

# Bans on Sex-Selective Abortions: How Far is Too Far?

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## I. Introduction

“My mother in law always tells me I am useless because I do not have a son. If I do not have a son, she says, they will send me back to India.”<sup>1</sup> These words come from a qualitative study on son preference and fetal sex selection among Indian immigrants in the United States in which women expressed the pressure to have sons from in-laws and husbands.<sup>2</sup> The failure to produce a male child resulted in verbal threats, physical abuse, and neglect.<sup>3</sup> The most common forms of neglect were the withholding of food, water, and rest during a woman’s pregnancy with a female fetus, although women also described being hit, pushed, choked, and kicked in the abdomen in a husband’s attempt to forcibly terminate a pregnancy.<sup>4</sup> Indian immigrants are not the only ones who face the pressure to have sex-selective abortions. Census studies indicate that many

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1. Sunita Puri, Vicanne Adams, Susan Ivey, & Robert D. Nachtigall, “*There is Such a Thing as Too Many Daughters, but Not Too Many Sons*”: *A Qualitative Study on Son Preference and Fetal Sex Selection Among Indian Immigrants in the United States*, 72 SOC. SCI. & MED. 1169, 1173 (2011) [hereinafter Puri et al., *Fetal Sex Selection Among Indian Immigrants*].

2. *Id.* at 1169.

3. *Id.* at 1173.

4. *Id.*

Chinese and Korean Americans also terminate pregnancies if the fetus is of the undesired sex.<sup>5</sup>

Further, the studies imply that sex selection is not a practice that can be easily eliminated, and technology has made it easier to practice sex selection early in a pregnancy. For instance, since the late 1960s, doctors have used ultrasound machines to determine the sex of a fetus, usually performed around twenty weeks into a pregnancy.<sup>6</sup> With current technology, however, the sex of the fetus can be known as early as the seventh, and sometimes the fifth, week.<sup>7</sup> Some women have embraced this technology to facilitate sex-selective abortions.<sup>8</sup> This phenomenon has raised many ethical and moral concerns among legal and medical professionals, scholars, and ordinary citizens around the world. To address these concerns, some countries, like India, have banned sex-selective abortions (although these laws tend to be poorly enforced). Other countries, like Sweden, have legalized abortions for all reasons up until the eighteenth week of pregnancy—even if the fetus's sex is the basis for the request.<sup>9</sup> In the United States, there exists no federal law on the issue; however, four states have criminalized the performance of sex-selective abortions (Illinois, Oklahoma, Pennsylvania, and Arizona).<sup>10</sup> Other states, like Virginia, are considering similar steps.<sup>11</sup>

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5. Douglas Almond & Lena Edlund, *Son-Biased Sex Ratios in the 2000 United States Census*, 105 PROC. NAT'L ACAD. 5681, 5681 (2008), available at [www.ncbi.nlm.nih.gov/pmc/articles/PMC2311342/pdf/zpq5681.pdf](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2311342/pdf/zpq5681.pdf).

6. Joseph Woo, *A Short History of Amniocentesis, Fetoscopy and Chorionic Villus Sampling*, <http://www.ob-ultrasound.net/amniocentesis.html> (last visited May 8, 2012); see also Kevin Harrington et. al., *Fetal Sexing by Ultrasound in the Second Trimester: Maternal Preference and Professional Ability*, 8 ULTRASOUND OBSTET. GYNECOL. 318, 318 (1996).

7. Some women use this technology to choose the sex of their fetus prior to conception. Pam Belluck, *Test Can Tell Fetal Sex at 7 Weeks, Study Says*, N.Y. TIMES (Aug. 9, 2011), <http://www.nytimes.com/2011/08/10/health/10birth.html>; see also Richard P. Smith, Hennie Lombaard, & Peter W. Soothill, *The Obstetrician's View: Ethical and Societal Implications of Non-Invasive Prenatal Diagnosis*, 26 PRENAT. DIAG. 631, 632 (2006).

8. Puri et al., *Fetal Sex Selection Among Indian Immigrants*, *supra* note 1, at 1169.

9. *Sweden Rules 'Gender-Based' Abortion Legal*, THE LOCAL (May 9, 2012), <http://www.thelocal.se/19392/20090512/>.

10. State Laws Regulating Reproductive Rights, LAW STUDENTS FOR REPRODUCTIVE JUSTICE, [http://lsrj.org/documents/factsheets/11\\_State%20Laws%20Regulating%20Repro%20Rights.pdf](http://lsrj.org/documents/factsheets/11_State%20Laws%20Regulating%20Repro%20Rights.pdf) (last visited Mar. 30, 2012).

11. Laura Vozella, *Va. Candidate Says He'll Push to Ban Sex-Selective Abortion*, WASH. POST (Oct. 28, 2011), [http://www.washingtonpost.com/local/dc-politics/va-candidate-says-hell-push-to-ban-sex-selective-abortion/2011/10/21/gIQAvPvFQM\\_story.html](http://www.washingtonpost.com/local/dc-politics/va-candidate-says-hell-push-to-ban-sex-selective-abortion/2011/10/21/gIQAvPvFQM_story.html).

Although the constitutionality of these laws has yet to be tested, sex selection prohibitions offer a unique opportunity to examine the bounds of reproductive autonomy and whether the right to have an abortion protects those who undergo sex-selective abortions. Do these laws conflict with the constitutional right to have an abortion as originally articulated under *Roe v. Wade*? Or do they fail the “undue burden” test of *Pennsylvania v. Casey*? Where does the “human dignity” standard of *Gonzalez v. Carhart* fall, and should that supersede a woman’s expressed right to choose to have an abortion?

While society can find reasons to justify abortions under certain circumstances but not others, public opinion should be irrelevant because the Constitution safeguards individual rights and does not subject them to popular vote. To impose the beliefs of some members of society onto other members who have different notions of rights can create cultural superiority, which devalues the viewpoints of minorities. Additionally, if the government does prohibit sex-selective abortions, women can lie about their reasons for wanting an abortion. Consequently, the constitutionally implied right to privacy, exhibited through the doctor-patient relationship, could be undermined. Therefore, in the interest of protecting both women’s safety and reproductive rights, the right to engage in sex selection should be protected under the right to liberty articulated in the Due Process Clause of the Fourteenth Amendment.

The remainder of this note analyzes the boundaries of reproductive autonomy under the United States Constitution and suggests how lawmakers should address the issue of sex-selective abortion. Part II examines sex selection practices and their regulation in both the United States and other parts of the world. Part III considers how sex selection affects abortion laws in the United States, and the constitutionality of such laws. Part IV analyzes the legal, ethical, and moral concerns that lawmakers may face while enacting anti-abortion laws. Lastly, Part V discusses proposed solutions that will uphold current abortion rights under the Constitution and the implications such laws will have for American society.

## **II. Sex Selection Practices and Regulations**

Certain cultural traditions and advancements in technology both support sex selection practices. While some governments have tried to stop the practice by passing laws regulating abortion, others have legalized it under the banner of individuals’ rights to reproductive autonomy. This section elaborates on the causes of sex selection

practices and discusses the methods by which different governments try to control and prevent the subsequent skews in sex ratios.

Sex selection has been occurring for centuries. Mara Hvistendahl describes women “whisper[ing] to each other about new technique[s] over tea.”<sup>12</sup> As a result, over 160 million women and girls are claimed to be absent from Asia because of sex-selective abortions.<sup>13</sup> That number is greater than the female population of the entire United States.<sup>14</sup> Sex selection in China and India alone has skewed the sex ratio at birth of the entire world, “from 105 to the biologically impossible 107” males born for every 100 females.<sup>15</sup> However, the sex ratio imbalance goes farther than Asia—it is present in Vietnam and Caucus countries like Azerbaijan, Georgia, and Armenia, as well as the Balkans.<sup>16</sup> Sex selection is not the phenomenon of a particular religion or culture; it happens among Hindus, Muslims, Christians, as well as people of different political and economic backgrounds.<sup>17</sup> A number of fascinating factors contribute to the growing prevalence of sex selection worldwide.

Sex selection has reached historic proportions in widely disparate countries and regions on Earth. Some societies condone sex selection because of the higher value placed on males than on females. Technological advancements aid these practices because they allow early detection of the sex of a fetus. Although several causes contribute to the growth of sex selection, it is their convergence—not just their sum total—that causes the massive spread of the practice.

#### A. Cultural Traditions

Women can feel pressured into having abortions because of the physical and verbal abuse that may come with the discovery of a pregnancy in certain societies.<sup>18</sup> Historically, in many Asian cultures, fathers prefer sons to daughters because only sons can legally inherit

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12. MARA HVISTENDAHL, *UNNATURAL SELECTION* 11 (2011).

13. *Id.* at 6.

14. *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited May 11, 2012) (a 2011 estimate under “Age Structure” indicates that the total number of females in the United States population equates to a little over 158 million).

15. HVISTENDAHL, *supra* note 12, at 6.

16. *Id.* at 6–7.

17. *Id.* at 10.

18. See Puri et al., *Fetal Sex Selection Among Indian Immigrants*, *supra* note 1, at 1173.

wealth.<sup>19</sup> Many women even prefer boys because they know “just how difficult it is to be female.”<sup>20</sup> Having boys can also be very empowering for women because it is seen as fulfilling their expected duties as a wife.<sup>21</sup> In fact, women have been known to commit suicide after giving birth to girls because they know their husbands or mothers-in-law would torture them to the point of death for failing to give birth to a boy.<sup>22</sup>

While selecting for male fetuses is the most common form of sex selection, in some countries prospective parents prefer girls. For instance, some couples in Israel choose to abort male fetuses to avoid having their child drafted into the military.<sup>23</sup> One Israeli couple was so desperate for a girl that they aborted a male fetus in their first pregnancy, and when the second resulted in twins (a boy and girl), the couple used selective reduction to abort only the boy.<sup>24</sup> Other Israeli couples, and also some European couples, use sex selection for family balancing reasons.<sup>25</sup> However, sex selection in Israel is only legally permissible for medical reasons.<sup>26</sup> In most European countries, the practice is only allowed for medical reasons or prohibited outright.<sup>27</sup> As a result, couples determined to perform the practice travel to special clinics or even abroad.<sup>28</sup>

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19. HVISTENDAHL, *supra* note 12, at 20.

20. *Id.* at 27.

21. *Id.*

22. *Id.* at 26. “Husbands torturing wives because of the birth of a daughter is not unique.” *Id.*; see also Richard Minitzer, *America’s Male Only Child Policy?*, FORBES, Dec. 5, 2011, <http://www.forbes.com/sites/richardminiter/2011/12/05/americas-male-only-child-policy/> (Some women share stories of how their husbands threatened divorce or abandonment if they failed to produce a male child. Other women explain how their husbands “choked or kicked [them] in the abdomen in the hopes of preventing a daughter”).

23. LORI B. ANDREWS, MAXWELL J. MEHLMAN, MARK A. ROTHSTEIN, GENETICS: ETHICS, LAW AND POLICY 371 (3d ed. 2010).

24. *Id.*

25. Yael Hashiloni-Dolev, *Attitudes Toward Sex Selection: A Survey Among Potential Users in Israel*, 30 PRENAT. DIAG. 1019, 1019 (2010); see also *Parents Queue to Select Baby Gender*, B.B.C. NEWS, Oct. 29, 2008, [http://news.bbc.co.uk/2/hi/uk\\_news/7696698.stm](http://news.bbc.co.uk/2/hi/uk_news/7696698.stm).

26. *Sex Selection*, WORLD IN VITRO FERTILIZATION UNITS, <http://www.ivf-worldwide.com/Education/sex-selection.html> (last visited Apr. 12, 2012) [hereinafter WORLD IN VITRO FERTILIZATION UNITS]; see also *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/fields/2018.html> (last visited May 11, 2012) (A sex ratio between 1.04 and 1.06 is considered normal. Israel’s sex ratio at birth is currently 1.05 boys to every girl, which indicates that there is no abuse in sex selection practices).

27. *Parents Queue to Select Baby Gender*, *supra* note 25.

28. *Id.*

Sex selection occurs in the United State, but only in small portions of the population; parents select for both males and females. For example, a Census study indicated that sex selection might occur in the prenatal stage among Chinese, Korean, and Indian parents, highlighting that “[m]ale bias [was] particularly evident for the third child[] if there was no previous son.”<sup>29</sup> By contrast, the study also revealed that “the sex ratios of eldest and younger children with an older brother were both within the range of biologically normal, as were White offspring sex ratios,” regardless of the sex of the elder siblings.<sup>30</sup> These statistics, however, do not make a significant impact on the sex ratio in the United States because the portion of the population that practices sex selection is very small.<sup>31</sup>

Even though sex selection practices have not changed the sex ratios in all countries, they have dramatically altered the sex ratios in Asia and Eastern Europe. However, the sex ratios could not have been skewed so significantly by cultural tradition and parental preference alone. Technology has also played its role.

#### **B. Technological Advancements**

Though prenatal technologies were initially developed to monitor prenatal health, it did not take long before doctors and physicians found ways to use the technology to detect the sex of a fetus. As a result, parents started using the technology to assist in sex selection. In places like China where the government does not allow couples to have more than one child, technology makes it simpler for parents to have the culturally preferred baby boy. The continued use of this practice, however, eventually led to the country’s drastic change in its sex ratio. Amniocentesis, chorionic villus sampling (CVS), and ultrasound machines, in particular, have helped contribute to the practice of sex-selective abortions by making it easier for parents to detect the sex of the fetus early in the pregnancy.

Amniocentesis, also known as amniotic fluid test, is a procedure that was developed to allow healthcare practitioners to determine

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29. Almond & Edlund, *Son-Biased Sex Ratios in the 2000 United States Census*, *supra* note 5, at 5681.

30. *Id.*

31. *Id.* at 5681–82 (Indians, Chinese, and Koreans make up less than two percent of the United States population, and so their practice of sex selection is not enough to skew the country’s sex ratio); *see also The World Factbook: Sex Ratios*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/fields/2018.html> (last visited May 11, 2012) (The sex ratio at birth in the United States is currently 1.05 males to every female, which is normal).

whether or not a fetus has genetic disorders or chromosomal abnormality.<sup>32</sup> The procedure involves inserting a thin needle into the uterus to retrieve a small sample of the fluid from around the fetus.<sup>33</sup> The test costs about \$1,500 and is generally conducted between fifteen and twenty-four weeks of gestation.<sup>34</sup> Amniocentesis is also considered the most accurate way for a healthcare practitioner to determine the sex of the fetus before birth.<sup>35</sup> In India, Delhi's government hospitals began offering amniocentesis in 1975.<sup>36</sup> The test soon became commercialized and was being offered as a "sex test," even though the original intent of the procedure was to screen the health of the fetus.<sup>37</sup>

Similar to amniocentesis, CVS is a procedure that can detect chromosomal abnormalities such as Down syndrome and other genetic disorders.<sup>38</sup> During this procedure, the doctor uses a needle or a tube to remove fetal cells from the placenta called chorionic villi, and sends the cells to the lab for genetic analysis.<sup>39</sup> CVS can be done sooner than amniocentesis, generally between ten to fourteen weeks of gestation.<sup>40</sup> Both amniocentesis and CVS carry a small risk of miscarriage, and "[a]s a result, most women currently do not opt for any form of diagnostic prenatal genetic testing unless a serious genetic or chromosomal disorder runs in their family or they screen high risk for a disease that would cause them to consider pregnancy termination."<sup>41</sup>

An obstetric ultrasound, also known as a sonogram, is another procedure used to manage a pregnancy by assessing the fetal growth

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32. Woo, *supra* note 6.

33. CAL. DEP'T OF PUB. HEALTH, THE CALIFORNIA PRENATAL SCREENING PROGRAM, RESULTS FOR SCREENING IN THE FIRST TRIMESTER 7 (2009), THE CALIFORNIA PRENATAL SCREENING PROGRAM, Results for Screening in the First Trimester - The Result of Your Blood Screening Test Is: "Screen Positive for Down Syndrome" 7 (California Department of Public Health ed., 2009), available at <http://www.cdph.ca.gov/programs/pns/Documents/1T%20T21%20PMS228%20PRINT%20FINAL.pdf> [hereinafter THE CALIFORNIA PRENATAL SCREENING PROGRAM].

34. Jaime S. King, *And Genetic Testing For All . . . The Coming Revolution in Non-Invasive Prenatal Genetic Testing*, 42 RUTGERS L.J. 599, 614 (2011).

35. *Pregnancy and Amniocentesis*, WEBMD, <http://www.webmd.com/baby/guide/amniocentesis> (last visited Mar. 29, 2012).

36. HVISTENDAHL, *supra* note 12, at 48.

37. *Id.*

38. King, *supra* note 34, at 613.

39. THE CALIFORNIA PRENATAL SCREENING PROGRAM, *supra* note 33, at 5.

40. King, *supra* note 34, at 613.

41. *Id.* at 12.

and diagnosing pregnancy-related complications.<sup>42</sup> This procedure gives parents direct access to images of the fetus with a “specialized use of sound waves to visualize and determine the condition of a pregnant woman and her fetus.”<sup>43</sup> Ultrasounds are also often used for non-medical purposes, such as determining the sex of the fetus.<sup>44</sup> In the early 1990s, General Electric (“GE”) built a factory in China to produce ultrasound machines for the local market, which led to their widespread use.<sup>45</sup> GE also helped sex selection reach India by selling cheap ultrasound machines to small-time doctors in rural parts of the country.<sup>46</sup>

Constant improvements in technology have led to the four-dimensional ultrasound, which can better assess the health, behavior, and sex of the fetus.<sup>47</sup> Moreover, ultrasound technology dramatically increased sex-selective abortions because of the absent risk of miscarriage associated with its use. Today ultrasounds are commonly used during pregnancies, although using them for nonmedical reasons is discouraged by some professionals because “[t]he fetal safety of ultrasound has not been definitely confirmed.”<sup>48</sup> China and other countries have banned the use of ultrasounds for fetal sex determination because of its impact on sex selection in the country.<sup>49</sup>

Newer genetic technologies, such as over-the-counter urine tests and mail order blood tests, can determine the sex of the fetus as early as five weeks into pregnancy.<sup>50</sup> While some testing products can be accurate, others are “as accurate as a coin toss,” and companies have faced lawsuits because of inaccurate results.<sup>51</sup> Nevertheless, earlier timing and risk free prenatal tests can make it especially desirable for pregnant women to pursue diagnoses. Rapid improvements to technologies also means noninvasive prenatal diagnosis (“NIPD”) “will offer newly pregnant women a less risky, comparably

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42. John Lai Yin Leung & Samantha Mei Che Pang, *Ethical Analysis of Non-Medical Fetal Ultrasound*, 16 NURSING ETHICS 637 (2009).

43. *Id.* at 637.

44. *Id.* at 638.

45. HVESTENDAHL, *supra* note 12, at 50.

46. *Id.*

47. Leung & Pang, *supra* note 42, at 638.

48. *Id.*

49. HVESTENDAHL, *supra* note 12, at 47, 52.

50. *Id.* at 56.

51. Mitch Lipka, *IntelliGender Gender Prediction Test as Accurate as a Coin Toss*, *Doctors Say*, DAILY FINANCE (May 12, 2010, 1:30PM), <http://www.dailyfinance.com/2010/05/12/intelligender-gender-prediction-test-just-as-accurate-as-a-coin/>.

inexpensive way to find out a great deal about their fetus' genetic makeup almost immediately upon discovering they are pregnant."<sup>52</sup> Further, early detection of the sex of the fetus means that some parents may be more willing to terminate a pregnancy if the fetus is not of the desired sex, because they have invested very little time into the pregnancy.<sup>53</sup> Women may also find an early abortion more emotionally tolerable, since they "have had less time to bond with the fetus or acclimate to being pregnant."<sup>54</sup>

While sex selection practices are not prevalent in all countries, NIPD has made it a serious problem in those that tend to prefer sons to daughters. Improvements in medical technologies have led to their use for alternative purposes; a mother may have an abortion for non-medical reasons if she discovers that the fetus is of the "wrong" sex. Further advancements in technology could mean more misuse, which could consequently lead to a greater gap in sex ratios in countries that place a higher value on certain sexes. Several governments have stepped in and actively taken a stance on the use of prenatal technologies for reasons other than medical necessity. Though some countries forbid doctors from telling parents the sex of the fetus in order to prevent sex-selective abortions, others have openly allowed sex-selective abortions because of an expressed individual right to reproductive autonomy.

### C. Governmental Policies and Politics

Sex selection has not always been a problem demanding governmental intervention. Many of today's family planning policies in countries other than the United States were originally implemented to fix overpopulation by limiting the number of children that couples could have. However, these policies made parents even more selective of the sex of their offspring because the policies limited parents' chances of having a child of the desired sex. In places like China, parents started to actively select boys because only boys could inherit the family's wealth, and because boys were expected to take care of the parents as they aged.<sup>55</sup> When the government realized the impact the policies had on sex selection, they tried to

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52. King, *supra* note 34, at 619.

53. *Id.* at 630.

54. *Id.* at 629. If women wait until the typical four-month mark to find out the sex of the fetus, it may be more traumatic to undergo an abortion because the woman invested four months thinking about the fetus.

55. Puri et al., *Fetal Sex Selection Among Indian Immigrants*, *supra* note 1, at 1171.

prohibit the practice. However, people had few incentives to follow the newer laws, most specifically because they were not enforced.

The sex ratio imbalances in countries like India and China did not develop until the government administered “family planning” ideas—ideas particularly developed and funded by Western activists and other foreign organizations.<sup>56</sup> For example, the New York-based Population Council, an organization founded by John D. Rockefeller, offered many reasons for population control, including economic development, geopolitics, conservation, and eugenics.<sup>57</sup> Other proponents of population control, including the United States Agency for International Development (“USAID”), the World Bank, the United Nations, and the Ford Foundation, used foreign aid, like food, as “leverage to demand that poor countries control fertility.”<sup>58</sup> Western advisers, backed by United Nations committees, went as far as advising India to conduct widespread sterilization of poor men.<sup>59</sup> Some Indian physicians even encouraged aborting healthy fetuses because population control was deemed so important.<sup>60</sup> Consequently, because people had to limit their family sizes, women started using sex-selective abortions to ensure that they had a male child.<sup>61</sup>

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56. Mathew Connelly, *Population Control in India: Prologue to the Emergency Period*, 32 POPULATION & DEV. REV. 630 (2006), available at <http://www.demog.berkeley.edu/~lyang/Prof-Wilmoth-Related/C126-PDF-Files/Connell.M-2006-PopulationControlIndiaPrologueEmergencyPeriod-Fr-PopulationDevelopmentReview-32.pdf>. The most notable organizations were the United Nations, the World Bank, the Ford Foundation, the International Planned Parenthood Federation, the Population Council of New York, and in India, India’s Ministry of Health and Family Welfare.

57. *Id.* at 633–34. Instead of helping the poor population, the government tried to reduce their numbers. See Steven W. Mosher, *China’s One-Child Policy: Twenty-Five Years Later*, HUMAN LIFE REVIEW (Sept. 8, 2009), [http://www.humanlifereview.com/index.php?option=com\\_content&view=article&id=42:chinas-one-child-policy-twenty-five-years-later&catid=31:2006-winter&Itemid=6](http://www.humanlifereview.com/index.php?option=com_content&view=article&id=42:chinas-one-child-policy-twenty-five-years-later&catid=31:2006-winter&Itemid=6) [hereinafter Mosher, *China’s One-Child Policy*].

58. *Id.* at 639. The USAID, World Bank, United Nations, and Ford Foundation together provided most of India’s annual \$1.5 billion aid package. In 1965 when India and Pakistan went to war over Kashmir, Lyndon Johnson was already “using food as leverage,” slowly reducing the aid. Interruption of the supply threatened famine. *Id.* at 652.

59. *Id.* at 629–30, 650. The policy was enforced by Indira Gandhi and carried out by her son, Sanjay Gandhi. *Id.* at 663.

60. HVISTENDAHL, *supra* note 12, at 80.

61. When asked which organizations might have backed the population control trials, Puneet Bedi, a hospital obstetrician from Delhi, replied, “I believe it was both the

Additionally, population control policies were introduced in China in 1980 when the country implemented its one-child policy.<sup>62</sup> This was immediately followed by mass production of ultrasounds in 1982.<sup>63</sup> Since parents had one opportunity to have a child of the preferred sex, ultrasounds gave prospective parents a relatively cheap and easy way to determine the sex of their fetus. In some provinces, however, Chinese law allowed couples to have a second child if the first child was a girl, but only after the daughter turned four years old.<sup>64</sup> In one incident, a woman who was mother to a two-and-a-half-year-old girl found out she was four months pregnant with another child, despite wearing the legally required IUD that was implanted in her after she gave birth to her first child.<sup>65</sup> She was told to report to the family-planning clinic for an abortion but went into hiding to protect her fetus.<sup>66</sup> As a result, several of her family members who refused to report her whereabouts were jailed for months. When she returned after the birth of her child, she was forced to pay money to have her family released from prison, and had to pay another fine to legitimize the status of her newborn child—even though the child was a boy.<sup>67</sup> Soon thereafter, she was forced to be sterilized.<sup>68</sup> These coerced population control tactics significantly impacted the practice of sex-selective abortions.

Likewise, in Guangdong, women who refused to have abortions were “handcuffed, tied with ropes or placed in pig’s baskets,” and sent off to the hospital for abortions.<sup>69</sup> The women were told that they did not have a choice because their choice affected everyone in the country.<sup>70</sup> As a result, and due to a cultural preference for sons, sex selection in this province, as well as neighboring regions, also increased.

Once sex selection practices started to significantly change the sex ratios in places like India, China, and South Korea, the

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Population Council and International Planned Parenthood Federation—but mainly the Ford Foundation . . . everyone is very tight-lipped about it.” *Id.* at 82.

62. *Id.* at 21.

63. *Id.*

64. Mosher, *China’s One-Child Policy*, *supra* note 57.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Michele Vink, *Abortion and Birth Control in Canton, China*, WALL ST. J., Nov. 30, 1981.

70. HVISTENDAHL, *supra* note 12, at 143.

governments outlawed sex selection and fetal determination.<sup>71</sup> However, until recently, governments did a poor job enforcing the ban. To avoid the legal consequences of getting caught, doctors used code to inform parents of the sex of the fetus.<sup>72</sup> Doctors justified their actions by stating that sex selection is high in demand and brings in a lot of business and that if they do not provide the services, women will go elsewhere.<sup>73</sup>

Other governments attempted to raise the status of women by spending heavily on education and investing in work opportunities for women to reduce the sex ratio imbalance.<sup>74</sup> In Delhi, for example, the government incentivizes parents to keep female fetuses by giving them money at the child's birth.<sup>75</sup> However, solely raising the economic status of women is not enough to stop sex selection.<sup>76</sup> Research suggests that as women experience better educational and career opportunities, they often choose to have smaller families, resulting in fewer opportunities to have sons, and therefore a stronger selection preference to have boys.<sup>77</sup> Nevertheless, the United States Central Intelligence Agency's report on sex ratios indicates that the skewed sex ratios in China, India, and South Korea, though still not normal, have all improved.<sup>78</sup>

Overall, three major factors contributed to the prevalence of sex selection worldwide—cultural traditions, technological advancements, and governmental policies and politics. Some states in the United States also fear that NIPD technologies may increase sex selection in

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71. WORLD IN VITRO FERTILIZATION UNITS, *supra* note 26; *see also The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/fields/2018.html> (last visited May 15, 2012) (The sex ratio at birth in India is currently 1.12 males to every female. In China, the sex ratio at birth is currently 1.13 males to every female. In South Korea, the sex ratio at birth is currently 1.07 males to every female. All of these ratios are biologically impossible).

72. Laura Lederer, *Missing Girls' in Asia: Magnitudes, Implications and Possible Responses*, AMERICAN ENTERPRISE INSTITUTE Sept. 17, 2008, <http://www.aei.org/events/2008/09/17/missing-girls-in-asia-magnitudes-implications-and-possible-responses-event/> (the website has an audio from a panel discussion that discusses the problem of "missing girls," at 12:09) [hereinafter Lederer, *Missing Girls' in Asia*]. For example, doctors told parents, "You will have a fine footballer" if the fetus was a boy, or "I'm sorry, it's a cloudy day for you" if the fetus was a girl. *Id.*

73. HVISTENDAHL, *supra* note 12, at 52.

74. Lederer, *Missing Girls' in Asia*, *supra* note 72.

75. *Id.*

76. HVISTENDAHL, *supra* note 12, at 39.

77. *Id.*

78. *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/fields/2018.html> (last visited May 15, 2012).

the country and skew the country's sex ratios. However, there is no basis for those fears because NIPD technologies and sex selection have not skewed the country's sex ratios, thus suggesting that people in the United States do not generally favor one sex over another. Nonetheless, four states have banned sex-selective abortions—Illinois, Oklahoma, Pennsylvania, and Arizona—while many more states consider enacting similar legislation. However, at the federal level, the U.S. House of Representatives recently failed to approve a bill that would ban sex-selective abortions.<sup>79</sup> The state bans raise the question of constitutional boundaries of reproductive choice: Is it lawful to allow abortion regardless of the reason?

### III. How Sex Selection Affects Abortion Laws in the United States

Debates about the legality of abortion in the United States have been ongoing for decades. Initially, the debate centered on the general principle of abortion rather than the particulars of the circumstances. Today, the debate also involves concerns about whether abortions should be allowed for specific reasons, such as sex selection. This section will first address how abortion laws developed in the United States. It will discuss where the laws stand today regarding sex-selective abortions, and what a ban on sex-selective abortions implies for reproductive autonomy.

#### A. A Brief History of Abortion Laws in the United States

In 1973, the United States Supreme Court held in *Roe v. Wade* that abortion is within the scope of personal liberty guaranteed by the Due Process Clause of the United States Constitution.<sup>80</sup> The case involved a pregnant, single woman who challenged the constitutionality of Texas's criminal abortion laws, which outlawed even attempting to have an abortion.<sup>81</sup> The only exception was "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."<sup>82</sup> The Court upheld a district court's ruling that the abortion statutes were overly broad and infringed on

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79. On May 31, 2012, the Prenatal Nondiscrimination Act failed in a 246 to 168 vote in the House of Representatives. *Govtrack.us*, CIVIC IMPULSE, LLC, May 31, 2012, <http://www.govtrack.us/congress/bills/112/hr3541>.

80. *Roe v. Wade*, 410 U.S. 113 (1973).

81. *Id.* at 117–18.

82. *Id.*

the plaintiff's Ninth and Fourteenth Amendment rights.<sup>83</sup> Further, this case established a "trimester" structure that prevented states from restricting abortions for any reason during the first trimester of a pregnancy.<sup>84</sup> In fact, the only time states were permitted to interfere was when the fetus became viable, which was usually in the third trimester of pregnancy.<sup>85</sup> Based on this trimester structure alone, women today would have the right to sex-selective abortions so long as it is done before the third trimester.

In a plurality opinion in 1992, the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* affirmed a woman's essential right to have an abortion under *Roe*, but granted the states more power to regulate the periphery of abortion practices.<sup>86</sup> Instead of using the trimester structure, the Court used the "undue burden test" in evaluating abortion restrictions before fetal viability.<sup>87</sup> The undue burden test invalidated abortion laws that placed "substantial obstacles in the path of a woman seeking an abortion before the fetus attain[ed] viability."<sup>88</sup> The Court reasoned that the State's interest in potential life should be calculated to aid a woman's free choice to an abortion, not hinder it.<sup>89</sup> Justices O'Connor, Kennedy, and Souter argued that the constitutional protection of a woman's right to an abortion is derived from the Due Process Clause of the Fourteenth Amendment, which provides that no State shall "deprive any person of life, liberty, or property, without due process of law."<sup>90</sup> Should the State interfere, "the liberty of the woman [would be] at stake."<sup>91</sup> The Justices even quoted Justice Brandeis's opinion in *Whitney v. California* stating that, "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States."<sup>92</sup> The *Casey*

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83. *Id.*

84. *Id.* at 171.

85. *Id.* at 161.

86. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

87. *Id.* at 877.

88. *Id.* at 837.

89. *Id.*

90. *Id.* at 846.

91. *Id.* at 852.

92. *Id.* at 846–47. (quoting *Whitney v. California*, 274 U. S. 357, 373 (1927) (Brandeis J., concurring)).

opinion further provides that the Constitution promises “a realm of personal liberty which the government may not enter.”<sup>93</sup>

In his concurring opinion, Justice Blackmun argued that:

State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women’s bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the “natural” status and incidents of motherhood—appears to rest upon a conception of women’s role that has triggered the protection of the Equal Protection Clause.<sup>94</sup>

By extension, Justice Blackmun’s argument for a woman’s right to choose how to use her body would protect sex-selective abortions, because having an unwanted child, even if he or she is unwanted because of his or her sex, would place an undue burden on the mother.<sup>95</sup>

Fifteen years later in *Gonzales v. Carhart*, in a 5-4 decision, the Supreme Court upheld Congress’s Partial-Birth Abortion Ban Act of 2003 (“The Act”).<sup>96</sup> The phrase “partial-birth abortion” refers to aborting a partially delivered fetus.<sup>97</sup> The Act was passed in response to a prior Supreme Court ruling that declared Nebraska’s partial-birth abortion act unconstitutional because it lacked “any exception for preservation of health of the mother,” and therefore could potentially deny a mother’s right to an abortion.<sup>98</sup> Unlike the Nebraska law, the Act includes a provision that permits partial-birth

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93. *Id.* at 847.

94. *Id.* at 928 (Blackmun, J. concurring).

95. See e.g. Puri et al., *Fetal Sex Selection Among Indian Immigrants*, *supra* note 1, at 1173 (some women were verbally and physically abused if they had a child of the undesired sex, placing both the mother’s and child’s life in danger).

96. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

97. 18 U.S.C. § 1531(b)(1)(A) (West 2003).

98. *Stenberg v. Carhart*, 530 U.S. 914, 914 (2000) (quoting *Casey*, 505 U.S. at 879) (internal quotations omitted).

abortions deemed “necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.”<sup>99</sup>

The Act also addresses moral, medical, and ethical concerns about the performance of partial-birth abortions, described as a “gruesome and inhumane procedure that is never medically necessary and should be prohibited.”<sup>100</sup> The majority’s opinion in *Carhart* expressed concerns about respecting the dignity of human life, and advocating for alternative methods to partial-birth abortions.<sup>101</sup> Additionally, *Carhart* gave more weight to the moral and ethical considerations of abortion than *Roe* or *Casey*. For instance, the Court held that regulations that express respect for the life of the unborn are permitted so long as they do not infringe on a woman’s right to an abortion.<sup>102</sup> The procedural methods of partial-birth abortions are also graphically described throughout the opinion; these descriptions support State interests in protecting the woman and the life of a fetus that may become a child.<sup>103</sup> *Carhart* emphasizes protecting “vulnerable and innocent human life,” and compares partial-birth abortions to the killing of a newborn infant.<sup>104</sup> These concerns opened doors for people to question the legality of sex-selective abortions. If moral and ethical standards outweigh a woman’s ultimate right to have an abortion, then sex-selective abortions could potentially be prohibited under *Carhart*, even if it is before fetal viability.

In a dissenting opinion, however, Justice Ginsburg argued that “legal challenges to undue restrictions on abortion procedures . . . center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”<sup>105</sup> But does equal citizenship afforded by abortion rights mean that a woman should have a right to select the sex of her child? I argue that it does. Any reason a woman chooses to have an abortion, whether it is because of financial hardship, health reasons, because the fetus is disabled, or because the

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99. 18 U.S.C. § 1531(a) (West 2003).

100. *Carhart*, 550 U.S. at 141 (internal quotations omitted).

101. *Id.* at 157.

102. *Id.* at 125.

103. *Id.* at 126.

104. *Id.* at 157–58.

105. *Id.* at 172.

woman does not like the sex of the fetus, ultimately translates to one thing: an abortion is sought because the child is unwanted.

### **B. Paving the Way for the Ban on Sex-Selective Abortions**

In 2011, Americans United for Life put together a model legislation and policy guide to assist states in designing bans on sex-selective abortions and abortions for genetic abnormalities.<sup>106</sup> The guide acknowledges that prenatal testing “can be a valuable tool for diagnosing and treating conditions that threaten the health or life of the mother, the child, or both.”<sup>107</sup> It then proceeds to suggest the ban of abortions for reasons such as sex selection.<sup>108</sup> Although the proposal acknowledges that there is “currently no evidence of a strong preference for males among American citizens,” it nonetheless suggests that government intervention is needed as protection just in case this ever changes.<sup>109</sup> The following section will analyze why this proposal and others like it are poorly designed from a constitutional perspective.

First, forcing women to go through the hardships of pregnancy to have a child they do not want can create an undue burden that lasts a lifetime. As in *Casey*, limitations should not hinder a woman’s choice to an abortion.<sup>110</sup> Courts have consistently held that while states may place limits on the right to an abortion, they may not impede on a woman’s overarching right to an abortion because it infringes their right to liberty under the Due Process Clause of the Fourteenth Amendment. *Roe* and *Casey* both justified abortion on substantive due process liberty grounds. Likewise, even though the Court in *Carhart* upheld the prohibition of partial-birth abortions for ethical reasons, the due process right to abortions under *Casey* stood strong because women still had alternative methods to pursue abortions.<sup>111</sup>

Second, banning sex-selective abortions can endanger both the life of the woman and the child. For example, bringing a girl into a family that devalues women could lead to abuse and neglect for both

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106. *Ban on Abortions for Sex Selection and Genetic Abnormalities: Model Legislation & Policy Guide for the 2012 Legislative Year*, AMERICANS UNITED FOR LIFE, <http://www.aul.org/wp-content/uploads/2010/01/Sex-Selective-and-Genetic-Abnormality-Ban-2012-LG.pdf> (last accessed Mar. 30, 2012).

107. *Id.* at 2.

108. *Id.* at 3.

109. *Id.* at 5.

110. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 877 (1992).

111. *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007).

the mother and child.<sup>112</sup> Under these circumstances, determined and desperate women will still find ways to terminate their pregnancy.<sup>113</sup> The alternative options, however, may be unsafe and even deadly.<sup>114</sup>

Third, banning sex-selective abortions does not address the causes of sex selection or son preference. Although the “social and economic factors that would cause a woman to terminate a pregnancy based on the sex of the fetus are troubling,” banning the practice does not address why families prefer one sex to another.<sup>115</sup> Son preference stems from deeply rooted cultural traditions and the elevated status of men.<sup>116</sup> Banning abortions will not change these preferences and will only force women to find alternative methods to pursue an abortion.<sup>117</sup> Therefore, if there is any general welfare interest in maintaining sex ratios, this would not provide an effective solution.

Lastly, sex-selective abortion bans “undermine the trusted relationship between a provider and a patient,” which consequently infringes on the constitutionally implied right to privacy.<sup>118</sup> Medical professionals rely on that trusted relationship in order to provide the best medical advice to the patient. For example, if a patient is unsure of her decision to have an abortion, doctors, nurses, and counselors are trained to identify and discuss the patient’s concerns.<sup>119</sup> But if sex-selective abortions are banned, women will be forced to lie about their reasons for wanting abortions, and consequently medical practitioners will not be able to address their patients’ concerns. Therefore, any legislation that bans any type of abortion “does nothing to advance women’s dignity, safety or agency, and is in fact a direct affront to it.”<sup>120</sup>

### C. Current Legislation on Sex-Selective Abortion

To date, four states have outlawed sex-selective abortion in the United States: Illinois, Oklahoma, Pennsylvania, and Arizona. The

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112. See Puri et al., *Fetal Sex Selection Among Indian Immigrants*, *supra* note 1, at 1173.

113. *Race and Sex Selection Abortion Bans Are Harmful to Women*, NATIONAL WOMEN’S LAW CENTER (Apr. 12, 2012), <http://www.nwlc.org/resource/race-and-sex-selection-abortion-bans-are-harmful-women>.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

ban's momentum is growing as other states are considering similar legislation. These laws all follow a format close to the one proposed by Americans United for Life.

In Illinois, physicians are not allowed to “intentionally perform an abortion with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus.”<sup>121</sup> The ban excludes abortions for genetic disorders linked to that sex.<sup>122</sup> Nevertheless, the ban not only attenuates the trusted relationship between a woman and her physician, but it also infringes on women's rights to personal liberty guaranteed by the Due Process Clause and reinforced under *Roe*, *Casey*, and *Carhart*.

The Oklahoma statute also provides that “[n]o person shall knowingly or recklessly perform or attempt to perform an abortion with knowledge that the pregnant female is seeking the abortion solely on account of the sex of the unborn child.”<sup>123</sup> The statute clarifies that “[n]othing in [the] section shall be construed to proscribe the performance of an abortion because the unborn child has a genetic disorder that is sex-linked.”<sup>124</sup> The law even allows the mother to seek injunctive relief if such an abortion is performed on her, and goes as far as allowing “any person who is the spouse, parent, sibling, or guardian of, or current or former licensed health care provider of, the female upon whom an abortion has been performed in violation of [the] section,” to seek damages.<sup>125</sup> This statute not only limits women's rights to abortions, which can be an undue burden, but it also undermines women's rights to privacy and bodily integrity by giving third parties the direct right to challenge those rights.

In Pennsylvania, abortion is prohibited unless a physician determines that the abortion is necessary, or if he receives a certified written statement signed by another physician stating that an abortion is necessary.<sup>126</sup> Furthermore, the legislation explicitly provides that a sex-selective abortion is not a necessary abortion.<sup>127</sup> “Any person who intentionally, knowingly or recklessly violates the provisions of this section commits a felony of the third degree,” which implies that both the mother and physician can be held criminally liable if a sex-

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121. 720 ILL. COMP. STAT. 510/6(8) (2012).

122. *Id.*

123. OKLA. STAT. tit. 63, § 1-731.2(B) (2010).

124. *Id.*

125. OKLA. STAT. tit. 63, § 1-731.2(C)(1)(a)–(b) (2010).

126. 18 Pa. CONS. STAT. § 3204(a)(1)–(2) (2012).

127. 18 Pa. CONS. STAT. § 3204(c) (2012).

selective abortion is performed.<sup>128</sup> “Physicians, physicians’ professional organization, several clinical providers of first-trimester abortions, members of the clergy, and an individual whose health care and disability insurance provided comprehensive abortion coverage” challenged the constitutionality of the Pennsylvania Abortion Control Act in *Casey*; however, the issue of banning sex-selective abortion was not addressed.<sup>129</sup>

In early 2011, Arizona became the most recent state to ban abortions based on the sex of the fetus, and the only state to include race as another factor to the ban.<sup>130</sup> Known as the “Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011,” the statute makes it a Class 3 felony if a person knowingly does any of the following:

- 1) Performs an abortion knowing that the abortion is sought based on the sex or race of the child or the race of a parent of that child.
- 2) Uses force or the threat of force to intentionally injure or intimidate any person for the purpose of coercing a sex-selection or race-selection abortion.
- 3) Solicits or accepts monies to finance a sex-selection or race-selection abortion.<sup>131</sup>

Furthermore, the “father of the unborn child who is married to the mother at the time she receives a sex-selection or race-selection abortion . . . may bring a civil action on behalf of the unborn child to obtain appropriate relief with respect to the violation [mentioned above].”<sup>132</sup> If a medical or mental health professional “knowingly does not report violation of this [law] to appropriate law enforcement authorities [they] shall be subject to a civil fine of not more than ten thousand dollars.”<sup>133</sup>

Interestingly, the “woman on whom a sex-selection or race-selection abortion is performed is not subject to criminal prosecution or civil liability for any violation” of this statute “or for a conspiracy

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128. 18 Pa. CONS. STAT. § 3204(d) (2012).

129. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

130. ARIZ. REV. STAT. ANN. § 13-3603.02 (2012).

131. ARIZ. REV. STAT. ANN. § 13-3603.02(A)(1)–(3) (2012).

132. ARIZ. REV. STAT. ANN. § 13-3603.02(C) (2012).

133. ARIZ. REV. STAT. ANN. § 13-3603.02(D) (2012).

to violate” this statute.<sup>134</sup> The purpose of the law is to protect fetuses from prenatal discrimination and inequality in society.<sup>135</sup> There is also a disclaimer at the end of the statute, which provides that the “act does not establish or recognize a right to an abortion and does not make lawful an abortion that is currently unlawful.”<sup>136</sup>

Not many people opposed Arizona’s law because arguments about gender discrimination undermine reproductive rights. Soon after passage, Arizona passed three more anti-abortion laws on April 10, 2012. One bill prohibits abortions after the eighteenth week of pregnancy, and another protects doctors from being sued if they withhold health information about a pregnancy that could cause a woman to seek an abortion.<sup>137</sup> These laws could limit a woman’s access to information provided from fetal testing technologies because doctors could refuse to provide such information, even if the technologies are used solely to monitor the health of the woman or fetus. The passage of these bills demonstrates that lawmakers can weaken or entirely abolish abortion rights if sex-selective abortions are not specifically challenged. And the longer these sex-selective abortion laws stand, the more difficult it will be to change them later.

#### **D. Implications of Sex-Selective Abortion Bans**

Laws like the ones implemented in Illinois, Oklahoma, Pennsylvania, and Arizona limit reproductive autonomy and can be a double-edged sword. On one hand, a state signals that it does not tolerate discrimination on the basis of sex. On the other hand, a state’s limitation on sex-selective abortions means that it takes a political and social stance by acknowledging differences in the legitimacy of reasons for abortion.

With so many technological innovations that contribute to the practice of sex selection, it is easy to forget their critical purpose of screening the health of the fetus and the mother. For example, “sex determination provides a powerful tool for identifying male fetuses at

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134. ARIZ. REV. STAT. ANN. § 13-3603.02(E) (2012).

135. *Id.*

136. *Id.*

137. John Celock, *Arizona Abortion Bill: Legislators Pass Three Bills, Including One That Redefines When Life Begins*, HUFFINGTON POST (Apr. 10, 2012), [http://www.huffingtonpost.com/2012/04/10/az-abortion-bills-arizona-gestational-age\\_n\\_1415715.html](http://www.huffingtonpost.com/2012/04/10/az-abortion-bills-arizona-gestational-age_n_1415715.html). Withholding information can dent the trusted doctor-patient relationship. Furthermore, if the doctor withholds information about a disability of the fetus or information that requires advanced preparation during the pregnancy, it may place a lifetime burden on the parents.

risk for the X-linked disease,” such as Duchenne/Becker Muscular Dystrophy.<sup>138</sup> More importantly, prenatal screening allows women to make decisions that will affect them for a lifetime. Whether the choice to undergo an abortion is due to an unhealthy fetus, or because the woman’s culture and living arrangement dictates that she have a child of a particular sex, the right to have an abortion places a woman in a safe environment with a trusted physician. Therefore, the Due Process Clause of the Fourteenth Amendment should protect a woman’s right to an abortion, including sex-selective abortions.

#### IV. Ethical and Moral Concerns About Sex Selection

Ethical and moral concerns can also factor into how a court determines the constitutionality of sex-selective abortions. For instance, the Supreme Court in *Carhart* relied on such concerns when it banned a method of abortion because its “inhumane procedure” undermined the “dignity of human life.”<sup>139</sup> Critics of sex selection argue that the practice undervalues females “from the time they are in the mother’s womb” because “[i]t is a kind of gender discrimination.”<sup>140</sup> However, it is important to note that though compromised, *Carhart* nonetheless upheld the right to an abortion under *Casey*, arguing that the ban would not unduly burden the mother since there are alternative methods of abortion. Additionally, the Court has never limited a woman’s reasons for seeking an abortion.

Studies also show variation in people’s attitudes about sex selection. In Cleveland, eighteen couples who were pursuing sex selection participated in ethnographic interviews from November 2005 to April 2006.<sup>141</sup> The couples reported many reasons for pursuing sex selection, including “a desire to limit the overall size of their family” by having “a single additional pregnancy” with a fetus of the desired sex.<sup>142</sup> The study suggests that couples pursuing

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138. King, *And Genetic Testing For All*, *supra* note 34, at 7. States that prohibit abortion for nonmedical sex selection in order to prevent discrimination, but permit sex-selective abortions for X-linked diseases, prohibit one form of discrimination but permit, very directly, another.

139. *Gonzales v. Carhart*, 550 U.S. 124, 141 (2007).

140. HVIStENDAHL, *supra* note 12, at 55.

141. Richard R. Sharp, Michelle L. McGowan, Jonathan A. Verma, David C. Landy, Sallie McAdoo, Sandra A. Carson, Joe Leigh Simpson, & Laurence B. McCulloch, *Moral Attitudes and Beliefs Among Couples Pursuing PGD for Sex Selection*, 21 REPROD. BIOMED. ONLINE 838 (2010) [hereinafter Sharp et al., *Moral Attitudes and Beliefs*].

142. *Id.* at 841.

preimplantation genetic diagnosis (“PGD”) through in vitro fertilization (“IVF”) for sex selection “view this as an ethically complex decision and express considerable uncertainty about the ethical acceptability of this practice.”<sup>143</sup> However, the couples also had “strong beliefs about reproductive liberty and prenatal privacy . . . [and] stressed the importance of these moral values.”<sup>144</sup> Although IVF and PGD are different than NIPD and sex-selective abortions, the couples’ attitudes are important because they equated sex selection practices with the right to have an abortion, “maintaining that individuals have a right to make such decisions privately.”<sup>145</sup>

Even physicians have “distinctly different perceptions of the ethical concepts of autonomy, beneficence, and non-maleficence as applied to sex selection.”<sup>146</sup> On one hand, sex selection technology providers argue that “sex selection [is] an expression of reproductive rights, was initiated and pursued by women, and was a sign of female empowerment that allowed couples to make well-informed family decisions.”<sup>147</sup> They also argue that the technology prevents “unwanted pregnancies and abortions, and minimize[s] the abuse of wives and/or neglect of children.”<sup>148</sup> On the other hand, primary care physicians question “whether women could truly express free choice under family and community pressure” to have a child of a particular sex.<sup>149</sup> They argue that sex selection technologies contribute to “gender stereotypes that could result in neglect of children of the lesser-desired sex, and [are] not a solution to domestic violence.”<sup>150</sup> However, prohibiting sex-selective abortions does not solve those problems either and instead infringes on reproductive autonomy. Proponents of sex-selective abortions would argue that reproductive autonomy is paramount and should not be infringed upon. Additionally, determined or desperate women will always find ways

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143. *Id.*

144. *Id.* at 844.

145. *Id.* at 838. IVF and PGD are different than NIPD because unlike NIPD, IVF and PGD are very invasive, uncomfortable, and carry risks. *See supra* note 34.

146. Sunita Puri & Robert D. Nachtigall, *The Ethics of Sex Selection: A Comparison of the Attitudes and Experiences of Primary Care Physicians and Physician Providers of Clinical Sex Selection Services*, 93 FERTILITY & STERILITY 2107, 2107 (2010).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

to have abortions, and having them in a safe medical environment is better than putting their lives at risk.

The general public also has its own opinions about sex-selective abortions. In 2008, the American National Election Studies included several abortion questions in its survey.<sup>151</sup> One was a generic question asking people how they felt about abortion, without specifying any conditions.<sup>152</sup> Out of 1,039 respondents who were asked, 39.9% of people felt that “[b]y law, a woman should always be able to obtain an abortion as a matter of personal choice.”<sup>153</sup> Only 15.4% of people felt that “abortion should never be permitted.”<sup>154</sup> The response that “[t]he law should permit abortion only in case of rape, incest, or when the woman’s life is in danger” was selected by 28.5% of people.<sup>155</sup> Permitting “abortion for reasons other than rape, incest, or danger to the woman’s life, but only after the need for abortion has been clearly established” was selected by 15.4% of people.<sup>156</sup> Less than 1% of respondents selected either “Other” or “Don’t know.”<sup>157</sup>

A comparison of response frequencies between two other abortion-themed questions provides important insight into what the public considers acceptable reasons for abortion.<sup>158</sup> In these questions, respondents were provided specific conditions for which a person might seek an abortion and presented them with nine response categories from which to choose. The first of these questions specified the most common condition for an abortion—where a mother may face some health risk, though not fatal.<sup>159</sup> The

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151. STANFORD UNIVERSITY AND THE UNIVERSITY OF MICHIGAN, *2008 Time Series Study*, AMERICAN NATIONAL ELECTION STUDIES (Jan. 15, 2012), <http://www.electionstudies.org/studypages/2008prepost/2008prepost.htm>. The procedure used here for the questions is called an embedded survey experiment. Survey respondents are randomly assigned one of the questions, but not the others. The randomization ensures all sets of respondents are representative of the public, thereby allowing the comparison of answers across the experiment’s conditions. *See also G3a. Abortion: Self-Placement [OLD]*, SDA: SURVEY DOCUMENTED ANALYSIS, May 2009, <http://sda.berkeley.edu/cgi-bin/hsda3?sdaprogram=describe&var=v085086&sdapath=%2Fvar%2Fwww%2Fsdaprograms%2Fsdas&study=%2Fvar%2Fwww%2Fhtml%2FD3%2FNES08new%20%2Fvar%2Fwww%2Fhtml%2FNpubvars%2FNES08new&varcase=lower&subtmpdir=%2Fvar%2Fwww%2Fhtml%2FTMPDIR>.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

other question specified “wrong gender” as the reason for abortion.<sup>160</sup> The largest discrepancy in responses to these scenarios was observed in the number of those that opposed the abortion “a great deal.”<sup>161</sup> Nearly a quarter (24.5%) opposed “a great deal” allowing abortion to be legal in cases with nonfatal health risks.<sup>162</sup> That percentage increased to three quarters (76.5%) when the abortion choice was the result of the child being the wrong gender.<sup>163</sup> Specifying sex selection as the reason for abortion resulted in an increase of roughly fifty percentage points to those who opposed the practice “a great deal.”<sup>164</sup>

These survey results show that while many Americans generally favor the general right to have an abortion, an overwhelming majority of them—76.5%—oppose abortion when it is pursued on the basis of gender preference. This difference is significant because it implies that Americans use their own ethical standards in determining whether they believe a woman has the right to sex-selective abortion.

In another study about sex selection, participants expressed strong beliefs that individuals should “have the freedom to make reproductive decisions unimpeded by the government.”<sup>165</sup> One woman from California asked, “Why would you want somebody else involved? . . . what about your privacy? . . . You have to have the permission of the government to do what you want to do with your sperm and egg?”<sup>166</sup> Even though the focus of the study was on preconception sex selection, the attitudes of these women are important because some of them pointed out that if the government tries to regulate sex selection, “it could lead to an erosion of reproductive rights, particularly the right to intentional miscarriage.”<sup>167</sup> “Many participants were in favor of physicians offering this technology for medical purposes only,” but like the

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160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*; see also Mallory Quigley, *Gendercide Issue Resurfaces in Light of Chinese Activist Fight*, CHARLOTTE LOZIER INSTITUTE, May 17, 2012, <http://www.lozierinstitute.org/news-room/press-releases/> (The Charlotte Lozier Institute conducted a public opinion poll on similar grounds and found that 77% of American adults would support making sex-selection abortion illegal “[w]hen the fact that the developing baby is a girl is the sole reason for seeking an abortion”).

164. *Id.*

165. Andrea L. Kalfoglou, Joan Scott & Kathy Hudson, *Attitudes About Preconception Sex Selection: A Focus Group Study with Americans*, 23 *HUM. REPROD.* 2731, 2734 (2008).

166. *Id.*

167. *Id.*

American National Election Studies demonstrates, they “presumed that physicians who would provide non-medical sex selection were unprincipled.”<sup>168</sup> Unprincipled or not, many physicians, including those working at a fertility clinic in Los Angeles, take “a clear stance in favor of patients opting for non-medical sex selection as a valid exercise of their reproductive autonomy.”<sup>169</sup>

Even pro-choice feminists are torn on the issue of sex-selective abortions because of potential discrimination against female fetuses.<sup>170</sup> This divide is grave because losing supporters means losing momentum with the abortion rights movement. For example, Arizona took advantage of the fact that there was little opposition to its sex-selective abortion law to pass more laws hampering a woman’s access to abortion. The most significant of these laws is one that allows doctors to withhold health information about a pregnancy that could cause a woman to seek an abortion.<sup>171</sup> Under current federal abortion laws, this law should be declared unconstitutional because withholding information on health problems may cause death, or even a lifetime of health problems. This law further places an undue burden on the mother, and therefore deprives her of her liberty.

The question then remains, should ethical and moral concerns dictate the law? The answer is “no” for the reasons articulated below.

First, “being pro-choice means supporting a woman’s right to decide whether or not to continue a pregnancy for whatever reason, even if one personally does not agree with her reason.”<sup>172</sup> Valuing the personal autonomy of women over fetal equality is important because people have ownership of their bodies, and no law should infringe on that ownership. The life of the fetus is also always contingent on the personal health choices of the mother, so allowing the mother personal autonomy means the life of the fetus must be subject to the

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168. *Id.*

169. Jaime S. King, *America’s Role in Sex Selection*, STANFORD LAW SCHOOL: THE CENTER FOR LAW AND THE BIOSCIENCE (Oct. 9, 2011), <http://blogs.law.stanford.edu/lawandbiosciences/2011/10/09/americas-role-in-sex-selection/>.

170. HVISTENDAHL, *supra* note 12, at 243 (“Some believed that sex selection was wrong only when it discriminated against girls; selecting *for* girls was another matter”). See also Almond & Edlund, *supra* note 5, at 5681–82 (sex selection in the United States is normal and does not overwhelmingly favor one sex over another).

171. See Celock, *Arizona Abortion Bill: Legislators Pass Three Bills, Including One That Redefines When Life Begins*, *supra* note 137.

172. Position Paper #24: Sex Selection Abortions, Abortion Rights Coalition of Canada (Jan. 2006), <http://www.arcc-cdac.ca/postionpapers/24-Sex-Selection-Abortions.pdf>.

mother's choices. It is just a consequence that has to be accepted if you allow women to make their own personal health choices. Women may choose to have abortions for reasons that may include the health of the fetus, lack of financial resources, interference with employment, being a victim of rape, or even the sex of the fetus. Like many women in India and China, some may seek abortions because they do not want to face severe consequences that come with giving birth to a girl. Regardless of the reason for wanting an abortion, there will always be members of society who oppose abortions based on their own ethical and moral beliefs. Discovering a consensus on morality to impose on society is impossible when it comes to abortion, largely because the decision to pursue an abortion is motivated by individual circumstances and personal moral codes. Also, the law and ethics can and do divide in some instances, and this should be one of them. The law simply allows each woman to follow her own conscience and moral code. Therefore, the fundamental principles under which abortion became legal—justified on substantive due process liberty grounds—should remain protected without the interference of individual moral beliefs.

Second, if some physicians have concerns about sex-selective abortions, they can choose whether to disclose such information to their patients, or disclose it at a later time in the pregnancy. This would not require governmental intervention and would allow all parties to exercise their liberty—a woman's liberty of reproductive autonomy and a physician's liberty to practice medicine. And so, women would still be able to get abortions, but the rights of physicians who may object to providing certain abortions would also be protected. This configuration is more appropriate than imposing a federal law because it does not require the government to justify valuing certain fetal traits over others. Consider, for example, that current state laws require prenatal screening for certain disorders.<sup>173</sup> Mothers can choose to have an abortion based on an abnormal prenatal screening. If federal laws prohibit prenatal sex screenings to prevent sex-selective abortions, but allowed other prenatal screenings, the government would implicitly validate other types of abortions. One possible consequence is that government intervention implies support for abortion rights in cases of disability or genetic disorders, and devalues the lives of people born under those conditions.

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173. ANDREWS ET. AL., *supra* note 23, at 384.

Third, though abortion rights are not explicated in the Constitution, reproductive rights are regarded as very personal and therefore subject to limited governmental intervention. Although current federal laws permit the states to add limitations to abortion rights, they still stress the importance of women having access to abortions in spite of the limitations.<sup>174</sup> Moral and ethical concerns will always change depending on changes in society. But those shifting standards should not change fundamental rights, such as reproductive autonomy, that have been protected for decades. If the government does intervene, there is no telling how far it will take the law and undermine fundamental liberties. Those against sex-selective abortions can choose not to get one, and those who desperately want abortions will find ways to get one—with or without the law on their side. The purpose of making abortion legal was to protect women and to allow them to enjoy freedom under the Constitution without burdening them with an unwanted pregnancy. Therefore, the right to an abortion should not change just because technology, politicians, or justices sitting on the Supreme Court change.

### V. Conclusion

The sex-selective abortion laws in Illinois, Oklahoma, Pennsylvania, and Arizona should all be declared unconstitutional under current federal abortion rulings because they force women to keep an unwanted pregnancy, thus burdening them for the rest of their lives. Even though *Carhart* made it illegal to provide abortion methods that undermine the dignity of human life, the Supreme Court still protected the dignity of a woman's life by preserving her ultimate right to an abortion. In case after case, the Supreme Court has upheld the importance of a woman's right to not be burdened by a pregnancy. Making abortions illegal for any reason will infringe on those rights currently protected and justified by substantive due process.

Furthermore, banning sex-selective abortions can endanger the lives of both the woman and the child if the child is raised in a family that never approved of its existence. The woman and child may both be beaten and neglected by the family. Implementing a ban on sex selection does not address those issues or other issues of sex selection, and may instead exacerbate problems. Further, abortion bans

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174. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992); see also *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007).

infringe on the trusted relationship between a patient and her physician. If a woman is forced to lie about her reasons for wanting an abortion, the breakdown in communication can prevent her from making the best decisions for herself and her fetus. This also closes doors for future communications regarding the health of the woman.

Although some parents may misuse sex selection technologies for the sake of choosing the sex of their fetuses, individual moral and ethical concerns should not dictate the laws because protecting reproductive autonomy and bodily integrity are key fundamentals of the Constitution. Disagreements on abortion rights will persist regardless of the reasons, and governmental intervention will infringe on liberties without resolving those disagreements.

Currently in the United States, sex selection practices do not favor one sex over another in ways that would skew the country's sex ratios, and there is at present no reason to think that they will in the future. And yet, states have implemented laws against sex-selective abortions citing those fears. The longer those laws stand, the less likely they are to be challenged, as they become better established. Those laws also pave the way for more anti-abortion laws, which further undermine a woman's right to control her own health.

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