



Prenatal Nondiscrimination Acts: Why They Are Essential

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Key Points

The history of eugenics, combined with modern scientific developments, has contributed to a culture that discriminates against unborn children with disabilities.

PRENDA laws must be passed in order to prevent these types of discriminatory, eugenic abortions from happening.

PRENDA laws continue the civil rights legacy in the U.S. by prohibiting abortions motivated by bias against an unborn child's race, sex, or disability.

Summary

Eugenics and abortion have a long shared history in the United States. Unfortunately, this connection is not a mere footnote of a bygone century. With modern scientific developments that can detect genetic characteristics and diagnose many disabilities in the womb, the potential for discriminatory abortions has only increased. To prevent such injustices from happening, many state legislatures have passed prenatal nondiscrimination acts (PRENDA). Such legislation has also been introduced at the federal level but has yet to pass. PRENDA laws are essential for ensuring unborn children are not aborted on account of an inherent characteristic or disability. They are a commonsense means of promoting a culture in which all human life is valued.

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History of Eugenics and Abortion Businesses

Eugenics (from the Greek for “good” and “origin” or “birth”) is a term coined by natural scientist Francis Galton in 1883.¹ It is also known by the alternate name “racial hygiene” (“Rassenhygiene” in German).² The theory of eugenics rose to prominence in the early to mid-twentieth century. Its adherents, eugenicists, believed society’s ills could be traced back primarily to hereditary or genetic causes, not external ones.³ Today, eugenics is most commonly identified with Nazi Germany’s justification for its Euthanasia Program⁴ and the Holocaust.⁵ Together, these programs combined to kill millions of people that the Nazi regime considered racially and biologically inferior between 1939 and the conclusion of World War II in 1945. But eugenic theory, now widely rejected due to its propensity to violate human rights (such as those laid out in the United Nations’ Declaration in 1948),⁶ was once a popular idea among the international scientific community, including Americans who championed family planning.

Eugenics’ shared history with birth control and abortion is perhaps most evident in the founding of what would become America’s top abortion business, Planned Parenthood. The organization paints a rosy picture of its beginnings, declaring on its website: “Planned Parenthood was founded on the revolutionary idea that women should have the information and care they need to live strong, healthy lives and fulfill their dreams — no ceilings, no limits.”⁷ This hyper-positive interpretation neglects to mention that Planned Parenthood’s founder Margaret Sanger embraced eugenic theory and believed birth control to be the “greatest and most truly eugenic method.”⁸ She wrote in her book *Woman and the New Race*, “Birth control itself, often denounced as a violation of natural law, is nothing more or less than the facilitation of the process of weeding out the unfit, of preventing the birth of defectives or of those who will become defectives.”⁹ Sanger believed in “racial health” and reducing the “ever increasing, unceasingly spawning class of human beings who never should have been born at all.”¹⁰

Planned Parenthood’s troubled eugenic legacy does not begin and end with the personal views of its founder, however. The June 1928 edition of the *Birth Control Review* (a publication of the American Birth Control League, the organization that would later become known as Planned Parenthood) mentions a conference held between members of the League and representatives from the American

Eugenics Society (AES) regarding “the advisability of combining the Birth Control Review and a Eugenics Society magazine, with the object of reaching a wider audience and covering a more extended field.”¹¹ Dr. Alan Guttmacher, the namesake of leading abortion research organization the Guttmacher Institute, served as vice president of the AES and president of the Planned Parenthood Federation of America from 1962-1974. Planned Parenthood first offered abortions in 1970,¹² during Guttmacher’s tenure as president.

Planned Parenthood of Greater New York (PPGNY) recently took steps to disavow its founder’s eugenic philosophy, announcing in July 2020 its intention to remove Sanger’s name from its building in Manhattan. And after years of the national organization trying to excuse away its racist roots, Planned Parenthood’s president and chief executive officer, Alexis McGill Johnson, finally admitted to Sanger’s eugenic beliefs in an April 2021 *New York Times* op-ed.¹³ “We will no longer make excuses or apologize for Margaret Sanger’s actions,” Johnson said.

Despite Planned Parenthood Federation of America’s pledge that it will reckon with the past harm Sanger caused, and despite PPGNY’s efforts to acknowledge the organization’s “historical reproductive harm within communities of color”¹⁴ and treat its role in this harm as a thing of the past, there is considerable evidence that abortion disproportionately slows racial minority birthrates and victimizes vulnerable populations. It is high time for Planned Parenthood to accept responsibility, not only for its eugenicist founder, but also for its ongoing involvement in the harm she began.

In May 2019, U.S. Supreme Court Justice Clarence Thomas wrote a lengthy opinion in *Box v. Planned Parenthood*, in which he cited abortion’s eugenic roots and its continued eugenic potential:

Whereas Sanger believed that birth control could prevent “unfit” people from reproducing, abortion can prevent them from being born in the first place. Many eugenicists therefore supported legalizing abortion, and abortion advocates—including future Planned Parenthood President Alan Guttmacher—endorsed the use of abortion for eugenic reasons. Technological advances have only heightened the eugenic potential for abortion, as abortion can now be used to eliminate children with unwanted characteristics, such as a particular sex or disability.¹⁵

A way to prevent these types of discriminatory abortions from happening is by passing PRENDA laws.

What Are PRENDA Laws?

Prenatal nondiscrimination acts (PRENDA) prohibit anyone from knowingly aborting the unborn child of a woman who sought the abortion solely on the basis of an inherent characteristic or disability of the unborn child.

The United States has a storied civil rights tradition of eliminating discrimination on the basis of race, sex, and disability. Federal and state laws prohibit discrimination on these bases in various contexts, including employment, education, housing, health insurance coverage, and athletics. PRENDA laws continue this civil rights legacy by prohibiting abortions motivated by bias against an unborn child's race, sex, or disability. These bills generally only implicate the abortion provider and exempt the mother from prosecution for seeking or obtaining a violating abortion.

The following are three major types of PRENDA laws and the vulnerable populations they seek to protect.

I. Genetic or Chromosomal Abnormality

Surveys suggest that many mothers facing a positive prenatal test result for common prenatally diagnosable conditions such as Down syndrome, spina bifida, or cystic fibrosis do not have access to the best information about the condition that has been diagnosed, the accuracy of the prenatal test, or contact with non-directive support services and support groups. Surveys also suggest that the number of unborn children terminated after being diagnosed with common prenatally diagnosable conditions is staggering. For babies prenatally diagnosed with cystic fibrosis (CF), the termination rate is 94.6 percent if both parents are known carriers of CF and 65 percent if parents are not known carriers of CF.¹⁶ For babies prenatally diagnosed with spina bifida, the termination rate is 63 percent, and for babies prenatally diagnosed with anencephaly, the termination rate is 83 percent.¹⁷

The country of Iceland prides itself on having nearly “eradicated” Down syndrome.¹⁸ However, the only reason the country has so few people with Down syndrome is that close to 100 percent of children diagnosed with Down syndrome are aborted before they are born. Iceland’s population is approximately 360,000, and only one or two people are born with Down syndrome each year.

A few years after the *Roe v. Wade* decision, the *American Journal of Mental Deficiency* published an article titled “Brief reports decline of Down’s syndrome after abortion reform in New York State.”¹⁹ The abstract stated, “trends indicate that abortion reform may have made a significant contribution to the reduction of severe mental retardation.” It is hard to imagine any medical journal publishing that a solution to a chromosomal abnormality is ending the person’s life. Yet, that is precisely what the *American Journal of Mental Deficiency* did in 1978. In the United States, 67 percent of women who receive a Down syndrome diagnosis for their unborn child choose abortion.²⁰

The following states have outlawed abortions on the basis of a Down syndrome diagnosis:

Arizona,²¹ Arkansas,²² Indiana,²³ Kentucky,²⁴ Louisiana,²⁵ Mississippi,²⁶ Missouri,²⁷ North Dakota,²⁸ Ohio,²⁹ South Dakota,³⁰ Tennessee,³¹ and Utah.³²

Unborn children with prenatal diagnoses besides Down syndrome are also facing discrimination in the womb. Since the late 1980s, through the process of alpha-fetoprotein screening and ultrasound diagnosis, doctors have been able to diagnose babies with meningomyelocele (MMC), more commonly known as a severe form of spina bifida, early in pregnancy. In Western countries, the abortion rate of an unborn child who has received a prenatal diagnosis of MMC is around 95 percent.³³

Discrimination in the womb also targets unborn babies with cystic fibrosis. In 1999, the National Institute of Health (NIH) recommended that CF screening become part of prenatal care so that parents could make “informed decisions” about having a child with CF. In 2001, the American College of Obstetricians and Gynecologists (ACOG) recommended the same course of action. As a result, prenatal testing for CF has become increasingly prevalent.³⁴ Although both NIH and ACOG

remain formally neutral, both organizations' policy recommendations include a link to the economic benefits of aborting an unborn child with CF.³⁵

Prenatal testing for CF is incredibly complicated, and accurately assessing the level of care a person with CF will need is challenging. Given the complexity of prenatally diagnosing CF, the alleged economic benefits of aborting a child with CF, and the lack of accurate information, parents face an immense amount of social pressure to abort their child.

Eugenic philosophy's responsibility for the prevalence of aborting babies with CF cannot be understated. Any pressure on a parent to abort a child is wrong but pressuring a parent to abort a child because of the potential cost of that child's health care is especially egregious. About 30,000 valuable members of society are currently living with CF in the United States,³⁶ and that value is not something that can be calculated in dollars and cents by NIH or ACOG.

If the abortion of unborn children diagnosed with disabilities continues to become the norm, born people with disabilities will face greater challenges as a result of this eugenic mindset. Therefore, passing laws that protect unborn children with genetic or chromosomal abnormalities also benefits those already born.

The following states have outlawed abortion on the basis of any genetic or chromosomal abnormality of the unborn child:

Indiana,³⁷ Kentucky,³⁸ Louisiana,³⁹ Mississippi,⁴⁰ North Dakota,⁴¹ and Oklahoma.⁴²

II. Race

Abortion and the corporate practices of abortion businesses disproportionately impact the birthrates of minority communities in the United States, particularly the black community. For example:

- According to a 2012 study by Life Issues Institute that relied on 2010 U.S. Census data, 79 percent of Planned Parenthood’s surgical abortion centers were located within walking distance of minority communities.⁴³
- Although black Americans make up about 13.4 percent of the U.S. population,⁴⁴ black women account for 33.6 percent of the country’s abortions.⁴⁵
- According to the Center for Disease Control’s (CDC) most recent Abortion Surveillance report, in the year 2018, “non-Hispanic Black women had the highest abortion rate (21.2 abortions per 1,000 women) and ratio (335 abortions per 1,000 live births).”⁴⁶ Meanwhile, “[n]on-Hispanic White women had the lowest abortion rate (6.3 abortions per 1,000 women) and ratio (110 abortions per 1,000 live births).”⁴⁷
- According to the Louisiana Bureau of Vital Records and Statistics, the total number of abortions in that state in 2018 was 8,097. Over half of those abortions (4,958) were of black babies, despite black residents only comprising 32 percent of the state population.⁴⁸
- In New York City, where the Planned Parenthood building formerly named for Margaret Sanger is located, more black pregnancies resulted in abortion than live birth in 2016 (23,209 versus 22,465).⁴⁹
- The U.S. Census Bureau reports that the black population “grew at a slower rate than most other major race and ethnic groups in the country” between 2000 and 2010.⁵⁰
- Black women have obtained approximately 18,700,000 of the 65 million abortions in the United States since abortion was widely legalized in 1973.⁵¹ Poignantly, that is almost the entire U.S. black population (18,872,000) at the time of the civil rights movement in the 1960s.⁵²
- Today, there are 44 million black people in the United States.⁵³ Our country would have nearly 50 percent more black citizens if abortion had not ended the lives of so many black children prior to birth.

The following states have outlawed abortion on the basis of the unborn child’s race:

Arizona,⁵⁴ Indiana,⁵⁵ Kentucky,⁵⁶ Mississippi,⁵⁷ Missouri,⁵⁸ and Tennessee.⁵⁹

III. Sex Selection

Emerging technologies, such as noninvasive prenatal testing, are making it possible to identify an unborn child's sex earlier in pregnancy than before. However, these developments are also making prenatal sex discrimination, in the form of sex selection, easier. In addition to being a civil rights abuse, sex-selective abortion is also a form of sex-based violence. Abortions of this kind are most frequently committed on baby girls during the second or third trimester of pregnancy after the sex has been determined. It should also be noted that abortions at this stage of pregnancy are particularly horrific because they are committed when the unborn child is already capable of feeling pain, according to substantial medical evidence.⁶⁰

Sex-selective abortion is particularly widespread in China, where sex-selection abortion has led to an estimated deficit of 34 million girls relative to boys.⁶¹ A 2015 annual report by the U.S. Congressional-Executive Commission on China reported that sex-selective abortions are still widely practiced there because of a "son-preference" deeply embedded in Chinese culture, coupled with the government's draconian family size restrictions, only recently changed from a one-child to two-child policy in 2015.⁶²

The documentary *One Child Nation*, winner of the 2019 Sundance Film Festival's Grand Jury Prize,⁶³ is a heart-rending, eye-opening account of China's one-child policy and the human rights violations that ensued. It reveals the particularly devastating effects the one-child policy had on women and girls. In the film, documentarian Nanfu Wang interviews her own mother, Zaodi, who recounts the pressure the family felt to bear a son: "When I was about to give birth to your brother, your grandma put a bamboo basket in the living room and said, 'If it's another girl, we'll put her in the basket and leave her in the street.'"⁶⁴ *One Child Nation* reveals that such experiences were not uncommon. Many female children were either aborted or abandoned on account of their sex, and the one-child policy gave way to a generation of trauma for girls and families.

China has one of the most skewed sex ratios in the world, with 106 males for every 100 females, far higher than the global average.⁶⁵ This has had significant social consequences. The disparity has fed a

“bride trafficking” market in China. Girls from impoverished communities in surrounding countries, including Pakistan, Myanmar, and Vietnam, are routinely targeted by Chinese traffickers, manipulated into a human trafficking arrangement, and sold to live as the brides of Chinese men who cannot find wives.⁶⁶

India also has an alarmingly unbalanced sex ratio. Selective abortion of girls is common, especially for second children after the first-born is a girl. It is estimated that sex-selective abortions of girls in India totaled approximately 4.2–12.1 million between 1980 and 2010.⁶⁷

Trends in other parts of Asia and the former Soviet Union have also shown a skewed sex ratio. Overall, 160 million girls are estimated to be missing worldwide because of sex-selective abortions.⁶⁸

Unfortunately, sex-selective abortion is likely occurring in the United States as well, especially within some ethnic groups with a preference for male children. A 2008 study by Columbia University economists Douglas Almond and Lena Edlund found “evidence of sex selection, most likely at the prenatal stage” among U.S.-born children of Chinese, Korean, and Asian Indian parents.⁶⁹ Coupled with declining fertility rates, the disparity in birth rates between boys and girls could have serious long-term implications in the United States if sex-selective abortion is not outlawed.

Being female should not be a death sentence for an unborn child. But as long as some cultures and individuals value male children over female, sex-selective abortions and other crimes against female children will continue to be a problem. Allowing humans to be discriminated against on account of their sex before birth fosters a culture of sex-based discrimination outside of the womb as well. The practice of sex selection makes humans into commodities with features parents can choose based on preference, rather than unrepeatably persons worthy of being welcomed into the world regardless of their sex.

Banning sex-selective abortion is overwhelmingly popular in the United States. In one study, 77 percent of respondents said they would be in favor of banning sex-selective abortion.⁷⁰

The following states have outlawed abortion on the basis of the unborn child's biological sex:

Arizona,⁷¹ Arkansas,⁷² Indiana,⁷³ Kansas,⁷⁴ Kentucky,⁷⁵ Mississippi,⁷⁶ Missouri,⁷⁷ North Carolina,⁷⁸ North Dakota,⁷⁹ Oklahoma,⁸⁰ Pennsylvania,⁸¹ Tennessee,⁸² and South Dakota.⁸³

PRENDA at the Federal Level

PRENDA legislation has been introduced in both the U.S. Senate and the House of Representatives. However, no PRENDA bill has ever passed a vote. The first PRENDA bill ever introduced in Congress was the Susan B. Anthony Prenatal Nondiscrimination Act of 2008. More recently, Rep. Ann Wagner (R-Mo.) introduced a Prenatal Nondiscrimination Act in the House to ban sex-selective abortion.⁸⁴ Senator John Kennedy (R-La.) has introduced a similar bill in the Senate.⁸⁵ In 2019, the first stand-alone Down syndrome abortion ban was introduced in the House⁸⁶ and Senate.⁸⁷

Lawsuits against PRENDA Laws

Pro-abortion activists have brought suit against PRENDA laws, claiming they infringe on a woman's right to an abortion before viability. As a result, some states' PRENDA laws have been struck down.

Indiana

Indiana passed a PRENDA law prohibiting abortionists from knowingly aborting the unborn child of a woman who sought the abortion solely on the basis of the unborn child's race, sex, or disability (including Down syndrome). The Seventh Circuit struck down Indiana's law.⁸⁸ In *Box v. Planned Parenthood*, the U.S. Supreme Court denied cert on the sex-selective and disability ban issue in the case.⁸⁹ The Court did not decide the issue because no other circuit, besides the Seventh, had ruled on the issue.⁹⁰ Justice Thomas wrote his own, lengthy opinion in order to bring attention to the history of abortion being used as a tool for eugenics.⁹¹ He highlighted the state's compelling interest in preventing

abortion from being used as a tool of modern-day eugenics.⁹² Justice Thomas' concurrence has led other judges to write similar concerns in lower courts as more judges are willing to uphold PRENDA laws.

Ohio

A three-judge Sixth Circuit panel struck down Ohio's Down syndrome abortion ban.⁹³ Judge Batchelder wrote a dissent citing Justice Thomas' concurrence in *Box v. Planned Parenthood*. She quoted Justice Thomas saying, “[w]hatever else might be said about *Casey*, it did not decide whether the Constitution requires States to allow eugenic abortions.”⁹⁴

The full Sixth Circuit issued a stay on the three-judge panel's judgment and took up the case en banc.⁹⁵ The en banc Sixth Circuit upheld Ohio's Down syndrome ban in a sweeping victory for the unborn and the pro-life movement. The court vacated the district court's preliminary injunction against the law and held that the state may enforce its law that prohibits the doctor from committing an abortion with the knowledge that the mother's reason for having the abortion is due to a diagnosis of Down syndrome.⁹⁶

The Department of Justice (DOJ) filed an amicus brief defending Ohio's law.⁹⁷ Assistant Attorney General Eric Dreiband of the Civil Rights Division said, “Ohio's Antidiscrimination Law affirms that people with Down syndrome have lives worth living and protecting. The Law also protects the medical profession from harm to its integrity and protects women from abortion providers who may seek to pressure them into obtaining an abortion because of Down syndrome.” He went on, “The federal government has an interest in the equal dignity of those who live with disabilities. Nothing in the Constitution requires Ohio to authorize abortion providers to participate in abortions the providers know are based on Down syndrome.”

Arkansas

Little Rock Family Planning brought a lawsuit seeking a temporary restraining order against Arkansas' Down syndrome abortion ban. The District Court for the Eastern District of Arkansas issued the

temporary restraining order, holding that the law protecting those with Down syndrome interfered with a woman's ability to choose abortion before viability.⁹⁸

Tennessee

Tennessee's PRENDA law had a court victory when a Sixth Circuit panel allowed the bill to go into effect while litigation continues over the bill's legality.⁹⁹ Although abortion businesses tried to claim that the law was improperly vague, the court disagreed.¹⁰⁰

Human Dignity

The Declaration of Independence proclaims that "all men are created equal" and "endowed by their Creator with certain unalienable Rights," among which are "Life, Liberty, and the pursuit of Happiness."¹⁰¹ The United States is a nation founded on ideals, particularly ideals relating to the dignity of the human person. Although America has not always perfectly upheld these ideals, she has a long history of striving to better recognize all people as being worthy of dignity and respect—regardless of age, race, ability, economic status, religion, sex, or country of origin—in the pursuit of becoming "a more perfect Union."¹⁰²

The value of the human person does not emanate from external traits or capacities, or even human rights laws passed by governments or adopted by intergovernmental organizations. Rather, human dignity is grounded in the reality that all people, born and unborn, possess inherent value by virtue of their shared humanity. All people are equal and deserve to be welcomed into society. Government's role is to help secure humanity's rights and keep them from being violated. History has shown the atrocities of eugenics, and with today's advanced technologies, modern law must keep pace to ensure that history's darkest moments are not repeated.

Conclusion

Although modern medical advancements, such as genetic testing and ultrasounds, have made it easier to heal various medical conditions afflicting unborn children, these advancements have also led to children being aborted on account of an inherent characteristic or a disability. PRENDA laws must be passed in order to prevent these types of discriminatory, eugenic abortions from happening. The various PRENDA laws highlighted in this brief will help promote a culture in which all human life is valued.

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- ²³ IND. CODE ANN. § 16-34-4-6 (LexisNexis through Public Law 2 of 2021 1st Reg. Sess. of 122nd General Assemb. and March 30, 2021).
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- ³⁹ LA. STAT. ANN. § 40:1061.1.2 (through 2020 2d Extraordinary Sess.).
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