 24, at 6-7 (attributing development of nineteenth-century family to combination of laissez faire ideology of marketplace and egalitarian ideology of the new Republic).

27. David Schneider, an anthropologist who studied the American family just before it began openly to shed traditional forms, posited the contrast between home and work to sit at the center of the ideology that defined traditional American families. DAVID M. SCHNEIDER, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* 45-49 (1968). Schneider wrote:

The set of features which distinguishes home and work is one expression of the general paradigm for how kinship relations should be conducted and to what end. These features form a closely interconnected cluster.

The contrast between love and money in American culture summarizes this cluster of distinctive features.

. . . .

. . . [T]he opposition between money and love is not simply that money is material and love is not. Money is material, but love is *spiritual*. The spiritual quality of love is closely linked with the fact that in love it is personal considerations which are the crucial ones.

Id. at 48-49.

28. DEMOS, *supra* note 25, at 31 (describing traditional family as refuge and loving “fortification”).

lated this “traditional” family through rules that contrasted with the rules that regulated life in the marketplace.

During this period, family life did change, but it was not for a century and a half that the “traditional” family began *visibly* to collapse. Before the late twentieth century, the family underwent a comparatively subtle process of transition. That process, much as the more revolutionary process of change in family life that commenced in the second half of the twentieth century, was reflected in legal changes.²⁹ These legal changes suggested, at first tentatively, a new social readiness—not broadly acknowledged for another century and a half—to define family members in certain contexts for certain purposes through Enlightenment values,³⁰ especially equality and liberty.

For over a century, however, society continued to portray the family generally as a social unit that ideally reflected community rather than individuality and fixed roles rather than bargain and choice. Only in the second half of the twentieth century did society and the law openly acknowledge and reinforce a vision of family broadly predicated on Enlightenment values, including especially equality and liberty (framed as autonomy). Family members, especially adults, began increasingly to view themselves as autonomous individuals free to negotiate the terms of their familial relationships.

That shift is reflected in a wide set of demographic changes, including increases in the incidence of divorce, nonmarital cohabitation, and nonmarital parentage.³¹ These changes in turn are reflected in far-reaching legal changes including, for instance, the Supreme Court’s delineation of a constitutional right to privacy in familial settings,³² the acceptance of prenuptial agreements³³ and of cohabitation

29. See *infra* note 30 and accompanying text.

30. In both the nineteenth and twentieth centuries, changes in family law reflected, far more than they effected, social changes. So, for instance, the promulgation of laws referred to generally as Married Women’s Property Acts, in the mid-nineteenth century freed married women from some part of the legal limitations regarding property ownership that marriage once brought to them. LESLIE J. HARRIS & LEE E. TEITELBAUM, *FAMILY LAW* 13 (2d ed. 2000). These statutes were generally uncontroversial when they were adapted by state legislatures. *Id.*

31. See, e.g., NAT’L COMM’N ON CHILDREN, *BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES* 4, 6 (1991) (noting American families underwent “[d]ramatic social, demographic, and economic changes during the past 30 years”).

32. See, e.g., *Roe v. Wade*, 410 U.S. 113, 162-66 (1973) (defining limited constitutional right to abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972) (finding a state contraception statute to be an unconstitutional interference with privacy rights of unmarried adults and expressly recognizing family members as autonomous individuals); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (finding a state contraception statute to be an unconstitutional intrusion on the right to marital privacy).

33. See, e.g., *Posner v. Posner*, 233 So. 2d 381, 383 (Fla. 1970) (finding that public policy supports enforcement of prenuptial agreements); *Scherer v. Scherer*, 292 S.E.2d 662, 666 (Ga. 1982) (relying expressly on contract law to enforce a prenuptial agreement); Os-

agreements,³⁴ and the so-called “no fault” divorce revolution.³⁵ After the 1960s, these changes occurred quickly and dramatically and resulted in widespread legal debate in courts, in legislatures, and in law schools, about the meaning of family and the implications of family life.

C. *The Erosion of Institutional Arbiters*³⁶

In an earlier time, questions about the moral and practical scope of family life were considered by a wide variety of institutional arbiters. But in the late twentieth century, those institutional settings collapsed or became far less central to or interested in defining the parameters of the domestic sphere. In part, this is a product of the same economic, political and social forces that re-defined the family.

Churches, schools, and voluntary communal groups were among the central institutions that traditionally directed discourse about the contours of family life in the United States. After World War II, each became significantly less important as an arbiter of moral matters within society generally. Churches, identified by de Tocqueville in the nineteenth century as central to the construction and significance of American mores,³⁷ began clearly to wither in significance in the second half of the twentieth century. Church attendance declined and even those who continued to attend churches became less committed to particular denominations and church communities.³⁸ Similarly, the influence of schools in delineating the proper scope of fam-

borne v. Osborne, 428 N.E.2d 810, 815 (Mass. 1981) (upholding the validity of a prenuptial contract).

34. See, e.g., MINN. STAT. § 513.075 (1988); *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (enforcing non-meretricious contract between non-marital cohabitants); *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) (recognizing express contracts between nonmarital cohabitants).

35. In 1969 California became the first state to provide for no-fault divorce. See Act of Sept. 4, 1969, ch. 1608, 1969 Cal. Stat. 3312. Within a decade, almost every state provided for some form of divorce that did not depend on accusations of fault. See generally Doris Jonas Freed, *Grounds for Divorce in the American Jurisdictions (as of June 1, 1974)*, 8 FAM. L.Q. 401, 402-23 (1974) (listing grounds for divorce by state).

36. The parameters and significance of the erosion of institutional arbiters in the late twentieth century in the United States are discussed in more detail in Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 351-54 (2002).

37. Alexis de Tocqueville wrote:

One cannot . . . say that in the United States religion influences the laws or political opinions in detail, but it does direct mores, and by regulating domestic life it helps to regulate the state.

I do not doubt for an instant that the great severity of mores which one notices in the United States has its primary origin in beliefs.

DE TOCQUEVILLE, *supra* note 14, at 268.

38. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 73-74 (2000).

ily relationships declined dramatically after World War II.³⁹ In fact, parents and the government have seemed similarly uninterested in schools generally, at least compared with other periods⁴⁰ and other countries.⁴¹ Moreover, a large number of voluntary communal groups, regarded by de Tocqueville as essential to the preservation of the American moral order,⁴² have ceased to exist or continue to exist but without active members.⁴³ These shifts have left Americans, faced with disputes about the parameters of family life, more inclined to turn to the law for resolutions.

Yet, as Asch intuited almost two decades ago, the law's responses to disputes about family matters are often limited in form and scope. In particular, at least since the 1970s, the law, in responding to disputes involving family and other communal relationships and identities, has generally been committed to autonomous individuality and to the protection and elaboration of individual rights.⁴⁴ Thus the law has been increasingly ready to sacrifice the demands of community to those of individual autonomy. In the last several decades, the law's commitment to individuality has inevitably shaped debate in the United States about a related set of matters, including, for instance, families, reproduction, the avoidance of reproduction, and privacy—including reproductive privacy.

And so, in fact, despite Asch's reasonable preference for furthering debate outside, as well presumably as inside, legal and political contexts, the tone and dimensions of debate in the United States about both abortion and family life have been largely forged in courts of law and in political responses to those courts' presumptions and pronouncements. The law has provided a fulcrum for vociferous, often antagonistic, debate about abortion. However, the shape of the public debate about abortion has been limited and its most important implications have largely been disguised as opposing groups have sought to gain the law's assistance in effecting concrete agendas, often at the

39. The role of schools in directing moral discourse generally has declined dramatically since World War II. Neil Postman has noted, for instance, that in the early decades of the Republic it was assumed that an educator's job included teaching about the "American creed" and the values it was presumed to reflect. NEIL POSTMAN, *THE DISAPPEARANCE OF CHILDHOOD* 140, 150-52 (1982).

40. Robert Putnam notes a startling decline in the number of parents who have participated in Parent Teacher Associations (PTAs) after the 1950s. PUTNAM, *supra* note 38, at 55-57. He reports that about a quarter million families a year dropped out of PTAs for two and a half decades after 1960. *Id.* at 56.

41. See STEPHANIE COONTZ, *THE WAY WE REALLY ARE* 143 (1997) (noting that in the U.S., funding education is not a national priority as it is in many other countries).

42. See DE TOCQUEVILLE, *supra* note 14, at 485-88.

43. PUTNAM, *supra* note 38.

44. Many legal scholars have commented in recent decades on the focus that American law places on what Mary Ann Glendon refers to as "rights discourse" (or "rights talk"). MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 7 (1991).

expense of furthering what Asch calls “rational discussion.”⁴⁵ In this regard, the disability rights critique could provide a useful perspective on abortion and relationships within family settings generally. This is so, insofar as the critique combines a focus on communal responsibility with an interest in safeguarding individuals’ rights and therein reflects aspects of both pro-choice and pro-life positions in the abortion debate.

*D. A Discourse About Abortion Alongside
the “Debate About Abortion”⁴⁶*

In significant part, the struggle in the United States about abortion has been played out through appeals to legal institutions, including courts and legislatures. The history of that struggle suggests the limits of the law as a moral arbiter. This Part sketches the ideological contours of the debate about abortion as one component of the wider debate about family. It further suggests that the law’s intense involvement in shaping abortion rights and other family relationships, especially in the last half century, has shaped discourse in light of the law’s capacity to contemplate disputes and to preclude or resolve them. This Part is thus intended to serve as background to the next Part, which considers the place of the disability rights critique in broadening social discourse about abortion and about family relationships.

Since the middle of the twentieth century, American society and law, long committed to autonomous individuality in the marketplace, have become increasingly committed to valuing and safeguarding autonomous individuality in family settings.⁴⁷ The law’s increasing readiness to resolve family disputes through principles of constitutional law has reinforced this commitment.⁴⁸ The Supreme Court rarely entertained family matters before the second half of the twentieth century.⁴⁹ Since that time, shifts in constitutional jurisprudence have facilitated family litigants’ invocation of Fourteenth Amendment due process and equal protection rights.⁵⁰ This jurisprudence

45. Asch, *supra* note 12, at 13.

46. I am now working on an essay (*Embryos as Symbols: A New Debate in an Old Guise*) that focuses more extensively on the issues considered in this Part that cannot be addressed here in light of present space limitations.

47. See *supra* Part II.B (characterizing shifts in social and legal understanding of family life in last half of twentieth century).

48. See generally Dolgin, *supra* note 36 (describing frequency with which Americans turn to law, and especially to constitutional law, to resolve moral disputes).

49. The domestic relations exception to diversity jurisdiction precludes access to federal courts for family litigants without a federal cause of action. *Ankenbrandt v. Richards*, 504 U.S. 689, 698-99 (1992).

50. See EVA R. RUBIN, *THE SUPREME COURT AND THE AMERICAN FAMILY* 13 (1986) (noting significance of *Brown v. Board of Education*, 347 U.S. 483 (1954), to late twentieth century jurisprudence involving family matters).

presumes individual rights, and has consequently resulted in a set of constitutional protections for *individuals* within families. So, for the most part, at present, constitutional law protects the autonomous individual and a concomitant right to choice, of family members, and especially of adults within families.⁵¹ For the most part, constitutional law has not provided for a comparably coherent response to defining and protecting relationships that do not presume autonomous individuality. So, for instance, the Supreme Court has been far less successful at defining and safeguarding family relationships between parents and children⁵² than at safeguarding the autonomous individuality of adults within family settings.⁵³

The limited right to abortion, defined in *Roe*,⁵⁴ and re-assessed, but in some part preserved, in *Casey*,⁵⁵ depends on a jurisprudence that presumes autonomous individuality. That jurisprudence is unproblematic unless the status of the fetus is invoked and balanced against the “status” of the woman.⁵⁶ The pregnant woman, defined in *Roe* as free to effect some, though not all, choices about abortion,⁵⁷ can be understood within the same ideological framework that encouraged the Court, eight years earlier in *Eisenstadt v. Baird*,⁵⁸ to

51. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The Court in *Casey* reaffirmed the basic right of a pregnant woman to abortion, noting expressly that the decision followed in significant part from the Court’s concern with protecting “individual liberty” and its commitment to *stare decisis*. *Id.* at 857. The Court wrote:

An entire generation has come of age free to assume *Roe*’s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe*’s central holding a doctrinal remnant; *Roe* portends no developments at odds with other precedent for the analysis of personal liberty.

Id. at 860-61.

52. See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000) (invalidating Washington State’s nonparental visitation statute as applied).

53. This jurisprudence reflects the absence of social consensus with regard to the meaning of childhood and the scope of the parent-child relationship. The confused state of the Court’s reasoning about children-in-families is illustrated by its 2000 decision in *Troxel*. *Id.* See also, Dolgin, *supra* note 36, at 369-92 (analyzing limitations of the Court’s decision in *Troxel*).

54. *Roe v. Wade*, 410 U.S. 113 (1973).

55. See *Casey*, 505 U.S. at 833. In *Casey*, the Court re-structured *Roe*’s delineation of the moral implications of the biological dimensions of pregnancy. In particular, *Casey* abandoned the trimester framework erected in *Roe*. See *id.* at 872-73. That conclusion, clearly responsive to claims about the status of the fetus, facilitated the Court’s upholding of a set of state regulations that seem clearly to interfere with a woman’s right to abortion. The Pennsylvania Abortion Control Act of 1982, at issue in *Casey*, required, among other things, that a woman seeking an abortion be given certain information before the abortion and wait at least twenty-four hours before having the procedure performed; required a minor seeking an abortion to get parental consent from at least one parent or go before a judge for permission, among other things; and required a married woman seeking an abortion to notify her husband. *Id.* at 844. In *Casey*, the Court upheld the first two regulations and declared the third unconstitutional. *Id.* at 887-98.

56. See *infra* notes 62, 70 and accompanying text.

57. *Roe*, 410 U.S. at 154.

couraged the Court, eight years earlier in *Eisenstadt v. Baird*,⁵⁸ to view adults' sexual relationships as subject to individual choice rather than to traditional, fixed understandings of sexuality, marriage and reproduction.⁵⁹ Thus, in some part, the Supreme Court's responses to the debate about abortion parallel responses to the wider debate within American society about the right of family members to construct the terms of their relationships.

There is, however, an alternative perspective within the debate about abortion that the Court and the legal system more broadly have been willing to entertain. This perspective brings a counterweight to the presumed importance of choice and individuality. While those favoring a right to abortion have consistently stressed the right to individuality and to equality of women within the domestic sphere,⁶⁰ opponents of abortion, generally identified as adherents of tradition in family matters,⁶¹ have stressed the ontological status of the fetus as a moral being—a person, in effect.

Insofar as pro-life voices have framed the political struggle about abortion in terms of the ontological status of the fetus, they have created a basis for decision-making, not predicated on the valuation of autonomous individuality. This framework, which has proved moderately effective as a strategic matter, has also served to disguise, and thus to further, a more encompassing agenda. The larger agenda implicates not only the status of embryos and fetuses but the meaning of personhood and the scope of family relationships. Thus, it implicates the locus of power within familial, and other communal, settings.

For abortion opponents, assertions about the fetus-as-child have provided the sort of strategic tool that has largely been lacking in other contexts involving legal responses to adults' expanded choices, especially about reproductive matters, within family contexts. In the

58. 405 U.S. 438 (1972) (defining constitutional right of an *individual*, whether married or not, to use contraception).

59. Clearly, traditional understandings of these matters are themselves subject to change. The essential difference between traditional understandings and modern understandings is not the presence or absence of change, but is located in a comparison between fixed statuses and attendant roles on the one hand and autonomous choice on the other. See JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* 14-15 (1997) (contrasting traditional and modern ideologies of family).

60. David J. Langum, *A Personal Voyage of Exploration through the Literature of Abortion History*, 25 *LAW & SOC. INQUIRY* 693, 702-03 (2000) (generally opposing abortion on grounds that "abortion is the killing of a life form" but recognizing the presence of responsible argument among those favoring right to abortion).

61. See, e.g., LUKER, *supra* note 4, at 192-215 (comparing responses of activists on both sides of debate about abortion). Luker correlated value judgments among a group of women activists about the status of the fetus on the one hand and about the scope of family life on the other, and concluded that the abortion debate provides a forum for contemplating a wider set of issues, including the parameters and meaning of motherhood. *Id.*

struggle over abortion, the centrality of claims about the status of the fetus in arguments presented by abortion opponents has proved powerful, though not determinative, in advancing a pro-life agenda.⁶² It has even resulted in those who support a right to abortion hesitating, at least in public contexts, to explore questions about the ontology of fetal development.⁶³ The centrality of *legal* responses in the debate about abortion has compelled those involved on all sides to sacrifice expansive discourse in the hope of legal victory. In consequence, a wider and more far-reaching social debate within society about the implications of abortion has largely been foreclosed in public settings.

This suggests the potential importance of the disability rights critique to the wider debate about abortion and of Asch's early intuition that questions about abortion might best be furthered outside legal and political settings. In short, the work of those within the disability rights movement,⁶⁴ who favor protecting a woman's right to abortion but who disfavor abortion for purposes of precluding the birth of a disabled child, challenges society to engage actively in a wider debate about abortion and the implications of abortion discourse for the meaning of personhood and the scope of family.

III. THE DISABILITY RIGHTS CRITIQUE, THE DEBATE ABOUT ABORTION, AND THE MEANING OF FAMILY

The disability rights critique belies expectations about differences in the ethos and world view of those who favor a legal right to abortion and of those who oppose that right.⁶⁵ Firmly committed to Enlightenment values and an ideology that prizes choice and

62. After *Roe*, pro-life advocates worked, for instance, to amend the Constitution to provide that life begins "from the moment of conception." KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 531 (14th ed. 2001) (considering changes in two decades after *Roe*). By the late 1980s many commentators presumed that the Court was ready to overrule *Roe*. *Id.* However, in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court upheld (while modifying the limits of) the basic right to abortion defined in *Roe*. After *Roe*, pro-life groups worked assiduously to focus the debate about abortion around a set of presumed biological truths. Ronald Dworkin, *The Concept of Unenumerated Rights*, 59 U. CHI. L. REV. 381, 404 (1992) (noting claims about biological status of fetus). Abortion opponents portray fetuses as babies, stressing, for instance, that after conception an embryo has a "biological blueprint for a new individual." Reva Siegel, *Reasoning from the Body*, 44 STAN. L. REV. 261, 325-26 (1992) (quoting Ray Kerrison, *Backdrop to Bush's Court Selection: Pictures Show What Abortion is About*, N.Y. POST, July 25, 1990, at 2). Proponents of the right to abortion deny that conception, or any other biological milestone during gestation, endows the fetus with moral standing. *See, e.g.*, C.R. AUSTIN, *HUMAN EMBRYOS: THE DEBATE ON ASSISTED REPRODUCTION* 22-31 (1989) (showing difficulty of settling on any moment in biological development as conclusive of the status of personhood).

63. *See, e.g.*, Saxton, *supra* note 6, at 390 (noting "taboo" placed on discussions of the fetus among feminists).

64. *See, e.g.*, Adrienne Asch & Gail Geller, *Feminism, Bioethics and Genetics*, in *FEMINISM AND BIOETHICS: BEYOND REPRODUCTION* 318 (Susan Wolf ed., 1996); Saxton, *supra* note 6, at 374.

65. LUKER, *supra* note 4, at 194-215.

autonomous individuality, those who have constructed the critique are concerned as well with elaborating an understanding of relationships and community that may sometimes preclude or limit choice.⁶⁶ Thus the critique reflects modernity's commitment to individuality and choice, but it modifies that commitment for the sake of safeguarding a community⁶⁷ of disabled people.

The critique presumes autonomy but prizes community. It values choice but is cognizant of the risk of sacrificing communal responsibility to individual preference. Many of those associated with the critique identify as feminists and/or leftists.⁶⁸ Yet some of their central positions, especially if viewed outside the critique's larger ideological frame, seem more consonant with a pro-life than a pro-choice platform. The readiness of the critique's adherents to cross starkly defined lines of social and legal debate makes it difficult for them to depend on extant legal responses in advancing the critique's agenda. At the same time, however, the critique, precisely because it merges (and values) a number of arguments and assertions more generally viewed as ideological antagonists in the debates about abortion and family life, suggests a new framework within which to contemplate and analyze abortion, personhood and communal (including familial) relationships.

A. *The Disability Rights Critique and the Law*

In significant part, the critique's agenda is not represented in the language of the law or directed at law-makers.⁶⁹ American law, reflecting disharmony about abortion within society, has variously provided for those anxious to safeguard a right to abortion and for those who oppose abortion. Sometimes courts have institutionalized aspects of each position.⁷⁰ But the law has generally done that without mediating the ideological concerns of those who value autonomous

66. Parens & Asch, *supra* note 2, at 12-13.

67. See *infra* notes 80, 81 and accompanying text (for consideration of that community's construction).

68. See, e.g., Adrienne Asch & Michelle Fine, *Shared Dreams: A Left Perspective on Disability Rights and Reproductive Rights*, in *WOMEN WITH DISABILITIES* 297 (Michelle Fine & Adrienne Asch eds., 1988); Parens & Asch, *supra* note 2, at 12.

69. Many of the law's limitations in facilitating social debate about abortion (which Asch recognized almost twenty years ago) apply as well to debate about prenatal testing, embryo selection, and selective abortion. See Asch, *supra* note 12.

70. So, for instance, in *Planned Parenthood v. Casey*, the Supreme Court upheld the Fourteenth Amendment due process right to abortion delineated in *Roe*. 505 U.S. 833, 846-53 (1992). The Court's plurality announced, however, that

a woman's liberty is not so unlimited . . . that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.

Id. at 869.

choice and of those who value limitations on choice. The law's responses to abortion have not stilled controversy. Instead, they have hardened lines of debate and have sharpened a sense that disagreements about abortion constitute a battleground on which the voices of modernity oppose those of tradition.

In this context, appeals to the law by those concerned with regulating abortion almost always rely either on the language of choice and individual autonomy or on language committed to the personhood of the fetus. Thus, often, pro-choice and pro-life adherents speak past each other. Partly for strategic reasons, those appealing to the law to provide for or to prohibit abortion have generally not forged alternative, more nuanced approaches. The law's responses, in turn, have encouraged ever sharpened dispute and have strengthened perceptions of the debate about abortion—and about the larger set of family issues that the debate about abortion symbolizes—as essentially impervious to mediation.

The work of the critique's advocates offers an alternative frame for discourse. The critique has situated itself adjacent to, rather than inside, the law's debate about abortion—in part because the law's responses to abortion provide no place for the critique's vision. The law has furthered the ends of those committed to pro-choice positions by constitutionalizing a right to choice in reproductive matters. The critique's willingness to limit choices about abortion precludes comfortable alliance with some pro-choice rhetoric and with the legal framework reflecting that rhetoric. On the other hand, the law has furthered the ends of those committed to pro-life positions by focusing on the ontological status of the fetus. The willingness of the critique's adherents to provide generally for abortion precludes alliance with most pro-life programs and with the legal framework that supports those programs.

In fact, those associated with the disability rights critique do not generally aim to curtail women's legal choices about abortion. Rather, they aim to reshape the ground on which those choices are entertained by individuals and by society. They urge, for instance, that physicians, other health care workers, and genetic counselors advising women and couples about the implications of prenatal testing be encouraged to think about prenatal testing and selective abortion more expansively than is generally the case.⁷¹ The hope is that, as a result, such counselors will more often refrain from presuming,

71. See, e.g., Saxton, *supra* note 6, at 381-90 (reframing implications of prenatal screening and selective abortion).

and thus unthinkingly communicating, the belief that any fetus identified as disabled should be aborted.⁷²

The work of the disability rights critique suggests that opposing positions in the debate about abortion (and family matters more widely) may be more open to mediation than is generally presumed. In working to construct a program that values the notion of autonomy, generally prized by those identified as pro-choice, *and* that values limitations on choice, generally prized by those identified as pro-life, the critique offers new options for discourse, and ultimately for shared understanding. Moreover, the critique promises to enrich debate by suggesting the ideological commonality of the debate's antagonists. At base, neither set of voices in the debate about abortion rejects the significance of choice and neither rejects the significance of community. Both interests are foundational to virtually all contemporary discourse about abortion and about the parameters of the domestic arena. Indeed, taken together, the pro-choice and pro-life positions in the debate about abortion reflect the parameters of the ideological framework within which Americans broadly understand personhood.

B. *The Disability Rights Critique and American Ideology*

In short, the critique's central propositions⁷³ as well as its broader agenda suggest that pro-choice and pro-life positions can be envisioned as ideological points within a broader debate rather than as absolute, unbridgeable ideological opposites. In aiming to protect individual autonomy while focusing on the construction of community, the critique suggests areas of compatibility and shared concern.⁷⁴ These include concern for safeguarding choice, a concern often elided by pro-life adherents, self-consciously aligned with tradition; and concern for responsible community that sometimes trumps choice and individuality, a concern often elided by pro-choice adherents, self-consciously aligned with modernity and firmly committed to autonomous choice.

Adrienne Asch and Michelle Fine have summarized the broad goals of the disability rights movement to include "a commitment to

72. See Adrienne Asch, *Why I Haven't Changed My Mind About Prenatal Diagnosis*, in *PRENATAL TESTING AND DISABILITY RIGHTS* 234 (Erik Parens & Adrienne Asch eds., 2000) (noting messages communicated in settings involving prenatal testing and subsequent abortion); Asch & Fine, *supra* note 68, at 297. Asch and Fine assert that "[g]enetic counselors, physicians, and all others involved with assisting women during amniocentesis should gain and provide far more and very different information about life with disabilities than is customarily available." *Id.* at 302.

73. Parens & Asch, *supra* note 2, at 12-13 (summarizing three central propositions of disability rights critique of prenatal diagnosis and selective abortion).

74. See, e.g., Asch & Fine, *supra* note 68, at 304.

self-determination and a shared sense of community, recognizing that the one is meaningless without a sense of the other.”⁷⁵ More specifically, in valuing a woman’s right to abortion, the critique presumes the importance of choice in the initial decision to have or to preclude having children. In disfavoring the abortion of a *particular* (disabled) child, the critique values restrictions on choice with regard to the *constitution* of one’s children.⁷⁶

In this regard, the critique’s encompassing agenda commits its adherents communal solidarity even if that necessitates limitations on choice. Those within the disability rights movement have implicitly embarked on an ideological journey committed to shaping and securing a construct of community. Others’ models of community provide tentative guideposts. Some adherents of the critique have invoked models of community identified through reference to race⁷⁷ or gender.⁷⁸ Others have sketched models of community through reference to the “social experience” of disability.⁷⁹ None of the proposed frameworks adequately defines the disability community but each indicates the significance of the project.⁸⁰

75. *Id.* For Asch and Fine, effecting this goal would serve as well to constitute a “just and inclusive society.” *Id.*

76. This pattern, providing for toleration of diverse choices in the *creation* of family relationships but less room for choice in the *constitution* of family relationships, is reflected in the decisions of a few judges who have struggled to preserve the notion that adults within families should be free to negotiate the terms of their own relationships, but that choice should be limited with regard to children and the parent-child relationship. *See, e.g., Janet L. Dolgin, A Rendezvous in the Marketplace? Transformations in Family Law in the United States, in REGULATING MORALITY: A COMPARISON OF THE ROLE OF THE STATE IN MASTERING THE MORES IN THE NETHERLANDS AND THE UNITED STATES* 193, 204 (Hans Krabbendam & Hans-Martien ten Napel eds., 2000).

77. Carol J. Gill, *The Social Experience of Disability, in HANDBOOK OF DISABILITY STUDIES* 365, 365 (Gary L. Albrecht et al. eds., 2001) (noting the experience of disability “may seem at first no different from the social stereotyping of other marginalized groups”).

78. *See, e.g., Saxton, supra* note 6, at 374; Joanna K. Weinberg, *Autonomy as a Different Voice: Women, Disabilities, and Decisions, in WOMEN WITH DISABILITIES, supra* note 68, at 269, 269-71 (noting “similar patterns” in histories of women’s movement and disability rights movement).

79. ROBERT F. MURPHY, *THE BODY SILENT* 135 (1990) (identifying the social experience of disability with social exclusion from ordinary, everyday life).

80. During the second half of the twentieth century, many groups, anxious to redress social wrongs directed at their members, modeled their strategies on those developed in the context of the civil rights movement. This has proved problematic to African-Americans as well as to these groups. None share the particular history and experiences of African-Americans. Moreover, the conflation of the history and experience of non-Black minority groups with the history and experience of African-Americans has served to mask the centrality of racism in much of American history.

A framework modeled to reflect the social experience of disability is also of limited value in constructing the sort of community to which the critique’s adherents aspire. Among other things, as sketched by Carol Gill, this experience includes at its center a “persistent and disquieting sense of mistaken identity.” Gill, *supra* note 77, at 353. Committing the disability rights movement, writ large, to this identity may provide a basis for shared identity among some people with disabilities but is likely to limit, rather than to expand, the possibility of establishing communal relationships between disabled and non-disabled peo-

Asch suggests a different model for community in asserting that a society anxious to avoid the births of children with disabilities is a society unprepared to provide for the needs of existing people with disabilities.⁸¹ Her apperception suggests the need to define and strengthen communities that include disabled people along with people not so identified. This community, envisioned with reference to its most felicitous potential, would reach beyond the social experience of disability and past various histories of social discrimination to convince “outsiders” that they are also “insiders” (and “insiders” that they may become, and can certainly profit from identifying with, “outsiders”). The disability rights movement may be especially well situated to construct a community able to temper autonomy with respect for responsible personhood. That is so, insofar as no one is immune from disability and no parent or potential parent is guaranteed to bear or to raise children free from disabilities and illness.

IV. CONCLUSION

In the American setting, the illusion of unending choice has become increasingly compelling since the early years of the Industrial Revolution, first in the marketplace, and, a century and a half later, in the home. The discourse engendered by the disability rights critique may fail to persuade significant numbers of prospective parents, especially those favoring a right to abortion, to forego selective abortion and embryo selection. Yet, the discourse stimulated by the disability rights critique may prove valuable in providing a new lens through which to consider the ideological constructs that shape understandings of personhood and of relationships between people within American society. And so, even if the work of the critique does not widely alter responses of society or the law to genetic testing, selective abortion, and pre-implantation embryo selection, discourse engendered by the critique may encourage prospective parents to understand that the choice to undergo prenatal genetic testing and the choices that follow such testing are morally complicated. These are choices that implicate the scope and meaning of the parent-child relationship, as well as understandings of the “Other” (and thus inevitably of the Self) within society.

ple. For the disability rights movement, that is essential. And for the rest of society, it promises a model for “modern” communities that could prove extremely valuable.

81. Telephone conversation with Adrienne Asch, Henry R. Luce Professor of Biology, Ethics, and the Politics of Reproduction, Wellesley College (June 12, 2002). *See also supra* note 72.