

Addressing Ableism: Lessons from the Problem of Female Feticide in India

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Abstract: Disability, as a class-facing discrimination, and oppression in society is largely ignored. Often, discrimination based on disability is considered valid because there is a biological distinction that justifies the discrimination. This Article draws parallels between the discrimination faced by other oppressed classes (based on sex, orientation, race, caste, etc.) and the disabled using the social model of disability. The term “enabled” is used to refer to those who are not disabled to emphasize that disability and the lack thereof are both societal constructs. This Article highlights and analyzes narratives of abortion as a means to illustrate discrimination faced by the disabled population. Specifically, the Article takes cues from the way female feticide has been addressed in India to look at potential solutions to the issue of erasure of disabled persons.

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I. INTRODUCTION

A recent advertisement by Anouk, a popular Indian clothing brand, champions the message that pregnant women can do more than simply raise babies.¹ The protagonist of the advertisement quits her job and starts her own business after her employer fails to promote her due to her pregnancy.² She

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¹ Myntra, *Anouk Bold is Beautiful: Pregnancy Doesn't Mean the End of Your Career*, YOUTUBE (Dec. 3, 2015), <https://www.youtube.com/watch?v=rz5rAFAvqCs>.

² *Id.*

powerfully admonishes her boss for equating her pregnancy to a handicap.³ Unfortunately, the advertisement falls prey to patently ableist assumptions.⁴ This is merely one instance of an oppressed group: women—perpetuating another form of oppression—ableism. This Article deals with the failure of modern society and popular culture to account for the intersectionality of oppression, especially the oppression of disabled people. Using the social model of disability, this Article will draw parallels between the discrimination faced by other oppressed classes (on the basis of gender, sexual orientation, race, caste, etc.) and disability.

This Article focuses on the issue of othering, a situation where classes of oppressed people actively distance themselves from specific groups and perpetuate other forms of oppression, such as perpetuating ableist views. For instance, people in the LGBTQ+ community have rejected the notion that queerness is a mental disorder to be cured; however, they have done so by presuming that there is a distinct category of people in need of cures who deserve discriminatory treatment.⁵ The very idea of disorder is socially constructed rather than an objective, self-evident category.⁶ Distancing of oneself from a supposed 'other' exacerbates the oppression of the 'othered' group. It is important to address these issues as oppression cannot be adequately dealt with if it lingers in less obvious, but equally harmful, forms.⁷

³ *Id.*

⁴ See Fiona AK Campbell, *Inciting Legal Fictions: 'Disability's' Date with Ontology and the Ableist Body of the Law*, 10 GRIFFITH L. REV. 42, 44 n.5 (2001) (defining ableism as "a network of beliefs, processes and practices that produce a particular kind of self and body (the corporeal standard) that is projected as the perfect, species-typical and therefore essential and fully human. Disability, then, is cast as a diminished state of being human.").

⁵ See generally Nancy H. Bartlett et al., *Is Gender Identity Disorder in Children a Mental Disorder?*, 43 SEX ROLES 753 (2000) (recommending the removal of Gender Identity Dysphoria from the Diagnostic and Statistical Manual of Mental Disorders ("DSM") of the American Psychiatric Association ("APA"), with reference to the capacity of inclusion in the DSM to pathologize differences from the accepted norm); Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. 565 (2015); Charles Silverstein, *The Implications of Removing Homosexuality from the DSM as a Mental Disorder*, 38 ARCHIVES SEXUAL BEHAV. 161 (2009).

⁶ See Rebecca A. Johnson, *"Pure" Science and "Impure" Influences: The DSM at a Scientific and Social Crossroads*, 15 DEPAUL J. OF HEALTH CARE L. 147, 151-62 (2013); Eric R. Maisel, *The New Definition of a Mental Disorder*, PSYCHOL. TODAY (July 23, 2013), <https://www.psychologytoday.com/blog/rethinking-psychology/201307/the-new-definition-mental-disorder>.

⁷ See generally WILLIAM LEONARD ET AL., PRIVATE LIVES 2: THE SECOND NATIONAL SURVEY OF THE HEALTH AND WELLBEING OF GLBT AUSTRALIANS (2012); ANGELINE FERDINAND ET AL., LOWITJA INST., MENTAL HEALTH IMPACTS OF RACIAL DISCRIMINATION IN VICTORIAN ABORIGINAL COMMUNITIES: THE LOCALITIES EMBRACING AND ACCEPTING DIVERSITY (LEAD) EXPERIENCES OF RACISM SURVEY (2012); R. C. Jiloha, *Deprivation, Discrimination, Human Rights Violation, and Mental Health of the Deprived*, 52 INDIAN J. PSYCHIATRY 207 (2010); Ram Chander Jiloha, *Indian Society, Social Hierarchies and Mental Health of the Deprived*, 10 DELHI PSYCHIATRY J. 127 (2007) (in addition to oppression being harmful within itself, membership in an oppressed group increases the chances of suffering from depression or other mental health problems).

In many countries, where legal termination of pregnancy is permitted, laws provide specific extensions of the right to terminate a pregnancy if a fetus is likely to be disabled (“FLD”).⁸ Emphasis is placed on the term *likely* because disability is a social construct and a fetus cannot be disabled prior to socialization. These laws devalue disabled lives and only serve to further perpetuate the oppression this class suffers. This Article proposes an alternative way to address the issue by looking at the way female feticide has been addressed in India.

Part II of this Article introduces the reader to various theories of oppression and discusses how most of these theories disadvantage disabled people. This Article uses the social model of disability to work with these theories and shifts the paradigm of ability-disability to one of enabling-disabling to highlight the ways in which disability is a social construct.

Part III of this Article examines how different discourses have dealt with the issue of abortion and how these inform laws in various countries. This Article addresses the misconception that the right to abortion is universally understood to be a feminist question. This Article expounds on other ways abortion has historically interacted and at times, failed to interact at all with feminist literature.

Part IV of this Article questions the issue of ableism in abortion and charts the options to address the overall problem of ableism in abortion laws. This section also addresses why existing frameworks do not adequately deal with the problems identified and suggests a radical new approach to the issue of erasure of disabled persons.

II. THE SOCIAL MODEL OF DISABILITY

A. *Forms of Oppression*

Oppression often works by distancing the oppressor from the oppressed group.⁹ For instance, men are expected to distance themselves from femininity—to ‘man up’ and ‘not be pussies.’¹⁰ This language insinuates that,

⁸ E.g., Medical Termination of Pregnancy Act, No. 34 of 1971, § 3(2)(b), INDIA CODE (1971). Other possible laws include: (1) the right to terminate FLD pregnancies where the general right to abortion does not exist; (2) the FLD as one of the conditions under which abortion is allowed; and (3) an extended time period for abortion of FLDs.

⁹ See Kum-Kum Bhavnani, *Talking Racism and the Editing of Women’s Studies*, in *INTRODUCING WOMEN’S STUDIES: FEMINIST THEORY AND PRACTICE* 27 (Diane Richardson & Victoria Robinson eds., 1993); Michelle Fine, *Working the Hyphens: Reinventing Self and Other in Qualitative Research*, in *HANDBOOK OF QUALITATIVE RESEARCH* 70 (Norman K. Denzin & Yvonna S. Lincoln eds., 1994); Michael L. Schwalbe & Douglas Mason-Schrock, *Identity Work as Group Process*, in *13 ADVANCES IN GROUP PROCESSES* 113, 139-43 (Barry Markovsky et al. eds., 1996); Fiona A. Kumari Campbell, *Exploring Internalized Ableism Using Critical Race Theory*, 23 *DISABILITY AND SOC’Y* 151, 155-56 (2008).

¹⁰ See Schwalbe & Mason-Schrock, *supra* note 9, at 129-130 (describing similar phrases and expectations men use to distance themselves from women).

as a man, being considered or called feminine is an intolerable insult.¹¹ This is reinforced in several laws, such as those that gender rape victims as female only—effectively asserting that men are immune to or cannot experience rape.¹² Further, men are granted allowances when their transgressions conform to stereotypical masculine behavior.¹³ This includes offenses such as sexual assault, which is often overlooked because society has come to accept that “boys will be boys.”¹⁴ Women, on the other hand, are granted certain rights only when they ‘step into’ the role of men, which demonstrates society’s preference for masculinity. Along this line of reasoning, any woman trying to demonstrate her resolve must do so in accordance with society’s expectation for masculinity.¹⁵

Systems of oppression pressure marginalized groups—to their detriment—to conform to the characteristics of the dominant groups.¹⁶ Racial and ethnic minorities are also expected to conform to the speech patterns¹⁷ and behaviours of dominant groups.¹⁸ In the United States, one example of this phenomenon is the fact that job applicants with African American names are hired at lower rates than applicants with the exact same credentials but who have ‘white’

¹¹ Sherryl Kleinman, *Why Sexist Language Matters*, 25 *QUALITATIVE SOC.* 299, 299–301 (2002); see also Douglas R. Hofstadter, *A Person Paper on Purity in Language*, in *METAMAGICAL THEMAS: QUESTING FOR THE ESSENCE OF MIND AND PATTERN* 159 (1985) (drawing an analogy between sexism in language being ubiquitous and the likely discomfort we would face in being confronted with the racist equivalent).

¹² See, e.g., Pen. Code § 375 (2013) (India) (restricting the definition of rape to the rape of a woman by a man).

¹³ MICHAEL KIMMEL, *THE GENDERED SOCIETY* 204 (4th ed. 2011).

¹⁴ *Id.*

¹⁵ Kleinman, *supra* note 11; see also Corinne A. Moss-Racusin et al., *Science Faculty’s Subtle Gender Biases Favor Male Students*, 109 *PROC. NAT’L ACAD. SCI. U.S.* 16474, 16474–79 (2012) (reporting study results showing faculty gender bias within academic settings); James Chartrand, *Why James Chartrand Wears Women’s Underpants*, *COPYBLOGGER* (Dec. 14, 2009), <http://www.copyblogger.com/james-chartrand-underpants> (describing her experience using a male pen name); Amanda Hess, *James Chartrand’s Constructed Masculinity Goes Far Beyond the Pen Name*, *WASH. CITY PAPER* (Dec. 15, 2009, 10:00 AM), <http://www.washingtoncitypaper.com/columns/the-sexist/blog/13118574/james-chartrands-constructed-masculinity-goes-far-beyond-the-pen-name> (exploring the effectiveness of James Chartrand’s male persona); Anna North, *“Taking a Man’s Name Opened Up a New World.” Why a Blogger Hid Her Gender*, *JEZEBEL* (Dec. 14, 2009, 3:00 PM), <http://jezebel.com/5426143/taking-a-mans-name-opened-up-a-new-world-why-a-blogger-hid-her-gender> (exploring the effectiveness of James Chartrand’s male persona).

¹⁶ See generally KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVILIZATION* (2007).

¹⁷ See Douglas S. Massey & Garvey Lundy, *Use of Black English and Racial Discrimination in Urban Housing Markets: New Methods and Findings*, 36 *URB. AFF. REV.* 452, 452–69 (2001).

¹⁸ See SHIRI EISNER, *BI: NOTES FOR A BISEXUAL REVOLUTION* 273–78 (2013) (ebook) (comparing the discrimination faced by the bisexual community to the discrimination faced by the Mizrahi population in Israel, where the Mizrahi population is expected to conform to Ashkenazi culture); see also Ella Shohat, *The Invention of the Mizrahim*, 29 *J. PALESTINE STUD.* 5, 5–20 (1999) (exploring Mizrahi discrimination in Israel).

names.¹⁹ Sexual minorities also experience similar pressures to conform to the norms of the majority. In many regions of the world, sexual minorities must show that they can live by heteronormative society's rules. For example, homosexual couples are often expected to have one partner play a traditionally male role and the other play a traditionally female role.²⁰ In countries where same-sex marriage is legal, it was legalized on the same premises as heterosexual marriage: the presumption that the partnership is to be monogamous, life-long, and grant legitimacy to any progeny.²¹ Some countries, such as Iran²² and India,²³ legally permit transsexuality and support the marriage of a trans person to a person of the opposite sex, yet continue to persecute homosexuality. Moreover, sexual minorities are expected to be in homonormative relationships. Homonormative, for the purpose of this paper, means homosexuals assimilating into the dominant heteronormative culture of marriage and family.²⁴ One example of heteronormative culture is society's expectation that a relationship is monogamous and limited to only two people.²⁵ Similarly, religious minorities are expected to keep overt signs of

¹⁹ Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991–93 (2004).

²⁰ See Lisa M. Walker, *How to Recognize a Lesbian: The Cultural Politics of Looking Like What You Are*, 18 SIGNS 866, 866–90 (1993).

²¹ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015).

²² Iran supports and even partially funds sex change operations for persons who are “diagnosed transsexuals.” Vanessa Barford, *Iran's 'Diagnosed Transsexuals'*, BBC NEWS (Feb. 25, 2008, 10:55 GMT), <http://news.bbc.co.uk/2/hi/7259057.stm>; see also Robert Tait, *A Fatwa for Transsexuals*, SALON (July 28, 2005, 3:08 PM), http://www.salon.com/2005/07/28/iran_transsexuals. However, homosexuality, for men and women, is still illegal and may be punishable by execution. Gay people are often pressured into undergoing sex-change operations under the pretext that their sexual orientation is indicative of the fact that they are transsexual. See Shmuley Boteach, *How Iran Solved Its Gay Marriage Problem*, OBSERVER (May 4, 2015, 1:13 PM), <http://observer.com/2015/05/how-iran-solved-its-gay-marriage-problem>.

²³ See *Nat'l Legal Services Auth. v. Union of India*, (2014) 5 SCC 438 (India). India's Supreme Court ruled that individuals who identify as transsexual, transgender, or third gender, have fundamental rights under the Indian Constitution. *Id.* However, in *Koushal v. NAZ Foundation*, the Indian Supreme Court reversed a lower court's ruling to decriminalize homosexuality. *Naz Foundation v. Government of NCT*, (2009) 111 DRJ 1 (D.B.), overruled by *Koushal v. NAZ Foundation*, (2013) 1 SCC 1 (India). By reversing *Naz Foundation*, the Supreme Court reaffirmed the constitutionality of laws prohibiting sodomy under section 377 of the Indian Penal Code. *Id.*

²⁴ For differing uses of the term “homonormative,” see Margaret Denike, *What's Queer About Polygamy?*, in *QUEER THEORY: LAW, CULTURE, EMPIRE* 137, 143 (Roberts Leckey & Kim Brooks eds., 2010); David Orzechowicz, *Fierce Bitches on Tranny Lane: Gender, Sexuality, Culture, and the Closet in Theme Park Parades*, in *20 GENDER AND SEXUALITY IN THE WORKPLACE* 227, 238, 242 (Christine L. Williams & Kristen Dellinger eds., 2010).

²⁵ See generally, RONALD C. DEN OTTER, *IN DEFENSE OF PLURAL MARRIAGE* (2015).

their affiliations from public view and are often expected to comply with the cultural expectations of the dominant or majority religious group.²⁶

It is often considered a compliment to say that a member of the oppressed group does not seem to be a member of the group or seems different from the other members.²⁷ This includes women who are often told in a complimentary tone that they are 'not like other women,' black people who do not 'act black,' gay people who are 'not flaming,' transgender people who 'pass,' and disabled people who "don't seem disabled."²⁸ This is one of the effects of "othering;"²⁹ the oppressed group is pressured to conform to the characteristics of the oppressing group to gain legitimacy.³⁰ This denies the differences within the oppressed group, forcing members to hide their individuality or suffer discrimination and erasure from the ruling class.³¹ As with other oppressed groups, disabled people are likewise expected to conform and be an inspiration to others by being able to navigate the world just like 'normal' folks, despite their disabilities.³² One is not allowed to express one's membership in an oppressed group without risking societal censure³³ and violence that could amount to death.³⁴

These and other forms of oppression create hierarchies in both value and productivity. First, equal access to the means of achievement is often denied to

²⁶ An example of this can be found in India's Bharatiya Janata Party platform. The party's vision statement uses the term Hindutva, which is the ideology that the Hindu way of life is part of India's culture, rather than a culture specific to those who follow the Hindu religion. Thus, the party views this ideology as secular, rather than religious, and believes that people of all faiths should embrace the Hindutva ideology. See also M. Venkaiah Naidu, *Vision Document 2004*, BHARATIYA JANATA PARTY, <http://ipv6.bjp.org/en/documents/vision-document/vision-document-2004/vision-document-2004> (last visited Nov. 6, 2017); Poulomi Banerjee, *Hinduism vs Hindutva: The Search for an Ideology in Times of Cow Politics*, HINDUSTAN TIMES (Apr. 10, 2017, 9:30 IST), <http://www.hindustantimes.com/india-news/hinduism-versus-hindutva/story-SYB9a5bwKPqBJxbM4fPg2O.html>.

²⁷ Kyung Mee Kim et al., *The Meaning of Social Inclusion for People with Disabilities in South Korea*, 64 INT'L J. DISABILITY, DEV. & EDUC. 19, 28 (2017).

²⁸ *Id.*

²⁹ Beth Ribet, *Surfacing Disability Through a Critical Race Theoretical Paradigm*, 2 GEO. J. L. & MOD. CRITICAL RACE PERSP. 209, 215--16 (2010).

³⁰ *Id.* at 216.

³¹ See generally YOSHINO, *supra* note 16.

³² Kim et al., *supra* note 27.

³³ See generally Faye Mishna et al., *Bullying of Lesbian and Gay Youth: A Qualitative Investigation*, 39 BRITISH J. SOC. WORK 1598, 1598-614 (2009).

³⁴ See Matthew Shepard & James Byrd, Jr., Hate Crimes Prevention Act, 18 U.S.C. § 249 (2009) (showing the creation of a separate category of hate crimes to address the disproportionate level of violence faced by minority populations); see also Crime and Disorder Act 1998, c. 37 (Gr. Brit.), <https://www.legislation.gov.uk/ukpga/1998/37/contents> (providing separate offenses for crimes motivated by the presumed race/religion of the victim).

minority groups through discriminatory laws and practices.³⁵ Second, the method of evaluation of an individual's achievement, productivity, and value is defined by the characteristics of the dominant group.³⁶ This method of evaluation reinforces the identification of differences³⁷ in the oppressed group, denies legitimacy to those differences, or devalues them.³⁸ A person from an oppressed group may thus be additionally identified by behavior usually attributed to that group and oppressed on that basis.³⁹ For instance, in a casteist society such as India's, the dominant culture of the upper castes is valued for its own sake.⁴⁰ The name or physical appearance of a person might serve as a *prima facie* indicator of membership in an oppressed group. One example would be the use of the title "Mr." versus "Ms." When these indicators are not definitive, the person may be identified through stereotypical behavioral traits,⁴¹ such as accent, dialect, and mannerisms of speech.⁴²

The focus here is on the idea of privilege as performativity.⁴³ Invisibility serves to ensure that the oppressing groups are oblivious to the nature of the oppression.⁴⁴ Since the majority groups' own needs are met and the needs of other groups are invisible, the majority groups assume that everyone else has the same needs and wants, which appear to be satisfied.⁴⁵ Therefore, in the mind of the privileged, the oppression they perpetrate does not exist.⁴⁶ All

³⁵ See JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (1869) (showing the stifling of achievements through restrictive laws).

³⁶ See CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) (explaining hierarchisation of traditionally "masculine" traits as being more valuable than "feminine" ones).

³⁷ See generally ROBERT WALD SUSSMAN, *THE MYTH OF RACE: THE TROUBLING PERSISTENCE OF AN UNSCIENTIFIC IDEA* (2014).

³⁸ See GILLIGAN, *supra* note 36.

³⁹ See generally YOSHINO, *supra* note 16.

⁴⁰ See Edward B. Harper, *Ritual Pollution as an Integrator of Caste and Religion*, 23 *J. ASIAN STUD.* 151, 151–97 (1964) (explaining vegetarianism and the ideas of purity and pollution among Hindus in India is an upper-caste value, that is sought to be imposed as being superior to other traditions in the stratified society); see also B. R. AMBEDKAR, *CASTES IN INDIA: THEIR MECHANISM, GENESIS AND DEVELOPMENT* 27–29 (1916). The idea of caste has been stated to be a process of assimilation of the cultural markers of the upper castes by the lower castes.

⁴¹ Massey & Lundy, *supra* note 17.

⁴² See YOSHINO, *supra* note 16.

⁴³ See John T. Warren, *Doing Whiteness: On the Performative Dimensions of Race in the Classroom*, 50 *COMM. EDUC.* 91, 105–06 (2001).

⁴⁴ See Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, in *MULTICULTURALISM* 30, 34–36 (1992), http://files.eric.ed.gov/fulltext/ED355141.pdf?utm_campaign=Revue%20newsletter&utm_medium=Newsletter&utm_source=revue#page=43. This is commonly referred to as the privilege of ignoring one's own privilege.

⁴⁵ *Id.*

⁴⁶ *Id.*

systems of oppression tend to follow this same pattern of hierarchizing a certain characteristic and thereby devaluing the assumed opposing characteristic and those who express them.⁴⁷ This may be seen in the French laws that ban the burqa and penalize women who express their faith through such garb by imposing steep monetary fines.⁴⁸ In defending this law, key members of the French legislature asserted that the law was necessary not only to promote female equality, but also to maintain the nation's secularism and the values of the republic—"liberty, equality, [and] fraternity."⁴⁹ In expressing such a rationale, the privileged majority demonstrates that it believed liberty and equality entitle women to wear revealing clothing without any restraint. This illustrates the privileged elite's assumption that all women prefer to wear revealing clothing and that no woman would voluntarily choose to wear a burqa. Ergo, if a woman is wearing a burqa, she has been forced to do so and must be liberated from such coercion.⁵⁰ This assumption is tremendously dangerous, as it speaks for all women—depriving them of the ability to make the choice to express their faith as they see fit.

Several civil rights movements over the centuries have sought to address various forms of oppression.⁵¹ Othered populations have been able to drive positive change by making their experiences visible through such movements.⁵² These movements often seek to emphasize and bring to light the differences between minority and majority groups as a means of pushing forward the rights and demands of othered groups.⁵³ The more visible the

⁴⁷ See GILLIGAN, *supra* note 36.

⁴⁸ See Ben Quinn, *French Police Make Woman Remove Clothing on Nice Beach Following Burkini Ban*, GUARDIAN (Aug. 23, 2016, 7:43 EDT), <https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach>; Angelique Chrisafis, *French Burkini Ban Row Escalates After Clothing Incident at Nice Beach*, GUARDIAN (Aug. 25, 2016, 2:16 AM), <https://www.theguardian.com/world/2016/aug/24/french-burkini-ban-row-escalates-clothing-incident-woman-police-nice-beach>.

⁴⁹ S.A.S. v. France, App. No. 43835/11, 2014 Eur. Ct. H.R., ¶ 17, <http://hudoc.echr.coe.int/eng?i=001-145466>.

⁵⁰ See David Chazan, *Burkini Ban Ruled Illegal in France - Prompting Right-Wing Backlash and Vow from Towns to Ignore It*, TELEGRAPH (Aug. 26, 2016, 8:00 PM), <http://www.telegraph.co.uk/news/2016/08/26/burkini-ban-illegal-french-court-rules>; Lizzie Dearden, *Burkini Ban Suspended: French Court Declares Law Forbidding Swimwear Worn by Muslim Women 'Clearly Illegal'*, INDEPENDENT (Aug. 26, 2016, 1:21 BST), <http://www.independent.co.uk/news/world/europe/burkini-ban-french-france-court-suspends-rule-law-forbidding-swimwear-worn-muslim-women-seriously-a7211396.html>. Ultimately, these laws were struck down by the State Council as being infringements on fundamental liberties of the women affected.

⁵¹ See generally SA: MUELMOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2012).

⁵² *Id.*

⁵³ Walker, *supra* note 20, at 868–69 (explaining it may be argued that visibility of difference in protests often spurs the move for equal rights, be it the suffragettes protesting sexism, the civil rights movement protesting racism, pride parades protesting heterosexism).

movement, the more likely the system of oppression will be addressed.⁵⁴ A recent example from India is the passage of the Criminal Law (Amendment) Act, 2013, which was proposed in response to nationwide protests over the gang-rape and murder of Nirbhaya (real name, Jyoti Singh) in New Delhi.⁵⁵ The Act passed within two months of the incident.⁵⁶ This response was incredibly quick, given that suggested improvements on the rape laws in the country had been pushed by various lobbies and ignored by the government for several years before the protests.⁵⁷ Thus, the less visible a movement or problem is, the more likely it is that it will remain unaltered.⁵⁸

B. Disability, Oppression, and the Social Model

Issues relating to disability have been largely invisible in the public sphere.⁵⁹ Disability is still widely considered a legitimate basis for discriminating against persons in terms of access to resources and the provision of agency and autonomy in life choices.⁶⁰ Disabilities are generally seen as impairments that are inherently negative—a condition to be eliminated from the impaired person when possible.⁶¹ Science once attached the labels of unsoundness of mind and incapacity to perform in the public

⁵⁴ See Jennifer Edwards, *Visibility as Power: A Historical Analysis of the Boise Gay Pride Celebration*, 3 MCNAIR SCHOLARS RES. J. 15 *passim* (2007) (showing increased visibility of the LGBTQ+ community fostered changes in societal attitudes and laws relating to sexual orientation).

⁵⁵ See Sruthi Gottipati et al., *Protests Across India over Death of Gang Rape Victim*, N.Y. TIMES (Dec. 29, 2012, 3:49 AM), <http://india.blogs.nytimes.com/2012/12/29/protests-organized-across-india-over-death-of-gang-rape-victim/>; Gardiner Harris & Hari Kumar, *Clashes Break Out in India at a Protest Over a Rape Case*, N.Y. TIMES (Dec. 22, 2012), <http://www.nytimes.com/2012/12/23/world/asia/in-india-demonstrators-and-police-clash-at-protest-over-rape.html>.

⁵⁶ The Criminal Law (Amendment) Act was deemed to come into force on Feb. 3, 2013, less than two months after the rape of Nirbhaya on Dec. 16, 2012. Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India), <http://indiacode.nic.in/acts-in-pdf/132013.pdf>.

⁵⁷ See, e.g., Criminal Law (Amendment) Act, 2006, No. 2, Acts of Parliament, 2006 (India), <http://ncw.nic.in/PDFFiles/Amendments%20to%20laws%20relating%20to%20women.pdf>; LAW COMM'N OF INDIA, LAW COMMISSION OF INDIA'S ONE HUNDRED AND SEVENTY SECOND REPORT ON REVIEW OF RAPE LAWS (2000), <http://www.lawcommissionofindia.nic.in/rapelaws.htm> at Chapter 3.

⁵⁸ Cf. *Iceland: Women Strike*, N.Y. TIMES (Oct. 25, 1975), <http://www.nytimes.com/1975/10/25/archives/iceland-women-strike.html>.

⁵⁹ See Sachin P. Mampatta, *India's Missing Disabled Population*, LIVEMINT (Sept. 16, 2015, 2:45 IST), <http://www.livemint.com/Opinion/1rx8tSYGwHB0ZRsvdNFIBP/Indias-missing-disabled-population.html>. An example of this invisibility may be seen in the documentation of disability in census records in India: the census takers allegedly skipped asking individuals if there were any disabled persons in the household, stating that it often made respondents uncomfortable. Consequently, the recorded percentage of disabled persons in India is 2.21%, compared to the average of 15.3% for the rest of the world. *Id.*

⁶⁰ See Kim et al., *supra* note 27.

⁶¹ Campbell, *supra* note 9 at 154; Campbell, *supra* note 4 at 52.

sphere to the female sex.⁶² These labels were then enforced by laws that presumed essential differences between “male” and “female” brains. Visibility of women’s subjugation arose during protests led by the suffragettes, resulting in a slow wearing-away of such labels. Just as the only thing stopping women from working in the public spheres were social constructs restricting access to these spaces, the only thing stopping disabled people is access to public spaces (in the form of ramps and other means of access, flexible working hours, allowance for differences in attitudes/behavior/needs), which is currently sorely lacking and in essence creating a disabling society.

The social model of disability, a brainchild of the disability rights movement in the United Kingdom,⁶³ posits that disability is not so much a consequence of an impaired body as much as society inadequately accounting for human differences.⁶⁴ This reframes the discourse on disability as being a problem with the way in which society is built, rather than being a problem caused by the unique traits of the individual. Humans have built their living environments largely in a manner that significantly excludes the disabled minority’s access.⁶⁵ For example, humans have invented escalators, lifts, and airplanes—inventions that allow humans to act and move in ways that would otherwise be physically impossible. However, access to these facilities is premised on being able to walk and does not account for people of differing bodily ability.⁶⁶ An analogy would be a world where climbing a rope is the only way to access higher floors in a building. People adept at rope climbing would have no problem using these facilities, but everyone else would be denied access. This social model of disability changes the narrative of the disabled person from “impaired and in need of charitable help” to “disadvantaged/incapacitated by societal structures and norms.” While gaining popularity in academia,⁶⁷ the social model of disability has not gained much traction in popular culture. This has contributed to the continued invisibility of disability issues and, consequently, provides very little impetus for laws that provide greater accessibility.

⁶² See MILL, *supra* note 35, at 47–74.

⁶³ See generally UNION OF THE PHYSICALLY IMPAIRED AGAINST SEGREGATION AND THE DISABILITY ALLIANCE, *FUNDAMENTAL PRINCIPLES OF DISABILITY* (1976) [hereinafter *PRINCIPLES OF DISABILITY*]; MICHAEL OLIVER, *SOCIAL WORK WITH DISABLED PEOPLE* (1983) [hereinafter *SOCIAL WORK WITH DISABLED PEOPLE*].

⁶⁴ See generally *PRINCIPLES OF DISABILITY*, *supra* note 63; *SOCIAL WORK WITH DISABLED PEOPLE*, *supra* note 63; Campbell, *supra* note 4; Adrienne Asch, *Disability Equality and Prenatal Testing: Contradictory or Compatible?*, 30 FLA. ST. U. L. REV. 315, 318 (2003); Adam M. Samaha, *What Good is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1251–308 (2007).

⁶⁵ See *SOCIAL WORK WITH DISABLED PEOPLE*, *supra* note 63; MICHAEL OLIVER, *UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE* (1996) [hereinafter *UNDERSTANDING DISABILITY*].

⁶⁶ See *SOCIAL WORK WITH DISABLED PEOPLE*, *supra* note 63.

⁶⁷ See Samaha, *supra* note 64, at 1251.

Most scholars endorsing the social model of disability do not claim that disability is solely created by external factors,⁶⁸ but rather that it is caused by a combination of individual traits and environmental factors.⁶⁹ The extent to which environmental factors cause the disability is often ignored or underestimated in disability narratives.⁷⁰ The idea of impairment as a legitimate part of the model of disability is further supported by the fact that skin color, sexuality, and gender are otherwise 'neutral' facts that do not affect the manner in which the person functions, but do affect the way in which society treats people.⁷¹

This Article, however, disputes this differentiation between disability and other forms of oppression. Disability is as much a combination of personal traits and societal factors as other oppressions. There are four possible kinds of disablement, based on existing models of disability: (1) those that are, or may be, accommodated by changes in environment; (2) those that are, or can be, accommodated by medical interventions; (3) those that can be accommodated by both; and (4) those that currently cannot be accommodated by either.⁷² For example, there have been several medical conditions, both disabling and fatal, that could not be addressed at an earlier point in time.⁷³ However, adequate funding for research has since provided permanent, long-term solutions to these issues. One example is Martine Rothblatt's personal funding of research in pulmonary hypertension, a condition the medical community did not research because the community thought it was unprofitable.⁷⁴ The funding provided certain medical solutions to an otherwise fatal condition. While the solution is far from perfect, this scenario demonstrates that societal disregard for funding certain avenues of research is a factor that makes an impairment 'disabling.' Another example may be seen in the historical time lag between the widespread use of the wheel to speed up and ease locomotion, in the form of chariots, and people using the wheel as a mobility aid for those who could not walk. The first chariots are said to have appeared around the year 3500 BC;⁷⁵ however, the earliest use of the wheel to

⁶⁸ David Wasserman et al., *Disability and Justice*, STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2015), <http://plato.stanford.edu/archives/sum2015/entries/disability-justice/>.

⁶⁹ Samaha, *supra* note 64, at 1257.

⁷⁰ Wasserman, *supra* note 68.

⁷¹ Liz Crow, *Including All of Our Lives: Renewing the Social Model of Disability*, in *EXPLORING THE DIVIDE* 55–72 (Colin Barnes & Geof Mercer eds., 1996).

⁷² See TOM SHAKESPEARE, *DISABILITY RIGHTS AND WRONGS* 35–53 (2006).

⁷³ Conditions for which medical interventions are available include diabetes, lactose intolerance, problems with eyesight, juvenile myoclonic epilepsy, certain forms of blindness, and deafness.

⁷⁴ Zira Moukheiber, *Jeni's Oil*, FORBES, (Jan. 7, 2002, 12:00 AM), <https://www.forbes.com/forbes/2002/0107/138.html>.

⁷⁵ Wheel. ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/technology/wheel> (last visited Jan. 1, 2016); Megan Gambino, *A Salute to the Wheel*, SMITHSONIAN MAG. (June 17, 2009), <http://www.smithsonianmag.com/science-nature/a-salute-to-the-wheel-31805121/>.

facilitate mobility for people who could not walk was nearly four millennia later.⁷⁶

Certain analogies can be drawn to emphasize the idea of multiple means of addressing disability. Myopia may be accommodated by glasses or by corrective surgery.⁷⁷ It is not normally considered a disability, nor would a person with myopia be pressured to opt for certain forms of medical intervention. Society has found ways to accommodate those with poor vision to the extent that most people who wear glasses are not considered disabled. Wearing glasses is considered unremarkable, even though many people would be completely unable to do necessary, everyday tasks without the aid of assistive vision technology.⁷⁸

Thus, the idea that those who are not currently considered disabled by society would remain 'able-bodied' in a state of nature without man-made interventions is not true. Likewise, there are several disabling conditions that are unique to certain kinds of anatomy. A person without female genitalia is unlikely to experience endometriosis, labor pain, childbirth, breastfeeding, menopause, and a myriad of other things.⁷⁹ These are physically founded and socially discriminated.⁸⁰ Pregnancy and childbirth are physical realities that are restricted to people with certain physiologies, but social discrimination against a person experiencing either is decried.⁸¹ The engagement with discrimination against women has been based on social causes, despite biological differences.⁸² Medical interventions are available for specific pregnancy-related issues. Epidurals for labour pain, for instance, which a woman may choose to take or forego, though this choice is usually informed by environmental factors.⁸³ Societally rooted discrimination, such as a lack of maternity leave, should be addressed in a similar manner—the option of extended maternity leave should exist and be free from censure or judgement.

⁷⁶ Brian Woods & Nick Watson, *History of the Wheel*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/history-of-the-wheelchair-1971423> (last visited Jan. 1, 2018).

⁷⁷ See Kerry D. Solomon et al., *LASIK World Literature Review: Quality of Life and Patient Satisfaction*, 116 *OPHTHALMOLOGY* 691, 691–701 (2009) (stating that LASIK, the surgery available for myopia, hyperopia and astigmatism has been reported to be one of the most successful elective surgeries available today).

⁷⁸ SOCIAL WORK WITH DISABLED PEOPLE, *supra* note 63, at 23.

⁷⁹ See Sally J. Kenney, *Pregnancy Discrimination: Toward Substantive Equality*, 10 *WIS. WOMEN'S L.J.* 351, 360 (1995).

⁸⁰ *Id.* at 361.

⁸¹ *Id.*

⁸² Anita Silvers, *Feminist Perspectives on Disability*, STAN. ENCYCLOPEDIA PHIL. (Aug. 29, 2013), <https://plato.stanford.edu/archives/win2016/entries/feminism-disability/>.

⁸³ Erica Schytt & Ulla Waldenström, *Epidural Analgesia for Labor Pain: Whose Choice?*, 89 *ACTA OBSTETRICIA ET GYNECOLOGICA* 238, 238 (2010); Jennifer Harkins et al., *Survey of the Factors Associated with a Woman's Choice to Have an Epidural for Labor Analgesia*, 2010 *ANESTHESIOLOGY RES. & PRAC.* 1, 1 (2010).

Likewise, transitioning medically into another sex should be an option for those who wish to pursue that course, not a necessary eventuality for every transgender person.⁸⁴ Nor does a transgender person have to adopt the roles, characteristics, or appearance, historically or traditionally, associated with a particular gender. In an ideal world, this will not be socially or medically mandated for any individual.⁸⁵ To conclude, differences in physiology can cause differences in various abilities which then can lead to differences in social treatment. But this phenomenon is not restricted to the class of medically disabled persons. Medical interventions can alleviate the individual effects of physiological differences if society invests in such solutions. The idea of impairment imbibes the idea of socially founded discrimination. It has been stated that while impairment is a fact, assumed inferiority is a social construct for which society is responsible.⁸⁶

To emphasize this model of ability, this Article renames the non-disabled community “enabled.” Thus far, the term enabled/enabling has only been used to identify means by which disabled people may access the world.⁸⁷ This furthers the erroneous belief that enabling modifications are ‘concessions’ or privileges granted to disabled people out of the beneficence of the non-disabled world, to be taken away when the benefactors deem fit. The terms ‘non-disabled,’ ‘temporarily able-bodied,’ and ‘able-bodied’ focus on the body’s adherence or non-adherence to the normative idea of what a person’s body should be.⁸⁸ The term “enabled” is, thus, the opposite of disabled—people are either enabled or disabled by their surroundings, and it is in the interest of all to ensure that nobody is disabled. The shift in terminology emphasizes that not being disabled is a privilege, and people are disabled or enabled based on the preference or convenience of the majority.

A potential problem with this formulation is its ability to dilute, somewhat, the idea of disability. This formulation defines disability in a way that potentially includes *any* form of oppression. Women may be considered disabled by a patriarchal society, left-handed people in a world built on right-handedness, etc. How then does one distinguish the specific problems faced by disabled people, as defined in the medical model, as opposed to women, LGBTQ+ persons, or persons disabled by other forms of oppression?

⁸⁴ See NAT’L LEGAL SERV. AUTH. v. UNION OF INDIA, (2014) 5 SCC 438, ¶ 129(2) (India) (affirming this proposition); see also Harper Jean Tobin, *Against the Surgical Requirement for Change of Legal Sex*, 38 CASE W. RES. J. INT’L L. 393 (2007).

⁸⁵ Silvers, *supra* note 82, at Part 5 (on the over-simplification of medical interventions as self-hatred).

⁸⁶ Crow, *supra* note 71, at 60.

⁸⁷ See TARA BRABAZON, *ENABLING UNIVERSITY: IMPAIRMENT, (DIS)ABILITY AND SOCIAL JUSTICE IN HIGHER EDUCATION* xviii (2015) (exemplifying, throughout the book, the use of the term “enablement” to talk about facilitation of disabled people).

⁸⁸ See Paul Harpur, *From Disability to Ability: Changing the Phrasing of the Debate*, 27 DISABILITY & SOC’Y 325, 330, 332 (2012).

This Article argues that there is no need to draw a distinction between disabled people in the traditional medical model and other oppressed groups. The needs of medically disabled people are not monolithic. The needs of someone in a wheelchair are completely different than those of someone on the Autism Spectrum or someone with Chronic Fatigue Syndrome. The Paralympics recognize several different categories of disability and impairment to maintain competitive parity, just as the Olympics⁸⁹ separates athletes on the basis of gender for the same reason.⁹⁰ Indeed, the Olympics separates men and women further into several different subcategories where required. For example, weight classes are specified in events such as weightlifting⁹¹ to maintain competitive parity in various events. The separation of the Olympics from the Paralympics is therefore more a function of habit than of necessity. The differences in how a person interacts with society and how the law may facilitate such interaction may account for differences in the form of disablement. These differences may be accommodated without requiring uniformity in the manner of enabling disabled people.

It is likely that the social model will be able to accommodate and include differences rather than punish them and provide for these differences through universal access, with better care for those who require it. This includes ensuring, for instance, that deaf people have access to sign language equivalents in public spaces and those with extreme social anxiety have access to spaces where they can interact with others on their own terms.⁹² An example of this accommodation is Gallaudet University for the Deaf, where sign language is the standard means of communication. Interestingly, those at the University who do not know sign language are considered “communicatively disabled.”⁹³

Another possible criticism for the adoption of this model might be the ‘costs’ of making society more accessible. However, the costs incurred are likely to be offset by corresponding gains through increased productivity as disabled people have access to productive opportunities. This would also apply to those

⁸⁹ This is another depiction of the infliction of “otherness” upon disabled people. The Olympic Games for enabled people are ubiquitous. However, the difference of disabled people is marked out, labelled, and emphasized as being separate or subordinate in the case of the Paralympics.

⁹⁰ Valérie Thibault et al., *Women and Men in Sport Performance: The Gender Gap Has Not Evolved Since 1983*, 9 J. SPORTS SCI. & MED. 214, 214 (2010).

⁹¹ INT’L WEIGHT LIFTING FED’N, TECHNICAL AND COMPETITION RULES AND REGULATIONS, (Tamás Aján et al. eds., 2013), http://www.swiss-weightlifting.ch/seiten/form/iwf_tech_regl_2013_2016_e.pdf.

⁹² See MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 155–223 (2007); Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 101–10 (2007) (explaining that social assumptions are responsible for whether people attain their full capabilities).

⁹³ I. King Jordan, *The Gallaudet Experience: Deafness and Disability*, 120 PMLA 625, 625 (2005).

who are temporarily impaired. Moreover, on principle, ethical societies and welfare states today are expected to counter all historical burdens of oppression.⁹⁴ The burden of expenses involved in correcting injustices, according to systems of corrective justice, will be borne by those responsible for the injustice, namely, society as a whole.⁹⁵ Historically, costs (at least in the short run) have always been incurred when basic human rights were extended to classes of people that were denied them, whether women, racial minorities, or oppressed castes.⁹⁶ Society has borne these costs knowing they were responsible for the creation of the disadvantage. The same would likewise be applicable to people who are disabled by society until such disablement ceases to operate.

The social model presumes that, through changes in social structure, society can adapt to prevent anyone from being disabled.⁹⁷ Thus, the social model seeks to prevent disability by ensuring greater accessibility for all—regardless of individual variation. This model emphasizes that individual variation should be embraced and accounted for in society rather than denied, derided, and erased. The adoption of this model in general policy decisions would bring to light one of the biggest ways in which erasure of disabled persons is implemented in practice—the selective abortion of FLDs.

III. THE ABORTION QUESTION, FEMINISM, AND THE INDIAN STATE

In the abortion debate, feminism and disableism find themselves at odds with each other. In this section, the Article undertakes a comparative analysis of the discourses surrounding abortion laws in the United States and India.

A. *Feminist Movement's Perpetuating Oppression*

The pro-choice movement, particularly in the United States, often uses a fetus' disability as an argument for the necessity of abortions.⁹⁸ Under this argument, women pregnant with FLDs should be allowed to terminate

⁹⁴ See generally ERNEST J. WEINRIB, *CORRECTIVE JUSTICE* (2012).

⁹⁵ See Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349 (2002) (“Corrective justice is the idea that liability rectifies the injustice inflicted by one person on another.”).

⁹⁶ For instance, one of the problems in the aftermath of the civil war in the United States was the unwillingness of states to spend money on the education of former slaves. The ‘cost’ here was primarily the funds needed to set up new public institutions for the education of large numbers of people who were previously not allowed to access it. See Alex Sandifer & Berry Dishong Renfer, *Schools for Freed Peoples*, NCPEDIA (2003), <http://www.ncpedia.org/education/freed-peoples>.

⁹⁷ See SHAKESPEARE, *supra* note 72, at 32.

⁹⁸ See Janice McLaughlin, *Screening Networks: Shared Agendas in Feminist and Disability Movement: Challenges to Antenatal Screening and Abortion*, 18 DISABILITY & SOC'Y 297 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); Medical Termination of Pregnancy Act, No. 34 of 1971, § 3(2)(ii), INDIA CODE (1971); see also Susan Sered, *A Feminist Sociologist's Thoughts on the Zika Virus*, OUR BODIES OURSELVES (Feb. 12, 2016), <http://www.ourbodiesourselves.org/2016/02/a-feminist-sociologists-thoughts-on-the-zika-virus/>.

pregnancy on the following grounds. First, the termination of pregnancy spares the child a life of suffering.⁹⁹ Second, the termination of pregnancy spares parents innumerable hardships and allows them to plan their family around monetary concerns.¹⁰⁰ Third, parents like to raise a child with the best possible chance of success in society and, therefore, refuse to raise a disabled child.¹⁰¹

While these arguments might seem benign, they bear a sinister resemblance to arguments supporting the abortion of female fetuses in patriarchal societies. The burdens of raising a female child in India can be severe.¹⁰² First, women themselves are likely to lead lives devoid of real opportunities, often finding their agency severely circumscribed.¹⁰³ Second, parents are expected to take responsibility for defending a female child from patriarchal violence, arguably increasing the cost and labor for parents raising female children.¹⁰⁴ Third, hosts of economic concerns underwrite the preference for male children, one of the main concerns being the issue of property and inheritance planning and dowry.¹⁰⁵

Many families selectively seek to terminate pregnancies of female fetuses to avoid the hardships the family is likely to face while raising a female child.¹⁰⁶ This has resulted in a huge deficit in the sex ratio in India.¹⁰⁷ The disparity is starker in regions where gender-based oppression is worse, but better in regions where gender equality is more prevalent.¹⁰⁸

There are no attempts by governments to justify or support a woman's right to terminate the pregnancy of female fetuses solely because a fetus is female, despite the fact that the child is likely to suffer through life as a consequence of being female. Nor are there attempts to encourage the decision

⁹⁹ Raanan Gillon, *Is There A 'New Ethics of Abortion'?*, 27 J. MED. ETHICS ii5, ii8–ii9 (2001).

¹⁰⁰ See McLaughlin, *supra* note 98.

¹⁰¹ See Asch, *supra* note 64, at 316.

¹⁰² U.N. WOMEN, SEX RATIOS AND GENDER BIASED SEX SELECTION: HISTORY, DEBATES AND FUTURE DIRECTIONS 9 (2014), <http://asiapacific.unfpa.org/sites/default/files/pub-pdf/Sex-Ratios-and-Gender-Biased-Sex-Selection.pdf> [hereinafter U.N. WOMEN].

¹⁰³ MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 1–4 (13th ed. 2008).

¹⁰⁴ U.N. WOMEN, *supra* note 102, at 35–38.

¹⁰⁵ *Id.* at 4–6, 8.

¹⁰⁶ Sabu M. George & Ranbir S. Dahiya, *Female Foeticide in Rural Haryana*, 33 ECON. & POL. WKLY. 2191, 2191 (1998).

¹⁰⁷ *Id.* at 2194.

¹⁰⁸ According to the sex ratios, there are an estimated several million missing women in India and China where there is a disparity in treatment of children based on gender. However, in the State of Kerala, in India, the sex-ratio is normal because women are afforded equality of opportunity. Specifically, there is a high female literacy rate and the culture endorses female ownership of property. See Amartya Sen, *Missing Women: Social Inequality Outweighs Women's Survival Advantage in Asia and North Africa*, 304 BRITISH MED. J. 587, 587–88 (1992).

to choose to terminate the pregnancy because raising a woman is inevitably a burden on the family's means in a society that is patently discriminatory. Instead, the policy of the government has been to actively attempt to alter society to make life more livable for members of the female sex.¹⁰⁹ Governments have made no such attempts to ensure the perpetuation or protection of the lives of any of the other oppressed minorities, such as Dalits, Muslims, sexual minorities, and disabled people, regardless of their status of being protected groups under the law.

B. Abortion Laws: A Comparative Analysis

In places where abortion is legal, there are two primary legal methods in which it is addressed. The first method, used in India and Great Britain, involves carving out an exception to the general criminalization of causing the termination of pregnancy.¹¹⁰ The United States¹¹¹ and Canada¹¹² operate using the second method, in which the right to seek the termination of a pregnancy is considered a fundamental right available to a pregnant woman, either in terms of autonomy rights or privacy rights.¹¹³ Under both methods, governments consider it in the interest of the state to regulate (at different thresholds) how, where, and when this right may be employed, due to the unique nature of pregnancy affecting the life of the pregnant woman and the potential life of the fetus if carried to term.¹¹⁴ This Article will primarily discuss the laws of India and the United States to compare the different approaches and the manner in which those approaches affect the regulation of abortion.

In India, the right of abortion is rarely, if ever, seen as arising from the feminist movement.¹¹⁵ The Medical Termination of Pregnancy Act of 1971 ("MTP Act") is the primary legislation that allows for abortion, under certain

¹⁰⁹ The government initiated schemes such as the "*Beti Bachao Beti Padhao*" ("save the daughter, educate the daughter") targeted at, amongst other things, the prevention of "gender biased sex selective elimination." See MINISTRY OF WOMEN & CHILD DEV., BETI BACHAO BETI PADHAO, http://wcd.nic.in/sites/default/files/About_BBBP_Scheme.pdf (last visited Oct. 31, 2017) [hereinafter BETI BACHAO BETI PADHAO].

¹¹⁰ *Compare* Medical Termination of Pregnancy Act, No. 34 of 1971, § 3, INDIA CODE (1971), with Abortion Act 1967, c. 87, § 1(1) (Eng.).

¹¹¹ See *Roe*, 410 U.S. 113 at 164–68.

¹¹² *The Queen v. Morgentaler*, [1988] 1 S.C.R. 30, 183–84 (Can.) (opinion of Wilson, J.) (citing Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 7 (U.K.)).

¹¹³ See *id.*; *Roe*, 410 U.S. at 113.

¹¹⁴ See *R v. British Broad. Corp.* [2003] UKHL 23, ¶ 114 (opinion of Lord Walker, J.) (justifying the existence of de-facto abortion on demand on the basis of the Abortion Act, 1967) (citation omitted).

¹¹⁵ Nivedita Menon, *The Impossibility of "Justice": Female Foeticide and Feminist Discourse on Abortion*, 29 CONTRIBUTIONS TO INDIAN SOC. 369, 373–74 (1995) (talking about the right to abortion is a result of population control goals).

circumstances, in India.¹¹⁶ The MTP Act was enacted to support population control and family planning initiatives.¹¹⁷ The MTP Act provides for the use of pregnancy termination as an alternative means of contraception if other means fail.¹¹⁸ The philosophical imports of whether life begins at conception—a question that has plagued the issue of abortion in the United States—is not a consideration in Indian laws and practice. However, the protection of female children and the improvement of the sex ratio are seen as feminist issues.¹¹⁹

The MTP Act is couched in the language of decriminalization, to counter the criminalization of causing a miscarriage under the Indian Penal Code.¹²⁰ It provides that a medical practitioner may terminate a pregnancy up to the twelfth week¹²¹ with the consent of the pregnant woman¹²² on one of two grounds: (1) that the continuance of the pregnancy would involve risk of life or health to the woman; or (2) that there is a substantial risk that the child, if born, would be born disabled.¹²³

The MTP act further clarifies that if a married woman is pregnant due to failure on the part of contraception, the anguish and undue financial burden likely to result in carrying such a pregnancy to term may be considered as constituting “grave injury to the mental health of the . . . woman.”¹²⁴ The limit on the length of the pregnancy for such termination is extended from twelve weeks to twenty weeks if two medical practitioners are willing to certify one of the conditions specified above.¹²⁵ The wording of the MTP Act, in addition to permitting the abortion of FLDs, may also imply that those without the means to raise their children are encouraged not to have children, while those who are privileged with the means are encouraged to do so.

There are parallels between the right of women to have an abortion and the right of people to live their lives as they choose. The U.S. right to life focuses on the importance of ownership and private control over one’s own life and body.¹²⁶ The right to abort reinforces this control by allowing pregnant women to make choices regarding their lives and the manner in which they desire to live. The idea is an exception to the law against murder—just as self-

¹¹⁶ See Medical Termination of Pregnancy Act, No. 34 of 1971, INDIA CODE (1971).

¹¹⁷ Menon, *supra* note 115, at 374–76.

¹¹⁸ Medical Termination of Pregnancy Act, No. 34 of 1971, § 3, explanation 2, INDIA CODE (1971).

¹¹⁹ See Menon, *supra* note 115, at 374.

¹²⁰ Indian Penal Code, No. 45 of 1860, § 312, PEN. CODE (1860).

¹²¹ Medical Termination of Pregnancy Act, No. 34 of 1971, § 3, INDIA CODE (1971).

¹²² *Id.* § 3(4)(b).

¹²³ *Id.* § 3.

¹²⁴ *Id.* § 3, explanation 1.

¹²⁵ *Id.* § 3(2)(b).

¹²⁶ *Roe*, 410 U.S. at 153–54.

defense excludes culpability from the crime of murder. One can look at the right to abortion in the United States as a parallel to the right of self-defense granted to women—the law grants a woman the right to defend her right to live as she pleases against outside intrusion. This is particularly true in the case of India’s MTP Act, where the right to terminate a pregnancy exists solely on two grounds: where the “continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health,”¹²⁷ or in cases where the child is at risk of being born seriously handicapped as mentioned above.

This parallels the abortion law in Great Britain¹²⁸ and the U.S. Supreme Court’s decision in *Roe v. Wade*.¹²⁹ The final ruling in *Roe* supported a woman’s right to decide to terminate her pregnancy based on her right to privacy, but this was couched in language that referred to the harm that women denied this right would be likely to face: direct harm in terms of effects on health and indirect harm in terms of stressful life prospects, psychological and mental harm, and so on.¹³⁰ The phrasing of these laws (both in the rulings of the courts cited above and in the MTP Act) is particularly indicative of the right to abortion being focused on protection of the right to life of the pregnant woman, which supports the parallel drawn to the right of self-defense.

C. Addressing Female Feticide in India

The Indian government also attempted to curb female feticide by making it illegal to identify the sex of the fetus prior to the birth of the child under Section 6 of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (“PNDT Act”).¹³¹ This move seeks to ensure that the right to access an abortion is still available for those who require it while also preventing sex-selection. Killing a newborn baby is a crime, but terminating a pregnancy to the extent permitted under the MTP Act is not.¹³² Ergo, presumably prohibiting sex determination results in the prevention of sex-selective abortions. While the passage of the PNDT Act has reduced the extent of female feticide,¹³³ it is nonetheless carried out with impunity in the

¹²⁷ See Medical Termination of Pregnancy Act, No. 34 of 1971, § 3, INDIA CODE (1971) (“[T]he anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.”).

¹²⁸ Abortion Act 1967, c. 87, § 1(2) (Eng.) (providing that the woman’s environment (actual or foreseeable) may be taken into account to determine risk to health).

¹²⁹ *Roe*, 410 U.S. at 153 (discussing the harms that could result to women who are denied the choice to terminate a pregnancy).

¹³⁰ See *id.* at 153.

¹³¹ Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, No. 57 of 1994, § 6, INDIA CODE (1994).

¹³² Medical Termination of Pregnancy Act, No. 34 of 1971, § 3(1), INDIA CODE (1971).

¹³³ See Arindam Nandi & Anil B. Deolalikar, *Does a Legal Ban on Sex-Selective Abortions Improve Child Sex Ratios? Evidence from a Policy Change in India*, 103 J. DEV. ECON. 216, 222 (2013)

country.¹³⁴ Many people continue to have fairly easy access to sex-selective abortion of female fetuses.¹³⁵

Some scholars argue that the drive to improve the sex ratio in India is primarily because the existence of the female sex is imperative for procreation and the continuance of existing privileges granted to the dominant male sex (including exclusive ownership of and sexual access to at least one woman).¹³⁶ The government's policy on marriage has been fairly conservative thus far, bordering on virtual ownership of women. A presumption exists in favor of the validity of a marriage, even when one of the parties is underage at the time of the marriage.¹³⁷ Rape laws do not apply to married women in the same way they apply to unmarried women; a man cannot be charged with raping his wife, regardless of whether she gives consent.¹³⁸ The age of consent is lower for a married woman than an unmarried woman.¹³⁹ There are criminal sanctions against adultery only when a married woman commits it, and the penalty is

(arguing the passage of the PNDT Act has resulted in the saving of 106,000 girls in the 0–6 age group from having been selectively aborted).

¹³⁴ *Id.*

¹³⁵ George & Dahiya, *supra* note 106, at 2194.

¹³⁶ Bianca Baldo, *Restricting Access to Abortion Services: A Conversation with Dr. Suchitra Dalvie on the Effects of Sex Selection in India*, GENDERIT.ORG (Oct. 5, 2015), <http://www.genderit.org/articles/restricting-access-abortion-services-conversation-dr-suchitra-dalvie-effects-sex-selection->.

¹³⁷ Marriages in violation of the Prohibition of Child Marriage Act, 2006 are voidable at the insistence of the party who was underage at the time of marriage. The underage party can only exercise this right up until two years after attaining majority. See Prohibition of Child Marriage Act, No. 6 of 2007, INDIA CODE (2007).

¹³⁸ Indian Penal Code, No. 45 of 1860, § 375, exception 2, PEN. CODE (1860) (exempting sexual acts by a man with his own wife from the definition of rape). There have been several demands to include marital rape within the definition of rape, under section 375 of the Indian Penal Code, such as the Justice Verma Committee Report and the 2006 report of the National Commission for Women. See J.S. VERMA ET AL., COMM. ON AMENDMENTS TO CRIMINAL LAW, REPORT ON THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW 113–18 (2013); Criminal Law (Amendment) Act, 2005, No. 2, Acts of Parliament, 2006 (India). Petitions were brought before the High Court of Delhi to challenge the exemption of marital rape as unconstitutional. However, at the time of writing, these cases are still pending and no judgement has been passed. Furthermore, the government has repeatedly insisted that the inclusion of marital rape as an offence would be impractical and ill-suited in the Indian context. See Rajyasree Sen, *Maneka Gandhi Tells Us Marital Rape Isn't Rape After All*, LIVEMINT, <http://www.livemint.com/Opinion/jdWYjEBWesSGEPI7aDgMbJ/Maneka-Gandhi-tells-us-maritalrape-isnt-rape-after-all.html> (Mar. 14, 2016, 12:50 IST); Jahnvi Sen, *Maneka Gandhi's Altered Stance on Marital Rape Angers Activists*, WIRE (Mar. 12, 2016), <https://thewire.in/24649/activists-angered-by-maneka-gandhis-altered-stance-on-marital-rape>; see also PTI, *Criminalising Marital Rape Will Threaten the Institution of Marriage, Centre Tells Delhi HC*, WIRE (Aug. 29, 2017), <https://thewire.in/172085/criminalising-marital-rape-will-threaten-institution-marriage-centre-tells-delhi-hc>.

¹³⁹ The age of consent for sexual intercourse for an unmarried woman is 16 years of age under section 375, paragraph 6 of the Indian Penal Code, whereas sexual intercourse by a man with his wife is only considered rape if the wife is below fifteen years of age. See Indian Penal Code, No. 45 of 1860, § 375, PEN. CODE (1860).

only applied to the man who commits adultery with such a married woman, unless with the consent or connivance of her husband.¹⁴⁰ No such sanction exists in the Indian Penal Code for the punishment of a woman who has sex with a man married to someone else. The agency of the woman in the case of the crime of “[e]nticing or taking away or detaining with criminal intent a married woman[.]” does not consider the woman’s consent as being relevant to the crime.¹⁴¹ These laws do not guarantee that every man will be assured access to at least one woman in the institution of marriage, though, as coercion is a recognized ground for invalidating a marriage.¹⁴² However, that small concession does not outweigh the various other laws evidencing the implied rationale for the government’s policy of seeking to curb female feticide.

The PNDT Act specifically permits the conduct of prenatal testing for the detection of chromosomal abnormalities, genetic metabolic diseases, sex-linked genetic diseases and congenital anomalies, among other things.¹⁴³ Indeed, the listed reasons are the *only* reasons for which registered medical practitioners may perform prenatal testing, thus reaffirming the MTP Act’s regulation that the termination of a pregnancy is permissible if the registered medical practitioner is of the opinion 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.”¹⁴⁴ The MTP Act does not define the extent to which one must be disabled before the MTP Act considers one “seriously handicapped,” and therefore, there is no clarity on the circumstances in which there is a substantial risk of the child being seriously handicapped. The additional explicit justification for a termination of pregnancy indicates that the state sanctions an abortion of an FLD over and above the health risk to the pregnant woman. The state is willing to be permissive of that which, in other cases, would be a criminal offence.¹⁴⁵ Further, the Indian Penal Code increases the potential punishment for the crime of causing a woman to miscarry if this occurs after viability of the fetus, which is exempted from punishment under the MTP Act, if two medical practitioners sanction it instead of one.¹⁴⁶

Section 23 of the PNDT Act also criminalizes seeking out, facilitating, or providing fetal sex determination on a pregnant woman, but it exempts the pregnant woman from this liability unless she can prove there was nothing

¹⁴⁰ See Indian Penal Code, No. 45 of 1860, § 497, PEN. CODE (1860).

¹⁴¹ See id. § 496; see also *Alamgir & Another v. Bihar*, AIR 1959 SC 436 (India) (citing Indian Penal Code, No. 45 of 1860, § 375, PEN. CODE (1860)).

¹⁴² Hindu Marriage Act, No. 25 of 1955, § 12(1)(c), INDIA CODE (1955).

¹⁴³ Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, No. 57 of 1994, § 4(2), INDIA CODE (1994).

¹⁴⁴ Medical Termination of Pregnancy Act, No. 34 of 1971, § 3(2)(ii), INDIA CODE (1971).

¹⁴⁵ Indian Penal Code, No. 45 of 1860, § 312, PEN. CODE (1860) (stating that voluntarily causing a woman to miscarry is an offense).

¹⁴⁶ Medical Termination of Pregnancy Act, No. 34 of 1971, § 3(2)(b), INDIA CODE (1971).

compelling her to seek sex determination of the fetus.¹⁴⁷ This reframes the issue as a societal problem rather than an individual crime and addresses it as such. The assumption is that society is toxic enough to force the woman to seek out the abortion of a female child and, therefore, access to abortion in these instances punishes society. Society thus becomes the target for change, rather than an individual's behavior. One can use the same perspective, coupled with the social model of disability, to look at the issue of abortion of FLDs.

IV. ABORTION: ABLEISM'S WAY OF ERASING THE DISABLED

A. Historical Erasure of Disabled Persons

The policy of governments has often been to wipe out disability rather than address it. Often, this has included attempts to prevent disabled people from procreating in the hope of eradicating them entirely.¹⁴⁸ In the early half of the twentieth century, many eugenics programs in the United States sterilized the 'feeble-minded' to prevent the birth of 'feeble-minded' babies.¹⁴⁹ While the Nazi eugenic programs have ended, these ideas seem to persist among other communities aspiring to be perfect. While ostensibly meant to eradicate genetic disabilities, in reality, such policies are aimed at reducing or eliminating disabled persons. This is akin to wiping out women to address the problem of patriarchy. Needless to say, the elimination of neither oppressor nor oppressed is considered desirable in comparison to the elimination of the systemic, institutional, and societal oppressions. The desire to create perfect babies indicates that the push to erase disabled persons still exists, and this desire manifests itself in a variety of other ways.

Recently, the *Rashtriya Swayamsevak Sangh*, a religious organization in India that supports the current right-wing government, advocated for the creation of the "perfect race" through the use of traditional medicine.¹⁵⁰ Last

¹⁴⁷ Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, No. 57 of 1994, § 23(3), INDIA CODE (1994).

¹⁴⁸ See PAULA LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL (2008).

¹⁴⁹ See *Buck v. Bell*, 274 U.S. 200 (1927); LOMBARDO, *supra* note 148; ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK (2016); Andrea DenHoed, *The Forgotten Lessons of the American Eugenics Movement*, NEW YORKER (Apr. 27, 2016), <http://www.newyorker.com/books/page-turner/the-forgotten-lessons-of-the-american-eugenics-movement>; see also KARL BINDING & ALFRED HOCHÉ, PERMITTING THE DESTRUCTION OF LIFE UNWORTHY OF LIFE. ITS MEASURE AND FORM. (1920). Recently, doctors in Pune, India, performed a "mass hysterectomy" on several disabled women, ostensibly for their protection. See Robin Abreu, *Pune Scandal*, INDIA TODAY (Feb. 28, 1994, 18:48 IST), <http://indiatoday.intoday.in/story/hysterectomies-on-mentally-retarded-women-rocks-pune/1/294862.html>.

¹⁵⁰ Shoaib Daniyal, *RSS' Grand Plan to Help Indians Bear Fair, Bespoke Babies Exposes Hindutva's Obsession with Race*, SCROLL.IN (May 8, 2017, 8:00 AM), <https://scroll.in/article/836880/rss-grand-plan-to-help-couples-bear-fair-tall-bespoke-babies-exposes-hindutvas-problem-with-race>; see also Maria Thomas, *Hindu Nationalists are Trying to Create Designer Babies that are Fair, Strong, and Smart*, QUARTZ (May 9, 2017),

year, the Indian government sought to introduce The Surrogacy (Regulation) Bill, 2016¹⁵¹ to regulate surrogacy in the country. The bill restricted access to surrogacy for couples that:

[H]ave not had any surviving child biologically or through adoption or through surrogacy earlier. However, that nothing contained in this item shall affect the intending couple who have a child and who is mentally or physically challenged or suffers from [a] life threatening disorder or fatal illness with no permanent cure.¹⁵²

The language of the section clearly equates disabled persons to non-existent persons. The bill was widely critiqued, primarily for the exclusion of both single persons and LGBTQ+ persons from access to surrogacy.¹⁵³ Most of the critiques completely ignore the issue of ableism in the bill, despite commenting on the restriction on those who already have children from accessing surrogacy.¹⁵⁴ This is indicative of the extent to which society has internalized ableism.

Indian census publications indicate that about 2.21 percent of the population is disabled.¹⁵⁵ This is inordinately lower than the estimates provided by the World Health Organization, which state that about 15.6 percent of the world adult population (fifteen and older) is likely to be disabled, and nearly 18.0 percent of the population in lower income countries is disabled.¹⁵⁶ This has been attributed to stigma associated with disclosure of disability. This stigma encourages disabled people and their families to refuse

<https://qz.com/979007/rss-hindu-nationalists-are-trying-to-create-designer-babies-that-are-fair-strong-and-smart/>.

¹⁵¹ See THE SURROGACY (REGULATION) BILL, No. 257 of 2016. The Bill was introduced in the lower house of the Indian Parliament (the *Lok Sabha*) and is pending there as of the writing of this Article.

¹⁵² *Id.* at cl. 4(iii)(c)(III).

¹⁵³ *Id.* at cl. 4(ii); see also Nidhi Gupta, *What's Wrong with The Surrogacy Bill*, HINDU (Sept. 9, 2016, 18:23 IST), <http://www.thehindu.com/thread/politics-and-policy/article9090866.ece>; Shannon Mathew, *The Surrogacy Bill: What It Says and What It Doesn't*, YP FOUNDATION (Mar. 24, 2017), <http://www.theypfoundation.org/news-2/2017/3/24/the-problem-with-the-surrogacy-bill>.

¹⁵⁴ See Gita Aravamudan, *Surrogacy Bill 2016 Imposes Unjust Bans and Does Not Focus on the Real Issues*, FIRSTPOST (Aug. 28, 2016, 17:06:43 IST), <http://www.firstpost.com/india/surrogacy-bill-2016-imposes-unjust-bans-and-does-not-focus-on-the-real-issues-2980460.html>; Gupta, *supra* note 153; Anil Malhotra, *Draft Surrogacy Bill Violates Fundamental Right of People to Choose Modes of Parenthood*, INDIAN EXPRESS (Mar. 6, 2017, 2:26 PM), <http://indianexpress.com/article/opinion/columns/surrogacy-bill-ban-commercial-2998128/>; Mathew, *supra* note 153.

¹⁵⁵ SOCIAL STATISTICS DIVISION, MINISTRY OF STATISTICS AND PROGRAMME IMPLEMENTATION OF THE GOVERNMENT OF INDIA, *DISABLED PERSONS IN INDIA: A STATISTICAL PROFILE 2016*, at 7 (2016); see also *Disabled Population*, OFFICE OF THE REGISTRAR, INDIA, http://censusindia.gov.in/Census_And_You/disabled_population.aspx (last visited Jan. 1, 2018).

¹⁵⁶ WORLD HEALTH ORGANIZATION, *WORLD REPORT ON DISABILITY 27* (2011), http://www.who.int/disabilities/world_report/2011/report.pdf.

to provide that information or encourages census conductors to forego inquiring about disability altogether during the counts.¹⁵⁷ The failure to account for the existence of a vast portion of disabled persons in the national census, or at least, account for their being disabled, is another means of erasing disabled persons from the national narrative.

B. *Abortion as Attempted Erasure*

Some have argued that the encouragement of abortion in cases of disability devalues disabled people in society,¹⁵⁸ while others have critiqued it.¹⁵⁹ Raanan Gillon,¹⁶⁰ for instance, argues that permitting a woman to abort a fetus does not devalue life because a fetus is not life.¹⁶¹ Thus, allowing for the abortion of a disabled fetus does not devalue the life of a disabled person.¹⁶² This Article would counter this argument by pointing out that disability is often permitted as a separate and distinct reason for abortion, clearly iterating the legal endorsement of the devaluation of such life, as distinct from others, if brought to term. Further, the general idea of restricting abortions to a set time frame in the beginning of the pregnancy is done on the basis that the state has an interest in protecting life, including prenatal life.¹⁶³ The U.S. Supreme Court based this idea on equal concern for the rights of the viable fetus and the rights of the pregnant woman.¹⁶⁴

If this concern for the rights of a viable fetus is not extended on an equal basis to FLDs, the state's prejudice against such fetuses manifests a bias against disability. This translates to a devaluation of certain lives. This situation can readily be analogized to a parallel hypothetical state which grants formal equality between men and women but where equality does not actually exist. In this state, women clearly lead better lives and men are necessarily doomed to social restrictions and are guaranteed to lead unhappy lives. If a parallel were to be drawn between this state and India or the United States, such a state would be justified in allowing an extended period during which abortion of male fetuses would be lawful, but the abortion of female

¹⁵⁷ Sachin P. Mampatta, *India's Missing Disabled Population*, LIVEMINT (Sept. 16, 2015, 2:45 IST), <http://www.livemint.com/Opinion/1rx8tSYGwHB0ZRsvdNFIBP/Indias-missing-disabled-population.html>.

¹⁵⁸ See generally Asch, *supra* note 64.

¹⁵⁹ See Gillon, *supra* note 99.

¹⁶⁰ Raanan Gillon is an Emeritus Professor of Medical Ethics at Imperial College, London. *Emeritus Professor Raanan Gillon*, IMPERIAL COLLEGE LONDON, <http://www.imperial.ac.uk/people/raanan.gillon> (last visited Jan. 1, 2018). He was Editor of the *Journal of Medical Ethics* from 1981–2001. *Id.*

¹⁶¹ See Gillon, *supra* note 99, at ii9.

¹⁶² *Id.*

¹⁶³ *Roe*, 410 U.S. at 150.

¹⁶⁴ *Id.*

fetuses would be criminalized. Sex-selective abortion is not a social issue in the United States, nor is sex-determination prohibited. Because sex selection in India is a problem, legislators have deemed it appropriate to ban the practice. However, both countries fail to acknowledge that the abortion of FLDs is tantamount to India's problem of sex-selective abortion, and the laws of both states only serve to perpetuate this problem rather than address it.

The prohibition of abortion is often based on the argument that fetuses are humans and the prohibition against the murder of other human beings should extend to these beings.¹⁶⁵ In countries that permit the termination of pregnancies, the time at which abortion of fetuses may be prohibited corresponds to the extent to which the fetus resembles what we consider a person with rights of their own.¹⁶⁶ This may also include the potential harm done to or pain suffered by the fetus during the abortion.¹⁶⁷ Increased legal tolerance for abortion of FLDs would then imply a lack of recognition that disabled persons are representative of human life to the state, again amounting to the devaluation of certain lives. This would be analogous to permitting additional defenses to the killing of disabled people than are generally unavailable when a victim is enabled, or a mitigation of sentences imposed on those convicted of killing disabled people because their lives are of less value to the state. Lawsuits brought for compensation after a wrongful loss of life may already corroborate this idea, as the monetary value of life is likely to be reduced when a disabled person is killed, as this is deemed to be a contingency that would have resulted in a loss of earnings in the person's life.¹⁶⁸

An alternative approach to justify the permissive abortion of FLDs might be an extension of the right to self-defense. An argument in this vein would likely be that the birth of a disabled child may cause such anguish and pain to the parents that the right of self-defense may be extended in certain instances to permit the abortion of FLDs. This concept can be further explored with a thought experiment. Presume that scientists discover the genetic link to homosexuality. Would a pregnant woman appalled by homosexuality be entitled to an extended right to abort a fetus beyond the generally permitted time? Would this apply to race? Would this apply to gender? Taken to the

¹⁶⁵ See Ronald Dworkin, *The Great Abortion Case*, in *A DOCUMENTARY HISTORY OF THE LEGAL ASPECTS OF ABORTION IN THE UNITED STATES: WEBSTER V. REPRODUCTIVE HEALTH SERVICES* 51, 65–70 (Roy M. Mersky & Gary R. Hartman eds., 1990) (“A state may properly fear the impact of widespread abortion on its citizens’ instinctive respect for the value of human life and their instinctive horror at human destruction or suffering, which are values essential for the maintenance of a just and decently civil society.”).

¹⁶⁶ *Id.* at 70; see also *Roe*, 410 U.S. at 150.

¹⁶⁷ Dworkin, *supra* note 165, at 57.

¹⁶⁸ See *Kerala S.R.T.C v. Thomas*, (1994) 2 SCC 176, ¶ 10–19 (India) (describing and applying the method by which damages for the death of an individual are to be calculated based on the deceased’s individual characteristics and circumstances).

extreme, would this kind of right of self-defense then be extendible to honor killings? The victims of such killings are usually targeted on the grounds that their circumstances or acts were morally intolerable and caused irrevocable anguish or reputational damage to the person who killed them.

Further, the prevention of the birth of FLDs does not prevent disabilities from occurring during the course of one's life. Indeed, most people face disabilities of various kinds as they age, varying from absolute immobility to failing senses of sight and hearing.¹⁶⁹ Across the world, the percentage of disabled people above the age of 60 is between 29.5 percent and 43.4 percent, depending on a country's income level,¹⁷⁰ compared to the 15.6 percent rate for all adults.¹⁷¹ As the World Health Organization and World Bank assert, "[d]isability is part of the human condition. Almost everyone will be temporarily or permanently impaired at some point in life, and those who survive to old age will experience increasing difficulties in functioning."¹⁷²

C. States' Obligations Towards Disabled People

Given the state's discontent with female feticide, India's abortion laws imply a valuation by the state of what constitutes a life worthy of being lived, and this valuation directly discriminates against disabled persons. The state is obliged to protect the right to equality under the Indian constitution.¹⁷³ This includes the prohibition of discrimination against disabled persons by the state. The constitutional jurisprudence in India on the extension of the right to equality to disabled persons is limited and is primarily focused on the implementation of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act of 1995 ("PWD Act").¹⁷⁴ The focus on constitutional violations is rather minimal, but it is clear that the PWD Act, coupled with the Constitution, provides for a right to equality for disabled persons.

The state can apply the constitutional provisions against discrimination to the social model of disability to ensure the right to equality. Article 15(2) of the Constitution provides that "[n]o citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to *any disability*, liability, restriction or condition with regard to—(a) access to shops, public restaurants, hotels and places of public entertainment."¹⁷⁵ Disability, as a social construct, asserts that society subjects people *to disabilities* on the grounds of individual

¹⁶⁹ WORLD HEALTH ORGANIZATION, *supra* note 156.

¹⁷⁰ *Id.* at 27.

¹⁷¹ *Id.* at 29.

¹⁷² *Id.* at 261.

¹⁷³ INDIA CONST. art. 14.

¹⁷⁴ Justice Sunanda Bhandare Foundation v. Union of India, (2017) 14 SCC 383 (India). Several writ petitions have been filed and granted since the passage of the PWD Act.

¹⁷⁵ INDIA CONST. art. 15 (emphasis added).

traits. This Article does not explicitly address individual traits, but it is possible to argue that disabled persons are 'socially backward classes' for purposes of article 15(4).

The PNDT Act could ban the determination of congenital abnormalities in fetuses that are likely to result in disabilities at birth—just as it bans the determination of sex of the unborn fetus. This would entail a corresponding deletion of section 3(2)(ii) of the MTP Act, which would then only consider as grounds for termination of pregnancy: (1) the risk to the health of the pregnant woman; or (2) when complications relating to the birth of the infant may be addressed with fetal surgery. Such a ban could work with corresponding provisions in the laws of other countries, as well. Thus, the right to terminate a pregnancy would still stand under the laws that permit abortions in various countries, but withhold information directing selective abortions in a discriminatory manner. In extreme cases where the condition is likely to result in the immediate or near-immediate death of the infant at birth, the ban would make an allowance, although these conditions fall under the fourth category of impairments where medical management is currently unavailable and research therein ought to be pursued.¹⁷⁶

There are many ways this devaluation of disabled persons' lives has affected the actual lives of disabled persons. There have been cases where parents did not provide their children with medical treatment because they were disabled.¹⁷⁷ The Baby Doe case is one such instance. Baby Doe was born with Down syndrome and a second medical condition that disconnected her esophagus from her stomach.¹⁷⁸ The latter condition was fatal if not treated, and surgeons could have easily completed the operation with a relatively high success rate. The parents, however, procured a court order permitting them to withhold treatment from Baby Doe, thus starving her to death on the advice of a medical practitioner.¹⁷⁹ They made this decision regardless of the fact that several other sets of parents sought to adopt the child and wanted to have the requisite surgery performed.¹⁸⁰ A similar case was that of Phillip Becker, where the biological parents of a child with Down syndrome sought to refuse heart surgery that the child required.¹⁸¹ Here, the judge permitted another

¹⁷⁶ See *supra* Part II.B.

¹⁷⁷ DWORKIN, *supra* note 165.

¹⁷⁸ *Charges Weighed for Parents Who Let Baby Die Untreated*, N.Y. TIMES (Apr. 17, 1982), <http://www.nytimes.com/1982/04/17/us/charges-weighted-for-parents-who-let-baby-die-untreated.html> (last visited Jan. 1, 2018).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ George J. Annas, *A Wonderful Case and an Irrational Tragedy: The Phillip Becker Case Continues*, in PERSPECTIVES ON DEATH AND DYING (Phillip A. Pecorino ed., 5th ed. 2002), http://www2.sunysuffolk.edu/pecorip/SCCCWEB/ETEXTS/DeathandDying_TEXT/Annas_Becker.html (last visited Jan. 1, 201).

couple to adopt the child who then ensured that the surgeons performed the surgery.¹⁸²

The prohibition of pre-natal determination of disability is likely to have one main side effect—an increase in the birth of disabled children. Unfortunately, no studies have yet been undertaken to estimate the number of missing disabled people in the world, unlike the many studies that estimate the number of missing women.¹⁸³ It is also likely that given the structure of the world today, this missing-disabled-persons statistic is likely to be viewed as a positive rather than a negative. However, this lack of awareness increases the strain on visibility that the disabled community struggles with. The disabled community faces erasure as a class, in that society expects them to either conform to the wonderful ideal of ableness, or recede into anonymity and oblivion.¹⁸⁴ Pressure comes in the form of laws that provide inclusion only when a disabled person is interested in being ‘cured,’ laws that encourage the selectively negative treatment of disabled persons beginning with FLDs, and social pressure on disabled persons to overcompensate for incompatible environments regardless of risks to personal health and well-being.

For clarification, this Article does not propose to take away a woman’s choice to terminate her pregnancy, but instead seeks to question the determination of likelihood of disability in the fetus as a factor in this decision. The choice to terminate a pregnancy would still exist, but the healthcare provider should hide the information on likelihood of disability at birth. The argument is not that all fetuses have an inherent right to be born and to exist, but rather, that discrimination against FLDs should cease; disability should not be a factor in the decision to terminate a pregnancy. This Article seeks to take up the discourse on female feticide in India and apply it to the question of abortion of FLDs. Other states may also apply this policy in the same manner.

Some have argued that the abortion of FLDs can be pinned to misrepresentations by medical practitioners, who administrators may have directed to provide value-neutral information and counseling on disabilities and raising children with disabilities.¹⁸⁵ However, this does not take into account the fact that it is nearly impossible to be value-neutral about disability in an ableist society. Providing information on the value of disabled people is unlikely to change the minds of people who want ‘normal’ children when the

¹⁸² *Id.*

¹⁸³ Sen, *supra* note 108.

¹⁸⁴ See Julian Quinones & Arijeta Lajka, “What Kind of Society Do You Want to Live in?": Inside the Country Where Down Syndrome is Disappearing, CBS NEWS (Aug. 15, 2017, 2:17 AM), <https://www.cbsnews.com/news/down-syndrome-iceland/>; Cf. Bonnie Rochman, *The Disturbing, Eugenics-like Reality that Can Emerge from Genetic Testing*, QUARTZ (Aug. 19, 2017), <https://qz.com/1056810/the-disturbing-eugenics-like-reality-unfolding-in-iceland/>.

¹⁸⁵ SMITHA NIZAR, THE CONTRADICTION IN DISABILITY LAW: SELECTIVE ABORTION AND RIGHTS 24, 180–90 (2016).

option to prevent the birth of an FLD exists.¹⁸⁶ The extent to which the state has attempted to prevent sex-selective abortions demonstrates both the willingness of society to pick and choose preferable traits in children and the kind of laws necessary to prevent discriminatory abortions on the basis of sex. While the state has also adopted the soft approach of dissemination of information on the value of women, it has not depended on the possibility that such measures may reduce female feticide. The state has actively legislated to prohibit dissemination of information on the sex of the fetus.¹⁸⁷ The only difference between the issue of sex-selection and the abortion of FLDs is the willingness of the state to consider the matter a problem and address it.¹⁸⁸

A possible critique of this position may be that a choice is only valid if the person making it is fully informed of all the potential outcomes of carrying the pregnancy to term. From the perspective of the Indian laws, statutes easily answer the question; there is no move on the part of the government to attempt to make these choices informed when it comes to sex selection. There are some arguments that push for full education regarding the outcome of carrying a female fetus to term, claiming that the cost of bearing a female child to some parents is so high that imposing the duty to bear daughters is problematic. This argument tends to treat the issue of equality for underprivileged classes as a given, thereafter using it to justify the perpetuation of other forms of oppression.¹⁸⁹ There is no way to cover all the possible qualities of the child that may make a pregnant woman think twice about bearing the child. Is the child likely to be intelligent? Is the child likely to live a productive life? Is the child likely to conform to society's standards and restrictions? Is the child heterosexual? Even assuming that the termination of a pregnancy should be a choice which is informed to the fullest extent possible, it should then ideally be left entirely to choice, rather than restricted to a set time limit and delineated conditions under which the termination may be facilitated. Termination of a pregnancy ought to be just that—restricted to the fact that the pregnancy is currently unplanned or unwanted, rather than involving value judgments on the kind or quality of the baby desired.

The explicit addition of the termination of FLDs is a deliberate and state-sanctioned devaluation of the life of disabled persons and is problematic in that it reinforces the idea that disabled lives are unworthy of state protection. It would be vastly more egalitarian if the state were to focus on providing

¹⁸⁶ For instance, the claim of the head of the Prenatal Diagnosis Unit at Landspítali University Hospital in Iceland is that the counselling given to pregnant persons whose screening has indicated the existence of Down syndrome in the fetus is as neutral as possible. However, this has not prevented the high prevalence of abortions in these cases. See Quinones & Lajka, *supra* note 184.

¹⁸⁷ Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, No. 57 of 1994, India Code (1994).

¹⁸⁸ See *supra* Part III (critiquing the theory that the state has a valid interest in preventing sex-selection but not abortion of FLDs).

¹⁸⁹ Murcha Saxton, *Disability Rights and Selective Abortion*, in *THE DISABILITY STUDIES READER* 106, 112–116 (Lennard J. Davis ed., 2006).

universal access and disability support instead of trying to encourage the elimination of disabled persons. A society that has disabled certain classes while enabling others is responsible for correcting the disabilities that it has imposed. Society cannot claim to be incapable of doing so when the imbalance now experienced by the groups was imposed by the state in the first place. Universal access includes providing resources and environmental accommodations that those who are disabled require to equally participate in the world today. An example of such resources and accommodations might include flexible hours for those who require rest more frequently than the average person but can participate in society or work at most other times. Another example would be to provide access ramps for those persons with mobility issues, as may be envisaged by a more inclusive society. Many women are more severely disabled by society than those traditionally considered disabled under the medical model. The high costs involved in facilitating equality of the sexes and the impossibility of achieving equality immediately have not stopped the state from prohibiting fetal sex-determination. The same standard, therefore, must be extended to the abortion of FLDs. Just as the government has held society responsible for skewed gender ratios and sought to address the issue through social means,¹⁹⁰ society must be held responsible for addressing the disabilities that it creates.

Such accommodations may also benefit the average enabled person. If a usually enabled person is ever affected by a disabling condition, whether temporary or permanent, accommodations for such conditions might come to exist because of the state's efforts to eliminate socially constructed disability. This makes it likely that such a change in a person's condition does not have a drastically negative effect on the person. The effects of this may also overflow into tort litigation. What kind of damages are likely to be sought or granted if a person has caused another a permanent impairment? If we are faced with a perfectly egalitarian utopia where no disability is actually disabling, then the damages are likely to be reduced to the medical costs and specific injuries.

V. CONCLUSION

The message that disabled lives are less worth living than enabled lives is one that is repeatedly reinforced in various laws, both in India and the United States. These laws beg the question: how committed are governments and society in general to the idea of equality for the disabled? Most social disadvantages tend to reduce with greater visibility, which drives social awareness and eventually change. The issue of disability is slightly self-defeating on this front, as the major initial hurdle for members of this group is a lack of actual physical access to the public sphere. This, in turn, creates a lack of visibility and therefore a lack of understanding that this issue is not societal but rather a structural problem, which, by its nature, stymies any progress and change on this front. Governments mandating access and inclusivity may start the much-needed push towards greater inclusivity for the

¹⁹⁰ See *BETI BACHAO BETI PADHAO*, *supra* note 109.

disabled. However, given the lack of this group's visibility, governments are usually not motivated to legislate on the subject and are often actively part of the problem.

Failure to extend equal recognition and respect for the disabled is the first step. Repealing laws that reinforce the notion that disabled lives are less worthwhile would go a long way in addressing the issue. First, this would provide visibility to the problems imposed upon disabled people by inaccessible societies. Second, this would likely spur governments and society to actually work towards improving universal access and inclusion instead of attempting to erase those who seek it. These efforts would go a long way in providing every person with access to the world's opportunities and the dignity of a valued life.