A Critical Review of Ohio's Unconstitutional "Right to Life Down Syndrome Non-Discrimination" Bill

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Introduction

Mark Schrad, from Villanova, Pennsylvania, was expecting the birth of his daughter when he got the news.[1] His pregnant wife, Jennifer, had undergone a routine prenatal ultrasound a week earlier when the test revealed "soft markers," which sometimes suggest genetic abnormalities in an unborn fetus.[2] Then, as many expectant mothers have done before her, Jennifer nervously underwent additional prenatal tests to get a more definitive result.[3]

Following these tests, Jennifer and Mark's physicians explained that they were expecting a child with Down Syndrome.[4] Not only would their future daughter have cognitive impairments, need special educational programs, face social ostracism, and have a host of other medical issues, but the physicians explained that her life would be far shorter than the typical child's life.[5] This would be the best-case scenario because an in utero diagnosis of Down Syndrome means a fifty-fifty chance of a miscarriage or stillbirth.[6] Reflecting on this conversation, and his now eight-year-old daughter Sophia, who has Down Syndrome, Mark wrote in his *New York Times* opinion piece that he believed "[h]ammering home the momentous difficulties that would await us as parents was clearly a tactical move by the doctor to push us toward an abortion."[7]

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* Antonin Scalia Law School, J.D. expected, 2019. I would like to dedicate my paper to Justice Ruth Bader Ginsburg.

1 Mark Lawrence Schrad, *Does Down Syndrome Justify Abortion?*, N.Y. Times, Sept. 4, 2015, https://www.nytimes.com/2015/09/04/opinion/does-down-syndrome-justify-abortion.html.

2 *Id.*

3 *Id.*

4 *Id*.

5 *Id.*

6 *Id.*

7 Schrad, *supra* note 1.

Today, in cases of Down Syndrome, abortion seems to be "the expectation, not the exception."[8] In 2012, a team of researchers found that up to 72 percent of all pregnancies in the United States are screened for Down Syndrome.[9] Most women learn of a potential fetal abnormality either in their first or second trimester serum screening, which tests the expecting mother's blood.[10] Where an elevated risk of Down Syndrome is present from the blood test, the American College of Obstetricians and Gynecologists strongly recommend that expectant mothers choose to have either chorionic villus sampling or amniocentesis testing to determine if the mother will give birth to a child with Down Syndrome.[11] Of the mothers in the U.S. who receive an in utero diagnosis of Down Syndrome, roughly 90 percent chose to have an abortion.[12]

This staggeringly high statistic has led to extremely divided opinions across the country.[13] Especially in Ohio, where lawmakers recently enacted Ohio's Right to Life Down Syndrome Non-Discrimination Act (Ohio Down Syndrome Bill), which has further fueled the pro-life, pro-choice debate.[14] This legislation, which passed both the Ohio Senate and House on December 13, 2017, prohibits a physician from performing an abortion in Ohio because of a fetal diagnosis of Down Syndrome.[15] Under the Ohio Down Syndrome Bill, signed into law by Governor John Kasich on December 22, 2017, if a physician aborts a fetus because of Down Syndrome, he will be guilty of a fourth-degree felony, and he will lose his medical license.[16] This

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[8] *Id.*; *see also* Darrin P. Dixon, J.D., *Informed Consent or Institutionalized Eugenics? How the Medical Profession Encourages Abortion of Fetuses with Down Syndrome*, 24 ISSUES L. & MED. 3, 5 (2008).

[9] Mark Leach, *How Many Women Have Prenatal Testing for Down Syndrome?*, DOWN SYNDROME PRENATAL TESTING (Aug. 25, 2014), http://www.downsyndromeprenataltesting.com/how-many-women-have-prenatal-testing-for-down-syndrome/.

[10] *Maternal Serum Alpha-Fetoprotein Screening*, AMERICAN PREGNANCY ASS'N (Sept. 2, 2016, 3:47 PM), http://americanpregnancy.org/prenatal-testing/maternal-serum-alpha-fetoprotein-screening/.

[11] Teresa Santin, *Is Down Syndrome Doomed? How State Statutes Can Help Expectant Parents Make Informed Decisions About Prenatal Down Syndrome Diagnoses*, 6 PITT. J. ENVTL. PUB. HEALTH L. 239, 249-50 (2012).

[12] Dixon, *supra* note 8.

[13] *See* Schrad, *supra* note 1.

[14] *Id.*

[15] OHIO REV. CODE ANN. § 2919.10.

[16] OHIO REV. CODE ANN. § 2919.10. *See* Jackie Borchardt, *Ohio Senate Sends Down Syndrome Abortion Ban to Gov. John Kasich*, CLEVELAND.COM (Dec. 13, 2017), http://www.cleveland.com/metro/index.ssf/2017/12/ohio_senate_sends_down_syndrom.html. *See* Joe Clark, *Gov.*

largely conservative-sponsored bill makes Ohio the third state, after North Dakota and Indiana, to pass a law that outlaws abortion after an in utero diagnosis of Down Syndrome.[17]

Yet, a predominant argument is that having a child with Down Syndrome should be a *choice* rather than a command.[18] As conservatives currently plan to cut back on federal assistance programs in Ohio, such as Medicaid and other home-based care services, that offset the tremendous cost of having a child with disabilities, the Ohio Down Syndrome Bill forces expectant parents, like Jennifer and Mark, to carry their child to term.[19] Regardless of the worrisome social and economic implications of the Ohio Down Syndrome Bill, it also poses an undue burden on a woman's constitutional right to seek an abortion under existing Supreme Court jurisprudence.[20] As a result, this Comment will argue that the Ohio Down Syndrome Bill will not survive judicial review if its constitutionality is challenged.

This Comment proceeds in two parts. Part I will provide a closer look at the causes of Down Syndrome, common traits of individuals with Down Syndrome, and health risks associated with Down Syndrome. Part I will also explain the typical prenatal diagnosis and genetic counseling process associated with a positive diagnosis of in utero Down Syndrome and will provide relevant information regarding common state restrictions on abortion rights, with an in-depth review of the Ohio Down Syndrome Bill and Supreme Court abortion precedent. Part II will examine the constitutionality of the Ohio Down Syndrome Bill, analyzing it under the infamous undue burden test, which measures the constitutionality of state laws regulating abortions.[21]

Kasich Signs Bill Banning Down Syndrome Abortions, NBC4 (Dec. 22, 2017 at 11:23 AM), http://nbc4i.com/2017/12/22/gov-kasich-signs-bill-banning-down-syndrome-abortions/. *But see* Preterm-Cleveland v. Himes, 294 F. Supp. 3d. 746, 758 (S.D. Ohio 2018) (The law was recently enjoined in March 2018 and is awaiting further proceedings by the court).

17 Schrad, *supra* note 1.

18 *Id.*

19 *Id.*

20 Samantha Allen, *Ohio's Sham Ban on Down Syndrome Abortion*, DAILY BEAST (Aug. 25, 2015, 1:00 AM), https://www.thedailybeast.com/ohios-sham-ban-on-down-syndrome-abortion. *See* OHIO REV. CODE ANN. § 2919.10.

21 In *Planned Parenthood v. Casey*, the Supreme Court held that states cannot enact laws that impose an "undue burden" on women who are seeking an abortion. A state law is an "undue burden" when the sole purpose or effect of the law is to place a "substantial obstacle in the path of women seeking an abortion." State regulations may express an interest in fetal life or even attempt to persuade women to choose not to have an abortion, so long as they are not a

I. BACKGROUND

Receiving the news that your unborn child has a genetic abnormality leads to a rush of different emotions, and many parents are unprepared to make such a demanding prenatal decision.[22] Because of the societal pressures to have a "normal" child coupled with the shame and social ostracism that many women face if they choose to have an abortion, an impossible decision must be made.[23] To fully understand a parent's right to choose to have a child with Down Syndrome, it is important to understand the background information regarding the decision to have an abortion and how abortion regulations have been dealt with by states and the Supreme Court.

A. *The Causes, Common Traits, and Health Risks Associated with Down Syndrome*

Down Syndrome is defined as a "chromosomal condition that is associated with intellectual disability, a characteristic facial appearance, and weak muscle tone (hypotonia) in infancy."[24] With one in every 691 persons born with this condition, Down Syndrome is the most common genetic irregularity among humans.[25]

The risk of Down Syndrome for a pregnant woman increases with the expectant mother's age, with women who are age thirty-five or older receiving a positive diagnosis with one in every 204 of their pregnancies.[26] Some studies even suggest that if the father is over fifty years of age, the likelihood of conceiving a child with Down Syndrome also rises.[27] Incidences of this genetic abnormality have shown no link to race, socio-economic status, ethnicity, or familial genetics, as there are very few individuals who have inherited Down Syndrome

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substantial obstacle or undue burden to a pregnant woman's decision and the law reasonably furthers relevant state interest's in fetal life. Planned Parenthood v. Casey, 505 U.S. 833, 876-77 (1992).

22 *See* Thomas E. Elkins & Doug Brown, *An Approach to Down Syndrome in Light of Infant Doe*, 1 ISSUES L. & MED. 419, 439-40 (1986).

23 *See* Schrad, *supra* note 1.

24 *Down Syndrome*, U.S. NAT'L LIBR. OF MED. (Oct. 4, 2017), https://ghr.nlm.nih.gov/condition/down-syndrome.

25 Santin, *supra* note 11, at 243.

26 *Down Syndrome*, MAYO CLINIC (Mar. 8, 2018), https://www.mayoclinic.org/diseases-conditions/down-syndrome/symptoms-causes/syc-20355977.

27 Santin, *supra* note 11, at 243.

from a parent.[28] Even though there is no cure for Down Syndrome because researchers have not been able to discover the reason for this chromosomal rearrangement or condition, some physicians purportedly believe that abortion is the answer.[29]

The most commonly known feature of a person with Down Syndrome is cognitive delays, or intellectual disability.[30] An individual with Down Syndrome will likely have "below normal mental functioning," but the specific degree of mental impairment ranges from mild (IQ: 50-70) to moderate (IQ: 35-50), and only occasionally severe (IQ: 20-35).[31] It is also common for the child's ability to speak to be delayed, and both her short and long-term memory to be affected; but, it is impossible to know the child's degree of mental impairment at birth or early on in her life.[32] However, an early emphasis on education and regular developmental therapy visits can increase the likelihood that an individual with Down Syndrome can reach semi-independence by adulthood.[33]

In terms of common characteristics, many individuals with Down Syndrome have identifiable features.[34] The most common features include "flattened face, small head, short neck, protruding tongue, upward slanting eye lids (palpebral fissures), unusually shaped or small ears, poor muscle tone, broad, short hands with a single crease in the palm, relatively short fingers, and small hands and feet."[35] While these features are common, they are not found in every individual with Down Syndrome, and many children will likely resemble their family despite their identifiable characteristics.[36]

Certain notable health conditions also commonly affect individuals with Down Syndrome.[37] About half of the individuals with Down Syndrome are born with a congenital heart defect that is usually correctable through surgery, but can be life-threatening.[38] Some individuals with Down Syndrome have gastrointestinal abnormalities, such as

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28 *Down Syndrome*, *supra* note 26.
29 *See* Santin, *supra* note 11, at 251.
30 Dixon, *supra* note 8, at 9.
31 *Id.*
32 *See id.*
33 *Id.* at 9-10.
34 Santin, *supra* note 11, at 245.
35 *Down Syndrome*, *supra* note 26.
36 Dixon, *supra* note 8, at 9.
37 Santin, *supra* note 11, at 244.
38 *Down Syndrome*, *supra* note 26.

an increased likelihood of gastrointestinal blockage, heartburn, or celiac disease.[39] Thyroid disease and Alzheimer's disease are also fairly common.[40] Certain autoimmune diseases and types of cancer, such as leukemia, become more common because of abnormalities in their immune systems.[41]

While these characteristics and conditions are notable, most of the medical conditions associated with Down Syndrome are curable, treatable, and even considered preventable.[42] With life spans increasing dramatically from twenty-five years in 1983 to sixty years today, most individuals with Down Syndrome can lead a relatively healthy, normal life.[43]

B. *Understanding Prenatal Diagnosis and Genetic Counseling*

Today, the American College of Obstetricians and Gynecologists recommends screening and diagnostic tests for Down Syndrome and other inherited or genetic concerns for all pregnant women.[44] A screen-positive result can be difficult to bear, but it only shows an elevated risk of Down Syndrome in the unborn fetus.[45] Further, only one unborn fetus out of one hundred pregnancies that screen positive for an elevated risk will actually have Down Syndrome.[46] Typically there are two separate screening tests done. The first, is the first trimester combined test, which is done with a blood test and a nuchal translucency test during an ultrasound to measure the back of the fetus's neck for fluid buildup.[47] The second test is the integrated screening test, which is done throughout the first and second trimesters and measures the nuchal translucency in ultrasounds and blood levels.[48]

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39 *Id.*

40 Santin, *supra* note 11, at 244-45.

41 *Id.*

42 *Id.* at 245.

43 *Id.*

44 *See Amniocentesis*, AMERICAN PREGNANCY ASS'N. (Sept. 2, 2016, 3:49 PM), http://americanpregnancy.org/prenatal-testing/amniocentesis/.

45 *See Down Syndrome*, *supra* note 26.

46 *A Screen Positive Result: What Does It Mean and What Do I Do Now?*, PERINATAL SERVICES BC (Mar. 2016), http://www.perinatalservicesbc.ca/Documents/Screening/Prenatal-Families/ScreenPositive/ScreenPositiveEnglish.pdf.

47 *Down Syndrome*, *supra* note 26.

48 *Id.*

The physician will recommend a diagnostic test if the mother's test comes back a "screen positive."[49] It is ultimately the mother's choice if she wants to continue with a diagnostic test because this test will reveal, with almost one-hundred percent certainty, whether the unborn fetus has Down Syndrome.[50] The two most common diagnostic screening tests are chorionic villus sampling (CVS) and amniocentesis.[51] Typically, CVS is done ten to thirteen weeks into pregnancy and involves taking cells from the placenta to analyze the fetal chromosomes.[52] CVS is performed with a thin, plastic catheter that goes through the vaginal canal to retrieve some of the placenta's tissue.[53] Amniocentesis is usually performed fourteen to twenty weeks into pregnancy and involves inserting a needle into the mother's uterus for a sample of the amniotic fluid to analyze the chromosomes of the fetus.[54] With almost one-hundred percent accuracy, this procedure detects chromosome genetic disorders, neural tube defects, and other abnormalities.[55] After the results from either of these tests are received, the physician then informs the family of the negative or positive diagnosis of Down Syndrome, or of other prenatal abnormalities.[56]

Upon a positive diagnosis of Down Syndrome, parents rely on medical professionals, such as doctors, midwives, and genetic counselors, to get a better picture of what their family's future will look like if they chose to have the child.[57] Genetic counselors usually play a large role in counseling families that are expecting a child with a genetic abnormality.[58] Unlike nurses, obstetricians, and other health care professions—who have minimal training on how to counsel parents—genetic counselors undergo two years of masters-level training

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[49] Dixon, *supra* note 8, at 35 n. 255.

[50] *Id.* at 35.

[51] *See Down Syndrome*, *supra* note 26.

[52] *Id.*

[53] *See Chorionic Villus Sampling*, MAYO CLINIC (Oct. 17, 2015), https://www.mayoclinic.org/tests-procedures/chorionic-villus-sampling/basics/definition/prc-20013566.

[54] *See Amniocentesis*, *supra* note 44. *See Amniocentesis*, MAYO CLINIC (Jan. 9, 2018), https://www.mayoclinic.org/tests-procedures/amniocentesis/about/pac-20392914.

[55] *Id.*

[56] *See* Dixon, *supra* note 8, at 26 (for a discussion of the topics that medical professionals are recommended by the American Academy of Pediatrics to discuss with families as they are going through the genetic testing process).

[57] Bret D. Asbury, *Fostering Informed Choice: Alleviating the Trauma of Genetic Abortions,* 25 CORNELL J.L. & PUB. POL'Y 293, 301 (2015).

[58] *Id.* at 302-03.

designed to enable them to guide parents through this choice.[59] Although clear-cut advice is forbidden, some scholars argue that genetic counselors diverge from their "non-directive" counseling methods and weigh in with what their perceptions of the family's future personal, economic, and social struggles.[60] Believing that genetic counselors actually harm expectant parents' ability to make a decision for themselves, some scholars also note problems with the brevity of the counseling visits and the fact that genetic counselors discuss only the hardships of having a child with Down Syndrome.[61]

C. *State Restrictions on Abortion Rights and Ohio Down Syndrome Bill (H.B. 214)*

The earliest regulations concerning the legal status of abortion in the United States were introduced into state criminal codebooks between 1821 and 1841.[62] The motivations for doing so varied from state to state, but the predominant reason was that major surgery—at the time—was very dangerous, and not all physicians were cautious enough or properly trained.[63] As a result, many states began forbidding abortions unless the expectant mother would actually die without the surgery.[64]

While the motivations for outlawing abortions have changed over time, states currently have numerous, enforceable laws that restrict abortions.[65] Today, states can regulate abortions if the state is attempting "to protect the life and health of the mother and to protect potential fetal life."[66] For example, forty-one states have laws that require an abortion to be performed by a licensed physician, eighteen states require women to go through counseling before an abortion, and forty-five states allow individual health care providers to refuse to

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59 *Id.* at 303.

60 *Id.* at 304-05.

61 *Id.* at 302.

62 James C. Mohr, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 20 (Oxford University Press 1979). *See* Jordan Larson, The 200-Year Fight for Abortion Access, THE CUT (Jan. 17, 2017), https://www.thecut.com/2017/01/timeline-the-200-year-fight-for-abortion-access.html for a list of historical events regarding the abortion "fight" in the United States.

63 Mohr, *supra* note 62, at 28.

64 *Id.* at 27.

65 Santin, *supra* note 11, at 252.

66 *Id.*

participate in an abortion procedure.[67] These laws, and other laws regulating abortion, are valid so long as a court does not enjoin the law, or determine that the law poses an undue burden on women who choose to have an abortion.[68]

States enjoy considerable flexibility in drafting laws that regulate abortions.[69] In 2013, North Dakota passed a strict piece of abortion legislation.[70] Making it illegal for a doctor to perform an abortion "because of fetal genetic anomalies," which includes Down Syndrome, the North Dakota House Bill 1305 states that: "[A] physician may not intentionally perform or attempt to perform an abortion with knowledge that the pregnant woman is seeking the abortion solely . . . because the unborn child has been diagnosed with . . . a genetic anomaly."[71] The law even imposes a criminal penalty, making the physician who performs the disability-selective abortion subject to a Class A misdemeanor.[72] Following North Dakota's legislation, in March of 2016, the Republican Governor of Indiana, Mike Pence, signed a bill that added broad limitations to a woman's access to abortion in Indiana.[73] Banning abortions motivated solely by the mother's objection to the fetus's race, gender, or disability, Indiana House Bill 1337 placed criminal restrictions on physicians who knowingly perform an abortion for these reasons.[74] But, in a permanent injunction, a federal judge blocked the portion of the Indiana law that would have banned abortions based solely on a fetus's disability or genetic anomaly, suggesting that such a restriction was inconsistent with a woman's long-established constitutional right to choose to have an abortion.[75]

In 2015, pro-life supporters in Ohio pushed for House Bill 135 (H.B. 135).[76] H.B. 135 proposed a similar ban on abortions if the mother sought an abortion because of a positive diagnosis of Down

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[67] *An Overview of Abortion Laws*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/overview-abortion-laws.

[68] Santin, *supra* note 11, at 252.

[69] *Id.* at 257.

[70] N.D. CENT. CODE § 14-02.1-02 (2013); Allen, *supra* note 20.

[71] N.D. CENT. CODE § 14-02.1-02 (2013).

[72] *Id.*

[73] IND. CODE §§ 16-34-4-4, 16-34-4-5 (2016); Mitch Smith, *Indiana Governor Signs Abortion Bill With Added Restrictions*, N.Y. TIMES (Mar. 24, 2016), https://www.nytimes.com/2016/03/25/us/indiana-governor-mike-pence-signs-abortion-bill.html?_r=0.

[74] IND. CODE §§ 16-34-4-4, 16-34-4-5 (2016).

[75] Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health, 265 F. Supp. 3d 859, 865-66, 873 (S.D. Ind. 2017).

[76] Allen, *supra* note 20.

Syndrome, or even if the physician "believed" that the fetus was being terminated because of Down Syndrome.[77] This bill, sponsored by Sarah LaTourette and David Hall, two Republican Ohio House representatives in 2015, was responding to pleas from the Ohio Right to Life committee, an influential pro-life group in the state.[78] At the time, the president of the Ohio Right to Life committee, Mike Gonidakis, was confident that H.B. 135 would pass, and thought it was needed to stop the "targeting" of babies born with Down Syndrome.[79] Gonidakis fought hard for the bill because he thought that—with the support of Republican Governor John Kasich, who was running for president at the time—he had all of the requisite votes.[80] Even so, H.B. 135 failed to pass later that same year.[81]

But, in June of 2017, the bill resurfaced in the Ohio Senate.[82] The hearing on the legislation was expedited after an influential CBS News report, which stated that Iceland had significantly reduced the number of Down Syndrome births because of its prenatal screenings and heavy-handed genetic counseling on abortions.[83] This report emphasized that other countries were not lagging far behind Iceland's almost 100 percent pregnancy termination rate upon an in utero finding of Down Syndrome.[84] For example, Denmark has a termination rate of 98 percent, the U.S. has a termination rate of 90 percent, and France has a termination rate of 77 percent.[85] Using this controversial CBS report to mobilize support against abortions, pro-life conservatives in Ohio pushed the bill into the Ohio Senate Health, Human

77 *Ohio's Controversial Abortion Bill*, THE ECONOMIST (Aug. 26, 2015), https://www.economist.com/blogs/democracyinamerica/2015/08/down-syndrome.

78 *Id.*

79 *Id.*

80 *Id.*

81 *See Ohio Bill Prohibiting Abortion if Fetus Has or May Have Down Syndrome (HB 214)*, REWIRE NEWS, https://rewire.news/legislative-tracker/law/ohio-bill-prohibiting-abortion-fetus-may-syndrome-hb-214/ (last updated Mar. 14, 2018).

82 David M. Perry, *How Ohio is Using Down Syndrome to Criminalize Abortion*, PACIFIC STANDARD (Oct. 3, 2017), https://psmag.com/social-justice/gop-using-down-syndrome-as-cynical-wedge.

83 Julian Quinones & Arijeta Lajka, *"What Kind of Society Do You Want to Live in?": Inside the Country Where Down Syndrome Is Disappearing*, CBS: ON ASSIGNMENT (Aug. 14, 2017, 4:00 PM), https://www.cbsnews.com/news/down-syndrome-iceland/; *see* CBS NEWS, *Ohio Lawmakers Step Up to Protect the Unborn with Down Syndrome*, http://www1.cbn.com/cbnnews/us/2017/september/ohio-lawmakers-step-up-to-protect-the-unborn-with-down-syndrome.

84 *Id.*

85 *Id.*

Services, and Medicaid Committee to hear proponent testimony for the bill.[86]

With language that roughly mirrors the prior failed bill, the key passage states that:

> No person shall purposely perform or induce or attempt an abortion on a pregnant woman if the person has knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of any of the following: (1) A test result indicating Down syndrome in an unborn child; (2) A prenatal diagnosis of Down syndrome in an unborn child; (3) Any other reason to believe that an unborn child has Down syndrome.[87]

The bill then states that any physician who violates this section will be guilty of a fourth degree felony—meaning six to eighteen months in prison and a maximum fine of $5,000—and the physician will lose his medical license.[88] In addition, the regulation "requires medical professionals to distribute up-to-date, evidence-based information on Down Syndrome to parents who receive the positive diagnosis."[89] Reflecting Ohio's strongly conservative base, which already lobbied in March 2017 to restrict abortions at 20 weeks post-fertilization, the bill's advocates emphasize that it "create[s] a society where people with Down Syndrome are included, accepted and loved."[90] State Representative Stephen Huffman even noted that, "[t]his legislation will end the discriminatory practice of abortion based on a Down Syndrome diagnosis because every life is sacred and worthy of protecting and preserving."[91]

After hearings in both the Ohio Senate and House, the revised and finalized bill—Ohio House Bill 214—passed the Ohio Senate on

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[86] Steven Ertelt, *Ohio Could Become Third State to Ban Abortions on Babies with Down Syndrome*, LIFE NEWS, http://www.lifenews.com/2017/08/22/ohio-could-become-third-state-to-ban-abortions-on-babies-with-down-syndrome/. .

[87] Perry, *supra* note 82.

[88] *Id.*; Ashley Lyles, *Ohio Bill Would Make Aborting a Fetus With Down Syndrome Illegal,* TONIC (Nov. 17, 2017, 1:45 PM), https://tonic.vice.com/en_us/article/9k3day/ohio-bill-would-make-aborting-a-fetus-with-down-syndrome-illegal.

[89] Stephen A. Huffman, *Rep. Huffman Applauds Passage of Bill Prohibiting Abortions on Unborn Children with Down Syndrome*, THE OHIO HOUSE OF REPRESENTATIVES (Nov. 2, 2017), http://www.ohiohouse.gov/stephen-a-huffman/press/rep-huffman-applauds-passage-of-bill-prohibiting-abortions-on-unborn-children-with-down-syndrome.

[90] Ertelt, *supra* note 86.

[91] Stephen A. Huffman, *supra* note 89.

December 13, 2017 by a vote of 20-12.[92] The bill then went to Republican Governor John Kasich's desk, where he had ten days to sign the bill into law.[93] On December 22, 2017, Governor Kasich signed the bill.[94] The bill is "the 20th piece of Ohio legislation restricting abortion rights and funding of reproductive health in the six years since Kasich became governor."[95]

D. *Supreme Court Abortion Precedent and Undue Burden Standard*

Since 1973, the Supreme Court of the United States has protected a woman's right to have an abortion under the United States Constitution.[96] In the Supreme Court opinion *Roe v. Wade*, the Justices held that "the right of personal privacy" includes the right of a woman to decide whether she will have an abortion.[97] Overturning a Texas law that prohibited all abortions except for those necessary to save the life of the mother, the Court rooted its decision in the right to privacy recognized in the Bill of the Rights and developed a strict scrutiny test to measure the constitutionality of a state abortion restriction.[98]

The Court held, however, that this right was qualified.[99] Deciding to balance the tension between the equally-valuable but competing

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92 *See* Tony Marco, *Ohio Bill Would Prohibit Abortions in Down Syndrome Cases*, CNN (Dec. 14, 2017, 5:54 PM), http://www.cnn.com/2017/12/14/health/ohio-down-syndrome-abortion-bill/index.html.

93 Kim Palmer, *Ohio Passes Law Barring Abortion over Down Syndrome Diagnosis*, REUTERS (Dec. 14, 2017) https://www.scientificamerican.com/article/ohio-passes-law-barring-abortion-over-down-syndrome-diagnosis/.

94 Joe Clark, Gov. Kasich Signs Bill Banning Down Syndrome Abortions NBC4 (Dec. 22, 2017, 11:23 AM), http://nbc4i.com/2017/12/22/gov-kasich-signs-bill-banning-down-syndrome-abortions/.

95 *See* Palmer, *supra* note 93.

96 *See* Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is. . .is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."). *See* WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW 613 (Thomas West ed., 3d ed. 2001).

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

98 *See id.* at 153-54. *See also* Catherine Maggio Schmucker, Note, *Everything Is Bigger in Texas-Especially the Abortion Debate: Why Texas House Bill 2 Can Survive A Constitutional Challenge and How It Should Change the Abortion Analysis*, 19 TEX. REV. L. & POL. 101, 106 (2014).

99 *See Roe*, 410 U.S. at 154, 162-64 (holding that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state issues in regulation." The Court further explains that "the State does have an important

state interests in pregnancies, the Court devised a trimester framework.[100] Within the first trimester, the Court held that a woman alone was entitled to decide whether to have an abortion, without any interference from the state.[101] The Court believed that "'until the end of the first trimester,'" or before a fetus is viable, "'mortality in abortion may be less than mortality in normal childbirth.'"[102] However, once a fetus has reached the second trimester—which is the stage when the fetus can exist independently outside the womb and abortions become more dangerous for the woman and her fetus—the woman and the state must share the interests in the pregnancy.[103] Finally, during the third trimester, the Court explained that state interests in the preservation of the life or health of the mother, and the interest in potential human life, were paramount to the woman and her right to choose.[104]

After the Court's plurality decision in *Roe*, there still was firm disagreement between the Justices on which provision of the Constitution guaranteed the woman's right to choose, or if the Constitution even guaranteed that right in the first place.[105] For twenty years after *Roe*, lower courts had a hard time applying *Roe*'s framework.[106] Many of the lower court decisions held that any state regulation that constricted a woman's ability to choose to have an abortion was unconstitutional, disregarding the trimester framework.[107] As a result, when the Supreme Court decided *Webster v. Reproductive Health Ser-*

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and legitimate interest in preserving and protecting the health of the pregnant woman . . . and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes compelling.'" The Court continues by explaining that "[i]f the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."). *See also* Maggio, *supra* note 98.

100 *See Roe*, 410 U.S. at 162-64.

101 *See id.* at 163.

102 *Id.* at 163. *See* Jeffrey Roseberry, *Undue Burden and the Law of Abortion in Arizona*, 44 ARIZ. ST. L.J. 391, 392 (2012).

103 *See Roe*, 410 U.S. at 150, 163. *See also* Roseberry, *supra* note 102, at 393.

104 *See Roe*, 410 U.S. at 163-64. *See also* Roseberry, *supra* note 102, at 392-93.

105 *See* Paula Walter, *Hellerstedt - 2016 - How the United States Supreme Court Aborted the Texas Abortion Statute*, 12 J. HEALTH & BIOMEDICAL L. 233, 252 (2017) ("In his concurrence, Justice Douglas grounded his opinion in the right to privacy and Justice Stewart framed his opinion in terms of the Fourteenth Amendment and the individual's right not to be deprived liberty without due process.").

106 *See id.*

107 *Id.*

vices in 1989, the Justices almost overturned *Roe*.[108] The Court held, in a splintered opinion, that a Missouri law that prohibited the use of government funds or facilities for "performing or 'encouraging or counseling' a woman to have an abortion, and allowed abortions after 20 weeks of pregnancy only if a test was done to ensure that the fetus was not viable."[109] But, the decision's reasoning was fragmented, and the dissenting Justices even expressed their fears that *Roe*'s protections for women were "not secure."[110]

Then, in 1992, when the Supreme Court considered *Planned Parenthood v. Casey*, the Justices reaffirmed that the right to privacy is a protected liberty under the Constitution and that it embraces a woman's right to have an abortion.[111] However, the plurality opinion—penned by Justices O'Connor, Kennedy, and Souter—rejected "the rigid trimester framework" established in *Roe* and its use of the strict scrutiny test.[112] Formulating a new standard, these Justices stated that the state only reaches "into the heart of the liberty protected by the Due Process Clause" when it imposes an "'undue burden' on access to abortion."[113] Regardless of which trimester the state was attempting to regulate, the joint opinion warned that the state's legislative purpose must be "reasonably related" to a valid state interest and that "substantial obstacles" that stand in the way of a woman exercising her right to an abortion should be invalidated, at least during the first trimester or prior to the fetus's viability.[114]

Under the undue burden test, the plurality overturned a portion of a Pennsylvania statute that required a woman to notify her spouse before undergoing an abortion.[115] The Court found that spousal notifications were a substantial obstacle for women who wanted to have an abortion because "notification itself deters women [who have been abused or women whose children have been abused] from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from

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108 Erwin Chemerinsky, CONSTITUTIONAL LAW: Principles and Policies 859 (5th ed. 2015); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989).

109 *Webster*, 492 U.S. at 520-22. *See* Chemerinsky, *supra* note 108.

110 *Webster*, 492 U.S. at 537. *See* Chemerinsky, *supra* note 108, at 860.

111 Planned Parenthood v. Casey, 505 U.S. 833, 845-46 (1992).

112 *Id.* at 873.

113 *Id.* at 874. *See* Chemerinsky, *supra* note 108, at 860.

114 *Casey*, 505 U.S. at 877-78; *see also* WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW 613 (Thomas West ed., 3d ed. 2001).

115 *Casey*, 505 U.S. at 887; *see also* WILLIAM J. RICH, *supra* note 114.

obtaining an abortion until it is too late."[116] Yet, the Justices held that a state can ensure that a woman's decision to have an abortion is "thoughtful and informed."[117] The Justices upheld a portion of the statute that made women wait twenty-four hours before having an abortion, and another portion that made a medical doctor explain the health risks and nature of an abortion procedure.[118] Also, the Justices upheld another portion of the statute that required the physician to explain the gestational age of the fetus and necessitated that women under the age of eighteen must have consent from a parent or guardian.[119]

In applying the undue burden standard, the Justices explained that even if the law persuades or influences a woman to choose childbirth over abortion, or if the law has incidental effects on making the woman's decision more difficult or costly, it is not unconstitutional per se.[120] Instead, the regulation is only an undue burden when the state imposes "on a woman's ability to make [the abortion] decision," or if the regulation is likely to prevent women from seeking an abortion.[121] Recognizing that all abortion regulations pose some type of burden, the Justices emphasized that, under the undue burden standard, abortion regulations are subject to weighing the burden on the woman against the interests of the state to protect pregnancies and unborn life.[122] An undue burden exists where a statute's purpose or effect is to pose a substantial obstacle on the abortion decision, not when statutes attempt to preserve potential life or regulate the health of the mother.[123] Some scholars, therefore, argue that "an undue burden exists only if a court concluded that a regulation will prevent women from receiving an abortion."[124]

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116 *Casey*, 505 U.S. at 888.

117 *Id.* at 872.

118 *Id.* at 885-87.

119 *Id.* at 882.

120 *Id.* at 874.

121 *Id.*

122 Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992); *see also* Catherine Maggio Schmucker, *Everything Is Bigger in Texas-Especially the Abortion Debate: Why Texas House Bill 2 Can Survive a Constitutional Challenge and How It Should Change the Abortion Analysis*, 19 TEX. REV. L. & POL. 101, 106 (2014).

123 *Casey*, 505 U.S. at 877. *See* Roseberry, *supra* note 102, at 393.

124 Chemerinsky, *supra* note 108, at 864.

Since *Casey*, the Supreme Court has upheld the undue burden test several times.[125] Most recently, in the 2016 *Whole Woman's Health v. Hellerstedt* opinion, the majority emphasized the "need for a balancing test that gave substantial weight to the personal liberty interests of women in seeking an abortion against the state's purported statutory interests."[126] The majority explained that, when using the undue burden test, courts must consider the burdens a law imposes together with the benefits, if any, that the law attempts to achieve.[127] As a result, the majority overturned a Texas law that required physicians performing abortions to have admitting privileges at a nearby hospital and that required all abortion clinics in the state to meet the minimum standards of ambulatory surgical centers because "neither of these provisions confers medical benefits that were sufficient to justify the burdens upon access."[128] The Justices relied on expert testimony and studies to determine that the Texas law did not relate to a significant health-related problem that the new law helped to cure, or any countervailing state interest.[129] Instead, because women in rural Texas would have to drive hundreds of miles on top of a variety of additional burdens that brought about the closing of various clinics in the state to obtain an abortion, the law posed an undue burden.[130] Because there was a lack of sufficient medical evidence justifying these heightened standards—which would have caused about half of the state's forty-one abortion clinics to close—the Supreme Court stated that the law was an unconstitutional burden on a woman's ability to have an abortion.[131]

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125 Linda J. Wharton et. al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317, 343 (2006). For examples of these cases, please see: Mazurek v. Armstrong, 520 U.S. 968 (1997); Steinberg v. Carhart, 530 U.S. 914 (2000). *See* Ayotte v. Planned Parenthood, 126 S. Ct. 961 (2006).

126 Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016); RICH, *supra* note 114.

127 *Hellerstedt*, 136 S. Ct. at 2301.

128 *Id.* (An ambulatory surgical center is a "modern healthcare facility focused on providing same-day surgical care, including diagnostic and preventive procedures." This definition was found here: *What is an ACS?*, AMBULATORY SURGERY CTR. ASS'N. https://www.ascassociation.org/advancingsurgicalcare/asc/whatisanasc).

129 *Id.* at 2311, 2318.

130 *Id.* at 2313.

131 *Id.* at 2311-12.

II. ANALYSIS

In *Hellerstedt*, the Court did not pinpoint a threshold for when a state regulation creates an undue burden on a woman who is trying to obtain an abortion prior to a fetus's viability.[132] Understanding the Court's current balancing approach, therefore, is a challenge, as the Court reviews regulations through a dual framework.[133] First, the Court tends to uphold abortion regulations that relate to a woman's wellbeing on an individual basis, such as waiting periods and informed consent.[134] Second, the Court tends to overturn restrictions that seem to make it harder for women to gain access to abortion facilities, such as the ambulatory surgical center and admitting privileges requirements rejected in *Hellerstedt*.[135]

A. *The Court Upholds Laws Regulating Women's Health Related to an Abortion*

The Supreme Court will likely overturn the Ohio Down Syndrome Bill because the bill does not purport to aid women's safety or wellbeing. Instead, the Ohio Down Syndrome Bill's purpose is to show respect for the Down Syndrome population and to combat the "discriminatory practice of abortion based on a positive Down Syndrome diagnosis."[136] As a result, the Court will only uphold a fetal protective law if the interests in fetal life and the state outweigh the burdens placed on the pregnant woman.

In *Casey*, the Court upheld Pennsylvania's informed consent, twenty-four hour waiting period, and parental consent laws.[137] The Court reasoned that while a woman has a right to an abortion, states are permitted to take meaningful steps to help ensure that the choice is "thoughtful and informed."[138] Further, these provisions were not a substantial obstacle for the woman in obtaining an abortion, but only affected her decision to make sure it was profound and that she

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132 Catherine Gamper, *A Chill Wind Blows: Undue Burden in the Wake of Whole Woman's Health v. Hellerstedt*, 76 MD. L. REV. 792, 812 (2017).

133 *Id.* at 793.

134 *Id.*

135 *Id.*

136 Huffman, *supra* note 89.

137 Planned Parenthood v. Casey, 505 U.S. 833, 881-83 (1992).

138 *Id.* at 872.

understood the health risks of an abortion procedure.[139] The provision of the Ohio Down Syndrome Bill that encourages physicians to provide educational materials related to Down Syndrome to pregnant women will likely not be overturned because Ohio is simply encouraging a thoughtful choice. But, the provision that makes it illegal for the physician to perform the abortion procedure will likely be unconstitutional.[140] Because the Ohio Down Syndrome Bill makes it a fourth-degree felony for a physician to knowingly perform an abortion in Ohio because of Down Syndrome, women will lie to their physician about the reason why they are having an abortion, or it could lead to physicians being warier about performing abortions out of a fear that the fetus could possibly have Down Syndrome.[141] Although only persuasive authority, a federal judge explained—in the permanent injunction for Indiana House Bill 1337—that the anti-discriminatory disability provision outlawing physicians from performing an abortion because of a fetal anomaly in Indiana was significant for expectant mothers.[142] Given the relatively short timeframe in which women may elect to terminate a pregnancy before fetal viability, the court explained that disruptions in the flow of significant health information and communications between a physician and his patient may be severe for many pregnant women.[143] Because women whose pregnancies are affected by a prenatal fetal anomaly also have to make difficult moral and complicated health decisions, the court explained that Indiana House Bill 1337—which is almost identical to the Ohio Down Syndrome Bill—was unconstitutional because it affected the patient's choice.[144]

In addition, in *Hellerstedt*, the Court looked for concrete evidence that either of the provisions actually served a stated purpose in protecting women's health.[145] Citing peer-reviewed studies, proof in amicus briefs from medical organizations, and expert testimony at trial, the Court concluded that the ambulatory surgical care and physi-

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139 *Id.*

140 *Id.*

141 *Id.*

142 *See* Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health, 265 F. Supp. 3d 859, 862-63 (S.D. Ind. 2017).

143 *See id.* at 867.

144 *See id. See* Perry, *supra* note 82.

145 *See Hellerstedt*, 136 S. Ct. at 2311-12. *See also* Mary Ziegler, *Liberty and the Politics of Balance: The Undue-Burden Test After Casey/Hellerstedt*, 52 HARV. C.R.-C.L. L. REV. 421, 462 (2017).

cian-admitting provisions in the Texas regulations did not make abortion procedures safer, but simply added unnecessary and superfluous precautions.[146] Explaining the need to balance the benefits and burdens created by a state regulation relating to abortion, the *Hellerstedt* majority did not find a reason for these provisions other than making it harder for women in Texas to have an abortion in the first place.[147] Clearly, Ohio's legislature will not be able to defend their law in court by citing examples that their Down Syndrome bill aids women's health. Instead, an in-utero diagnosis of Down Syndrome means a fifty-fifty chance of a miscarriage or stillbirth for the pregnant woman, which means that the regulation may actually put women's health in jeopardy.[148]

Even so, citing nothing more than the importance of combatting discrimination against Down Syndrome, Ohio's fetal protective law does not cite pain to the fetus as the reason for the law—and does no more than simply asserts an interest in fetal dignity.[149] As the Court stated in *Casey*, "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before fetal viability."[150] Given the nature of this principle, outright bans on certain pre-viability abortions, such as the Ohio Down Syndrome Bill's ban on pre-viability abortions due to Down Syndrome, is likely to be held unconstitutional by the court.[151] Put more simply, courts have recognized that because a woman's right to *choose* an abortion is protected, this leaves no room for states like Ohio to examine the basis upon which a woman makes her choice.[152] Consequently, because the harm to women in Ohio far outweighs the generalized, anti-discriminatory aims of the state, and because Ohio is attempting to dictate that fetuses may not be aborted because of a positive Down Syndrome diagnosis, the Ohio Down Syndrome Bill will likely be seen as violating the constitutional rights of women.

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146 *See Hellerstedt*, 136 S. Ct. at 2311. *See also* Ziegler, *supra* note 145, at 462.

147 *Hellerstedt*, 136 S. Ct. at 2309 (2016). *See* Ziegler, *supra* note 145, at 461-63.

148 Schrad, *supra* note 1.

149 *See* Marco, *supra* note 92.

150 Planned Parenthood v. Casey, 505 U.S. 833, 837 (1992).

151 *See* Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health, 265 F. Supp. 3d 859, 869 (S.D. Ind. 2017).

152 *See id.* at 867-70; Preterm-Cleveland v. Himes, 294 F. Supp. 3d 746, 754 (S.D. Ohio 2018).

B. *The Court Overturns Restrictions that Make It Harder for Women to Gain Access to Abortion Facilities*

When evaluating whether the Ohio Down Syndrome Bill restricts access to abortion facilities, the Court will likely consider if the bill requires abortion providers to meet standards that the Court views as "unrealistic, difficult to implement, or result in closing of abortion clinics statewide."[153] While the Ohio Down Syndrome Bill does not pose direct requirements on abortion clinics—like the regulations relating to the admitting privileges and ambulatory surgical center requirements in *Hellerstedt* did—the law closes off all abortion clinics statewide in Ohio for women who choose to abort their fetuses because of Down Syndrome.[154] Creating a substantial burden, the Ohio Down Syndrome Bill will not only have a drastic effect on a pregnant woman in Ohio whose fetus has Down Syndrome, but may even affect all of the pregnant women in the state.

In *Hellerstedt*, the majority found that the Texas admitting privileges and ambulatory surgical center requirements "imposed an undue burden on women in the state because, once the law was in effect, only about seven or eight abortion facilities in the state could remain open."[155] These remaining clinics would then have to meet the demand for all of the abortions in Texas, which would be particularly difficult because roughly 60,000 to 72,000 women seek abortions in the state every year.[156] The Court further emphasized that women in rural Texas would have to "travel long distances to get abortions in crammed-to-capacity superfacilities" and that these "two abortion requirements erected a particularly high barrier for poor, rural, or disadvantaged women."[157]

In Ohio, recent statistics suggest that roughly 21,186 abortions happen in the state every year.[158] While the Ohio Down Syndrome Bill will not shut down a full abortion facility in the state, it would mean that every woman with a positive diagnosis of Down Syndrome

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153 Gamper, *supra* note 132, at 807.

154 *See* OHIO REV. CODE ANN. § 2919.10.

155 *Hellerstedt*, 136 S. Ct. at 2317. *See* Gamper, *supra* note 132, at 807.

156 *Hellerstedt*, 136 S. Ct. at 2317. *See* Gamper, *supra* note 132, at 807.

157 Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2318 (2016).

158 *Induced Abortions in Ohio*, OHIO DEP'T OF HEALTH (2014), https://www.odh.ohio.gov/-/media/ODH/ASSETS/Files/health-statistics—-vital-stats/Induced-Abortions-in-Ohio-2014.pdf?la=en.

has to drive to another state, which can be a drastic burden for poor, rural, or disadvantaged women, as in *Hellerstedt*.[159] Contrary to laws that require women to be fully informed and wait twenty-four hours before proceeding with their choice to have an abortion, the Ohio law simply tries to change the statistic that roughly 90 percent of women in the U.S. abort their fetus after a positive diagnosis of Down Syndrome, rather than educate women to make an informed choice. Failing to have an adequate reason for imposing this substantial burden on women who want to gain access to an abortion facility, this law also subjects practitioners to harsh penalties for violating the law.[160] These penalties may drive physicians away from performing abortions in the state of Ohio altogether because losing their medical licenses—and facing up to eighteen months in prison and a fine of $5,000—is not a light punishment.[161] If physicians in Ohio stop performing abortions altogether, this would create an undue burden on women because it would limit every woman's access to an abortion procedure in the entire state.[162] As a result, the unintended consequences of the bill may drive all abortions out of Ohio, creating an undue burden for women—who have or have not received—a positive diagnosis of Down Syndrome.[163]

CONCLUSION

On August 28, 2015, Mary Carpenter wrote a response to a New York Times piece entitled *Ohio Bill Would Ban Abortion if Down Syndrome Is Reason*, after Ohio attempted to pass the Down Syndrome bill for the first time.[164] In her piece, Mary explains the horror that she went through after her diagnostic test results revealed that she was having a child with Down Syndrome.[165] Because her family was living in a foreign country and her husband's health was failing,

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159 *Cf.* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2303 (2016).

160 S.B. 164, 132nd Leg., 1st Sess., (Ohio 2017) (imposing a fourth-degree felony and revocation of medical license for "performing or attempting to perform an abortion that was being sought because of Down syndrome.").

161 OHIO REV. CODE ANN. § 2929.14(A)(4), 18 (West 2017).

162 *See* Gamper, *supra* note 132, at 812-13.

163 *See id.*

164 Mary Carpenter, *Ban Abortion for Down Syndrome?*, N.Y. TIMES, Aug. 28, 2017, https://www.nytimes.com/2015/08/29/opinion/ban-abortion-for-down-syndrome.html?mcubz=0.

165 *Id.*

Mary felt that she had no choice but to abort her pregnancy.[166] Scared that she may have to raise a child with a disability alone, Mary terminated her pregnancy because—emotionally and financially—she was unsure whether she had the resources to handle a child with Down Syndrome.[167] Mary emphasized that this decision was right for her at the time and was one that she will never forget.[168] Mary further explained that legislation like the Ohio Down Syndrome Bill would take away that much-needed choice for women.[169] Urging others to see that her decision was not because she wanted a "perfect" child, Mary's story sheds light on the importance of allowing women in the United States to choose whether to have a child with Down Syndrome.[170]

Having a child with Down Syndrome leads to many social, familial, educational, and financial responsibilities, prompting an abortion jurisprudence that has reflected a steady commitment to regulations that encourage women's health and not to state laws that pose an undue burden on a woman's access to an abortion facility.[171] It is important that the balance of interests not be too far in favor of fetal life, at the expense of women's interests in dignity and equality.

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

170 Mary Carpenter, *Ban Abortion for Down Syndrome?*, N.Y. TIMES, Aug. 28, 2017, https://www.nytimes.com/2015/08/29/opinion/ban-abortion-for-down-syndrome.html?mcubz=0.

171 *Id.*