Sex-Selective Abortion in the U.S.: Does *Roe v. Wade* Protect Arbitrary Gender Discrimination?

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Introduction

Despite the general embrace of diverse cultures in the United States, there are certain cultural practices that fundamentally conflict with Western values. Treatment of women is a frequent source of cultural conflict because many parts of the world still practice various forms of female subjugation.[1] Child marriage,[2] female genital mutilation,[3] and honor killings,[4] although undoubtedly rare in the U.S., do

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[1] *See, e.g.*, Special Rapporteur, Comm'n on Human Rights, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions*, ¶¶ 66-67, 69, U.N. Doc. E/CN.4/2004/7 (Dec. 22, 2003) (by Asma Jahangir), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/172/60/PDF/G0317260.pdf (describing state-tolerated honor killings in Pakistan).

[2] Heather Heiman & Jeanne Smoot, Tahirih Justice Ctr., Forced Marriage in Immigrant Communities in the United States: 2011 National Survey Results 1-2, 7-9 (Layli Miller-Muro ed.) (2011), *available at* http://www.tahirih.org/site/wp-content/uploads/2011/09/REPORT-Tahirih-Survey-on-Forced-Marriage-in-Immigrant-Communities-in-the-United-States-September-2011.pdf (noting that girls as young as thirteen are forced into marriage—through deception, physical violence, or other means—for reasons including protection of family honor, enhancing family status, and economic security).

[3] U.S. Dep't of Health & Human Servs., Office on Women's Health, Female Genital Cutting: Frequently Asked Questions 1 (2009), *available at* http://www.womenshealth.gov/publications/our-publications/fact-sheet/female-genital-cutting.pdf (defining female genital mutilation as the cultural practice of "partially or totally removing the external female genitalia").

[4] Amnesty Int'l, Culture of Discrimination: A Fact Sheet on "Honor" Killings 1-2 (2012), *available at* www.amnestyusa.org/sites/default/files/pdfs/honor_killings_fact_sheet_final_2012.doc (noting that honor killing is the cultural practice—found mostly in regions of the Middle East and South Asia—of killing a woman to "reclaim" family honor).

> Women and girls can be killed for a variety of behaviors. This can range from talking with an unrelated male to consensual sexual relations outside marriage to being a victim

occur.[5] Because these cultural practices violate U.S. law, the victims enjoy legal protection, and the perpetrators, when caught, are subject to punishment.[6]

What happens, however, when U.S. law actually protects a cultural practice that treats women as less valuable than men? Such seems to be the case with discriminatory, sex-selective abortion.[7]

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of rape to seeking a divorce or refusing to marry the man her family has chosen for her. Even the suspicion of a transgression may result in a killing.

Id. at 2.

5 The Tahirih Justice Center estimates that from 2009 to 2010, there were 3,000 known and suspected cases of forced marriage in the United States—many of which involved girls younger than eighteen. HEIMAN & SMOOT, *supra* note 2, at 2-3. Based upon a CDC study, one report estimates that in 1990, 168,000 women in the U.S. had either undergone or were at risk of female genital mutilation. Wanda K. Jones et al., *Female Genital Mutilation/Female Circumcision: Who Is at Risk in the U.S.?*, 112 PUB. HEALTH REP. 368, 372 (1997), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1381943/pdf/pubhealthrep00038-0014.pdf; *see also Female Genital Cutting Research*, BRIGHAM & WOMEN'S HOSP., http://www.brighamandwomens.org/Departments_and_Services/obgyn/services/africanwomenscenter/research.aspx (last updated Oct. 19, 2011) (replicating the methodology of the CDC study to estimate that in 2000, approximately 228,000 women in the U.S. had either undergone or were at risk of female genital mutilation, a 35% increase over ten years). Lubaina Ahmed is just one identified victim of honor killing in the U.S. *See* State v. Ahmed, 813 N.E.2d 637, 664-66, 669 (Ohio 2004) (upholding the death sentence for Nawaz Ahmed, who murdered his wife, for alleged infidelity, and three of her family members for trying to help her escape her marriage); *see also* Frank Hinchey, *Killer of 4 Sentenced to Death*, COLUMBUS DISPATCH, Feb. 3, 2001, at 1C ("[Nawaz Ahmed's attorneys] said [Ahmed] felt that his wife's request for a divorce would make him look bad in his Islamic faith.") Other alleged honor killing victims in the U.S. include Noor Almaleki, Sandeela Kanwal, Amina and Sarah Said, and the wife and daughters of Ismail Peltek. *See* Abigail Pesta, *An American Tragedy*, MARIE CLAIRE, August 1, 2010, at 98 (Noor Almaleki—killed by her father, allegedly because she had dishonored the family by being "Americanized" and resisting a forced marriage); Jamie Tarabay, *Man Accused of Killing Daughter for Family Honor*, NPR (Jan. 26, 2009), http://www.npr.org/templates/story/story.php?storyId=99616128 (Sandeela Kanwal—strangled to death by her father who, according to police, claimed that it was his right "given to him by God" to cleanse the family of shame); Glenna Whitley, *American Girls*, DALLAS OBSERVER (June 19, 2008), http://www.dallasobserver.com/2008-06-19/news/american-girls/ (Amina and Sara Said—shot to death by their father, allegedly for having American boyfriends and bringing shame to the family); Michael Zeigler, *Man Killed for 'Honor,' He Tells Cops*, ROCHESTER DEMOCRAT & CHRON., Apr. 24, 2004, at 1B (Wife and daughters of Ismail Peltek—murdered, according to Peltek, because his wife and older daughter had been molested by Peltek's brother, and because the youngest daughter had been "sullied" by a gynecological exam).

6 18 U.S.C. § 116 (2006) (declaring that female genital mutilation is illegal in the U.S.); *see* ARIZ. REV. STAT. ANN. § 25-102 (2008) (prohibiting marriage of minors, under the age of sixteen, without parental consent, court-mandated marriage counseling, and a determination by the court that the marriage is both consensual and in the best interest of the minor "under the circumstances"); *but see* CAL. FAM. CODE §302 (West 2008) (allowing marriage of minors under age eighteen with parental consent and a court order).

7 *See* Reply Brief for Petitioners & Cross-Respondents at 11 n.20, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902) (noting that petitioners did not con-

Sex-selective abortion, in this context, is the systematic abortion of girls[8] because of their burden on the family and low social worth in certain cultures.[9] Before the widespread availability of prenatal screening, this selection was accomplished through infanticide, or neglect of girls to the point that they died disproportionately more often than boys.[10] However, with modern technology, women can easily discover the gender of their child early in a pregnancy,[11] and terminate it, without having to endure a full pregnancy and delivery. The practice is so widespread in some parts of the world that India, in response to this phenomenon, made it illegal for doctors to tell expectant parents the sex of their child.[12]

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cede the constitutionality of a Pennsylvania sex-selective abortion ban, and that they believe it to be illegal under *Roe v. Wade*).

[8] Although it is possible for boys to be the target of sex-selective abortion, the practice is overwhelmingly used to select against girls. *See generally*, MARA HVISTENDAHL, UNNATURAL SELECTION: CHOOSING BOYS OVER GIRLS, AND THE CONSEQUENCES OF A WORLD FULL OF MEN (2011). Therefore, this Comment uses the term 'sex-selective abortion' to refer generally to selection against girls.

[9] *See* Mallika Kaur Sarkaria, Comment, *Lessons from Punjab's "Missing Girls": Toward a Global Feminist Perspective on "Choice" in Abortion*, 97 CALIF. L. REV. 905, 910 (2009) (citing ASHISH BOSE & MIRA SHIVA, DARKNESS AT NOON: FEMALE FOETICIDE IN INDIA (2003)). For example, in Punjab—a relatively developed and wealthy state in India—there is strong societal pressure to have a son:

> Given today's societal norms and pressures, a contemporary Punjabi woman will choose abortion if the choice is between abortion and no abortion. When multiple choices are placed on the table—the choice to raise a daughter without dowry; the choice to have a daughter support her in old age without ridicule; the choice to have a daughter carry forth the family name without shame; the choice to raise a daughter without fear that violence will be inflicted on her—the same Punjabi woman might not choose to abort her female fetus. . . .
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> When the choice is between abuse and honor; ridicule and prestige; vulnerability and security; women will choose honor, prestige, and security—and Punjabi women will have sons.

Id. at 908-09.

[10] Kristi Lemoine & John Tanagho, *Gender Discrimination Fuels Sex Selective Abortion: The Impact of the Indian Supreme Court on the Implementation and Enforcement of the PNDT Act*, 15 U. MIAMI INT'L & COMP. L. REV. 203, 207-08 (2007) (citing Rita Patel, *The Practice of Sex Selective Abortion in India: May You Be the Mother of a Hundred Sons*, 7 CTR. FOR GLOBAL INITIATIVES 1, 2 (1996)) ("While systematic discrimination against girl children has existed in India for centuries, it was not until the late eighteenth century that British officials first documented it in the form of female infanticide.").

[11] Blood tests are now able to determine the gender of a fetus as early as seven weeks into pregnancy. *See* Pam Belluck, *Is It Boy or Girl? A Test at 7 Weeks*, N.Y. TIMES, Aug. 10, 2011, at A1, *available at* http://www.nytimes.com/2011/08/10/health/10birth.html.

[12] *See* The Pre-Natal Diagnostic Techniques Act, No. 57 of 1994, INDIA CODE (1994) (indicating in the preamble that the purpose of the law is to prevent "pre-natal sex determination leading to female foeticide").

Despite sex-selective abortion's obvious incompatibility with Western feminist sensibilities,[13] it seems that the legal protections afforded by *Roe v. Wade* and its progeny actually shield the practice from legal scrutiny.[14] The Supreme Court, in *Roe*, created a constitutional privacy protection surrounding the decision to terminate a pregnancy.[15] Subsequent abortion decisions have established that the government can regulate abortion in certain circumstances, but cannot prevent an abortion that threatens the physical or mental health of the mother.[16] Not until *Gonzales v. Carhart*, in 2007, did the Court uphold a meaningful restriction on abortion by allowing a federal ban on partial-birth abortion.[17]

At the state level, there is a wide array of abortion regulations, including bans on post-viability abortion.[18] Some states have even attempted to prohibit sex-selective abortion.[19] However, all of these statutes remain subject to the Supreme Court's broadly defined physical and mental health exception.[20]

This Comment examines the extent to which state or U.S. law can prevent sex-selective abortion.[21] Part I demonstrates that the use of abortion to discriminate against the female gender is a significant problem, which U.S. law should prohibit. It also examines what constitutes a legal abortion in the U.S., starting with Supreme Court jurisprudence on abortion and then state statutes on abortion. It then

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13 *See* April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?*, 10 WIS. WOMEN'S L.J. 161, 219-20 (1995) (describing sex-selective abortion as being in "*direct opposition* to the tenets and goals of feminism" (emphasis added)).

14 *See Casey*, 505 U.S. at 878-79; Roe v. Wade, 410 U.S. 113, 165 (1973).

15 *Roe*, 410 U.S. at 153.

16 *See* Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 327-28 (2006) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (plurality opinion)); Stenberg v. Carhart, 530 U.S. 914, 938 (2000); *Casey*, 505 U.S. at 879 (citing *Roe*, 410 U.S. at 164).

17 *See* Gonzales v. Carhart, 550 U.S. 124, 132, 168 (2007).

18 GUTTMACHER INST., STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS (Mar. 8, 2013) [hereinafter GUTTMACHER REPORT], *available at* http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf (showing only Alaksa, Colorado, District of Columbia, Mississippi, New Hampshire, New Jersey, New Mexico, Oregon, Vermont, and West Virginia without late term prohibitions on abortion).

19 ARIZ. REV. STAT. ANN. § 13-3603.02 (2008); 720 ILL. COMP. STAT. 510/6(8) (2008); OKLA. STAT. tit. 63, § 1-731.2 (2008); 18 PA. CONS. STAT. ANN. § 3204(c) (2008).

20 *See Casey*, 505 U.S. at 879; *Roe*, 410 U.S. at 153.

21 Although this Comment takes the position that sex-selective abortions should be prohibited, it takes no position on the related topic of sex-based abortions motivated by gender-specific genetic disease or abnormality.

examines the state interest in protecting women from gender discrimination.

Part II analyzes the problems with implementing any meaningful restrictions on sex-selective abortion under *Roe* and its progeny. Beginning at the state level, this Part considers whether existing or proposed regulations on sex-selective abortion would pass constitutional muster or would be enforceable as a practical matter, and whether there are alternative methods for curbing the practice. It then examines whether the Supreme Court's decision in *Gonzales*—upholding a federal ban on partial-birth abortions[22]—could provide a justification for federal regulation of sex-selective abortion. Part II finds that although the reasoning of *Gonzales* could be applied to sex-selective abortion, any ban on sex-selective abortion would challenge the viability rule established forty years ago in *Roe*.

I. BACKGROUND

A. *The Problem: Use of Abortion to Discriminate Against the Female Gender*

Sex-selective abortion is not a topic that preoccupies many Americans. In many parts of Asia, however, it is a subject of national concern.[23] Gender ratios at birth in countries like China and India[24] skew so far from biologically normal levels that demographers believe there are between 100 and 160 million women missing from Asia.[25] According to researchers and demographers, only sex-selective abortion can account for the imbalance.[26] Although preference for a son is not a

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[22] Gonzales v. Carhart, 550 U.S. 124, 168 (2007).

[23] *See* Julia Duin, *India's Imbalance of Sexes*, WASH. TIMES, Feb. 26, 2007, at A01 (quoting Renuka Chowdhury, India's cabinet-level minister of state for women and child development: "It is a matter of international and national shame for us that India . . . kills its daughters"); *see also Rising Sex-Ratio Imbalance 'a Danger'*, CHINA DAILY, Jan. 23, 2007, at 1, *available at* http://www.chinadaily.com.cn/china/2007-01/23/content_789821.htm (quoting a joint statement from the Central Committee of the Communist Party of China and the State Council, that gender imbalance is "'a hidden danger' for society that will 'affect social stability'").

[24] Although many other countries throughout Asia, Africa and parts of Europe also demonstrate high levels of sex-selection, and similar gender imbalances, this comment uses China and India as the primary examples because of their large population sizes.

[25] HVISTENDAHL, *supra* note 8, at 5-12.

[26] Prabhat Jha et al., *Low Male-to-Female Sex Ratio of Children Born in India: National Survey of 1.1 Million Households*, 367 LANCET 211, 217 (2006) (concluding that prenatal sex determination and sex-selective abortion are the most plausible explanations for the abnormal

new phenomenon in these regions, the technology to engineer the sex of children is.[27] For example, increases in gender imbalance correlate heavily with the availability of sonograms.[28]

Of course, availability of sonograms and the preference for sons are not unique to India or China, so there must be another explanation for Asia's unusually high gender imbalance. Part of the problem is that in many Asian countries, daughters are an economic burden, while sons provide financial security and carry on the family name.[29] There is a Hindu saying: "Raising a daughter is like watering your neighbour's garden."[30] Daughters in India, and other Asian cultures, become part of their husband's family and do not contribute to their parents' households.[31] The daughter's parents also customarily pay for the wedding and dowry, among other things.[32] A sonogram advertisement in India describes a mother's options: "Spend 500 rupees now [for an abortion], save 50,000 rupees later [for dowry]."[33]

Counterintuitively, this cultural preference for sons has intensified with the economic development and modernization of Asia.[34] It is tempting to think that increased income and education for both men and women would improve rather than exacerbate the problem of discriminatory sex-selection. Unfortunately, cultural equality of women

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sex ratio at birth in India); *see also* HVISTENDAHL, *supra* note 8, at 8-9 (showing that other purported explanations such as infanticide, disease, and underreporting of female births cannot account for the gender imbalance).

27 Prenatal tests used to determine fetal gender, such as amniocentesis—the extraction of fetal cells for genetic testing—and sonograms—images of the fetus produced through ultrasound examination—started to become available in India in the 1970s. HVISTENDAHL, *supra* note 8, at 48-49. *See also* Joseph Woo, *A Short History of the Development of Ultrasound in Obstetrics and Gynecology*, OB-ULTRASOUND.NET, http://www.ob-ultrasound.net/history2.html (last updated Nov. 2006) (detailing the rapid advancement of prenatal ultrasound technology in the 1970s and 1980s). Armed with these tests, women can control the gender of their children by aborting fetuses of an undesired gender.

28 HVISTENDAHL, *supra* note 8, at 11, 49; Lemoine & Tanagho, *supra* note 10, at 209-10.

29 *See* Sarkaria, *supra* note 9, at 910-13.

30 *Gendercide: The Worldwide War on Baby Girls*, ECONOMIST (Mar. 4, 2010), http://www.economist.com/node/15636231.

31 *Id.*

32 *But see* Dowry Prohibition Act, No. 28 of 1961, INDIA CODE (1961); *see also* Judith G. Greenberg, *Criminalizing Dowry Deaths: The Indian Experience*, 11 AM. U. J. GENDER SOC. POL'Y & L. 801, 808-09 (2003) (showing that dowry deaths—the murder of a bride because of insufficient dowry—increased by 40% between 1994 and 1998).

33 Sarkaria, *supra* note 9, at 928.

34 *See Gendercide: The Worldwide War on Baby Girls*, *supra* note 30.

has not kept up with the economy in this part of the world; gender ratios are worse in the wealthier regions of India and China.[35]

A partial explanation for this phenomenon is the decrease in fertility rate that comes with economic development.[36] As wealth increases, family sizes decrease.[37] This is the result of, among other things, better survival rates of children and less need for child labor to support the family.[38] Family planning initiatives in India and population control measures, like China's one-child policy, have also contributed to falling birth rates.[39]

Although having fewer children makes economic sense for families in newly modern regions, it also increases the risk of not having a son.[40] Mathematically, in a family with six children—leaving gender entirely up to nature—there is only a 1% chance of not having a son.[41] With only two children, the risk jumps to 25%.[42] Judging by the sharp increases in gender imbalance for second children—where the first child is a girl—many parents seem unwilling to bear this risk, and are utilizing prenatal testing and abortion to ensure that at least one of their children is a boy.[43] In some regions of China, the ratio of second children being sons as opposed to daughters—where the first child is female—approaches two to one.[44]

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35 *See* HVISTENDAHL, *supra* note 8, at 39-40.

36 *See* HVISTENDAHL, *supra* note 8, at 38-39.

37 HVISTENDAHL, *supra* note 8, at 38-39.

38 HVISTENDAHL, *supra* note 8, at 38-39 (explaining that when survival rates of children go up, parents rationally respond by having fewer children).

39 Therese Hesketh et al., *The Effect of China's One-Child Family Policy After 25 Years*, 353 N. ENG. J. MED. 1171 (2005), *available at* http://www.nejm.org/doi/pdf/10.1056/NEJMhpr051833; BETSY HARTMANN, REPRODUCTIVE RIGHTS & WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL 157-71 (1995).

40 *See* HVISTENDAHL, *supra* note 8, at 19-21.

41 *See* HVISTENDAHL, *supra* note 8, at 19-21.

42 *See* HVISTENDAHL, *supra* note 8, at 19-21.

43 *See* Prabhat Jha et al., *Trends in Selective Abortions of Girls in India: Analysis of Nationally Representative Birth Histories from 1990 to 2005 and Census Data from 1991 to 2011*, 377 LANCET 1921, 1921 (2011) (demonstrating sharp rises in the sex ratio at birth when parents are having a second or third child, where all prior children are female, and no similar rise when prior children are male).

44 *See* Wei Xing Zhu et al., *China's Excess Males, Sex-Selective Abortion, and One Child Policy: Analysis of Data from 2005 National Intercensus Survey*, 338 BRIT. MED. J. 1211, 1214 (2009), *available at* http://www.bmj.com/highwire/filestream/346356/field_highwire_article_pdf/0.pdf (showing a second-order birth ratio of 192 in Jiangsu, and 190 in Anhul, where the first child is female).

B. *Why Should Americans Care?*

At first glance, the problem of sex-selective abortion seems remote to the U.S. Although polls show a slight son preference among Americans,[45] the birth ratio in the U.S. is biologically normal.[46] Any cultural preference that exists in America for sons is apparently not strong enough to trigger systemic sex-selective abortion, despite better access to prenatal screening and abortion, and lower fertility rates than in India.[47]

There is reason, however, for Americans to be concerned about sex-selective abortion occurring in the U.S. The pervasiveness of the practice in the two largest populations of the world makes it almost a certainty that the practice follows some immigrants into the U.S.[48]

To illustrate the severity of the problem, consider that the biologically natural birth rate is 105 boys for every 100 girls.[49] In India, the ratio of boys to girls under age fifteen is 114 to 100.[50] In China, the

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45 *See, e.g.*, *Family Values Differ Sharply Around the World*, GALLUP NEWS SERV. (Nov. 7, 1997), http://www.gallup.com/poll/4315/family-values-differ-sharply-around-world.aspx (showing that when asked about the preferred sex of a hypothetical only-child, 35% of Americans prefer sons, 23% prefer daughters, and 42% have no preference).

46 *See The World Factbook: United States*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (last updated Feb. 11, 2013) (follow "People and Society" hyperlink) (showing a birth ratio of 1.05).

47 *Compare The World Factbook: United States*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (last updated Feb. 11, 2013) (follow "People and Society" hyperlink) (showing a U.S. fertility rate of 2.06 children born per woman), *with The World Factbook: India*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/in.html (last updated Feb. 5, 2013) (follow "People and Society" hyperlink) (showing India's fertility rate to be 2.58 children born per woman).

48 *See* Douglas Almond & Lena Edlund, *Son-Biased Sex Ratios in the 2000 United States Census*, 105 PROC. OF THE NAT'L ACAD. OF SCI. 5861, 5861 (2008) *available at* http://www.pnas.org/content/105/15/5681.full.pdf (showing that sex ratios at birth within certain Asian demographics are not biologically normal, and demonstrate a statistical preference for sons). American researchers have observed a similar phenomenon in Canada. *See* DOUGLAS ALMOND ET AL., NAT'L BUREAU OF ECON. RESEARCH, O SISTER, WHERE ART THOU? THE ROLE OF SON PREFERENCE AND SEX CHOICE: EVIDENCE FROM IMMIGRANTS TO CANADA 16 (2009), *available at* http://www.nber.org/papers/w15391.pdf. Certain areas of Canada have attempted to curb the practice of sex selection by preventing doctors from identifying fetal gender to parents; however, American clinics advertise sex determination services to immigrant communities in those regions, which helps them to circumvent the restrictions. *See id.* at 9-10.

49 *See, e.g.*, R. Jacobsen et al., *Natural Variation in the Human Sex Ratio*, 14 HUM. REPROD. 3120, 3121 (1999).

50 *The World Factbook: India*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/in.html (last updated Feb. 5, 2013) (follow "People and Society" hyperlink), *see also* CENSUS OF INDIA, PROVISIONAL POPULATION TOTALS OF INDIA 93 (2011), *available at*

ratio is 116 to 100.[51] These two countries also made up over 11% of U.S. immigration from 2000 to 2009, totaling 1.182 million legal permanent residents over that period.[52] Additionally, hundreds of thousands of Indians and Chinese enter the U.S. every year on work and student visas.[53]

Of course, immigrants from these countries will not necessarily practice sex-selective abortion. Acclimation to American culture and its better opportunities for women should ensure that sex-selective abortion is rare. However, assimilation and acculturation do not necessarily occur overnight, or even over a generation. Many native cultural practices, including those that conflict with the laws of the host country, such as polygamy[54] and female genital mutilation,[55] persist in immigrant communities.[56]

Empirical evidence also demonstrates a higher rate of sons to daughters among children born in the U.S. to Chinese, Korean, and Indian parents.[57] Although the sex ratio of first-borns within this group is a biologically natural 105 boys per 100 girls, the ratio jumps to 117 to 100 for second children, where the first child was a girl.[58] If the first two children are girls, the ratio for third children goes up to 151 to 100.[59] However, where any previous child is a boy, the sex ratio is biologically natural for all subsequent children.[60] Among Caucasian

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http://www.censusindia.gov.in/2011-prov-results/data_files/india/Final_PPT_2011_chapter5.pdf (showing sex ratios as high as 125 boys to 100 girls, aged zero to six, in certain states).

51 *The World Factbook: China*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html (last updated Feb. 11, 2013) (follow "People and Society" hyperlink).

52 OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2010 YEARBOOK OF IMMIGRATION STATISTICS 10 (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf.

53 *Id.* at 76-77.

54 *See* Jonathan Wynne-Jones, *Sharia: A Law Unto Itself?*, TELEGRAPH (Aug. 7, 2011), http://www.telegraph.co.uk/news/uknews/law-and-order/8686504/Sharia-a-law-unto-itself.html (noting a case of polygamy in England where the practice is illegal).

55 Jones et al., *supra* note 5, at 372 (estimating that in 1990, 168,000 women in the U.S. had either undergone or were at risk of female genital mutilation, based on a CDC study).

56 *See* Wynne-Jones, *supra* note 54 (reporting the existence of Sharia courts in Britain, which, although they have no official jurisdiction, resolve family and civil disputes among Muslim immigrant communities, in accordance with Islamic religious and cultural norms).

57 Almond & Edlund, *supra* note 48, at 5861; NICHOLAS EBERSTADT, AM. ENTER. INST., A WORLDWIDE WAR AGAINST BABY GIRLS: SEX-SELECTIVE ABORTION GOES GLOBAL 13 (2011), *available at* http://www.aei.org/files/2011/06/14/Eberstadt%20Global%20War%20Against%20Baby%20Girls%20AEI%20June%202011.pdf.

58 Almond & Edlund, *supra* note 48, at 5861.

59 Almond & Edlund, *supra* note 48, at 5861.

60 Almond & Edlund, *supra* note 48, at 5861.

parents, in contrast, the sex ratio remains biologically normal, regardless of the sex of prior children.[61] This data indicates that cultural preference for sons follows immigrants to the U.S., and that some practice sex-selective abortion in this country.[62]

Even outside of cultural groups where sex-selective abortion is concentrated, sex selection can be a problem. One example is selective reduction. Selective reduction is the targeted abortion of one or more fetuses in a multiple pregnancy, leaving one or more to survive.[63] Although selective reduction can occur in natural pregnancies, in vitro fertilization (IVF) has made it a more common practice.[64] When performing IVF, doctors implant multiple embryos in a woman to increase the probability of successful pregnancy, which in turn, increases the risk of multiples, such as twins or triplets.[65] The practice of selective reduction presents parents, across cultures, with the choice of which fetus or fetuses to abort, and which to carry to term. If the gender of those fetuses plays a role in the parents' choice, this is an area where sex-selection may already be occurring in the U.S.

Sex-selective abortion should also concern Americans because of the similar potential for race-selective abortions.[66] For example, a white woman who would not otherwise have an abortion might choose to abort if she knew that the father of her child was black. One could imagine scenarios where a young woman in a racist family would face ridicule and even disownment if she were to have a child of undesired race.

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61 Almond & Edlund, *supra* note 48, at 5861.

62 Although sex-selective abortion is not the only way to control the sex of children, it is the least expensive and most effective method currently available, so it is likely that this demonstrated gender imbalance is primarily the result of sex-selective abortion.

63 Stacey Pinchuk, *A Difficult Choice in a Different Voice: Multiple Births, Selective Reduction and Abortion*, 7 DUKE J. GENDER L. & POL'Y 29, 30 (2000) (citing Diane M. Gianelli, *New York Panel Urges Stricter Controls Over Fertility Clinics*, Am. Med. News (May 18, 1998), http://www.ama-assn.org/amednews/1998/pick_98/pick0518.htm).

64 *See* Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. ON LEGIS. 1, 24 (2003) (quoting Mark I. Evans, *Selective Reduction for Multifetal Pregnancy: Early Options Revisited*, 42 J. REPROD. MED. 771, 771 (1997)).

65 *Id.* at 21.

66 Congress, and other lawmaking bodies have raised the issue of race-selective abortion as a concern, and have attempted to prevent it through legislation. *See* Susan B. Anthony and Frederick Douglas Prenatal Nondiscrimination Act of 2009, H.R. 1822, 111th Cong. (2009) ("To prohibit discrimination against the unborn on the basis of sex or race . . . ."); *see also* ARIZ. REV. STAT. ANN. § 13-3603.02 (2008) (designating as a class three felony, any abortions "sought based on the sex or race of the child or the race of a parent of that child").

Where it is legal to abort a pregnancy based on sex, so too can women abort based on race. Some lawmakers have recognized this problem, and attempted to address it.[67] Currently, however, only Arizona specifically prohibits race-based abortion.[68]

The apparent legal status of sex-selective abortion throughout most of the U.S.[69] runs counter to the sensibilities of most Americans, as demonstrated by polls that repeatedly show a strong desire to outlaw the practice.[70] In a 2007 poll, conducted by Ayres McHenry & Associates, 79% of respondents believed that sex-selective abortion should be illegal.[71] In a 2006 Zogby poll, 86% believed that sex-selective abortion should be illegal.[72] In a 1989 Gallup poll, 80% believed that sex-selective abortion should be illegal.[73] Distaste for sex-selective abortion remains strong among those who believe abortion should be legal in some circumstances: according to a 1989 Boston Globe poll, 69% of respondents who thought abortion should be legal thought sex-selective abortion should be *illegal*.[74] Even ignoring poll numbers, purposely aborting girls because of a cultural preference for sons intuitively conflicts with basic gender equality norms in the U.S.

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67 *See* Susan B. Anthony and Frederick Douglas Prenatal Nondiscrimination Act of 2009, H.R. 1822, 111th Cong. (2009) ("To prohibit discrimination against the unborn on the basis of sex or race . . . ."); *see also* ARIZ. REV. STAT. ANN. § 13-3603.02 (2008) (designating as a class three felony, any abortions "sought based on the sex or race of the child or the race of a parent of that child").

68 ARIZ. REV. STAT. ANN. § 13-3603.02 (2008).

69 Only a handful of states attempt to prohibit sex-selective abortion. *See* ARIZ. REV. STAT. ANN. § 13-3603.02 (2008); 720 ILL. COMP. STAT. 510/6(8) (2008); OKLA. STAT. tit. 63, § 1-731.2 (2008); 18 PA. CONS. STAT. ANN. § 3204(c) (West 2008).

70 *See infra* notes 71-74 and accompanying text.

71 AYRES, MCHENRY & ASSOCS. INC., PUBLIC OPINION ON OVERTURNING *Roe v. Wade* 2 (2007), *available at* http://www.eppc.org/docLib/20070514_RoeMemoFinal.pdf (showing that, out of a randomly selected sample of 1,000 registered voters, 79% believe that that abortion should be illegal when it is because "the woman does not like the gender of her fetus").

72 Jeff Jacoby, Op-Ed., *Choosing to Eliminate Unwanted Daughters*, BOSTON GLOBE (April 6, 2008), http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/04/06/choosing_to_eliminate_unwanted_daughters (citing a 2006 Zogby poll).

73 *Gallup/Newsweek Poll*, Roper Ctr. for Pub. Op. Research, Apr. 13, 1989, *available at* iPOLL Databank, File No. USGALNEW.89130.Q002G (showing that, out of a randomly selected sample of 750 adults, 80% believe that abortion should be illegal when it is because "the sex of the child is not what the parents want").

74 *Abortion Survey*, Roper Ctr. for Pub. Op. Research, Mar. 29, 1989, *available at* iPOLL Databank, File No. USKRC.033189.R2I (showing that, out of a randomly selected sample of 1,002 registered voters—of the 53% of respondents who indicated that abortion should be "legal" in "certain circumstances,"—that 69% believe that abortion should be *illegal* when it is because the "fetus [is] not [the] desired sex").

It is also important to draw attention to the practice of sex-selective abortion because its repressive effects on women are subtler than the visceral examples of honor killing[75] or female genital mutilation.[76] Abortion is typically a private matter and, therefore, there is usually little public evidence that it has even occurred. Unlike the days before prenatal screening, when sex-selection required infanticide, a woman can now determine the sex of her child and abort the unwanted girl without telling anyone she was even pregnant.[77]

Sex-selection may be primarily limited to a small subset of the U.S. immigrant population, and it might not threaten the overall gender balance of American society, but it is a problem nevertheless. Quietly, and hidden from scrutiny, an untold number of American daughters have been aborted in favor of sons, solely for the sin of being the wrong gender.

C. *Abortion Law in the U.S.*

Despite sharply divided opinions on its morality, abortion is legal and widely available in every state.[78] Although the right to abortion is not absolute,[79] the Supreme Court's abortion jurisprudence shows lit-

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75 Honor killing is the practice of killing an allegedly disgraced female to restore the family's honor. *See* AMNESTY INT'L, CULTURE OF DISCRIMINATION: A FACT SHEET ON "HONOR" KILLINGS 1-2 (2012), *available at* www.amnestyusa.org/sites/default/files/pdfs/honor_killings_fact_sheet_final_2012.doc (citing an example of a father who unrepentantly killed his fourteen-year-old daughter after she was raped, because "our honor was dirtied"); AHA FOUNDATION, HONOR VIOLENCE FACT SHEET 1 (2012), *available at* http://theahafoundation.org/wp/wp-content/uploads/2011/05/AHA-Foundation-Honor-Violence-Fact-Sheet-2012.pdf ("Conduct such as resisting an arranged marriage, seeking divorce, adopting a Western lifestyle and wearing Western clothing, and having friends of the opposite sex have resulted in honor violence.").

76 Female genital mutilation, also called female genital cutting, is the cultural practice of "partially or totally removing the external female genitalia." U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE ON WOMEN'S HEALTH, FEMALE GENITAL CUTTING: FREQUENTLY ASKED QUESTIONS 1 (2009), *available at* http://www.womenshealth.gov/publications/our-publications/fact-sheet/female-genital-cutting.pdf ("The most severe form of [female genital mutilation] is when all external genitalia are removed and the vaginal opening is stitched nearly closed. Only a small opening is left for urine and menstrual blood.").

77 Ultrasounds can accurately reveal the gender of a fetus as early as fourteen weeks into pregnancy. *See* B.J. Whitlow et al., *The Sonographic Identification of Fetal Gender from 11 to 14 Weeks of Gestation*, 13 ULTRASOUND OBSTETRICS & GYNECOLOGY 301, 301 (1999). Noninvasive tests using cell-free fetal DNA can reliably determine fetal gender as early as seven weeks. *See* Stephanie A. Devaney et al., *Noninvasive Fetal Sex Determination Using Cell-Free Fetal DNA: A Systematic Review and Meta-Analysis*, 306 J. OF AM. MED. ASS'N 627, 631-34 (2011).

78 *See* Roe v. Wade, 410 U.S. 113, 164 (1973).

79 Doe v. Bolton, 410 U.S. 179, 189 (1973).

tle meaningful limitation on the right to abortion,[80] with the exception of partial-birth abortion.[81] Many states have created obstacles to obtaining abortions, such as waiting periods,[82] and even attempted to prohibit sex-selective abortion.[83] The U.S. House of Representatives also considered a law banning sex-selective abortion, which never passed.[84] This Section first summarizes the Supreme Court's abortion jurisprudence, then focuses on partial-birth abortion, and finally reviews state regulations on abortion.

1. Early Supreme Court Jurisprudence

In 1973, *Roe v. Wade* marked the first in a series of cases, which established a right to obtain an abortion, and it remains binding law today.[85] The Supreme Court included abortion among previously recognized "fundamental" privacy rights protected under Fourteenth Amendment substantive due process.[86] The Court also concluded that the unborn are not "persons" protected by the Fourteenth Amendment.[87]

Justice Blackmun's majority opinion created a legal framework for abortion based upon the medical trimester framework.[88] During the first trimester of pregnancy—the twelve weeks after the first day of a missed period—the state could not regulate abortion in any way.[89] After the first trimester, but before viability, the state could regulate the administration of abortion, but only to protect the health of the mother, and any regulation had to survive strict scrutiny.[90] After viability, the state interest in protecting potential life supposedly

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80 *See Roe*, 410 U.S. at 163-64 (allowing restriction of abortion, post-viability, *except* where necessary to preserve "the life or health of the mother"); *see also Doe*, 410 U.S. at 192 (defining health of the mother, for the purposes of determining the necessity of abortion, to include physical, emotional, psychological, familial, and age factors).

81 *See* Gonzales v. Carhart, 550 U.S. 124, 168 (2007).

82 *E.g.*, 18 PA. CONS. STAT. ANN. § 3205 (2008).

83 ARIZ. REV. STAT. ANN. § 13-3603.02 (2008); 720 ILL. COMP. STAT. 510/6(8) (2008); OKLA. STAT. tit. 63, § 1-731.2 (2008); 18 PA. CONS. STAT. ANN. § 3204(c) (2008).

84 Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2009, H.R. 1822, 111th Cong. (2009).

85 *See* Roe v. Wade, 410 U.S. 113, 164 (1973).

86 *Id.* at 152-53 (recognizing previous cases in which substantive due process considerations protected activities relating to family, child rearing, and contraception).

87 *Id.* at 158.

88 *Id.* at 164-65.

89 *Id.* at 163.

90 *Id.*

becomes "compelling" enough to restrict abortion; however, it can never preclude an abortion that is necessary to preserve the "life or health" of the mother.[91] In the companion case to *Roe*, *Doe v. Bolton*, the Court defined health of the mother to include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."[92]

Planned Parenthood of Southeastern Pennsylvania v. Casey modified *Roe* by lowering the burden for pre-viability regulation of abortion from strict scrutiny to an "undue burden" test.[93] The Court in *Casey* defined the undue burden test as a restriction on state regulations that have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[94] Based on the Court's reasoning of what restrictions pose a "substantial obstacle" to abortion,[95] and which do not,[96] any regulation which removes the ultimate choice to have an abortion from the hands of the woman or would prevent a substantial number of women from obtaining abortions, would be a substantial obstacle.[97]

Casey also extended the period during which the state can regulate abortion into the first trimester, subject to the undue burden

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91 Roe v. Wade, 410 U.S. 113, 163-64 (1973) (allowing prohibition of post-viability abortions, except where it is necessary for preservation of the life or health of the mother).

92 Doe v. Bolton, 410 U.S. 179, 192 (1973).

93 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871, 877 (1992) (plurality opinion).

94 *Id.* at 877.

95 Spousal notification requirements pose a substantial obstacle because a "significant number of women" would not be willing to notify their husbands because of fear of abuse, hence giving abusive husbands a de facto veto power over the abortion decision. *See id.* at 893-98.

96 Regulations requiring informed consent or twenty-four hour waiting periods do not pose a substantial obstacle, because the ultimate choice to obtain an abortion remains in the woman's control, even if the statutes increase the cost of abortion for some women. *See id.* at 881-87.

97 *See id.* at 883-99. Although parental notification requirements seemingly remove the ultimate choice to have an abortion from the mother, these statutes only pass the undue burden test if there is "an adequate judicial bypass procedure," which would allow a minor to obtain an abortion without parental consent if she shows the court that she is mature enough to make the decision without her parents, *or* if abortion is in her best interest. *Id.* at 899; Bellotti v. Baird, 443 U.S. 622, 643-44 (1979).

test.[98] Post-viability, the rule remained unchanged: states may restrict abortion, subject to the physical and mental health exception.[99]

2. Partial-Birth Abortion

In practice, the health exception, by nature of its broad definition,[100] guarantees access to abortion even late into pregnancy, as the Supreme Court has never upheld a meaningful post-viability abortion ban.[101] The federal ban on partial-birth abortion, however, is the first sign that the Court is willing to restrict access to at least certain abortion procedures.[102] Partial-birth abortion, also referred to as "dilation and extraction," is a method of abortion in which the doctor induces labor, partially delivers the living fetus, and then kills the fetus—either by cutting open the base of the fetus's skull and removing the brain with a suction device, or by crushing the skull—before completing the birth.[103]

Thirty-one states have attempted to outlaw partial-birth abortion,[104] and the Supreme Court's first opportunity to address such a

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98 *Casey*, 505 U.S. at 878.

> We reject the rigid trimester framework of *Roe v. Wade*. To promote the State's profound interest in potential life, *throughout pregnancy* the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

Id. (emphasis added).

99 *Id.* at 846, 860.

100 *See* Doe v. Bolton, 410 U.S. 179, 192 (1973) ("[A]ll factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."); Roe v. Wade, 410 U.S. 113, 163-64 (1973) (listing possible medical harms resulting from an unwanted pregnancy, including psychological harm, mental and physical taxation, distress, and the stigma of unwed motherhood).

101 Courts regularly strike down abortion regulations that do not include exceptions to preserve the life or health of the mother. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914, 937-38 (2000).

102 *See* Gonzales v. Carhart, 550 U.S. 124, 132-33, 168 (2007).

103 *Id.* at 136-40; *Stenberg*, 530 U.S. at 927.

104 ALA. CODE §§ 26-23-1 to 6 (2008), *invalidated by* Summit Med. Assocs., P.C. v. Siegelman, 130 F. Supp. 2d 1307 (M.D. Ala. 2001); ALASKA STAT. § 18.16.050 (2008); ARIZ. REV. STAT. ANN. § 13-3603.01 (2008); ARK. CODE ANN. § 20-16-1201 to 07 (2008); FLA. STAT. § 390.0111(5) (2008); GA. CODE ANN. § 16-12-144 (2008); IDAHO CODE ANN. § 18-613 (2008); 720 ILL. COMP. STAT. 513/10 (2008), *invalidated by* Hope Clinic v. Ryan, 249 F.3d 603 (7th Cir. 2001); IND. CODE § 16-34-2-1(b) (2008); IOWA CODE § 707.8A (2008), *invalidated by* Planned Parenthood v. Miller, 195 F.3d 386 (8th Cir. 1999); KAN. STAT. ANN. § 65-6721 (2008); KY. REV. STAT. ANN. § 311.765 (West 2008), *invalidated by* Eubanks v. Stengel, 224 F.3d 576 (6th Cir. 2000); LA. REV. STAT. ANN. §§ 32.10-11 (2008); MICH. COMP. LAWS § 333.17016 (2008); MISS. CODE ANN. § 41-41-73 (2008); MO. REV. STAT. § 565.300 (2008), *invalidated by* Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon, 429 F.3d 803 (8th Cir. 2005),

ban was in *Stenberg v. Carhart* in 2000.[105] The *Stenberg* Court struck down Nebraska's partial-birth abortion ban for two reasons: first, it lacked an exception to preserve the mother's health, as mandated in *Roe*,[106] and second, it posed a substantial obstacle to obtaining abortions, because the statute's language was vague, potentially restricting other common abortion procedures used in the second trimester.[107]

Because the District Court of Nebraska, as the trier of fact, found that partial-birth abortion could sometimes be a safer procedure than other methods of abortion, the majority decided that a health exception was necessary.[108] However, Justice Thomas, in dissent, reasoned that a health exception was not necessary, because the statute regulated only a particular method of abortion, while leaving the ultimate decision to undergo an abortion up to the woman.[109] Justice Thomas cited evidence presented by doctors before Congress that there are few, if any, cases where a partial-birth abortion would be safer that other methods of abortion.[110]

Stenberg's holding led to the invalidation of many state partial-birth abortion bans.[111] However, seven years later, in *Gonzales v. Carhart*, the Supreme Court upheld a federal ban on partial-birth

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vacated, 550 U.S. 901 (2007) (awaiting remand); MONT. CODE ANN. § 50-20-401 (2008); NEB. REV. STAT. § 28-328 (2008), *invalidated by Stenberg*, 530 U.S. 914; N.J. STAT. ANN. § 2A:65A-6 (West 2008), *invalidated by* Planned Parenthood v. Farmer, 220 F.3d 127 (3d Cir. 2000); N.M. STAT. ANN. § 30-5A-3 (2008); N.D. CENT. CODE § 14-02.6-02 (2008); OHIO REV. CODE ANN. § 2919.151 (West 2008); OKLA. STAT. tit. 21, § 684 (2008); R.I. GEN. LAWS § 23-4.12-2 (2008), *invalidated by* R.I. Med. Soc. v. Whitehouse, 239 F.3d 104 (1st Cir. 2001); S.C. CODE ANN. § 44-41-85 (2008); S.D. CODIFIED LAWS § 34-23A-27 (2008); TENN. CODE ANN. § 39-15-209 (2008); UTAH CODE ANN. §76-7-326 (2008); VA. CODE ANN. § 18.2-71.1 (2008); W. VA. CODE § 33-42-8 (2008), *invalidated by* Daniel v. Underwood, 102 F. Supp. 2d 680 (S.D.W. Va. 2000); WIS. STAT. § 940.16 (2008), *invalidated by* Hope Clinic v. Ryan, 249 F.3d 603 (7th Cir. 2001).

105 *Stenberg*, 530 U.S. at 921.

106 *Id.* at 930; Roe v. Wade, 410 U.S. 113, 164-65 (1973). Although the statute did provide a narrow exception, it only applied to preserve the mother's *life* from threats arising from the pregnancy itself. NEB. REV. STAT. § 28-328(1) (2008) ("No partial-birth abortion shall be performed in this state, unless such procedure is 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*." (emphasis added)).

107 Stenberg v. Carhart, 530 U.S. 914, 939-40, 945-46 (2000).

108 *Stenberg*, 530 U.S. at 932, 938 (citing Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1126 (D. Neb. 1998)).

109 *Id.* at 1009-10 (Thomas, J., dissenting).

110 *Id.* at 1015-17.

111 *E.g.*, Hope Clinic v. Ryan, 249 F.3d 603, 604-05 (7th Cir. 2001) (invalidating Illinois's partial-birth abortion ban).

abortion.[112] The statute in question in *Gonzales* was explicitly worded to apply only to partial-birth abortions, thus avoiding the problem of Nebraska's statute—identified by the Court in *Stenberg*[113]—of potentially preventing other types of abortion procedures.[114]

Unlike in *Stenberg*, the Court in *Gonzales* did not defer to findings of the lower courts.[115] Instead, because *Gonzales* addressed a federal statute, it relied largely on the factual findings made by Congress in passing the bill.[116] According to congressional findings, there was a "medical consensus that [partial-birth abortion] is never medically necessary."[117] Although the Court recognized contradictory evidence to this supposed consensus, it held that where there is uncertainty over the medical necessity of partial-birth abortion, Congress has the power under the Commerce Clause to regulate it for legitimate ends.[118] Under this holding, the federal government can regulate certain abortion procedures when (1) there is uncertainty over whether the procedure is ever medically necessary to preserve the health of the mother, (2) the regulation furthers a legitimate interest of the state, and (3) there are safe, alternative methods of abortion available.[119]

The *Gonzales* Court's narrow holding preserves *Stenberg*.[120] However, the Court adopted the logic of the *Stenberg* dissenters—that a health-of-the-mother exception is not necessary because the statute only prohibits a particular type of abortion, allowing women to choose alternative methods.[121] Of course, this logic works both ways, as Justice Ginsburg pointed out in her dissent in *Gonzales*: if women can easily get a different type of abortion, then the statute does not further the state's interest in protecting potential life.[122]

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112 *See* 18 U.S.C. § 1531 (2006); Gonzales v. Carhart, 550 U.S. 124, 132-33, 168 (2007).

113 *Stenberg*, 530 U.S. at 939-40, 945-46.

114 *Gonzales*, 550 U.S. at 141-43, 146-50.

115 *Compare Gonzales*, 550 U.S. at 133, 165 ("The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake."), *with Stenberg*, 530 U.S. at 940 ("[T]his Court normally follows lower federal-court interpretations of state law.").

116 *Gonzales*, 550 U.S. at 165-66, 168.

117 *Id.* at 165-66.

118 *Id.* at 165-67.

119 *Id.* at 166-67.

120 *Id.*

121 *Id.* at 164; Stenberg v. Carhart, 530 U.S. 914, 965-66 (2000) (Kennedy, J., dissenting).

122 *See* Gonzales v. Carhart, 550 U.S. 124, 181 (Ginsburg, J., dissenting).

The *Gonzales* Court addressed this problem indirectly by pointing to a state interest in protecting the ethics and integrity of the medical profession.[123] Because it is the job of doctors and nurses to save lives, Congress found that, by repeatedly killing viable fetuses that are "inches" away from personhood, in such a "brutal and inhumane" manner as partial-birth abortion, practitioners could suffer long-term psychological and reputational harm.[124] The Court also relied on testimony of doctors and nurses, who claimed that they were unwilling to disclose details of the procedure to patients,[125] and who described graphic scenes of fetuses contracting in pain, and going limp, as the doctor removed the brain.[126]

Justice Ginsburg further worried that this holding could apply equally to other forms of abortion, which are also, in her words, "brutal" and involve "tearing a fetus apart."[127] Therefore, *Gonzales* could lead to a slippery slope of prohibiting abortion procedures until there are none left.[128] Although any subsequent prohibitions of abortion procedures would still have to preserve safe, alternative procedures,[129] the dissenters had legitimate cause to worry about *Gonzales* threatening the framework of *Roe* and *Casey*.[130]

3. State Regulation of Abortion

Although *Gonzales* dealt with a federal ban on partial-birth abortion, most abortion regulation occurs at the state level.[131] Therefore, in discussing sex-selective abortion, it is important to consider the extent to which states can and do regulate abortion.

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123 *See id.* at 157 (majority opinion) (citing Washington v. Glucksberg, 521 U.S. 702, 731 (1997)).

124 *Id.*

125 *Id.* at 159.

126 *Id.* at 138-39 (quoting H.R. Rep. No. 108-58, at 3 (2003)).

127 *Id.* at 181-82 (Ginsburg, J., dissenting) (quoting Stenberg v. Carhart, 530 U.S. 914, 946-47 (2000) (Stevens, J., concurring)).

128 *See* Gonzales v. Carhart, 550 U.S. 124, 186 (2007) (Ginsburg, J., dissenting); *see also Stenberg*, 530 U.S. at 946-47 (Stevens, J., concurring).

129 *Gonzales*, 550 U.S. at 166-67.

130 *See id.* at 186 (Ginsberg, J. dissenting) (claiming that the majority blurs the bright-line rule, established by *Roe* and *Casey*, which determines when the state cannot regulate abortion); *see also* Randy Beck, Gonzales, Casey*, and the Viability Rule*, 103 NW. U. L. REV. 249, 276-79 (2009) (citing Gonzales v. Carhart, 550 U.S. 124, 155-60 (2007)) (arguing that *Gonzales* makes it awkward for the Supreme Court to justify the viability framework established in *Roe*).

131 *See* GUTTMACHER REPORT, *supra* note 18 (outlining the litany of state abortion regulations).

Only ten states, and the District of Columbia, do not have some kind of prohibition on post-viability or late-term abortions.[132] The remaining states, which purport to restrict the practice,[133] must provide exceptions for threat to the mother's life or health, which include mental and familial factors that could affect a woman's wellbeing.[134] Some of these restrictions also allow exceptions for cases of rape,[135] incest,[136] or abnormality in the fetus,[137] which, given the broad definition of a woman's health in *Doe*, are likely redundant.[138]

Regulation of pre-viability abortion varies widely by state. Most states require abortions be performed by licensed physicians,[139] and may require abortions to be performed at hospitals after the first or second trimester.[140] The Supreme Court also allows states to require informed consent prior to an abortion.[141] Informed consent statutes can, among other things, require doctors to offer a pregnant woman the opportunity to view an ultrasound of her fetus,[142] inform her of potential negative psychological effects of abortion,[143] and require her to wait twenty-four hours after counseling before obtaining an abortion.[144] State regulations, such as these, comply with *Casey* because they leave the ultimate decision to have an abortion in the hands of the woman.[145]

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132 GUTTMACHER REPORT, *supra* note 18 (showing only Alaska, Colorado, District of Columbia, Mississippi, New Hampshire, New Jersey, New Mexico, Oregon, Vermont, and West Virginia without post-viability prohibitions).

133 *See, e.g.*, CAL. HEALTH & SAFETY CODE § 123468 (2008) (prohibiting post-viability abortions, unless "continuation of the pregnancy posed [a] risk to the life or health of the pregnant woman").

134 *See* Doe v. Bolton, 410 U.S. 179, 192 (1973).

135 UTAH CODE ANN. § 76-7-305(8)(c) (2008).

136 *Id.* at § 76-7-305(8)(d).

137 MD. CODE ANN., HEALTH-GEN. § 20-209(b)(2)(ii) (West 2008).

138 *See Doe*, 410 U.S. at 192.

139 *E.g.*, CAL. HEALTH & SAFETY CODE § 123468(a) (2008).

140 *E.g.*, VA. CODE ANN. § 18.2-73 (2008).

141 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 883 (1992) (plurality opinion) (permitting states to further their goal of "protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion").

142 *E.g.*, FLA. STAT. §390.0111(3)(a)(1)(b)(II) (2008).

143 *E.g.*, MICH. COMP. LAWS §§ 333.17015(8)(a), (11)(b)(iii) (2008).

144 *E.g.*, *id.* at § 333.17015(5).

145 *See Casey*, 505 U.S. at 877.

Almost all states also require parental notice or consent for minors seeking an abortion.[146] However, because this type of restriction removes the ultimate decision of whether to have an abortion from the woman's hands, such statutes must contain a judicial bypass.[147] This bypass takes the form of an expedited, confidential court hearing—often including provision of appointed counsel[148]—where a minor can petition the court for access to abortion based on her ability to make a mature, well-informed decision, or by showing that an abortion would be in her best interests.[149]

Some states have attempted specifically to prevent sex-selective abortion through legislation,[150] and others have considered following suit.[151] In Arizona, for example, it is a felony for doctors to knowingly perform a gender-based abortion.[152] It is also a felony to intimidate a woman into obtaining a gender-based abortion, and the state provides for a civil action "on behalf of the unborn child."[153] The statute does not, however, require doctors to inquire into the motivations for an abortion.[154] In Illinois, Oklahoma, and Pennsylvania, the laws against sex-selective abortion only restrict abortions which are *solely* based upon the gender of the unborn child.[155]

146 GUTTMACHER REPORT, *supra* note 18 (showing only Connecticut, Hawaii, Maine, New York, Oregon, Vermont, Washington, and the District of Columbia without either parental consent or notice requirements).

147 *See Casey*, 505 U.S. at 899; *see also* Bellotti v. Baird, 443 U.S. 622, 643 (1979) (plurality opinion) ("[I]f the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.").

148 *See, e.g.*, Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 508 (1990) (citing OHIO REV. CODE ANN. § 2151.85 (West 2006), *amended by* 2012 Ohio Laws 169) ("[T]he court must appoint a guardian ad litem and an attorney to represent the minor if she has not retained her own counsel.").

149 *See Bellotti*, 443 U.S. at 643-44.

150 *See* ARIZ. REV. STAT. ANN. § 13-3603.02 (2008); 720 ILL. COMP. STAT. 510/6(8) (2008); OKLA. STAT. tit. 63, § 1-731.2 (2008); 18 PA. CONS. STAT. ANN. § 3204(c) (2008).

151 *See* S.B. 1702, 2012 Leg., Reg. Sess. (Fla. 2012) (requiring abortion providers to sign an affidavit stating that they have no knowledge that the abortion is motivated by the child's sex or race).

152 ARIZ. REV. STAT. ANN. § 13-3603.02 (2008).

153 *Id.*

154 *See id.* at § 36-2157 (requiring abortion providers to sign an affidavit claiming that they are not aborting because of sex, and to their knowledge, the person seeking abortion is not doing so either).

155 720 ILL. COMP. STAT. 510/6(8) (2008); OKLA. STAT. tit. 63, § 1-731.2 (2008); 18 PA. CONS. STAT. ANN. § 3204(c) (2008).

Interestingly, the briefs of *Casey* note Pennsylvania's law against sex-selective abortion.[156] The petitioners, who successfully challenged certain provisions of Pennsylvania's abortion laws, stated:

> [T]he Solicitor [General's] contention that petitioners opted not to challenge [Pennsylvania Code, Section] 3204(c) (prohibiting abortions based on the sex of the fetus) because they believe it is constitutional, is simply wrong. While petitioners believe this provision violates *Roe*, it obviously could only be challenged by a plaintiff who could satisfy Article III's standing requirement. Thus, a challenge remains a future possibility.[157]

This passage indicates that although a few states have recognized sex-selective abortion as a problem, it is unclear whether they have the authority to enforce any prohibition on the practice.

D. *State Interest in Preventing Gender Discrimination*

Sex-selective abortion, as it is typically practiced, not only treats women as less valuable than men, but denies them their very existence. It is therefore important to keep in mind the role the U.S. government plays in upholding gender equality when analyzing the legality of sex-selective abortion.

U.S. federal and state governments have long recognized an interest in upholding gender equality. The Fourteenth Amendment protects women from arbitrary gender discrimination,[158] and the Nineteenth Amendment ensures women's suffrage.[159] Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 also protect women from gender discrimination in education and employment.[160] The Violence Against Women Act goes even further, providing states with federal funding to enhance protection of women on the streets, in their homes, and in the courts, along with a litany of programs to enhance safety for women.[161]

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156 Reply Brief for Petitioners & Cross-Respondents, *supra* note 7, at 11 n.20.

157 *Id.* (citations omitted).

158 U.S. CONST. amend. XIV; *see* Reed v. Reed, 404 U.S. 71, 74 (1971).

159 U.S. CONST. amend. XIX.

160 20 U.S.C. § 1681 (2006); 42 U.S.C. § 2000e-2 (2006).

161 *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013) (codified as amended in scattered sections of the United States Code).

Abortion jurisprudence itself proclaims to protect women's reproductive rights and their ability to control their destiny.[162] As Justice Ginsburg noted:

> [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 . . . center on a woman's autonomy to determine her life's course, and thus enjoy equal citizenship stature.[163]

State laws also declare an interest in protecting the equality of women.[164] California goes so far as to maintain a Commission on the Status of Women:

> The Legislature finds and declares that despite the fact that women apparently have greater equality in California than in many states, they still are not able to contribute to society according to their full potential. With a view to developing recommendations which will enable women to make the maximum contribution to society, the Legislature has created the Commission on the Status of Women and Girls.[165]

Achieving gender equality is an ongoing process in this country, as traditional distinctions between male and female roles in society are revisited, revised, and abolished.[166] For this reason, it is important to ensure that U.S. laws that are intended to protect equality for

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162 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851, 869 (1992) (plurality opinion).

163 Gonzales v. Carhart, 550 U.S. 124, 171-72 (2007) (Ginsburg, J., dissenting) (citation omitted) (emphasis added) (quoting *Casey*, 505 U.S. at 856 (plurality opinion)).

164 *See, e.g.*, CAL. CONST. art. 1, § 8 ("A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."); VA. CODE ANN. § 40.1-28.6 (2008) (prohibiting employers from discriminating based on sex).

165 CAL. GOV'T CODE § 8240 (West 2008).

166 As recently as January of this year, Secretary of Defense, Leon Panetta, and Chairman of the Joint Chiefs of Staff, General Martin Dempsey, issued a memo opening up all U.S. ground combat units to women. Memorandum from Leon E. Panetta, Sec'y of Def., and Gen. Martin E. Dempsey, Chairman of the Joint Chiefs of Staff (Jan. 24, 2013), *available at* http://www.defense.gov/news/WISRJointMemo.pdf. U.S. Air Force Captain Kim Reed—call sign "Killer Chick"—provides an example of how integrated women have become within the armed forces, and she dismisses the notion that gender gets in the way of her military career:

> I get asked that a lot, "What's it like to be a female in a fighter squadron?" Honestly, I never think about it. The important thing is to work really hard and be good at it, and

women do not have unintended consequences that could actually have the opposite effect.

II. ANALYSIS

Sex-selective abortion highlights a tension between U.S. law, which provides for wide access to abortion,[167] and the goal of protecting the equal status and value of women in society.[168] The comparative importance of preventing sex-selective abortion necessarily depends upon a person's views on abortion generally, and whether that individual considers sex-selection a serious problem for women.[169] Some feminists argue that access to abortion trumps any concerns over sex-selection.[170] On the other hand, a clear majority of Americans seem to believe that sex-selective abortion should be illegal in the U.S.[171]

Ultimately, whether or not states or the federal government can restrict sex-selective abortion depends on the framework established by the Supreme Court in *Roe* and its progeny.

> then nobody cares what gender you are. I'm not a female fighter pilot. I'm just a fighter pilot, and I love it.

See WOMEN IN MILITARY SERV. FOR AM. MEM'L FOUND., INC., CLOSE CALL: FIGHTER PILOT SAVES TROOPS AND HER DAMAGED "WARTHOG" 4 (2008), *available at* http://www.womensmemorial.org/Education/PDFs/WHM08USAF.pdf.

[167] *See supra* Part I.B.1.

[168] *See supra* Part I.C.

[169] *See* Cherry, *supra* note 13, at 210.

[170] *See* Shannon Bream, *Abortion Battle Heats Up on the Hill*, FOX NEWS (Dec. 5, 2011), http://www.foxnews.com/politics/2011/12/05/abortion-battle-heats-up-on-hill/%3E/ (quoting Nancy Northup, President of the Center for Reproductive Rights, as saying that sex-selective abortion is "a trumped up problem"). The opinion that abortion rights are more important than preventing sex selection is not new:

> Feminist philosopher Tabitha Powledge is one scholar who has forcefully voiced this position: "To make it illegal to use prenatal diagnostic techniques for sex choice is to nibble away at our hard-won reproductive control, control that I think most of us believe is the absolute rock-bottom minimum goal we have got to keep achieved before we can achieve anything else."

Cherry, *supra* note 13, at 207 (quoting Tabitha M. Powledge, *Unnatural Selection: On Choosing Children's Sex*, *in* THE CUSTOM-MADE CHILD?: WOMEN-CENTERED PERSPECTIVES 193, 197 (Helen B. Holmes et al. eds., 1981)).

[171] *See supra* Part I.A.

A. *Can States Meaningfully Regulate Sex-Selective Abortion?*

Despite the efforts of some states to outlaw sex-selective abortion,[172] the existing statutes are unlikely to survive constitutional challenge. First, because these statutes purport to prevent sex-selective abortion outright, they seem to present a substantial obstacle to obtaining an abortion—taking the abortion decision out of the woman's hands and potentially preventing a significant number of abortions—which does not satisfy the *Casey* undue burden test.[173] Of course, this obstacle would not apply to women seeking abortions for reasons other than sex selection, but *Roe* does not require women to justify their abortions.[174] Quite the opposite, *Roe* proclaims abortion as a fundamental privacy right.[175]

Second, many of the reasons for sex-selective abortion—such as family pressure and financial stability[176]—fit comfortably within the broad definition of health exceptions required of any restriction on abortion.[177] According to *Roe* and *Casey*, any restriction on abortion must allow an exception to protect the health of the mother, which includes emotional, psychological, and familial wellbeing.[178] If the birth of a daughter would likely be a financial burden or a source of familial strife, such a reason for an abortion seemingly satisfies *Doe*.[179] Even without external cultural pressure, a woman with three daughters could rationally argue that a fourth daughter would cause her mental distress, while a son would provide family balance.[180]

Because state sex-selective abortion bans seem to violate the principles of *Roe* and *Casey*, they probably survive only because they have not been challenged in court.[181] As noted in the petitioner's

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172 *See supra* Part I.B.3.

173 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion).

174 *See* Roe v. Wade, 410 U.S. 113, 152-53 (1973).

175 *See id.*

176 *See supra* note 9 and accompanying text.

177 *See Casey*, 505 U.S. at 846, 852-53; *Roe*, 410 U.S. at 153-54.

178 *Casey*, 505 U.S. at 846, 852-53; Doe v. Bolton, 410 U.S. 179, 192 (1973); *Roe*, 410 U.S. at 153.

179 *See Doe*, 410 U.S. at 192.

180 *See What is Family Balancing?*, GENETICS & IVF INST., http://www.givf.com/familybalancing/ (last visited Feb. 21, 2013).

181 *Cf.* N.Y. PENAL LAW § 125.40 (McKinney 2009) (illustrating a similar situation where an abortion law clearly violates *Roe*, and the editor's notes of the official codebook explicitly admit that the law is constitutionally deficient, but has not been tested in court).

reply brief in *Casey*, the only reason Planned Parenthood did not challenge the Pennsylvania sex-selective abortion ban was lack of standing.[182]

In addition to the constitutional issues, enforceability of sex-selective abortion prohibitions would be problematic. These statutes prohibit abortion only if the doctor *knowingly* performs a sex-selective abortion.[183] Because doctors are not required to inquire into the motivation of an abortion, such a statute would be nearly impossible to enforce in most cases.[184] Further, even if doctors know or suspect that a woman wants an abortion for sex-selective reasons, they could still escape liability if sex selection was not the *sole* reason for the abortion.[185] Given the broad definition of health exceptions, there are many alternate reasons available to justify an abortion.[186]

Another potential avenue to preventing sex-selective abortion would be to restrict doctors from disclosing the sex of a fetus. Some commentators have predicted that such a law would satisfy *Roe* and *Casey*, as it would leave the choice of abortion firmly in the hands of women, only removing the information necessary to make a gender-based decision.[187] Indeed, *Casey* allows the state to provide specific information to pregnant women—such as the gestational age and development of the fetus and the potential negative psychological effects of abortion—aimed at dissuading them from having an abortion.[188] For most Americans, information on the gender of the child would not seem to be relevant in making a fully informed decision on whether to have an abortion. However, it is not obvious that *withholding* information from the mother would be acceptable in the same

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182 Reply Brief for Petitioners & Cross-Respondents, *supra* note 7, at 11 n.20.

183 ARIZ. REV. STAT. ANN. § 13-3603.02(A)(1) (2008); 720 ILL. COMP. STAT. 510/6(8) (2008); OKLA. STAT. tit. 63, § 1-731.2(B) (2008); 18 PA. CONS. STAT. ANN. § 3204(c)-(d) (2008).

184 *See* ARIZ. REV. STAT. ANN. § 13-3603.02(A)(1) (2008); 720 ILL. COMP. STAT. 510/6(8) (2008); OKLA. STAT. tit. 63, § 1-731.2(B) (2008); 18 PA. CONS. STAT. ANN. § 3204(c)-(d) (2008).

185 *See* 720 ILL. COMP. STAT. 510/6(8) (2008) ("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." (emphasis added)); OKLA. STAT. tit. 63, § 1-731.2 (2008) ("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 unborn child." (emphasis added)); 18 PA. CONS. STAT. ANN. § 3204(c) (2008) ("No abortion which is sought *solely* because of the sex of the unborn child shall be deemed a necessary abortion." (emphasis added)).

186 *See* Doe v. Bolton, 410 U.S. 179, 191-92 (1973).

187 *See* Cherry, *supra* note 13, at 194-96, 220-22.

188 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872-73 (1992) (plurality opinion).

way as informed consent requirements, because *Casey* emphasizes the benefit to women of *more* information.[189]

Constitutionality aside, a law preventing disclosure of a fetus's gender would be difficult to pass because the scope of the sex-selection problem is narrow in this country.[190] The vast majority of parents in the U.S. who want to know the sex of their children have blameless reasons, such as knowing what color to paint the nursery walls. It is also unclear that such a restriction would be effective. For example, India's ban on disclosing fetal gender has been ineffectual due to non-compliance of doctors, and availability of inexpensive sonogram equipment, which private entrepreneurs can operate out of the trunk of their cars.[191] Any restrictions in the U.S. of gender disclosure would likely create a market for portable, do-it-yourself prenatal screening.

Probably the most effective option for states that want to curb sex-selective abortion is to use informed consent requirements to discourage prenatal discrimination. As recognized by *Casey*, the state may provide information to pregnant women so that they can make a fully informed choice.[192] States should be able to "express profound respect" for the achievements and struggles of the female gender toward equality, in the same way that they can "express profound respect for the life of the unborn."[193]

Of course, these requirements will not dissuade all parents from sex-selective abortions. However, they could help to educate recent immigrants, who might not realize that women have greater opportunities to support themselves and their families in the U.S. than they would in their native countries.

States could also combine such informed consent requirements with penalties for doctors who knowingly perform sex-selective abortions. As discussed, penalties for doctors are likely unenforceable;

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189 *See id.* (noting that the purpose of informed consent is to provide women with sufficient information to make a fully informed choice); Cherry, *supra* note 13, at 222.

190 *See* Almond & Edlund, *supra* note 48, at 5861 (showing that gender imbalance is found in Asian communities within the U.S., while the gender ratio for Caucasians is biologically normal).

191 HVISTENDAHL, *supra* note 8, at 50-52; Lemoine & Tanagho, *supra* note 10, at 212 (citing examples of doctors in India using body language or different colored pens to disclose the sex of a fetus to expecting parents).

192 *Casey*, 505 U.S. at 872-73, 883.

193 *See id.* at 877-78.

however, they could provide additional deterrent effect and incentivize doctors to counsel their patients against sex-selection.

B. *Can the Federal Government Meaningfully Restrict Sex-Selective Abortion?*

Just as state restrictions on sex-selective abortion seem untenable,[194] it is also unlikely that the federal government could prevent the practice. Congress, like the states, is subject to *Roe* and *Casey*.[195] However, there is one caveat that could create a gap in abortion jurisprudence that would allow federal regulation of sex-selective abortion: *Gonzales*.[196]

Comparing sex-selective abortion with partial-birth abortion is useful because it highlights some of the tensions between *Gonzales* and the Supreme Court's prior abortion orthodoxy. First, both procedures are wildly unpopular. In a 2011 Gallup poll 64% of respondents favored banning partial-birth abortion.[197] The numbers for sex-selective abortion are even higher, with various polls ranging from 79% to 86% support for banning the procedure.[198]

Second, both procedures transcend the divide between pre and post-viability, articulated in *Roe* and *Casey*.[199] Partial-birth abortions can occur as early as sixteen-weeks into pregnancy,[200] well prior to the point of viability, which is between twenty-three and twenty-eight weeks.[201] Similarly—without getting into a Schrödinger-like thought

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194 *See supra* Part II.A.

195 *See* Gonzales v. Carhart, 550 U.S. 124, 145-46 (2007) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion); Roe v. Wade, 410 U.S. 113 (1973)) (recognizing that federal laws regulating abortion must conform to the requirements of *Roe* and *Casey*).

196 *See Gonzales*, 550 U.S. at 146-50.

197 JEFF JONES & LYDIA SAAD, GALLUP, USA TODAY/GALLUP POLL 4 (2011), *available at* http://www.gallup.com/poll/File/148886/Abortion_2_110808.pdf (asking whether a random sample of 1,016 adults over the age of 18, living in the United States, favor or oppose a law which would "make it illegal to perform a specific abortion procedure conducted in the last six months of pregnancy known as a 'partial birth abortion,' except in cases necessary to save the life of the mother").

198 *See supra* notes 71-74 and accompanying text.

199 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992) (plurality opinion); Roe v. Wade, 410 U.S. 113, 163-64 (1973).

200 Stenberg v. Carhart, 530 U.S. 914, 927 (2000).

201 *See Casey*, 505 U.S. at 860.

experiment[202]—a fetus's sex exists independent of the stage of pregnancy, and a sex-selective abortion can occur as soon as the sex is known.[203] Therefore, restrictions on either procedure are subject to the pre and post-viability regime established by *Roe* and *Casey*: restrictions must not impose an undue burden on obtaining an abortion, and they must have exceptions to protect the health of the mother.[204]

A sex-selective abortion ban seems to fail both of those criteria. However, *Gonzales* complicates the matter. Its holding is narrow and technically preserves the viability and health exception rules, but *Gonzales*'s justification seems to expand the legitimate state interests at play in the abortion domain to include the "integrity and ethics of the medical profession."[205] In contrast, *Casey* specifically forbids the imposition of an undue burden, no matter the state interest.[206] But where the Court distinguished partial-birth abortion in *Gonzales* by showing that a ban did not prevent a woman from obtaining an abortion by alternative methods,[207] a ban on sex-selective abortion would leave no alternative to a woman who wanted a gender-based abortion.

Facially, this distinction could prevent a sex-selective abortion ban from passing the undue burden test. However, from a broader perspective, this could be a similarity between partial-birth abortion and sex-selective abortion: attempts to ban either practice are not intended to strike at the practice of abortion, as a whole, but only to prevent specific abortion procedures that violate cultural norms. In the case of partial-birth abortion, it is the brutality and similarity to infanticide that triggers state interest.[208] In the case of sex-selective

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202 *See* Beverly Horsburgh, *Schrödinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color*, 17 CARDOZO L. REV. 531, 531-32 (1996) (explaining a thought experiment, created by physicist Erwin Schrödinger, in which there is a 50% chance that a cat, trapped in a box, is either alive or dead, and that until the box is opened for observation, the cat is simultaneously alive and dead).

203 *See* Belluck, *supra* note 11 (describing a blood test that can reveal the sex of a fetus as early as seven weeks into pregnancy).

204 *See Casey*, 505 U.S. at 877; *Roe*, 410 U.S. at 163-65.

205 *See* Gonzales v. Carhart, 550 U.S. 124, 157 (2007) (citing Washington v. Glucksberg, 521 U.S. 702, 731 (1997)).

206 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 533, 877 (1992).

207 *Gonzales*, 550 U.S. at 166-67 (finding that where there is uncertainty over the health consequences of preventing a particular method of abortion, Congress can regulate it, so long as there are safe alternatives).

208 *Id.* at 158.

abortion, it would be the arbitrary discrimination against females, which violates U.S. norms of gender equality.[209]

This potential state interest in preventing arbitrary gender discrimination brings attention to *Roe*'s viability rule, which even Justice O'Connor—whose opinion in *Casey* affirmed *Roe*'s "central holding"[210]—has argued to be arbitrary.[211] According to *Roe* and *Casey*, the state interest in protecting a potential life grows as the fetus develops, eventually becoming strong enough to overcome the woman's privacy interest.[212] However, a fetus does not become more female as it develops. It is not obvious why the state should have any less interest in preventing gender discrimination pre-viability than it would post-viability. Indeed, Justice Blackmun, the author of *Roe* and its viability rule, admitted in his private correspondences that the viability rule was arbitrary.[213]

There is also an inherent irony that *Casey* and *Roe*, which the Supreme Court proclaims to be guardians of women's rights,[214] would protect sex-selective abortion—a practice that discriminates against women. This kind of analysis could lead the Court to rethink its viability rule, and allow for greater pre-viability restrictions.

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209 *See supra* Part I.C.

210 *Casey*, 505 U.S. at 852-53 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.").

211 *See* Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting) ("The choice of viability . . . is no less arbitrary than choosing any point before viability or any point afterward."). Justice White later made a similar statement that viability was an arbitrary test. *See* Thornburgh v. Am. Coll. Of Obstetricians and Gynecologists, 476 U.S. 747, 794 (1986) (White, J., dissenting) ("[T]he Court's choice of viability as the point at which the State's interest becomes compelling is entirely arbitrary."). Justice Scalia has also pointed out this inconsistency:

> Justice O'Connor was correct in her former view. The arbitrariness of the viability line is confirmed by the Court's inability to offer any justification for it beyond the conclusory assertion that it is only at that point that the unborn child's life "can in reason and all fairness" be thought to override the interests of the mother.

Casey, 505 U.S. at 989 n.5 (Scalia, J., concurring in part and dissenting in part) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992) (plurality opinion)).

212 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1929); Roe v. Wade, 410 U.S. 113, 163-64 (1973).

213 Beck, *supra* note 130, at 250 n.6 (citing DAVID GARROW, LIBERTY AND SEXUALITY 580 (1998)).

214 *See* Gonzales v. Carhart, 550 U.S. 124, 171-72 (2007) (Ginsburg, J., dissenting); *Casey*, 505 U.S. at 851, 856, 869.

Similarly, a federal sex-selective abortion ban would challenge *Casey*'s holding. The Court's logic in *Gonzales* is only a step or two removed from justifying a sex-selective abortion ban. As Justice Ginsburg's dissent in *Gonzales* noted, if the U.S. can protect a pre-viability fetus from one brutal method of abortion, why not protect it from other, equally brutal methods?[215] And if U.S. law can prevent multiple methods of abortion, based on distaste for the procedures, why not prevent abortions that have discriminatory motives? These kinds of restrictions would run up against *Casey*'s "undue burden" test, and would challenge the rationale of that holding.

Justice Ginsburg wished to avoid this potential slippery slope,[216] and with good reason. There are many who believe that public opinion exerts an observable influence on Supreme Court decisions.[217] If that is the case, there is the slim possibility that a sex-selective abortion ban could be upheld, either with subtle distinguishing, as in *Gonzales*,[218] or a complete overturn of one or more prior decisions.

Even *Casey* seems to recognize the effect of public opinion on the law. According to Justice Stevens, the justification for regulating abortion comes from the normative view, held by many people, that abortion is unacceptable.[219] The plurality in *Casey* also implicitly recognized the effect of public opinion when it justified the viability line as a function of fairness, rather than a function of constitutional principle.[220]

Despite the unpopularity of sex-selective abortion,[221] a prohibition on the procedure would facially violate the Supreme Court's abortion jurisprudence.[222] Although *Gonzales* exposes some gaps in the Court's reasoning, it is unlikely that a sex-selective abortion ban could squeeze through them. Therefore, it is important that lawmakers draw attention to sex-selective abortion, and pressure the

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215 *See Gonzales*, 550 U.S. at 181-82 (Ginsburg, J., dissenting).

216 *Id.* at 186.

217 *See* Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 264-67 (2010) (identifying several scholars who have found that public opinion has an effect on the Supreme Court).

218 *See Gonzales*, 550 U.S. at 166-67.

219 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 914-15 (1992) (Stevens, J., concurring).

220 *See id.* at 870 (plurality opinion) (citing Roe v. Wade, 410 U.S. 113, 163 (1973)).

221 *See supra* notes 71-74 and accompanying text.

222 *See supra* Part II.A.

Supreme Court to recognize a new exception that would allow meaningful protections of the unborn from gender discrimination.

CONCLUSION

This year marks the fortieth anniversary of *Roe v. Wade*, and it is a fitting time to reflect on one of the unintended consequences of that decision: the legal protection of sex-selective abortion. Sex-selective abortion is a real practice and is not limited to far-away countries. It is an invidious form of discrimination, which does not just treat women differently from men, but denies them their very existence.

Ultimately, a ban on sex-selective abortion is more symbolic than functional because a woman may choose to misrepresent her reasons for obtaining an abortion. However, there is value in symbolism. By making laws that prevent arbitrary, gender-based discrimination against female—or male—fetuses, women who are otherwise ambivalent about aborting their potential daughter because of a cultural or familial son-preference, might be dissuaded.

Because current Supreme Court jurisprudence seemingly does not allow for restrictions on sex-selective abortions, states should create informed consent requirements, which would educate pregnant women on the implications of gender discrimination. And although a federal ban on sex-selective abortion would likely not survive Supreme Court scrutiny, Congress should continue its attempts to pass such a law. As demonstrated by *Gonzales*, abortion law in the U.S. is not fully settled, and the Court might surprise us.