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Samuel R. Bagenstos

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## ARTICLE

# FROM INTEGRATIONISM TO EQUAL PROTECTION: TENBROEK AND THE NEXT 25 YEARS OF DISABILITY RIGHTS

SAMUEL R. BAGENSTOS\*

If there is one person who we can say is most responsible for the legal theory of the disability rights movement, that person is Jacobus tenBroek. Professor tenBroek was an influential scholar of disability law, whose writings in the 1960s laid the groundwork for the disability rights laws we have today.<sup>1</sup> He was also an influential disability rights activist. He was one of the founders and the president for more than two decades of the National Federation of the Blind, one of the first—and for many years undisputedly the most effective—of the organizations made up of people with disabilities that fought for the rights of people with disabilities.<sup>2</sup> Yet in the legal academy at large, Professor tenBroek is best known not for his disability law scholarship but for his other work—notably on poverty law (where he was a key legal architect of the welfare rights movement)<sup>3</sup> and especially on the

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\* Frank G. Millard Professor of Law, University of Michigan Law School. This essay is an annotated version of the 2015–2016 Annual Law Journal Lecture delivered at the University of St. Thomas Law School in October 2015. Many, many thanks to my hosts at St. Thomas and the editors of this law journal for all of their assistance.

1. See Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841 (1966); Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809 (1966).

2. See tenBroek, *supra* note 1, at 841 n.†. For a history of the National Federation of the Blind, see generally FLOYD MATSON, *WALKING ALONE AND MARCHING TOGETHER: A HISTORY OF THE ORGANIZED BLIND MOVEMENT IN THE UNITED STATES, 1940–1990* (1990).

3. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 306 n.17 (1971) (“The legal arguments which underpinned litigation against relief agencies were developed in substantial part by Jacobus tenBroek, a blind professor of political science at the University of California in Berkeley, who spent the better part of his career writing about what he called America’s dual system of justice—one for the affluent, another for the poor.”); see also MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973*, at 20–21 (1993). For Professor tenBroek’s most important contributions to poverty law scholarship generally, see *FAMILY LAW AND THE POOR: ESSAYS BY JACOBUS TENBROEK* (Joel F. Handler ed., 1971).

Fourteenth Amendment.<sup>4</sup>

The purpose of this essay is to bring together two of the important bodies of scholarship produced by Professor tenBroek. Professor tenBroek's disability law work is well known to disability rights activists and scholars, and his work on the Fourteenth Amendment is well known to constitutional scholars. But nobody has really brought the two lines of work together. Here, I'd like to do that. In particular, I'd like to show how tenBroek's important scholarship on the antislavery origins of the Fourteenth Amendment can help us to chart an agenda for the next 25 years of disability rights, just as tenBroek's scholarship on disability integrationism set the agenda for the Americans with Disabilities Act (ADA)<sup>5</sup> and its first 25 years.

### I. INTEGRATIONISM AND THE FIRST 25 YEARS OF THE ADA

In 1966, with President Johnson's Civil Rights Act having been only recently adopted, and the battles of the African American civil rights movement still raging, Professor tenBroek published two articles in the *California Law Review* that sketched out the course of something we did not yet know to call disability rights law. The articles, entitled "The Disabled and the Law of Welfare," and "The Right to Live in the World: The Disabled in the Law of Torts," defended an integrationist theory of disability law.<sup>6</sup> Professor tenBroek argued that the American legal response to disability had previously been marked by "custodialism"—in which the goal was to protect and maintain people with disabilities as essentially wards of the state.<sup>7</sup> But he also argued that in recent years American law had increasingly defended, and *should* ultimately adopt, a principle of "integrationism"—in which the goal was to provide people with disabilities the support to enable them to participate fully in the life of the community.<sup>8</sup>

One can draw a direct line between tenBroek's principle of integrationism and the Americans with Disabilities Act. Each of the pieces of legislation that laid the groundwork for the ADA rested on that principle. Professor tenBroek's own "Right to Live in the World" piece lauded the state-by-state adoption of "white cane laws," which imposed duties on drivers to accommodate blind pedestrians who walked with canes.<sup>9</sup> The purpose and effect of those laws, of course, was to guarantee that people with disabilities could maneuver in society with everyone else, without caretak-

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4. See JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

5. Pub. L. No. 101-336, 104 Stat. 327 (1990).

6. See tenBroek, *supra* note 1; tenBroek & Matson, *supra* note 1.

7. See tenBroek, *supra* note 1, at 842; tenBroek & Matson, *supra* note 1, at 816.

8. See tenBroek, *supra* note 1, at 843-47; tenBroek & Matson, *supra* note 1, at 816, 840.

9. See tenBroek, *supra* note 1, at 902-11.

ers accompanying them every step of the way. These “white cane laws” really were the first American disability rights statutes.

And they were quickly followed by a wave of federal legislation. The Architectural Barriers Act of 1968—the first federal disability rights law—opened up government buildings so that people with disabilities could have independent access alongside everyone else.<sup>10</sup> The Rehabilitation Act of 1973—which applied disability nondiscrimination rules to all federally funded programs and activities—extended the same integrationist principles to health care, education, transportation, and the workplace.<sup>11</sup> Indeed, the basic idea behind the Rehabilitation Act’s crucial Section 504<sup>12</sup> was to create a disability-rights analogue to Title VI of the Civil Rights Act of 1964,<sup>13</sup>—the statute that was central in ensuring racial integration of our Nation’s schools.<sup>14</sup>

Two years after the Rehabilitation Act, when Congress adopted the Education for All Handicapped Children Act<sup>15</sup> (now the Individuals with Disabilities Education Act), integrationism was at the center of the statute. The law required schools to serve children with disabilities in the “least restrictive environment.”<sup>16</sup> The statute’s drafters drew that requirement from earlier constitutional litigation brought by civil rights lawyers who explicitly sought to apply the principles of *Brown v. Board of Education*<sup>17</sup> to disability.<sup>18</sup> “Mainstreaming,” and, later, “inclusion,” became the crucial buzzwords of the statute.

The final piece of pre-ADA federal disability rights legislation was the 1988 Fair Housing Amendments Act.<sup>19</sup> That statute made a number of changes to strengthen the landmark 1968 Fair Housing Act. One of these changes was, for the first time, to prohibit housing discrimination based on disability.<sup>20</sup> The Fair Housing Act, like *Brown* and Title VI, was a centerpiece of the legal efforts to achieve racial integration in the United States. By adding disability to that statute, Congress again endorsed integrationism as a basic goal of disability policy.

The Americans with Disabilities Act represents the most comprehensive legal realization of Professor tenBroek’s goal of disability integration. The ADA, which celebrated its 25th Anniversary last year, fundamentally

10. Act of August 12, 1968, Pub. L. No. 90–480, 82 Stat. 718.

11. Rehabilitation Act of 1973, Pub. L. No. 93–112, 87 Stat. 355.

12. 29 U.S.C. § 794 (2014).

13. 42 U.S.C. § 2000d (2014).

14. See RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 41–59 (2d ed. 2001).

15. Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, 89 Stat. 773.

16. 20 U.S.C. § 1412(a)(5) (2006).

17. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

18. See Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 802–10 (2006) (discussing these developments).

19. Fair Housing Amendments Act of 1988, Pub. L. No. 100–430, 102 Stat. 1619.

20. See 42 U.S.C. § 3604(f) (2014).

promotes integrationism in several ways. Start with the findings that Congress wrote into the statute. The statute says that “historically, society has tended to isolate and segregate individuals with disabilities,” that “such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem,” and that “individuals with disabilities continually encounter various forms of discrimination,” including “segregation.”<sup>21</sup>

The focus on integration extends beyond the congressional findings to the ADA’s core operative provisions as well. Those provisions interact to guarantee people with disabilities access to all of the major institutions of economic and civic life on an equal basis—and require those institutions to take affirmative steps, in the form of reasonable accommodations, to ensure that people with disabilities can act as full participants alongside the nondisabled. The ADA is premised on the following idea: the major institutions of society were designed without people with disabilities in mind. But people with disabilities have a claim in justice to demand that those institutions be designed with the understanding that they are full members of society like anyone else and can be expected to participate fully in them—as subjects with their own projects, choices, and independence, rather than as objects to be cared for. This basic idea underscores the statute’s prohibitions against discrimination, its requirements of physical and program accessibility, and its demand for reasonable accommodations and modifications.<sup>22</sup> It is an idea that Professor tenBroek was the first to develop in legal theory.

The ADA incorporates Professor tenBroek’s policy of integrationism in a more overt way as well. One of the key cases the Supreme Court has decided under the statute is its 1999 decision in *Olmstead v. L.C. ex rel. Zimring*.<sup>23</sup> In that case, which has been aptly called the *Brown v. Board of Education* of the disability rights movement,<sup>24</sup> the Court held that the ADA imposes an integration mandate, which requires states that administer services for people with disabilities to do so in the most integrated setting appropriate to the individual.<sup>25</sup> In the decade and a half since that decision, *Olmstead* has pushed states to tilt away from housing people with disabilities in custodial institutions and nursing homes separate from the rest of the community. Instead, states have begun to build up robust systems of services and supports that enable people with disabilities to live in apartments alongside others in the community; to make basic life choices; and to spend their lives in the same activities in which everyone else participates. Re-

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21. 42 U.S.C. § 12101(a)(2), (5) (2009).

22. For a general discussion, see Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 418–45 (2000).

23. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

24. See Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding “We the People”*: *The Disability Rights Cases*, 104 COLUM. L. REV. 49, 49 (2004).

25. See *Olmstead*, 527 U.S. at 597–603.

cently, *Olmstead* has led states to abandon dead-end work in sheltered workshops and commit to providing supported employment services that enable people with even very severe disabilities to obtain meaningful, remunerative work in the competitive economy.<sup>26</sup>

Even outside of the *Olmstead* context, many of the key cases applying the ADA have guaranteed that people with disabilities get the antidiscrimination protections and accommodations necessary to participate fully, equally, and side-by-side with nondisabled persons in all of the key arenas of everyday life, from attending court and other government proceedings,<sup>27</sup> to patronizing stores and businesses,<sup>28</sup> to recreational activities like going to the movies or the ball game,<sup>29</sup> patronizing casinos,<sup>30</sup> or going on a cruise.<sup>31</sup> These developments are a great vindication of tenBroek.

## II. EQUAL PROTECTION AND THE NEXT 25 YEARS

So the last 25 years, and even before, have been the age of integration for people with disabilities. I do not want to suggest that the problems of segregation, isolation, and exclusion that tenBroek highlighted, and that the ADA attacked, have been solved. Far from it. To be sure, the ADA, and the legislation that preceded it, has resulted in notable gains for Americans with disabilities. Buildings and programs are more accessible; Americans with disabilities are better educated—and far more often educated in integrated settings—than before; those disabled Americans with jobs by and large have better jobs; and people with disabilities are far more a part of everyday American life. But the proportion of Americans with disabilities who are not in the workforce remains stubbornly high; businesses still fail to comply with basic requirements of the ADA; services for people with disabilities are still too often delivered in segregated settings; and prejudice and discrimination persist.

I don't think it is time to inter Professor tenBroek's principle of integrationism. That principle is still vital. But it may be time to build on it and go beyond it. Many of the issues that occupy the disability rights movement today—and will increasingly occupy the disability rights movement in the years to come—are not principally about integrationism. Yet I think Professor tenBroek's work gives us an important guidepost for thinking about those issues.

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26. For a review of developments since *Olmstead*, see Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1 (2012).

27. See *Tennessee v. Lane*, 541 U.S. 509 (2004).

28. See, e.g., *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1047 (9th Cir. 2008).

29. See, e.g., *Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997).

30. See, e.g., Joseph R. Perone, *Feds Probe A.C. Casinos on Handicapped Access*, THE STAR LEDGER (Mar. 30, 2011, 5:57 PM), [http://www.nj.com/business/index.ssf/2011/03/post\\_129.html](http://www.nj.com/business/index.ssf/2011/03/post_129.html).

31. See, e.g., *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005).

The insights come, not from Professor tenBroek's disability law work, but from his extremely important scholarship on the Equal Protection Clause. Lawyers of a certain generation probably spent formative time in law school working through tenBroek's 1949 article, written with his colleague Joseph Tussman, on equal protection law.<sup>32</sup> That piece, with its intense and crisp analytical discussion of the problem of legislative classification—complete with Venn diagrams!—structured how generations of lawyers, law professors, and judges understood the basic concerns of equal protection doctrine. Although I attended law school just over 40 years after Tussman and tenBroek's article appeared, that article provided the analytic structure through which I, too, learned equal protection law.

But in some ways tenBroek's more important theoretical contribution to equal protection scholarship was his 1951 book, *The Antislavery Origins of the Fourteenth Amendment*.<sup>33</sup> In that book, Professor tenBroek conducted an extensive old-school originalist examination of where the Fourteenth Amendment came from and what its drafters understood it to mean. As the book's title makes clear, tenBroek found the Amendment's origins in the constitutional theories developed by antislavery activists before the Civil War. These activists included Theodore Weld,<sup>34</sup> Henry Stanton,<sup>35</sup> Salmon Chase,<sup>36</sup> Alvan Stewart,<sup>37</sup> and many others. Professor tenBroek persuasively described how the theories developed and articulated by these theorists were central to the way that the congressional drafters and supporters of the Fourteenth Amendment—notably John Bingham—described and defended that amendment.<sup>38</sup>

Professor tenBroek argued that a crucial aspect of the antislavery constitutional theory was the concept of the "protection of the laws," which in turn formed the root for "equal protection of the laws."<sup>39</sup> This concept was not about trying to ensure that legislative classifications were reasonable, rational, or sufficiently closely connected to sufficiently important interests. Indeed, it wasn't about legislative classification at all. Rather, it was about something much more elemental: The right, which the antislavery activists considered a natural right, to have the government protect individuals against the depredations of other individuals.<sup>40</sup> The antislavery activists derived this natural right from a social-contractarian analysis similar to that of

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32. Tussman & tenBroek, *supra* note 4.

33. TENBROEK, *supra* note 4.

34. *See id.* at 21–23, 27–28.

35. *See id.* at 27–28.

36. *See id.* at 37–39.

37. *See id.* at 43–48.

38. *See id.* at 183–217.

39. *See* TENBROEK, *supra* note 4, at 221–22.

40. *See id.* at 20–21, 23, 28–30, 41, 88, 96–98.

the Declaration of Independence<sup>41</sup>: Why do people give up their liberty to submit themselves to the authority of governments? They do so in order to achieve protection for their basic interests—life, liberty, and estate in the Lockean formulation; life, liberty, and the pursuit of happiness in the Jeffersonian one. “To secure these rights,” the Declaration said, “governments are instituted among men.” And because we all give up our liberty in order to obtain protection of our personal security and other basic interests, the government has an obligation to hold up its end of the deal—to protect us when other private individuals threaten those interests.<sup>42</sup> Equal protection of the laws was thus an affirmative guarantee of state protection.

tenBroek argued that this, far more than an effort to regulate legislative classification, is what the Equal Protection Clause was originally intended to be about. He summarized:

The equal protection of the laws, then, as an integral part of the doctrines of social compact and natural rights, and as understood by the abolitionists, was far from the simple command of comparative treatment that courts and later generations have made it. Freeman, all men, were entitled to have their natural rights protected by government. Indeed, it was for that purpose and that purpose only that men entered society and formed governments. \* \* \*. The equal protection of the laws is thus a command for the full or ample protection of the laws. It is basically an affirmative command to supply the protection of the laws. This is its primary character. Its negative on governmental action is secondary and almost incidental.<sup>43</sup>

I am not saying that tenBroek’s is the “right” way to read the Equal Protection Clause doctrinally; however, I do think that tenBroek’s analysis brings to the fore some important aspects of constitutionalism in a just society that our dominant focus on the “negative Constitution” suppresses.<sup>44</sup> And I think that the work of progressive scholars like Robin West, who have drawn on tenBroek’s argument to develop a constitutional theory in which the state has important affirmative responsibilities to the people, is extremely attractive.<sup>45</sup> But I don’t have any desire to adjudicate the question whether tenBroek is right about the original intent behind, or public meaning of, the Equal Protection Clause. Some historians have challenged

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41. *See id.* at 62–63 n.20 (discussing the centrality of the Declaration to “the constitutional theory of the abolitionists”).

42. *See id.* at 66, 96.

43. *Id.* at 177.

44. For an aptly-titled critique of the notion of the “negative Constitution,” see Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).

45. *See, e.g.,* Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111 (1991).



tenBroek's conclusions, while others have offered forceful rebuttals to those challenges.<sup>46</sup>

Nor would I say that tenBroek's abolitionist-derived reading is in any way the dominant understanding of the Fourteenth Amendment in current doctrine. I mean, obviously—that's the whole point of the "negative Constitution" phrase. Current doctrine recognizes little in the way of affirmative constitutional obligations to protect persons against each other.<sup>47</sup> To be sure, there is some hint of tenBroek in *Romer v. Evans*,<sup>48</sup> where the Court says that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."<sup>49</sup> And when a state offers protection to some and not others, the dominant understanding even today requires equal protection scrutiny of the differential treatment. But current doctrine imposes important limitations even there. In discussing Congress's power to step in when states fail to provide equal protection of the laws, tenBroek argues that Section 5 of the Fourteenth Amendment gives the federal government the authority to step in and provide the protection that the states are not:

The only possible method by which Congress could by appropriate legislation enforce section 1 would be itself to supply the protection to individuals which the state had withheld. If individuals are deprived of life, liberty, or property without due process of law, Congress might supply the due process and see that persons are not deprived without it. If persons are not protected in their natural rights at all, or are not as well protected as others, or if citizens are not protected in their privileges and immunities, then Congress might make up the state's deficiency and give the protection.<sup>50</sup>

Yet in *United States v. Morrison*,<sup>51</sup> that is exactly what the Court held that Congress may *not* do. Although the Court credited evidence indicating that the judicial systems in many, perhaps most, states did not give female

46. For criticism of tenBroek's arguments, see ROBERT M. COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* 154–58 (1975). For an avowedly originalist effort to defend tenBroek's arguments, see Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165 (2011).

47. See, e.g., *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."); see also *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) ("In light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations.");

48. *Romer v. Evans*, 517 U.S. 620 (1996).

49. *Id.* at 633.

50. TENBROEK, *supra* note 4, at 204–05.

51. *United States v. Morrison*, 529 U.S. 598 (2000).

victims of gender-motivated violence the same protection that they gave other victims,<sup>52</sup> it held that Congress could not respond to the problem by simply giving the victims the protection the states were withholding—a cause of action against the individuals who were victimizing them.<sup>53</sup> Rather, the Court held, Congress was limited to taking action against the states themselves<sup>54</sup>—even though that action would almost certainly be less efficacious, and it might well create the accountability problems that the Court has emphasized in its anti-commandeering jurisprudence.<sup>55</sup>

So I can hardly say that tenBroek’s abolitionist understanding of equal protection reflects the law today. And it is not my goal to argue that tenBroek’s understanding *should* be the law. Rather, I want to explore what the abolitionist understanding of equal protection has to tell us about the future of disability rights in America. As I will argue in the balance of this essay, I think that many of the issues that are coming to the fore in disability law and policy are issues that are best addressed by taking that understanding seriously. If the first 25 years of the ADA were driven by the effort to codify tenBroek’s integrationist principle, I believe that the next 25 years will be as much about the effort to heed tenBroek’s equal-protection insights. I will discuss three areas in which the equal-protection issue seems to me especially salient these days: (1) hate crimes against, and abuse of, people with disabilities; (2) police use of force against people with disabilities; and (3) the continuing controversy regarding the possible legalization of physician-assisted suicide.

### A. *Hate Crimes and Abuse of People with Disabilities*

People with disabilities are frequent victims of violent crime. According to data from the Bureau of Justice Statistics, “The rate of violent victimization against persons with disabilities (36 per 1,000) was more than twice the age-adjusted rate for persons without disabilities (14 per 1,000) in 2013. Persons with disabilities experienced 1.3 million violent victimizations, accounting for 21% of all violent victimizations.”<sup>56</sup>

A number of factors likely contribute to this disparity. A crucial one is that perpetrators of violent crime specifically target individuals with disabilities, whether out of animus or because of the perception that disabled persons are particularly vulnerable victims. BJS reports that “24% of violent

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52. *See id.* at 619–20.

53. *See id.* at 625–26.

54. *See id.*

55. *See* Printz v. United States, 521 U.S. 898, 929–30 (1997). For a tenBroekian criticism of *Morrison*, see Lucinda M. Finley, *Putting “Protection” Back In the Equal Protection Clause: Lessons from Nineteenth Century Women’s Rights Activists’ Understandings of Equality*, 13 TEMP. POL. & CIV. RTS. L. REV. 429, 449–51 (2004).

56. Erika Harrell, U.S. Dep’t of Justice, *Crime Against Persons with Disabilities, 2009–2013—Statistical Tables 1* (2015), <http://www.bjs.gov/content/pub/pdf/capd0913st.pdf>.

crime victims with disabilities believed they were targeted due to their disability.”<sup>57</sup>

When adults with disabilities receive services in custodial settings such as state institutions, nursing homes, and group homes, they are especially vulnerable to violence and abuse. The institutional setting places individuals with disabilities in close proximity to caregivers who may not be well screened and monitored, and the separation of institutions from the community limits opportunities for outsiders to see and stop what is going on. In 2011, the journalist Danny Hakim wrote a deeply researched series for the *New York Times* on violent abuse in New York’s developmental disability system. He found that “of some 13,000 allegations of abuse in 2009 within state-operated and licensed homes, fewer than 5 percent were referred to law enforcement.”<sup>58</sup> Hakim highlighted well-supported allegations of a number of serious crimes, including aggravated assaults and even rape.<sup>59</sup>

Children with disabilities are subject to disproportionate abuse and violence in a variety of settings. A number of studies show that children with various disabilities are more frequently subject to bullying and harassment in school.<sup>60</sup> The National Crime Victimization survey found that “youth with any disability are more than two times more likely to be exposed to sexual assault as other children.”<sup>61</sup> And a 2011 review of the literature found that “children with disabilities (broadly defined) are at significantly greater risk for physical maltreatment and neglect” by their parents and caregivers.<sup>62</sup> Far too often, this physical maltreatment has the most devastating consequences. The Autistic Self Advocacy Network reports that since 2010, “over seventy people with disabilities have been murdered by their parents.”<sup>63</sup> These parents often claim that they were acting in their children’s own interest, to put an end to their “suffering.”<sup>64</sup>

57. *Id.* at 5.

58. Danny Hakim, *At State-Run Homes, Abuse and Impunity*, N.Y. TIMES, Mar. 12, 2011, [http://www.nytimes.com/2011/03/13/nyregion/13homes.html?\\_r=0](http://www.nytimes.com/2011/03/13/nyregion/13homes.html?_r=0).

59. *See id.*

60. *See* NAT’L COUNCIL ON DISABILITY, BULLYING AND STUDENTS WITH DISABILITIES (2010), [https://www.ncd.gov/rawmedia\\_repository/3d42cb45\\_b1a4\\_43ea\\_829b\\_306f9e21a393.pdf](https://www.ncd.gov/rawmedia_repository/3d42cb45_b1a4_43ea_829b_306f9e21a393.pdf); Suzanne Perkins, *An Ecological Perspective on the Comorbidity of Childhood Violence Exposure and Disabilities: Focus on the Ecology of the School*, 2 PSYCHOL. OF VIOLENCE 75, 81 (2012); Heather A. Turner, Jennifer Vanderminden, David Finkelhor, Sherry Hamby & Anne Shattuck, *Disability and Victimization in a National Sample of Children and Youth*, 16 CHILD MALTREATMENT 275, 276 (2011).

61. Turner et al., *supra* note 60, at 276.

62. *Id.*

63. Diane Coleman, *NDY Joins Autistic Self Advocacy Network, ADAPT and NCIL in Annual Day of Mourning*, NOT DEAD YET (Jan. 25, 2015), <http://www.notdeadyet.org/2015/01/ndy-joins-autistic-self-advocacy-network-adapt-and-ncil-in-annual-day-of-mourning.html> (quoting Autistic Self Advocacy Network’s statement).

64. *See, e.g.*, Rohini Coorg & Anne Tournay, *Filicide-Suicide Involving Children With Disabilities*, 28 J. CHILD NEUROLOGY 745, 745 (2012).

These statistics obviously describe a major threat to the equality of people with disabilities. They also, I would argue, describe a problem of equal protection of the laws. Where matters of such basic personal security as the freedom from abuse, violence, rape, and murder are concerned, we are at the core of the matters with which, according to Professor tenBroek, the Fourteenth Amendment is concerned. Heeding the abolitionist understanding of the Fourteenth Amendment, the state has an obligation to protect individuals with disabilities against these bodily invasions. And it has an obligation to provide *equal* protection to individuals with disabilities—which is to say, no less protection than the state provides to nondisabled victims of similar violence.

But the state has failed in this obligation. In particular, the legal system has generally not taken violent crime and abuse against individuals with disabilities as seriously as it has taken similar types of violence against nondisabled individuals. To be sure, there are encouraging signs. The Shepard-Byrd Hate Crimes Act, signed by President Obama in 2009, provides federal criminal penalties for discriminatory violence against individuals with disabilities.<sup>65</sup> The first ever prosecution under that law involved a shocking act of violence perpetrated against a Native American young man with a developmental disability. A Justice Department press release summarized the facts this way:

Beebe took the victim to his apartment, which was adorned in racist paraphernalia, including a Nazi flag and a woven dream catcher with a swastika in it. After the victim had fallen asleep, the defendants began defacing the victim's body by drawing on him with blue, red and black markers. Once the victim awoke, Beebe branded the victim, who sat with a towel in his mouth, by heating a wire hanger on a stove and burning the victim's flesh, causing a permanent deep impression of a swastika in his skin. The defendants used a cell phone to create a recording of the victim in which they coerced him to agree to be branded.<sup>66</sup>

The enactment of the Shepard-Byrd Act, and prosecutions like that one, are important steps in guaranteeing the equal protection of the laws. But they are not enough. Ample evidence demonstrates that police, prosecutors, and jurors frequently disbelieve reports of violence when they are made by individuals with disabilities.<sup>67</sup> And this disbelief, in turn, encour-

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65. See 18 U.S.C. § 249(a)(2) (2006).

66. Press Release, U.S. Dep't of Justice, Civil Rights Div., Two Men Sentenced for Racially-Motivated Assault in New Mexico (Jan. 25, 2012), <http://www.justice.gov/opa/pr/two-men-sentenced-racially-motivated-assault-new-mexico>.

67. See, e.g., Bernadette West & Sampada Gandhi, *Reporting Abuse: A Study of the Perceptions of People with Disabilities (PWD) Regarding Abuse Directed at PWD*, DISABILITY STUD. Q., Vol. 26, No. 1 (2006) (collecting evidence); Laurie E. Powers & Mary Oschwald, *Violence and Abuse Against People with Disabilities: Experiences, Barriers, and Prevention Strategies* 8 (2004), <http://www.phinational.org/sites/phinational.org/files/clearinghouse/AbuseandViolence>

ages victimizers to select disabled individuals as their targets.<sup>68</sup> So does the failure of law enforcement to penetrate the closed, out-of-the-way, segregated settings in which too many people with significant disabilities are forced to spend significant portions of their lives.<sup>69</sup>

In the case of parents who kill their children who have disabilities, the denial of equal protection is rooted in deep societal attitudes of what Paul Brest in another context calls “selective sympathy and indifference.”<sup>70</sup> Many nondisabled persons instinctively sympathize with the parents in these situations, without taking the perspective of the disabled children seriously. And these societal attitudes affect prosecution, conviction, and sentencing decisions. As the Autistic Self Advocacy Network describes it, “[t]he media portrays these murders as justifiable and inevitable due to the ‘burden’ of having a disabled person in the family. If the parent stands trial, they are given sympathy and comparatively lighter sentences, if they are sentenced at all.”<sup>71</sup>

When parents of individuals with disabilities struggle because of a lack of adequate services for their loved ones, we should of course sympathize and work to ensure that their loved ones get the services and support they need. There is no doubt that our current disability system relies too heavily on parents and family members to provide the supports needed to live in the community.<sup>72</sup> That is a problem because of the burden it places on families, but it is also a problem because it denies independence to individuals with disabilities. Individuals without disabilities, as they grow up into adulthood, want to move away from their parents and begin a life on their own, in which they control what they do on a day-to-day and minute-to-minute basis. Individuals with disabilities often want the same thing. When our service system forces parents to serve in the role of front-line caregivers for

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Brief%203-7-04.pdf, (“Men and women with disabilities have described common and unique personal barriers to managing abuse. While most individuals are concerned that they won’t be believed if they report abuse, men with disabilities and people with cognitive disabilities express particular concern.”); Elizabeth Reiman, *Implicit Bias about Disabilities: Does it Exist for Forensic Interviewers and Could It Affect Child Credibility Decisions in Child Abuse Investigations: An Exploratory Study* (Oct. 1, 2014) (unpublished Ph.D. dissertation, City University of New York), [http://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1465&context=gc\\_etds](http://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1465&context=gc_etds) (finding implicit bias against disability among forensic interviewers).

68. See Shunit Reiter, Diane N. Bryen & Ifat Shachar, *Adolescents with Intellectual Disabilities as Victims of Abuse*, 11 J. INTELLECTUAL DISABILITIES 371, 372 (2007) (“Offenders are drawn to victims with disabilities because they are considered to be vulnerable and unable to seek help or report the crime.”).

69. See, e.g., Leonora LaPeter Anton, Michael Braga & Anthony Cormier, *Shrouded in Secrecy: How Florida’s Mental Hospitals Keep Deadly Mistakes Hidden*, TAMPA BAY TIMES/HERALD-TRIBUNE, Nov. 2, 2015, <http://www.tampabay.com/projects/2015/investigations/florida-mental-health-hospitals/secrecy/>.

70. Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7 (1976).

71. Coleman, *supra* note 63 (quoting ASAN).

72. See Bagenstos, *supra* note 26, at 44.

their adult children with disabilities, it denies individuals with disabilities the opportunity for independence that nondisabled adults take for granted. That is wrong, and we need to change our long-term support policies to resolve the problem.

But that is a far cry from excusing or justifying the killings of individuals with disabilities by their parents. To punish those parents less severely than other parents who commit filicide is to value the lives of people with disabilities less than those of the nondisabled. That form of disparate regard denies equal protection of the laws in Professor tenBroek's sense.

These acts of violence implicate the basic security—and even the life-and-death interests—of individuals with disabilities. Disability rights advocacy must urgently focus on providing the equal protection of the laws that is necessary to prevent and punish them.

### B. *Police Use of Force Against People with Disabilities*

The Black Lives Matter movement has recently focused much-needed attention on unnecessary and undue police use of force against African Americans. What is often lost in the discussion is that many of the victims of unnecessary use of force—including many of its African American victims—are individuals with disabilities whose disabilities play an important role in leading to the use of violence against them.<sup>73</sup>

The most common scenario involves individuals with mental illness. Indeed, a recent review of the literature by the ACLU concluded that approximately “half of fatal police encounters involve persons with psychiatric disabilities.”<sup>74</sup> That's half of *all* fatal police encounters, not just half of the fatal police encounters involving individuals with disabilities. A comprehensive review of case reports by the *Washington Post* this past summer found a smaller fraction, but still a strikingly large number. In the first six months of 2015, the *Post* found, police in the United States had shot and killed 462 people, 124 of whom (over one quarter) were, in the *Post's* words, “in the throes of mental or emotional crisis.”<sup>75</sup> Because the newspaper's analysis focused only on police shootings of those who expressed sui-

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73. See, e.g., Rick Cohen, *Excessive Police Force toward Persons with Disabilities Needs National Discussion*, NON PROFIT Q., May 26, 2015, <http://nonprofitquarterly.org/2015/05/26/excessive-police-force-toward-persons-with-disabilities-needs-national-discussion/> (“Recent cases of alleged police brutality toward blacks intersect with the presence of disabilities in some striking ways. Ruderman and Simons note, for example, that Freddie Gray may have had an intellectual disability due to the effects of lead poisoning. In Boston, there was the case of 41-year-old Wilfredo Justiniano, suffering from schizophrenia, who despite being ‘armed’ only with a writing pen was killed in 2013 by a police officer.”).

74. Brief for ACLU et al. as Amici Curiae in Support of Respondent at 17, *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015) (No. 01-1015), 2015 WL 721233.

75. Wesley Lowery, Kimberly Kindy, Keith L. Alexander, Julie Tate, Jennifer Jenkins & Steven Rich, *Distraught People, Deadly Results*, WASH. POST, June 30, 2015, <http://www.washingtonpost.com/sf/investigative/2015/06/30/distraught-people-deadly-results/>.

cidal intentions or for whom “police or family members confirmed a history of mental illness,” it acknowledged that its “approach likely understates the scope of the problem.”<sup>76</sup>

Even so, the *Post*’s findings were striking. Thirty percent of individuals in mental health crisis who were shot by the police “carried a blade, such as a knife or a machete—weapons that rarely prove deadly to police officers.”<sup>77</sup> Perhaps most strikingly, in 45 of the 124 cases, the reason the police were called in the first place was to help the individual obtain mental health treatment. But rather than provide the protection for which they were called in, they ended up fatally shooting those they were initially supposed to be helping.<sup>78</sup>

Is this because police are bad people? Not at all. Does it mean that the police are intentionally discriminating against individuals with mental illness? Not necessarily. But it does reflect a denial by the state of the equal protection of the laws. There is nothing inevitable about police officers serving as the front-line responders to mental health crises. Rather, the central role of law enforcement results from the state’s choices about how to set up its service delivery system.

The most effective responses to mental health crises do not involve law enforcement in the first instance, but instead involve trained mental health professionals—social workers, psychologists, even psychiatrists—as well as peers who are trained to de-escalate and intervene appropriately.<sup>79</sup> It is notable—and should be a model—that the Department of Justice in its ADA settlements over the past five years has treated mental health crisis services as a key component of a state’s compliance with the *Olmstead* decision. Those settlements have required states to implement a number of types of crisis services, including 24-hour crisis hotlines, mobile crisis teams staffed by mental health professionals, and crisis drop-in centers, beds, and apartments staffed by peers for times when people briefly need residential services.<sup>80</sup> These requirements create an integrated mental health crisis system that focuses on ensuring that those who go into crisis can retain their ties to the community to the extent possible—and that, crucially, does not make the police the primary entry-point into the mental health system.

Adoption of reforms like these would significantly reduce the occasion for risky encounters between law-enforcement officers and individuals with mental illness. To be sure, these reforms would not eliminate those en-

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76. *Id.*

77. *Id.*

78. *Id.*

79. See U.S. DEP’T OF HEALTH & HUMAN SERVICES, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., PRACTICE GUIDELINES: CORE ELEMENTS IN RESPONDING TO MENTAL HEALTH CRISIS 7, 9 (2009), <http://store.samhsa.gov/shin/content/SMA09-4427/SMA09-4427.pdf>.

80. For discussion of some of these settlements, see Bagenstos, *supra* note 26, at 35–36.

counters entirely. But that points to another failure of our current practices. Despite the successful efforts of some forward-looking police departments around the country, officers by and large still do not receive appropriate or sufficient training for dealing with individuals who are experiencing mental health crises. The *Washington Post* reported that “[a]lthough new recruits typically spend nearly 60 hours learning to handle a gun, . . . they receive only eight hours of training to de-escalate tense situations and eight hours learning strategies for handling the mentally ill.”<sup>81</sup> Even when they do receive training in how to address these situations, the *Post* reported, that training tends to be “counterproductive,” by encouraging officers to establish authority and control as a first principle—an approach that will typically escalate rather than de-escalate a mental health crisis.<sup>82</sup> But accumulating evidence demonstrates that, even when police remain the first responders to mental health crisis, the use of specially-trained “crisis intervention teams” can lead to much better outcomes.<sup>83</sup>

It is thus fair to say that many of the police shootings that have inspired such vocal opposition recently are the direct result of the state’s failure to provide appropriate mental health crisis services and to give sufficient training to police officers in addressing mental health crises. To a lesser extent, individuals with other sorts of disabilities—including deafness, cerebral palsy, autism, and intellectual disabilities—confront similar problems. The lack of police training to deal with people with these disabilities has led to inappropriate arrest, excessive use of force, and even death.<sup>84</sup> Equal protection demands that police receive the training necessary to engage appropriately and safely with individuals with disabilities.

Last term, in *City and County of San Francisco v. Sheehan*,<sup>85</sup> the Supreme Court granted certiorari to decide whether the ADA applies to police uses of force against people with disabilities. The Court ultimately avoided the question,<sup>86</sup> but its opinion suggests that many justices seriously entertained the proposition that the ADA does *not* apply to such uses of force—and that a majority of the Court might well endorse that proposition in an appropriate case in the future.<sup>87</sup> Such a position, it seems to me, would

81. Lowery et al., *supra* note 75.

82. *Id.*

83. See, e.g., Amy C. Watson & Anjali J. Fulambarker, *The Crisis Intervention Team Model of Police Response to Mental Health Crises: A Primer for Mental Health Practitioners*, 8 BEST PRACTICES IN MENTAL HEALTH 71 (2012).

84. See Brief for ACLU et al. as Amici Curiae in Support of Respondent, *Sheehan*, *supra* note 74, at 9–16.

85. 135 S. Ct. 1765 (2015).

86. See *id.* at 1773–74.

87. See *id.* (citation omitted):

Our decision not to decide whether the ADA applies to arrests is reinforced by the parties’ failure to address a related question: whether a public entity can be liable for damages under Title II for an arrest made by its police officers. Only public entities are subject to Title II, and the parties agree that such an entity can be held vicariously liable for money damages for the purposeful or deliberately indifferent conduct of its employ-



disregard the plain text of the ADA, which covers anything a state and local government does, without any textual limitation.<sup>88</sup> It would also disregard the Court's own unanimous decision in the 1998 *Yeskey* case, which held that the statute's general language unambiguously applies to the operations of state prisons and which refused to read any unexpressed exception into the broad statutory text.<sup>89</sup> But even more than that, a decision to exempt police uses of force from the ADA's coverage would represent an abdication of the tenBroekian obligation to guarantee the equal protection of the laws. I am therefore somewhat relieved that the Court avoided the issue, though I find the suggestions in the Court's opinion worrisome.

Now, you may see a tension between my first example and this one. Earlier, I was arguing that the failure to provide aggressive policing and prosecution denied equal protection of the laws to individuals with disabilities. Here, you might say, I'm arguing that *too* aggressive policing denies equal protection. Can these two positions coexist?

I would argue yes—and that the two positions have coexisted since the development of the abolitionist constitutionalism that Professor tenBroek elaborates in his work. Abolitionist constitutionalists argued that the brutality of the state *and* the failure of the state to intervene to stop the brutality of private parties were two sides of the same coin.<sup>90</sup> The theme appears in the work of Professor tenBroek's contemporary, Gunnar Myrdal, whose *An American Dilemma* treats police brutality and the lack of effective policing in black communities as components of the same problem.<sup>91</sup> And it is a central theme in President Truman's groundbreaking civil rights report, *To Secure These Rights*, issued in 1947<sup>92</sup>—which was the basis for the civil rights plank that Minneapolis's then-mayor Hubert Humphrey memorably supported during the Democratic National Convention the following year.<sup>93</sup> I argue that we should apply the same insights to the disability context.

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ees. See Tr. of Oral Arg. 10–12, 22. But we have never decided whether that is correct, and we decline to do so here, in the absence of adversarial briefing.

88. See 42 U.S.C. § 12132 (2012) (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”).

89. *Pennsylvania Dep’t of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998).

90. See, e.g., TENBROEK, *supra* note 4, at 88 (quoting abolitionist lawyer Joel Tiffany’s argument that citizens have a right to demand “protection against the oppression of individuals, communities and nations, foreign nations and domestic states; against lawless violence exercised under the forms of governmental authority”); *id.* at 97 (“The equal protection of the laws is violated fully as much, perhaps even more, by private invasions made possible through failure of government to act as by discriminatory laws and officials.”).

91. See GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 535–46 (1944).

92. See PRESIDENT’S COMMITTEE ON CIVIL RIGHTS, *TO SECURE THESE RIGHTS* 20–27 (1947).

93. See GLENDA ELIZABETH GILMORE & THOMAS J. SUGRUE, *THESE UNITED STATES: A NATION IN THE MAKING, 1890 TO THE PRESENT* 312 (2015).

### C. *Assisted Suicide*

Let me turn to my third example. Unlike the others, it is not strictly a criminal justice issue, but it is very much in the news: the legalization of assisted suicide. In its 1997 decisions *Washington v. Glucksberg*<sup>94</sup> and *Vacco v. Quill*,<sup>95</sup> the Supreme Court upheld state laws in Washington State and New York banning physician-assisted suicide. Although the large number of separate opinions made the Court's precise rationale unclear—and subject to continuing dispute<sup>96</sup>—the Court plainly held, at least in the circumstances of the cases before it, that the Washington and New York statutes did not deny Fourteenth Amendment rights to due process<sup>97</sup> and equal protection.<sup>98</sup>

Disability issues were central to the litigation and decision of *Glucksberg* and *Quill*. When the New York Task Force on Life and the Law recommended, in 1994, that the state retain its prohibition on assisted suicide, it highlighted two key risks that legalization would pose to people with disabilities. First, it noted that many people who commit suicide are depressed or have other psychiatric conditions, yet these conditions are poorly diagnosed and treated; many others, it noted, have chronic pain but do not have access to appropriate pain treatment.<sup>99</sup> Allowing assisted suicide, the Task Force concluded, thus would predictably lead to the unnecessary deaths of people with these conditions.<sup>100</sup> Second, the Task Force concluded that people whose disabilities are costly to treat would face subtle coercion—from insurers, doctors, family members, or even their own sense of obligation to family members—to end their lives.<sup>101</sup> When the Clinton Administration filed a brief in support of the prohibition of assisted suicide, it highlighted these disability issues.<sup>102</sup>

So did the Court in its *Glucksberg* opinion. Indeed, Chief Justice Rehnquist's Opinion for the Court in *Glucksberg* makes an argument that sounds rather clearly in Professor tenBroek's equal protection theory (though he does not cite tenBroek):

94. 521 U.S. 702 (1997).

95. 521 U.S. 793 (1997).

96. See, e.g., Ronald Dworkin, *Assisted Suicide: What the Court Really Said*, N.Y. REV. BOOKS, Sept. 25, 1997 ("On June 26, the Court decided these cases, refusing to recognize such a right by an apparently crushing 9-0 vote. But though press reports did not make this clear, the unanimity of the vote was deceptive. Five of the six justices who wrote opinions made it plain that they did not reject such a right in principle, suggesting that the Court might well change its mind in a future case when more evidence of the practical impact of any such right was available.").

97. See *Glucksberg*, 521 U.S. at 735.

98. See *Quill*, 521 U.S. at 797.

99. See N.Y. STATE TASK FORCE ON LIFE & LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT (1994).

100. See *id.*

101. See *id.*

102. Brief for the United States as Amicus Curiae Supporting Petitioners at 19–24, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 96-110), 1996 WL 663185.

The State's interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and "societal indifference." The State's assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person's suicidal impulses should be interpreted and treated the same way as anyone else's.<sup>103</sup>

Since *Glucksberg* and *Quill*, advocates of the legalization of assisted suicide have proceeded on a state-by-state basis. They have obtained passage of laws in Oregon,<sup>104</sup> Vermont,<sup>105</sup> and Washington<sup>106</sup> that have legalized and regulated the practice, and they have won a major step toward legalization in the Montana state courts.<sup>107</sup> New developments on the issue occur almost daily. The New Mexico Supreme Court seems poised to legalize assisted suicide in that state.<sup>108</sup> And just hours before I gave the lecture that formed the basis for this essay, California Governor Jerry Brown signed a bill to legalize assisted suicide in the Golden State.<sup>109</sup>

Much of the public debate surrounding these developments has taken a form that is familiar from the politics of abortion rights. Defenders of the legalization of assisted suicide argue in terms of individual liberty, the right to make choices that are fundamental to directing one's own life course and authoring one's own life story, and the right to control one's body.<sup>110</sup> Most of the opponents whose voices are heard in the media argue that assisted suicide denies the sanctity of human life.<sup>111</sup> Not surprisingly, the media tends to portray fights over the assisted suicide issue as but another battle in the abortion wars.

There is a degree to which this portrayal is accurate. Many supporters of the legalization of assisted suicide do see their position as congruent with, and perhaps even required by, their support for the right of a woman

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103. *Glucksberg*, 521 U.S. at 732.

104. See Or. Rev. Stat. §§ 127.800–127.897.

105. See 18 Vt. Stat. Ann. Ch. 113.

106. See Wash. Rev. Code §§ 70.245.010–904.

107. See *Baxter v. State*, 224 P.3d 1211 (Mont. 2009).

108. See Madeline Schmitt, *New Mexico Supreme Court Hears Assisted Suicide Case*, KRQE NEWS 13 (Oct. 26, 2015), <http://krqe.com/2015/10/26/new-mexico-supreme-court-hears-assisted-suicide-case/>.

109. See Patrick McGreevy, *After Struggling, Jerry Brown Makes Assisted Suicide Legal In California*, L.A. TIMES, Oct. 5, 2015, <http://www.latimes.com/local/political/la-me-pc-gov-brown-end-of-life-bill-20151005-story.html>.

110. See, e.g., Kevin Drum, *My Right to Die: Assisted Suicide, My Family, and Me*, MOTHER JONES, Jan./Feb. 2016, <http://www.motherjones.com/politics/2016/01/assisted-suicide-legalization-california-kevin-drum>.

111. See, e.g., Damon Linker, *Why Opposition to Assisted Suicide is Inextricably Tied to Religion*, THE WEEK, Jan. 20, 2016, <http://theweek.com/articles/600032/why-opposition-assisted-suicide-inextricably-tied-religion>.

to choose to have an abortion.<sup>112</sup> And many opponents oppose the legalization of assisted suicide based on a vitalist view that accords with their anti-abortion politics.<sup>113</sup>

But Professor tenBroek's analysis points the way to a different argument against the legalization of assisted suicide, one that scrambles the traditional lines of abortion politics. It is an argument that many disability rights activists who are avowedly pro-choice have repeatedly made, though it is one that has struggled to be heard in the media narrative.<sup>114</sup>

The basic argument is this<sup>115</sup>: In our society, when people seek to terminate their own lives, the dominant societal response is to try to stop them from doing so. We have suicide hotlines, we place people under suicide watch in jails and hospitals, and we may even civilly commit people or otherwise severely restrict their liberty to prevent them from killing themselves. But when a person has a disability, advocates of assisted suicide believe that the desire to kill oneself is understandable. They thus argue for withdrawing the protection of the state laws that generally prohibit third parties from aiding people in ending their own lives. This reflects a negative—and stereotypical or prejudiced—view of life with a disability, one that most people with disabilities do not hold.<sup>116</sup> And it also constitutes a denial of equal protection of the laws in Professor tenBroek's sense—as the Court's opinion in *Glucksberg* all but told us.

I would argue, therefore, that if one takes Professor tenBroek's understanding of equal protection seriously, one should oppose the legalization of assisted suicide. And that is true whether one holds to a general anti-abortion politics or one instead supports abortion rights.<sup>117</sup>

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112. See, e.g., Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls & Judith Jarvis Thomson, *et al.*, *Assisted Suicide: The Philosophers' Brief*, N.Y. REV. BOOKS, Mar. 27, 1997.

113. This is true even of some disability rights advocates who oppose assisted suicide. See, e.g., Stephen L. Mikochik, *Assisted Suicide and Disabled People*, 46 DEPAUL L. REV. 987 (1997).

114. See, e.g., Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Article on Roe, Casey, and the Right to Die*, 44 AM. U. L. REV. 803 (1995); Paul Steven Miller, *The Impact of Assisted Suicide on Persons with Disabilities—Is it a Right Without Freedom?*, 9 ISSUES L. & MED. 47, 59–60 (1993); Martha Minow, *Which Question? Which Lie? Reflections on the Physician-Assisted Suicide Cases*, 1997 SUP. CT. REV. 1, 21–22.

115. I cite numerous disability rights advocates making aspects of this argument in Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, 29 HARV. J. L. & GENDER 425, 435 (2006).

116. On the differences in attitudes toward disability between those with and those without disabilities, see Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383 (2012); Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745 (2007).

117. I once thought that one's views on the prohibition of assisted suicide necessarily had to track one's views on the prohibition of disability-selective abortion—that is, if one thought that assisted suicide should be banned, one should also think that disability-selective abortion should be banned as well. See Bagenstos, *supra* note 115, at 461. That may be true if one's basis for prohibiting assisted suicide is simply a concern about coercion. But to the extent that the concern about assisted suicide is the failure to provide equal protection to persons with disabilities, as I argue here it should be, then one's view about disability-selective abortion should turn in significant part on one's views of fetal personhood. Whether the fetus has personhood status has, of

### III. CONCLUSION

Professor tenBroek's principle of integrationism set the agenda for the first 25 years of the ADA, and it's still a vital principle. But the life-and-death issues that I have discussed today are exceptionally important right now, and those issues are best addressed by a different principle, one also developed by Professor tenBroek—the abolitionist understanding of the equal protection of the laws. That principle should set our agenda for the next 25 years.

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course, been a central focus of debate over abortion rights generally. *See generally* Maya Manian, *Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health*, 74 OHIO ST. L.J. 75 (2013). In *Roe v. Wade*, 410 U.S. 113, 157–59 (1973), the Supreme Court reviewed constitutional text, history, and precedent and concluded that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.” Thus, I think one can oppose assisted suicide on tenBroekian equal protection grounds regardless of one's views of any particular abortion regulation.