

A HIDDEN GENDERCIDE: DISCREPANCIES BETWEEN EMBRYO DESTRUCTION AND SEX SELECTIVE ABORTION LAWS

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*"We are facing an immense threat to life: not only to the life of individuals but also to that of civilization itself."*¹ ~Pope John Paul II

INTRODUCTION

Sex selection is a devastating practice with devastating consequences. Sex selection perpetuates gender discrimination. Sex selective abortion laws are an international law issue, affecting the United Nations global population efforts.² India and China have ever-widening gender gaps because male children are preferred for socioeconomic reasons.³ According to the World Health Organization's Genomic Research Centre, sex selective abortion has existed since the 1970s.⁴ Western countries are beginning to see widening ratio differences as more female fetuses are being aborted in Western Asian communities.⁵

In the United States, some Americans have begun to take notice of this practice, as indicated by recent efforts in the House of Representatives.⁶ Currently, a discrepancy exists in United States law between the regulation of pre-transfer and post-implantation sex selective destruction. In pre-transfer embryo destruction, an embryo created via artificial reproductive technology

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1. Pope John Paul II, *Letter to Families from Pope John Paul II* ¶ 21 (St. Paul ed. 1994).
2. See Preventing Gender-Biased Sex Selection: An Interagency Statement OHCHR, UNFPA, UNICEF, UN Women and WHO (2011) [hereinafter Interagency Statement].
3. Genomic Resource Ctr., *Gender and Genetics: Sex Selection and Discrimination*, WORLD HEALTH ORG., <http://www.who.int/genomics/gender/en/index4.html> (last visited Oct. 10, 2015).
4. *Id.*
5. See Monica Sharma, *Twenty-First Century Pink or Blue: How Sex Selection Technology Facilitates Gendercide and What We Can Do About It*, 46 FAM. CT. REV. 198, 202 (2008).
6. See Prenatal Nondiscrimination Act (PRENDA) of 2012, H.R. 3541, 112th Cong. (2011).

(ART) is destroyed before it is implanted into a womb.⁷ Abortion occurs after the implantation in the uterine lining occurs, thus ending the pregnancy.

Sex selection is creating a global demographic crisis. The average worldwide sex ratio at birth is 105 boys per 100 girls born.⁸ Abnormal sex ratios have been noted in many Asian countries.⁹ In some locations in northwest India, sex ratios have reached upwards of 114 to 120.¹⁰ The fertility rate of Indian women has declined; parental and medical intervention can “increase the chance of having a son in smaller families.”¹¹ In some provinces in China, where male children are preferred, the sex ratio has risen to 115.¹² In Lianyungang, government statisticians found a gender ratio of 163 boys for every 100 girls under the age of five.¹³ In Tianmen, Hubei, that number is 176 to 100.¹⁴ In China, one-sixth of female children are aborted or become victims of infanticide.¹⁵ One-sixth of Chinese boys will not be able to find a wife.¹⁶ Additionally, sixty percent of the world’s sex trafficking occurs in China.¹⁷

Imbalanced sex ratios and sex selection should also concern Western nations. Firstly, population control efforts have introduced male-dominant developing nations to reproductive technology and abortion. Secondly, evidence of sex selection among Asian populations living in Western nations suggests that sex selection is not an isolated issue.

There is undoubtedly a need to evaluate the moral equivalency of sex selective embryo destruction outside of the womb and sex selective abortion. Although the two are morally equivalent, this note argues that this discrepancy reflects the confusion and lack of guidance concerning reproductive

7. Sharma, *supra* note 5, 198–99.

8. Natalie Wolchover, *Why Are More Boys Born than Girls?*, LIVESCIENCE (Sept. 9, 2011, 5:13 PM), <http://www.livescience.com/33491-male-female-sex-ratio.html>.

9. A study noted an increase in the sex ratio exceeding “107 males per 100 females has been reported in India, China, Taiwan, and South Korea.” Sylvie Dubuc & David Coleman, *An Increase in the Sex Ratio of Births to India-Born Mothers in England and Wales: Evidence for Sex-Selective Abortion*, 33 POPULATION & DEV. REV. 383, 383 (June 2007) (internal citations omitted). The study’s authors point out, “in [China, South Korea, and India], fertility has fallen sharply on average, and the technique and availability of prenatal sex determination have greatly increased.” *Id.* at 384 (alteration in original). See also P.N. Mari Brat & A.J. Francis Xavier, *Fertility Decline and Gender Bias in Northern India*, 40 DEMOGRAPHY 637 (2003) (suggesting the sex ratio in northern India could rise to 130 due to the preference for boys and the termination of unwanted fertility).

10. Dubuc & Coleman, *supra* note 9, at 383–84 (citing 21 ROBERT D. RETHERFORD & T.K. ROY, NATIONAL FAMILY HEALTH SURVEY SUBJECT REPORTS, FACTORS AFFECTING SEX-SELECTIVE ABORTION IN INDIA AND 17 MAJOR STATES 39 (2003)).

11. *Id.* at 394.

12. *Id.* at 383.

13. MARA HVISTENDAHL, UNNATURAL SELECTION: CHOOSING BOYS OVER GIRLS, AND THE CONSEQUENCES OF A WORLD FULL OF MEN 23 (2011).

14. *Id.*

15. Chai Ling & Stacey Kao, *Time to End Gendercide in China and in America*, ALL GIRLS ALLOWED (Sept. 19, 2014), <http://allgirlsallowed.org/news/time-end-gendercide-china-and-america>.

16. *Id.*

17. *Id.*

technology, as well as the confusion in the Supreme Court abortion framework. There is a need to analyze different aspects of the legal and moral bases for restrictions on sex-selective abortion as well as embryo destruction.¹⁸ Sex selection occurs across all social classes and religions.¹⁹ In fact, the highest, wealthiest social classes in India and China have the highest skewed sex ratio.²⁰

This Note will explore the background and issues surrounding sex selective abortion and sex selective embryo destruction. Part I will investigate how sex selective practices are defined, as well as equating sex selective abortion with sex selective embryo destruction. Part I will further identify the underlying causes of sex selection. The current law, or lack thereof, perpetuates gender discrimination. Part II will observe the current regulations concerning sex selective practices. Although international efforts have been made to curtail the practice, the United States has avoided regulations in the area of assisted reproductive technology. Part II will also note discrepancy between the laws regarding pre-implantation, or embryo destruction, and post-implantation abortion. Finally, in Part III, this Note will ask whether or not the United States can regulate sex selection under a constitutional and judicial framework, and why sex selective embryo destruction laws are more likely to be upheld.

I. A BRIEF BACKGROUND OF SEX SELECTION: SEX SELECTIVE PROCEDURES DEFINED

A. *Sex Selective Abortion*

Sex selective abortion has been described as “the systematic abortion of girls because of their burden on the family and low social worth in certain cultures.”²¹ In other words, women seek abortions because of the gender of the fetus. According to the World Bank’s *World Development Report*, there are four million women missing due to sex-selective abortion and high female mortality rates.²² An interagency statement published by the World Health Organization, *Preventing Gender-Biased Sex Selection*, revealed that the United Nations recognized a population imbalance that occurred due to sex selection.²³ Other nations have recognized a growing need to address the issue

18. See Seema Mohapatra, *Global Legal Responses to Prenatal Gender Identification and Sex Selection*, 13 NEV. L.J. 690, 693, 702 (2013).

19. See *Gendercide*, THE ECONOMIST (Mar. 4, 2010), <http://www.economist.com/node/15606229>.

20. See *id.*

21. Jason C. Greaves, Case Comment, *Sex-Selective Abortion in the U.S.: Does Roe v. Wade Protect Arbitrary Gender Discrimination?*, 23 GEO. MASON U. CIV. RTS. L.J. 333, 335 (2013) (footnote omitted).

22. THE WORLD BANK, THE WORLD DEVELOPMENT REPORT 2012: GENDER EQUALITY AND DEVELOPMENT 15 tbl.1 (2012).

23. See Interagency Statement, *supra* note 2, at 1.

of growing gender ratio gaps and cultural practices that disfavor women and the birth of infant females.²⁴

B. *Sex Selective Embryo Destruction*

In pre-transfer embryo destruction, an embryo created via ART is destroyed before it is placed into a female's uterus.²⁵ Why does this occur? Generally, "sex determination is the only current method of identifying embryos or fetuses potentially affected with sex-linked disorders."²⁶ Sex selective screening takes place post-fertilization and pre-implantation, and involves the destruction and discarding of embryos.²⁷

There are many steps to the artificial creation of embryos; for instance, sperm can be screened to favor the gametes that are most likely to produce a male child.²⁸ Screening for sex can occur after fertilization, or after the embryo is old enough to determine its sex.²⁹ Artificially created embryos through in vitro fertilization (IVF) "undergo genetic diagnosis" before transfer so that "only embryos free from defects or having the desired sex or other particular qualities are transferred."³⁰

Pre-implantation genetic diagnosis (PGD) identifies genetic defects or particular genetic features, such as sex, in embryos conceived for IVF purposes.³¹ Scientific techniques such as PGD and pre-implantation genetic haplotyping are being used to screen for sex selection.³² Other procedures, such as amniocentesis, chorionic villus sampling, sperm sorting,³³ and simple ultrasounds or urine samples can also identify the sex of the unborn child.³⁴

Sex selective practices are morally equivalent in that they discriminate against women. Although an abortion requires implantation to take place, sex selective embryo destruction occurs for the same reasons as sex selective

24. See, e.g., Mohapatra, *supra* note 18, at 703–08.

25. See Sharma, *supra* note 5, at 199.

26. Comm. on Ethics, *Sex Selection*, in ACOG COMM. OP. NO. 360, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS 2 (2007).

27. See Sharma, *supra* note 5, at 199.

28. See *id.*

29. See *id.* at 199–200.

30. D. BRIAN SCARNECCHIA, *BIOETHICS, LAW, AND HUMAN LIFE ISSUES* 160 (2010) (footnote omitted) (internal quotations omitted).

31. See generally Samuel Marcus, *IVF Techniques*, IVF-INFERTILITY.COM, <http://www.ivf-infertility.com/ivf/pgd.php> (last updated Nov. 23, 2004); Bratislav Stankovic, "It's A Designer Baby!"—*Opinions on Regulation of Preimplantation Genetic Diagnosis*, 3 *UCLA J.L. & TECH.* 1, 1 (2005).

32. *About Genetic Selection*, CTR. FOR GENETICS AND SOC'Y, <http://www.geneticsandsociety.org/section.php?id=82> (last visited Oct. 10, 2015).

33. Interagency Statement, *supra* note 2, at 12, 14–15. ("[T]here is little long-term evidence concerning the safety of this method . . .").

34. Recently, it was reported that a new urine test can predict an unborn child's sex with about "80% accuracy." Danielle Dellorto, *Pregnant with Girl or Boy? At-home Test May Tell You*, CNN, <http://www.cnn.com/2009/HEALTH/06/09/gender.prediction.test/> (last updated June 9, 2009).

abortion. In both instances, a female embryo is destroyed because of her sex. This is an act of violence towards women with global impact. Currently, “[h]alf of the countries in the world are at or below replacement-level fertility,”³⁵ and fertility will likely continue to decline.

C. *A Global Problem*

The Genomic Resource Center of the World Health Organization reports that there are three motivations for sex selection: medical, family balancing, and gender preference.³⁶ It notes that there are concerns regarding the natural sex ratio and that gender preferences may “reinforce discriminatory and sexist stereotypes towards women by devaluing females.”³⁷

In many Asian countries, parents prefer male children, and there is a noticeable gap in gender equality.³⁸ A common example of this inequality is the legal restrictions on female inheritance.³⁹ In addition to the resulting ratio imbalance,⁴⁰ there is evidence of increased violence, human trafficking, and shared brides.⁴¹ Other reports note that an abnormally high percentage of unmarried men leads to increased violence, war, kidnapping, and rape.⁴² By the year 2020, young, unmarried men in China and India will constitute twelve to fifteen percent of the world’s young adult male population.⁴³

35. HVISTENDAHL, *supra* note 13, at 257 (citing CIA, *Country Comparison: Total Fertility Rate*, in THE WORLD FACTBOOK (2014), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2127rank.html>).

36. Genomic Resource Ctr., *supra* note 3. A University of California San Francisco study which followed sixty-five female, Indian immigrants in America found that of the women in the study who became pregnant with female children, eighty-nine percent decided to abort. Karin Rush-Monroe, *Pressure to Bear Sons Leads Some Immigrant Indian Women to Sex Selection, Abortion, Study Finds*, UCSF NEWS SERVICES (May 20, 2011), <https://www.ucsf.edu/news/2011/05/9903/pressure-bear-sons-leads-some-immigrant-indian-women-sex-selection-abortion-study>.

37. Genomic Resource Ctr., *supra* note 3.

38. *See, e.g.*, Interagency Statement, *supra* note 2, at 1.

39. *Id.* at v.

40. The chances of a sex selective abortion increases with the birth order of the child. A 2007 Oxford University study found that the male to female child ratio for Indian mothers was much higher for the third child, and concluded that this indicated that sex selective abortions were occurring. Laretta Brown, *British Parliament Votes 181–1 to Ban Sex Selective Abortions*, CNSNEWS.COM (Nov. 5, 2014, 5:30 PM), <http://cnsnews.com/news/article/laretta-brown/british-parliament-votes-181-1-ban-sex-selective-abortions>. *See also* Interagency Statement, *supra* note 2, at 2.

41. *See* Interagency Statement, *supra* note 2, at 5 (citing CHRISTOPHE Z. GUILMOTO, CHARACTERISTICS OF SEX RATIO IMBALANCE IN INDIA AND FUTURE SCENARIOS 11 (2007)).

42. *See, e.g.*, Janice Shaw Crouse, *The United Nations Abortion Dilemma*, TOWNHALL.COM (Mar. 2, 2007), http://www.townhall.com/columnists/JaniceShawCrouse/2007/03/02/the_united_nations_abortion_dilemma; Andrea Mrozek, *Canada’s Lost Daughters*, WESTERN STANDARD, June 5, 2006, at 36; Valerie M. Hudson & Andrea M. Den Boer, *‘Bare Branches’ and Danger in Asia*, WASH. POST, July 4, 2004, at B.07.

43. Sharma, *supra* note 5, at 203.

The worldwide consequences of sex selection should be alarming. Today, China and India make up forty percent of the world's population.⁴⁴ Studies have revealed increasing violent behaviors due to gender imbalance.⁴⁵ There is an undeniable global impact of disproportionate sex ratios in several other Asian nations: Afghanistan, Bangladesh, South Korea, Pakistan, Taiwan, and Iran.⁴⁶

In 1989, South Korea had a sharp increase in sex selective abortions; the sex ratio increased with birth order.⁴⁷ For first-born children, the sex ratio was 104 boys to 100 girls; for second births, it was 113; for third births, it was 185; and for fourth births, it was 209.⁴⁸ Because of South Korea's overwhelming sex selection problem, including its rapidly declining population, its government is now enforcing abortion laws; doctors and judges are also observing the abortion bans.⁴⁹

Other effects of sex selection have been reported, such as sharp declines in fertility.⁵⁰ But most importantly, gender discrimination against females is the primary cause of sex selective abortion. Because of gender preference, women also face possible violence, rejection, divorce, and being forced to continuously become pregnant until a male child is produced.⁵¹

If abortion and prenatal screening becomes more accessible in the Middle East—a region notorious for its male preference, male dominance, and unrest—it is likely to be the next region to develop a sex ratio imbalance.⁵² Albania, for instance, despite its highly religious population of Muslims, Roman Catholics, and Christian Orthodox, has an official sex ratio of 115, and some estimate it is even higher.⁵³ Widespread and cheaper ultrasounds, along with a plummeting fertility rate, seem to be at the root of Albania's imbalanced sex ratio.⁵⁴

In fact, the United Nations Population Fund (UNFPA) attempted to address the sex selection issue by avoiding an open discussion of abortion,

44. *Id.*

45. *See id.*

46. *Id.* at 201.

47. HVIStENDAHL, *supra* note 13, at 24.

48. *Id.* (citing Therese Hesketh & Zhu Wei Xing, *Abnormal Sex Ratios in Human Populations: Causes and Consequences*, 103 *PRO. OF THE NAT'L ACAD. OF SCI.* 13271, 13272 (2006)).

49. *Id.* at 246.

50. *See generally* DISCRIMINATION OF FEMALE CHILDREN IN MODERN INDIA: FROM CONCEPTION THROUGH CHILDHOOD (T.V. Sekher & Neelambar Hatti eds., 2010).

51. Interagency Statement, *supra* note 2, at v.

52. *See, e.g.*, Christophe Z. Guilmoto, *The Sex Ratio Transition in Asia* 19 (Ctr. Population & Dev., Working Paper No. 5, 2009).

53. HVIStENDAHL, *supra* note 13, at 41 (citing UNITED NATIONS POPULATION FUND, UNFPA GUIDANCE NOTE ON PRENATAL SEX SELECTION 1 (2010) [hereinafter PRENATAL SEX SELECTION]).

54. *Id.* at 42.

instead referring only to prenatal sex selection.⁵⁵ In its Guidance Note on Prenatal Sex Selection, UNFPA warned its agents “not [to] identify sex selection itself as a human rights abuse.”⁵⁶

Although the United States was previously adamant that their support of “reproductive health” did not include a right to abortion,⁵⁷ more recently, the United States has insisted that reproductive health does include abortion.⁵⁸ Certain pro-life and religious groups have taken positions against sex selective practices.⁵⁹ The Holy See has been very vocal at the United Nations,⁶⁰ particularly against what it believes are pro-abortion agendas, even warning that “[c]ertain groups encourage coercive population control by contraception, sterilization and even abortion.”⁶¹

The United Nations has expressly addressed the issue, although it does not have any direct solutions, except for challenging male-dominated cultures.

Since in all societies discrimination on the basis of sex often starts at the earliest stages of life, greater equality for the girl child is a necessary first step in ensuring that women realize their full potential and become equal partners in development. In a number of countries, the practice of prenatal sex

55. *Id.* at 150–51. See generally UNITED NATIONS POPULATION FUND—INDIA, WHY DO DAUGHTERS GO MISSING? (2013) (pre-natal sex selection in India).

56. PRENATAL SEX SELECTION, *supra* note 53, at 10 (alteration in original).

57. Jeanne E. Heard, *UN General Assembly Approves Disability Convention*, NAT’L RIGHT TO LIFE (Dec. 13, 2006), <https://www.nrlc.org/international/un-general-assembly-approves-disability-convention>.

58. *Secretary Clinton Confirms U.S. Thinks Abortion Access Is ‘Reproductive Health,’* CATHOLIC NEWS AGENCY (Apr. 22, 2009), <http://www.catholicnewsagency.com/new.php?n=15758>.

59. For example, the Catholic Church teaches that life begins at conception; according to the papal encyclical *Evangelium Vitae*:

This evaluation of the morality of abortion is to be applied also to the recent forms of intervention on human embryos which, although carried out for purposes legitimate in themselves, inevitably involve the killing of those embryos. This is the case with experimentation on embryos, which is becoming increasingly widespread in the field of biomedical research and is legally permitted in some countries. Although “one must uphold as licit procedures carried out on the human embryo which respect the life and integrity of the embryo and do not involve disproportionate risks for it, but rather are directed to its healing, the improvement of its condition of health, or its individual survival”, it must nonetheless be stated that the use of human embryos or fetuses as an object of experimentation constitutes a crime against their dignity as human beings who have a right to the same respect owed to a child once born, just as to every person.

Pope John Paul II, *Evangelium Vitae* [Encyclical Letter on the Value and Inviolability of Human Life] ¶ 63 (1995) (footnotes omitted) (quoting Congregation for the Doctrine of the Faith, *Donum Vitae* [Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation] pt. 1(3) (1987)).

60. See Celestino Migliore, *Address by H.E. Archbishop Celestino Migliore, Permanent Observer of the Holy See in New York at General Debate of the 63rd session of the General Assembly of the United Nations* (Sept. 2008), www.un.org/ga/63/generaldebate/pdf/holysee.pdf.

61. PONTIFICAL COUNCIL FOR THE FAMILY, ETHICAL AND PASTORAL DIMENSIONS OF POPULATION TRENDS ¶ 87 (1994).

selection, higher rates of mortality among very young girls, and lower rates of school enrollment for girls as compared with boys, suggest that “son preference” is curtailing the access of girl children to food, education and health care. This is often compounded by the increasing use of technologies to determine foetal sex, resulting in abortion of female foetuses. Investments made in the girl child’s health, nutrition and education, from infancy through adolescence, are critical.⁶²

At the 1994 United Nations International Conference on Population and Development (ICPD) in Cairo, the United Nations declared that “the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so”⁶³ The Conference further encouraged governments “to take the necessary measures to prevent . . . prenatal sex selection”⁶⁴ In its action plan to protect the girl child, the UN reported that its objectives were:

- (a) To eliminate all forms of discrimination against the girl child and the root causes of son preference, which results in harmful and unethical practices regarding female infanticide and prenatal sex selection;
- (b) To increase public awareness of the value of the girl child, and concurrently, to strengthen the girl child’s self-image, self-esteem and status;
- (c) To improve the welfare of the girl child, especially in regard to health, nutrition and education.⁶⁵

As seen in (b), the United Nations calls to eliminate “all forms of discrimination” that lead to the unethical practice of sex selection.⁶⁶ Still, it does not call for a ban on the actual discriminatory act of prenatal sex selection. The report expands upon its previous call to action in paragraph 4.17:

Overall, the value of girl children to both their family and society must be expanded beyond their definition as potential child-bearers and caretakers and reinforced through the adoption and implementation of educational and social policies that encourage their full participation in the development of the societies in which they live. Leaders at all levels of the society must speak out and act forcefully against patterns of gender discrimination within the

62. U.N. International Conference on Population and Development (ICPD), *Report of the International Conference on Population and Development*, ¶ 4.15, U.N. Doc. A/CONF.171/13 (Sept. 5–13, 1995) [hereinafter *ICPD*].

63. *Id.* at ¶ 7.3.

64. *Id.* at ¶ 4.23.

65. *Id.* at ¶ 4.16.

66. *Id.*

family, based on preference for sons. *One of the aims should be to eliminate excess mortality of girls, wherever such a pattern exists.* Special education and public information efforts are needed to promote equal treatment of girls and boys with respect to nutrition, health care, education and social, economic and political activity, as well as equitable inheritance rights.⁶⁷

Although the United Nations calls for an elimination of particular discrimination, violence, and death, it does not ask for a ban on sex-based embryo or fetal destruction. The 1994 ICPD recognized that reproductive rights “include[] [the] right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.”⁶⁸ According to the World Health Organization (WHO) Interagency Statement:

States also have an obligation under international human rights law to respect, protect and fulfil [sic] the human rights of women, as elaborated for example in the International Covenant on Civil and Political Rights (ICCPR); the International Covenant of Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and the Convention on the Rights of the Child (CRC).⁶⁹

Condemnation of the discriminatory effects of sex selective procedures are absent from the United Nations documents. The United Nations and other organizations that support reproductive rights fail to see that sex selection is the ultimate form of gender discrimination. As discussed above, there are several cultural factors that encourage sex selective practices. Restrictions on family size and increased contraception use both result in lower fertility, therefore perpetuating a preference for male children.⁷⁰

Some positive proposals for addressing gender discrimination include “laws for more equitable patterns of inheritance, and measures such as direct subsidies at the time of a girl’s birth, scholarship programmes, gender-based school quotas or financial incentives, or pension programmes for families with girls only.”⁷¹ Instead of banning the abortion procedures, the WHO and other organizations propose programs and campaigns changing attitudes towards girls.⁷² This includes “access to information, health care services and

67. *Id.* at ¶ 4.17, reprinted in UNITED NATIONS POPULATION FUND, PROGRAMME OF ACTION OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT: 20TH ANNIVERSARY EDITION 34–35 (2014) (emphasis added).

68. *Id.* at ¶ 7.3 (alteration in original).

69. Interagency Statement, *supra* note 2, at 3 (alteration in original).

70. See Interagency Statement, *supra* note 2, at v.

71. *Id.*

72. *Id.*

nutrition,” education, and “personal security—including protection from coercion.”⁷³

The Interagency Statement expresses concern that sex selective bans will not solve gender discrimination, which is at the heart of sex selection.⁷⁴ The Statement also hypothesizes that women will turn to unsafe abortions because they still face violence, divorce, abandonment, etc.⁷⁵ According to the Statement, “denying them access to needed services—and thus further violating their rights” does not address the issue.⁷⁶ Even if the female child is born, there is a likelihood of neglect and infanticide, including drowning, smothering, and abandonment.⁷⁷ Also, the Statement argues that there is much difficulty in proving that an abortion was conducted for sex selective purposes.⁷⁸

Although gender discrimination and inequalities are at the root of this cultural phenomenon, technological developments, such as the increased use of PGD, indicate that sex selection is not simply addressed through discouraging gender stereotypes. Sex selection bans are a form of protection against discrimination. Likely out of fear of retaliation and violence from husbands and families of pregnant women, the Statement does not call for a ban on sex selection. These organizations fail to recognize an equivalency of sex selective abortion and embryo destruction with the killing of females. While the organizations in the Statement fret about “violating their [reproductive] rights,”⁷⁹ perhaps they are enabling and perpetuating the discrimination against women by not banning the act of violence itself. If sex selective practices are heavily regulated, then sex selection would not be an option for families. Currently, parents of the child or coercive family members know that this method is available to them.

Also, sex selection is not solely a male-driven practice; in many countries, for many women producing a male heir is honorable and empowering.⁸⁰ There is the element of raising one’s social status, even if it means subjecting oneself to multiple, dangerous late-term abortions.⁸¹ And perhaps women living in Western nations forget that in other places in the world, “women know best just how difficult it is to be female.”⁸² Further, opponents of sex selection bans

73. *Id.* at 10.

74. *See id.*

75. *Id.* at 5.

76. *Id.* at 4 (citing B.M. Dickens et al., *Sex Selection: Treating Different Cases Differently*, 90 INT’L J. OF GYNECOLOGY & OBSTETRICS 171 (2005)).

77. *Id.* at 5; STEVEN W. MOSHER, POPULATION CONTROL: REAL COSTS, ILLUSORY BENEFITS 18 (2008).

78. Interagency Statement, *supra* note 2, at 6.

79. *Id.* at 4 (citations omitted).

80. *See* HVISTENDAHL, *supra* note 13, at 27 (quoting Danièle Bélanger, *Sex-Selective Abortions: Short-term and Long-term Perspectives*, 10 REPROD. HEALTH MATTERS 194, 194 (May 2002)).

81. *Id.*

82. *Id.*

fail to recognize that sex selection is not simply a matter of exercising a reproductive right. Women are choosing to abort as part of their familial duty; in Vietnam, women “name the daughters growing inside of them before aborting.”⁸³ And although many Indians view abortion as taking a human life and ethically wrong,⁸⁴ Indian women give into pressure from government efforts to curtail the population. In fact, when asked, these women “do not see [abortion] as a matter of legal or human rights.”⁸⁵

Meanwhile, with the widening gender ratios in Western Nations, the United Nations may have to take more preemptive action. In the 1994 ICPD—reaffirmed in 2014⁸⁶—the United Nations report included two particularly interesting paragraphs regarding the elimination of discrimination:

Governments are urged to prohibit female genital mutilation wherever it exists and to give vigorous support to efforts among non-governmental and community organizations and religious institutions to eliminate such practices.

Governments are urged to take the necessary measures to prevent infanticide, prenatal sex selection, trafficking in girl children and use of girls in prostitution and pornography.⁸⁷

Although many nations have joined the initiative to stop female genital mutilation, there has not been a similar campaign to end sex selection.⁸⁸ Laws that ban genital mutilation are aimed at prevention and protecting women. In 2007, the United Nations Commission on the Status of Women called for the elimination of infanticide and gender selection.⁸⁹ The resolution, sponsored by the United States and South Korea, was subsequently “withdrawn due to opposition from China, India, and several other countries.”⁹⁰

A partnership with pro-life organizations and religious organizations may be a valuable option for future action against sex selection:

Governments should promote much greater community participation in reproductive health-care services by decentralizing the management of public

83. *Id.* (footnote omitted).

84. CTR. FOR YOUTH DEV. & ACTIVITIES, REFLECTIONS ON THE CAMPAIGN AGAINST SEX SELECTION AND EXPLORING WAYS FORWARD 18 (2007).

85. *Id.* (alteration in original).

86. UNITED NATIONS POPULATION FUND, PROGRAMME OF ACTION OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT: 20TH ANNIVERSARY EDITION (2014).

87. *ICPD supra* note 62, at ¶¶ 4.22, 4.23.

88. Sharma, *supra* note 5, at 204.

89. *Id.* (citing Samantha Singson, *China, India and Canada Kill UN Resolution Against Sex Selected Abortions*, LIFESITE (Mar. 8, 2007), <https://www.lifesitenews.com/news/china-india-and-canada-kill-un-resolution-against-sex-selected-abortions>).

90. Sharma, *supra* note 5, at 204 (footnote omitted) (citing Bélanger, *supra* note 80).

health programmes and by forming partnerships in cooperation with local non-governmental organizations and private health-care providers. All types of non-governmental organizations, including local women's groups, trade unions, cooperatives, youth programmes and religious groups, should be encouraged to become involved in the promotion of better reproductive health.⁹¹

Governments should take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning, and in all cases provide the humane treatment and counselling [sic] of women who have had recourse to abortion.⁹²

Unfortunately, the United Nations is strangely silent about restricting or banning sex-selective abortions, as discussed above, it encouraged eliminating "excess mortality of girls, wherever such a pattern exists."⁹³ Ironically, the United Nations hesitates from calling abortion and embryo destruction a form of "excess mortality" despite the thousands to millions of girls missing from the world's population.⁹⁴ In paragraph 4.27 on the responsibility of men, it states, "special emphasis should be placed on the prevention of violence against women and children."⁹⁵

II: THE LAW: REGULATIONS ON SEX SELECTION

A. *Sex Selective Abortion*

In the United States, abortion laws are more permissive compared to other nations.⁹⁶ The Supreme Court of the United States has declared abortion within the fundamental right to privacy, which protects individual rights in the areas of "marriage, procreation, contraception, family relationships, and child rearing and education."⁹⁷ Although landmark decisions such as *Roe v. Wade*⁹⁸ and *Planned Parenthood v. Casey*⁹⁹ have guaranteed abortion access in the United States, recent Supreme Court decisions have demonstrated that the

91. ICPD, *supra* note 62, at ¶ 7.9.

92. *Id.* at ¶ 7.24 (alteration in original).

93. *Id.* at ¶ 4.17.

94. *Id.*

95. *Id.* at ¶ 4.27.

96. April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?*, 10 WIS. WOMEN'S L.J. 161, 164 (1995) (discussing the fact that women in the United States are not required to disclose the reason for seeking an abortion).

97. *See* *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (internal citations omitted). *See also* Justin Gillette, *Pregnant and Prejudiced: The Constitutionality of Sex-and Race-Selective Abortion Restrictions*, 88 WASH. L. REV. 645, 656 (2013).

98. *Roe*, 410 U.S. at 113.

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

legislative and judicial branches are willing to restrict abortion on narrower grounds.¹⁰⁰

At the federal level, the United States House of Representatives attempted to pass the Prenatal Nondiscrimination Act (PRENDA) in December 2012.¹⁰¹ The revised bill failed to pass the House of Representatives.¹⁰² In the Senate, a similar bill failed to pass.¹⁰³

Some states have prohibited sex selective abortion: Arizona, Oklahoma, Kansas, North Carolina, North Dakota, Pennsylvania, and Illinois.¹⁰⁴ Arizona's sex selection law, although it does not require doctors to inquire into the reason for obtaining an abortion, makes it a felony for doctors to knowingly perform a sex-based abortion or to coerce a woman into obtaining a sex-based abortion, and even creates a civil action on behalf of the unborn child.¹⁰⁵ As of 2010, Oklahoma requires that doctors complete a form, indicate the reasons for seeking an abortion, and specifically indicate whether the woman is obtaining the abortion because she wants a child of a different sex.¹⁰⁶ Other states have proposed similar sex selection bills in their state legislatures.¹⁰⁷

100. *See* *Gonzales v. Carhart*, 550 U.S. 124, 133–35, 147, 168 (2007) (upholding a ban on partial-birth abortion, specifically the abortion procedure known as intact dilation and extraction).

101. Prenatal Nondiscrimination Act (PRENDA) of 2012, H.R. 3541, 112th Cong. (2011).

102. Ed O'Keefe, *Bill Banning 'Sex-Selective Abortions' Fails in the House*, WASH. POST (May 31, 2012), http://www.washingtonpost.com/blogs/2chambers/post/bill-banning-sex-selective-abortions-fails-in-the-house/2012/05/31/gJQAgCYn4U_blog.html.

103. Prenatal Nondiscrimination Act (PRENDA) of 2012, S. 3290, 112th Cong. (2012). *See also* Jack Coleman, *Jimmy Carter Equates Sex-Selection Abortion with Murder of Babies*, NATIONAL RIGHT TO LIFE NEWS (Mar. 26, 2014), <http://www.lifenews.com/2014/03/26/jimmy-carter-equates-sex-selection-with-murder-of-babies> (Former President Jimmy Carter voiced opposition to sex selective abortion in a 2014 interview).

104. 18 PA. CONST. STAT. § 3204(c) (1989) (“No abortion which is sought solely because of the sex of the [fetus] shall be deemed a necessary abortion.” (alteration in original)); ARIZ. REV. STAT. § 13-3603.02 (2011) (banning race- and sex-selective abortions); 720 ILL. COMP. STAT. 510 /6-8 (1975) (“No person shall intentionally perform an abortion with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus.”); OKLA. STAT. ANN. tit. 63, § 1-731.2(b) (2010) (“No 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 [fetus].” (alteration in original)); H.B. 2443, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (an individual may not “perform[] an abortion knowing that the abortion is sought based on the sex or race of the child”); H.B. 2253, 58th Leg., Reg. Sess. (Kan. 2013) (A person may not “perform or induce an abortion . . . with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the [fetus].” (alteration in original)); S.B. 353, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013) (Banning abortions performed “with knowledge, or an objective reason to know, that a significant factor in the woman seeking the abortion is related to the sex of the [fetus].” (alteration in original)); Marsha Shuler, *Louisiana Bill Aimed to Ban Abortion Based on Sex of Unborn Stalls*, THE ADVOCATE (May 26, 2015), <http://theadvocate.com/csp/mediapool/sites/Advocate/assets/templates/FullStoryPrint.csp?cid=12476065#&preview=y> (Louisiana attempted a similar bill in May 2015).

105. ARIZ. REV. STAT. ANN. § 13-3603.02 (2011).

106. OKLA. STAT. ANN. tit. 63, §§ 1-738I–1-738P (2010); OKLA. STAT. ANN. tit. 63, § 1-738K(F) (2010).

107. H.B. 1131, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); S.B. 56, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); H.B. 845, 11th Leg., Reg. Sess. (Fla. 2013); S.B. 1072, 115th Leg., Reg. Sess. (Fla.

Other nations have taken steps to ban sex selection. In India, it is illegal for doctors to tell expectant parents the sex of their child.¹⁰⁸ Abortion is legal in India up to the twentieth week of pregnancy, and the grounds for the abortion must be disclosed.¹⁰⁹ Similarly, in China, it is illegal to screen fetuses for gender.¹¹⁰ Given China's cultural preference for boys, China's one child policy drives many Chinese women to seek abortions when they discover they are pregnant with a female child.¹¹¹ A recent amendment to this law further extends the sex selection ban and offers a punishment with fines and a three-year jail sentence.¹¹²

Sex selection in Austria, New Zealand, South Korea, Switzerland, and Vietnam is prohibited for any reason.¹¹³ Other nations that regulate sex selection prohibit sex selective procedures for social or non-medical reasons, but allow sex selection for medical reasons, such as screening for genetic diseases associated with gender.¹¹⁴

Sex selection is not a new issue to the United Kingdom. In 2008, the United Kingdom enacted the Human Fertilisation and Embryology Act of 2008.¹¹⁵ More recently, on November 4, 2014, the British House of Commons voted 181 to 1 in favor of a private member's bill that sought to ban sex selective abortion.¹¹⁶ The bill was backed by eleven female Members of

2013); H.B. 1430, 118th Gen. Assemb., 1st Reg Sess. (Ind. 2013). See Thomas J. Malony, *Roe, Casey, and Sex-Selection Abortion Bans*, 71 WASH. & LEE L. REV. 1089, 1095–96 (2014).

108. The Pre-Natal Diagnostic Techniques (Regulation and Misuse) Act, 1994, No. 57, Acts of Parliament, 1994 (India).

109. Dubuc & Coleman, *supra* note 9, at 395 n.5.

110. Liu Chang, *Jail for Those Who Help Sex Selection*, CHINA DAILY (Dec. 26, 2005), http://www.chinadaily.com.cn/english/doc/2005-12/26/content_506443.htm.

111. Chai Ling & Stacey Kao, *Time to End Gendercide in China and in America*, ALL GIRLS ALLOWED (Sept. 22, 2014), <http://allgirlsallowed.org/news/time-end-gendercide-china-and-america>.

112. Sharma, *supra* note 5, at 205.

113. Seema Mohapatra, *Global Legal Responses to Prenatal Gender Identification and Sex Selection*, 13 NEV. L.J. 690, 703 (2013).

114. See *id.*

115. Human Fertilisation and Embryology Act, 2008, c. 22 (U.K.). See also *Baby Gender Selection Ruled Out*, BBC NEWS (Nov. 12, 2003), <http://news.bbc.co.uk/1/hi/health/3257893.stm>.

116. Sheetal Parmar, *MPs Back Ban on Sex-Selective Abortion*, BBC NEWS (Nov. 4, 2014), <http://www.bbc.com/news/uk-politics-29891005>. What prompted this sudden action taken by the House of Commons? In 2012, a *Daily Telegraph* investigation revealed two doctors in the United Kingdom agreeing to carry out abortions on female fetuses. The Crown Prosecution Service did not prosecute the doctors because it claimed that the law does not prohibit sex selective abortions. The United Kingdom Department of Health responded by issuing updated rules:

Abortion on the grounds of gender alone is illegal. Gender is not itself a lawful ground under the Abortion Act. However, it is lawful to abort a fetus where two RMPs are of the opinion, formed in good faith, 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, and some serious conditions are known to be gender-related.

DEPARTMENT OF HEALTH, GUIDANCE IN RELATION TO REQUIREMENTS OF THE ABORTION ACT, 2014 10 (2014) (UK) (internal citations and quotations omitted).

Parliament from three of the United Kingdom's major political parties.¹¹⁷ The bill was aimed at reiterating the United Kingdom's 1967 Abortion Act, which proponents claimed disallowed sex selective abortions.¹¹⁸ The "Stop Gendercide" campaign supporting the amendment found support in pro-choice organizations such as Jeena International, Karma Nirvana, and Sharan Project.¹¹⁹

On February 23, 2015, the proposed amendment ultimately failed, defeated in a 292 to 201 vote.¹²⁰ Opponents argued that the bill was likely to "divide communities,"¹²¹ and they were concerned that the change would prevent abortions performed for fetal congenital disorders related to gender.¹²² Finally, the amendment, according to opponents, could dissuade women from confiding in their doctor if pressured into a gender-based abortion.¹²³

Sex selective abortions are not new to the United Kingdom.¹²⁴ British census data shows that there are approximately between 1,400 and 4,700 females missing from Pakistani, Afghani, Bangladeshi, Indian, Chinese, and Nepalese populations within the country.¹²⁵ It is argued that women living in Britain may travel to India if they are unable to obtain an abortion in the United

117. Laretta Brown, *British Parliament Votes 181-1 to Ban Sex Selective Abortions*, CNS NEWS (Nov. 5, 2014, 5:03 PM), <http://cnsnews.com/news/article/laretta-brown/british-parliament-votes-181-1-ban-sex-selective-abortions>.

118. Greg Daly, *British Parliament Votes to Ban Sex-Selective Abortions*, ALETEIA (Nov. 6, 2014), <http://www.aleteia.org/en/politics/article/british-parliament-votes-to-ban-sex-selective-abortions-5814522673627136> (explaining that the British Medical Association (BMA) claims that sex selective abortion is allowed under the mental health exception). The BMA claims that the unborn child's sex can affect the pregnant woman's mental health. *Id.* See also Fiona Bruce, *Video: MPS Vote 18:1 to Ban Sex Selective Abortion*, STOP GENDERCIDE (Nov. 6, 2014), <http://www.stopgendercide.org/video-uk-mps-vote-to-ban-sex-selective-abortion/>.

119. Fiona Bruce, *Fiona Bruce MP: We Need an Explicit Ban on Sex-Selective Abortion*, CONSERVATIVEHOME (Feb. 23, 2015), <http://www.conservativehome.com/platform/2015/02/fiona-bruce-mp-we-need-a-clear-ban-on-sex-selective-abortion.html>.

120. See *MPs Reject Backbench Bid to Amend Abortion Laws*, BBC NEWS (Feb. 24, 2015), <http://www.bbc.com/news/uk-politics-31596968>.

121. Simon Caldwell, *The UK Denies Clear Protection Against Gender Based Abortions*, MODE OF LIFE (Feb. 23, 2015), <http://modeoflife.org/the-uk-denies-clear-protection-against-gender-based-abortions>.

122. Rob Merrick, *Five Hampshire MPs Backed a Controversial Amendment to Toughen Abortion Laws to Ban Them on the Grounds of Gender*, SOUTHERN DAILY ECHO (Feb. 24, 2015), http://www.dailyecho.co.uk/news/district/romsey/11814896.Hampshire_MPs_defeated_over_bid_to_toughen_abortion_laws/?ref=mac.

123. *Id.*

124. Kounteya Sinha, *UK Introduces Bill to Ban Sex-Selective Abortions*, TIMES OF INDIA (Nov. 4, 2014, 5:50 PM), <http://timesofindia.indiatimes.com/world/uk/UK-introduces-bill-to-ban-sex-selective-abortions/articleshow/45035681.cms> (quoting Britain's Prime Minister David Cameron who expressed to parliament the abortion of fetuses because they are girls is "simply an appalling practice").

125. Parmar, *supra* note 116 (quoting British MP Sharma stating, "[i]f nothing else, then name and shame those families or individuals who are putting pressure on the young girls.>").

Kingdom for gender reasons, even though the practice is also illegal in India.¹²⁶ The sex ratio differences between children born to India-born women living in England and Wales, and to women born in the United Kingdom are unusually pronounced. For Indian-born women living in England and Wales, the sex ratio has significantly increased from “103–104 males per 100 females between 1969 and 1989 to 113 between 1990 and 2005” for the third child onward.¹²⁷ The increase is disconcerting because “the trend among India-born mothers is too sudden and pronounced to have a likely biological or environmental cause.”¹²⁸ Declining fertility and preference for male children, coupled with the increasing use of prenatal sex diagnosis and abortion of females, are unmistakable components in the sex ratio discrepancy.¹²⁹

Those of Asian origin living in England and Wales, have slightly lower sex ratio discrepancies.¹³⁰ In certain Muslim countries, such as Pakistan and Bangladesh, sex selective practices are not as accessible.¹³¹ Surprisingly, the fertility rate of Pakistani and Banladeshi mothers living in England and Wales have also declined, and if the preference for male children and smaller families remains, sex selection may become a practice for these populations in the future.¹³²

B. *Sex Selective Embryo Destruction*

The United States has very few regulations on gender-based decisions regarding human embryos. Unfortunately, the commercialization of ART and the commodification of human embryos have effectively turned IVF into a form of unregulated commerce. There is undoubtedly a need for regulation and judicial guidance within the area of human embryos in both ART and embryonic research.¹³³ The United States Department of Health and Human Services proposed a model program for embryo labs.¹³⁴ Over a decade ago, the President’s Council on Bioethics called for federal regulation of IVF¹³⁵ due to

126. See Dubuc & Coleman, *supra* note 9, at 394–95 (citing D. McDougall, *Desperate British Asians Fly to India to Abort Baby Girls*, THE GUARDIAN (Jan. 21, 2006), <http://www.theguardian.com/world/2006/jan/22/india.uk>).

127. *Id.* at 389.

128. *Id.*

129. See generally *id.* at 383–400.

130. See *id.* at 395.

131. See *id.*

132. See *id.* at 395–96.

133. See generally John A. Robertson, *Commerce and Regulation in the Assisted Reproduction Industry*, 85 TEX. L. REV. 665 (2007) (book review).

134. Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. § 263a-1 (1992).

135. Charles P. Kindregan Jr. et al., 2 MASS. PRACTICE *Family Law and Practice* § 26:5 (4th ed. 2014) (explaining that in vitro fertilization is a medical procedure where an ovum is “surgically removed from the body of a woman, fertilized in a petri dish with a man’s sperm, and the resultant embryo implanted in the woman’s uterus.”).

increased technology and methods.¹³⁶ Over a decade ago, the Ethics Committee of the American Society of Reproductive Medicine stated in a 2004 report, “until a more clearly persuasive ethical argument emerges, or there is stronger empirical evidence that most choices to select the gender of offspring would be harmful, policies to prohibit or condemn as unethical all uses of non-medically indicated preconception gender selection are not justified.”¹³⁷ In 2015, the same committee reported that it “has not reached consensus on whether it is ethical for providers to offer ART for sex selection for nonmedical purposes.”¹³⁸

There is no agency or board of ethics that oversees ART.¹³⁹ Currently, the Food and Drug Administration (FDA) may have jurisdiction over biological products, or biologics, though it is unclear as to whether the FDA has power over ART.¹⁴⁰

The Council of Europe Convention on Human Rights and Biomedicine, article 14, prohibits use of assisted reproduction techniques to choose sex, except where this is intended to avoid serious hereditary sex-related disease.¹⁴¹ However, the United Kingdom has not adopted this Convention. In the United Kingdom, “selection on clinical grounds is widely practised and endorsed by the UK government.”¹⁴² The United Kingdom has, however, regulated sperm-sorting techniques involved in IVF.¹⁴³ For instance, PGD is only allowed for medical reasons.¹⁴⁴

In Italy, there are strict laws regarding reproductive technology including IVF and embryonic stem cell research, even prohibiting PGD before implantation.¹⁴⁵ Germany’s Embryo Protection Act of 1990 protects some embryos from destruction and research, and although German courts have recently held that PGD is allowed under the Act, sex selection is still

136. *Biotechnology and Public Policy: Biotechnologies Touching the Beginning of Human Life*, (The President’s Council on Bioethics, Staff Working Paper, 2004), <https://bioethicsarchive.georgetown.edu/pcbe/background/biotechnology.html> [hereinafter *Biotechnology and Public Policy*].

137. *Preconception Gender Selection for Nonmedical Reasons*, 82 FERTILITY & STERILITY S232, S234 (2004).

138. *Use of Reproductive Technology for Sex Selection for Nonmedical Reasons*, 103 FERTILITY & STERILITY 1418, 1421 (2015).

139. *See generally Biotechnology and Public Policy*, *supra* note 136.

140. *Id.*

141. Commission for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, no. 164, art. 14 (Apr. 4, 1997).

142. Sheila A.M. McLean, *Sex Selection: Intergenerational Justice or Injustice?*, 24 MED. & L. 761, 763 (2005).

143. Amanda Mitchison, *Sex Selection: Getting the Baby You Want*, THE GUARDIAN (Apr. 2, 2010), <http://www.guardian.co.uk/lifeandstyle/2010/apr/03/sex-selection-babies>.

144. Dubuc & Coleman, *supra* note 9, at 394.

145. Mohapatra, *supra* note 18, at 707.

prohibited.¹⁴⁶ Austria, Ireland, and Switzerland completely prohibit PGD.¹⁴⁷ Additionally, Belgium, France, Greece, Holland, and Norway limit PGD to medical use.¹⁴⁸

C. *Discrepancy*

Sex selective abortion is easier to regulate than sex selective embryo destruction. By the very nature of artificial reproductive technology, doctors and parents choose what kind of child they want to conceive and be impregnated with. Analysis of fetal DNA can be found in the mother's bloodstream early in the pregnancy.¹⁴⁹ The freedom to screen a child for diseases, disabilities, and even sex is difficult to regulate. Also, PGD makes screening embryos due to particular genetic traits, especially gender, an accessible technology.¹⁵⁰

Furthermore, the law has failed to recognize sex selective abortion and sex selective embryo destruction as equivalent. This is most likely due to the Supreme Court's confusing abortion jurisprudence. Abortion can fit into a framework given in *Roe* or *Casey*, but it is unclear where embryos fit into the abortion framework. Regrettably, there is very little law concerning human embryos. The discussion below will predict how the current law would treat sex selection, and why sex selective abortion law would be deemed unconstitutional. On the other hand, sex selective embryo destruction laws are more likely to withstand a constitutional challenge.

III. THE SOLUTION: REGULATING SEX SELECTION IN THE UNITED STATES

In the United States, there is a discrepancy between the laws regulating abortion and those regulating embryos. Because sex selection has been introduced into both of these medical procedures, a further analysis is needed to determine the extent to which the United States can regulate sex selection. Despite campaigns and laws implemented to eradicate the cultural and economic causes of gender discrimination, such as those that eliminate the dowry requirements,¹⁵¹ sex selection continues to remain a viable form of gender discrimination in the United States.

146. Susanne Benöhr-Laqueur, *Fighting in the Legal Grey Area: An Analysis of the German Federal Court of Justice Decision in Case Preimplantation Genetic Diagnosis*, 8 POIESIS & PRAX 3, 3-4 (2011).

147. Stankovic, *supra* note 31, at 27.

148. *Id.*

149. See Jaime S. King, *And Genetic Testing for All... The Coming Revolution in Non-invasive Prenatal Genetic Testing*, 42 RUTGERS L.J. 599, 600 (2011).

150. See Marcus, *supra* note 32 ("The procedure is associated with ethical and medical concerns and raises issues of sex selection and genetic engineering.").

151. See *Favoring Boys in India*, PBS NEWSHOUR (Aug. 16, 2001, 12:00 AM), http://www.pbs.org/newshour/bb/asia-july-dec01-india_boys_8-16.

Although there is a normal sex ratio for Asian populations in the United States for the first born child, the ratio is skewed for later births.¹⁵² While the practice seems isolated to Chinese, Indian, and Korean Americans, which make up less than two percent of the population in the United States,¹⁵³ protection from gender discrimination does not—and should not—depend on the number of females affected. Surveys show that twenty-five to thirty-five percent of American parents stated that they would use sex selection techniques if they were affordable and readily available.¹⁵⁴ Although sex selection is known in the United States as a type of family balancing,¹⁵⁵ it is sex discrimination in practice.

Under the current abortion jurisprudence, it is likely that regulations on sex selective abortion would not survive the *Roe* and *Casey* framework. Nevertheless, this Note argues that it is possible for a sex selection ban in the arena of ART. More specifically, the Court's upholding of an abortion procedure ban in *Gonzales v. Carhart* paved the way for a ban on embryo destruction based upon the gender of the embryo, under a state's moral interest.¹⁵⁶

A. Sex Selection Abortion Ban

Would a sex selection ban, particularly a sex selective abortion ban, based upon gender discrimination survive? Interestingly, Justice Ginsburg remarked that the Supreme Court's position in *Roe* was "weakened" by the "exclusion of a constitutionally based sex-equality perspective."¹⁵⁷ The biological differences between men and women are not considered in the Court's abortion analysis.¹⁵⁸ A woman's right to seek an abortion seems to be better analyzed under a gender equality theory rather than an undefined right to privacy.¹⁵⁹ Regulations on reproductive rights could fall within gender

152. See HVISTENDAHL, *supra* note 13, at 43.

153. *Id.*

154. *Id.* at 255.

155. See *Preconception Gender Selection for Nonmedical Reasons*, *supra* note 138, at S233–S234.

156. See generally *Gonzales v. Carhart*, 550 U.S. 124 (2007).

157. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985).

I understand the view that for political reasons the reproductive autonomy controversy should be isolated from the general debate on equal rights, responsibilities, and opportunities for women and men. I expect, however, that organized and determined opposing efforts to inform and persuade the public on the abortion issue will continue through the 1980s. In that process there will be opportunities for elaborating in public forums the equal-regard conception of women's claims to reproductive choice uncoerced and unsteered by government.

Id.

158. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016 (1984).

159. See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991).

discrimination because the regulations target women. If reproductive rights were analyzed under gender equality theory, sex selective abortion laws would be analyzed under gender equality and discrimination, perhaps even allowing for prospective rights of unborn women. Congress has the ability to legislate against gender discrimination “through its Fourteenth Amendment and Commerce Clause Powers,”¹⁶⁰ and states have a legitimate interest in gender equality as well.

What scrutiny would apply? There are few cases to offer guidance. In *UAW v. Johnson Controls, Inc.*,¹⁶¹ the Court held that a policy preventing women with childbearing capacity from lead-exposed jobs violated Title VII. The Court found that the policy discriminated against women because of their sex and childbearing abilities.¹⁶² In *United States v. Virginia*,¹⁶³ the Court applied what may be its strongest legal test yet for sex-based discrimination: an intermediate scrutiny with teeth,¹⁶⁴ and the Court alluded to a narrowly tailored interest.¹⁶⁵ The Court applied a variation of strict scrutiny to an anti-discrimination law when a First Amendment infringement occurred,¹⁶⁶ and the Court applied a lesser, almost intermediate scrutiny of a Fourteenth Amendment Equal Protection Clause case where a statute appeared to violate the fundamental right to marriage.

Regulations on women’s reproductive rights could fall within gender discrimination because the regulations target women. Congress has the ability to legislate against gender discrimination “[t]hrough its Fourteenth Amendment and Commerce Clause powers,”¹⁶⁷ and states have a legitimate interest in gender equality as well. The Court applied strict scrutiny to an anti-discrimination law when a First Amendment infringement occurred,¹⁶⁸ and the Court applied a lesser, almost intermediate scrutiny in a Fourteenth Amendment Equal Protection Clause case where a statute appeared to violate the fundamental right to marriage.¹⁶⁹

Nevertheless, abortion rights are still entrenched within the Supreme Court’s substantive due process jurisprudence, under the right to privacy concept.¹⁷⁰ Legislation that intrudes upon fundamental rights are usually

160. Gillette, *supra* note 98, at 676 (citing David B. Oppenheimer, *Congress and the Supreme Court’s Conflict over Antidiscrimination Law*, 37 HUM. RTS. 18, 18 (2010)).

161. *UAW v. Johnson Control, Inc.*, 499 U.S. 187, 200 (1991).

162. *Id.* at 198.

163. *United States v. Virginia*, 518 U.S. 515 (1996).

164. *Id.* at 533–34, 567 (Scalia, J., dissenting).

165. *Id.*

166. *Boy Scouts of America v. Dale*, 530 U.S. 640, 688 (2000) (using a “substantial burden” test).

167. Gillette, *supra* note 97, at 676 (citing David B. Oppenheimer, *Congress and the Supreme Court’s Conflict over Antidiscrimination Law*, 37 HUM. RTS. 18, 18 (2010)).

168. *Boy Scouts of America*, 530 U.S. at 657–59 (applying strict scrutiny to an expressive association claim).

169. *Zablocki v. Rehal*, 434 U.S. 374, 387–91 (1978).

170. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846, 851 (1992).

subject to strict scrutiny,¹⁷¹ but abortion is now subject to the “undue burden” standard in *Casey*.¹⁷² Further, reproductive autonomy was found to be a non-economic liberty interest; non-economic liberty interests include “the right to bodily integrity and the right to familial control.”¹⁷³ The Court began to define the perimeters of a “private realm of family life which the state cannot enter.”¹⁷⁴ Further, in the contraception cases, the Supreme Court protected “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.”¹⁷⁵ Under privacy and liberty rights and principles, the Court fashioned its current abortion doctrine.¹⁷⁶ The Court has described these interests as “control over [one’s] destiny,”¹⁷⁷ “the right to choose,”¹⁷⁸ and “the freedom to decide matters of the highest privacy and the most personal nature.”¹⁷⁹

The main issue in regulating sex selection is that it would be a motive-based abortion restriction. An analysis of the current framework is needed. In *Roe*, the Supreme Court determined that women may seek an abortion for any reason.¹⁸⁰ In *Roe*, the Court explained that the “right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”¹⁸¹ *Roe* created a trimester framework, where the state may not regulate abortion until after the first trimester, but also where the state’s interest in protecting fetal life increases further into the later stages of the pregnancy.¹⁸² The Court noted, “with respect to the [s]tate’s important and legitimate interest in the health of the mother, the ‘compelling’ point, in the light of present medical knowledge, is at approximately the end of the first trimester.”¹⁸³ In other words, the state could regulate abortion when the unborn child reached viability, or “presumably has the capability of meaningful life

171. *Id.* at 871.

172. *Id.* at 876.

173. Gillette, *supra* note 97, at 657 (footnote omitted). See also *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part) (“One aspect of this liberty is a right to bodily integrity, a right to control one’s person.”); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925).

174. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

175. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

176. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1396–97 (1992). See also *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990) (analyzing the right to refuse medical treatment under the Fourteenth Amendment liberty interest, not the right to privacy).

177. Gillette, *supra* note 97, at 664 (alteration adopted) (quoting *Casey*, 505 U.S. at 869).

178. *Id.* (quoting *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000)).

179. *Id.* (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 915 (1992) (Stevens, J., concurring in part)).

180. See Michael Stoke Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, n.4 (2003).

181. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

182. *Id.* at 163–64.

183. *Id.* at 163.

outside the mother's womb."¹⁸⁴ The regulation must also "reasonably relate[] to the preservation and protection of maternal health," and leave an exception for the life or health of the mother.¹⁸⁵

Casey reaffirmed *Roe*'s holding that the state could not prohibit abortion prior to viability because a woman has the right to reproductive autonomy prior to fetal viability.¹⁸⁶ The *Casey* Court, however, held that a state could regulate abortions prior to viability if the regulation did not create an "undue burden" for women seeking abortions.¹⁸⁷ The Court defined this undue burden as a regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."¹⁸⁸ Lastly, the *Casey* Court upheld the health exception requirement in abortion regulations.¹⁸⁹ In her dissent from the subsequent *Gonzales* case, Justice Ginsburg noted *Gonzales* "blurs the line, firmly drawn in *Casey*, between previability and postviability abortions."¹⁹⁰ It does appear, though, that post-viability, the "state interest in protecting potential life supposedly becomes 'compelling' enough to restrict abortion" so long as the restriction allows for the life or health of the mother exception.¹⁹¹

Did *Casey* lower the scrutiny? Abortion regulations went from a strict scrutiny standard to the undue burden standard.¹⁹² Even under this new burden, a sex selective abortion ban would likely be struck down as unconstitutional under the current framework. Per *Casey*, pre-viability regulations cannot impose an undue burden on a woman's right to abortion.¹⁹³ A sex selective abortion ban would impose an undue burden because completely removing the option of abortion from an abortion-minded woman would "place[] a substantial obstacle"¹⁹⁴ on her right to obtain an abortion.

Also under *Casey*, a state may restrict abortion post-viability when the life or health of the mother exception is included.¹⁹⁵ There may be a compelling state interest in protecting female fetuses from gender discrimination, and through the ban, promote gender equality. Because of technological advancements, gender can be detected pre-viability. This fact perhaps points

184. *Id.*

185. *Id.* at 163–64.

186. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 864–69 (1992) (discussing "legitimacy" at length).

187. *Id.* at 876.

188. *Id.* at 877. This holding was affirmed by the Court in *Sternberg v. Carhart*, 530 U.S. 914, 938, 945–46 (2000).

189. See *Casey*, 505 U.S. at 879.

190. *Gonzales v. Carhart*, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting).

191. Greaves, *supra* note 21, at 345–46 (quoting *Roe v. Wade*, 410 U.S. 113, 163–64 (1973)).

192. See *Casey*, 505 U.S. at 876.

193. *Id.* See also Thomas J. Malony, *Roe, Casey, and Sex-Selection Abortion Bans*, 71 ELON U. SCH. L. 1089, 1089 (2014).

194. See Malony, *supra* note 208, at 1114.

195. See *Casey*, 505 U.S. at 879. See also Malony, *supra* note 208, at 1089.

out a major flaw in applying the trimester and viability framework to sex selection: a female fetus does not become more female throughout the pregnancy.

In *Gonzales*, the Court upheld a partial-birth—or intact dilation and extraction—ban, on the grounds that the regulation furthered a legitimate state interest.¹⁹⁶ The Court reasoned that there was a legitimate state interest in protecting the life of the fetus and the mental health of the woman obtaining the abortion.¹⁹⁷ Congress had a sufficient basis to conclude that the procedure “implicates additional ethical and moral concerns that justify a special prohibition.”¹⁹⁸ Because the regulation in question was a statute passed by Congress, the Court looked at the congressional intent.¹⁹⁹ Congress found the “abortion methods [the act] proscribed had a ‘disturbing similarity to the killing of a newborn infant,’” and it was “concerned with ‘draw[ing] a bright line that clearly distinguishes abortion and infanticide.’”²⁰⁰ The Court examined all of the moral implications of the banned abortion procedure, focusing on a portion of *Casey* where the Court noted that prior abortion decisions had “undervalued the [s]tate’s interest in potential life.”²⁰¹ The Court also stated, “the government may use its voice and its regulatory authority to show its profound respect for the life within the woman.”²⁰² *Gonzales* did not provide a medical exception, instead acknowledging that Congress found the particular procedure was never medically necessary, as the woman could still have access to alternative abortion procedures.²⁰³

In this decision, the Court certainly broke away from precedence. While in *Casey* the state interest could not overcome the undue burden,²⁰⁴ *Gonzales* expanded this legitimate state interest: “under our precedents it is clear the state has a significant role to play in regulating the medical profession.”²⁰⁵ The Court even stated that the state has an interest in the “integrity and ethics of the medical profession.”²⁰⁶

In her dissent, Justice Ginsburg expressed concern that the Court relied upon moral concerns in their decision.²⁰⁷ Justice Ginsburg also pointed out that

196. *Gonzales v. Carhart*, 550 U.S. 124, 136, 158 (2007).

197. *Id.* at 158–60.

198. *Id.* at 158.

199. *Id.* at 156–57.

200. *Id.* at 158 (first alteration in original, second alteration adopted) (quoting notes following 18 U.S.C. § 1531 (2000), p. 768, ¶¶ (14)(L), (14)(G)).

201. *Id.* at 146 (alteration in original).

202. *Id.* at 157.

203. *Id.* at 163–64, 166–67.

204. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 883, 876 (1992).

205. *Gonzales*, 550 U.S. at 157.

206. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)).

207. *Gonzales*, 550 U.S. at 182 (Ginsburg, J., dissenting) (alteration in original) (citation omitted) (quoting *Casey*, 505 U.S. at 856) (noting *Casey* rejected basing judicial decisions on “principles of morality” or mandating “moral code[s]”).

the state's interest in protecting the potential life was in fact hindered because women could obtain an abortion by an alternative abortion procedure.²⁰⁸ Ginsburg also noted that:

[Women's] ability to realize their full potential . . . is intimately connected to "their ability to control their reproductive lives." Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.²⁰⁹

The *Gonzales* Court reasoned that there were alternative abortion procedures available to the women seeking the abortion.²¹⁰ There is no alternative procedure in the case of sex selection, but sex selection regulations are arguably distinguishable from the current framework. Would, for instance, Justice Ginsburg argue that unborn females "enjoy equal citizenship stature"?²¹¹

The Supreme Court has not yet issued an opinion on a motive-based abortion regulation. Sex selection bans would most likely fit into this category. In *Lawrence v. Texas*, the Court asserted, "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."²¹² Does the Court's current definition of liberty preclude states from regulating sex selective abortion? At first, it appears as though motive-based regulations on abortion would be violating liberty interests, and abortion rights are a protected liberty interest. *Casey* emphasized that:

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.²¹³

Sex selection bans, on the other hand, are not based upon personal beliefs concerning when life begins or conceptualizing personhood. Although motive-based, these bans do not intrude upon the liberty to define "existence" or "the mystery of human life."²¹⁴ This Note argues instead that the Supreme Court has not established a framework appropriate to apply to motive-based restrictions on abortion. It is noteworthy, however, that liberty does not include the right to act on an invidious prejudice, even if it includes the right to

208. *Gonzales*, 550 U.S. at 181 (Ginsburg, J., dissenting).

209. *Id.* at 171–72.

210. *Id.* at 166–67.

211. *Id.* at 172 (Ginsburg, J., dissenting).

212. *Lawrence v. Texas*, 539 U.S. 559, 562 (2003).

213. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

214. *Id.*

entertain prejudice in thought and speech. Similarly, the motive for sex selection may be separated from the act of sex selection.

Under current law, a regulation on sex selective abortion must not present a “substantial obstacle” to women seeking to obtain an abortion.²¹⁵ If abortion remains a privacy right, then it is unlikely *Roe* would allow a regulation that forced women to reveal their motive for abortion.²¹⁶ Sex selection bans may be subjected to a health of the mother exception, which remains broadly defined.²¹⁷ Because of possible environmental and cultural threats that may face a mother bearing a female child, the threats to her well-being would fall within the health exceptions. The factors the Court has defined in the health of the mother include anything that would be “relevant to the well-being of the patient,” including “physical, emotional, psychological, [and] familial” factors.²¹⁸ The “familial” factor²¹⁹ could encompass the consequences of giving birth to a daughter.

Enforcement of these statutes would be difficult; in many of the current statutes, doctors are not required to inquire about the woman’s motive for seeking an abortion.²²⁰ Additionally, women could provide other reasons for the abortion—such as family balancing, financial strife, or the timing of the pregnancy—and the sex selective abortion could still take place.

In the alternative, regulations could prevent doctors from disclosing the sex of the unborn child. This withholding of information, granted, seems to be in tension with *Casey*, where the Court upheld regulations that provided women with information to dissuade them from having an abortion.²²¹ The reasons of parents wanting to know the sex of their unborn child are certainly not usually aimed towards terminating the pregnancy. This sweeping ban on not disclosing the gender of the fetus would also encroach upon other parental rights. Finally, evidence shows how ineffectual such a regulation would be: despite India’s ban on disclosing the gender of the fetus, doctors do not comply with this law, and private sonograms are readily available.²²²

Although a state can create requirements—such as necessary ultrasounds or a twenty-four hour waiting period—to influence or inform the mother’s decision-making, the state cannot create an undue burden on a woman’s right to obtain an abortion.²²³ At the very least, a sex selective abortion regulation could be aimed at educating immigrants, or all women, of sex selection and

215. *Id.* at 877.

216. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

217. *Id.* at 153; *see also Casey*, 505 U.S. at 879.

218. *Doe v. Bolton*, 410 U.S. 179, 192 (1973) (alteration in original).

219. *Id.*

220. Greaves, *supra* note 21, at 356.

221. *Casey*, 505 U.S. at 872–73.

222. Greaves, *supra* note 21, at 357.

223. *Casey*, 505 U.S. at 893–94 (striking down a spousal notification requirement).

could emphasize equal rights for women living in the United States. Similar regulations, including parental consent, have passed the undue burden test in *Casey*.²²⁴

B. *Sex Selective Embryo Destruction Bans*

Some states already regulate human embryonic research.²²⁵ There is a lack of federal guidance, however, on the treatment of human embryos.²²⁶ In addition, there is a lack of self-regulation within the reproductive technologies industry.²²⁷ Very few court decisions have been issued on ART and treatment of embryos or research on embryos.²²⁸ Courts face many other obstacles when determining the rights of embryos or the owners of embryos.²²⁹ For example, there is no legal personhood for a fetus or embryo.²³⁰ Additionally, embryos can be used in research, such as embryonic stem cell research and nuclear cell transfer.²³¹ It is difficult to regulate separate realms of reproductive services and scientific research.

The framework for abortion and sexuality may provide for embryonic destruction.²³² The Supreme Court upheld “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.”²³³ Further, in *Casey*, the majority noted that the rights to privacy and contraception were linked to abortion cases, “as all of the cases affirmed women’s liberty to make ‘personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it.’”²³⁴ It is

224. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 326, 326–27 (2006).

225. *See* LA. REV. STAT. § 9:129 (2014); ME. REV. STAT. ANN. tit. 22 § 1593 (2014); MICH. COMP. LAWS § 333.2685 (2014); MINN. STAT. § 145.422 (2004); 18 PA. CONS. STAT. § 3216 (2014).

226. Stankovic, *supra* note 31, at 4–5.

227. *Id.* at 6.

228. *See Davis v. Davis*, 842 S.W.2d 588, 596 (Tenn. 1992) (discussing the right not to reproduce); *see also In re Baby M*, 537 A.2d 1227, 1264 (N.J. 1998) (weighing the best interests of the child and holding a surrogacy contract to be unenforceable due to violations of state law and public policy). *But see Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993) (determining that the surrogacy contract was enforceable and the surrogate mother had no parental rights). *See also Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2025–26 (2012) (A mother sought Social Security benefits for her children conceived by in vitro fertilization after her husband’s death. The Supreme Court held that *Chevron* deference should be applied to a Social Security Administration definition of “child,” taken from the state inheritance law in the state of the father’s death.).

229. Usually the owners are the biological parents or one biological parent of the embryo, particularly for reproductive technology. However, clinics or research facilities can own embryos. *See Davis*, 842 S.W.2d at 597.

230. *Roe*, 410 U.S. 133, 156–57 (1973).

231. Susan M. Wolf et al., *Using Preimplantation Genetic Diagnosis to Create a Stem Cell Donor: Issues, Guidelines & Limits*, 31 J.L. MED. & ETHICS 327, 328–29, 335–36 (2003).

232. *See Davis*, 842 S.W.2d at 596.

233. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

234. Gillette, *supra* note 97, at 666 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 853 (1992)).

possible that ART could fall under the contraception and abortion framework because it turns on the decision to bear or beget a child,²³⁵ therefore categorized under fundamental rights. The current undue burden test, however, involves abortion only, not the destruction of embryos, which occurs outside of the woman's body, and before pregnancy.

This Note predicts that a sex selection ban aimed at embryo destruction only could survive a constitutional challenge. Firstly, such a regulation would be moderating a type of medical practice and procedure. Secondly, the regulation would recognize the state interest in protecting one gender from discrimination.

ART and embryo destruction are different from abortion; although these procedures fall within reproductive rights, they are less likely to fall within personal autonomy rights because women are seeking to become pregnant. Here, such a ban would be aimed at a medical practice, not interfering with bodily autonomy.²³⁶ For instance, the fertilization occurs outside of the mother's body. Because similar statutes have been declared unconstitutional due to vagueness, a state regulation should look to consistent or precedential definitions for particular levels of development so that the protected entity—the female embryo—is clearly defined.²³⁷

Such a ban should place emphasis on the state's interest, and should carefully avoid infringing upon any fundamental rights, particularly, the right to privacy or liberty interests. The bill should allow for an exception for sex-related diseases, similar to the European laws. By allowing this exception, it leaves medical decisions in the hands of the parents.²³⁸ This also may circumvent privacy rights and autonomy rights challenges. These precautions would prevent the regulation from being subjected to strict scrutiny, because there is no suspect class involved.²³⁹

Similarly, a sex selective embryo destruction ban would survive an equal protection challenge on the basis of gender because the law would be aimed at embryos not yet implanted into a woman's uterus. Further, the ban would be neutral in the way it applies to women, and would apply to every individual, regardless of gender. As discussed in the section above, reproductive rights are not analyzed under gender discrimination. A carefully drafted regulation on embryo destruction, then, would be aimed at doctors employing sex selective

235. However, an individual's right to choose not to procreate seems to outweigh a woman's reproductive decisions when the father of an embryo decides to destroy the embryo. See Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1167 (2008).

236. Stankovic, *supra* note 31, at 9.

237. *Id.* at 11 (citing *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1363 (N.D. Ill. 1990)).

238. Stankovic, *supra* note 31, at 18.

239. *Id.* at 9.

practices. If there is no viable gender discrimination claim, then the ban is not subject to heightened or intermediate scrutiny.²⁴⁰

Finally, the Supreme Court has stated, “it is clear the State has a significant role to play in regulating the medical profession”²⁴¹ and an interest in the “integrity and ethics of the medical profession.”²⁴² This language could provide some insight on how a state’s interest would play in a constitutional analysis of a sex selection ban on embryo destruction only.

CONCLUSION

Denying “potential life”²⁴³ to women is denying women their full potential. Sex selection allows maltreatment of women, and the gender ratio imbalance affects this massive part of the world’s population. Sex selection has spread, and the consequences are devastating. The future of the world’s population will be forever changed. In the United States, there is a duty and ability to begin to regulate these practices.

Sex selection takes society past a couple’s right to regulate their families. With sex selection, parents are controlling the fate of their daughters, but that fate is death. The question left for legislators to answer is this: Is gender equality necessary in all stages of life?²⁴⁴

240. See generally *Craig v. Boren*, 429 U.S. 190 (1976) (defining intermediate scrutiny for gender discrimination).

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

242. *Id.*

243. *Roe v. Wade*, 410 U.S. 113, 150 (1973).

244. See Gayle T. Lemmon, *Hillary: Global Economy Depends on Women*, DAILY BEAST (Sept. 16, 2011, 12:45 PM), <http://www.thedailybeast.com/articles/2011/09/16/hillary-clinton-s-apec-speech-women-are-key-to-global-economy.html> (“[W]e don’t have a person to waste . . . and we certainly don’t have a gender to waste.”).