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A Postal Code Lottery: Unequal Access to Abortion Services in the United States and Northern Ireland

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Abstract

This Note argues that one's postal code, or where one lives within the United States or in Northern Ireland, should not negatively impact a woman's access to safe abortion services. This Note will examine abortion-related jurisprudence in the United States and Northern Ireland and will make recommendations for the ways in which access to abortion services can be legally improved. Part I will explain current jurisprudence on abortion in the United States within the Due Process Clause and Equal Protection Clause contexts. Part II will analyze the current legal framework that governs access to abortion in Northern Ireland and will review its obligations under the European Convention on Human Rights. Part III will discuss how the restrictions on abortion in the United States and Northern Ireland must be revised to ensure access to this fundamental human right, ensuring compliance with nondiscrimination principles under the Equal Protection Clause and the European Convention on Human Rights. This Note will conclude by drawing parallels between the experiences that Texan and Northern Irish women face when seeking abortion services. When legal restrictions make abortion inaccessible, these regulations are discriminatory and leave women with no choice but to resort to unsafe measures or to carry unwanted pregnancies to term, as is happening in the United States and Northern Ireland.

KEYWORDS: Abortion, Equal Protection, Due Process, Discrimination, Ireland, UK, US, Privacy, Equality, Texas, Criminalization

NOTE

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Hailey K. Flynn[*]

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"*Abortion is no tragedy. No moral slip for which we forgive hapless, weak women. Abortion is one of the concrete, fundamental ways we assert women's right to design our own lives. It is one of the ways we claim ourselves—for ourselves*."[1]

\- *Marlene Gerber Fried*

1. Marlene Gerber Fried, *Abortion in the United States: Legal but Inaccessible*, in ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000, 224 (Rickie Solinger ed., 1998) (citing Stephanie Poggi, *Abortion in the Media*, RESIST NEWSLETTER (Feb. 1995)).

Throughout this Note, my use of the term "woman" is shorthand for individuals that can become pregnant. This analysis is not intending to disregard transgender men, gender non-conforming people, or intersex individuals that become pregnant since these legal barriers affect all people who become pregnant, and likely disproportionately impact people with diverse gender identities. However, the specific issues that people with diverse gender identities face are outside of the scope of this Note.

INTRODUCTION

After having to wait two weeks longer than she wanted, Sandra was finally able to get an appointment for her abortion procedure at a clinic in her home state of Texas.[2] Following new legal requirements, she needed to wait to see the same doctor who provided her a sonogram and mandatory counseling.[3] Unexpectedly, this doctor needed to have surgery, and therefore could not perform Sandra's abortion at the scheduled time.[4] Sandra was left either to hope that this doctor recovered before Texas' twenty-week gestational limit, or to restart the process with another doctor (that is, if there was an available appointment).[5] Meeting these requirements was further complicated by the hundreds of miles Sandra needed to drive to the clinic, the amount of money needed to arrange child care for her daughter, and the number of days that Sandra needed to take off from work to visit the clinic.[6] The longer that Sandra needed to wait to get an abortion, the more expensive the procedure became.[7] If she could not reschedule her appointment soon, other options would include traveling to nearby states or taking black market drugs to induce an abortion.[8] Frustrated and discouraged, she hoped to obtain her procedure quickly, knowing that getting an abortion is her *only* option.[9]

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2. This description is based on Amber's personal story of trying to get an abortion in Texas. The name has been changed since other facts were added. *See Stories: Amber, Texas*, DRAW THE LINE, http://www.drawtheline.org/stories/our-story-needs-to-be-told/ (last visited Jan. 27, 2016).

3. *See id.*

4. *See id.*

5. *See id.*

6. *See* Whole Woman's Health v. Cole, 790 F.3d 563, 598 (5th Cir. 2015) (stating that the closest clinic within Texas is 550 miles away from El Paso); *see also* Fried, *supra* note 1, at 212-13 (noting the barriers that low-income women face when attempting to obtain abortion access).

7. *See FAQs*, WOMEN'S MED, http://www.womensmed.com/faqs/faq/ (last visited Dec. 29, 2015) (obtaining an abortion increases approximately US$100 per week after eleven weeks gestation).

8. *See also* Manny Fernandez & Erik Eckholm, *Court Upholds Texas Limits on Abortions*, N.Y. TIMES, June 9, 2015, at A1 (noting that women were already traveling to New Mexico to obtain abortions); Erica Hellerstein, *The Rise of DIY Abortion in Texas*, THE ATLANTIC (June 27, 2014), http://www.theatlantic.com/health/archive/2014/06/the-rise-of-the-diy-abortion-in-texas/373240/ (increasing numbers of women crossing into Mexico to gain access to Misoprostol, which is a medicine that can be used to induce abortion, or access smuggled versions of the drug in the United States).

9. *See Stories: Amber*, *Texas*, *supra* note 2.

Where women have been afforded the right to terminate unwanted or risky pregnancies, abortion services have made women's lives safer, as maternal mortality ratios have dropped precipitously.[10] When women do not have access to abortion locally, however, *most* women are left with no choice but to carry an unwanted pregnancy to term or to seek a clandestine, unsafe abortion, putting their lives at risk.[11] The women that are disproportionately affected may be low-income women, women of color, immigrant women, and/or young women, raising concerns about intersectionality.[12] Conversely, affluent women will always find an abortion provider because neither cost nor travel poses an insurmountable hurdle.[13]

Within the United States, a woman living in El Paso, Texas might need to drive 550 miles to the nearest abortion provider in the state.[14] The ability for this woman to access an abortion depends upon

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10. *See* David A. Grimes et al., *Unsafe Abortion: The Preventable Pandemic*, 368 THE LANCET 1908, 1913 (2006) (noting a decrease in maternal mortality ratios when abortion is legal and accessible since demand shifts from clandestine, unsafe abortions to safe, legal ones); *see also* WORLD HEALTH ORG., SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS 23 (2d ed., 2012), http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf [hereinafter 2012 SAFE ABORTION GUIDELINES] (describing the reduction in maternal mortality ratios when safe, legal abortion is available).

11. *See* Grimes et al., *supra* note 10, at 1909-12 (discussing the severe health risks or death that may result from an unsafe abortion); *see also* 2012 SAFE ABORTION GUIDELINES, *supra* note 10, at 19-20 (explaining that health risks of unsafe abortion include hemorrhage; sepsis; peritonitis; or cervical, abdominal, vaginal, or uterine trauma). *See generally Safe and Legal Abortion is a Woman's Human Right*, CTR. FOR REPROD. RTS. 1 (2011), http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_fac_safeab_10.11.pdf.

12. *See, e.g.*, Fried, *supra* note 1, at 212-13 (noting the disproportionate impact on low income women, women of color, and young women in the United States); *see also* Ctr. for Reprod. Rts. & Nat'l Latina Inst. for Reprod., *Nuestra Voz, Nuestra Salud, Nuestro Texas: The Fight for Women's Reproductive Health Care in the Rio Grande Valley*, NUESTRO TEXAS 32-33 (2013), http://www.nuestrotexas.org/pdf/NT-spread.pdf [hereinafter *Nuestro Texas Report*] (discussing the particular challenges that undocumented women face in obtaining reproductive health care in the Rio Grande Valley).

13. *See* Laura Bassett, *Map Shows Abortion Access in Texas Now Only for Wealthy*, HUFFINGTON POST (Oct. 8, 2014), http://www.huffingtonpost.com/2014/10/08/texas-abortion-access-is-_n_5952968.html (noting that women with means can always afford to travel to access the abortion services that they need); *see also* Marcy Bloom, *Need Abortion, Will Travel*, RH REALITY CHECK (Feb. 25, 2008), http://rhrealitycheck.org/article/2008/02/25/need-abortion-will-travel/ (describing the historical reality that affluent women in need of abortions have always traveled to where safe and legal services are available).

14. *See* Whole Woman's Health v. Cole, 790 F.3d 563, 598 (5th Cir. 2015) (noting that the closest Texas clinic is 550 miles from El Paso); *see also* Fernandez & Eckholm, *supra* note 8 (noting that the court found the 550 mile requirement permissible since women were already traveling to New Mexico to obtain abortions).

her ability to take time off from work, have access to transportation, and child-care arrangements for multiple days due to the waiting period and the current backlog that Texas clinics are facing.[15] The Fifth Circuit reasoned that women should just cross state lines to Arkansas or New Mexico to access their constitutional right to an abortion.[16] The requirement to travel across state lines to obtain an abortion erects significant barriers to accessing the procedure and reinforces the stigma of getting an abortion.[17]

Similarly, in the United Kingdom's jurisdiction, Northern Ireland, most women's reasons for obtaining an abortion do not fall under the narrow health exception, which is the only circumstance in which abortion is permitted within the territory.[18] As such, to obtain an abortion, Northern Irish women are required to find or borrow as much as GB£2,000 to travel to other parts of the United Kingdom to access abortion from a private provider.[19] Due to the abortion stigma in Northern Ireland, taking time off from work, making child-care arrangements, finding money, and traveling for the procedure become even more complicated.[20]

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15. *See* Bassett, *supra* note 13 (stating that abortion restrictions in Texas are much more likely to impact low income women, who have less access to child and prenatal care, sex education, and other services). *See generally Nuestro Texas Report*, *supra* note 12 (describing the challenges to accessing reproductive health care in light of the clinic closures across Texas).

16. *See Whole Woman's Health,* 790 F.3d at 597-98 (describing that Texan women currently access abortions in New Mexico and can continue to do so).

17. *See generally* Fried, *supra* note 1, 208-24 (highlighting the barriers that women face to obtaining abortion despite its legality within the United States); Alison Norris et al., *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*, 21 WOMEN'S HEALTH ISSUES S49, S49-S54 (2011) (analyzing the roots of abortion stigma, those affected by it, and mechanisms to address the rampant abortion stigma in society in the United States).

18. *See infra* Part II.A (detailing the legal framework in Northern Ireland). *See generally* Amnesty Int'l, *Northern Ireland: Barriers to Accessing Abortion Services*, AMNESTY INT'L (2015), http://www.amnesty.org.uk/sites/default/files/eur_45_0157_2015_northern_ireland_-_barriers_to_accessing_abortion_services_pdf.pdf (describing the legal and practical barriers to abortion access in Northern Ireland).

19. *See Real Stories of Abortion in Northern Ireland: Mary's Story*, FAMILY PLANNING ASSOCIATION, http://www.fpa.org.uk/abortion-in-northern-ireland/video-stories (last visited Jan. 9, 2016) (discussing the stress of needing to find GB£2,000 before the 24 week limit when only diagnosed with a fetal abnormality at 20 weeks). *See generally Northern Ireland: Barriers to Accessing Abortion Services*, *supra* note 18 (noting the legal and actual barriers to abortion access in Northern Ireland).

20. *See Real Stories of Abortion in Northern Ireland: Irene's Story*, FAMILY PLANNING ASSOCIATION, http://www.fpa.org.uk/abortion-in-northern-ireland/video-stories (last visited

As these scenarios highlight, women without access to resources are the ones that bear the brunt of restrictive abortion policies, both in the United States and in Northern Ireland.[21] This Note argues that one's postal code, or where one lives within the United States or the United Kingdom, should not negatively impact a woman's access to safe abortion services. This Note will examine abortion-related jurisprudence in the United States and Northern Ireland and will make recommendations for the ways in which access to abortion services can be legally improved. Part I will explain current jurisprudence on abortion in the United States within the Due Process Clause and Equal Protection Clause contexts. Part II will analyze the current legal framework that governs access to abortion in Northern Ireland and will review its obligations under the European Convention on Human Rights. Part III will discuss how the restrictions on abortion in the United States and Northern Ireland must be revised to ensure access to this fundamental human right, ensuring compliance with non-discrimination principles under the Equal Protection Clause and the European Convention on Human Rights. This Note will conclude by drawing parallels between the experiences that Texan and Northern Irish women face when seeking abortion services. When legal restrictions make abortion inaccessible, these regulations are discriminatory and leave women with no choice but to resort to unsafe measures or to carry unwanted pregnancies to term, as is happening in the United States and Northern Ireland.[22]

Jan. 9, 2016) (discussing the difficulties of arranging for child care, borrowing money, and pretending to go to London on holiday to obtain an abortion); *see also Northern Ireland: Barriers to Accessing Abortion Services*, *supra* note 18, at 5 (describing the suffocating stigma that Northern Irish women face when they decide to get an abortion).

21. *See* Bassett, *supra* note 13 (illustrating challenges that low-income women face to obtain access to abortion services); *see also Northern Ireland: Barriers to Accessing Abortion Services*, *supra* note 18 (detailing the barriers that Northern Irish women face to access safe abortion services).

22. *See Safe and Legal Abortion is a Woman's Human Right, supra* note 11 (describing the choice that women are forced to make when they are unable to access safe abortion services); *see also* Grimes et al., *supra* note 10, at 1908 (describing the high incidence of unsafe abortions when abortion is criminalized or legal, but not easily accessible).

I. *LEGAL FRAMEWORKS FOR PROTECTING REPRODUCTIVE RIGHTS IN THE UNITED STATES*

This Part will (A) discuss the way in which the right to obtain an abortion is protected under the liberty interests as part of the Due Process Clause, (B) review how US courts have mostly declined to recognize the denial of access to abortions as sex discrimination under the Equal Protection Clause, and (C) analyze the way in which the Supreme Court has sometimes used the Due Process and Equal Protection Clauses to address discrimination. Reviewing the ways in which these legal protections of the fundamental right to abortion have been implemented will be compared to the Northern Irish legal framework in Part III.

A. *Due Process Clause Protections for the Right to Abortion in the United States*

This Section will (1) review foundational jurisprudence on contraceptives and abortion, detailing the scope of access to the right to abortion and (2) lay out the current regulations before the courts under the undue burden analysis, focusing on current challenges in the states of Mississippi, Texas, and Wisconsin. Finally, this Section will (3) review other areas of US legal doctrine that could be persuasive on this issue.

1. Historical Supreme Court Jurisprudence on the Right to Choose Whether and When to Bear Children

The right to an abortion has been guaranteed under the Due Process Clause, which states that no one shall be "deprived of life, liberty or property without due process of law."[23] The protection of the fundamental right to abortion began with the principles that the Court laid out in guaranteeing the right to contraceptives.[24] *Griswold*

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23. U.S. CONST. Amends. V, XIV. The Due Process Clause appears twice in the Constitution; the Fifth Amendment protects against federal incursions into a person's due process rights whereas the Fourteenth Amendment addresses potential abuses by individual states. *Id.* As such, when a federal regulation is alleged to infringe on the right to abortion, litigants will rely on the Fifth Amendment Due Process Clause. Conversely, when a state regulation is at issue, the Fourteenth Amendment Due Process Clause will be the basis for the challenge.

24. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 926-27 (1992)

v. Connecticut initially established the right to access and use contraceptives for married couples, which was guaranteed under the right to privacy within marriage.[25] Since the right to privacy itself is not explicitly stated in the Bill of Rights, the *Griswold* Court held that "[t]he foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[26] *Griswold* established that contraceptive use in marriage fell within the right to privacy from unwarranted governmental intrusion as a fundamental, constitutional right, forming the bedrock of reproductive rights law.[27] Notably, these rights protections were only guaranteed within the confines of marriage after *Griswold*, leaving room for the expansion of these rights to their unmarried counterparts.[28]

> [T]his Court also has held that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as procreation, child-rearing, marriage, and contraceptive choice. These cases embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government. In Roe v. Wade, this Court correctly applied these principles to a woman's right to choose abortion.

Id. (Blackmun, J., concurring in part, dissenting in part) (citations omitted) (referencing Justice O'Connor's opinion as well as the holding in Eisenstadt v. Baird, 405 U.S. 438 (1972) and Roe v. Wade, 410 U.S. 113 (1973)); *Eisenstadt*, 405 U.S. at 453 (noting the fundamental right to bodily autonomy, which includes the right to decide whether or when to bear a child).

25. Griswold v. Connecticut, 381 U.S. 479 (1965) (challenging a Connecticut statute that made it unlawful to use or prescribe contraceptives); *see also* Caroline Kane & Nina Ramos, *Healthcare Law Chapter: Contraception and Privacy*, 5 GEO. J. GENDER & L. 643, 643-45 (2004) (noting that *Griswold* first protected the constitutional right to privacy for married persons to use contraceptives under the liberty prong of the Due Process Clause).

26. *Griswold*, 381 U.S. at 484 (explaining how the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution provided guarantees of the right to privacy within the rights that these Amendments protect).

27. See Lance Gable, *Law Review Symposium 2010: Reproductive Rights, Human Rights, and the Human Right to Health: Article: Reproductive Health as a Human Right*, 60 CASE W. RES. 957, 972 (2010) (discussing Griswold as the foundation for Roe and its progeny, which continue to be the focal point of the reproductive rights conversation); *see also* Janel A. George, *2012 Feminist Legal Theory Conference: Beyond a Beautiful Fraud: Using a Human Rights Framework to Realize the Promise of Democracy*, 42 U. BALT. L. REV. 277, 286 (2013) (describing *Griswold* as foundational to mainstream reproductive rights jurisprudence in the 1960s and 1970s).

28. *Griswold*, 381 U.S. at 485-86 (focusing on the fundamental importance of marital privacy); *see also 50 Years After the Griswold v. Connecticut Decision: Fact Sheet*, NAT'L WOMEN'S LAW CTR. (2015), http://www.nwlc.org/sites/default/files/pdfs/griswold_anniversary_6.2.155.pdf.

The right to use and access contraceptives was expanded in *Eisenstadt v. Baird* to unmarried couples.[29] The Court held on Equal Protection grounds that its prior rationale to strike down the statute banning contraceptives to protect against unwarranted governmental intrusion into a marriage *per se* violated the rights of single persons wishing to use contraceptives.[30] Similarly situated individuals need to be treated alike; the Court held that this disparate treatment that unmarried couples experienced when attempting to access contraceptives amounted to an unlawful violation of their right to privacy.[31] "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[32] By using the Equal Protection framework, focusing on matters of equality rather than liberty, the *Eisenstadt* Court ensured that all similarly situated individuals should have equal access to their fundamental right to privacy, including the right to contraceptives.[33] Taken together, *Griswold* and *Eisenstadt* firmly established that the right to access contraceptives fell within the right to privacy, which was an

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29. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (expanding the privacy right by determining that it is the individual, who is either single or married, who needs to make the fundamental decision of whether or when to bear a child); *see also 50 Years After the Griswold v. Connecticut Decision: Fact Sheet*, *supra* note 28 (noting *Eisenstadt*'s expansion of the fundamental right to use contraceptives to unmarried couples).

30. *Eisenstadt*, 405 U.S. at 443 (noting that the Massachusetts statute violated Equal Protection for single persons). *See generally 50 Years After the Griswold v. Connecticut Decision: Fact Sheet*, *supra* note 28 (highlighting the importance of *Eisenstadt*'s expansion of the fundamental right to use contraceptives to unmarried couples).

31. *Eisenstadt*, 405 U.S. at 446-47 (citing Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)) (emphasizing that people cannot be placed into different categories and treated differently arbitrarily); *see also* Reed v. Reed, 404 U.S. 71, 75-76 (1971) (holding that an Idaho probate statute violates the Equal Protection of the Constitution by allowing preferential treatment of male over female applicants to be administrator of a decedent's estate since this classification does not pass a heightened scrutiny test).

32. *Eisenstadt*, 405 U.S. at 453 (establishing the fundamental right to bodily autonomy for single and married women alike). *See generally* Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203 (2007) (discussing the way in which the Due Process and Equal Protection Clauses worked in tandem in *Eisenstadt* to ground the fundamental right to decide whether or when to bear a child).

33. *See supra* note 31 and accompanying text (noting that denying unmarried access to contraceptives amounted to a violation of their right to privacy).

essential step for extending the right to privacy to encompass access to abortion.[34]

Examining the legality of accessing abortion, *Roe v. Wade* established the right by holding "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."[35] In this framework, *Roe* examined the rights of the potential life, asserting that these rights limit—yet do not extinguish—a woman's right to choose whether and when to have children.[36] *Roe* relied on the liberty provision under the Due Process Clause in the Fourteenth Amendment rather than Equal Protection grounds.[37] Reliance on liberty demonstrated the importance of freedom from governmental intrusion to make decisions on whether and when to bear a child and represented a continued revitalization of the substantive due process framework, resurrected in *Griswold*.[38] Although both aspects of the Fourteenth Amendment do protect unwarranted government intrusion into fundamental rights, the Equal Protection Clause provides an additional buffer against statutes that *de jure* discriminate against a particular class of people.[39]

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34. *See 50 Years After the Griswold v. Connecticut Decision: Fact Sheet*, *supra* note 28, at 2 (highlighting the role that Griswold and Eisenstadt played in opening the door to the fundamental Constitutional right to abortion); *Eisenstadt*, 405 U.S. at 453 (explaining that the privacy discussed in *Griswold* is between two individuals, thus requiring privacy from governmental intrusion to be protected in women's childbearing decisions).

35. Roe v. Wade, 410 U.S. 113, 154 (1973) (indicating the primary importance of women's autonomy, but that there are some instances in which there are potential compelling state interests in a potential life that may outweigh the woman's rights).

36. *Id*. at 162-64 (stating that the fetus only represents a potential life, and therefore cannot override the woman's health interests). *See generally* Khiara M. Bridges, *"Life" in the Balance: Judicial Review of Abortion Regulations*, 46 U.C. DAVIS L. REV. 1285 (2013) (explaining the challenges of regulating the interests in women's health and potential fetal life following *Roe*).

37. *See Roe*, 410 U.S. at 153 (focusing the due process rationale protected abortion as a liberty interest where a woman had the right to choose to obtain an abortion rather than looking at deprivation of abortion services as sex discrimination under equal protection); *cf.* Farrell, *supra* note 32, at 210-12 (discussing the overlap of the due process and equal protection doctrines in protecting fundamental rights in *Roe*).

38. *See supra* note 26 and accompanying text; *see also* Ryan C. Williams, *Symposium*, *The Evolution of Theory: The Paths to Griswold*, 89 NOTRE DAME L. REV. 2155, 2176-82 (2014) (noting the evolution of using emanations in the penumbras to ground the right to privacy in the Bill of Rights in *Griswold* and the path back to using the substantive due process doctrine).

39. *See generally* Farrell, *supra* note 32 (noting the interchangeability of the way that the Due Process and Equal Protection Clauses are used to protect fundamental rights); Yifat

Subsequent cases have narrowed the scope of a woman's right to obtain an abortion.[40] Although *Planned Parenthood v. Casey* is commonly regarded as the case that vastly limits the breadth of *Roe* since it developed the undue burden standard, this trend began under *Harris v. McRae* by upholding the constitutionality of the Hyde Amendment.[41] The Hyde Amendment restricts the cases in which Medicaid funding can be used to pay for abortions to solely instances of rape, incest, or life endangerment.[42] The *McRae* Court held that the Hyde Amendment does not violate the Fifth Amendment Due Process Clause or the Equal Protection Clause under rational basis scrutiny.[43] Although women have a constitutionally protected right to abortion, the *McRae* Court held that this constitutional right does not create a positive obligation for the government to ensure access to the

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Bitton, *The Limits of Equality and the Virtues of Discrimination*, 2006 MICH. ST. L. REV. 593 (2006) (comparing the legal remedies for *de jure* versus *de facto* discrimination and noting that Equal Protection most directly deals with *de jure* discrimination).

40. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980) (prohibiting Medicaid funding from covering abortion services); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (abrogating the trimester framework, developing the undue burden standard, and upholding regulations including parental consent laws and mandatory waiting periods); Gonzalez v. Carhart, 550 U.S. 124 (2007) (imposing a federal ban on the safer second trimester procedure since an alternative existed).

41. The undue burden standard under the Due Process Clause is an intermediate tier of scrutiny, and falls between strict scrutiny and rational basis. *See Casey*, 505 U.S. at 877-78 (establishing the undue burden standard, which is when "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."); *McRae*, 448 U.S. at 318 (couching a low income woman's inability to access abortion as a result of poverty as obstacle of her own creation, which the government is not obligated to cure).

42. Pub. L. 96-123 § 109 (1979) (noting the citation for the challenged Hyde Amendment under McRae). A version of the Hyde Amendment has been reauthorized annually since 1977. *See The Hyde Amendment Creates an Unacceptable Barrier to Women Getting Abortions: Fact Sheet*, NAT'L WOMEN'S L. CTR., 1 (July 2015), http://www.nwlc.org/sites/default/files/pdfs/the_hyde_amendment_creates_an_unacceptable_barrier.pdf (noting the impact that the Hyde Amendment continues to have on women who wish to obtain an abortion).

43. *McRae*, 448 U.S. at 316-18 (noting that the government is not obligated to ensure that there are not barriers to realizing constitutional rights protections). Rational basis scrutiny is when the law is rationally related to a legitimate government purpose. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 491 (1955) (stating that since the purpose of the statute is rationally related to the legitimate government objective, then the Court cannot strike down the statute as a violation of the Due Process Clause. This case also illustrates that rational basis review is a deferential standard).

procedure.[44] The *McRae* Court described the United States government's obligations as follows:

> But, regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. . . . although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of *her indigency*.[45]

By stripping low-income women of their ability to use Medicaid funding to pay for an abortion, many have argued that their right to access an abortion is virtually eliminated.[46]

When the Court decided *Planned Parenthood v. Casey*, critically, it upheld the fundamental right to an abortion prior to viability.[47] However, it is widely criticized for its development of the undue burden standard as a lesser level of protection for the

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44. *McRae*, 448 U.S. at 316-18 (stating that the Constitutional protections do not confer an entitlement to ensure that there are no barriers to the realization of that right). *See generally* Kris Palencia, *Harris v. McRae: Indigent Women Must Bear the Consequences of the Hyde Amendment*, 12 Loy. U. Chi. L. J. 255 (1981) (explaining the legal challenges to the Hyde Amendment).

45. *McRae*, 448 U.S. at 316 (emphasis added).

46. *See generally* Palencia, *supra* note 44, at 255 (describing the ways in which low income women are forced to bear the brunt of the Hyde Amendment, effectively eliminating their right to choose whether to obtain an abortion since it is not affordable); *The Hyde Amendment Creates An Unacceptable Barrier to Women Getting Abortions: Fact Sheet*, *supra* note 42 (describing the burdens that the Hyde Amendment places on low income women and the disproportionate impact of the Hyde Amendment on women of color).

47. Viability when the fetus can sustain life outside of the womb—a fact-specific inquiry for each pregnancy—but generally thought to be between twenty-four to twenty-eight weeks. *See, e.g., Viability (Nonviable or Viable)*, BOUVIER LAW DICTIONARY (2012); *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845-46 (1992) (amending the legal framework within which abortion restrictions can be viewed as legitimate state interests)*; cf.* Alan Brownstein, *How Rights are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 867-78 (1994) (viewing access to fundamental rights under the Constitution through the prism of abortion jurisprudence after the development of the undue burden standard in Casey).

fundamental right to an abortion.[48] Under the undue burden standard, government regulations designed to encourage women to continue the pregnancy are permitted, as long as these restrictions do not pose "a substantial obstacle to the woman's exercise of the right to choose."[49] Among the regulations under review were parental consent, informed consent, and waiting period requirements, each of which was upheld under the undue burden standard.[50] Under the liberty interest of the Due Process Clause, the undue burden standard of review serves as a lower tier of scrutiny than strict scrutiny but a higher tier than rational basis, introducing ambiguity into the rights protections that the fundamental abortion right receives.[51] Furthermore, since only the spousal notification requirement was struck down under the undue burden standard, the remaining restrictions that were upheld suggest that the standard is deferential to the legislature when determining whether regulations pose a substantial obstacle to a woman's right to choose.[52]

Mazurek v. Armstrong subsequently demonstrates that the substantial obstacle threshold is high by upholding a restriction where only physicians can perform abortions.[53] Despite the fact that a

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48. *Casey*, 505 U.S. at 875-79 (describing the scope of the undue burden standard); *see also* Brownstein, *supra* note 47, 867-92 (describing the ambiguities of the undue burden threshold).

49. *Casey*, 505 U.S. at 877-78 (citing parental consent requirements and other regulations intending to improve the woman's health as an example of a permissible restriction on women's right to choose). O'Connor also argues that informed consent requirements and 24 hour mandatory waiting periods before obtaining an abortion do not constitute an undue burden on a woman's right to choose. *Id.* at 882-83.

50. *Compare Casey*, 505 U.S. at 881-87 (noting the rationale for why parental consent for minors, a mandatory twenty-four hour waiting period, and informed consent requirements do not pose a substantial obstacle to a woman's right to choose), *with id.* at 887-95 (detailing how spousal notification puts women's safety at risk, for example, by subjecting them to increased risk of physical assault).

51. *See generally* Bridges, *supra* note 36 (describing where the undue burden standard falls as a tier of scrutiny); Brownstein, *supra* note 47 (explaining where the undue burden standard of scrutiny fits into the protection of fundamental rights).

52. *See Casey*, 505 U.S. at 877-79 (stating that women must be able to make the ultimate decision about whether or not to terminate a pregnancy). *But see* Mazurek v. Armstrong, 520 U.S. 968 (1997) (upholding a physician only provider requirement where a statute was passed to target a particular physician's assistant that provided abortions). *See generally* Part I.B (describing how regulations in effect have made it more difficult to obtain abortion services throughout the United States).

53. *See Mazurek*, 520 U.S. at 971-73 (claiming that the physician only requirement would not pose a substantial obstacle in practical effect for women wishing to obtain an

physician-assistant was the sole non-physician abortion provider in the state at the time of the passage of the physician-only requirement, the Supreme Court held that there was insufficient evidence to demonstrate that this regulation would pose a substantial obstacle to a woman's right to choose.[54] In 2007, the Supreme Court upheld the Congressional "partial birth abortion ban" in *Gonzales v. Carhart*, determining that banning an intact dilation and evacuation ("Intact D&E") procedure was reasonable despite the fact that an Intact D&E was the safest second-trimester abortion procedure alternative available to women.[55] The Court concludes that since "[a]lternatives are available to the prohibited procedure," this ban did not constitute a "substantial obstacle" to a woman's right to choose.[56] *Carhart* marks a continuation of the trend, illustrating the difficulty of showing that a particular restriction poses a substantial obstacle to abortion and demonstrating how high the threshold is to strike down regulations that impinge upon a woman's right to choose.[57]

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abortion); Bridges, *supra* note 36, at 1290-94 (describing the weaknesses in the undue burden framework).

54. *See Mazurek*, 520 U.S. at 973-74 (focusing on the fact that the statute might have a harmful effect is immaterial if it does not pose a substantial obstacle for women seeking access to abortion); Gonzales v. Carhart, 550 U.S. 124 (2007) (restricting physicians from practicing a safer second trimester abortion procedure since there was a similar, yet less safe available alternative).

55. *See Carhart*, 550 U.S. at 162 (noting "intact D&E decreases the risk of cervical laceration or uterine perforation because it requires fewer passes into the uterus with surgical instruments and does not require the removal of . . . fragments that may be sharp"); *see also* Brief of the American College of Obstetricians and Gynecologists as Amicus Curiae Supporting Respondents, Gonzales v. Carhart, Nos. 05-380/1382 (Nov. 2006) (explaining the medical reasons that Intact D&E is safer for women than a standard Dilation & Evacuation ("D&E") procedure and emphasizing that it is critical for the Intact D&E procedure to remain legal).

56. The available alternatives that the Court refers to are standard D&E procedures, which can also be performed during the second trimester. *Compare Carhart*, 550 U.S. at 156, 164 (stating that since the majority of D&E procedures would not be prohibited, this cannot amount to an undue burden), *with* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) ("And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.").

57. *See Carhart*, 550 U.S. at 156, 164; *see also* Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (noting that because of insufficient evidence in the record that there would be a substantial obstacle to obtaining an abortion, anti-abortion activists targeting a particular provider or the fact that there might be a harmful effect of the effect of the statute were deemed immaterial).

Although the core holding in *Roe* has remained intact through *Casey* and its progeny, these subsequent cases have vastly narrowed the scope of a woman's ability to terminate her pregnancy by safeguarding limits on who can actually obtain an abortion, alongside various state-level regulations that have served to increase waiting periods and introduced onerous restrictions.[58] Even when these restrictions do not meet the "undue burden" threshold, many of the regulations have either forced clinics to close or required women to jump through hoops to access a constitutionally protected medical procedure.[59]

2. An Undue Burden?

Three years after *Carhart* was decided, Tea Party Republicans were elected to Congress and state legislatures throughout the country and passed 288 anti-abortion regulations since 2011, amounting to more restrictions than were passed in the prior decade.[60] Many of these statutes are known as the Targeted Restrictions of Abortion Providers ("TRAP laws"), which are medically unnecessary requirements for facilities providing abortions that do not make the procedure safer for women, requiring providers to have admitting privileges at local hospitals or for clinics to meet the building

58. *See infra* Part I.B (describing the impact that the targeted regulation of abortion providers has had on accessing abortion in many states across the United States).

59. *See* The Editorial Board, *The Reproductive Rights Rollback of 2015*, N.Y. TIMES, Dec. 19, 2015, at SR10 (describing the increase in the passage of legislative measures, making it more difficult to access abortion procedures). *See generally* Esmé E. Deprez, *The Vanishing U.S. Abortion Clinic, Bloomberg QuickTake* (Sept. 14, 2015), http://www.bloombergview.com/quicktake/abortion-and-the-decline-of-clinics (describing the current expanse of anti-abortion legislation that has been able to limit the provision of abortion services); Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, 17 GUTTMACHER POL'Y REV. (2014), http://www.guttmacher.org/pubs/gpr/17/1/gpr170109.html (analyzing the impact that the flood of restrictions on abortion have had on accessing the procedure).

60. Tea Party Republicans emerged as an anti-Washington, libertarian faction of the party in 2010 for which its vehement opposition to abortion has been essential for maintaining the unity of the Republican party. *See* Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 282-83 (2013); *see also* Elizabeth Nash et al., *Laws Affecting Reproductive Health and Rights: 2013 State Policy Review: Abortion*, GUTTMACHER INST. tbl.1 (2014), http://www.guttmacher.org/statecenter/updates/2013/statetrends42013.html (illustrating substantial increase in number of abortion restrictions between 2011-2013 as compared to entire previous decade); Deprez, *supra* note 59 (highlighting the spike in anti-abortion regulations since 2010).

standards of ambulatory surgical centers.[61] These requirements have been challenged in various court cases, testing the limits of the undue burden standard.[62]

In Mississippi, the state legislature passed requirements for all physicians who perform abortions to obtain staff and admitting privileges to a local hospital through House Bill 1390 ("H.B. 1390").[63] Since the hospitals have been unwilling to grant these privileges, if H.B. 1390 goes into effect, the only remaining clinic providing abortion services in the state would be forced to close its doors.[64] In *Jackson Women's Health Organization v. Currier*, the Fifth Circuit held that Mississippi could not satisfy its Constitutional obligations by requiring women to travel to a different state to avail

61. *See generally Targeted Restrictions of Abortion Providers: States Policies in Brief*, GUTTMACHER INST. 1-2 (2015), https://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf (describing the most common types of TRAP laws and noting the scope of these restrictions in each of the states where TRAP laws have been passed or are in effect). *See also* Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—and the Women They Serve—Pay the Price*, 16 GUTTMACHER POL'Y REV. 8-10 (2013); Stephen Bendheim, Holly Puritz & Christian Chisholm, *Letter to Karen Remley, Commissioner of Health, Virginia Department of Health,* from Virginia Section, American Congress of Obstetricians and Gynecologists, V (Sept. 14, 2011), http://www.acog.org/About_ACOG/ACOG_Departments/State_Legislative_Activities/~/media/Departments/State%20Legislative%20Activities/2011VAACOGltrVDH.pdf.

62. *See* Currier v. Jackson Women's Health Organization, Docket No. 14-997 (filed Feb. 18, 2015), http://www.scotusblog.com/case-files/cases/currier-v-jackson-womens-health-organization/ (appealing the Fifth Circuit decision holding that the admitting privileges requirement constituted an undue burden); *see also* Whole Woman's Health v. Hellerstedt, Docket No. 15-274 (granted Nov. 13, 2015) (previously known as Whole Woman's Health v. Cole) (challenging the Fifth Circuit's decision that the admitting privileges and ambulatory surgical center requirements did not constitute an undue burden on a woman's right to choose an abortion). At the time of writing, only *Whole Woman's Health*'s petition for certiorari has been granted.

63. Jackson Women's Health Org. v. Currier, 760 F.3d 448, 450 (5th Cir. 2014) (explaining the requirements that HB 1390 imposed on the sole provider of abortion in the state); Mississippi H.B. 1390 § 1(f) (describing the admitting privileges requirement for abortion providers).

64. *Jackson Women's Health Org.*, 760 F.3d at 457-58 (describing the Constitutional problems with closing the only abortion provider in the state); *see also* Deprez, *supra* note 59 (noting that Mississippi is one of four states in the U.S. where there is only one abortion provider to serve the entire state); Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice,* 125 YALE L.J. 23 (forthcoming 2016) (stating reasons that hospitals are unwilling to grant admitting privileges and their far-reaching practical effect).

themselves of their rights, relying on *Missouri ex rel. Gaines v. Canada*.[65]

> Gaines simply and plainly holds that a state cannot lean on its sovereign neighbors to provide protection of its citizens' federal constitutional rights. . . . Gaines locks the gate for Mississippi to escape under another state's protective umbrella and thus requires us to conduct the undue burden inquiry by only looking at the ability of Mississippi women to exercise their right within Mississippi's borders.[66]

The Fifth Circuit noted the undue burden created by extinguishing the right to obtain an abortion within Mississippi's borders by requiring abortion providers to obtain medically unnecessary admitting privileges at a local hospital, further noting,

> Such a proposal would not only place an undue burden on the exercise of the constitutional right, but would also disregard a state's obligation under the principle of federalism—applicable to all fifty states—to accept the burden of the non-delegable duty of protecting the established federal constitutional rights of its own citizens.[67]

Mississippi filed a Petition for Certiorari, but at the time of writing, the Court had not yet determined whether it will hear the case.[68]

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65. *See* State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) (noting that Missouri cannot fulfill its constitutional obligations by relying on services available in other states). *Compare Jackson Women's Health Org.*, 760 F.3d at 449 (discussing how the State could not discharge its Constitutional obligations to another state under the principle of Federalism), *with* Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015) (noting that Texan women should be required to cross state lines to obtain abortion services since El Paso share metropolitan area with Santa Teresa, New Mexico).

66. *See Jackson Women's Health Org.*, 760 F.3d at 463 (relying upon *State of Missouri ex rel. Gaines v. Canada*, where the Court held that Missouri was in violation of Equal Protection by denying the African American male admission to a Missouri law school on the basis of race, but providing a stipend to attend law school in another state); *see also* Campbell Robertson & Erik Eckholm, *Judges Block Abortion Curb in Mississippi*, N.Y. TIMES (July 29, 2014), http://www.nytimes.com/2014/07/30/us/mississippi-abortion-clinic-federal-court-blocks-closing.html?_r=0 (describing the result of the Fifth Circuit opinion, noting the American College of Gynecologists and Obstetricians brief that asserts that admitting privileges requirements are medically unnecessary to guarantee the safety of an abortion).

67. *Jackson Women's Health Org.*, 760 F.3d at 449.

68. *See* Currier v. Jackson Women's Health Org., Docket No. 14-997, http://www.scotusblog.com/case-files/cases/currier-v-jackson-womens-health-organization/ (last visited Jan. 11, 2016) (listing the status of the challenge to the Fifth Circuit's decision in favor of *Jackson Women's Health Organization*); *see also* Petition for a Writ of Certiorari, Docket No. 14-___997 (Feb. 18, 2015), *Jackson Women's Health Org.*, 760 F.3d (filing a Petition for

Texas has also passed TRAP laws in House Bill 2 ("H.B. 2") where physicians are required to have admitting privileges to local hospitals, and any venue where abortions are performed is required to be outfitted as an ambulatory surgical center.[69] The law has been enjoined in part since its passage, but if it goes into effect completely, as few as eight clinics in urban areas would remain to serve the entire state of Texas.[70] Texas has a state population of approximately 27 million people and a square mileage of 268,596, which is larger than Australia in population and Afghanistan in square mileage.[71]

Following a negative judgment in the Fifth Circuit in June 2015, the Supreme Court granted *Whole Woman's Health*'s stay and subsequently its petition for a writ of certiorari.[72] The Petition for Certiorari alleges that if a regulation merely states that its objectives are to protect women's health and ensure access to safe abortion

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Certiorari on behalf of the State of Mississippi); Petition for a Writ of Certiorari: Brief in Opposition, Docket No. 14-997 (Apr. 21, 2015), Currier v. Jackson Women's Health Org., 760 F.3d 448 (5th Cir. 2014) (filing a response to the Petition on behalf of Jackson Women's Health Organization).

69. Texas H.B. 2 (2013) §§ 2, 4 (describing the admitting privileges requirement in section 2 and the ambulatory surgical center requirement in section 4, both of which are currently being challenged); *Texas Omnibus Abortion Bill H.B. 2: RHRC Data*, RH REALITY CHECK, http://data.rhrealitycheck.org/law/texas-omnibus-abortion-bill-hb-2-2013/ (last visited Jan. 11, 2016) [hereinafter *Texas Omnibus Abortion Bill Data*] (describing the provisions of H.B. 2).

70. *See* Bassett, *supra* note 13 (illustrating the clinic closures that would result if H.B. 2 goes fully into effect in Texas, where only eight clinics would remain open); *see also Texas Omnibus Abortion Bill Data*, *supra* note 69 (describing the status of the court challenges to the relevant H.B. 2 provisions).

71. *See State and County QuickFacts: Texas*, UNITED STATES CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST045214/48,00 (last visited Jan. 11, 2016) (noting that Texas' 2014 population estimate is 26,956,958); *see also* U.N. DEP'T OF ECON. & SOC. AFFAIRS, POPULATION DIVISION, WORLD POPULATION PROSPECTS: THE 2015 REVISION, KEY FINDINGS AND ADVANCED TABLES, ESA/P/WP.241, 13-17 (2015) (listing the population by country). *Compare State Area Measurements and Internal Point Coordinates*, UNITED STATES CENSUS BUREAU, https://www.census.gov/geo/reference/state-area.html (last visited Jan. 11, 2016), *with Square Miles: Countries Compared*, NATIONMASTER, http://www.nationmaster.com/country-info/stats/Geography/Land-area/Square-miles (last visited Jan. 11, 2016) (illustrating that the area of Texas is larger than the area of most countries of Myanmar (Burma), Afghanistan, and France).

72. *See* Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015) (finding in favor of the State of Texas, allowing the H.B. 2 provisions to go into effect); Petition for Writ of Certiorari, Docket No. 14-50928 (2015), Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015) (granted Nov. 13, 2015) (this case has been renamed Whole Woman's Health v. Hellerstedt) (arguing that the Fifth Circuit decision is wrongly decided since the regulations violate the undue burden standard and restricts access to safe abortion services).

services, this statement alone is insufficient to meet the legitimate purpose requirement under the Due Process Clause.[73] To avoid the imposition of a substantial obstacle in purpose or effect under the undue burden requirement, the Court must be able to review the actual effect on women's health, since H.B. 2 would have the impact of closing three-quarters of the clinics that were in operation prior to its passage.[74] In its decision, the Fifth Circuit also distinguishes *Whole Woman's Health* from *Jackson* on Equal Protection grounds, stating that the effect of the admitting privilege requirements in Mississippi would be to close the only clinic in the state whereas women living on the Texas border who faced clinic closures would be able to visit the clinics in Arkansas or New Mexico.[75]

Admitting privileges requirements in Wisconsin have also been challenged.[76] The Wisconsin statute dictated that doctors that provided abortions needed to have admitting privileges to hospitals within thirty miles of the facility where the abortion was provided.[77] In *Planned Parenthood of Wisconsin v. Schimel*, the Seventh Circuit upheld the West District of Wisconsin's decision that the admitting privileges requirements were unconstitutional as they violated the

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73. Petition for Writ of Certiorari, *supra* note 72, at *2, *13-*17 (arguing that the Court must review the extent to which the regulation actually benefits women's health under the undue burden standard since the regulation cannot have the purpose or effect of placing a substantial obstacle on a woman's right to obtain an abortion prior to viability); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.").

74. Petition for Writ of Certiorari, *supra* note 72, at *33-34 (noting the impact that H.B. 2 would have on clinic closures throughout Texas); s*ee also* Bassett, *supra* note 13 (highlighting that if H.B. 2 goes into effect, the remaining clinics would be clustered in urban areas).

75. *Compare Whole Woman's Health*, 790 F.3d at 563 (noting that Texan women already cross the border into New Mexico to obtain abortion), *with* Jackson Women's Health Organization v. Currier, 760 F.3d 448 (5th Cir. 2014) ("So long as the undue burden analysis is confined by Mississippi's borders, the closure of that state's sole abortion provider *must* be an undue burden.").

76. At the time of writing, the State of Wisconsin has not filed a Petition for a Writ of Certiorari. *See* Planned Parenthood of Wis., Inc. v. Schimel, No. 15-1736 (7th Cir. 2015) (discussing the permanent injunction of the admitting privileges requirement); *see also* Wis. Stat. § 253.095(2) (stating that abortion providers must have admitting privileges to hospitals within thirty miles of the clinic where the abortion is provided).

77. Wis. Stat. § 253.095(2) (establishing that doctors providing abortion must have admitting privileges to hospitals within thirty miles of the abortion clinic); *see also* Wis. Stat. § 940.15(5) (stating that only doctors are permitted to perform abortions in Wisconsin).

undue burden standard established under *Casey*.[78] In his opinion, Judge Posner emphasized that the inability to obtain admitting privileges would result in halving the number of abortion clinics in the state, reducing the capacity of the clinics that are able to continue operating, and not providing significant additional benefits beyond the existing hospital transfer protocols.[79] The State of Wisconsin argues that women in need of late-term abortions can travel to Chicago, in neighboring Illinois, since it is roughly ninety miles from Milwaukee.[80] The *Schimel* court relies on *Gaines* and *Ezell v. City of Chicago*, noting that one's liberty to enjoy constitutional rights cannot be curtailed based upon the assumption that the right to an abortion can be exercised in another jurisdiction, making this an unconstitutional alternative to providing abortion within Wisconsin.[81]

Querying whether admitting privileges would improve women's health, Judge Posner emphasized that abortion complications are "rare and rarely dangerous—a fact that further attenuates the need for abortion doctors to have admitting privileges" and are four times less

78. *Schimel*, No. 15-1736 at 14-15 (quoting Planned Parenthood of Wisconsin v. Van Hollen, No. 13-cv-465-wc, 2013 WL 3989238 at *10 n. 26 (W.D. Wis. Aug. 2, 2013) ("[T]he complete absence of an admitting privileges requirement for [other] clinical [i.e., outpatient] procedures including for those with greater risk [than abortion] is certainly evidence that [the] Wisconsin's legislature's only *purpose* in its enactment was to restrict the availability of safe, legal abortion in this State, particularly given the lack of any demonstrable medical benefit for its requirement either presented to the Legislature or [to] this court." (emphasis in original)); *see also* Tara Culp-Ressler, *Judge Explains the Dangerously Successful Strategy Against Abortion Rights in Three Sentences*, THINK PROGRESS (Nov. 24, 2015), http://thinkprogress.org/health/2015/11/24/3725319/wisconsin-abortion-federal-court/ (describing how restrictions on abortion have served to significantly reduce access and were held to be unconstitutional in the Seventh Circuit).

79. *Schimel*, No. 15-1736 at 6-7, 25 (describing how women's access to essential health services is decreased and does not benefit women); *see also* Culp-Ressler, *supra* note 78 (noting that restrictions on abortion providers do not enhance the safety of abortion procedures, which are already safe and result in few complications).

80. *Schimel*, No. 15-1736 at 20-22 (emphasizing that eighteen to twenty-four percent of women that would need to travel to Chicago or its surrounding areas would not be able to travel, for various reasons); *see id.* at 22-23 (quoting Planned Parenthood Arizona v. Humble, 753 F.3d 905, 913 (9th Cir. 2014)).

81. *Id*. at 20-21 (citing Ezell v. City of Chicago, 651 F.3d 684, 697 (7th Cir. 2011) (citations omitted) (noting that one's constitutional right to free speech cannot be abridged based upon the idea that it can be exercised in another place)); *see also* State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 350 (1938) ("[T]he obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction.").

likely to occur than other routine procedures such as colonoscopies.[82] Judge Posner highlighted many legislatures' purposes when passing TRAP laws in their respective states:

> [ ] convincing the Court to overrule Roe v. Wade and [Planned Parenthood v. Casey] is a steep uphill fight, and so some of them proceed indirectly, seeking to discourage abortions by making it more difficult for women to obtain them. They may do this in the name of protecting the health of women who have abortions, yet as in this case the specific measures they support may do little or nothing for health, but rather strew impediments to abortion. . . . Opponents of abortion reveal their true objectives when they procure legislation limited to a medical procedure—abortion—that rarely produces a medical emergency.[83]

Since these TRAP laws disproportionately impact lower-income women and do not improve women's health to a sufficient extent to justify the curtailment of the constitutional right to abortion, the permanent injunction on the admitting privileges requirement was upheld.[84]

In addition to these requirements, legislatures have also passed a wave of mandatory ultrasound laws.[85] In North Carolina, for example, providers were not only required to administer an ultrasound, but also were mandated by the state to describe fetal development details,

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82. *Schimel*, No. 15-1736 at 8, 12 (describing that corollary admitting privileges requirements do not exist for procedures that produce more complications such as colonoscopies); *see also* Emily Crockett, *The Case Against Anti-Abortion "Admitting Privileges" Laws, in One Court Ruling*, VOX POL'Y & POLITICS (Nov. 25, 2015), http://www.vox.com/2015/11/25/9801108/anti-abortion-scott-walker-defeat (describing the ways in which admitting privileges requirements do not improve women's health, including the fact that no other outpatient procedures-including those with higher complication rates—required admitting privileges).

83. *Schimel*, No. 15-1736 at 25.

84. *See infra* Part III.A.1-2 (discussing the disproportionate impact of abortion restrictions on low-income individuals); *Schimel*, No. 15-1736 at 20-23, 25-26, 28-29 (describing that admitting privilege requirements do not have a strong medical justification, and therefore are more likely to pose an undue burden on a woman's right to access abortion services).

85. *See State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INST. (Sept. 1, 2015), http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf (detailing the ultrasound requirements in various states, three of which resemble the North Carolina provision that was struck down); *see also* Adam Liptak, *Supreme Court Refuses to Hear Case on Pre-Abortion Ultrasounds*, N.Y. TIMES, June 15, 2015, at A16 (noting that North Carolina was one of five states where the provider was required to display and describe the ultrasound image to the woman seeking an abortion).

irrespective of whether the woman wanted to know this information.[86] In *Stuart v. Camnitz*, the Fourth Circuit heard this challenge, striking down this mandatory ultrasound requirement as compelled speech for providers; North Carolina's subsequent Petition for Certiorari was denied.[87] The current cases pending certiorari review will test the strength of the undue burden standard to determine whether women can actually access their fundamental right to abortion.[88]

B. *What Have Courts Said about the Denial of Abortion Services as Sex Discrimination?*

The prevailing view for how abortion has been protected within US jurisprudence has been through the liberty right under the Due Process Clause.[89] With few exceptions, the US legal system has declined to recognize the denial of abortion access as sex discrimination *per se*.[90] This section will review historical approaches to Equal Protection jurisprudence with a particular focus on when discrimination on the basis of sex can be triggered.

Facing discrimination as a result of pregnancy is an experience that only a woman could have, and therefore constitutes sex discrimination.[91] To quote Justice Ginsburg, "[i]t was always

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86. Stuart v. Camnitz, 774 F.3d 238, 246 (4th Cir. 2014) (cert. denied) (describing that the physician is required to administer and describe the ultrasound, even if the woman does not wish to see or hear about the fetus); *see also* Liptak, *supra* note 85 (stating that twenty-four states have pre-abortion ultrasound requirements and five states had similar regulations to North Carolina's unconstitutional version).

87. *Stuart*, 774 F.3d at 256 ("Transforming the physician into the mouthpiece of the state undermines the trust that is necessary for facilitating healthy doctor-patient relationships and, through them, successful treatment outcomes."); *see also* Liptak, *supra* note 85 (describing the Court's standard one sentence order for the rejection of certiorari review).

88. Petition for Writ of Certiorari, *supra* note 72, at *2, *13-*17 (arguing that the Fifth Circuit's decision constituted an undue burden in violation of the Due Process Clause); Petition for a Writ of Certiorari: Brief in Opposition, Docket No. 14-997 (Apr. 21, 2015), Jackson Women's Health Org. v. Currier, 760 F.3d 448, 448 (5th Cir. 2014) (filing a response to the petition on behalf of Jackson Women's Health Organization).

89. *See supra* Part I.A.

90. *See* Roe v. Wade, 410 U.S. 113, 153-54, 162-64 (1973) (deciding that a woman's right to choose an abortion was protected under the Due Process Clause); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877-79 (1992) (upholding the central tenet of Roe, determining that a woman's right to choose was protected until viability under the undue burden standard).

91. *See generally* Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010) (analyzing now Justice Ruth Bader Ginsburg's arguments for why pregnancy discrimination

recognition that one thing that conspicuously distinguishes women from men is that only women become pregnant; and if you subject a woman to disadvantageous treatment on the basis of her pregnant status . . . you would be denying her equal treatment under the law."[92] Yet, the Supreme Court in *Geduldig v. Aiello* disagreed, holding that pregnancy-related discrimination did not constitute sex discrimination; as a result, the Equal Protection Clause has largely been viewed as an unreliable avenue for protecting abortion-related rights.[93] In *Geduldig*, the Court reviewed a California disability statute where pregnancy-related disabilities were ineligible for coverage under the state insurance scheme and held that this prohibition did not constitute sex discrimination, despite the fact that pregnancy is a condition that only women can experience.[94] Subsequently, *Geduldig*'s reasoning was applied in *General Electric v. Gilbert*, where the Court held that the denial of pregnancy-related disabilities under a disability plan was not a violation of the Civil Rights Act.[95] The Pregnancy Discrimination Act was passed in Congress in response to *Geduldig* and *Gilbert*'s restrictive holdings, yet its application is limited in that it only applies to employment

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constitutes sex discrimination); Diane L. Zimmerman, *Comment: Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441 (1975) (describing how the *Geduldig* Court failed to recognize the differential impact that pregnancy and other gender-specific characteristics have on women).

92. *See* Siegel & Siegel, *supra* note 91, at 771 (citing Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 103d Cong. 206 (1993) (statement of Judge Ginsburg)).

93. *See id.* at 791 (noting that the sex discrimination and abortion jurisprudence have developed in isolation from one another). *See generally* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985) (noting Roe's shortcomings by not deciding the case on sex equality grounds).

94. *See* Geduldig v. Aiello, 417 U.S. 484, 493-97 (1974) (holding that pregnancy related disabilities are not eligible for coverage and accordingly do not constitute a violation of Equal Protection); *see also id.* at 501 (Brennan, J., dissenting) ("Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.").

95. *See* General Electric Co v. Gilbert, 429 U.S. 125, 138 (1976) (describing that denial of pregnancy-related disability benefits does not violate Equal Protection); Siegel & Siegel, *supra* note 91, at 772 n.8 (explaining how *Geduldig*'s reasoning was applied in *Gilbert*); *see also* Daniela M. de la Piedra, *Flirting with the PDA: Congress Must Give Birth to Accommodation Rights that Protect Pregnant Working Women*, 17 COLUM. J. GENDER & L. 275, 279-80 (2008) (describing *Gilbert*'s holding that there are no risks that men are protected from that women are not and no risks that women are protected from that men are not, therefore not violating Equal Protection doctrine).

settings.[96] Sex discrimination in employment settings is defined to include discrimination that occurs:

> because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .[97]

The Pregnancy Discrimination Act also specifies that prohibiting pregnancy discrimination does not require or preclude employers from paying for abortions, except in the necessary case when carrying the fetus to term would endanger the mother's life.[98] Women's childbearing capabilities have historically resulted in their "disadvantaged treatment" and discrimination.[99] Although the Pregnancy Discrimination Act partially corrects for the pregnancy-based discrimination, it is limited to employment settings, which is only a small subset of the ways in which women experience pregnancy-based discrimination.[100] Despite Equal Protection language that would seem to support the provision of abortion rights, the scepter of *Geduldig* still looms large.[101] Although prior gender-related

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96. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978) (providing that discrimination on the basis of pregnancy in employment contexts is unlawful); *see also* Siegel & Siegel, *supra* note 91, at 772 n.8 ("Congress responded by enacting the Pregnancy Discrimination Amendment to Title VII (PDA), which defines discrimination on the basis of pregnancy as discrimination on the basis of sex.").

97. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978) (establishing the grounds for pregnancy discrimination and statutorily rejecting *Geduldig* and *Gilbert* in employment contexts).

98. *Id*. (ensuring critical protections for the woman's health). *See generally* de la Piedra, *supra* note 95 (critiquing the Pregnancy Discrimination Act's functionality in limiting discrimination in employment settings).

99. *See* Siegel & Siegel, *supra* note 91, at 783 (citing Brief for the Petitioner, Struck v. Sec'y of Def., 409 U.S. 1071 (1972) (No. 72-178), 1972 WL 135840); *see also* John C. Gibson, *Childbearing and Childrearing: Feminists and Reform*, 73 VA. L.R. 1175, 1175 (1987) (describing the slow pace of reform for pregnancy-related policies due to the perception of women as child-rearers).

100. *See e.g.*, Ginsburg, *supra* note 93, at 375-86 (describing the importance of applying the equality framework to address pregnancy-related issues, including the abortion question). *See generally* de la Piedra, *supra* note 95 (discussing the limits of the application of the PDA).

101. *See* Julie F. Kay, *Note: If Men Could Get Pregnant: An Equal Protection Model for Federal Funding of Abortion Under a National Health Care Plan*, 60 BROOKLYN L. REV. 349, 377-80 (1994) (noting the Court's denial to recognize that regulations affecting pregnant women affect women as a class); *see also* Zimmerman, *supra* note 91, at 461-62 (highlighting

Equal Protection cases had applied some heightened standard of scrutiny to gender-based classifications, the *Geduldig* Court's decision not to recognize pregnancy as a sex-based trait necessarily sits in tension with these cases.[102]

Applying the Equal Protection doctrine to abortion jurisprudence is also limited by the principle that only facial, *de jure* discrimination is unconstitutional.[103] *Washington v. Davis* is the key case in analyzing discriminatory effect in the Equal Protection context, where the Court explicitly limited the applicability of the Equal Protection Clause to facial, *de jure* discrimination rather than expanding its scope to include the prohibition of *de facto* discrimination.[104] The Equal Protection Clause seeks to prevent discrimination in official conduct.[105] In *Davis*, a police officers' entrance examination disproportionately precluded African-American applicants from joining the police force.[106] However, the Court held that where there is not a clear, invidious discriminatory purpose and there is only a

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the role that sex stereotyping played in the *Geduldig* decision and the problematic impact that it has on women).

102. *See supra* note 101 and accompanying text. *Compare* Frontiero v. Richardson, 411 U.S. 677, 687-91 (1973) (describing that classifications on the basis of sex must be evaluated under a strict scrutiny standard of review), *with* Reed v. Reed, 404 U.S. 71, 75-77 (1971) (noting that the Equal Protection clause prohibits different treatment to a class of people that is not related to the purpose of the statute and stating that the statute's default male preference was arbitrary and unsupportable); Craig v. Boren, 429 U.S. 190, 227-28 (1976) (establishing that the rational-basis test is the appropriate level of scrutiny for the gender-based classification); *and* United States v. Virginia, 518 U.S. 515, 532-34 (1996) (requiring the State to show that the gender-based classifications are serving important governmental objectives for which the classification is substantially related to the achievement of these aims).

103. Washington v. Davis, 426 U.S. 229, 237 (1976) (noting the disproportionately higher failure rate among black applicants over white applicants); *see also* Robert C. Power, *The Wire and Alternative Stories of Law and Inequality*, 46 IND. L. REV 425, 441 (2013) (explaining the role of "discriminatory effect" as a non-dispositive factor in the Court's analysis of an action's constitutionality).

104. Because *Washington v. Davis* dealt with the Washington D.C. police force and a federally administered test, this Equal Protection challenge was based on the Fifth Amendment Due Process Clause claim established through Bolling v. Sharpe, 347 U.S. 497 (1954). *See Davis*, 426 U.S. at 239; *see also Bolling*, 347 U.S. at 498-99 (stating that the Equal Protection Clause also pertains to the actions of the federal government through the Fifth Amendment Due Process Clause).

105. *Davis*, 426 U.S. at 239.

106. *Id.* at 237 (stating that black applicants were four times as likely to fail the police examination as white applicants); *see also* Power, *supra* note 103, at 441 (describing the Court's holding in Washington v. Davis that discriminatory impact is relevant yet insufficient to declare an action unconstitutional).

discriminatory effect, this racially discriminatory impact provided insufficient grounds to hold the law or action unconstitutional.[107] Explaining its rationale, the *Davis* court stated that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[108] Heightened classification requirements for historically marginalized populations are critical for ensuring that discriminatory statutes are held invalid, yet the clear purpose requirement indicates that fewer laws or official actions will be declared unconstitutional.[109] This discriminatory purpose requirement has been used to screen out various potential claims by protected classes, since proving purpose is a high barrier.[110]

C. *Liberty and Equality: The Due Process Clause and Equal Protection Doctrine Working in Tandem*

This section will review ways in which the Due Process and Equal Protection Clauses have been used together to uphold certain fundamental rights, which have not frequently been applied in the context of abortion access. Recently, *Obergefell v. Hodges* struck down remaining prohibitions on same-sex marriage, emphasizing the connection between liberty and equality.[111] Even before *Obergefell*, this relationship was articulated in Justice Stevens' dissent in *Bowers v. Hardwick*, where he highlighted the unique relationship between Due Process liberty interests and Equal Protection: "[a]lthough the

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107. *Davis*, 426 U.S. at 239 (noting that the Equal Protection clause intends to address invidious discrimination between groups); see also Power, *supra* note 103, at 441 (describing the requirement of a clear discriminatory purpose).

108. *Davis*, 426 U.S. at 242.

109. *Id.* (stating that the rule that "racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations" is not triggered in this case); *see also* Power, *supra* note 103, at 441-42 (noting the difficulty in producing sufficient evidence to prove discriminatory purpose since the intention is often well-hidden).

110. *See* Kay, *supra* note 101, at 385 (describing how the purpose requirement within the equal protection analysis has the impact of limiting these challenges). *See generally* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (providing a critical analysis of the sex equality jurisprudence arguing for an increased emphasis on the purpose and impact of actions and that current Constitutional protections do not sufficiently emphasize biological differences between men and women).

111. Obergefell v. Hodges, 576 U.S. ___, *19-22 (2015) (describing that the Due Process clause and Equal Protection clauses work in complementarity to protect fundamental rights). *See generally* Farrell, *supra* note 32 (describing the unclear delineation when applying the Equal Protection Clause and Due Process Clause to protect fundamental rights).

meaning of the principle that 'all men are created equal' is not always clear, it surely must mean that every free citizen has the same interest in 'liberty' that the members of the majority share."[112] *Obergefell* relied in part upon *Loving v. Virginia* as guiding precedent on the illustrative relationship that exists between the Due Process and Equal Protection Clauses to determine when there are fundamental rights at stake.[113] "The equal protection analysis depended in central part on the Court's holding that the law burdened a right 'of fundamental importance.' . . . Each concept—liberty and equal protection—leads to a stronger understanding of the other."[114] Rather than just acting as a bellwether for potential fundamental rights violations, "the Equal Protection Clause can help to identify and correct inequalities . . . vindicating precepts of liberty and equality under the Constitution."[115] The *Obergefell* Court's approach could be squarely applied to address another fundamental right, the right to decide whether or when to have children, in part since these same key constitutional concepts of liberty and equality are rooted in the Court's decisions in *Griswold* and *Eisenstadt*.[116] *Whole Woman's Health* may open the door to a new approach to reviewing abortion restrictions through a composite Due Process and Equal Protection analysis, which will be discussed in Part III.[117]

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112. Bowers v. Hardwick, 478 U.S. 186, 218 (1986) (Stevens, J., dissenting) (noting that all individuals have the same interests in liberty and should equally receive protections against government intrusion); *see also* Farrell, *supra* note 32, at 226-32 (describing that the equal protection clause has been also used to identify fundamental rights at issue, in addition to the "implicit in the concept of ordered liberty" and "history and traditions" tests).

113. *Obergefell*, 576 U.S. at *20 (quoting Loving v. Virginia, 388 U.S. 1, 12 (1965) "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."); *see also* Farrell, *supra* note 32, at 247-48 (concluding that the Court has developed separate tests for fundamental rights under the Due Process and Equal Protection Clauses, but often views them as interchangeable when it sees fit).

114. *Obergefell*, 576 U.S. at 20 (illustrating how liberty and equality help to understand the fundamental importance of certain rights); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (grounding the liberty right to decide whether or when to bear children in the equality context of single and married people alike being able to make this choice); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (explaining how the penumbras in the First, Third, Fourth, Fifth, and Ninth Amendments ground the right to privacy protections in the Due Process clause as a fundamental right).

115. *Obergefell*, 576 U.S. at 21.

116. *Id*.

117. *See infra* Part III.A.1.

II. *NORTHERN IRELAND'S LEGAL FRAMEWORK TO ADDRESS ABORTION*

Northern Ireland's *sui generis* political system has enabled it to maintain a more restrictive approach to abortion than other jurisdictions in the United Kingdom.[118] First, this section will introduce the current legal framework in Northern Ireland, and then will discuss current European Court of Human Rights jurisprudence on abortion under the European Convention of Human Rights. Finally, this section will conclude by analyzing the stigmatizing impact that abortion criminalization has on women as well as how this encourages women to seek out unsafe methods to terminate unwanted pregnancies.

A. *Northern Ireland's Current Legal Landscape, Generally and as Applied to Abortion*

This section will introduce Northern Ireland's (1) government structure; (2) the current statutes, regulatory guidelines, and case law that frame the legal status of abortion; and (3) the legal challenge to the jurisdiction-based abortion coverage through the National Health Service ("NHS").

1. Quasi-Autonomous, but Still a United Kingdom Jurisdiction

Conflict in Northern Ireland, known as "The Troubles," raged for roughly forty years over whether Northern Ireland would remain a part of the United Kingdom or join the Republic of Ireland; the 1998 Good Friday Agreement laid the foundation for peace in Northern Ireland, establishing a right to self-determination.[119] The Good Friday

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118. *See infra* Part II.A.1-2 (describing the structure of Northern Ireland's government).

119. Agreement Reached in Multi-Party Negotiations, Dublin, Belfast, London, arts. 1(i)-(iv), Apr. 10, 1998 [hereinafter Good Friday Agreement, (providing for Northern Ireland to choose to remain a part of the United Kingdom or join the Republic of Ireland); *see also Dealing with Northern Ireland's Past: Towards a Transitional Justice* Approach, Northern Ireland Human Rights Commission (July 2013), http://www.nihrc.org/uploads/publications/NIHRC_Transitional_Justice_Report.pdf (providing a transitional justice framework to address longstanding conflict in Northern Ireland); Ari Shapiro, *For Northern Ireland, Wounds from 'The Troubles' Are Still Raw*, NPR (Nov. 28, 2014), http://www.npr.org/sections/parallels/2014/11/28/367183005/for-northern-ireland-wounds-from-the-troubles-are-still-raw (stating how communities are still impacted by the forty years of conflict).

Agreement also required the establishment of the Northern Ireland Human Rights Commission ("NIHRC") to advise the Secretary of State on the development of a Bill of Rights.[120] Subsequently, the St. Andrews Agreement in 2006 provided a framework for a semi-autonomous government for Northern Ireland, indicated that it would remain a United Kingdom jurisdiction with future possibilities for self-determination, and reiterated the call for the establishment of a Northern Irish Bill of Rights.[121] The Human Rights Act of 1998 gave legal effect to the rights contained within the European Convention on Human Rights within the United Kingdom.[122] Furthermore, the Human Rights Act stipulated that the United Kingdom courts are required to take into account European Court of Human Rights decisions, judgments, or advisory opinions when Convention rights are raised in the Courts.[123]

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120. *See* Good Friday Agreement, *supra* note 119, Strand One, Safeguards, § 5(b) (noting the establishment of a Northern Ireland Human Rights Commission aligned with the European Convention of Human Rights); *id.* at Rights, Safeguards, and Equality of Opportunity, §§ 2-4 (noting the incorporation of the European Convention of Human Rights into domestic law, the establishment of the Northern Ireland Human Rights Commission, and the incorporation of equality principles, including on the basis of gender); *see also* Anne Smith, *Internationalisation and Constitutional Borrowing in Drafting Bills of Rights*, 60(4) INT'L & COMP. L.Q. 867, 875 (2011) (discussing the NIHRC's responsibility for the development of a Bill of Rights in Northern Ireland).

121. *See* St. Andrews Agreement, 2006, §§ 2-3, Annexes A-B (noting the semi-autonomous nature of Northern Ireland's government and its obligations to follow the European Convention on Human Rights). *See generally A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland*, NORTHERN IRELAND HUMAN RIGHTS COMMISSION (Dec. 10, 2008) http://www.nihrc.org/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf [hereinafter 2008 NIHRC Guidance on the Bill of Rights] (describing the process of attempting to establish a Bill of Rights for Northern Ireland).

122. *See About Human Rights*, NORTHERN IRELAND HUMAN RIGHTS COMMISSION, http://www.nihrc.org/about-human-rights [hereinafter NIHRC, *About Human Rights*] (stating that the Human Rights Act gives legal effect of ECHR rights and freedoms contained in the Convention). *But see* 2008 NIHRC Guidance on the Bill of Rights, *supra* note 121, at 9 (noting that the Human Rights Act only signs onto the body of the Convention and not its protocols and stating that all of the United Kingdom jurisdictions would need to sign onto the protocol jointly).

123. *See* Human Rights Act, 1998, art. 2(1)(a) (stating that challenges involving Convention rights require consideration of existing jurisprudence from the European Court of Human Rights); *see also* NIHRC, *About Human Rights*, *supra* note 122 (describing the Convention rights that are protected, including the right to respect for one's private and family life and the right to non-discrimination).

2. Particular Circumstances for Northern Ireland?: The Legal Framework for Abortion

Access to abortion within Northern Ireland remains severely restricted since the Abortion Act of 1967's coverage within the United Kingdom does not extend to Northern Ireland.[124] The Abortion Act of 1967 permits abortion if the woman is not more than twenty-four weeks pregnant, if there is risk of physical or mental injury to the woman or her family, a risk of permanent injuries to the woman, better health outcomes if the woman terminates her pregnancy, or is carrying a fetus with physical or mental abnormalities.[125] However, Northern Ireland still follows the United Kingdom's legal framework that preceded the passage of the Abortion Act of 1967.[126] As such, a woman in Northern Ireland is not able to obtain an abortion other than to preserve her life when there are risks to her physical and mental health, where these health risks must be either permanent or long-term and serious, such as an imminent risk of death to the mother.[127]

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124. *See The World's Abortion Laws: Northern Ireland*, CTR. FOR REPROD. RIGHTS (2015), http://worldabortionlaws.com/map/ (indicating that abortion is only permitted to protect a woman's mental health). *See generally Northern Ireland: Barriers to Accessing Abortion Services*, *supra* note 18 (describing the barriers that women in Northern Ireland face to access abortion services).

125. *See* Abortion Act 1967, c. 87, §§ 1, http://www.legislation.gov.uk/ukpga/1967/87/contents ("Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped"). The entirety of the Abortion Act 1967 does not apply to Northern Ireland. *Id.* § 7(3)*; see also id.* § 1(1) (noting that the provisions of the 1967 Abortion Act reflect the amendments made by the Human Fertilisation and Embryology Act 1990).

126. *See* Rex v. Bourne [1939] 1 K. B. 687 (decriminalizing abortion when preserving the life of the mother); *see also* Offences against the Person Act, 1861, §§ 58-59 (N. Ir.) (establishing that abortion is criminalized and anyone who induces a miscarriage is guilty of a felony or misdemeanor, depending on the scope of offense).

127. Court of Appeal in Northern Ireland in Family Planning Association of Northern Ireland v. Minister For Health and Social Services and Public Safety, [2004] NICA 37, [12].

The Offences against the Person Act of 1861 provides the foundation for criminalizing inducing an abortion by criminalizing a woman who attempts to or successfully procures an abortion with felony or misdemeanor charges.[128]

> Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .[129]

Unlawfully supplying medicines or instruments knowing that they will be used for the purpose of inducing abortion is a misdemeanor offense under the Offences Against the Person Act.[130]

Rex v. Bourne narrowed the application of the Offences Against the Person Act, stating that "[n]o person ought to be convicted under s. 58 of the Act of 1861 unless the jury are satisfied the act was not done in good faith for the purpose only of preserving the life of the mother."[131] Therefore, if an abortion is performed for the good faith purpose of preserving the pregnant woman's life, the woman would

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128. Offences against the Person Act, 1861, §§ 58-59 (N. Ir.) (noting that the woman who seeks to obtain a miscarriage is guilty of a felony, and a provider who assists her is guilty of a misdemeanor); *see also* Department of Health, Social Services and Public Safety, Guidance on the Termination of Pregnancy: The Law and Clinical Practice in Northern Ireland § 2.2 n.1 (July 2008) [hereinafter *2008 Northern Ireland Termination of Pregnancy Guidance*] (describing the Offence against the Person Act as a key component of the law with respect to pregnancy termination in Northern Ireland).

129. Offences against the Person Act, 1861, § 58 (N. Ir.).

130. *Id*. (targeting providers who might help a woman to obtain abortion services); *see also* 2008 Northern Ireland Termination of Pregnancy Guidance, *supra* note 128, § 2.2 n.1 (determining that the Offences against the Person Act is in effect and criminalizes women and providers who receive or perform abortions outside of the legally authorized circumstances).

131. Rex v. Bourne [1939] 1 K. B. 687 (placing the burden on the state to prove that obtaining an abortion was not for the purpose of preserving the life of the mother in good faith); *see also 2008 Northern Ireland Termination of Pregnancy Guidance*, *supra* note 128, § 2.2 n.1 (noting the consistent application of the Bourne decision in Northern Irish cases).

no longer be subject to criminal liability.[132] The Criminal Justice Act of Northern Ireland of 1945 further criminalized abortion when a child would be capable of being born alive—including a provision that a woman who is twenty-eight weeks pregnant would meet the prima facie evidentiary requirement—only dischargeable in the good faith instance of the preservation of the life of the mother.[133]

Subsequent abortion-related jurisprudence in Northern Ireland has predominantly centered on defining the scope of when abortion is permitted within the context of the threat to a woman's physical or mental health by continuation of the pregnancy.[134] In *Family Planning Association for Northern Ireland v. Minister for Health, Social Services and Public Safety*, the Court requested the development of guidelines to clarify the circumstances in which providers would be able to lawfully perform abortions.[135] As stipulated in *Family Planning Association for Northern Ireland*, the guidelines expanded upon the mandate that abortions are permitted when the continuation of pregnancy would put a woman's physical or mental health at risk with an adverse effect that is "real and serious" as well as "permanent or long-term."[136] These current regulations

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132. Offences against the Person Act, 1861, §§ 58, 59 (N. Ir.) (criminalizing abortion for every woman who intends to procure her own abortion and providers who help women to obtain abortions); Rex v. Bourne [1939] 1 K. B. 687 (requiring the state to prove that obtaining an abortion was not for the purpose of preserving the life of the mother in good faith).

133. Criminal Justice Act, § 25 (1945) (N. Ir.) (describing the offense of child destruction for when a child is capable of being born alive); *see also 2008 Northern Ireland Termination of Pregnancy Guidance*, *supra* note 128, § 2.2 n.1 (noting that the Criminal Justice Act of 1945 should be read in conjunction with the Offences against the Person Act and *Rex v. Bourne*).

134. *See 2008 Northern Ireland Termination of Pregnancy Guidance*, *supra* note 128, Annex A, ¶¶ 7-13 (citing influential cases after 1993); *see also* Eileen V. Fegan & Rachel Rebouche, *Northern Ireland's Abortion Law: The Morality of Silence and the Censure of Agency*, 11 FEMINIST LEGAL STUDIES 221, 228 (2003) (describing the series of unreported cases, including *Re K*, *Re A.M.N.H.*, and *Re S.J.B.*, that established that the risk needed to be real, serious, and long term to qualify for the mental health exception).

135. *Family Planning Association for Northern Ireland v. Minister for Health, Social Services and Public Safety*, ¶¶ 5, 9-10, 12 [2004] (describing the necessity of the development of guidelines to medical professionals for practices related to the termination of pregnancy); *see also 2008 Northern Ireland Termination of Pregnancy Guidance*, *supra* note 128, Annex A, ¶ 13 (referencing the order to develop legal guidelines on the termination of pregnancy).

136. *See 2008 Northern Ireland Termination of Pregnancy Guidance*, *supra* note 128, ¶ 3.2 (explaining that real, serious, and long-term mental health effects are rare and must be assessed by a medical professional); *see also Family Planning Association for Northern Ireland v. Minister for Health, Social Services and Public Safety*, ¶ 12 [2004] (suggesting principles that should be included in the development of abortion guidelines).

limit the scope of the situations in which an abortion would be lawfully permitted to occur.[137]

In 2013, the Department of Health, Social Services and Public Safety also held a consultation to clarify the circumstances within the existing legal framework in which abortion should be permitted.[138] Within the context of preserving the life or physical or mental health of the pregnant woman, the consultation focused on the mental health grounds, doctor certification, conscience-based refusals to pregnancy termination, counseling requirements, patient confidentiality, and human rights concerns.[139] The Northern Ireland Human Rights Commission applied for judicial review ("*NIHRC Judicial Review*") to determine whether the legal framework—the Offences against the Person Act of 1861 and the Criminal Justice Act of 1945—can be read to be consistent with the European Convention on Human Rights.[140] In a pair of decisions in 2015, the High Court of Northern Ireland held that the current legal framework is not Convention-compliant in instances of fatal fetal abnormality or sexual crimes, but

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137. *See Family Planning Association for Northern Ireland v. Minister for Health, Social Services and Public Safety*, ¶ 12 [2004] (noting that a probability, and sometimes a possibility, of a woman's imminent death would be permissible grounds for termination); *see also 2008 Northern Ireland Termination of Pregnancy Guidance*, *supra* note 128, ¶ 3.2 (stating that the instances of real, serious, and long-term mental health consequences from pregnancy are likely to be rare).

138. *See* Department of Health, Social Services and Public Safety, *Draft Termination of Pregnancy Guidance Summary of Consultation Responses Received*, 2 (Oct. 2013), https://www.dhsspsni.gov.uk/sites/default/files/consultations/dhssps/termination-pregnancy-responses-2013.pdf [hereinafter *DHSSPS Summary of Pregnancy Termination Guidance Consultation*] (seeking guidance within the existing legal framework where it is unlawful to terminate a pregnancy "unless it is necessary to preserve the life of a pregnant woman, or there is a risk of real and serious adverse effect on her physical or mental health, which is either long term or permanent"); *see also* Family Planning Association for Northern Ireland v. Minister for Health, Social Services and Public Safety, ¶ 12 [2004] (describing the circumstances in which the risk of a woman's imminent death would be permissible grounds for termination).

139. *See DHSSPS Summary of Pregnancy Termination Guidance Consultation*, *supra* note 138 (detailing the issues raised within the consultation and the arguments presented by each respondent); Committee for Health, Social Services and Public Safety, *Official Report: Guidance on Termination of Pregnancy in Northern Ireland: DHSSPS* (Oct. 22, 2013) (briefing the Northern Ireland Assembly on the outcomes of the consultation process on the guidance document).

140. Northern Ireland Human Rights Commission's Application for Judicial Review, [2015] NIQB 96, 2015 WL 8131461 (describing that Northern Ireland's legal framework on abortion cannot be read to be Convention-compliant in instances of fatal fetal abnormality and instances of rape and incest); Northern Ireland Human Rights Commission's Application for Judicial Review, ¶¶ 4-5 [2015] NIQB 102, 2015 WL 9112625 (confirming that there is no possible construction of the current legal framework to interpret it as Convention-compliant).

does not compel the legislature to implement this change statutorily.[141]

3. Northern Irish Women Are Able to Travel to Other Parts of the United Kingdom to Obtain a Safe Abortion

Within the United Kingdom, the National Health Service Act of 2006 provides a comprehensive health care system free of charge, including access to abortion in certain circumstances.[142] Each jurisdiction within the United Kingdom has also created its own coverage requirements.[143] Because of the more permissive legal framework to access abortions in other parts of the United Kingdom, in 2011, NHS documented that there were 1,007 women from Northern Ireland that sought abortion services in hospitals and clinics in England, mostly "in fee charging independent private clinics."[144] Alliance for Choice as an intervener suggests that the actual figure is

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141. *See* Northern Ireland Human Rights Commission's Application for Judicial Review, [2015] NIQB 96, 2015 WL 8131461 (holding that in instances of fatal fetal abnormality and instances of rape and incest, Northern Ireland's legal framework on abortion cannot be read to be Convention-compliant); Northern Ireland Human Rights Commission's Application for Judicial Review, ¶¶ 3-5 [2015] NIQB 102, 2015 WL 9112625 (determining that there is not any possible construction of the current legal framework to interpret it as Convention-compliant, but cabining this interpretation as provisional for other courts, a referendum, or legislature to decide); Douglas Dalby, *Judge Leaves Northern Ireland's Abortion Laws to Lawmakers*, N.Y. TIMES, Dec. 16, 2015, at A18 (stating that Judge Horner did not order exceptions in the instances of fatal fetal abnormality or sexual crimes as '"a step too far"'); *see also infra* Part II.B for a discussion on the court's interpretation of the European Convention on Human Rights.

142. *See* National Health Service Act 2006, c. 41, § 1(3) (noting that the health services must be provided free of charge, except in certain exceptional circumstances); *see also* R. (on the application of A) v. Secretary of State for Health, [2014] EWHC 1364 (Admin), [23], 2014 WL 1220042 (citing that National Health Service Act, 2006 §§ 3(1)(c)-(d) are usually interpreted as coverage for legal abortions).

143. *See* National Health Service Act, 2006, c. 41, § 3(1)(d), 6 (stating that possibility of providing any service that NHS provides in England in other jurisdictions, including "such other services or facilities for the care of pregnant women . . . as he considers are appropriate as part of the health service"); *see also* R. (on the application of A), [2014] EWHC 1364 (Admin.), ¶¶ 35-36 (noting the different available health care services by United Kingdom jurisdiction as a result of the residence-based system).

144. R. (on the application of A), [2014] EWHC 1364 (Admin.), ¶¶ 9, 14 (noting that only five abortions were provided free of charge in England); Abortion Act 1967, § 1 (permitting women up to twenty-four weeks pregnant to obtain an abortion if continuing the pregnancy would pose physical or mental health risks or in the case of fetal impairment).

likely closer to 2,000 women per year.[145] In *R (on the Application of A) v. Secretary of State for Health* (hereinafter "*R*"), the Court reviewed whether Northern Irish women should be able to access free abortion services through NHS.[146] The lower court held that Northern Irish women should not be allowed to access free abortions in other United Kingdom jurisdictions, because of the reasonableness of a residence-based health care system, which was upheld on appeal.[147]

Although women are allowed to go to England to obtain legal abortions, citizens of Northern Ireland cannot access free abortions through NHS as is possible in the other United Kingdom jurisdictions.[148] The *R* court upheld the NHS' express policy, which states "that in general the NHS should not fund services for residents of Northern Ireland which the Northern Ireland assembly has deliberately decided not to legislate to provide, and which would be unlawful if provided in Northern Ireland."[149] Therefore, since there is no access to state-funded abortion services, Northern Irish women are required to pay out of pocket for their flights to jurisdictions where

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145. R. (on the Application of A) v. Secretary of State for Health, C1/2014/1687 [2015] EWCA Civ. 771, [2], 2015 WL 4401470 (stating that Alliance for Choice as intervener suggests that the actual figure of Northern Irish women seeking abortions in England is double the official figure); *Northern Ireland: Barriers to Accessing Abortion Services*, *supra* note 18 (describing that many Northern Irish women seeking abortions in other jurisdictions give false addresses for fear of criminal sanctions).

146. R. (on the application of A), [2014] EWHC 1364 (Admin.), ¶¶ 2, 35-36 (describing the legal challenge querying whether a Northern Irish resident present in England can access free abortion services through NHS); *see also Northern Ireland: Barriers to Accessing Abortion Services*, *supra* note 18, at 17-18 (describing the Court's decision to deny Northern Irish women NHS coverage for abortion services and the problematic financial impact that the travel requirement to obtain abortion services imposes).

147. R. (on the application of A), [2014] EWHC 1364 (Admin.), ¶ 57 (deferring to the authority within each jurisdiction to determine coverage limits); R. (on the Application of A), [2015] EWCA Civ. 771, ¶ 16 (holding that NHS cannot provide services to someone "temporarily present" in that jurisdiction).

148. *See* National Health Service Act 2006, c. 41, § 3(1)(d), 6 (stating that possibility of providing any service that NHS provides in England in other jurisdictions, including "such other services or facilities for the care of pregnant women . . . as he considers are appropriate as part of the health service"); *see also* Abortion Act 1967, ¶ 7(3) (noting that the provisions of the Abortion Act 1967 do not extend to Northern Ireland).

149. *Compare* R. (on the application of A), [2014] EWHC 1364 (Admin.), ¶ 58 (holding the lawfulness of the exclusion of abortion services from Northern Irish women), *with* Committee on the Elimination of Discrimination against Women, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, ¶ 50, U.N. Doc. CEDAW/C/GBR/CO/7 (2013) (stating that the limit on abortion services within Northern Ireland "mak[es] it necessary for women to seek abortions in other parts of the State party").

abortions are provided as well as for the procedure itself; for example, plaintiff in *R* paid GB£600 (equivalent to US$909) for the procedure and roughly GB£300 (equivalent to US$454) in travel costs.[150] These costs can be prohibitively expensive and may preclude individuals from seeking safe abortions.[151] *R*'s holding does not bar Northern Irish women from continuing to travel to fee charging, independent clinics in other parts of the United Kingdom since the complaint focuses on accessing abortion services without a fee.[152]

On appeal, the court upheld the jurisdictional distinctions to protect the Northern Ireland government's choice to follow the pre-1967 Abortion Act legal framework and dismissed public law and European Convention on Human Rights arguments for a protected abortion right within Northern Ireland.[153] In particular, appellants argue that the European Convention on Human Rights protects the right to obtain an abortion through the right to respect for private and family life (Article 8) and the prohibition on discrimination (Article 14).[154] *R* also invokes a larger question, which is whether it is lawful to fully cover abortion services for some United Kingdom citizens

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150. R. (on the application of A), [2014] EWHC 1364 (Admin.), ¶ 10; *see also* British Pound to US Dollar Rate, XE.COM (last visited Jan. 11, 2016) (converting to the U.S. Dollar based on October 1, 2015 exchange rates).

151. *Northern Ireland: Barriers to Accessing Abortion Services*, *supra* note 18, 17-18; *The Northern Ireland Poverty Bulletin 2013/14 Is Released*, DEPARTMENT FOR SOCIAL DEVELOPMENT (June 25, 2015), https://www.dsdni.gov.uk/news/northern-ireland-poverty-bulletin-201314-released (stating the median weekly household income as GB£404 and poverty rates increased to 21 percent of Northern Irish individuals).

152. *Compare* R. (on the application of A), [2014] EWHC 1364 (Admin.), ¶¶ 3-5, *with* Committee on the Elimination of Discrimination against Women, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, ¶ 50, U.N. Doc. CEDAW/C/GBR/CO/7 (2013) (noting that Northern Irish women are required to travel to other parts of the United Kingdom to access abortion services).

153. R. (on the Application of A), [2015] EWCA Civ. 771, ¶¶ 16, 21-39 (noting that Article 8, the right to respect for privacy and family life, and Article 14, the prohibition on discrimination, are not violated by the denial of access to abortion services); see also European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8, 14, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] (establishing the right to respect for privacy and family life and non-discrimination).

154. *See infra* Part II.B (discussing the application of the European Convention on Human Rights to Northern Ireland); *see also* ECHR, *supra* note 153, arts. 8, 14 (protecting the right to respect for privacy and family life and non-discrimination).

and deny access to those services altogether for other United Kingdom citizens.[155]

B. *European Court of Human Rights Jurisprudence: Friend or Foe?*

Since the Human Rights Act of 1998 gave domestic effect to the European Convention on Human Rights, the Northern Irish Courts are required to respect, protect, and fulfill these rights within their borders.[156] Of particular concern in European Court of Human Rights jurisprudence in the abortion context are Articles 3, 8, and 14.[157] Within the High Court of Northern Ireland's recent *NIHRC Judicial Review*, the court analyzed whether Northern Ireland's legal framework on abortion could be interpreted to be consistent with the relevant European Convention rights.[158]

Article 3 states that "[n]o one should be subjected to. . . inhuman or degrading treatment. . . ."[159] Inhuman or degrading treatment does not meet the threshold of torture, and is set at deliberate inhuman treatment that causes cruel and serious suffering.[160] The European Court of Human Rights has stated that the

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155. *See infra* Part III.B (discussing the implications of unequal protection of the laws by jurisdiction); *Northern Ireland: Barriers to Accessing Abortion Services*, *supra* note 18, at 40-41 (noting the harms of a postcode lottery, where access to services differs from one NHS Trust to another).

156. *See* Human Rights Act, 1998, art. 2(1)(a) (noting that challenges involving Convention rights require consideration of existing jurisprudence from the European Court of Human Rights); *see also* NIHRC, *About Human Rights*, *supra* note 122, at 25 (describing the European Convention rights that are protected).

157. ECHR, *supra* note 153, arts. 3, 8, 14 (protecting the right to be free from cruel, inhuman, and degrading treatment, the right to respect for private and family life, and non-discrimination). *See generally* European Court of Human Rights, *Reproductive Rights Fact Sheet: Access to a Lawful Abortion* (July 2015), http://www.echr.coe.int/Documents/FS_Reproductive_ENG.pdf (discussing the application of articles 3, 8, and 14 within the Convention to abortion access).

158. *See* Northern Ireland Human Rights Commission's Application for Judicial Review, [2015] NIQB 96, 2015 WL 8131461 (holding that Northern Ireland's legal framework on abortion does not comply with article 8 of the European Convention in instances of fatal fetal abnormality, serious malformation of the fetus, and instances of rape and incest). *See generally Reproductive Rights Fact Sheet: Access to a Lawful Abortion*, *supra* note 157 (describing how articles 3, 8, and 14 within the European Convention have been applied to abortion and other reproductive rights cases).

159. ECHR, *supra* note 153, art. 3.

160. *See R.R. v. Poland*, No. 27617/04 Eur. Ct. H.R., ¶¶ 148-152 (2011) (describing the general principles of inhuman and degrading treatment protected under Article 3 in the European Convention); *see also* Alyson Zureick, *(En)Gendering Suffering: Denial of Abortion*

denial of abortion services, in certain circumstances, such as in *R.R. v. Poland*, can constitute inhuman or degrading treatment.[161] In *NIHRC Judicial Review*, the High Court stated that Article 3 can be violated when women are lawfully entitled to obtain certain abortion services but are blocked from accessing a procedure to which they are lawfully and medically entitled.[162] Although Northern Irish women are currently required to travel to other jurisdictions within the United Kingdom for abortion services related to fatal fetal abnormalities, severe malformation of the fetus, or resulting from a sexual crime, the High Court holds this "additional stress" does not satisfy the "minimum threshold of severity" to constitute inhuman or degrading treatment.[163]

The European Court of Human Rights has also analyzed Articles 8 and 14 within the context of reproductive health care.[164] Article 8

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as a Form of Cruel, Inhuman, or Degrading Treatment, 38 FORDHAM INT'L L.J. 99, 107-09 (2015) (noting the distinctions between torture and cruel, inhuman, and degrading treatment according to different charter-based and treaty monitoring bodies).

161. *See R.R. v. Poland*, No. 27617/04 Eur. Ct. H.R., ¶¶ 153-62 (2011) (noting that the denial of access to diagnostic testing for concerns about a pregnant woman's fetal abnormality and subsequent denial of access to an abortion amounted to a violation of inhuman treatment under Article 3 of the European Convention of Human Rights); *see also* Zureick, *supra* note 160, at 117 (discussing the European Court's holding in *R.R.* that delaying access to genetic testing that were a prerequisite for an abortion in Poland were determinative, precluded access to an abortion altogether causing mental anguish and amounted to an Article 3 violation).

162. *See* Northern Ireland Human Rights Commission's Application for Judicial Review, ¶¶ 114-16 [2015] NIQB 96, 2015 WL 8131461 (relying on *P & S v. Poland* and *R.R. v. Poland*, emphasizing that both cases sought relief for plaintiffs who were unable to access abortion services to which they were lawfully entitled); *see, e.g.*, R.R. v. Poland, No. 27617/04 Eur. Ct. H.R., ¶¶ 153-62 (2011) (denying access to fetal abnormality diagnostic testing and access to an abortion amounted to a violation of inhuman treatment under Article 3 of the European Convention of Human Rights).

163. *See* Northern Ireland Human Rights Commission's Application for Judicial Review, ¶¶ 120-21 [2015] NIQB 96, 2015 WL 8131461 (noting that there is insufficient evidence before the High Court to hold that the requirement to travel to an additional pregnancy to terminate a pregnancy is any more traumatic in these exceptional circumstances); see also Amelia Gentleman, *"It Was the Scariest Thing I've Ever Done": The Irish Women Forced to Travel for Abortions*, THE GUARDIAN (Oct. 31, 2015), http://www.theguardian.com/world/2015/oct/31/abortion-ireland-northern-ireland-women-travel-england-amelia-gentleman (describing the harrowing circumstances facing Northern Irish and Irish women who are required to travel to certain jurisdictions within the United Kingdom to gain access to abortion procedures).

164. *Compare* Tysiąc v. Poland, No. 5410/03 Eur. Ct. H.R. (2007), *with* Evans v. United Kingdom, No. 6339/05 Eur. Ct. H.R. (2007) (contrasting that the Court in *Tysiąc*, a therapeutic abortion case, holds that an article 8 violation has taken place whereas with Evans, an in-vitro fertilization case, the Court holds that an article 8 and 14 violation did not occur). *See*

addresses the right to respect for private and family life, and defines these protections as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[165]

It is important to note that Article 8(2) only allows interference into the right to private and family life when this interference is legally permitted *and* when circumstances are extreme and exceptional, such as in instances of national security.[166] Article 14 prohibits discrimination such that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[167] Taken together, Article 14's prohibition of discrimination on the basis of sex should bar restrictions to Article 8's protection of private and family life that limit access to this right on the basis of sex.[168]

The European Court of Human Rights recognizes in *Tysiąc v. Poland* that States parties have a positive obligation to respect the private life of their citizens, noting that:

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generally Reproductive Rights Fact Sheet: Access to a Lawful Abortion, *supra* note 157 (discussing relevant European Court of Human Rights jurisprudence to abortion access).

165. *See* ECHR, *supra* note 153, art. 8.

166. *See* ECHR, *supra* note 153, art. 8(2) (stating permissible instances where government interference is permitted to infringe on the right to respect privacy and family life). *See generally Reproductive Rights Fact Sheet: Access to a Lawful Abortion*, *supra* note 157 (detailing where the European Court has held article 8 violations in the abortion context).

167. *See* ECHR, *supra* note 153, art. 14.

168. *Compare* R. (on the Application of A) v. Secretary of State for Health, C1/2014/1687 [2015] EWCA Civ. 771, [30]-[39], 2015 WL 4401470 (rejecting arguments that articles 8 and 14 are violated), *with Reproductive Rights Fact Sheet: Access to a Lawful Abortion*, *supra* note 157 (noting where the European Court has found Article 8 violations).

> [T]he Court observes that the very nature of the issues involved in decisions to terminate a pregnancy is such that the time factor is of critical importance. The procedures in place should therefore ensure that such decisions are timely so as to limit or prevent damage to a woman's health which might be occasioned by a late abortion. Procedures in which decisions concerning the availability of lawful abortion are reviewed post factum cannot fulfil such a function. In the Court's view, the absence of such preventive procedures in the domestic law can be said to amount to the failure of the State to comply with its positive obligations under Article 8 of the Convention.[169]

Although there is not an unqualified right to abortion under the European Convention of Human Rights, *Tysiąc* protects the right to obtain an abortion in a State Party jurisdiction once it is lawfully protected in those circumstances.[170] For example, abortion is protected when continued pregnancy poses a risk to a woman's health in Poland: "[o]nce the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it."[171] Read in conjunction with other European Court of Human Rights decisions, such as *R.R. v. Poland*, these decisions lay the groundwork for personal autonomy in health care decisions, including but not limited to reproductive health.[172]

In *A, B and C v. Ireland*, the European Court addressed the claims of three applicants that needed to travel to England to access lawful abortion services, determining that applicants A and B's claims

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169. Tysiąc v. Poland, No. 5410/03 Eur. Ct. H.R., ¶ 118 (2007).

170. *Id*. ¶ 116 (noting that the State cannot put barriers in place to obtain abortion when it is legal in certain circumstances); Joanna N. Erdman, *The Procedural Turn: Abortion at the European Court of Human Rights*, *in* Rebecca J. Cook, Joanna N. Erdman & Bernard M. Dickens, TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES 124-25 (1st ed., 2014) (discussing the State's positive obligation to ensure access to a lawful abortion).

171. Tysiąc v. Poland, No. 5410/03 Eur. Ct. H.R., ¶ 116 (2007) (asserting the State's positive obligation to provide access to abortion procedures within lawful circumstances); Erdman, *supra* note 170, at 124-25 (describing that the State has a positive obligation to ensure the pregnant woman has access to the requisite procedure for a lawful abortion).

172. *See* R.R. v. Poland, No. 27617/04 Eur Ct. H.R. (2011) (holding that denying access to abortion amounted to ill-treatment); *see also* Laurens Lavrysen, *R.R. v. Poland: Health Rights under Art. 8 ECHR*, STRASBOURG OBSERVERS (June 2, 2011), http://strasbourgobservers.com/2011/06/02/r-r-v-poland-health-rights-under-art-8-echr/ (emphasizing the importance of *R.R.* in establishing personal autonomy and the rights of the patient in health care).

did not constitute an Article 8 violation.[173] Because applicant C was suffering from a rare form of cancer and feared for her life once she became pregnant, the European Court held that requiring her to travel to England to obtain a lawful abortion did constitute an Article 8 violation.[174] The European Court relies on the deferential standard of the Margin of Appreciation, holding that the State has the authority to determine its level of rights protections for potential life.[175] The European Court of Human Rights did note the Republic of Ireland's extremely strict prohibition on abortion, noting that complainant A would have been able to access abortion in forty other European states on health and well-being grounds and complainant B would have been able to access abortion services in thirty-five States on well-being grounds.[176] Despite holding that there was no Article 8 violation, this comparative legal analysis pegs the Republic of Ireland as a European outlier on the circumstances in which abortion is permitted.[177] *A, B and C* also addresses the Article 14 violation implicated by Irish women needing to travel to the United Kingdom to access abortion services, but declines to decide on these grounds.[178]

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173. A, B and C v. Ireland, No. 25579/05 Eur. Ct. H.R., ¶¶ 241-42 (2010) (asserting that it was within Ireland's Margin of Appreciation to determine its level of rights protections to afford to protect potential life); Erdman, *supra* note 170, at 125 (noting that A and B's challenge was to legalize abortion when the woman's health was at risk).

174. A, B and C v. Ireland, No. 25579/05 Eur. Ct. H.R., ¶¶ 243-68 (2010) (analyzing Ireland's obligations to protect against arbitrary interference into people's private lives under Article 8 of the European Convention); Stijn Smet, *A., B. and C. v. Ireland: Abortion and the Margin of Appreciation*, STRASBOURG OBSERVERS (Dec. 17, 2010), http://strasbourgobservers.com/2010/12/17/a-b-and-c-v-ireland-abortion-and-the-margin-of-appreciation/ (noting the requirement for Ireland to pass legislation to be in compliance with the decision).

175. A, B and C v. Ireland, No. 25579/05 Eur. Ct. H.R., ¶¶ 241-42 (2010) (asserting that it was within Ireland's Margin of Appreciation to determine its level of rights protections to afford to protect potential life); Smet, *supra* note 174 (describing the disconnect between applying the Margin of Appreciation principle while noting Ireland as a regional outlier from the European consensus).

176. A, B and C v. Ireland, No. 25579/05 Eur. Ct. H.R., ¶¶ 241-42 (2010) (applying regional comparative law to illustrate how restrictive the abortion law is in the Republic of Ireland); *World Abortion Map*, CTR. FOR REPROD. RTS. http://worldabortionlaws.com/map/ (illustrating Ireland and Northern Ireland as regional outliers with far more restrictive abortion laws).

177. A, B and C v. Ireland, No. 25579/05 Eur. Ct. H.R., ¶¶ 241-42 (2010) (upholding the Republic of Ireland's legal framework while noting its restrictiveness as compared to other countries in the region); *World Abortion Map*, *supra* note 176, Europe (demonstrating how the rest of the region permits abortion in more circumstances).

178. A, B and C v. Ireland, No. 25579/05 Eur. Ct. H.R., ¶¶ 269-70 (2010) (stating that the Court will not decide on these grounds). *See generally Reproductive Rights Fact Sheet:*

Articles 8 and 14 were also raised in the *NIHRC Judicial Review*.[179] The *NIHRC Judicial Review* held that prohibiting abortion in instances of fatal fetal abnormality and pregnancies resulting from sexual crimes violate Article 8, the right to respect for private and family life.[180] When one's personal autonomy is infringed under Article 8(1), the Government must justify this intrusion "in accordance with the law, for a legitimate aim, necessary in a democratic society," which is not justifiable in instances of fatal fetal abnormality, rape, or incest.[181] The High Court also emphasized that requiring women to travel to other United Kingdom jurisdictions, such as England or Wales, creates an emotional burden on those obligated to travel and a disproportionate impact on low-income individuals.[182] Despite this assertion of the burden on low-income women, the High Court held that there was not "a clear inequality of treatment in the enjoyment of a substantive right [that] is a fundamental aspect of the case" and therefore there was no Article 14

Access to a Lawful Abortion, *supra* note 157 (illustrating that the Court has declined to decide abortion cases on Article 14 grounds).

179. *See* ECHR, *supra* note 153, arts. 8, 14 (establishing the right to respect for privacy and family life and non-discrimination); *see* Northern Ireland Human Rights Commission's Application for Judicial Review, ¶¶ 122-72 [2015] NIQB 96, 2015 WL 8131461 (noting that there is an Article 8 violation, but no Article 14 violation); *see also* R. (on the Application of A) v. Secretary of State for Health, C1/2014/1687 [2015] EWCA Civ. 771, [30]-[39], 2015 WL 4401470 (rejecting arguments that articles 8 and 14 are violated).

180. Northern Ireland Human Rights Commission's Application for Judicial Review, ¶¶ 145-46, 148, 160-62, 166 [2015] NIQB 96, 2015 WL 8131461 (holding that fatal fetal abnormalities and pregnancies resulting from sexual crimes constitute Article 8 violations); *see* ECHR, *supra* note 153, art. 8 (protecting the right to respect for private and family life from governmental interference).

181. Northern Ireland Human Rights Commission's Application for Judicial Review, ¶¶ 145-46, 148, 160-62, 166 [2015] NIQB 96, 2015 WL 8131461 (analyzing fatal fetal abnormalities, severe malformations of the fetus, and pregnancy resulting from a sexual crime under the Article 8 balancing test, holding that criminalizing abortion in instances of severe malformations of the fetus does not amount to an Article 8 violation); *see* Amelia Gentleman, *A Milestone for Abortion in Northern Ireland-But Where Does the Law Stand?*, THE GUARDIAN (Nov. 30, 2015), http://www.theguardian.com/uk-news/2015/nov/30/northern-ireland-abortion-laws-human-rights (describing that the current legal framework only violates human rights in instances of fatal fetal abnormality, rape, and incest).

182. Northern Ireland Human Rights Commission's Application for Judicial Review, ¶ 154 [2015] NIQB 96, 2015 WL 8131461 (stating the heavier burden that lower income women experience by being required to travel to other jurisdictions to obtain abortion services); *see also Northern Ireland: Barriers to Accessing Abortion Services*, *supra* note 18, at 17-20 (describing the stigma that Northern Irish women face, which is exacerbated by the requirement to travel outside of the jurisdiction to obtain the procedure).

violation on the prohibition on discrimination.[183] The High Court also notes that the *R* case holds that the differential treatment that pregnant women in Northern Ireland face as compared to women in England and Scotland does not constitute direct or indirect discrimination.[184] Finally, the High Court emphasizes that the prohibition on discrimination only applies with respect to other European Convention rights, and since the High Court already found an Article 8 violation, determining the existence of an Article 14 violation is unnecessary.[185]

C. *Impact of Criminalizing Abortion in Northern Ireland*

Despite the holding in *NIHRC Judicial Review*, abortion is still a criminal offense in Northern Ireland, except in instances where continuing the pregnancy poses a permanent or long-term threat to the woman's physical or mental health; this legal framework stigmatizes abortion.[186] Criminal sanctions assign "deviance" to women seeking

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183. Northern Ireland Human Rights Commission's Application for Judicial Review, ¶ 167-72 [2015] NIQB 96, 2015 WL 8131461 (describing the test for an Article 14 breach). *See generally* Rory O'Connell, *Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR*, 29 J. OF THE SOC'Y OF LEGAL SCHOLARS 211, 211-29 (2009) (describing the traditional emphasis on formal equality within European Court of Human Rights jurisprudence).

184. Northern Ireland Human Rights Commission's Application for Judicial Review, ¶ 171 [2015] NIQB 96, 2015 WL 8131461 (explaining that the R court did not find the varying access to abortion services on the basis of their jurisdiction to constitute discrimination within the meaning of Article 14); *see also* R. (on the Application of A) v. Secretary of State for Health, C1/2014/1687 [2015] EWCA Civ. 771, [47]-[50], 2015 WL 4401470 (stating that pregnant women from Northern Ireland compared to other women from the United Kingdom do not experience discrimination on prescribed grounds in their inability to access NHS coverage for abortion services).

185. Northern Ireland Human Rights Commission's Application for Judicial Review, ¶ 168 [2015] NIQB 96, 2015 WL 8131461 (relying upon Dudgeon v. United Kingdom and A, B and C v. Ireland as precedent that the prohibition on discrimination only applies to the breach of European Convention rights and does not need to be reviewed once there is a breach of another article. However, the Court may inquire into Article 14 violations in these instances); A, B and C v. Ireland, No. 25579/05 Eur. Ct. H.R., ¶ 270 (2010) (stating that the European Court will not inquire into Article 14 violations since it already found an Article 8 violation).

186. *See* Northern Ireland Human Rights Commission's Application for Judicial Review, ¶¶ 3-5 [2015] NIQB 102, 2015 WL 9112625 (determining the current legal framework cannot be interpreted as Convention-compliant, but is provisional for other courts or legislature to decide); *see also supra* Part II.A (describing the legal framework in Northern Ireland); Rebecca J. Cook, *Stigmatized Meanings of Criminal Abortion Law* in ABORTION LAW, *in* Rebecca J. Cook, Joanna N. Erdman & Bernard M. Dickens, TRANSNATIONAL PERSPECTIVE:

abortions and medical professionals who provide these services, reinforcing the idea that abortion is an immoral act that society deems reprehensible.[187] As a result, many women fear the consequences of their family or friends discovering that they have had an abortion.[188] Stigma perpetuates and seemingly legitimizes that women should experience guilt or shame when obtaining an abortion, which is worsened by women's need to travel outside of Northern Ireland to obtain the procedure.[189]

Anand Grover, the former Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health ("Special Rapporteur on the Right to Health") addressed the variety of problematic outcomes of abortion criminalization in its 2011 Report.[190] Focusing on the impact of criminal laws on reproductive health and the right to health, Grover stated "[c]riminal laws penalizing and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realization

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CASES AND CONTROVERSIES 347 (1st ed., 2014) (noting that criminalizing abortion ascribes a social meaning of "inherently wrong and harmful to society").

187. *See* Cook, *supra* note 186, at 347-49 (describing the history and impact of criminalization on women); *see also* Human Rights Council, Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, U.N. Doc. A/66/254, ¶ 21 (Aug. 3 2011) [hereinafter Interim Report of the Special Rapporteur on the Right to Health] (noting the criminalization of abortion as a barrier to the realization of women's right to health).

188. *See Northern Ireland: Barriers to Accessing Abortion Services*, *supra* note 18, at 15-16, 20 (noting women's desire to keep the procedure secret due to the stigma); *see also Real Stories of Abortion in Northern Ireland: Irene's Story*, FAMILY PLANNING ASSOCIATION, http://www.fpa.org.uk/abortion-in-northern-ireland/video-stories (last visited Jan. 11, 2016) (describing the need to pretend to go to London on holiday to obtain an abortion).

189. *See Northern Ireland: Barriers to Accessing Abortion Services*, *supra* note 18, at 19-20 (describing the frustration that women face by needing to travel outside of Northern Ireland to access abortion services); *see also Real Stories of Abortion in Northern Ireland*, FAMILY PLANNING ASSOCIATION, http://www.fpa.org.uk/abortion-in-northern-ireland/video-stories (last visited Jan. 11, 2016) (noting the challenges with needing to travel to England to obtain abortion access).

190. *See* Interim Report of the Special Rapporteur on the Right to Health, *supra* note 187, ¶ 35 (stating that women will seek clandestine, often unsafe abortion procedures to terminate unwanted pregnancies); *see also Northern Ireland: Barriers to Accessing Abortion Services*, *supra* note 18, at 11 (describing the coat hanger advocacy campaign which illustrated the two alternatives that women faced, clandestine abortions or travel to other UK jurisdictions).

of women's right to health and must be eliminated."[191] Furthermore, Grover highlights the cyclical nature of the resulting stigma: "[c]riminalization of abortion results in women seeking clandestine, and likely unsafe, abortions. The stigma resulting from procuring an illegal abortion and thereby breaking the law perpetuates the notion that abortion is an immoral practice and that the procedure is inherently unsafe, which then reinforces continuing criminalization of the practice."[192]

Beyond confronting the crippling stigma, the fact that one to two thousand women annually must leave the Northern Irish borders to obtain a safe abortion also requires them to have the means to afford the travel costs and the procedure cost at the private clinic.[193] In many cases, the impracticability of traveling to the United Kingdom to obtain an abortion may leave women with the "choice" of carrying an unwanted pregnancy to term or pursuing clandestine, unsafe alternatives.[194] Since unsafe abortions have severe health outcomes

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191. *See* Interim Report of the Special Rapporteur on the Right to Health, *supra* note 187, ¶ 21. Former Special Rapporteur on the Right to Health, Anand Grover, supports this assertion with this justification:

> These laws infringe women's dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health. Moreover, such laws consistently generate poor physical health outcomes resulting in deaths that could have been prevented, morbidity and ill-health, as well as negative mental health outcomes, not least because affected women risk being thrust into the criminal justice system.

See generally Cook, *supra* note 186, at 347-69 (illustrating the role the mutually reinforcing role that criminalization and stigma play, pushing women's abortion experiences underground and posing serious risks to their health).

192. *See* Interim Report of the Special Rapporteur on the Right to Health, *supra* note 187, ¶ 35.

193. *See Northern Ireland: Barriers to Accessing Abortion Services*, *supra* note 18, at 11, 16-18 (describing the choice to travel or seek out clandestine alternatives). *See generally* Interim Report of the Special Rapporteur on the Right to Health, *supra* note 187, ¶¶ 21-35 (discussing how criminalization and restrictive regulations limit women's access to their right to health).

194. *See Northern Ireland: Barriers to Accessing Abortion Services*, *supra* note 18, at 11, 16-18 (noting the choice to travel or resort to unsafe alternatives, explaining the statistics of women that travel to access abortion services annually and the financial requirements to access abortion services); *see also* R. (on the Application of A) v. Secretary of State for Health, C1/2014/1687 [2015] EWCA Civ. 771, [2], 2015 WL 4401470 (illustrating the unreliability of statistics about Northern Irish women seeking abortions in England, since Alliance for Choice estimates suggest that the actual number is double the official figure). *See generally* Interim Report of the Special Rapporteur on the Right to Health, *supra* note 187, ¶¶ 21-35 (detailing the impact that criminalization and restrictive regulations have on curtailing women's right to health).

for women, resulting in serious infections, infertility, or death, criminalization and stigma can have far-reaching consequences for women who cannot carry an unwanted child to term.[195]

III. *PROTECTING ABORTION ACCESS FROM BEING A POSTAL CODE LOTTERY THROUGH PRIVACY AND EQUALITY LENSES*

Texas and Northern Ireland provide illustrative examples in different contexts of how the jurisdiction where a woman lives in the United States or the United Kingdom is dispositive in determining the available health coverage, which is in direct violation of the rights protecting access to abortion.[196] Section A of this Part will argue that in United States jurisprudence, the Equal Protection Clause must be invoked alongside the Due Process Clause to protect the fundamental right to abortion, using intersectionality to determine suspect classifications. This Section will also emphasize the importance of being able to physically access an abortion as the key consideration of whether a fundamental right is being respected. Section B will also contend that the jurisdictional rationale used to offset the United Kingdom and Northern Ireland's obligations under the European Court of Human Rights is insufficient and results in an unequal application of fundamental rights to Northern Irish women.

A. *Impact of Exceptions on a Woman's Right to Access Reproductive Care Within the United States*

This section will (1) focus on the role that applying the Equal Protection Clause alongside the Due Process Clause can play in identifying regulations that violate the undue burden standard; (2) propose the application of an intersectional lens when determining

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195. *See* Sneha Barot, *Unsafe Abortion: The Missing Link in Global Efforts to Improve Maternal Health*, 14(2) GUTTMACHER POL'Y REV. (June 2011), http://www.guttmacher.org/pubs/gpr/14/2/gpr140224.html (noting the unsafe health outcomes that women face from unsafe abortions); 2012 SAFE ABORTION GUIDELINES, *supra* note 10, at 19-20 (describing the health risks that women face from obtaining unsafe abortions).

196 . *See State Policies in Brief: Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (2015), https://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf [hereinafter *State Policies in Brief: TRAP Laws*] (analyzing the TRAP laws in effect in each US state); *see also* Abortion Act 1967 § 1(1), 7(3) (comparing the legality of abortion in England, Wales, and Scotland, as compared to Northern Ireland).

protected classes in the Equal Protection analysis; and (3) review the actual impact that the TRAP laws are having on Texan women.

1. A Strong Relationship Between the Liberty Right and Equal Protection

As Justice Kennedy discussed in *Obergefell*, "the Equal Protection Clause can help to identify and correct inequalities . . . vindicating precepts of liberty and equality under the Constitution."[197] Applying this principle to the right to abortion, as it currently stands, where a woman lives in the United States dictates her ability to access this fundamental right.[198] Despite the fact that the undue burden standard under *Casey* only permits the state to enact regulations that may encourage a woman to choose childbirth over an abortion, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability."[199]

Since *Casey* was decided, courts have inquired to various extents about whether the purpose or effect of certain legislation poses substantial obstacles to a woman's right to an abortion.[200] An efficacious review of challenged legislation's *effect* on women's health—in comparison to the ways in which it limits a woman's right to an abortion—can provide insight into the purpose or effect of such legislation.[201] Reviewing the putative medical benefits of abortion

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197. Obergefell v. Hodges, 576 U.S. ___, 21 (2015).

198. *See State Policies in Brief: TRAP Laws*, *supra* note 196 (comparing the TRAP laws across States); *see, e.g.*, Deprez, *supra* note 59 (noting the anti-abortion legislation limits the provision of abortion services in certain states).

199. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877-78 (1992) (establishing the threshold that a regulation must pass to be struck down as an undue burden); *see also* Khiara M. Bridges, *supra* note 36, at 1311-19 (describing the structure and function of the undue burden standard).

200. *Compare* Gonzales v. Carhart, 550 U.S. 124, 157-58, 161-62 (2007) (upholding the intact D&E ban since an alternate, less safe procedure, the D&E, was available), *with* Planned Parenthood of Wis., Inc. v. Schimel, No. 15-1736, 8-15, 24-26 (7th Cir. 2015) (emphasizing that abortion complications are rare, admitting privileges requirements do not provide significant additional benefit to the transfer agreements between abortion clinics and nearby hospitals in the event of complications, and the legislative purpose is to restrict abortion access).

201. *Schimel*, No. 15-1736 at 22-23.

> To determine whether the burden imposed by the statute is 'undue' (excessive), the court must 'weigh the burdens against the state's justification, asking whether and to what extent the challenged regulation *actually* advances the state's interests. If a

regulations is critical, not only to determine whether there is a potential medical benefit from this regulation, but also to assess whether this will preclude many women from accessing their right to obtain an abortion.[202] For example, in *Schimel*, Judge Posner focuses on the State of Wisconsin's argument that women can travel to Chicago to obtain access to abortion services once TRAP laws in Wisconsin have forced clinics in Milwaukee to close:

> [A] 90-mile trip is no big deal for persons who own a car or can afford an Amtrak or Greyhound ticket. But more than 50 percent of Wisconsin women seeking abortions have incomes below the federal poverty line and many of them live in Milwaukee. . . . For them a round trip to Chicago, and finding a place to stay overnight in Chicago . . . may be prohibitively expensive. . . . These women may also be unable to take the time required for the round trip away from their work or the care of their children. . . . 18 to 24 percent of women who would need to travel to Chicago or the surrounding area for an abortion would be unable to make the trip.[203]

Given the "nonexistent" medical benefit that admitting privileges requirements confer to Wisconsin women and that nearly one-quarter of women who would be required to travel to Chicago for abortion services cannot make the trip due to their income level or lack of social support resources, the purpose and effect of admitting

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> burden significantly exceeds what is necessary to advance the state's interests, it is 'undue,' which is to say unconstitutional. The feebler the medical grounds (in this case, they are nonexistent), the likelier is the burden on the right to abortion to be disproportionate to the benefits and therefore excessive.

Id. (citing Planned Parenthood Arizona, Inc. v. Humble, 753 F.3d 905, 913 (9th Cir. 2014) (emphasis added)). *See generally Evaluating Priorities: Measuring Women's and Children's Health and Well-Being Against Abortion Restrictions in the States*, IBIS REPROD. HEALTH & CTR. FOR REPROD. RTS (2014), http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Priorities_Project.pdf (noting the inverse relationship between the number of TRAP laws and a State's performance on its maternal health, child health, and social determinants of health indicators).

202. *Schimel*, No. 15-1736 at 22-23 (citing Humble, 753 F.3d 905, 913 (9th Cir. 2014)) (establishing the balancing test between the potential medical benefit of an abortion regulation with the burden that the restriction imposes on women); *see also* Boonstra & Nash, *supra* note 59, at 12-13 (noting the disproportionate impact of TRAP laws on low-income women, young women, immigrant women, and women of color by requiring these women to travel greater distances and increasing the risk of abortion complications).

203. *Schimel*, No. 15-1736 at 22.

privileges is to pose a substantial obstacle to women's right to abortion.[204]

Accordingly, in challenges to TRAP laws, the relationship between the liberty right within the Due Process Clause and the Equal Protection Clause should be emphasized to protect fundamental rights, as was held in *Obergefell*.[205] The Equal Protection Clause will be particularly helpful in determining whether the regulation imposes an undue burden to accessing abortion in a discriminatory manner.[206] In most instances, the legislature does not explicitly state that the purpose of a particular regulation is to limit women's access to abortion, but instead purports that it is a regulation to protect women's health.[207] As is the case with admitting privileges or ambulatory surgical center requirements, however, it results in numerous clinic closures across the state, meaning that women that live in proximity to urban centers have a higher likelihood of accessing an abortion as compared to women that live in rural areas, far away from metropolises.[208] States have attempted to use the argument that it is permissible to travel across state lines to a closer

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204. *See id.* at 22-25 ("Opponents of abortion reveal their true objectives when they procure legislation limited to a medical procedure—abortion—that rarely produces a medical emergency."); *see also* Culp-Ressler, *supra* note 78 (describing that TRAP Laws do not improve women's quality of care and illuminate the purpose of lawmakers to restrict access to abortion without banning it outright).

205. Obergefell v. Hodges, 576 U.S. ___, 21 (2015) (noting the relationship between the liberty right under the Due Process Clause and the Equal Protection Clause); *see also* Farrell, *supra* note 32, at 247-48 (describing how the Court often views its fundamental rights tests under the Due Process and Equal Protection clauses as interchangeable when it sees fit).

206. *See* Kay, *supra* note 101, at 374 (noting the disproportionate impact on barriers to abortion services on women of color). *See generally* Ginsburg, *supra* note 93 (describing the importance of viewing access to abortion through a sex equality perspective).

207. *See* Kay, *supra* note 101, at 381 (arguing that equal protection should shift its focus away from the intent to who experiences discrimination as a result of a particular regulation); *see also* Davis, 426 U.S. at 238-52 (illustrating the limitations of using a purpose requirement to address discriminatory effects). *See generally* Greenhouse & Siegel, *supra* note 64 (describing the clinic closures that result when legislatures pass TRAP laws under the auspices of "protecting women's health").

208. *See* Bassett, *supra* note 13 (illustrating the concentration of abortion providers in urban centers); *see also* Rebecca Wind, *One-Third of U.S. Women Seeking Abortions Travel More than 25 Miles to Access Services*, GUTTMACHER INST. (July. 26, 2013), http://www.guttmacher.org/media/nr/2013/07/26/ ("It is therefore not surprising that 31% of women who lived in rural areas traveled more than 100 miles to access abortion services, and an additional 43% traveled between 50–100 miles. Rural women are underrepresented among abortion patients.").

city in a neighboring state to fulfill its constitutional obligations.[209] However, recalling *Gaines* and *Ezell*, a state cannot discharge its constitutional obligations by foisting the responsibility of fulfilling fundamental rights onto another state.[210] Viewing these travel requirements through the Equal Protection Clause illustrates the discriminatory barriers that a woman in one state must face to access abortion that a woman in a different state would not, while simultaneously highlighting the undue burden that women must experience to access their constitutional right to abortion.[211]

Low-income women, women of color, young women, and immigrant women are disproportionately burdened by these regulations, due to concerns about taking time off from work, costs and barriers to travel, or hurdles to obtaining judicial bypass in a parental consent state.[212] Wealthier woman will be able to afford child care, take paid vacation time, or afford the travel cost to the provider of their choosing.[213] The Equal Protection lens here also illustrates that TRAP laws pose substantial obstacles to a woman's right to choose an abortion since it becomes impracticable for many women

209. *Compare* Jackson Women's Health Organization v. Currier, No. 13-60599 (5th Cir. 2015) (stating that Mississippi could not require women seeking abortions to travel to another state to access their constitutional rights), *with* Whole Woman's Health v. Cole, No. 14-50928 at *55 (5th Cir. 2015) (claiming that Texas can fulfill its constitutional obligations since El Paso shares a metropolitan area with Santa Teresa, New Mexico).

210. *See* State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) (stating that Missouri cannot satisfy its constitutional obligations by relying on services available in other states); *see also* Ezell v. City of Chicago, 651 F.3d 684, 697 (7th Cir. 2011) (noting that abridging the exercise of certain constitutional rights cannot be justified based on the assumption that those rights can be exercised in another jurisdiction).

211. *See State Policies in Brief: TRAP Laws*, *supra* note 196 (illustrating the difference between the TRAP laws in effect between States); *see also* Farrell, *supra* note 32, at 246-48 (noting where the Court has applied the Equal Protection Clause in the Due Process analysis previously).

212. *See* Planned Parenthood of Wis., Inc. v. Schimel, No. 15-1736, 22 (7th Cir. 2015) (describing the strain that low-income women would face if required to travel to Chicago to obtain a late-term abortion); Bassett, *supra* note 13 (demonstrating the disproportionate impact on low-income Texan women, in particular. *See generally* Nuestro Texas Report, *supra* note 12 (noting the impact of the reproductive health restrictions on women living in the Rio Grande valley).

213. *See Schimel*, No. 15-1736 at 22 (stating that women who can afford to travel to Chicago are not burdened by the requirement to travel); Bassett, *supra* note 13 (noting that wealthy women have always been able to access abortions); *see also* Heidi Williamson, *Roe Should Be a Reality for All, Not Just a Wealthy Few*, TALK POVERTY (Jan. 22, 2015), http://talkpoverty.org/2015/01/22/roe-reality-just-wealthy/ (describing the barriers that low income women face to access abortions).

to overcome these hurdles.[214] As a critical precursor to the right to choose an abortion, women must first have access to the procedure in practical effect.[215] If women cannot afford an abortion or schedule an appointment with a provider who meets the state's requirements, then these women are not presented with the fundamental right to choose an abortion.[216] "Choice" becomes a cruel word to describe the woman's obligation to turn to clandestine alternatives or to carry an unwanted pregnancy to term.[217] As such, in *Whole Woman's Health*, the Court must look at the practical effect of the TRAP regulations on women's health, finding that (1) these regulations do not help to advance women's health and safety and (2) these regulations pose a substantial obstacle to the right to an abortion, thus constituting an undue burden.[218]

The equality doctrine has been conspicuously absent within abortion jurisprudence in the United States, since the rights to privacy and liberty have done most of the heavy lifting.[219] Through the application of the *Obergefell* framework to introduce Equal Protection into the discussion, *McRae*'s holding that denies low-income women

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214. *See* George, *supra* note 27, at 301-02 (describing the inadequacy of the reproductive "choice" framework to address low-income women's reproductive autonomy and the necessity to focus on issues of racial inequality to achieve reproductive justice); *see also* Kay, *supra* note 101, at 385 (noting the importance of focusing on the laws that have a negative impact on women's access to abortion).

215. *See* Bassett, *supra* note 13 (illustrating the practical difficulties that Texan women face to obtain abortion services); s*ee also State Policies in Brief: TRAP Laws*, *supra* note 196 (showing the regulations that can preclude women's access to abortions in different states).

216. *See generally Amber*, *supra* note 2 (describing the impact of overbooking and the requirement to see the same provider throughout the abortion process); *State Policies in Brief: TRAP Laws*, *supra* note 196 (illustrating the state's burdensome requirements to access an abortion by state).

217. *See* George, *supra* note 27, at 301-02 (describing the failures of the term "choice" to meet many women's needs); *see also Fact Sheet: The Hyde Amendment Creates an Unacceptable Barrier to Women Getting Abortions*, NAT'L WOMEN'S LAW CTR. (July 2015) (noting the impact that the Hyde Amendment has on low income women's ability to access an abortion procedure).

218. Petition for Writ of Certiorari, *supra* note 72, at 32-36 (noting that the Court must actually review the impact that a regulation has on women's health when determining if a regulation poses an undue burden). *See generally* Benson Gold & Nash, *supra* note 61 (describing that TRAP laws do not protect women's health and safety).

219. *See supra* Part I. *See generally* Ginsburg, *supra* note 93, at 375-86 (describing the weakness of abortion jurisprudence without a sex equality lens); Law, *supra* note 110, at 955-1040 (advocating for a sex equality approach to women's access to abortion).

access to abortion through Medicaid could be re-visited.[220] Since the primary way in which low-income women access health care is through Medicaid coverage, allowing Medicaid funding to cover abortion services would address the current insurmountable barriers and substantial obstacles.[221] An Equal Protection lens may also open the door to the re-evaluation of pregnancy discrimination as sex discrimination, reconsidering *Geduldig*, since only women who cannot obtain abortions would be deprived of their liberty rights.[222]

2. Focus on Intersectional Discrimination to Determine Suspect Classification

When applying the Equal Protection lens to identify Due Process Clause violations, using an intersectional approach to analyze disproportionate impact on a protected class will be critically important for reviewing whether regulations pose an undue burden on women's ability to access abortions.[223] The intersectional approach focuses on the interconnectedness of an individual's classifications on the basis of gender, race, age, and class, acknowledging that these identities are not mutually exclusive and can have compounding discriminatory effects.[224] Reductions in scrutiny either related to

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220. Obergefell v. Hodges, 576 U.S. ___, 21 (2015) (noting the application of the Equal Protection and Due Process Clauses to address a potential infringement on a fundamental right); Harris v. McRae, 448 U.S. 297, 317 (1980) (holding that the United States is not obligated to provide federal funding for abortion services through Medicaid).

221. *See supra* notes 45-46 and accompanying text (stating that low-income women who access their health care needs through Medicaid are denied access to abortions as a result of the Hyde Amendment); *see also* George, *supra* note 27, at 301-04 (noting the importance of confronting structural poverty issues within the reproductive justice framework when addressing low income women's access to abortion).

222. *See* Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974) (holding that pregnancy-discrimination did not constitute sex discrimination); *see also* Siegel & Siegel, *supra* note 91, at 771-98 (noting the importance of taking a sex equality approach to address discrimination that women face, including pregnancy discrimination).

223. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 142-43 (1989) (establishing the discourse on intersectional discrimination that women of color face, in particular). *See generally* George, *supra* note 27 (addressing how reproductive oppression has disproportionately impacted communities of color, immigrant women, and low income women, and discussing how a human rights approach is critical to address structural inequality concerns).

224. *See* Crenshaw, *supra* note 223, at 150-52 (noting the mutually reinforcing nature of different identities); *see also* Aisha Nicole Davis, *Intersectionality and International Law: Recognizing Complex Identities on the Global Stage*, 28 HARV. HUM. RTS. J. 205, 207-12

Equal Protection claims on the basis of gender or undue burden claims under the Due Process Clause make it increasingly possible for problematic restrictions to remain in place.[225] The Court has previously made these determinations on the basis of a sole classification, such as race, gender, or socioeconomic status.[226] However, since people are not only classified by a single trait, people experience discrimination as, for example, a person of color, a woman, and low-income individual simultaneously.[227] Accordingly, since looking at structural discrimination through any one of these lenses alone is insufficient to assess the discrimination that the individual faces, a multidimensional analysis based on intersectional discrimination should be used to determine whether a fundamental right is being infringed.[228]

To critically evaluate the importance of applying the intersectionality framework, reviewing the Court's holding in *McRae* serves as an illustration of the failings of a single-trait identification of a suspect class and the importance of applying a multi-factor test to

(2015) (noting the shortcomings of single-issue classification, where race and sex discrimination cannot be considered simultaneously).

225. *See* Bridges, *supra* note 36, at 1293 n.23 (noting that the undue burden standard is a weaker standard of review than Roe's trimester framework); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881-87 (1992) (upholding all of the abortion restrictions, including waiting periods, parental consent, and "informed consent").

226. *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) (establishing a limited presumption of constitutionality when particular regulations affect a "discrete and insular minority"); *see also* Harris v. McRae, 448 U.S. 297, 317 (1980) (focusing on solely on income level as the rationale for the decision); Darren Lenard Hutchinson, *Symposium Article: Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 301-07 (2001) (noting that courts have declined to decide on intersectional grounds, and have looked an discrimination as an "either/or" issue, where discrimination is because of one category or another rather than both categories).

227. *See generally* Crenshaw, *supra* note 223, at 142-43 (addressing the multiple vehicles through which individuals can experience discrimination); Nancy Ehrenreich, *Article: Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251 (2002) (describing how structural oppression is proliferated by addressing discrimination along the lines of identity groups).

228. *See* Hutchinson, *supra* note 226, at 301-07 (describing how turning a blind eye to intersectional discrimination disregards the unique position of a person experiencing multiple forms of discrimination simultaneously); *see also* Crenshaw, *supra* note 223, at 140 (highlighting that "the intersectional experience is greater than the sum of racism and sexism").

determine whether a class should be protected.[229] *McRae* challenged the Hyde Amendment—only permitting Medicaid funding for abortion in limited circumstances—the Court held that the Government did not have a positive obligation to provide funding to women to access abortion.[230] This holding has had a significant impact on the accessibility of the procedure, particularly for lower income, non-white women.[231]

> [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. . . . The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.[232]

Here, the Court hides behind the fact that guarantees of fundamental rights in the United States are negative rights obligations rather than positive ones, without acknowledging that denying Medicaid funding for abortion services *per se* precludes low-income women from accessing their fundamental rights.[233]

This is corollary to the discussion in Justice Ginsburg's dissent in *Burwell v. Hobby Lobby Stores, Inc.*, where the exclusion of certain contraceptives illustrates the disproportionate impact that denying

229. Harris v. McRae, 448 U.S. 297, 317 (1980) (deciding that low-income women who receive their health care through Medicaid should not be required to obtain access to abortion services through Medicaid funding). *See generally* Crenshaw, *supra* note 223.

230. *McRae*, 448 U.S. at 317. The conditions under the Hyde Amendment were broadened in 1993 to allow Medicaid funding to cover abortions in exceptional circumstances of rape and incest in addition to life endangerment. *See* Fried, *supra* note 1, at 212-13.

231. *See McRae*, 448 U.S. at 317-18 (detailing that the government is not required to ensure that women's fundamental right to abortion is realized through Medicaid funding); *see also Distribution of the Nonelderly with Medicaid by Race/Ethnicity*, KAISER FAMILY FOUNDATION (2013), http://kff.org/medicaid/state-indicator/distribution-by-raceethnicity-4/ (indicating that fifty-nine percent of Medicaid recipients are non-white).

232. *McRae*, 448 U.S. at 317.

233. Positive rights obligations are ways in which the government must act to guarantee certain rights whereas negative rights solely protect certain areas from unwarranted governmental intrusion. *See, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272 (1990); *see supra* note 45-46 and accompanying text (disregarding the reality that low-income women receive health care through Medicaid and are denied abortion access when Medicaid cannot cover the procedure); Kay, *supra* note 101, at 374 n.100 (describing that the impact of the Hyde Amendment "was tantamount to a total denial of access to abortion for low-income women").

insurance coverage for contraceptives would have on low-income women.[234] For example, intrauterine devices are more effective at preventing pregnancy than more affordable forms like condoms or birth control pills.[235] Yet, once cost barriers to these more effective kinds of contraceptives are removed, women overwhelmingly select the more effective forms of birth control over their counterparts.[236] When contraceptives are not provided through insurance, this disadvantages women from receiving necessary health care since contraceptives can be prohibitively expensive.[237] Without insurance coverage, a minimum wage earner would need to pay roughly one full month's salary to access an intrauterine device.[238] These same cost-considerations are particularly applicable to women in an abortion context, where the average first trimester abortion costs US$470, which increases along with the gestational period, and can cost up to US$3,000.[239] Using the same formula as the Guttmacher Institute

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234. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2788-89, 2800 (2014) (Ginsburg, J., dissenting) (describing the disproportionate impact that denying contraceptive coverage would have on low-income women); *see also State of Birth Control Coverage: Health Plan Violations of the Affordable Care Act*, NAT'L WOMEN'S LAW CTR., 1 n.1, http://www.nwlc.org/sites/default/files/pdfs/stateofcoverage2015final.pdf (noting that moderate out-of-pocket costs can preclude low- and middle-income women from accessing essential preventative care that they need).

235. *See Birth Control Guide*, FOOD & DRUG ADMIN., OFFICE OF WOMEN'S HEALTH, http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM356451.pdf (last visited Jan. 11, 2016) (describing efficacy of different birth control options); *see also* Gregor Aisch & Bill Marsh, *How Likely Is It that Birth Control Can Let You Down?*, N.Y. TIMES (Sept. 13, 2014), http://www.nytimes.com/interactive/2014/09/14/sunday-review/unplanned-pregnancies.html?_r=0 (illustrating the pregnancy failure rate for various kinds of birth controls).

236. Gina M. Secura et al., *Provision of No-Cost, Long-Acting Contraception and Teenage Pregnancy*, 371 NEW ENG. J. MED. 1316, table 1 (2014), http://www.nejm.org/doi/full/10.1056/NEJMoa1400506#t=articleResults (stating that of the 1404 young women that participated in this study, 1132 selected long-acting, reversible contraceptive methods, including intrauterine devices, compared to 175 using hormonal birth control pills); *see* Heather D. Boonstra, *Leveling the Playing Field: The Promise of Long-Acting Reversible Contraceptives for Adolescents*, 16 GUTTMACHER POL'Y REV. 15 (2013) (noting the barrier that cost poses to adolescents selecting long-acting reversible contraceptives as a contraceptive method).

237. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2788-89 (2014) (Ginsburg, J., dissenting); *see also supra* note 234 and accompanying text (asserting the impact that out-of-pocket costs can have on access to contraceptives).

238. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2800 (Ginsburg, J., dissenting) (citations omitted).

239. *See Are You in the Know?: Abortion*, GUTTMACHER INST. http://www.guttmacher.org/in-the-know/abortion-costs.html (last visited Dec. 29, 2015) (stating the average cost of a

applied in their Amicus Curiae brief for consideration in *Hobby Lobby*, the Federal Minimum Wage is US$7.25 per hour, calculated based upon a forty-hour work week, which amounts to US$290 in pre-tax dollars.[240] As such, a first trimester abortion costs roughly half of one month's salary and a later term abortion can cost up to three months of salary.[241] Due to other financial obligations, such as rent, food, transportation costs, child care, and other expenses, paying for an abortion out-of-pocket is often unaffordable for low-income women.[242] It is particularly likely that second trimester abortions would often be inaccessible because they would be prohibitively expensive.[243]

The Court's meager analysis in *McRae* also baldly illustrates the problem with a single-issue classification.[244] Those that are affected by the Hyde Amendment's funding restrictions are not just low-income individuals. They are also women, who may be from various ethnic backgrounds; from a family that has recently emigrated to the United States; who may be young; married or unmarried; with children or without children; from a rural or urban environment. Restrictions on Medicaid funding disproportionately affect communities of color since fifty-nine percent of Medicaid recipients across the United States are non-white.[245] By solely looking at one's

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first trimester abortion); *FAQs*, WOMEN'S MED, *supra* note 7 (noting that the cost of abortion can be expected to increase about US$100 per week after eleven weeks gestation).

240. Brief of the Guttmacher Institute and Professor Sara Rosenbaum as Amici Curiae in Support of the Government at 16 n.37, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354 & 13-356) (calculating a low-income woman's weekly wage based upon minimum wage); *see also* Fair Labor Standards Act of 1938, as Amended § 206(a)(1)(c) (establishing the federal minimum wage rate of US$7.25 as of July 24, 2009).

241. Brief of the Guttmacher Institute and Professor Sara Rosenbaum as Amici Curiae in Support of the Government at 16 n.37, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354 & 13-356) (using the minimum wage to calculate a low-income woman's weekly wage); *see also* Fair Labor Standards Act of 1938, as Amended § 206(a)(1)(c) (setting the federal minimum wage rate of US$7.25 per hour).

242. *See Are You in the Know?*, *supra* note 239 (noting the first trimester abortion cost); *FAQs*, WOMEN'S MED, *supra* note 7 (calculating costs of obtaining an abortion increases roughly US$100 per week after eleven weeks gestation).

243. *See supra* note 242 and accompanying text.

244. *See* Harris v. McRae, 448 U.S. 297, 314-18 (1980) (focusing solely on the women's indigency rather than her experience as a low-income individual and a woman); *see also* Palencia, *supra* note 44, at 275-76 (noting that low-income women will disproportionately bear the impact of the Hyde Amendment and *Harris v. McRae*).

245. *See Distribution of the Nonelderly with Medicaid by Race/Ethnicity*, *supra* note 231 (disaggregating statistics by racial classification of Medicaid recipients).

income, the gender and racial factors that could also be the basis for suspect classifications are overlooked.[246] Had the Court in *McRae* looked at the disproportionate impact that these Medicaid restrictions would have on (1) women as the only group that would need to have access to an abortion procedure, (2) their inability to access their fundamental right to choose an abortion without the financial support through the Medicaid program that provided comprehensive health insurance for low income individuals, which (3) disproportionately impacted communities of color and young women, the Court would be seeing a fuller picture of the impact on the restriction of the fundamental right.[247] By reviewing these additional factors to determine whether these regulations are discriminatory against individuals that trigger protected class status multiple times, the Court would at least need to ensure that the regulation would be narrowly tailored to achieve an important government purpose, necessarily elevating the level of scrutiny applied.[248] Because intersectionality focuses on multiple historical grounds for discrimination including race, national origin, and gender, strict scrutiny should be applied, requiring the regulation to be narrowly tailored and the least restrictive means of serving a compelling government interest.[249]As applied to *Whole Woman's Health*, the District Court emphasized the burdens created by the admitting privileges and ambulatory surgical center requirements on women themselves:

> [T]ravel distances [resulting from widespread clinic closures] combine . . . with the following practical concerns to create a *de facto* barrier to abortion for some women: 'lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off from work, immigration status and inability to pass border checkpoints, poverty level, the time and expense involved in

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246. *See* Crenshaw, *supra* note 223, at 140 (noting that "the intersectional experience is greater than the sum of racism and sexism."); *see also* Palencia, *supra* note 44, at 272-75 (emphasizing the Court's failure to apply heightened scrutiny).

247. *See* Crenshaw, *supra* note 223, at 140; *see also* Palencia, *supra* note 44, at 225.

248. *See* Bridges, *supra* note 36, at 1319-34 (analyzing the legitimacy of the test of balancing government interests and individual rights and reviews whether there is any government interest in protecting fetal life); *see also* Palencia, *supra* note 44, at 272-78 (noting the Court's failures to apply heightened scrutiny and its focus on the sole classification of indigency in its analysis).

249. *See* Crenshaw, *supra* note 223, at 140; *see also* Palencia, *supra* note 44 at 225.

> traveling long distances, and other, inarticulable psychological obstacles.'[250]

In order to fully address the burdens that these TRAP laws place on women, the Court must consider at a minimum the woman's gender, income, age, immigration status, child-care options, and residence.[251] Applying an intersectional lens to view discrimination should ensure that women of color, young women, low-income women, or women living in a certain state or region of that state are not disproportionately precluded from accessing abortion services.[252]

3. The Impact of Abortion Restrictions on Access to Services: Zooming in on Texas

Abortion regulations that create barriers to actually accessing the procedure disproportionately affect lower income women, young women, and women of color.[253] Under the undue burden standard of review developed through *Casey*, the Court's refusal to strike down the twenty-four hour waiting period, parental consent, and "informed consent" laws has led to a deluge of similar restrictions across the country, purportedly intended to encourage women to reconsider their decision about terminating their pregnancies or protect women's health.[254] These arbitrary requirements—waiting certain lengths of

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250. Petition for a Writ of Certiorari, Brief for Petitioners at *24 (Sept. 3, 2015), Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015).

251. *See* Crenshaw, *supra* note 223, at 140 (noting the disproportionate impact of intersectional discrimination on individuals, which is greater than the sum of its parts); *see also* Hutchinson, *supra* note 226, at 301-07 (describing how ignoring intersectional discrimination overlooks the unique, more pronounced experience of facing discrimination on multiple bases).

252. *See* Crenshaw *supra* note 223, at 146-49; *see also* Hutchinson, *supra* note 226, at 301-07.

253. *See* Fried, *supra* note 1, at 212-13 (noting that "[a]ccess has been undermined primarily through denial of public funding for abortion, parental involvement laws, and the loss of abortion services."); *see, e.g.*, *Proposed Ban on Abortion After 20 Weeks Is Misguided and Harms Women's Health*, GUTTMACHER INST. (Sept. 21, 2015), http://www.guttmacher.org/media/inthenews/2015/09/21/ (describing the disproportionate impact that the 20 week ban would have on low-income women because of travel requirements, cost barriers, waiting periods, and other hurdles).

254. A state may regulate abortion as long as it does not have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992); *see* Benson Gold & Nash, *supra* note 61, at 7 (noting that the regulations in effect throughout the United States are patently anti-abortion regulations that do not have the purpose of protecting women's health).

time or receiving certain information or permissions—require women to travel to the clinic on multiple occasions, increasing the cost of obtaining an abortion.[255] Each time, women must arrange child care, take time off of work, and possibly travel considerable distances to the nearest clinic.[256]

TRAP laws have led to the closure of countless clinics throughout the country and in Texas, based upon arbitrary requirements passed under the auspices of medical necessity for safer abortions, by requiring clinics to meet the standards of ambulatory surgical centers, mandating that providers to have admitting privileges to local hospitals, or require that clinics are located within a determined distance of local hospitals.[257] Before the Supreme Court granted an injunction in *Whole Woman's Health*, as few as *eight* clinics in the entire state of Texas would have remained open as a result of H.B. 2, primarily serving the urban areas in the state, and requiring rural women to travel considerable distances to access abortion services.[258]

Women living in the Rio Grande Valley and El Paso were constructively isolated from accessing reproductive care services within their home state.[259] Even with these provisions enjoined

255. *See* Fried, *supra* note 1, at 213 ("Clearly, some welfare recipients cannot afford abortions at all. Others are forced to divert money from other essentials, such as food, rent, and utilities. Even when women are able to raise the money, the time it takes to search for funding makes it more likely they will need a more costly and more difficult second-trimester procedure."); *FAQs*, WOMEN'S MED, *supra* note 7 (stating that the cost of abortion increases by roughly US$100 per week after eleven weeks gestation and can cost up to US$3,000); *see also Texas Abortion Clinic Map*, FUND TEXAS CHOICE, http://fundtexaschoice.org/resources/texas-abortion-clinic-map/ (last visited Jan. 11, 2016) (showing the sparse distribution of clinics throughout Texas).

256. *See State Policies in Brief: TRAP Laws*, *supra* note 196 (highlighting discrepancies between the TRAP laws in effect by State); *see also* Benson Gold & Nash, *supra* note 61, at 7-12 (detailing the impact of TRAP laws on abortion access).

257. *See State Policies in Brief: TRAP Laws*, *supra* note 196 (demonstrating differences between the TRAP laws in effect by State); *see also* Benson Gold & Nash, *supra* note 61, at 7-12 (describing the impact of TRAP laws on access to abortion services).

258. *See* Whole Woman's Health v. Cole, 576 U.S. 56 (2015) (granting a stay to the Fifth Circuit's decision that would have allowed the H.B. 2 provisions to go into effect); *see also Texas Abortion Clinic Map*, *supra* note 255 (describing current clinics that are open and the services that they provide).

259. *See* Whole Woman's Health v. Cole, No. 14-50928 *at 55 (5th Cir. 2015) (stating that the closest clinic to El Paso in Texas is 550 miles away); *see also* Fernandez & Eckholm, *supra* note 8, at 3 (noting that the court found the 550 mile requirement permissible since

currently, women in the Rio Grande valley have great difficulty accessing any reproductive health services since there are not nearby clinics, few people have access to transportation, and many women living in the valley are undocumented.[260] As such, many women rely on Misoprostol smuggled across the border from Mexico without clear instructions on how to take the medication safely.[261] Due to the draconian measures included within H.B. 2, such limited access to abortion institutionalizes stigma, severely restricts access to abortion, and requires women to risk their lives to exercise their constitutionally protected rights.[262] As access is narrowing, it is imperative that the United States addresses the rising incidence of unsafe abortion, not by placing further restrictions on abortion, but instead by striking down problematic restrictions that leave women with no choice but to resort to these unsafe measures to access their fundamental right to obtain an abortion.[263] Beyond maintaining abortion as a legal right, without a strong reproductive justice response to fight against barriers that restrict abortion access—predominantly impacting low-income women, young women, and women of color—the United States may be returning to the pre-*Roe* days where women are more likely to obtain unsafe, clandestine

women were already traveling to New Mexico to obtain abortions but the 235 mile distance for women in the Rio Grande Valley did pose an undue burden).

260. *See* Hellerstein, *supra* note 8, at 3 (discussing the increase in women crossing into Mexico to gain access to Misoprostol, which is a medicine that can be used to induce abortion); *see also* Nuestro Texas Report, *supra* note 12, at 6 (describing the particular challenges that women in the Rio Grande Valley to gain access to reproductive health services).

261. *See* Hellerstein, *supra* note 8, at 3 (noting the trend to seek abortions outside of clinics as abortion services within clinics are more difficult to access); *Texas Threat to Abortion Clinics Dodged at Flea Markets*, BLOOMBERG BUSINESS (July 11, 2013), http://www.bloomberg.com/news/articles/2013-07-11/flea-market-abortions-thrive-as-texas-may-close-clinics (describing the common practice of women taking black market Misoprostol to induce abortion).

262. *See* Interim Report of the Special Rapporteur on the Right to Health, *supra* note 187, ¶¶ 24-25 (noting the impact that overly restrictive regulations have on the safety of abortion); 2012 SAFE ABORTION GUIDELINES, *supra* note 10, at 86 (describing the correlation between the restrictive nature of abortion laws and the rate of unsafe abortions).

263. Hellerstein, *supra* note 8, at 3 (describing how women are filling the gap to access essential abortion services by self-inducing using smuggled Misoprostol from Mexico); *see State Policies in Brief: TRAP Laws*, *supra* note 196 (describing that TRAP laws have no benefit on the patient's health and illustrating how far reaching these regulations are).

abortions.[264] Viewing these abortion restrictions through an intersectional lens as part of a composite Equal Protection-Due Process Clause analysis will help to address the disproportionate impact that these barriers have on low-income women, young women, and women of color.[265]

B. *Criminalization of Abortion in Northern Ireland: Discriminatory and Stigmatizing*

Continued criminalization of abortion in Northern Ireland is impermissible and must be brought in line with the rest of the United Kingdom's abortion policies. The Courts have held that NHS is a residence-based system such that NHS Trusts in other jurisdictions are not obligated to provide abortion services to Northern Irish women, and Northern Ireland is permitted to keep its restrictive legal framework in place where abortions are only permitted in extremely limited circumstances.[266] Conversely, England does provide its residents with coverage for abortion services for sixty to ninety percent of the cost of the procedure.[267] Within the United Kingdom, not only does this mean that Northern Irish women are not afforded the same care as English women, but also Northern Irish women need

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264. Hellerstein, *supra* note 8, at 8 (noting the large numbers of women in the Rio Grande Valley that are purchasing Misoprostol to induce abortion); *Texas Threat to Abortion Clinics Dodged at Flea Markets*, *supra* note 261, at 4 (describing the limited choices that low-income, undocumented women living in the Rio Grande Valley have to access abortion services).

265. *See supra* Part III.A.2 (describing the intersectional framework).

266. *See supra* Part II.A.2 (describing the current legal framework governing abortion access in Northern Ireland); *see also* R. (on the application of A) v. Secretary of State for Health, [2014] EWHC 1364 (Admin), [58], 2014 WL 1220042 (enabling NHS Trusts to decline to cover services for Northern Irish women); Northern Ireland Human Rights Commission's Application for Judicial Review, ¶¶ 3-5 [2015] NIQB 102, 2015 WL 9112625 (determining that prohibiting abortion for fatal fetal abnormalities and pregnancies as a result of sexual crime cannot be interpreted as Convention-compliant, but is considered provisional for other courts or the legislature to decide).

267. *Compare Abortion*, NHS CHOICES, http://www.nhs.uk/conditions/Abortion/Pages/Introduction.aspx (last visited Oct. 31, 2015) (noting that NHS will cover sixty – ninety percent of an abortion procedure, depending upon location), *with* R. (on the application of A), [2014] EWHC 1364 (Admin.), ¶ 4 ("[The claimant] was able to access such services, albeit they were those provided privately by an independent clinic, outside the NHS for a fee. . . .").

to spend up to GB£2,000 to travel to England to obtain abortion services from a private provider.[268]

Although the European Court of Human Rights held in *A, B and C v. Ireland* that requiring Irish women to travel to England to obtain abortions was not in itself a violation of Article 8, the right to respect for private and family life, the Northern Irish situation is distinguishable.[269] Northern Irish women are citizens of the United Kingdom and are unable to obtain the same treatment as those in the other jurisdictions of the United Kingdom, as acknowledged in *NIHRC Judicial Review*.[270] This amounts to the State's arbitrary infringement on a woman's right to respect for private and family life.[271] Since the United Kingdom passed the 1967 Abortion Act, according to *Tysiąc v. Poland*, once abortion is legal in certain circumstances, "[the State] must not structure its legal framework in a way which would limit real possibilities to obtain [abortion]."[272] The United Kingdom is limiting real possibilities for its citizens to obtain abortions by allowing Northern Ireland to maintain a severely restrictive legal framework through criminalizing abortion in most circumstances and precluding NHS abortion coverage for Northern

268. *See* NHS CHOICES, *supra* note 267 (describing the services available through the NHS to women from English, Scottish, and Welsh jurisdictions, but not the Northern Irish jurisdiction); *Northern Ireland: Barriers to Accessing Abortion Services*, *supra* note 18, at 18, 29 (noting the costs of traveling to other UK jurisdictions to access abortion services).

269. A, B and C v. Ireland, No. 25579/05 Eur. Ct. H.R., ¶¶ 224, 239-42 (2010) (stating that the margin of appreciation allows the Republic of Ireland to require Irish women to travel to another State to obtain access to abortion services); *see* Abortion Act 1967 § 7(3) (stating that Northern Ireland is exempt from the requirement to provide abortion services to women up to twenty-four weeks pregnant in instances of health and fetal impairment).

270. Northern Ireland Human Rights Commission's Application for Judicial Review, ¶¶ 154, 171 [2015] NIQB 96, 2015 WL 8131461 (stating that the *R* court did not find differing access to abortion based on one's residence within the United Kingdom to constitute discrimination when considered with or without Article 8); *see also* R. (on the Application of A) v. Secretary of State for Health, C1/2014/1687 [2015] EWCA Civ. 771, [47]-[50], 2015 WL 4401470 (stating that pregnant women from Northern Ireland compared to other women from the United Kingdom do not experience discrimination on prescribed grounds in their inability to access NHS coverage for abortion services).

271. See ECHR, *supra* note 153, arts. 8, 14 (applying the right to respect for private and family life and non-discrimination principle contained in the Convention, the NHS "postcode lottery" denying women access to abortion services denies both rights); NHS CHOICES, *supra* note 267 (describing NHS coverage requirements, indicating which jurisdictions will perform abortion services and which will not).

272. Tysiąc v. Poland, No. 5410/03 Eur. Ct. H.R., ¶ 116 (2007); *see* Abortion Act 1967 § 1(1), 7(3) (establishing the instances in which abortion is permitted in the United Kingdom).

Irish women.[273] Therefore, denying Northern Irish women access to abortions is in violation of Article 8, the right to respect for private and family life.[274]

Infringing upon women's ability to obtain an abortion in Northern Ireland also amounts to unequal, discriminatory treatment in violation of Article 14, which states that discrimination is prohibited "on any ground such as sex, . . . association with a national minority. . . ."[275] Since abortion is a health procedure that only women need protected under Article 8, the denial of this procedure amounts to discrimination on the basis of sex when it is not provided.[276] Similarly, women from Northern Ireland could be considered to have an association with a different national minority by being Northern Irish; a Northern Irish woman receives patently different treatment than women from the rest of the United Kingdom, which amounts to *de jure* and *de facto* discrimination.[277] Since the 1967 Abortion Act has written into the statute that the Act does not apply to Northern Ireland, this is *de jure* discrimination of an essential

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273. Tysiąc v. Poland, No. 5410/03 Eur. Ct. H.R., ¶ 118 (2007). (stating that once abortion is permitted within a country, obstacles to obtaining that right to abortion cannot be imposed); *see supra* Part II.A (specifying that abortion is currently criminalized in all circumstances except when it is necessary to preserve a pregnant woman's life, or if there is a risk of a long-term, permanent injury to her physical or mental health, which is real and has a serious adverse effect despite the provisional view in NIHRC Judicial Review); R. (on the Application of A) v. Secretary of State for Health, C1/2014/1687 [2015] EWCA Civ. 771, [58], 2015 WL 4401470 (holding that Article 8 is not violated by the availability of abortion services in England for Northern Irish women for cost). *See generally* Erdman, *supra* note 170, at 121-42 (describing the European Court of Human Rights' approach to abortion jurisprudence).

274. Tysiąc v. Poland, No. 5410/03 Eur. Ct. H.R., ¶ 116 (2007) (permitting abortion within a country means that real obstacles to obtaining access to abortion cannot be imposed); ECHR, *supra* note 153, art. 8 (establishing a right to respect for private and family life).

275. ECHR, *supra* note 153, art. 14.

276. Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 24, Women and Health (Article 12)*, ¶ 11, U.N. Doc. A/54/38/Rev.1 (1999) ("It is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women."). *See generally* Ginsburg, *supra* note 93, at 375-86 (describing the importance of applying the equality framework to address pregnancy-related issues, including the abortion question).

277. ECHR, *supra* note 153, art. 14 (establishing protected class status for association with a national minority). *See generally* Bitton, *supra* note 39, at 594 (noting the limitations of *de jure* discrimination analysis and how *de jure* analysis does not always capture individuals who experience *de facto* discrimination).

health service protected under Article 8 of the European Convention.[278]

Furthermore, the fact that the only way that Northern Irish women can access an essential health service is by paying as much as GB£2,000 to travel to other parts of the United Kingdom to obtain the procedure from a private provider also limits who is able to access abortions in practical effect, therefore also amounting to *de facto* discrimination.[279] As the High Court acknowledges in *NIHRC Judicial Review* with respect to limited circumstances:

> There is evidence that such a provision, forcing these young women to travel to England and Wales, can have the consequence of imposing a crushing burden on those least able to bear it. . . . [S]uch criminal provisions requiring them to travel abroad to have an abortion will impose a heavy financial burden upon them. That burden will weigh heavier on those of limited means.[280]

As Northern Ireland is a part of the United Kingdom, the United Kingdom is obligated to ensure that Northern Irish women are able to obtain the same access to abortion as women that live in the rest of the United Kingdom without requiring women to travel to other jurisdictions.[281]

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278. Abortion Act 1967 § 7(3) (excluding Northern Ireland from requirements to broaden abortion access); Tysiąc v. Poland, No. 5410/03 Eur. Ct. H.R., ¶ 116 (2007) (noting that once abortion is legal within a territory, the legal framework must not be structured "in a way which would limit real possibilities to obtain it").

279. Northern Ireland Human Rights Commission's Application for Judicial Review, ¶ 154 [2015] NIQB 96, 2015 WL 8131461 (stating the heavier burden that lower income women experience if unable to obtain charitable assistance or family support); *Northern Ireland: Barriers to Accessing Abortion Services*, *supra* note 18, at 18, 29 (describing travel costs to obtain an abortion in other UK jurisdictions); Fegan & Rebouche, *supra* note 134, at 227-28 (noting the costs involved to travel to England for abortion services and the difficulty obtaining medical follow-up for the procedure).

280. Northern Ireland Human Rights Commission's Application for Judicial Review, ¶ 154 [2015] NIQB 96, 2015 WL 8131461 (noting that being required to travel to England or Wales in the exceptional categories of fatal fetal impairment and pregnancy as a result of sexual crime places heavy emotional and financial demands on women).

281. *See supra* Part II.A.1 (describing Northern Ireland's government structure); Tysiąc v. Poland, No. 5410/03 Eur. Ct. H.R., ¶ 116 (2007) (stating that the legal framework must not be structured "in a way which would limit real possibilities to obtain it" once abortion is legal in a territory).

CONCLUSION

The United States and Northern Ireland share the concept that the jurisdiction in which a woman lives determines her access to her fundamental rights.[282] In the United States, the right in question is her fundamental right to an abortion whereas in Northern Ireland, the rights in question are her right to respect for private and family life and the prohibition of discrimination.[283] Since there are entire demographics of people who cannot access safe abortion services within their jurisdiction and who are required to travel over borders to obtain them, the associated costs to obtain the procedure have a discriminatory effect on low-income communities.[284] For equality to be achievable, the courts must root out invidious, intersectional discrimination and ensure that cost concerns do not pose barriers to women's access to their fundamental rights.[285]

Accordingly, despite the fact that few courts have explicitly rendered judgments to this effect, targeting abortion—health services that only women need—constitutes sex discrimination.[286] Restricting abortion threatens core, reproductive rights that must be secured for women to achieve equality.[287] As such, the future of abortion litigation should include a non-discrimination prong that enables women of any age, from all income levels, any ethnic background, and hailing from any jurisdiction within the United States and United Kingdom to access safe, legal abortion services.[288] One's postal code should not preclude a woman from accessing safe, legal abortion services that are available within other jurisdictions in the United States and the United Kingdom.[289]

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282. *See supra* Parts 1.A.2, II.A.2-3 & III.A.3 (noting the particular challenges that women in Texas and Northern Ireland have in accessing abortion services).

283. *See supra* Parts I.A.1, II.B (analyzing the legal context for the abortion right in the United States and European Court of Human Rights, respectively).

284. *See supra* Parts II.A.3, III.A (discussing the impact that abortion restrictions have on requiring women to travel to obtain the procedure).

285. *See supra* Part III.A.2 (describing the intersectional approach to determining suspect classification).

286. *See supra* Parts I.B, II.B (noting that Courts have generally avoided deciding abortion cases on equality grounds).

287. *See supra* Parts I.B, II.C (describing the importance of having access to abortion as a critical woman's right).

288. *See supra* Parts III.A.2, III.B (noting the importance of applying an anti-discrimination lens in reviewing regulations on abortion).

289. *See supra* Part III (describing the inaccessibility of abortion due to legal barriers).