

ARTICLE

# Reason-Based Abortion Bans, Disability Rights, and the Future of Prenatal Genetic Testing

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## Introduction

Recent advances in prenatal genetic testing have made testing for congenital disorders more accessible, with emerging technologies promising further expansion of available testing options. In particular, non-invasive prenatal testing (“NIPT”) has allowed women to identify more fetal disorders earlier in pregnancy than was possible only a decade ago. In addition to allowing women to prepare for the birth of a child with a disability, prenatal diagnoses give women the ability to terminate a pregnancy to avoid raising a child with a disability, a choice driven by myriad factors.

Expansion of prenatal testing has raised concerns among disability rights advocates: for example, that expanded testing may cause various harms to the disability community, such as increased stigma and reduction of the prevalence of disability in the population. Anti-abortion advocacy groups and lawmakers have seized on these concerns to introduce new abortion restrictions we will call “reason-based abortion bans.” These are bans that prohibit abortions sought for specific reasons. Laws proposed and enacted in various U.S. states include prohibitions on abortions sought due to a fetus’s race, sex, or disability. Abortions sought on the basis of a fetus’s disability or genetic abnormality are commonly referred to as genetic-selective abortions (“GSAs”); bans on GSAs are often called genetic-selective abortion bans (“GSABs”).<sup>1</sup> Citing threats to the disability community, proponents of such laws employ disability rights rhetoric to justify GSABs. They argue that by preventing terminations of pregnancies following diagnoses of fetal disability, GSABs serve to protect the rights of potential children with disabilities, ameliorate expressive harms to the disability community, and prevent eugenic elimination of disability.

This Article investigates the role of GSABs in anti-abortion advocates’ efforts to tie restrictions on reproductive choice to the disability rights movement. Part I begins with a brief history of prenatal testing and reason-based abortion bans before describing the legal structure of GSABs and the justifications advanced by their proponents. Part II provides a critical analysis of those justifications, as well as an analysis of the practical effects of GSABs, ultimately assessing whether GSABs advance disability rights interests. Part III then situates GSABs within the broader context of disability rights discourse about prenatal genetic testing. This Article concludes that despite the rhetoric aligning the campaign for GSABs with the disability rights movement, evaluation of the proffered arguments and practical implications reveal that GSABs are more closely aligned with an anti-abortion agenda than promotion of disability rights. We argue that in connecting these two areas of advocacy, there is a real risk that subsequent

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<sup>1</sup>The terms “disability” and “genetic abnormality” are not well defined in the context of GSABs and are often used interchangeably. For the purposes of this paper, they will be used to refer to congenital conditions generally rather than a subset of medically or ethically defined conditions.

politicization of disability rights could inhibit the adoption of policies that enjoy widespread support in the disability community, and which are supported by cogent arguments and evidence of practical efficacy.

## History of genetic-selective abortion bans

### *Advances in genetic testing and the genesis of reason-based bans*

In the early 1970s, new technologies began offering prospective parents a window into the genetic characteristics of their future offspring.<sup>2</sup> By the early 2000s, these once-novel technologies were part of routine prenatal care, including regular use of maternal blood tests, ultrasounds, and diagnostic tests to identify genetic disorders and fetal malformations.<sup>3</sup> In 2007, the American College of Obstetricians and Gynecologists (“ACOG”) recommended that all women be offered prenatal testing, an expansion of its previous recommendation that such testing be offered only to women considered high-risk.<sup>4</sup>

Then, in 2011, the arrival of noninvasive prenatal testing (“NIPT”) once again revolutionized the prenatal testing landscape.<sup>5</sup> NIPT, which requires only a routine blood draw, offers women genetic information about their fetuses earlier in pregnancy and without the risk of miscarriage associated with invasive testing.<sup>6</sup> Because NIPT is considered screening, rather than diagnostic, it is often supplemented with diagnostic tests. But NIPT can nonetheless provide a wide array of information about genetic conditions such as Trisomy 13, 18, and 21; sex chromosome aneuploidies; other chromosomal conditions; microdeletions; and certain inherited diseases.<sup>7</sup> Since its introduction, use of NIPT has expanded beyond the clinical context, and commercial providers now offer NIPT to screen for an increasing number of genetic conditions.<sup>8</sup> Adoption of new technologies such as polygenic risk scores and whole genome sequencing will continue the expansion of genetic information available to prospective parents.<sup>9</sup> Routine testing has also been promoted by professional organizations, with both the American College of Medical Genetics and Genomics (“ACMG”) and ACOG recommending that NIPT be offered to all pregnant women regardless of risk.<sup>10</sup>

The advent of reason-based abortion bans largely tracks the history of prenatal testing. Illinois introduced the first such ban in the U.S. in 1975, prohibiting abortions performed on the basis of fetal sex; Pennsylvania followed suit in 1989.<sup>11</sup> The next wave of reason-based bans did not arrive until the 2010s. Concurrent with the expanded availability of prenatal testing and introduction of NIPT, this wave included a new variety of reason-based abortion ban: the genetic-selective abortion ban. Model GSAB legislation was first published by Americans United for Life (“AUL”), an anti-abortion advocacy group,

<sup>2</sup>See *Evolution of Prenatal Testing*, THE HASTINGS CTR. (Nov. 27, 2017), <https://www.thehastingscenter.org/prenatal/evolution-prenatal-testing/> [<https://perma.cc/U85S-AXBQ>]; Nevena Krstić & Sarah G. Običan, *Current Landscape of Prenatal Genetic Screening and Testing*, 112 BIRTH DEFECTS RSCH 321, 321-322 (2019).

<sup>3</sup>See *Evolution of Prenatal Testing*, *supra* note 2; Krstić & Običan, *supra* note 2.

<sup>4</sup>Am. Coll. Obstetricians & Gynecologists, *Invasive Prenatal Testing for Aneuploidy*, 88 ACOG PRAC. BULL. 1 (2007).

<sup>5</sup>See *Evolution of Prenatal Testing*, *supra* note 2.

<sup>6</sup>See Am. Coll. Obstetricians & Gynecologists, *Screening for Fetal Chromosomal Abnormalities*, 226 ACOG PRAC. BULL. (2016); Errol R. Norwitz & Brynn Levy, *Noninvasive Prenatal Testing: The Future is Now*, 6 REV. OBSTETRICS & GYNECOLOGY 48 (2013).

<sup>7</sup>See *Evolution of Prenatal Testing*, *supra* note 2; Michelle J. Bayefsky & Benjamin E. Berkman, *Implementing Expanded Prenatal Genetic Testing: Should Parents Have Access to Any and All Fetal Genetic Information*, AM. J. BIOETHICS (forthcoming 2022); Krstić & Običan, *supra* note 2, at 324-325.

<sup>8</sup>See *Evolution of Prenatal Testing*, *supra* note 2; Bayefsky & Berkman, *supra* note 7.

<sup>9</sup>Bayefsky & Berkman, *supra* note 7.

<sup>10</sup>Persistent inequality in access to reproductive care, including NIPT, is important in the discussion of abortion policy but is beyond the scope of this paper. Anthony R. Gregg et al., *Noninvasive Prenatal Screening for Fetal Aneuploidy, 2016 Update: A Position Statement of the American College of Medical Genetics and Genomics*, 18 GENETICS MED. 1056 (2016); Am. Coll. Obstetricians & Gynecologists, *Prenatal Diagnostic Testing for Genetic Disorders*, 162 ACOG PRAC. BULL. (2016).

<sup>11</sup>720 Ill. Comp. Stat. 510/1(2016); 1989 Pa. Laws 64.

in 2011.<sup>12</sup> State legislatures quickly took up the cause: Missouri introduced AUL-inspired legislation in 2012, and North Dakota passed similar legislation in 2013.<sup>13</sup> Since 2012, there have been 29 GSAB bills introduced in 16 states.<sup>14</sup> Six states have passed GSAB bills,<sup>15</sup> and bills are pending in three.<sup>16</sup>

### Legislative text and structure

Closely tracking AUL's model legislation, North Dakota's 2013 law is largely representative of GSABs in other states.<sup>17</sup> The key provision prohibits a physician from "intentionally perform[ing] or attempt[ing] to perform an abortion with knowledge that the pregnant woman is seeking the abortion solely... [b]ecause the unborn child has been diagnosed with either a genetic abnormality or a potential for a genetic abnormality."<sup>18</sup> The law defines "genetic abnormality" as "any defect, disease, or disorder that is inherited genetically," including "any physical disfigurement, scoliosis, dwarfism, Down syndrome, albinism, amelia, or any other type of physical or mental disability, abnormality, or disease."<sup>19</sup>

While terminology varies by state, "disability" and "genetic abnormality" generally refer to the same set of conditions described in the North Dakota bill. Perhaps the most notable point of divergence among various states' GSAB bills is whether the conditions must be inherited. The first three states to pass GSABs limited the definition of disability to conditions that are "genetically inherited," while later bans moved toward more open-ended language.<sup>20</sup> Furthermore, while the first four states to pass GSABs describe conditions in terms of defects, diseases, or disorders, Arizona and Mississippi refer instead to any "abnormal gene expression."<sup>21</sup> Four laws also provide exceptions to GSABs when a fetus has a lethal condition, though the scope of such exceptions remains ambiguous.<sup>22</sup>

As written, GSABs place the onus on physicians to refrain from performing GSAs and impose consequences including criminal, civil, and professional sanctions.<sup>23</sup> Several states extend civil causes of action against the physician to allow suits brought by the prospective mother, father, grandparent, or estate of the fetus and allow the state to seek injunctive relief.<sup>24</sup> No state's GSAB provides for punishment of women seeking abortions.<sup>25</sup> Four laws require some kind of documentation reflecting whether there

<sup>12</sup>Greer Donley, *Does the Constitution Protect Abortions Based on Fetal Anomaly?: Examining the Potential for Disability-Selective Abortion Bans in the Age of Prenatal Whole Genome Sequencing*, 20 Mich. J. of Gender & L. 291, 303 (2013).

<sup>13</sup>See *Missouri Introduces Americans United for Life Model Legislation to Prohibit Sex-Selection Abortions and the Targeting of the Disabled*, AM. UNITED FOR LIFE (Jan. 31, 2013), <https://aul.org/2013/01/31/missouri-introduces-americans-united-for-life-model-legislation-to-prohibit-sex-selection-abortions-and-the-targeting-of-the-disabled/>; *North Dakota Becomes First State to Limit Abortions Based on Sex-Selection and Genetic Abnormalities Using AUL Model Legislation*, AM. UNITED FOR LIFE (Mar. 26, 2013), <https://aul.org/2013/03/26/north-dakota-becomes-first-state-to-limit-abortions-based-on-sex-selection-and-genetic-abnormalities-using-aul-model-legislation/> [<https://perma.cc/K7RU-7Q6K>].

<sup>14</sup>See, e.g., S.B. 468, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); H.R. 1221, 2021 Leg., Reg. Sess. (Fla. 2021); H.R. 2281, 101st Gen. Assemb., Reg. Sess. (Ill. 2019); H.R. 1815, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016); H.R. 1678-FN, 2020 Leg., 2020 Sess. (N.H. 2019); S.B. 1430, 56<sup>th</sup> Leg., 2d Sess. (Okla. 2018); S.B. 74, 2021 Leg., Reg. Sess. (W. Va. 2021); H.R. 0161, 2021 Leg., Gen. Sess. (Wyo. 2021).

<sup>15</sup>2021 Ariz. Sess. Laws 286; 2016 Ind. Acts 313; 2019 Ky. Acts 37; 2016 La. Acts 563; 2020 Miss. Laws 1295; 2013 N.D. Laws 117. Many states have passed similar legislation specifically banning Down syndrome-selective abortions, but those laws have been excluded from this analysis.

E.g., 2021 S.D. Sess. Laws Ch. 151; 2019 Utah Laws 124.

<sup>16</sup>H.R. 4737, 2021 Leg., Reg. Sess. (Mich. 2021); S. 760, 2021 Leg., Reg. Sess. (Mich. 2021); H.R. 3872, 124th Gen. Assemb., 124th Sess. (S.C. 2021); Assemb. 595, 2021-2022 Leg., Gen. Sess. (Wis. 2021).

<sup>17</sup>2013 N.D. Laws 117.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

<sup>20</sup>2016 Ind. Acts 313; 2016 La. Acts 563; 2013 N.D. Laws 117.

<sup>21</sup>2021 Ariz. Sess. Laws 286; 2020 Miss. Laws 1295.

<sup>22</sup>2021 Ariz. Sess. Laws 286; 2016 Ind. Acts 313; 2019 Ky. Acts 37; 2016 La. Acts 563.

<sup>23</sup>2021 Ariz. Sess. Laws 286 (Arizona extends liability to those who coerce or finances GSAs).

<sup>24</sup>See, e.g., 2019 Ky. Acts 37; 2016 La. Acts 563.

<sup>25</sup>2021 Ariz. Sess. Laws 286; 2016 La. Acts 563.

was a diagnosis of disability prior to termination and/or the mother's stated reason for termination, although physicians are not required to specifically inquire into whether the diagnosis of the disability motivated the abortion in question.<sup>26</sup>

### *Arguments advanced in favor of genetic-selective abortion bans*

Rhetoric justifying GSABs—whether in legislative text, state house and senate debates, legal documents, or other communications from politicians and advocates—tends to coalesce around a central proposition: bans are necessary to “protect the most vulnerable.”<sup>27</sup> Several distinct lines of argument emerge, however, about what “protecting the most vulnerable” means. Three arguments dominate both legal and normative debates: the discrimination argument, the expressivist argument, and the eugenics argument.

#### *Discrimination against “unborn human beings”*

The discrimination argument, in its simplest form, is that each GSA is an act of discrimination against a particular fetus. Under the discrimination argument, prohibiting GSAs serves to extend the existing scheme of state and federal anti-discrimination law.<sup>28</sup> In 2019, an amicus brief filed on behalf of several states in support of Indiana's GSAB (“States’ Brief”) claimed that bans are analogous to laws that “prohibit the ‘moral and social wrong’ of discrimination by private parties in public accommodations,” echoing language used in state and federal civil rights laws, most notably the Civil Rights Act of 1964 and the Americans with Disabilities Act (“ADA”).<sup>29</sup> The preamble of Kentucky's bill similarly uses language from the ADA and state civil rights legislation in framing its GSAB law as one that “establishes a reasonable accommodation for the unborn children.”<sup>30</sup> The use of such language suggests that a fetus at any stage of gestation has a right to be born, and when a GSA occurs, that right is functionally denied on the basis of disability. Proponents claim to find legal authority for this rationale in several sources, including domestic statutory and constitutional law, the Declaration of Independence, international law, and natural law.<sup>31</sup>

#### *The expressivist threat*

The expressivist argument posits that GSAs send a message that lives of those with disabilities are less valuable than others and, further, that in failing to ban GSAs, states actively endorse that message. One sponsor of North Dakota's GSAB legislation encapsulated the expressivist argument in stating that, “[North Dakota's] bill will send the message out that North Dakota values human life in all forms. If it should not pass, are we telling every Down syndrome person that they are not worth anything and should

<sup>26</sup>See, e.g., 2020 Miss. Laws 1295 (provider must document whether “the presence or presumed presence of any genetic abnormality in the unborn human being had been detected at the time of the abortion” and provide a “statement confirming that the reason for the abortion, as stated by the maternal patient, was not because of... the presence or presumed presence of any genetic abnormality”).

<sup>27</sup>2021 Ariz. Sess. Laws 286.

<sup>28</sup>E.g., *Relating to the Prohibition on Abortions for Sex Selection or Genetic Abnormalities: Hearing on H.B. 1305 Before the S. Judiciary Comm*, 63rd Leg. Assemb., Gen. Sess. (N.D. 2013) (statement of Rep. Betty Grande) (the bill “affirms a policy of nondiscrimination” by extending existing protections for those with disabilities to “such persons before they are born.”).

<sup>29</sup>Brief of the States of Wis. et al. as Amici Curiae Supporting Petitioners at 18, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 U.S. 1780 (2019) (No. 18-483) [hereinafter States’ Brief]; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243; Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327, 355.

<sup>30</sup>2019 Ky. Acts 37; Americans with Disabilities Act, *supra* note 28, at 331-32; KY. REV. STAT. ANN. §§ 344.010 - 344.990.

<sup>31</sup>E.g., 2020 Miss. Laws 434 (legislative findings referencing the “inherent right against discrimination”); *Relating to the Prohibition on Abortions for Sex Selection or Genetic Abnormalities, Definitions and Provide a Penalty: Hearing on H.B. 1305 Before the H. Human Servs. Comm*, 63rd Leg. Assemb., Gen. Sess. (N.D. 2013) (statement of Janne Myrdal, State Director, Concerned Women of America) (“Our Founding Fathers clearly delineated the right to life as one that is unalienable and endowed by our Creator” that is violated by GSAs).

have been aborted?”<sup>32</sup> Arizona made this rationale explicit in its legislative findings, declaring an intent “to send an unambiguous message that children with genetic abnormalities, whether born or unborn, are equal in dignity and value to their peers.”<sup>33</sup> Indiana further incorporated this notion into the legal argument defending its GSAB, stating that without the law, “individuals already living with these same disabilities will no doubt receive the demeaning and stigmatizing message that they are not valued as productive members of society with equal human dignity.”<sup>34</sup>

### *Eugenic potential*

The eugenics argument is concerned with the use of abortion for the “*elimination* of classes of people,” often analogizing GSAs to eugenic practices of the early twentieth century, which aimed to use genetic manipulation for racial improvement and the elimination of undesirable traits.<sup>35</sup> The point was made forcefully in the States’ Brief’s claim that “[r]ecent efforts to ‘eliminate’ Down syndrome are nothing more than ‘people pushing [a] particular “final solution” [] that people [with Down syndrome] should not exist.”<sup>36</sup> The eugenics argument puts forth the idea that if given the choice, women will terminate pregnancies following diagnosis of a disability at such a high rate that eventually, no babies with diagnosable disabilities will be born.

While proponents of GSAB bills tend to use Down syndrome as the paradigmatic genetic condition, they are clear that the argument extends to all GSAs.<sup>37</sup> The eugenic potential of GSAs is central to discussions of constitutionality, an issue frequently raised by opponents in legislative debates and litigation.<sup>38</sup> In defending its GSAB in court, Indiana referred to it as an “anti-eugenics law.”<sup>39</sup> By arguing that preventing eugenics is a compelling state interest advanced by GSABs, states like Indiana endeavor to place GSABs within the existing legal framework for state and federal constitutional review.<sup>40</sup>

While the eugenics argument focuses primarily on preventing the targeting and potential eradication of disability, there is a secondary line of the argument that views selection against disability as the first step towards a future in which increasing availability of genetic information allows parents to select for non-medical traits. In one of the earliest debates over the topic, a proponent of GSABs voiced his concern that expansion of genetic testing would lead to a “shopping cart’ mentality toward children, the belief that a child is a property [] to ‘have.’”<sup>41</sup> The looming threat of “designer babies” continues to animate the GSA debate: with some of the most recent legal documents defending GSABs by suggesting that in the future, decisions to terminate may be based on the “likelihood that the child will be short, nearsighted, or intellectually average, or lack perfect pitch”.<sup>42</sup>

<sup>32</sup>H.R. Floor Session Feb. 8, 2013, 63rd Legis. Assemb., (N.D. 2013) 11<sup>th</sup> order (statement of Rep. Vernon Laning).

<sup>33</sup>S.B. 1457, 55<sup>th</sup> Leg. 286<sup>th</sup> Sess. (Ariz. 2021).

<sup>34</sup>Petition for Writ of Certiorari at 23, *Comm’r of the Ind. State Dep’t of Health v. Planned Parenthood of Ind. & Ky., Inc.*, 139 U.S. 1780 (2019) (No. 18-483) [hereinafter Petition for Certiorari].

<sup>35</sup>States’ Brief, *supra* note 28, at 19; *Eugenics and Scientific Racism*, NAT’L HUM. GENOME RSCH. INST., <https://www.genome.gov/about-genomics/fact-sheets/Eugenics-and-Scientific-Racism> [<https://perma.cc/9EGG-EES9>] (Dec. 1, 2021).

<sup>36</sup>States’ Brief, *supra* note 28, at 24.

<sup>37</sup>Some states include exceptions for lethal fetal anomalies. See 2021 *Ariz. Sess. Laws* 286; 2016 *Ind. Acts* 213; 2019 *Ky. Acts* 37; 2016 *La. Acts* 563.

<sup>38</sup>See, e.g., Respondents’ Brief in Opposition to Petition for Writ of Certiorari, at 13-17, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 U.S. 1780 (2019) (No. 18-483), 2020 WL 1313289, at \*14.

<sup>39</sup>Petition for Certiorari, *supra* note 33, at 29.

<sup>40</sup>See, e.g., MISS. CODE ANN. 41-41-403 (WEST 2020) (“Mississippi maintains a compelling interest in preventing abortion from becoming a tool of modern-day eugenics”).

<sup>41</sup>*Relating to the Prohibition on Abortions for Sex Selection or Genetic Abnormalities: Hearing on H.B. 1305 Before the S. Judiciary Comm*, 63rd Leg. Assemb., Gen. Sess. (N.D. 2013) (statement of William Schuh).

<sup>42</sup>Secretary Meier’s Response to Plaintiffs’ Motion for a Temporary Restraining Order of House Bill 5 at 6, *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-cv-00178-DJH (W.D. Ky. Mar. 19, 2019) [hereinafter Meier’s Response].

### *Other for GSABs*

While most arguments for GSABs focus on protecting vulnerable fetuses and individuals with disabilities, some center women as the vulnerable parties in need of protection. Under this view, women are subject to coercion and misinformation from the medical establishment that may cause them to pursue GSAs when they otherwise would not.<sup>43</sup> In some cases, the potential harm of GSAs is expanded to include a secondary effect on families when vulnerable women are frightened into abortions without the agreement of spouses or other partners, a situation that may lead to “broken marriages” and downstream consequences for other children and society at large.<sup>44</sup>

Often raised in tandem with the need to protect vulnerable women is a concern that in performing GSAs, the medical profession risks losing credibility and public trust. The argument is that the state is responsible for ensuring that doctors are “viewed as healers, not as enablers and practitioners of eugenics.”<sup>45</sup> Linking this concern to GSABs specifically, Arizona’s bill states that bans “protect the integrity and ethics of the medical profession by preventing doctors from becoming witting participants” in GSAs, thereby protecting faith in the medical profession.<sup>46</sup>

### **Are genetic-selective abortion bans consistent with the aim of advancing disability rights?**

Although GSABs have their roots in the anti-abortion movement, proponents of the bans position themselves as defenders of the disability community, tapping into the robust and complex field of disability rights advocacy. None of the bans enacted thus far have been proposed as part of a broader disability rights policy agenda, however, making it clear that proponents are not adopting the cause of disability rights wholesale and raising the question why GSABs are the intervention of choice. As this Section will explore, even where arguments in support of GSABs closely resemble arguments made by disability rights advocates, careful parsing of the rhetoric and legislative text reveals that GSABs cannot be justified solely on the basis of disability rights. Frequently misleading and inconsistent, the arguments that position GSABs as part of the disability rights movement merely capitalize on widespread sympathy and support for disability rights, advancing policy more aligned with an anti-abortion agenda than with disability advocacy. GSABs’ alignment with the anti-abortion movement is underscored by the practical effects of GSABs, which do not achieve the purported goals related to disability rights: rather, GSABs restrict access to abortion and suppress productive dialogue about disabilities and disability rights.

### *Rhetorical and legal arguments are logically unsound and often conflict with legislative text*

#### *The claim that disability-selective abortion is an act of discrimination against a particular fetus presupposes a universal right to be born*

The discrimination argument that GSAB proponents set forth identifies the denial of a fetus’s right to be born as a discriminatory act. Unless the right to be born is contingent upon diagnosis of a disability, it would logically extend to all fetuses. To prohibit abortions only when a fetus is “targeted” on the basis of disability would be to deny every other fetus protection of that right. As such, the discrimination argument intrinsically advances a right-to-life agenda.

In the absence of a universal right to be born, GSABs cannot be logically understood as anti-discrimination laws. Rather, they bear more similarities to hate crime laws, which punish criminal activities motivated by bias toward certain protected groups.<sup>47</sup> Violations of GSABs, like violations of

<sup>43</sup>See, e.g., AM. UNITED FOR LIFE, PRENATAL NONDISCRIMINATION ACT OF 2018, S. 2325, 115<sup>th</sup> Cong. (2018).

<sup>44</sup>*Relating to the Prohibition on Abortions for Sex Selection or Genetic Abnormalities: Hearing on H.B. 1305 Before the S. Judiciary Comm*, 63rd Leg. Assemb., Gen. Sess. 2 (N.D. 2013) (statement of William Schuh).

<sup>45</sup>Meier’s Response, *supra* note 41, at 8-9.

<sup>46</sup>2021 Ariz. Sess. Laws 286.

<sup>47</sup>See Kenneth W. Simons, *Hate (or Bias) Crime Laws*, in *THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW* 285, 285-286 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019).



hate crime laws, require both an act, performance of an abortion, and a motivation, prenatal diagnosis of disability. Hate crime laws, however, require that the underlying conduct is itself criminal, which is not true in the case of GSABs.<sup>48</sup>

*Arguments erroneously conflate gsas with the eugenics movement of the twentieth century*

Although increased occurrence of GSAs reduces the population of individuals with disabilities, it has little else in common with the eugenics movement of the twentieth century. The argument is emotionally powerful, as it harkens back to a time when even the U.S. Supreme Court endorsed state control of certain reproductive decisions for the purposes of racial betterment.<sup>49</sup> But GSAs are not part of any centralized campaign to reduce or eradicate the incidence of disability in the population. Instead, they are the private decisions of individual women regarding whether to carry a pregnancy to term. While disability rights advocates have raised concerns about the aggregate effect of decreasing incidence of disability, they have placed far more emphasis on the misleading, biased, and pressured manner in which genetic testing has been offered to prospective parents and how results have been communicated.

And crucially, proponents of GSABs do not seem motivated by preserving disability in the population as a valuable form of diversity.<sup>50</sup> For example, proponents frequently tout the increasing availability of treatments and cures for prenatally diagnosed disabilities as reasons why women should not abort on that basis.<sup>51</sup> GSAB proponents are not focused on preserving disability; they are concerned with the *act of abortion*.

*Taken to their logical conclusion, these policies could radically reduce access to reproductive care*

Proponents of GSAB laws claim that the state interest in preventing discrimination and eugenics applies with equal force at all stages of pregnancy, thereby providing justification for pre-viability abortion restrictions.<sup>52</sup> Not only do such restrictions prevent access to safe abortion care, they also curtail access to reproductive care more broadly in ways that are particularly harmful to those with disabilities.<sup>53</sup>

Furthermore, the eugenics argument does not draw a clear line between abortion and other reproductive decision-making. The eugenics argument does not rely on the right of a particular fetus to be born; rather, it focuses on the aggregate effects of women's reproductive choices, including—but not limited to—the choice to obtain an abortion. Much of the history referenced to link GSAs to the eugenics movement of the twentieth century relates to the expansion of access to birth control, not abortion.<sup>54</sup> The anti-eugenic rhetoric adopted to justify GSA bans would also justify reason-based bans on contraception, such as bans applicable to women over 40 who may choose to use birth control (in part) to eliminate the risk of having a child with Down syndrome. Thus, the anti-eugenic rationale offered for these laws opens the door to restrictions on contraceptive use, preimplantation screening in the case of invitro fertilization, and other reproductive care.<sup>55</sup>

<sup>48</sup> See *id.* at 294.

<sup>49</sup> See Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021); Dov Fox, *Abortion, Eugenics and Personhood in the Supreme Court* (UNIV. SAN DIEGO SCH. L. L. RSCH PAPER SERIES, Research Paper No. 19-405, 2019).

<sup>50</sup> See Rosemarie Garland-Thomson, *The Case for Conserving Disability*, 9 J. BIOETHICAL INQUIRY 339 (2012).

<sup>51</sup> See, e.g., 2020 Miss. Laws 434 (finding that “[p]harmaceutical treatments, gene therapies, and prosthetic advances have given formerly handicapped and disabled human beings much greater opportunities for survival and success than ever before.”).

<sup>52</sup> See, e.g., States’ Brief, *supra* note 28, at 25.

<sup>53</sup> Nikita Mhatre, ACCESS, AUTONOMY, AND DIGNITY: ABORTION CARE FOR PEOPLE WITH DISABILITIES (2021).

<sup>54</sup> See Murray, *supra* note 48.

<sup>55</sup> In the process of in vitro fertilization, preimplantation screening allows prospective parents to test embryos for certain genetic conditions prior to choosing which embryos will be transferred to a woman’s uterus for gestation. See Susannah Baruch et al., *Preimplantation Genetic Screening: A Survey of in vitro Fertilization Clinics*, 10 GENETICS MED. 685 (2008).

*The broad scope of these laws and rhetorical focus on down syndrome obscure meaningful differences among disabilities and genetic abnormalities*

The GSABs currently in effect encompass a wide array of genetic conditions with varying prognoses in terms of suffering, morbidity, early childhood mortality, and adverse events for the mother. These are all factors that may come into play as women decide whether to carry pregnancies to term. Rhetoric in support of bans, however, primarily uses the example of Down syndrome, evading discussion of what it means to raise a child with other kinds of disabilities. Down syndrome makes a sympathetic case because it tends to be more familiar and has an increasingly favorable prognosis, but the overwhelming focus on Down syndrome makes it hard to have realistic conversation about the effect of GSABs. Even when women chose to continue pregnancies following diagnosis of a disability and are happy with that choice, individuals with disabilities and their families may face significant challenges.<sup>56</sup> Failing to reckon with the most severe fetal disabilities and idealizing the experience of raising a child with disabilities discounts those experiences and overlooks policies that could address the range of challenges facing the disability community.<sup>57</sup>

The GSAB conversation is further confused by the conflation of disability with the more fluid and ambiguous concept of a genetic abnormality. Technological advances are increasing the number of genetic abnormalities that can be detected through prenatal testing far beyond those that cause the kinds of disabilities central to the debate over GSAs. The term “genetic abnormalities”—which could include all kinds of genetic findings, from benign mutations to variants that are merely predictive of future traits—thus attenuates the link between GSABs and disability rights concerns.<sup>58</sup>

*The focus on heritability in the legislative text is much narrower than the broader disability rights concerns*

While eugenics is concerned with traits that are hereditary, the discrimination and expressivist arguments are not limited to those traits. Both the discrimination and expressivist arguments apply with equal force to non-heritable disabilities. This aspect of the discrimination and expressivist propositions finds support in the civil rights laws cited by GSAB proponents, none of which differentiate among disabilities on the basis of heritability.<sup>59</sup> Though the text of most GSAB bills limits their application to genetically inherited disabilities, non-heritable conditions (such as those caused by sporadic mutations or toxicity) are listed as examples of included disabilities, further muddling the role of heritability. Whether mistaken or misleading, the inclusion of conditions such as Down syndrome, which is roughly 99 percent sporadic, reveals the tension between the different arguments used to justify these laws.<sup>60</sup> Down syndrome may be an easier case to talk about given the familiarity and prognosis noted above, but as a legal matter, the eugenic justification applies with more force to heritable traits that could be permanently eliminated from the population through universal uptake of GSAs.

*In practice, these laws will not advance disability rights*

*GSAB laws are not designed to be enforceable*

Penalties imposed upon physicians by GSAB laws require proof that a woman was seeking an abortion because of a diagnosis of a disability and proof that the abortion provider knew of that reason. That

<sup>56</sup>See Bayefsky & Berkman, *supra* note 7, at 8.

<sup>57</sup>See Sujatha Jesudason & Julia Epstein, *The Paradox of Disability in Abortion Debates: Bringing the Pro-Choice and Disability Rights Communities Together*, 84 *CONTRACEPTION* 541, 542 (2011).

<sup>58</sup>See Nat'l Hum. Genome Rsch. Inst., *Understanding What Can Be Diagnosed by Which Genetic Test*, YOUTUBE (Sep. 8, 2015), <https://youtu.be/N6zuLj7VvpY>.

<sup>59</sup>E.g., Americans with Disabilities Act, *supra* note 28, at 329-330 (“The term ‘disability’ means, with respect to an individual --- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”)

<sup>60</sup>Gratias Tom Mundakel, *Down Syndrome*, *MEDSCAPE* (May 18 2020), <https://emedicine.medscape.com/article/943216-overview#a4> [<https://perma.cc/X3AN-P82F>]



showing would be extraordinarily difficult to make under any evidentiary standard unless the physician's knowledge was specifically documented. Further heightening the enforcement difficulty that GSAB laws present, four of six enacted laws limit liability to cases in which a diagnosis was the woman's sole reason for seeking the abortion, requiring that the provider knew there were *no* other motivating factors. While some states require that physicians report whether they knew a woman was seeking an abortion for prohibited reasons, none require physicians to proactively inquire into the matter.

The practical enforceability of GSABs does not seem to concern legislators, as many use the very fact of the laws' unenforceability to defend them, stating that concerns about reduced abortion access are overblown due to (1) the reality that the laws would rarely apply and (2) the fact that women could always lie about their motivations.<sup>61</sup>

### *The threat of penalty serves to intimidate providers and decrease women's access to important medical information*

Even if GSAB laws are never enforced, the specter of criminal and civil litigation is likely to reduce access to reproductive health care and disrupt the doctor-patient relationship.<sup>62</sup> ACOG warns that "gross interference" in the doctor-patient relationship threatens to "[create] a system in which patients and physicians are forced to withhold information or outright lie in order to ensure access to care."<sup>63</sup> Once a woman receives a diagnosis of a fetal disability, she may be denied access to an abortion—even if the diagnosis is not a motivating reason for seeking one—out of an abundance of caution on the part of health care providers.<sup>64</sup> Providers may also be hesitant to discuss diagnoses in depth for fear of receiving information that would put them in the position of denying care or violating the law should the patient chose to terminate her pregnancy.<sup>65</sup>

Women who want to preserve the choice to have an abortion may also be deterred from engaging in open dialogue with doctors, genetic counselors, or other professionals regarding the implications of prenatal testing and any potential diagnosis.<sup>66</sup> Access to comprehensive and reliable information is critical for women receiving diagnoses of fetal disability: such information is necessary for both the woman who chooses to terminate her pregnancy and for the woman who chooses to continue her pregnancy and prepare to raise a child with a disability.<sup>67</sup> In fact, access to professional counseling, particularly by specialists, has been associated with lower rates of pregnancy termination,<sup>68</sup> underscoring the concern expressed by disability rights groups that "in chilling that conversation, [GSABs] may make it harder for women to obtain the accurate information they need to make an informed decision – and

<sup>61</sup>See, e.g., Petition for Certiorari, *supra* note 33, at 29; Jaime Staples King, *Not This Child: Constitutional Questions in Regulating Noninvasive Prenatal Genetic Diagnosis and Selective Abortion*, 60 UCLA L. REV. 2, 43 (2012).

<sup>62</sup>See Sital Kalantry, *What Are the Right Reasons for Terminating a Pregnancy?*, HUM. RTS. HOME BLOG (Mar. 15, 2018), [https://lawprofessors.typepad.com/human\\_rights/2018/03/what-are-the-right-reasons-for-terminating-a-pregnancy.html](https://lawprofessors.typepad.com/human_rights/2018/03/what-are-the-right-reasons-for-terminating-a-pregnancy.html) [<https://perma.cc/MUC4-Q64H>].

<sup>63</sup>Mark S. DeFrancesco, *ACOG Statement on Abortion Reason Bans*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (Mar. 10, 2016), <https://www.acog.org/news/news-releases/2016/03/acog-statement-on-abortion-reason-bans> [<https://perma.cc/J249-B494>].

<sup>64</sup>See Brief of Amici Curiae, Disability Advocates in Support of Plaintiffs-Appellees and Affirmance at 16-17, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, 917 F.3d 532 (2018) (No. 17-3163) [hereinafter *Disability Advocates Brief*]; King, *supra* note 59, at 37.

<sup>65</sup>See Disability Advocates Brief, *supra* note 62, at 16; King, *supra* note 59, at 37.

<sup>66</sup>See Disability Advocates Brief, *supra* note 62, at 16; King, *supra* note 59, at 36.

<sup>67</sup>See Disability Advocates Brief, *supra* note 62, at 16; King, *supra* note 59, at 36; Philippa Willitts, *As a Disabled Woman, I Oppose Ohio's Down Syndrome Abortion Law. This is Why.*, GLOB. COMMENT (Jan. 5, 2018) <https://globalcomment.com/disabled-woman-oppose-ohios-syndrome-abortion-law/> [<https://perma.cc/EM5E-ZTZP>].

<sup>68</sup>See Jacqueline J.P.M. Pieters et al., *Considering Factors Affecting the Parental Decision to Abort After a Prenatal Diagnosis of a Sex Chromosome Abnormality*, 14 GENETICS MED. 558, 558 (2012); Kwon Chan Jeon et al., *Decision to Abort After a Prenatal Diagnosis of Sex Chromosome Abnormality: A Systematic Review of the Literature*, 14 GENETICS MED. 27, 36-37 (2011); Anne Hawkins et al., *Variables Influencing Pregnancy Termination Following Prenatal Diagnosis of Fetal Chromosome Abnormalities*, 22 J. GENETIC COUNSELING 238, 245 (2013).

more likely that women will terminate pregnancies as a result of fears that might have been alleviated with further information.”<sup>69</sup>

### *GSABs risk exacerbating expressivist concerns*

By removing the decision to terminate a pregnancy following diagnosis of a fetal disability from the social and economic context in which it occurs, rhetoric surrounding GSAB laws circumvents a potentially productive conversation about how society could further embrace and support parents of children with disabilities, instead simplifying GSAs as a choice for or against disability.<sup>70</sup> While ableist attitudes and negative views of disability may play a role in some termination decisions and contribute to the social context in which such decisions are made, the claim that GSAs are predominately motivated by a view that lives of those with disabilities are less valuable is not supported by evidence.<sup>71</sup> Attitudes about disability are influenced by a wide array of social, political, and economic factors, and the personal decision about whether to continue a pregnancy following the diagnosis of disability is further complicated by individual circumstances such as finances and family dynamics.<sup>72</sup> The expressive threat of GSAs is greatest when they are perceived to be motivated by animus or intolerance of disability, so when rhetoric in support of these laws promotes that perception, it can worsen potential expressivist problems.

### **The problematic implications of using disability rights arguments to support GSABs**

Although GSABs are not easily enforceable and do not advance disability rights, the rhetorical strategy to link the anti-abortion agenda and the disability rights movement could still have practical implications for the way that pregnant women access and interact with prenatal testing. The rhetoric promoting GSABs touches on very real concerns about the evolving role of testing among disability rights advocates. These concerns are complicated by the fraught relationship between disability rights advocates and the genetic counseling profession. In this section, we briefly explore this historical and contemporary tension. We then argue that linking disability rights and anti-abortion advocacy could have the effect of further exacerbating conflict by unnecessarily politicizing disability rights, potentially hindering progress in the many areas of policy innovation around which there might be significant agreement.

### *Disability rights perspectives on prenatal testing*

#### *Routinization of prenatal testing*

“Routinization” is an umbrella term that captures many of the changes in prenatal care that disability rights advocates fear will continue to result from developments in prenatal testing. The most prominent of these changes is the integration of testing into routine prenatal care, leading more women to undergo testing without consideration of its implications and creating pressure for women to test who otherwise would not by stigmatizing the choice not to test.<sup>73</sup> Another concern related to routinization is that the

<sup>69</sup>Disability Advocates Brief, *supra* note 62, at 5; see also David Perry, *Don't Politicize My Son Over Down Syndrome*, CNN: OPINION (Aug. 24, 2015), <https://www.cnn.com/2015/08/24/opinions/perry-abortion-down-syndrome-ohio/index.html> [<https://perma.cc/GN8E-35FM>].

<sup>70</sup>See Madelyn Peterson, *Disability Advocacy and Reproductive Choice: Engaging with the Expressivist Objection*, 21 J. GENETIC COUNSELING 13, 14 (2012).

<sup>71</sup>See *id.*; Bayefsky & Berkman, *supra* note 7, at 8.

<sup>72</sup>See Bruce P. Blackshaw, *Genetic Selective Abortion: Still a Matter of Choice*, 23 ETHICAL THEORY & MORAL PRAC. 445, 450 (2020); Peterson, *supra* note 68 at 15.

<sup>73</sup>See Adriana Kater-Kuipers *et al.*, *Ethics of Routing: A Critical Analysis of the Concept of 'Routinisation' in Prenatal Screening*, 44 J. MED. ETHICS 626, 627 (2018); Simona Zaami *et al.*, *Ethical, Legal and Social Issues (ELSI) Associated with Non-Invasive Prenatal Testing: Reflections on the Evolution of Prenatal Diagnosis and Procreative Choices*, 12 GENES 204, 207-208 (2021).

presumption of prenatal genetic testing and the lack of patient-centered counseling will cause abortion to become the default response to a diagnosis of disability.<sup>74</sup> Such a presumption may reduce the amount of information women seek and the extent of deliberation before making a termination decision. Furthermore, this presumption raises concerns that women who chose not to abort will face judgment for not having “avoided” disability when had the option to do so.<sup>75</sup>

### *Relationship between the disability community and the genetic counseling profession*

When women seek information and guidance about prenatal testing from genetic counselors, those counselors necessarily become involved in extremely personal decisions about whether to undergo prenatal genetic testing and what actions to take on the basis of those test results.<sup>76</sup> Historic ties between the genetic counseling profession and the eugenics movement, however, perpetuate concerns that prenatal genetic testing and associated counseling may result in a form of modern eugenics.<sup>77</sup> Empirical studies and personal accounts of the professional attitudes and practices of genetic counselors lend some credence to fears that genetic counseling as a profession exhibits bias against disability.<sup>78</sup> Professional organizations have tried to combat these perceptions by recognizing the value of all people—“including differences in one’s physical, cognitive, or psychiatric functioning”<sup>79</sup>—and affirming a “strong opposition to efforts that warp genetics knowledge for social or political ends.”<sup>80</sup> But concerns that “[n]egative assumptions about disabilities may influence the counseling clinicians provide” persist.<sup>81</sup>

Many in the disability rights community take issue with a tendency among genetic counselors to describe disability in terms of medical and functional impairments without communicating more encouraging aspects of living with a disability.<sup>82</sup> The deficits in counselor-patient communication extend to an absence of conversations about services and resources available to families of children with disabilities, should women choose to continue their pregnancies.<sup>83</sup> Concerns about how information about disability is communicated are closely related to a tendency to focus on abortion in discussions of women’s options following a diagnosis of disability, perhaps influenced by personal beliefs of some genetic counselors.<sup>84</sup> Firsthand accounts of patient interactions with genetic counselors have reinforced these fears, with many reporting pressure to undergo testing and negative descriptions of life with a child with a disability.<sup>85</sup>

<sup>74</sup>See Kater-Kuipers et al., *supra* note 71, at 627; Zaami et al., *supra* note 71, at 208; Paul Steven Miller & Rebecca Leah Levine, *Avoiding Genetic Genocide: Understanding Good Intentions and Eugenics in the Complex Dialogue Between the Medical and Disability Communities*, 15 *GENETICS MED.* 95, 102 (2013).

<sup>75</sup>See Zaami et al., *supra* note 73, at 208.

<sup>76</sup>Certified genetic counselors are healthcare professionals who provide information and guidance about testing, diagnosis, and risk of genetic conditions. See, e.g., *About Genetic Counselors*, NAT’L SOC’Y GENETIC COUNS, <https://www.nsgc.org/About/About-Genetic-Counselors> [<https://perma.cc/F6P4-WW3U>].

<sup>77</sup>See Anne C. Madeo et al., *The Relationship Between the Genetic Counseling Profession and the Disability Community: A Commentary*, 155 *AM. J. MED. GENETICS* 1777, 1778 (2011); Miller & Levine, *supra* note 72, at 97.

<sup>78</sup>See, e.g., Emma Vaimberg et al., *Project Inclusive Genetics: Exploring the Impact of Patient-Centered Counseling Training on Physical Disability Bias in the Prenatal Setting*, 16 *PLoS ONE* 1 (2021); Ellyn Farrelly et al., *Genetic Counseling for Prenatal Testing: Where is the Discussion About Disability?*, 21 *J. GENETIC COUNSELING* 814, 820-21 (2012).

<sup>79</sup>NAT’L SOC’Y GENETIC COUNS., POSITION STATEMENT ON DISABILITY (Apr. 12, 2018), <https://www.nsgc.org/Policy-Research-and-Publications/Position-Statements/Position-Statements/Post/disability> [<https://perma.cc/8WPR-2557>].

<sup>80</sup>Anthony Wynshaw-Boris, *American Society of Human Genetics Statement Regarding Concepts of “Good Genes” and Human Genetics*, *AM. SOC’Y HUM. GENETICS* (Sep. 24, 2020), <https://www.ashg.org/publications-news/ashg-news/statement-regarding-good-genes-human-genetics/> [<https://perma.cc/G8CH-3JT6>].

<sup>81</sup>Miller & Levine, *supra* note 72, at 97-98; see also Madeo et al., *supra* note 75, at 1778.

<sup>82</sup>See Madeo et al., *supra* note 75, at 1779; Farrelly et al., *supra* note 76, at 820.

<sup>83</sup>See Farrelly et al., *supra* note 76, at 820.

<sup>84</sup>*Id.* at 819-20; Vaimberg et al., *supra* note 76, at 6.

<sup>85</sup>See Madeo et al., *supra* note 75, at 1780; Perry, *supra* note 67.

### Reception of GSABs

Despite concerns about the consequences of prenatal genetic testing, the academic disability rights community has forcefully rejected GSABs as an appropriate policy response.<sup>86</sup> A common thread in critiques of GSABs is the assertion that bans not only fail to protect disability rights: they also hinder the very cause they are purported to advance while significantly interfering with other ethical prerogatives such as bodily autonomy.<sup>87</sup>

Looking beyond academia, however, disability advocates have articulated a much broader range of views on GSABs. Parents of children with disabilities play a particularly prominent role in the dialogue. Although advocates on both sides of the GSAB debate tend to share concerns about prenatal testing, they remain markedly split in their evaluation of bans as an answer to those concerns. While some disability rights advocates have called out bans for “allow[ing] people with disabilities to be used as political pawns” in a broader anti-abortion campaign,<sup>88</sup> others have been vocal in their support of GSABs, expressing the view that, without such laws, “the deck is stacked against children with genetic abnormalities.”<sup>89</sup> What remains clear, however, is that abortion as a means to promote disability rights “does not remotely enjoy uniform support among persons with disabilities and their advocates.”<sup>90</sup>

### Areas of consensus

One of the risks posed by GSABs is that by politicizing disability rights, they disrupt coalition-building that could promote popular policies with many advocates emphasizing the importance of “find[ing] common cause with liberals and conservatives from around the country.”<sup>91</sup> Ultimately, the basic idea that the main task for those looking to promote disability rights is to “get to work building a more inclusive society” continues to find support from advocates across the political spectrum.<sup>92</sup> Reports produced by various coalitions of physicians, genetic counselors, clinical geneticists, disability rights advocates, and reproductive justice advocates have proven the ability of different constituencies to come together in support of a shared policy agenda.<sup>93</sup>

Proposals for reform within the genetic counseling profession aim to equip counselors with tools to better support patients in reproductive decision-making and educate prospective parents about the prospect of raising a child with a disability. Even those supporting GSABs acknowledge the relationship between women’s lack of access to information and counseling and the prevalence of GSAs.<sup>94</sup> Evidence suggests that conventional educational approaches may be insufficient, and early evaluations of newer approaches—including greater emphasis on partnerships with and inclusion of the disability

<sup>86</sup>E.g., Madeo *et al.*, *supra* note 75; Jesudson & Epstein, *supra* note 55; Kalantry, *supra* note 60; Ruth Macklin, *Judicial, Legislative, and Professional Attempts to Restrict Pregnant Women’s Autonomy*, 16 *AMA J. ETHICS* 827 (2014).

<sup>87</sup>See, e.g., Kalantry, *supra* note 60; Macklin, *supra* note 84; King, *supra* note 59.

<sup>88</sup>ARC OF IND., STATEMENT ON HOUSE BILL 1337 (Mar. 10, 2016); see also David Perry & Elizabeth Picciuto, *Op-Ed: Disability Rights and Reproductive Rights Don’t Have to be in Conflict*, L.A. TIMES (Aug. 29, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-perry-picciuto-disability-rights-abortion-zika-20160829-snap-story.html> [<https://perma.cc/9LD2-MTJ6>]; S.E. Smith, *Disabled People Are Tired of Being a Talking Point in the Abortion Debate*, VOX (May 29, 2019), <https://www.vox.com/first-person/2019/5/29/18644320/abortion-ban-2019-selective-abortion-ban-disability> [<https://perma.cc/Z6U2-DUJZ>].

<sup>89</sup>Sharing Down Syndrome Arizona’s Motion to Intervene as Defendant and Memorandum in Support at 10, *Isaacson v. Brnovich*, No. 2:21-cv-01417-DLR (D. Ariz. Oct. 13, 2021) [hereinafter *Motion to Intervene*]; see also *Amici Curiae Brief of Women Speak for Themselves et al. in Support of Defendants-Appellants and Reversal, Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of the Ind. State Dep’t of Health*, 917 F.3d 532 (2018) (No. 17-3163).

<sup>90</sup>Disability Advocates Brief, *supra* note 62, at 9.

<sup>91</sup>Perry, *supra* note 67; see also ARC OF IND., *supra* note 86; Disability Advocates Brief, *supra* note 62, at 13.

<sup>92</sup>Perry, *supra* note 67.

<sup>93</sup>E.g., GENERATIONS AHEAD, BRIDGING THE DIVIDE (2009); Janice Edwards & Richard Ferrante, TOWARD CONCURRENCE: UNDERSTANDING PRENATAL SCREENING AND DIAGNOSIS OF DOWN SYNDROME FROM THE HEALTH PROFESSIONAL AND ADVOCACY COMMUNITY PERSPECTIVES (2009).

<sup>94</sup>See, e.g., Katherine Beck Johnson & Laura Grossberndt, FAM. RSCH. COUNCIL, ISSUE ANALYSIS NO. IS21E01, PRENATAL NONDISCRIMINATION ACTS: WHY THEY ARE ESSENTIAL (2021); *Motion to Intervene*, *supra* note 87, at 11.

community, opportunities for counselors to interact with individuals with disabilities outside of formal academic settings, understanding the lived experiences of those with disabilities, and patient-centered counseling—appear promising.<sup>95</sup>

Policies focused on patients' experiences include increasing access to high-quality genetic counseling that prioritizes individual families' values and provides information that is more comprehensive, less biased, and deemphasizes a normative and medically centered view of health.<sup>96</sup> Patients must also have more access to and information about supports that “attend to the structural factors and material conditions that constrain and enable [lives of those with disabilities].”<sup>97</sup> Increasing confidence of prospective parents in their ability to provide the time, money, and other resources necessary to raise a child with a disability would provide more families with meaningful choices, likely reducing the number of GSAs.<sup>98</sup>

## Conclusion

GSABs are not designed to advance disability rights; rather they exploit historic and contemporary concerns of disability rights advocates to promote an anti-abortion agenda. By co-opting disability rights rhetoric, proponents of GSABs pit reproductive rights against disability rights and the genetic counseling profession against the disability community. In doing so, GSAB proponents inhibit coalition-building that could achieve meaningful policy change and make the world a more inclusive, accessible place for those with disabilities. Policies that would make raising a child with a disability more feasible and attractive for families could go a long way in reducing the number of GSAs and addressing precisely the problem GSAB proponents claim to be concerned with. But instead of embracing such policies, GSAB proponents choose to focus on restricting reproductive choice. Restrictions in the name of disability rights are likely to expand in the coming years as new technologies provide prospective parents with increasing amounts of genetic information about their fetuses, including information about less serious genetic conditions and non-medical traits like height or sexual orientation. As the scope of genetic information available to prospective parents grows, so too will the scope of GSABs, further undermining the legal right to abortion and potentially setting back the disability rights movement.

<sup>95</sup>See Farrelly et al., *supra* note 76; Edwards & Ferrante, *supra* note 91.

<sup>96</sup>Jesudason & Epstein, *supra* note 51, at 542-543; Kater-Kuipers et al., *supra* note 71, at 628-629; Farrelly et al., *supra* note 76, at 822; Edwards & Ferrante, *supra* note 91; GENERATIONS AHEAD, *supra* note 91.

<sup>97</sup>Mindy Roseman, *Restricting Women's Autonomy in the Name of "Eugenics"*, L. & POL. ECON. PROJECT (Nov. 11, 2019), <https://lpeproject.org/blog/restricting-womens-autonomy-in-the-name-of-eugenics/> <https://perma.cc/K8UE-ARP5>]; *see also* Willitts, *supra* note 65; GENERATIONS AHEAD, *supra* note 91.

<sup>98</sup>Roseman, *supra* note 95; Willitts, *supra* note 65; GENERATIONS AHEAD, *supra* note 91.

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