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TESTING SEX

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INTRODUCTION

A revolution has happened in prenatal testing. Ushering in this change is a new prenatal test that relies on a simple blood sample collected from a pregnant woman.[1] From the beginning of pregnancy, cell-free fetal DNA travels across the placental lining into the mother's bloodstream, increasing in quantity as the pregnancy progresses.[2] Potential parents can test that DNA for chromosomal abnormalities and for fetal sex after ten weeks of gestation, which is several weeks before a reliable ultrasound and seven weeks before an amniocentesis can be performed.[3] As numerous newspaper and popular media articles report, what women can discover during their pregnancies will continue to evolve

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1. *See* Henry T. Greely, *Get Ready for the Flood of Fetal Gene Screening*, 469 NATURE 289, 289 (2011).

2. *Id.* at 290.

3. Stephanie A. Devaney et al., *Non-Invasive Fetal Sex Determination Using Cell-Free Fetal DNA*, 306 J. AM. MED. ASS'N 627, 634 (2011) (stating that fetal DNA can be tested accurately between seven and twelve weeks of gestation while ultrasound is unreliable before eleven weeks); 105 AM. JUR. 3D, *Proof of Facts* § 3 (3d ed. 2009) (indicating that amniocentesis is performed at about sixteen weeks gestation). In amniocentesis, a long spinal needle is inserted through the abdomen and the wall of the uterus into the amniotic sac surrounding the fetus. *Id.* Another form of prenatal testing is Chorionic Villus Sampling ("CVS"), in which a thin catheter, inserted through the cervix, gathers cells from the placenta. *Id.* CVS can occur earlier than amniocentesis, at ten to twelve weeks. *Id.* However, CVS has a slightly higher risk of causing miscarriages than amniocentesis. LYNN B. JORDE ET AL., MEDICAL GENETICS 269 (4th ed. 2010).

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dramatically over the next ten years.[4] This new non-invasive prenatal test ("NIPT"), coupled with advances in gene sequencing, could give parents information about all manner of traits, disorders, and propensities—from susceptibility to serious diseases, such as cancer and heart disease, to superficial traits, such as hair and eye color.[5] The test is easy to perform, close to 100% accurate for fetal sex, and currently in clinical and commercial use.[6]

4. *See, e.g.*, Lindsay Abrams, *Prenatal Testing: Earlier and More Accurate Than Ever*, ATLANTIC (Nov. 5, 2012, 9:30 AM), http://www.theatlantic.com/health/archive/2012/11/prenatal-testing-earlier-and-more-accurate-than-ever/264472/2/; Erin Biba, *This Simple Blood Test Reveals Birth Defects—And the Future of Pregnancy*, WIRED (Dec. 24, 2012, 6:30 AM), http://www.wired.com/2012/12/ff-prenatal-testing/all/; Carolyn Y. Johnson, *DNA Blood Test Can Detect Prenatal Problems*, BOS. GLOBE (Feb. 26, 2014), http://www.bostonglobe.com/lifestyle/health-wellness/2014/02/26/new-study-suggests-prenatal-genetic-tests-could-offered-all-pregnant-women/V1GQuRL4jkr1M6Oe1XcQCK/story.html; Jonathan Lapook, *New DNA Test Could Revolutionize Prenatal Screening*, CBS NEWS (Feb. 26, 2014, 7:20 PM), http://www.cbsnews.com/news/new-dna-test-could-revolutionize-pre-natal-screening/; Marilynn Marchione, *The Big Story: DNA Blood Tests Show Prenatal Screening Promise*, ASSOCIATED PRESS (Feb. 26, 2014, 6:07 PM), http://bigstory.ap.org/article/dna-blood-tests-show-prenatal-screening-promise; Steven Salzberg, *A DNA Sequencing Breakthrough That Many Expectant Moms Will Want*, FORBES (Mar. 9, 2014, 8:00 AM), http://www.forbes.com/sites/stevensalzberg/2014/03/09/a-dna-sequencing-breathrough-that-many-expectant-moms-will-want/; Michael Specter, *The Gene Factory*, NEW YORKER Jan. 6, 2014, at 34, 40, *available at* http://www.newyorker.com/magazine/2014/01/06/the-gene-factory; Rob Stein, *Blood Test Provides More Accurate Prenatal Testing for Down Syndrome*, NAT'L PUB. RADIO (Feb. 26, 2014, 5:01 PM), http://www.npr.org/blogs/health/2014/02/26/282095202/blood-test-provides-more-accurate-prenatal-testing-for-down-syndrome; Christopher Weaver, *Tough Calls on Prenatal Tests: Companies Race to Promote New Genetic Screen for Down Syndrome; Worries About Patient Confusion*, WALL ST. J., Apr. 4, 2013, at B1, *available at* http://online.wsj.com/news/articles/SB10001424127887324883604578398791568615644.

5. *See* Bernard M. Dickens, *Ethical and Legal Aspects of Non-Invasive Prenatal Genetic Diagnosis*, 124 INT'L J. GYNECOLOGY & OBSTETRICS 181, 181–82 (2014) ("What was once a cavernous divide between the outer reaches of imaginative science fiction and the reality of the limited capacity of prevailing biotechnology is becoming progressively narrowed, making it foreseeable to achieve complete gene sequencing of an early fetus in utero by resort to cffDNA testing."); Jaime S. King, *And Genetic Testing for All . . . The Coming Revolution in Non-Invasive Prenatal Genetic Testing*, 42 RUTGERS L.J. 599, 599–600, 656 (2011) (noting that non-invasive prenatal tests relying on cffDNA can detect Down syndrome, trisomy 13, fetal sex, and other genetic characteristics); John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327, 370–73 (2011) [hereinafter Robertson, *Abortion and Technology*].

6. Ashwin Agarwal et al., *Commercial Landscape of Non-Invasive Prenatal Testing in the United States*, 33 PRENATAL DIAGNOSIS 521, 521–23 (2013) ("Several applications of NIPT . . . are already in use, and testing for common chromosomal aneuploidies such as trisomies 13, 18, and 21 became commercially available in 2011."); Antina de Jong et al., *Non-Invasive Prenatal Testing: Ethical Issues Explored*, 18 EUR. J. HUM. GENETICS 272, 272 (2010) (noting that testing can be easy and safe); Abrams, *supra* note 4 (noting that the test can be completed with 99.92% accuracy).

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NIPT is largely unregulated, and patients, physicians, and insurance companies manage prenatal testing.[7] However, the first legislation to respond explicitly to NIPT focuses on restricting abortion.[8] State legislatures have entered the regulatory field with statutes prohibiting pregnancy terminations based on fetal sex or fetal diagnosis. Before 2011, only two states prohibited sex-selective abortion.[9] Six states have since passed sex-selective abortion bans[10] and almost half of the country's state legislatures have considered similar bills.[11] North Dakota recently enacted a law prohibiting abortion based on a diagnosis of "genetic abnormality or a potential for a genetic abnormality."[12]

The Prenatal Nondiscrimination Act ("PRENDA"), introduced three times in the U.S. Congress, is the federal counterpart of state bans.[13] PRENDA refers to an emerging market of non-invasive prenatal genetic testing, warning about a new "sex-determination niche industry" of "low-cost commercial products."[14] PRENDA would impose fines and jail time on a physician who "performs [or attempts to perform] an abortion knowing that such abortion is sought based on the sex, gender, color or race of the child, or the race of a parent of that child."[15] The current ver-

7. *See* Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1457 (2008).

8. *Cf.* Prenatally & Postnatally Diagnosed Conditions Awareness Act, Pub. L. No. 110-374, § 3, 122 Stat. 4051–52 (2008) (enabling the Secretary of Health and Human Services to issue grants to organizations that collect information on genetic disorders and assist families raising children with Down syndrome or other prenatally or postnatally diagnosed conditions). *But see* Deborah Pergament, *What Does Choice Really Mean?: Prenatal Testing, Disability, and Special Education Without Illusions*, 23 HEALTH MATRIX: J.L. & MED. 55, 80–83 (2013).

9. *See e.g.*, 720 ILL. COMP. STAT. 510/6 (8) (2012); 18 PA. CONS. STAT. § 3201(c) (1989).

10. ARIZ. REV. STAT. ANN. § 13-3603.02 (2011); OKLA. STAT. tit. 63, § 1-731.2.B (2012); S.D. CODIFIED LAWS § 34-23A-10 (2014) (effective July 1, 2014); H.R. 2253, 85th Leg. Reg. Sess. (Kan. 2013); H.B. 1305, 63d Leg. Assemb., Reg. Sess. (N.D. 2013); S.B. 353, Gen. Assemb., 2013 Sess. (N.C. 2013).

11. For a discussion of proposed state laws, see *infra* Part II.A.

12. H.B. 1305, § 2(1)(b), 63d Leg. Assemb., Reg. Sess. (N.D. 2013).

13. Prenatal Nondiscrimination Act (PRENDA) of 2013, H.R. 447, 113th Cong. (2013) [hereinafter PRENDA]; Prenatal Nondiscrimination Act (PRENDA) of 2012, H.R. 3541, 112th Cong. (2012); Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2009, H.R. 1822, 111th Cong. (2009).

14. PRENDA § 2(a)(1)(C).

15. PRENDA § 250(a); *cf. infra* text accompanying notes 151–52 (problematizing PRENDA's treatment of race). This article's focus on sex selection does not intend to minimize the problematic treatment of race by PRENDA or other state bills. The race provisions of PRENDA suggest troubling stereotypes and are difficult to understand. PRENDA devotes only two pages of the twenty-five page bill to race-based terminations. It is un-

sion of PRENDA did not move out of the House Subcommittee on the Constitution and Civil Justice[16] or the Senate Committee on the Judiciary.[17] But even if PRENDA does not pass next year or in the foreseeable future, the bill lends legitimacy to state legislative efforts and offers an example of laws seeking to regulate abortion decisions after testing.

Bills such as PRENDA draw on longstanding advocacy by women's rights groups on sex selection, although PRENDA co-opts that advocacy for anti-abortion ends. In the 1980s and 1990s, U.S. scholars and advocates denounced the skewed sex ratios of other countries that suggested some combination of sex-selective abortion, female infanticide, and neglect of girls.[18] International

clear how a provider would determine that abortion is "because the child or a parent of the child is of an undesired race" or "motivated by race bias." PRENDA § 2(c). PRENDA states that "[a]bortion is the leading cause of death in the Black community," which suggests that all African American women having terminations have sought race-based abortions under the bill. *Id.* §§ 2(d), (e). The American Civil Liberties Union ("ACLU") challenged, unsuccessfully, the constitutionality of Arizona's law banning race-based abortions, arguing that the law permits discrimination and invidious stereotypes. *See* Jessica Mason Pieklo, *Advocates Ask Ninth Circuit to Reinstate Challenge to Arizona Race- and Sex-Selection Abortion Ban*, RH REALITY CHECK (Mar. 13, 2014, 9:56 AM), http://rhreality check.org/article/2014/03/13/advocates-ask-ninth-circuit-reinstate-challenge-arizona-race-sex-selection-abortion-ban/.

16. *See* PRENDA, H.R. 447, 113th Cong. (2013) (as reported by House Judiciary).

17. *See* PRENDA, S.B. 138, 113th Cong. (2013) (as reported by Senate Judiciary).

18. *E.g.*, April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?*, 10 WIS. WOMEN'S L.J. 161, 168–70, 172 (1995) (stating that "the shortage of girl children is as severe in Western 'developed' nations as it is in the 'developing' world"); Jodi Danis, *Sexism and "The Superfluous Female": Arguments for Regulating Pre-Implantation Sex Selection*, 18 HARV. WOMEN'S L.J. 219, 223–25, 240–41 (1995) (questioning whether "persons in the United States should be permitted to treat X-sperm cells as a negative trait to be selected against"); Lynne Marie Kohm, *Sex Selection Abortion and the Boomerang Effect of a Woman's Right to Choose: A Paradox of the Skeptics*, 4 WM. & MARY J. WOMEN & L. 91, 93, 109–10 (1997) (commenting that most ethicists "in the United States have assumed that such abortions are undesirable, if not immoral") (internal citation omitted); Rachel E. Remaley, *"The Original Sexist Sin": Regulating Preconception Sex Selection Technology*, 10 HEALTH MATRIX: J.L. & MED. 249, 277–78 (2000) (noting the difference between dominant preference for males versus females is greater in India and Asian countries than in the United States); John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B.U. L. REV. 421, 457–58 (1996) [hereinafter Robertson, *Genetic Selection*] (explaining how the ratio of males to females in China increased during the one-child per family policy); Dorothy C. Wertz & John C. Fletcher, *Ethical and Social Issues in Prenatal Sex Selection: A Survey of Geneticists in 37 Nations*, 46 SOC. SCI. MED. 255, 255, 270 (1998) [hereinafter Wertz & Fletcher, *Ethical and Social Issues*] ("The basic reason why geneticists in many Western nations can compromise their personal views in favor of client autonomy is that they do not regard sex selection as a social problem."); Dorothy C. Wertz & John C. Fletcher, *Fatal Knowledge? Prenatal Diagnosis and Sex Selection*, 19 HASTINGS CTR. REP. 21, 25 (1989) [hereinafter Wertz & Fletcher, *Fatal Knowledge?*] (describing sex selection in India).

human rights law now recognizes sex selection as gender discrimination, violence against women, or both.[19] As discrimination, it is the product of gender inequality in law and in cultural practices.[20] As violence against women, it is a type of subjugation that allegedly results in trafficking, increased militancy, and rampant violence when men outnumber women.[21] The claim that sex selection will lead to widespread violence pervades so many different literatures that it has become common sense, even though it is a claim that is difficult to prove.[22]

PRENDA calls for gender equality and protection from violence with the moral claims of the anti-abortion movement. But both opponents and proponents of current legislation face significant obstacles. On the one hand, PRENDA is a poor tool for its purported goal: reason-based abortion bans are difficult to enforce because patients have not been required to give reasons for their terminations and typically are not subject to state mechanisms that vet truthfulness.[23] On the other hand, reproductive rights supporters face a stark dilemma of how to best advocate for curbing sex selection without supporting abortion restrictions, especially given the rhetoric of violence that characterizes the practice.

Confronted by their prior advocacy against the practice, opponents of PRENDA offer constitutional and empirical rebuttals, neither of which is terribly persuasive. First, legal commentators

19. *See infra* Part III.A.1–2.

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

21. *See infra* Part III.A.2.

22. *See id.* Note that this article references "sex" rather than "gender" in describing sex-selection practices. In so doing, it refers to a commonly understood description of biological differences between male and female infants at birth. This article does not intend to suggest that gender, sexuality, and sexual difference are neutral, non-constructed, or interchangeable terms. Quite to the contrary, one problem of the current sex-selective abortion debate is that it takes for granted a binary between women and men, leaving scant room for the much more complicated and nuanced understanding of gender, sex, and sexuality developed over the last several decades. *See* Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE J. 519, 520 (1988) ("In distinguishing sex from gender, feminist theorists have disputed causal explanations that assume that sex dictates or necessitates certain social meanings for women's experience."). *See generally* JUDITH BUTLER, UNDOING GENDER 176–203 (2004) (complicating the definitions of and commitments to sexuality, gender, and sexual difference).

23. *See infra* text accompanying notes 172–78.

that oppose PRENDA argue that the bill is unconstitutional.[24] They read *Planned Parenthood of Southeastern Pennsylvania v. Casey*[25] as conferring constitutional protection for abortion before viability for any reason.[26] However, the Supreme Court of the United States' more recent decision in *Gonzales v. Carhart*, which upheld a law that banned an abortion procedure performed infrequently before viability, complicates the question of whether a pre-viability abortion ban is always impermissible.[27] *Gonzales* also strengthened the interests that states can assert in protecting the integrity of physicians, potential life, and the mental health of women.[28] Anticipating constitutional challenges, PRENDA's drafters crafted language that aligns with the state interests set out in *Gonzales*.[29] PRENDA implies that low-cost, non-invasive testing will lead to "neo-eugenics"[30] and unfettered control over a potential child's nonmedical genetic characteristics; pressure on women to have abortions they will regret; and incentives for providers to offer NIPT for financial gain.[31] Under *Gonzales*, these claims may be cognizable as state interests that could justify laws banning sex-selective abortion or, for that matter, abortions for reason of genetic abnormalities.

Second, PRENDA opponents argue that sex selection (specifically son preference) does not happen in the United States or only happens in rare circumstances.[32] There is no conclusive proof that sex selection takes place on a broad scale in this country,[33] but re-

24. *See, e.g.*, Jaime Staples King, *Not This Child: Constitutional Questions in Regulating Non-Invasive Prenatal Genetic Diagnosis and Selective Abortion*, 60 UCLA L. REV. 2, 8 (2012) [hereinafter King, *Not This Child*] (debating the constitutional question of a state banning abortion because of the reason for abortion).

25. 505 U.S. 833 (1992).

26. *See infra* text accompanying notes 264–68.

27. 550 U.S. 124, 146–47, 168 (2007).

28. *See* Sonia M. Suter, *The "Repugnance" Lens of* Gonzales v. Carhart *and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1519 (2008).

29. *Compare* PRENDA, H.R. 447, 113th Cong. (2013), *with Gonzales*, 550 U.S. at 158–60.

30. PRENDA § 2(a)(1)(K). *See generally* Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 BERKELEY TECH. L.J. 897, 937 (2007) (describing neo-eugenics as "an attempt to influence reproduction to have healthier, fitter offspring").

31. PRENDA § 2, at 10–13; *see infra* Part III.B for a discussion on the constitutionality of a sex-selective abortion ban.

32. *See infra* Part III.B.2.

33. Data from the National Center for Health Statistics reveals normal sex ratios of babies born in the United States from 1975 to 2002. *See* T.J. Mathews & Brady E. Hamil-

cent studies suggest that sex-selective abortion, in which boys are preferred to girls, happens in certain communities.[34] Moreover, potential parents select for fetal sex with assisted reproductive technologies ("ART").[35] Physicians report that some patients use a pre-implantation genetic diagnosis for sex even when they have no fertility problems.[36]

The intent of this article is not to make empirical claims about the frequency of sex selection or normative claims about what courts should do if confronted with a constitutional challenge. Its purpose is to demonstrate that the abortion politics dominating this discussion cannot address the practical problems that will arise with the introduction of NIPT. Discussions of sex-selective abortion bans do not simply need firmer constitutional or empirical grounding; they require a better understanding of what policies shape prenatal testing.

Understanding testing helps elucidate why legislative battles on sex selection may succeed and fail with little practical effect. Evolving standards for genetic counseling and informed consent, however, will shape how patients make decisions after receiving prenatal test results. Historically, negotiating what to test and what to do after testing has been a matter of ethics and not necessarily of law.[37] Those who oppose bills like PRENDA might use their advocacy energies both to resist the anti-abortion tactics of

ton, *Trend Analysis of the Sex Ratio at Birth in the United States*, 53 NAT'L VITAL STAT. REP. at 1, 1–6 (2005).

34. *See, e.g.*, James F.X. Egan et al., *Distortions of Sex Ratios at Birth in the United States: Evidence for Prenatal Gender Selection*, 31 PRENATAL DIAGNOSIS 560, 560–65 (2011).

35. *See, e.g.*, Gina Kolata, *Ethics Questions Arise as Genetic Testing of Embryos Increases*, N.Y. TIMES (Feb. 4, 2014), *available at* http://www.nytimes.com/2014/02/04/health/ethics-questions-arise-as-genetic-testing-of-embryos-increases.html?hp&_r=0 (discussing the ethics of choosing sex through in vitro fertilization). Research shows that IVF users select female embryos just as frequently as male ones due to the desire to maintain a balanced household (in terms of children's gender). Sujatha Jesudason & Susannah Baruch, *Sex Selection: What Role for Providers*, 86 CONTRACEPTION 597, 597 (2012).

36. *See* Jesudason & Baruch, *supra* note 35, at 597 (noting that there are many reasons why people choose to engage in sex selection and there is a lack of data revealing why).

37. *See* ALEXANDRA MINNA STERN, TELLING GENES: THE STORY OF GENETIC COUNSELING IN AMERICA 147, 164–69 (2012) (describing, with the introduction of amniocentesis, the debate among bioethicists about whether sex selection should be allowed in every instance, as a matter of patient choice, or whether providers should dissuade patients from sex selection).

state legislators, and to grapple with the management of NIPT in physicians' offices and on the market.

This article proceeds in four parts. Part I reviews the literature on NIPT and the prevalence of sex selection. Part II describes current legislative strategies to ban sex selection, mapping the commonalities among pending bills and recently enacted legislation. Focusing on PRENDA as an example, Part II also describes how the federal bill depicts the social problems of gender discrimination and violence against women. Part III demonstrates how the drafters of bills banning sex-selective abortion have relied on the rhetoric of the women's rights movement. Additionally, it explains why empirical and constitutional claims fail to respond to that co-optation. Part IV considers the costs and opportunities of shifting from explicating constitutional rights and contesting empirical studies to discussing regulatory options for new testing technology.

I. TESTING SEX AND SEX SELECTION IN THE UNITED STATES

In 1955, scientists discovered that fetal cells collected from amniotic fluid in the second trimester could predict a fetus' sex.[38] Today, fetal cells collected from the maternal bloodstream can reveal sex without amniocentesis, and it can be done as early as the first trimester.[39]

There is evidence that Americans engage in sex-selective abortion.[40] Sometimes they do so to balance the boy-girl ratio of their families[41] or because they prefer a specific gender.[42] This part re-

38. Cynthia M. Powell, *The Current State of Prenatal Genetic Testing in the United States*, *in* PRENATAL TESTING AND DISABILITY RIGHTS 44 (Erik Parens & Adrienne Asch eds., 2000) (recounting that in 1955 amniocentesis was performed to identify risks of sex-linked disorders); STERN, *supra* note 37, at 153 (noting that amniocentesis was originally performed later in the second trimester).

39. Powell, *supra* note 38, at 50; Caroline F. Wright & Hilary Burton, *The Use of Cell-Free Fetal Nucleic Acids in Maternal Blood for Non-Invasive Prenatal Diagnosis*, 15 HUM. REPROD. UPDATE 139, 140–43 (2008).

40. *See* Egan et al., *supra* note 34, at 565.

41. Audrey R. Chapman & Peter A. Benn, *Non-Invasive Prenatal Testing for Early Sex Identification: A Few Benefits and Many Concerns*, 56 PERSP. BIOLOGY & MED. 530, 531 (2013) ("Some families are likely to seek the information about sex out of curiosity or to prepare for the birth of their child. . . . [, or] for purposes of family balancing . . . , or because of strong preferences for one sex.").

42. *See* Egan et al., *supra* note 34, at 565.

views the emerging technology that permits sex determination early in pregnancy, summarizes demographic and ethnographic studies that explore whether sex selection actually occurs, and describes how pre-implantation genetic diagnosis ("PGD") facilitates sex selection.

A. *New Prenatal Genetic Tests*

Until the development of NIPT,[43] prospective parents who wanted to learn the sex of a fetus had three options: chorionic villus sampling ("CVS"), amniocentesis, and ultrasound.[44] CVS and amniocentesis both rely on a sample extracted *in utero*, whereas NIPT depends only on a blood sample from a pregnant woman.[45] Amniocentesis and CVS are typically not used until early in the second trimester; both tests are invasive, expensive, and carry up to a 1% risk of miscarriage.[46] Almost all pregnant women who seek to determine fetal sex rely on ultrasound.[47] Unlike amniocentesis, ultrasound is non-invasive, free from risks of miscarriage, and cost effective; but like amniocentesis, an ultrasound for sex is not reliable until the second trimester of pregnancy.[48]

43. Amy Swanson et al., *Non-Invasive Prenatal Testing: Technologies, Clinical Assays and Implementation Strategies for Women's Healthcare Practitioners*, 1 CURRENT GENETIC MED. REP. 113, 114 (2013) (noting "many exciting advances in the field of non-invasive prenatal testing (NIPT) including the discovery of fetal cell-free DNA (cfDNA) in maternal plasma and the development of massively parallel sequencing (MPS) and counting techniques using cfDNA, leading to the launch of the first non-invasive tests"). Cell-free DNA travels across the placental lining and comprises three to six percent of the total cell-free DNA in maternal circulation. After birth, almost all fetal DNA leaves the mother's bloodstream, although a very small quantity of fetal DNA can linger for years. Wright & Burton, *supra* note 39, at 140. The NIPT sex-determination test was designed primarily to identify and treat sex-linked diseases, such as hemophilia or Duchene's muscular dystrophy. *See* Peter A. Benn & Audrey R. Chapman, *Ethical Challenges in Providing Non-Invasive Prenatal Diagnosis*, 22 CURRENT OP. OBSTETRICS & GYNECOLOGY 128, 128–29 (2010) (describing how NIPT has been developed in response to difficulties arising from traditional invasive prenatal testing, giving parents a test for sex-linked disorders without as much risk).

44. Peter G. Scheffer et al., *Reliability of Fetal Sex Determination Using Maternal Plasma*, 115 OBSTETRICS & GYNECOLOGY 117, 117 (2010).

45. Wright & Burton, *supra* note 39, at 139–40.

46. *See* Chapman & Benn, *supra* note 41, at 532–33; Wright & Burton, *supra* note 39, at 139.

47. Chapman & Benn, *supra* note 41, at 532.

48. *See* Devaney et al., *supra* note 3, at 627–28, 634 (stating that the "[a]dvantages of ultrasound examination are that it is noninvasive, widely available, and accurate after approximately 13 weeks' gestation.").

The accuracy of NIPT increases as pregnancy progresses,[49] and NIPT is reliable after seven to twelve weeks of gestation.[50] In 2011, the *Journal of the American Medical Association* published a meta-analysis of fifty-seven published studies on NIPT for sex determination.[51] The results show high levels of accuracy between seven and twelve weeks at just under 99% specificity (probability of a negative result) and 95% sensitivity (probability of a positive result).[52] This means that NIPT could become part of a patient's first prenatal visit, which occurs between eight and twelve weeks into the pregnancy.[53] NIPT could also take the place of risk screening currently in use—ultrasounds and serum screenings that reveal information about the pregnancy.[54] At the point of amniocentesis or CVS, most patients have assessed the risks of certain genetic and physical conditions with two ultrasounds, at around ten and twenty weeks, and two serum screenings (blood tests), at around twelve and sixteen weeks.[55] NIPT can supplement or eliminate these prenatal screenings as well as potentially displace amniocentesis or CVS.[56] This last point has been a source of some controversy. Research studies have urged caution regarding the clinical use of NIPT for aneuploidies (or disorders of missing or extra chromosomes), especially as a substitution from traditional screening and testing.[57] Researchers in maternal-fetal medicine have questioned whether rates of sensitivity and specificity are relevant for the broader population of women, who have

49. *Id.* (explaining the attributing factors to improved performance of the test in later gestation).

50. *Id*. at 634; *see also* M. Hill et al., *Non-Invasive Prenatal Determination of Fetal Sex: Translating Research into Clinical Practice*, 80 CLINICAL GENETICS 68, 72 (2011).

51. Devaney et al., *supra* note 3, at 627.

52. *Id*. at 627–28, 631, 633; Mary E. Norton et al., *Non-Invasive Prenatal Testing for Fetal Aneuploidy: Clinical Assessment and a Plea for Restraint*, 121 OBSTETRICS & GYNECOLOGY 847, 850 (2013).

53. *See* Ruth M. Farrell et al., *Risk and Uncertainty: Shifting Decision Making for Aneuploidy Screening to the First Trimester of Pregnancy*, 13 GENETICS MED. 429, 434 (2011).

54. De Jong et al., *supra* note 6, at 273.

55. *See* Stephanie Morian et al., *A New Era in Non-Invasive Prenatal Testing*, 369 NEW ENG. J. MED. 499, 499 (2013) (describing ultrasound technology as occurring around week eleven, blood samples taken around week ten, and amniocentesis as occurring after week fifteen). *But see* de Jong et al., *supra* note 6, at 273 (describing ultrasound as occurring around week eighteen, CVS as occurring around week eleven, and amniocentesis as occurring around week fifteen).

56. De Jong et al., *supra* note 6, at 273.

57. Morian et al., *supra* note 55, at 499 (listing some of the issues with NIPT testing, such as lack of Food and Drug Administration regulation and the limited evidence concerning performance characteristics).

low-risk pregnancies, given that the first studies of NIPT's accuracy relied on populations with known aneuploidies.[58] However, these concerns are abating. Research published in February 2014 suggests NIPT is an accurate and appropriate screening tool for all pregnant women.[59]

There is an emerging and lucrative market for NIPT.[60] For-profit companies, such as Verinata Health, Sequenom, and Ariosa Diagnostics, sell NIPT to health care providers and health care organizations.[61] At present, these companies offer NIPT through physicians and advertise NIPT as "'screening tests' that may require follow-up procedures."[62] Tests that are available on the market to physicians, and soon directly to consumers,[63] are marketed presently to women over the age of thirty-five, an age group with higher risk of pregnancies with a genetic disorder.[64] Al-

58. *See* Norton et al., *supra* note 52, at 849 ("The tests have primarily been validated on archived samples in carefully selected groups of high-risk women; such studies do not answer the question of clinical use in the general population."); *see also* Morian et al., *supra* note 55, at 499 (stating that studies on NIPT rely on "archived samples with known karyotypes that intentionally included a large proportion of specimens from women with known aneuploid fetuses").

59. *See* Diana W. Bianchi et al., *DNA Sequencing Versus Standard Prenatal Aneuploidy Screening*, 370 NEW ENG. J. MED. 799, 806 (2014) ("[A] comparison showed that noninvasive prenatal cfDNA testing performed better than standard screening methods, with an improvement by a factor of 10 in the positive predictive value for trisomy 21 in our predominantly low-risk patient population.").

60. *See* Norton et al., *supra* note 52, at 847–48 (noting that NIPT, unlike amniocentesis and CVS, was moved out of an academic setting and licensed to commercial companies who were largely funded by venture capital, allowing these tests to "bypass some components of a rigorous, unbiased vetting process, which helps to provide quality assurance").

61. Jaime S. King, *Politics and Fetal Diagnostics Collide*, 491 NATURE, Nov. 2012, at 33, 34.

62. *Id*.

63. The direct-to-consumer market will also evolve in the next decade. *See* Diana W. Bianchi, *At-Home Fetal DNA Gender Testing: Caveat Emptor*, 107 OBSTETRICS & GYNECOLOGY 216, 217 (2006). But currently, companies have been somewhat cautious in advertising testing kits and have not released data on the numbers of prenatal tests sold. *See* Sunita Puri & Robert D. Nachtigall, *The Ethics of Sex Selection: A Comparison of the Attitudes and Experiences of Primary Care Physicians and Physician Providers of Clinical Sex Selection Services*, 93 FERTILITY & STERILITY 2107, 2107 (2010); *cf.* Gail H. Javitt, *Pink or Blue? The Need for Regulation Is Black and White*, 86 FERTILITY & STERILITY 13, 14 (2006) ("State laws vary with respect to whether tests can be offered directly to consumers, and many states allow it. Moreover, even those tests that are currently physician mediated for the most part lack formal assurance from any of the traditional regulators that they . . . provide information useful to health-care decision making.").

64. *See, e.g.*, *Expectant Parents: Overview*, VERIFI PRENATAL TEST, http://www.verifitest.com/expectant-parents/ (last visited Nov. 24, 2014). Verinata encourages women to test at ten weeks, rather than seven weeks, to ensure the accuracy of results. *Compare id*.

though researchers have warned that companies selling NIPT products have ignored the present recommendations of professional organizations, the trajectory of NIPT, particularly for sex, in clinics and on the internet appears clear.[65] As one obstetrician put it, "I wouldn't be surprised if in a few years there are pink and blue kits available at supermarkets where you buy them."[66]

Moreover, private health care insurers (for example, UnitedHealth Group, WellPoint, and Aetna) cover NIPT for pregnant women with family histories of genetic conditions who are over thirty-five years old, or who screen positive for moderate- to high-risk of fetal abnormalities.[67] The present limitations on which women should use NIPT will likely change as research emerges on the accuracy of NIPT for women of any age, medical history, or level of risk. And the costs of NIPT will decrease as it becomes routine and sequencing technology advances.[68] Tests that are not covered by insurance now cost between $1200 and $2800; with insurance, tests cost between $200 and $235.[69] Laboratories offering NIPT will soon sign test-specific contracts with insurance plans, making their particular test "in-network and covered," resulting in lower out-of-pocket costs for patients.[70] Additionally, companies, such as Verinata and Sequenom, offer customers without insurance coverage caps on out-of-pocket costs and introductory pricing deals.[71]

("This screening test may be an option for you to consider if: You have a confirmed singleton or twin pregnancy of at least 10 weeks gestational age . . ."), *with* Devaney et al., *supra* note 3, at 634 ("In summary, the overall performance of noninvasive fetal sex determination using maternal blood can be high, if performed . . . when sufficient cell-free fetal DNA is present (7 weeks' gestation or later).").

65. Norton et al., *supra* note 52, at 849 (noting that the age cutoff for pregnancy is discredited by many as an effective screening test). The American College of Obstetricians and Gynecologists ("ACOG") advises that providers should only offer NIPT to women with serum and ultrasound screenings that indicate high risk of fetal genetic conditions, or family histories of genetic disease. AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS COMM. ON GENETICS, COMM. OP. NO. 545: NON-INVASIVE PRENATAL TESTING FOR FETAL ANEUPLOIDY 2 (2012); *see also* Morain et al., *supra* note 55, at 501. *But see* Bianchi et al., *supra* note 59, at 799, 805 (describing research that supports NIPT for women at a low risk of carrying fetuses with genetic abnormalities).

66. Puri & Nachtigall, *supra* note 63, at 2111.

67. Weaver, *supra* note 4.

68. *See* Greely, *supra* note 1, at 290.

69. Agarwal et al., *supra* note 6, at 522.

70. Swanson et al., *supra* note 43, at 117.

71. *See* Morian et al., *supra* note 55, at 501; Rita Rubin, *New Prenatal Blood Tests Come with High Hopes and Some Questions*, KAISER HEALTH NEWS (Nov. 26, 2012),

In short, NIPT is easy to use, becoming less expensive, and increasingly supported by a growing market. NIPT can give prospective parents information about a fetus' genetic profile much earlier in pregnancy.[72] Indeed, the fear that NIPT will sweep into the country's obstetric offices has been one justification to legislate. Before assessing that legislation, the next two sections consider the inclination to utilize this new technology to test for fetal sex.

B. *Questions of Prevalence*

To what extent sex selection occurs in the United States has been a matter of fierce debate over the last few years.[73] In 2012, an anti-abortion group, Live Action, sent members "undercover" to five Planned Parenthood clinics under the guise of pregnant women seeking abortions because the fetus was female.[74] In a video posted online, a Planned Parenthood staff member explained at what point in pregnancy a patient may learn the sex of a fetus and that Planned Parenthood would not deny her an abortion based on her reason.[75] The staff member concluded the conversation by wishing the patient, "Good luck, and I hope you do get your boy."[76] Three days after this interaction, Planned

http://kaiserhealthnews.org/news/prenatal-blood-tests/ (discussing the pricing for the tests performed by Verinata and Sequenom and indicating that the Verinata test offers an "introductory price").

72. *See* Wright & Burton, *supra* note 39, at 139–40; *cf.* Greer Donley et al., *Prenatal Whole Genome Sequencing: Just Because We Can, Should We?*, 42 HASTINGS CTR. REP., July–Aug. 2012, at 28, 33.

73. *See* Sujatha Jesudason & Anat Shenker-Osorio, *Sex Selection in America: Why It Persists and How We Can Change It*, ATLANTIC (May 31, 2012, 8:30 AM), www.theatlantic.com/politics/archive/2012/05/sex-selection-in-america-why-it-persists-and-how-we-can-change-it/257864/ ("Son preference, missing girls, sex selection: We may seek to label these Chinese or Indian issues, but they exist here in America . . . . the purportedly spreading practice of sex-selective abortion is back in the news."); Osagie K. Obasogie, *Are Skewed Sex Ratios in America's Future?*, BIOPOL. TIMES (June 30, 2011), www.biopoliticaltimes.org/article.php?id=5775.

74. Laura Bassett, *Planned Parenthood Sting Caught on Video, Released by Anti-Abortion Activists*, HUFFINGTON POST (May 29, 2012, 7:28 PM), http://www.huffingtonpost.com/2012/05/29/planned-parenthood-video_n_1552672.html; *see also* Leslie Kantor & Carolyn Westhoff, *New Secret Hoax Campaign Another Tactic in the Wars Over Safe Abortion Care and Women's Rights*, RH REALITY CHECK (Apr. 23, 2012, 3:09 PM), http://rhrealitycheck.org/article/2012/04/23/secret-hoax-campaign-is-another-abortion-wars-tactic/.

75. Bassett, *supra* note 74.

76. *Id.*

Parenthood Federation of America ("PPFA") fired the employee and pledged to train other employees on proper protocol.[77]

Though the "sting operation" was intended to incite controversy with a purposely anti-abortion message, it tells little about the actual prevalence of sex selection in the United States. Live Action's activities, however, follow from a number of demographic studies that suggest that sex selection has been, for some communities, a U.S. phenomenon. Included in the Congressional Record of PRENDA,[78] studies published in *Applied Economics* and *Prenatal Diagnosis* offer evidence that gender selection occurs in Chinese, Korean, Filipino, and Indian families.[79] These studies relied on birth records to show higher ratios of male births to female births in comparison to other ethnic groups.[80] Moreover, if the first two children were daughters, the third child was more likely to be a son, and women were more likely to have terminated a pregnancy between the second and third child.[81] Likewise, a 2008 study, published in the *Proceedings of the National Academy of Science*, reports skewed sex ratios among children born to foreign-born Chinese, Indian, or Korean parents in the U.S. census data.[82] The study similarly found that, while the sex ratio for

77. *Id.* It is unclear what the "proper protocol" is, given that Texas, where the "sting operation" occurred, does not ban sex-selective abortion and PPFA does not typically deny women abortions based on the reason stated. PPFA's news release stated: "It is critical that we help the public understand the importance of providing nonjudgmental, confidential care even when faced with difficult questions about deeply troubling issues such as sex selection motivated by gender bias." Press Release, Planned Parenthood Federation of America (May 30, 2012) (on file with author).

78. *Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011: Hearing on H.R. 3541 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 97–143, 156–61 (2011).

79. Jason Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data*, 1 AM. ECON. J.: APPLIED ECON., no. 2, 2009, at 1, 7, 15, 25–26 (concluding that Chinese and Indian parents were more likely to have a son at their third and fourth births than the other ethnic groups that were studied based on data from the 1980, 1990, and 2000 United States Censuses, data from the National Center for Health Statistics from 1971 to 2004, and data from the California Department of Health Services from 1970 to 2005); *see also* Egan et al., *supra* note 34, at 564–65.

80. *See* Abrevaya, *supra* note 79, at 13; Egan et al., *supra* note 34, at 564.

81. Abrevaya, *supra* note 79, at 26–28; Egan et al., *supra* note 34, at 564. Abrevaya's study compared "[r]atios for Black, Chinese, Filipino, Asian Indian and Korean . . . to those reported for White births. [The study] also determined sex ratios by birth order for first, second and third or more children." *Id.* at 560–61. Ultimately, the researchers found evidence strongly suggesting prenatal sex selection for third or more births among Chinese, Indian, and Korean populations in the United States.

82. Douglas Almond & Lena Edlund, *Son-Biased Sex Ratios in the 2000 United States Census*, 105 PROC. NAT'L ACAD. SCI. U.S. AM. 5681, 5681 (2008), *available at* http://www.p

first-born children was normal, subsequent children were more likely to be male if there was no previous male child.[83] If there were no sons, the sex ratio for the third child was 1.51 males to one female (as compared to a natural ratio of boy-girl births of 1.02 to 1.06 males for every one female).[84] Seema Mohapatra notes that this ratio is comparable to ratios in South Korea, China, and India.[85]

In a qualitative study, researchers from the University of California interviewed sixty-five South Asian American immigrants who relied on sex selection technology between September 2004 and December 2009.[86] Study participants reported coercion to have sons and violence resulting from carrying or giving birth to daughters.[87] Participants reported that they felt pressure from family members who perceived that sex-selective abortions were readily available in the United States.[88] Of the women interviewed, 40% had already terminated prior pregnancies with female fetuses, and 89% of the women pregnant with female fetuses planned to pursue abortions.[89]

The methods and conclusions of these studies have been controversial. Sneha Barot concluded that the ethnic communities studied constitute a very small proportion of the wider population and that researchers have not shown the cause of disparate ratios, whether it be abortion or pre-pregnancy fertility treatments.[90]

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nas.org/content/105/15/5681.full.pdf+html.

83. *Id*.

84. Jesudason & Shenker-Osorio, *supra* note 73 ("[W]omen will likely give birth to 100 girls for every 102 to 106 boys (for a ratio of 1.02 to 1.06 boys per girl).").

85. Seema Mohapatra, *Global Legal Responses to Prenatal Gender Identification and Sex Selection*, 13 NEV. L.J. 690, 695–96 (2013).

86. Sunita Puri et al., "*There Is Such a Thing as Too Many Daughters, But Not Too Many Sons": A Qualitative Study of Son Preference and Fetal Sex Selection Among Indian Immigrants in the United States*, 72 SOC. SCI. & MED. 1169, 1170 (2011).

87. *Id.* at 1173 ("The most common forms of neglect were the withholding of food, water, and rest during a woman's pregnancy with a female fetus, although women also described being hit, pushed, choked, and kicked in the abdomen in a husband's attempt to forcibly terminate a pregnancy.").

88. *Id.* at 1172 (noting that the pressure from family members increased with each birth of a daughter).

89. *Id*. at 1170.

90. Sneha Barot, *A Problem-and-Solution Mismatch: Son Preference and Sex-Selective Abortion Bans*, 15 GUTTMACHER POL'Y REV., Spring 2012, at 18, 21 (describing one study as "a small-scale qualitative study" and "limited and inconclusive"); *see also* Almond & Edlund, *supra* note 82, at 5681–82 ("[B]ecause Indians, Chinese, and Koreans make up <2% of the U.S. population, the effect on the breeding population sex ratio is small.").

Moreover, a 2014 report, *Replacing Myths with Facts: Sex-Selective Abortion Laws in the United States*, reviewed the first (as compared to third) births of both foreign-born parents and parents identifying with Indian, Chinese, or Korean ancestry and found no evidence of son preference.[91] In addition, the report states, "[W]hen we compare the overall sex ratio at birth of foreign-born Chinese, Indian and Korean families to the sex ratio at birth of whites born in the United States, we find that these Asian groups have *more* girls on average than whites."[92]

The evidence of sex selection is clearly contested. Neither opponents nor proponents of sex-selective abortion bans strengthen their case by arguing that there is no desire to select for sex or that sex selection is a rampant problem in this country. Indeed, the studies described here offer only a glimpse into the diverse practices of clinics and physicians' offices, and of individuals and families. Likewise, the use of ART and reports from providers confirm that prenatal sex determination occurs to some extent.

C. *Clinical Availability*

Physicians disagree about the ethics of sex selection.[93] In a recent survey, only 21% of physicians said they would offer sex determination tests to pregnant women whose only motivation for testing was to choose the sex of a future child.[94] In contrast, a 2011 study of the attitudes of obstetricians and fertility specialists found that "providers believed that the advancement of science in developing new, less expensive, less invasive, and more private means of achieving sex selection was an important future

91. *See* BRIAN CITRO ET AL., REPLACING MYTHS WITH FACTS: SEX-SELECTIVE ABORTION LAWS IN THE UNITED STATES 16 (Sujatha Jesudason et al. eds., 2014) [hereinafter REPLACING MYTHS WITH FACTS], *available at* https://ihrclinic.uchicago.edu/page/replacing-myths-facts-sex-selective-abortion-laws-united-states.

92. *Id.*

93. *See* Lauren C. Sayres et al., *Cell-Free Fetal DNA Testing: A Pilot Study of Obstetric Healthcare Provider Attitudes Toward Clinical Implementation*, 31 PRENATAL DIAGNOSIS 1070, 1071 (2011) (describing survey results, which concluded that 16% of medical providers did not feel that patients should receive all available diagnostic prenatal genetic testing, but 73% of medical providers felt that a test should be provided if a patient requests); *cf.* Wertz & Fletcher, *Ethical and Social Issues*, *supra* note 18, at 256–57 (explaining that most physicians respond differently depending on the situation of the patient).

94. *See* Sayres et al., *supra* note 93, at 1071–72.

step."[95] For some providers, it is a question of protecting patient autonomy and decision-making.[96] For others, NIPT is the "latest use of medical technology for social rather than therapeutic reasons," and as one pediatrician commented, "there is so much money to be made."[97]

Professional organizations have been cautious about what sex selection means. For example, in a 2007 opinion, the American College of Obstetricians and Gynecologists ("ACOG") opposed using medical techniques to choose the sex of offspring (even for family balancing) except in circumstances of sex-linked disease.[98] The ACOG opinion conceded, however, that "[b]ecause a patient is entitled to obtain personal medical information, including information about the sex of her fetus, it will sometimes be impossible for health care professionals to avoid unwitting participation in sex selection."[99]

A 2004 statement of American Society for Reproductive Medicine ("ASRM") on sex selection before conception stated, "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 nonmedically indicated preconception gender selection are not justified."[100]

95. Puri & Nachtigall, *supra* note 63, at 2111.

96. *See id*. at 2110–11 (acknowledging the "personal and private nature of reproductive decision-making").

97. *Id.* at 2111.

98. AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS COMM. ON ETHICS, SEX SELECTION 1 (2007) [hereinafter ACOG, SEX SELECTION], *available at* http://www.acog.org/~/media/Committee%20Opinions/Committee%20on%20Ethics/co360.pdf?dmc=1&ts=20130104T1829289757 ("The Committee on Ethics supports the practice of offering patients procedures for the purpose of preventing serious sex-linked genetic diseases. However, the committee opposes meeting requests for sex selection for personal and family reasons, including family balancing, because of the concern that such requests may ultimately support sexist practices."). Seventy percent of respondents to a recent survey said they would follow the guidance of professional organizations such as the ACOG in deciding which types of testing to offer. Sayres, *supra* note 93, at 1072; *see also* Jesudason & Baruch, *supra* note 35, at 599 (arguing that providers, like primary care physicians, should counsel patients on parenting expectations and responsibilities).

99. ACOG, SEX SELECTION, *supra* note 98, at 4; *see also* Swanson et al., *supra* note 43, at 117 ("[P]rofessional societies have unanimously agreed that NIPT is a safe and effective screening test for fetal aneuploidy in high-risk women . . . None of the [professional] societies support the use of non-invasive prenatal tests in the low/average risk populations at this time due to the lack of data.").

100. Ethics Comm. of the Am. Soc'y for Reprod. Med., *Preconception Gender Selection*

Evidence of the will to select sex prenatally also exists in the use of PGD, a method of testing an embryo before implantation in the uterus.[101] These embryos are cultivated by in vitro fertilization ("IVF"), and patients can choose to discard embryos for any number of reasons, including sex.[102] According to one study, "as of 2006, half of American fertility clinics that offer embryo screening allow would-be parents some form of sex selective add-ons . . . and the market is growing."[103] Interviews with physicians suggest "providers are increasingly encountering patients wanting to select the sex of their future children, including fertile couples with no history of infertility or family genetic disease who seek [IVF] and [PGD] simply to choose the sex of the child."[104] Providers who support PGD for sex-selection purposes argue that it helps "prevent multiple pregnancies and abortions"[105] and is "the most hu-

for Nonmedical Reasons, 82 FERTILITY & STERILITY S232, S234 (2004). Swanson and Part IV of this article argue that the ACOG, in a joint opinion with the Society of Maternal Fetal Medicine, shifted more responsibility to providers by supporting the clinical use of NIPT for certain populations of women. Swanson, *supra* note 43, at 114; *see infra* Part IV.

101. *See* King, *Not This Child*, *supra* note 24, at 59 n.299 (defining PGD).

102. *See* Judith F. Daar, *ART and the Search for Perfectionism: On Selecting Gender, Genes, and Gametes*, 9 J. GENDER RACE & JUST. 241, 246, 249–50 (2005). Outside of PGD, a small percentage of patients who choose the gender of a fetus rely on sperm sorting, which has historically been unpredictable. MicroSort is a sperm-sorting tool commercialized by the IVF Institute, which self-reports that "ninety-two percent of parents who requested a female baby ended up with a female baby, and eighty-one percent of parents who requested a male baby ended up with a male baby." Meredith Leigh Birdsall, Note, *An Exploration of "The 'Wild West' of Reproductive Technology": Ethical and Feminist Perspectives on Sex-Selection Practices in the United States*, 17 WM. & MARY J. WOMEN & L. 223, 229 (2010). But the efficacy and safety of MicroSort has been the subject of an FDA investigation. Dov Fox, *Safety, Efficacy, and Authenticity: The Gap Between Ethics and Law in FDA Decision-making*, 2005 MICH. ST. L. REV. 1135, 1143.

103. Jesudason & Shenker-Osorio, *supra* note 73.

104. Jesudason & Baruch, *supra* note 35, at 597. However, one study of prospective mothers utilizing IVF coupled with PGD ("IVF-PGD") suggests stigma associated with sex determination because study participants rejected it as frivolous or irresponsible. Michelle McGowan, *Constructions of Good Motherhood in an Online Forum for Users of Preimplantation Genetic Diagnosis*, *in* MOTHERHOOD ONLINE 180, 191 (Michelle Moravec ed., 2011). Women who decided to use IVF-PGD to screen for genetic mutations stated that although they could conceive naturally and then undergo prenatal testing coupled with abortion, IVF-PGD was more palatable because they would not be faced with the option of aborting a wanted pregnancy. *Id.* at 186.

105. Puri & Nachtigall, *supra* note 63, at 2110; Ashley Bumgarner, Note, *A Right to Choose?: Sex Selection in the International Context*, 14 DUKE J. GENDER L. & POL'Y 1289, 1290 (2007) ("[S]ome polls suggest that as many as twenty-five percent of Americans, and forty percent of American women being treated for infertility, would prefer to choose the sex of their next baby through preimplantation sex-selection procedures."). However, abortion decisions are not absent in the context of ART. When multiple embryos are implanted and more than two attach for gestation, patients may "selectively reduce" the pregnancy, but such selective reduction has physical and ethical implications. *See* Theresa Glennon,

mane, scientifically sound option for women."[106] Interestingly, whether the patient sees a primary care physician or a fertility physician appears to make a difference in how testing is offered. Primary care physicians are hesitant to offer sex determination testing for any reason; they are more likely to scrutinize a patient's reasons for selecting a particular sex, especially if the provider suspects spousal or family coercion.[107] Reproductive endocrinologists are more likely to view the issue as a woman's choice:[108] "There is a strong belief among both providers and patients that withholding any service is a denial of patients' rights."[109]

PGD for sex determination is largely to obtain the "idealized nuclear family" of an equal number of sons and daughters, although there is evidence of son preference.[110] Some fertility services target specific cultural groups that favor sons to daughters by advertising the use of PGD for fetal sex selection.[111]

NIPT, or any other prenatal test, and PGD are not perfectly analogous, but both technologies reflect a desire to consider sex before or early in pregnancy. The new wave of sex-selective abortion bans in the United States followed closely behind the introduction of NIPT, and legislatures have taken up the case against sex-selective abortion.[112] The next part explores what these laws and bills provide before Part III considers the origins of women's rights claims in sex-selective abortion legislation.

Choosing One: Resolving the Epidemic of Multiples in Assisted Reproduction, 55 VILL. L. REV. 147, 158 (2010).

106. Puri & Nachtigall, *supra* note 63, at 2110.

107. *Id*.

108. *See id*. at 2110.

109. Wertz & Fletcher, *Ethical and Social Issues*, *supra* note 18, at 261.

110. Richard R. Sharp et al., *Moral Attitudes and Beliefs Among Couples Pursuing PGD for Sex Selection*, 21 REPROD. BIOMED. ONLINE 838, 845 (2010) www.rbmojournal.com/article/S1472-6483(10)00623-1/fulltext (noting that in this particular study the majority of participants (78%) were seeking to select a boy).

111. *See* Jesudason & Baruch, *supra* note 35, at 598.

112. Nora Hertel, *SD Gender Abortion Ban Bill Criticized, Revised*, WASH. TIMES (Mar. 3, 2014), http://www.washingtontimes.com/news/2014/mar/3/sd-panel-deadlocks-on-sex-selection-abortion-ban/?page=all; Celeste McGovern, *New Prenatal Testing Could Drastically Increase Abortion Rate*, NAT'L CATH. REG. (June 25, 2012), http://www.ncregister.com/daily-news/new-prenatal-testing-could-drastically-increase-abortion-rate/.

II. LEGISLATIVE STRATEGIES TO BAN SEX SELECTION

Debate about sex selection dates back to the development of amniocentesis in the 1950s and the application of ultrasound in pregnancy in the 1960s.[113] As these technologies became more common—ultrasound became less expensive and more accurate and amniocentesis became less dangerous and available earlier in the second trimester—concerns about sex-selective abortion became prevalent in ethical, medical, and legal conversations.[114]

The first U.S. legislation addressing sex-selective abortion is nearly three decades old. In 1985, the Illinois legislature amended its abortion law to prohibit abortions performed "with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus."[115] In 1982, Pennsylvania prohibited abortions unless the physician determined that, "based on his [or her] best clinical judgment, the abortion [was] necessary" and provided that "[n]o abortion which is sought solely because of the sex of the unborn child shall be deemed a necessary abortion."[116] Pennsylvania's abortion statute became the basis of the challenge in *Planned Parenthood of Southeastern Penn-*

113. *See* MARA HVISTENDAHL, UNNATURAL SELECTION: CHOOSING BOYS OVER GIRLS, AND THE CONSEQUENCES OF A WORLD FULL OF MEN 115–18 (2011) (noting that critics of ultrasound technology in the 1960s worried about the power of science to de-humanize fetuses and the government exploitation and manipulation of populations); Kohm, *supra* note 18, at 107–08 (tracing the practice of sex-selection arising for a male child to ancient Greek philosophy); *see also* Ross Douthat, Op-Ed., *Eugenics, Past and Future*, N.Y. TIMES, June 10, 2012, at SR12, *available at* http://www.nytimes.com/2012/06/10/opinion/sunday/douthat-eugenics-past-and-future.html?_r=0 (questioning whether new technologies, like NIPT, that facilitate parents' access to prenatal genetic information, will lead to a troublesome "liberal eugenics" in which parents are in complete control of choosing their children's genetic characteristics); Jesudason & Shenker-Osorio, *supra* note 73 (linking NIPT and the growing interest in sex selection).

114. *See* Amitai Etzioni, *Sex Control, Science, and Society*, 161 SCI. 1107, 1107–12 (1968); Jane M. Friedman, *Legal Implications of Amniocentesis*, 123 U. PA. L. REV. 92, 107 (1974) ("Behavioral scientists who have investigated the matter are virtually unanimous in concluding that there is a strong preference for male offspring in the United States."). Friedman noted that on one hand, gender imbalance could have harmful social effects, but on the other, sex selection could slow population growth. *Id.*

115. 720 ILL. COMP. STAT. 510/6(8), *amended by* S.B. 890, 84th Gen. Assemb. (Ill. 1985). The law excludes abortions because of genetic disorders linked to sex. *Id.*

116. 18 PA. CONS. STAT. ANN. § 3201(c) (1989).

sylvania v. Casey,[117] although litigators did not attack the sex-selection provision.[118]

Today, anti-abortion strategies at the state level are succeeding; legislatures across the country have begun to impose restrictions on patients' choices and options after prenatal testing. This is against a backdrop in which states and the federal government have seldom regulated technologies for testing[119] and, until recently, did not seek to shape or limit decisions made after prenatal testing.[120] This part examines the proposed laws and enacted statutes that prohibit sex-selective abortions.

117. 505 U.S. 833, 844 (1992).

118. Linda Wharton, a lawyer representing the Women's Law Project in *Casey* stated: "We didn't challenge the sex selection provision because it is a red herring." Michael deCourcy Hinds, *Federal Judge Blocks a New Anti-Abortion Law in Pennsylvania*, N.Y. TIMES, Jan. 12, 1990, at A18, *available at* http://www.nytimes.com/1990/01/12/us/federal-judge-blocks-a-new-anti-abortion-law-in-pennsylvania.html.

119. Rachel Rebouché & Karen Rothenberg, *Mixed Messages: The Intersection of Prenatal Genetic Testing and* Abortion, 55 HOW. L.J. 983, 996 (2012) ("Like the federal government, states generally do not regulate the specifics of prenatal genetic testing and screening and do not typically regulate how health care professionals offer screening or explain or treat genetic disorders."). The Food and Drug Administration has not chosen to regulate NIPT. Instead, it has considered NIPT a laboratory-developed test (developed and validated by a laboratory), which is governed by the Clinical Laboratory Improvement Amendments. *See* 42 C.F.R. § 493.1 (2013); *see also* Javitt, *supra* note 63, at 13–14 (noting the FDA's ability to regulate medical devises used in the diagnosis of disease or other medical conditions, including pregnancy, and that genetic tests are not classified as medical devices). The Advisory Committee on Genetics for the Secretary of Health and Human Services has noted the regulatory gaps and Congress has unsuccessfully tried to strengthen oversight over genetic tests. *See* Ronald L. Weiss, *The Long and Winding Regulatory Road for Laboratory-Developed Tests*, 138 AM. J. CLINICAL PATHOLOGY 20, 23–24 (2012).

120. Increasingly, states seek to regulate if and how genetic counselors and physicians discuss abortion. For instance, Missouri forbids state-sponsored genetic counseling programs from making a referral for an abortion unless the mother's life is in danger. MO. REV. STAT. § 191.320 (2013); Oklahoma makes it clear that genetic counselors are not required to mention abortion as an option. OKLA. STAT. tit. 63, § 1-568 (2011). Tennessee forbids prenatal testing offered in state programs for a condition that cannot be cured. TENN. CODE ANN. § 68-5-504(a)(2) (2013) ("[P]rocedures or services designed to search out disorders in unborn children that are not treatable shall not be provided for under [this part]."). Arizona and Oklahoma protect doctors from lawsuits if they fail to disclose fetal abnormalities to patients. ARIZ. REV. STAT. ANN. § 12-719.C (2003) (shielding anyone from wrongful birth or wrongful life claims regardless or "birth defect or other adverse medical condition"); OKLA. STAT. tit. 63 § 1-741.12 (2011). Nebraska and Virginia incorporated refusal rights for genetic counselors in the states' licensing laws for genetic counseling. NEB. REV. STAT. § 38-3424 (2013); VA. CODE ANN. § 54.1-2957.21 (2014).

A. *State Laws and Bills*

As noted, Pennsylvania and Illinois prohibited sex-selective abortion decades ago;[121] Arizona,[122] Oklahoma,[123] North Carolina,[124] Kansas,[125] North Dakota,[126] and South Dakota[127] recently passed laws restricting sex-selective abortions. Since 2010, twenty other state legislatures have considered similar legislation seeking to restrict sex-selective abortion.[128]

These bills and statutes are fairly uniform. State legislatures use a template published by Americans United for Life ("AUL"), an anti-abortion, non-profit group.[129] AUL's annual report, *Defending Life*,[130] contains model legislation for states, and in the last several years, the report included a model sex-selective abortion ban.[131] The model legislative findings state that "[t]he United States, along with other countries, has petitioned the United Nations General Assembly to declare sex-selective abortion a crime against women;"[132] that "[w]omen are a vital part of our society and culture and possess the same fundamental human rights as men;" and that "[a] large population of young, unmarried men can be a cause of increased violence and militancy within a society."[133]

121. 18 PA. CONS. STAT. § 3204(c) (1989); 720 ILL. COMP. STAT. 510/6(8) (1975).

122. ARIZ. REV. STAT. ANN. § 13-3603.02 (2010). Note that Arizona is the only state to currently ban both sex- and race-based abortions.

123. OKLA. STAT. tit. 63, § 1-731.2.B (2011).

124. N.C. GEN. STAT. § 90-21.121 (2013).

125. KAN. STAT. ANN. §§ 40-2246–79-3606 (2013).

126. N.D. CENT. CODE § 14-02.1-02 (2013).

127. S.D. CODIFIED LAWS § 34-23A-64 (2011).

128. From 2010 to 2013, states considering sex-selective abortion bans included Arizona, Florida, Georgia, Kansas, North Carolina, North Dakota, Oklahoma, and Wisconsin. *State Center, Monthly State Update: Major Developments in 2010*, GUTTMACHER INST. (Dec. 31, 2010), http://www.guttmacher.org/statecenter/updates/2010/dec.html.

129. *Legislative Victories*, AMS. UNITED FOR LIFE, http://www.aul.org/legislative-resources/legislative-victories/ (last visited Nov. 24, 2014).

130. AMS. UNITED FOR LIFE, DEFENDING LIFE 2013 (2013), http://aul.org/featured-images/AUL-1301_DL13%20Book_FINAL.pdf.

131. AMS. UNITED FOR LIFE, BAN ON ABORTIONS PERFORMED FOR REASONS OF SEX SELECTION, POTENTIAL GENETIC DEFORMITY, OR POTENTIAL DISABILITY 249–59 (2012) [hereinafter AUL MODEL LEGISLATION], *available at* http://www.aul.org/wp-content/uploads/2012/04/model-ban-abortions-sex-selection.pdf.

132. *Id*. at 249.

133. *Id*. at 249–50.

Prohibiting any person from performing an abortion "solely" on account of sex, the AUL Model Legislation lists penalties for states to customize, such as fines, imprisonment of open duration, civil damages, and medical license revocation, as well as relief for the pregnant woman from liability or criminal punishment.[134] The model suggests that states treat women terminating pregnancies because of fetal sex, regardless of their intent, as victims, "entitled to all rights, protections, and notifications afforded to crime victims."[135]

Although many states follow the AUL model, there are some notable differences among bills and statutes.[136] Most state legislation requires that sex be the "sole" reason for abortion,[137] but some laws criminalize terminations in which sex is one of any number of motivations.[138] The North Carolina law prohibits a provider from terminating a pregnancy "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 unborn child."[139] However, the same law clarifies that there is no "affirmative duty on a physician to inquire as to whether the sex of the unborn child is a significant factor."[140] The Arizona statute does not ban abortion "solely" because of sex; the law prohibits abortion "based on the sex or race of the child or the race of a parent of that child."[141] Unlike North Carolina, Arizona requires physicians to

134. *Id*. at 254–55 ("Any physician or other person who intentionally or knowingly violates this Act is guilty of a [*insert appropriate offense classification*].").

135. *Id.* at 255.

136. With the exception of Kansas, New York, Florida, New Jersey, and Ohio, state bills specifically track the AUL Model Legislation's "with knowledge" language, imposing penalties on abortion performed intentionally for sex selection. *See* AUL MODEL LEGISLATION, *supra* note 131, at 253. For a legislative example, see H.R. 98, 214 Gen. Assemb., Reg. Sess. (Va. 2014).

137. *See* AUL MODEL LEGISLATION, *supra* note 131, at 253 (adopted by various states). The model legislation makes an exception for "performance of an abortion because the unborn child has a genetic disorder that is linked to the unborn child's sex." *Id*. It also preserves application of the law after viability "[i]f this Section is held invalid as applied to the period of pregnancy prior to viability." *Id.*

138. For example, in addition to examples provided in the text, proposed legislation in Florida, Michigan, New Jersey, and Ohio does not contain the word "solely." *See* H.R. 845, 2013 Leg., Reg. Sess. (Fla. 2013); H.B. 5644, 97th Leg., 2014 Reg. Sess. (Mich. 2014); H.R. 2157, 215th Leg., 2012 Reg. Sess. (N.J. 2012); H.B. 7, 129th Gen. Assemb., 2012 Reg. Sess. (Ohio. 2012).

139. N.C. GEN. STAT. § 90-21.121(a) (2013).

140. *Id.* § 90-21.121(b).

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

sign an affidavit stating that the abortion is not based on sex or race.[142] The South Dakota law prohibits sex-selective abortions that are "either solely or partly due to the unborn child's sex."[143] Moreover, South Dakota now requires physicians to report to a state agency: "(a) Whether the pregnant mother used a sex-determining test; (b) What type of sex-determining test the pregnant mother used; and (c) The approximate gestational age of the unborn child, in weeks, when the test was taken."[144] Bills proposed in West Virginia and Oregon do not require intent or knowledge for a physician to be found guilty of performing a sex-selective abortion.[145]

Also following the AUL Model Legislation, North Dakota enacted, and Missouri has considered, abortion bans for genetic abnormalities, detected by prenatal genetic tests. The North Dakota legislation prohibits physicians from performing abortions solely because "the unborn child has been diagnosed with either a genetic abnormality or a potential for a genetic abnormality."[146] Legislators in Missouri introduced a similar bill in 2013 that punishes doctors for performing abortions with knowledge that the termination is sought solely because the child has been diagnosed with a genetic abnormality or a potential for a genetic abnormality.[147] This legislation moves in the opposite direction of the few states that have explicitly permitted abortion because of serious genetic conditions.[148]

B. *The Federal Bill*

PRENDA, first introduced as the Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act, is the proposed

142. *Id.* § 36-2157 (2011).

143. S.D. CODIFIED LAWS § 34-23A-10.1(3) (2014).

144. *Id.* § 34-23A-34 (2014).

145. H.R. 4034, 77th Leg. Assemb., Reg. Sess. (Or. 2014); H.R. 2371, 81st Leg., Reg. Sess. (W. Va. 2013) (noting that the physician is required to take "reasonable measures" to determine the motivation of the woman).

146. H.R. 1305, 63d Leg. Assemb. § 2(1)(b) (N.D. 2013).

147. H.R. 386, 97th Gen. Assemb., Reg. Sess. (Mo. 2013) (noting that a violation of the law could be a class A misdemeanor or a class D felony).

148. *See, e.g.*, MD. CODE ANN., HEALTH–GEN. § 20-209(b)(2)(ii) (LexisNexis Repl. Vol. 2009); TEX. HEALTH & SAFETY CODE ANN. § 170.002(b)(3) (West 1998); UTAH CODE ANN. § 76-7-302(3)(b)(ii) (LexisNexis 2012).

federal legislation regulating sex-selective abortions.[149] The present Congress will likely not pass PRENDA and, even if it did, President Barack Obama would likely not sign it. However, the bill has been useful to the six states that recently passed sex-selective abortion bans and the twenty states that considered similar bills.[150]

Under PRENDA, any person who knowingly performs or facilitates "an abortion undertaken for purposes of eliminating an unborn child of an undesired sex . . . [or] race"[151] may be fined; sentenced to up to five years in prison; enjoined from further medical practice; and face civil action by the patient, by the father of the fetus, and by the parents of a minor patient.[152] PRENDA does not punish women that terminate their pregnancies.

Repeating the language in the AUL Model Legislation, the first paragraphs of PRENDA read as a call for women's "fundamental human rights."[153] The bill refers to studies described in Part I as evidence of son preference in the United States, specifically in immigrant communities "tracing their origins to countries where sex-selection abortion is prevalent."[154] Sex selection is then described as "barbaric" and "gender-based violence, predicated on sex discrimination."[155] Invoking the U.S. experience with eugenics,[156] PRENDA, quoting the ASRM, states that sex selection

149. Prenatal Nondiscrimination Act of 2011, H.R. 447, 113th Cong. (2013); Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011, H.R. 3541, 112th Cong. (2011); Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2009, H.R. 1822, 111th Cong. (2009).

150. *See supra* notes 121–28 and accompanying text.

151. PRENDA § 250(h)(2)–(3).

152. *Id.* § 250(a)–(b).

153. *Id.* § 2(a)(1)(A); AUL MODEL LEGISLATION, *supra* note 131, at 4.

154. PRENDA § 2(a)(1)(F); *see also supra* notes 168–71 and accompanying text.

155. PRENDA § 2(a)(1)(D).

156. PRENDA's section on race receives far less attention than sex selection and grounds its legislative justification in civil rights and anti-eugenics movements:

> A thorough review of the history of the American population control movement and its close affiliation with the American Eugenics Society reveals a history of targeting certain racial or ethnic groups for "family planning." This history likely contributes to the current statistic that a Black baby is five times as likely to be aborted as a White baby, often in a federally subsidized clinic.

Id. § 2(a)(2)(D)–(E). However, as many commentators have noted rightly, the troubling and confusing invocation of race and racial eugenics "promote[s] anti-immigrant sentiments, stigmatize[s] and discriminate[s] against women of color by suggesting they can't be trusted to make their own reproductive health care decisions." Pieklo, *supra* note 15.

"trivialize[s] human reproduction by making it depend on the selection of non-essential features of offspring."[157]

Sex-selective abortions, according to PRENDA, "are often the product of violent coercion,"[158] and such coercion exacerbates the vulnerability women face in pregnancy.[159] PRENDA claims that women who abort because of fetal sex feel "guilt, shame and sadness over their inability to 'save' the daughters they had aborted."[160] According to the bill, echoing other anti-abortion arguments, women terminating pregnancies experience mental illness, depression, and increased risk of physical and chronic pain.[161]

PRENDA also emphasizes the purported costs of sex imbalance:

> Experts worldwide document that a significant sex-ratio imbalance in which males numerically predominate can be a cause of increased violence and militancy within a society. Likewise, an unnatural sex-ratio imbalance gives rise to the commoditization of humans in the form of human trafficking, and a consequent increase in kidnapping and other violent crime . . . . Sex-selection abortions have the effect of diminishing the representation of women in the American population, and therefore, the American electorate . . . . Sex-selection abortion reinforces sex discrimination and has no place in a civilized society.[162]

PRENDA invokes human rights arguments and cites to the work of the UN Commission on the Status of Women.[163] The bill also refers to the work of political philosopher Amartya Sen, who esti-

157. PRENDA § 2(a)(1)(K) (citing a 2004 Ethics Committee Opinion as well as the ACOG 2007 Ethics Committee Opinion, Number 360). Seema Mohapatra argues that PRENDA misrepresents the ASRM's opinion in that the Society has reserved condemnation of sex selection until there is better proof of harm caused by the practice. Mohapatra, *supra* note 85, at 714.

158. PRENDA § 2(a)(1)(L)(i).

159. *See id.* § 2(a)(1)(L)(ii)–(iii) (listing various forms of coercion caused by sex selection situations, as well as stating that homicide is "the most common cause of death for pregnant women").

160. *Id.* § 2(a)(1)(L)(iii).

161. *Id.* § 2(a)(1)(M). *See generally* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694 (2008) (describing the strategies of anti-abortion advocates, as well as the writings of the Supreme Court of the United States, that seek to restrict abortion under the banner of protecting women).

162. PRENDA § 2(a)(1)(N)–(P).

163. *Id.* § 2(a)(1)(H) (stating that the United States led a delegation at the U.N. Commission session condemning sex-selective abortion).

mated that 100 million women are missing because of poor treatment of girls and preference for boys.[164]

PRENDA situates the United States as contributing to the world epidemic of gendercide.[165] The bill makes two claims about the consequences of leaving sex selection unregulated: the first is that the United States will become a "safe haven" for parents seeking to evade another country's ban.[166] The second is that the United States is out of step with international condemnation of sex selection by failing to pass a law criminalizing it.[167] PRENDA compares the United States to India and China where son preference has been addressed by national legislation.[168] The *Replacing Myths with Facts* report notes, however, that male-biased sex ratios are higher in several other countries and those countries are not overly represented in U.S. immigrant communities.[169] And a number of countries legislate to express disapproval of the practice but do not have skewed sex ratios.[170] Many other countries' laws that pertain to sex selection in IVF procedures or sperm sorting do not explicitly prohibit abortion.[171]

164. *Id.* § 2(a)(1)(I); Amartya Sen, *More Than 100 Million Women Are Missing*, 37 N.Y. REV., Dec. 20, 1990, at 61 (1990). Sen noted the paradox that son preference persists even at a moment when economic development in varying countries should be improving the lives of women and girls. *Id.* However, Sen did not specifically address sex-selective abortion. *See also* Amartya Sen, *Gender Inequality and Theories of Justice*, *in* WOMEN CULTURE & DEVELOPMENT 259 (Martha C. Nussbaum & Jonathan Glover eds., 1995) (discussing gender inequalities in various fields).

165. *See* PRENDA § 2(a)(1)(E)–(F).

166. *Id.* § 2(a)(1)(J).

167. *Id.*; *see also* Lusine Aghajanova & Cecilia T. Valdes, *Sex Selection for Nonhealth-Related Reasons*, 14 VIRTUAL MENTOR: AM. MED. ASS'N J. ETHICS 105, 107 (2012), http://www.virtualmentor.ama-assn.org/2012/02/pdf/ccas3-1202.pdf (stating that five countries prohibit sex selection "for any reason, while 31 countries prohibit it for social or nonmedical reasons").

168. PRENDA § 2(a)(1)(J).

169. REPLACING MYTHS WITH FACTS, *supra* note 91, at 8.

170. *Compare id.* at 9 tbls.1 & 2 (listing countries with skewed sex ratios), *with id. at* 10 & 33–34 n.45 (citing countries that have legislated on sex selection practices but do not have skewed sex-ratios at birth).

171. *See, e.g.*, Assisted Human Reproduction Act, S.C. 2004, c. 2 (Can.) (banning sex selection procedures to determine fetal sex, like sperm sorting or in vitro sex determination, but not banning sex-selective abortion or sex determination technologies during pregnancy). Australia's sex selection ban largely exists through national guidelines prohibiting nonmedically necessary sex selection in all accredited facilities and physician's offices. *See Review of Sex Selection*, HUMAN FERTILISATION & EMBRYOLOGY AUTH. (Feb. 1, 2012), http://www.hfea.gov.uk/517.html. South Australia and Western Australia have banned sex selection using reproductive technology when there is no risk of genetic disorder. *See Sex Selection & Abortion: Australia*, LIB. OF CONG. (Feb. 28, 2014), http://www.

However, PRENDA's sponsor, Representative Trent Franks, called sex selection a common ground issue for advocates and opponents of abortion.[172] Representative Franks of Arizona emphasized the bill's symbolic importance, responding to the problems of enforcing sex-selective abortion bans.[173] In most states there are no requirements for patients to disclose their reasons for abortions.[174] Even if state laws require providers to ask patients to disclose their motives, clinics are not equipped with lie-detector tests and cannot prohibit a patient from visiting another provider.[175] Thus, after testing for any fetal characteristic, the larger challenge of how a state could dictate and police patients' decisions remains.

One may not believe that Representative Franks seeks common ground with reproductive rights supporters, just as one may seriously doubt that PRENDA is an authentic call for women's rights.[176] These laws are one of several anti-abortion strategies seeking to criminalize all abortion in the United States.[177] But these bans enjoy popularity in part because opposition to sex selection has a long and rich history steeped in women's rights ac-

loc.gov/law/help/sex-selection/australia.php.

172. Lauren Vogel, *Sex-Selective Abortions: No Simple Solution*, 184 CAN. MED. ASSOC. J. 286, 286 (2012). The common ground between abortion supporters and opponents, according to the congressional materials supporting PRENDA, is "the desire to combat discrimination." H.R. REP. NO. 112-496, at 15 (2012).

173. *See* Vogel, *supra* note 172, at 286–87 (discussing the difficulty of enforcing sex-selection bans in various countries, but reasoning that "it's also true that sometimes the law is a teacher. . . . There's something about the law saying that this is something as a society that we collectively agree is wrong that begins to cause people to look at their own conscience in that regard"); *see also* Kohm, *supra* note 18, at 120 (noting that the use of the adjective "solely" could render the statute virtually useless if a mother simply states she is aborting based on non-sex-selection reasons).

174. A few states now require physicians to record and to report to law enforcement or a governmental agency the reasons patients give for seeking abortions. *See, e.g.*, FLA. STAT. § 390.0112 (2013); OKLA. STAT. tit. 63, § 1-738k (2010); S.D. CODIFIED LAWS § 34-23A-34 (2004).

175. *See* Kohm, *supra* note 18, at 120 ("[I]t is impossible to estimate how many [abortions] are truly performed for purposes of sex selection, as women never have to disclose their reason for obtaining an abortion.").

176. Mohapatra, *supra* note 85, at 720 ("In the United States, PRENDA and the sex-selective state laws seem more concerned with weakening a general right to choose rather than a sincere commitment to gender equality. In contrast, countries in Asia and Europe aim to curb son preference by restricting access to gender identification technology and abortion services.").

177. *See* REPLACING MYTHS WITH FACTS, *supra* note 91, at 21 ("Restricting access to abortion is the primary motivation for sex-selective abortion bans. All the bans have been proposed and supported by people who oppose abortion generally.").

tivism. Gender discrimination and violence against women have been the narratives defining an international agenda against sex selection that helped justify legal intervention abroad.[178]

The next part describes the origins of the violence and discrimination narratives of PRENDA and similar bills. It demonstrates how the debate in the United States relied on the language of an international human rights movement and advanced a solution—a criminal ban—that reproductive rights advocates sought to avoid.

III. SEX SELECTION GOES ABROAD AND COMES HOME

Over the last thirty years, commentators have made varying moral and ethical arguments against sex selection—that son preference is inherently sexist, stereotyped, and immoral.[179] For some ethicists, sex selection for any reason is "steeped in the same kind of gendered social norms and expectations as preferences that lead to sex ratio imbalances in other countries."[180] Many have worried that sex determination is the first step down a slippery road of eugenics, genetic manipulation, and genetic determinism, allowing potential parents to select for nonmedical, genetic characteristics.[181]

As repeated in contemporary debates, sex selection is the product of, and leads to, widespread discrimination and violence against women. Writing in 1968 in response to the emergence of amniocentesis, sociologist Amitai Etzioni reported "both professional forecasters of the future and leading scientists see sex con-

178. *See* Aghajanova & Valdes, *supra* note 167, at 107–08; Mohapatra, *supra* note 85, at 718.

179. *See* Jesudason & Baruch, *supra* note 35, at 597 ("There are serious social and ethical concerns at stake in sex selection that require deeper, more long-term consideration . . . ."). *But see* Robertson, *Genetic Selection*, *supra* note 18, at 457 (arguing that "[g]iven the cost and inconvenience associated even with preconception techniques, couples are not likely to use such methods in such numbers that they will affect gender ratios or otherwise harm the interests of women").

180. Jesudason & Baruch, *supra* note 35, at 597; *see also* Wertz & Fletcher, *Fatal Knowledge?*, *supra* note 18, at 25.

181. *See* Danis, *supra* note 18, at 240–41; *see, e.g.*, Mark Evans et al., *Attitudes on the Ethics of Abortion, Sex Selection, and Selective Pregnancy Termination Among Health Care Professionals, Ethicists, and Clergy Likely to Encounter Such Situations*, 164 AM. J. OBSTETRICS & GYNECOLOGY 1092, 1092–99 (1991).

trol as a mass practice in the foreseeable future."[182] Etzioni expressed the same concerns of current sex selection bills: Parents would be susceptible to son preference, given then-recent studies that parents preferred boys to girls,[183] and that "cumulative male surplus will thus produce a society with some of the rougher features of a frontier town,"[184] resulting in "the diminution of the number of agents of moral education and the increase in the number of criminals."[185]

Women's rights advocates have made similar arguments about the effect of sex selection. Focusing on China, India, and a few other countries, women's rights activists brought to light the disproportionate ratio of sons to daughters and the booming business of ultrasound technology for sex determination.[186]

Yet activists have not agreed about the best mode or form of regulation. Reproductive rights advocates may not have wanted prohibitions on abortion, but their interventions in sex selection

182. Etzioni, *supra* note 114, at 1108.

183. *Id*. A 2011 Gallup Poll suggested that Americans prefer boys to girls:

> If Americans could have only one child, they would prefer that it be a boy rather than a girl, by a 40% to 28% margin, with the rest having no preference or no opinion on the matter. These attitudes are remarkably similar to what Gallup measured in 1941, when Americans preferred a boy to a girl by a 38% to 24% margin.

Frank Newport, *Americans Prefer Boys to Girls*, *Just as They Did in 1941*, GALLUP (June 23, 2011), http://www.gallup.com/poll/148187/Americans-Prefer-Boys-Girls-1941.aspx?utm_source=alert&utm_medium=email&utm_campaign=syndication&utm_content=morelink utm_term=USA.

184. Etzioni, *supra* note 114, at 1109.

185. *Id.* (invoking race and class dynamics (and stereotypes)). Etzioni wrote, "[i]nterracial and interclass tensions are likely to be intensified because some groups, lower classes and minorities specifically, seem to be more male oriented than the rest of the society." *Id.*

186. U.N. Dep't of Pub. Info., *Incest, Rape and Domestic Violence*, 2, U.N. Doc. DPI/1772/HR (Feb. 1996) [hereinafter *Incest, Rape and Domestic Violence*], http://www.un.org/rights/dpi1772e.htm ("According to reports from India, genetic testing for sex selection has become a booming business, especially in the country's northern regions. Indian gender-detection clinics drew protests from women's groups after the appearance of advertisements suggesting that it was better to spend $38 now to terminate a female foetus than $3,800 later on her dowry. A study of amniocentesis procedures conducted in a large Bombay hospital found that 95.5 per cent of foetuses identified as female were aborted, compared with a far smaller percentage of male foetuses."); *see also, e.g.*, Christopher S. Wren, *Old Nemesis Haunts China on Birth Plan*, N.Y. TIMES (Aug. 1, 1982), http://www.nytimes.com/1982/08/01/world/old-nemesis-haunts-china-on-birth-plan.html.

abroad, reflecting a disagreement among feminists, may have inadvertently promoted criminal bans.[187]

A. *Responses to Sex Selection Abroad*

International human rights law rejects sex selection. The 180 signatories of the International Conference on Population and Development Programme of Action ("ICPD") pledged "[t]o eliminate all forms of discrimination against the girl child . . . which results in . . . prenatal sex selection."[188] In 2011, the World Health Organization, in collaboration with the United Nations Population Fund Activities ("UNFPA"), UN Women, and other organizations, issued a statement denouncing sex selection.[189] The meaning of "sex selection" varies in these documents and U.N. documents often list different, cultural practices together.[190] Son preference can happen prenatally, with abortion or with PGD, or after birth through neglect of girl children or female infanticide.[191]

Public attention to the particular issue of sex-selective abortion grew out of the population control movement and the politics of procreative decision-making. Beginning in the 1950s and gather-

187. This part draws from chapter two of JANET HALLEY ET AL., GOVERNANCE FEMINISM: AN INTRODUCTION 14, 20 (forthcoming 2015) (on file with author).

188. International Conference on Population and Development, Cairo, Egypt, Sept. 5–13, 1994, *Report of the International Conference on Population and Development*, ¶ 4.16(a), U.N. Doc. A/CONF.171/13 (Oct. 18, 1994) [hereinafter *Int'l Rep. on Population & Dev.*] Moreover, the ICPD Programme for Action states: "Governments are urged to prohibit female genital mutilation" and to "prevent infanticide, prenatal sex selection, trafficking in girl children and use of girls in prostitution and pornography." *Id.* ¶ 4.22–.23

189. WORLD HEALTH ORG., PREVENTING GENDER-BIASED SEX SELECTION: AN INTERAGENCY STATEMENT OHCHR, UNFPA, UNICEF, UN WOMEN AND WHO v–vi (2011) [hereinafter WHO INTERAGENCY STATEMENT], *available at* http://whqlibdoc.who.int/publications/2011/9789241501460_eng.pdf.

190. The Beijing Platform states: "Acts of violence against women also include forced sterilization and forced abortion, coercive/forced use of contraceptives, female infanticide and prenatal sex selection." Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, *Report of the Fourth World Conference on Women*, ¶ 115, U.N. Doc. A/CONF. 177/ 20 (Oct. 17, 1995), *available at* http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en.

191. *See* Dinesh C. Sharma, *Widespread Concern Over India's Missing Girls*, 362 LANCET 1553, 1553 (2003) (explaining that female infanticide is still a major problem in some countries); Ram Mashru, *It's a Girl: The Three Deadliest Words in the World*, INDEP. (Jan. 18, 2012, 11:46 AM), http://blogs.independent.co.uk/2012/01/16/it's-a-girl-the-three-deadliest-words-in-the-world/ ("Gendercide in South Asia takes many forms: baby girls are killed or abandoned if not aborted as foetuses. Girls that are not killed often suffer malnutrition and medical neglect as sons are favoured when shelter, medicine and food are scarce.").

ing momentum in the 1960s, demographers predicted unmanageably high birth rates, leading to shortages of food and energy resources.[192] In the United States, both major political parties listed population control as a legislative priority. Conservatives tended to focus on stemming the spread of communism, and progressives tended to focus on the relationship between stretched resources, hunger, and poverty.[193]

American-backed organizations, such as the Ford Foundation and the Population Council, and donors like John D. Rockefeller III, Hugh Moore, and Lewis Strauss, funded population control activities.[194] These efforts helped create the UNFPA. In 1967, United Nations Secretary General U Thant proposed creating a fund to address population issues through research, training, and advising.[195] The technical nature of the proposed program coupled with the controversial topic of family planning led the United Nations to create a separate organization that relied exclusively on voluntary contributions.[196] The program was transferred to the United Nations Development Program ("UNDP") when it became operational in 1969,[197] and, by 1972, fifty-two countries had made voluntary contributions.[198] As a result of this fundraising success, the UNFPA moved from the UNDP to its present place as a subsidiary organ of the United Nations General Assembly.[199] The U.S. government took a crucial role in forming the UNFPA and

192. *See Republican Party Platform of 1968*, PRESIDENCY (Aug. 5, 1968), http://www.presidency.ucsb.edu/ws/?pid=25841; Written Statement from Matthew Connelly, Prof. of History, Colum. U., to the H. Comm. on Foreign Affairs, Subcomm. on Africa, Global Health, Global Human Rights, and International Organizations, *Confronting the Legacies of Population Control: Historical Perspectives on the Global Spread of Sex-Selective Abortion*, 3–4 (2013) (referencing PAUL R. EHRLICH, THE POPULATION BOMB 18–19 (1971)).

193. *See* MICHELLE GOLDBERG, THE MEANS OF REPRODUCTION: SEX, POWER, AND THE FUTURE OF THE WORLD 41, 44–45 (2009); *see also Republican Party Platform of 1968*, PRESIDENCY 8–10 (Aug. 5, 1968), http://www.presidency.ucsb.edu/ws/?pid=25841.

194. HVISTENDAHL, *supra* note 113, at 32–33.

195. RACHEL SULLIVAN ROBINSON, WORKING GROUP ON U.N. POPULATION FUND ACTIVITIES, UNFPA IN CONTEXT: AN INSTITUTIONAL HISTORY 6–7 (2010), *available at* http://www.cgdev.org/doc/UNFPA-in-Context.pdf.

196. *Id.* at 7.

197. *Id.* at 6–7.

198. *Id.* at 8.

199. *Id.* The UNFPA continued to share a governing council with the UNDP until 1980. *Id.*

the United States was the largest contributor for the first decade of the UNFPA's existence.[200]

The UNFPA became a leader for a population control movement that initially appeared indifferent to sex selection.[201] In the 1980s, women's rights advocates as well as anti-abortion advocates criticized the UNFPA for complicity in coercive abortions under China's one-child policy (implemented in 1979).[202] Historian Matthew Connelly argued before a Congressional hearing that

> American scientists, aid officials, and activists played leading roles . . . promot[ing] sex-selective abortion as a potential solution to what they saw as the population explosion . . . [I]t is precisely because the U[.]S[.] took a leading role in advocating population control worldwide that we cannot pretend that we have no responsibility for the consequences.[203]

Women's rights advocates mobilized against population politics that implicitly or explicitly encouraged forced sterilization, abortion, and contraceptive use.[204] The 1974 U.N. World Population Conference agenda included only a brief mention of individuals'

200. Chad M. Gerson, *Toward an International Standard of Abortion Rights: Two Obstacles*, 5 CHI. J. INT'L L. 753, 760 (2005).

201. Mara Hvistendahl's account of the U.S. influence on the population control movements in India was cited as a shameful past in a recent congressional hearing. *India's Missing Girls: Hearing Before the Subcomm. on Africa, Global Health, Global Human Rights, & International Organizations of the H. Comm. on Foreign Affairs*, 113th Cong. 24–25 (2013) [hereinafter *Hearing on India's Missing Girls*] (statement of Sabu M. George) (claiming that "American government and foundations, institutions . . . have spent up to 60 years advocating and funding population control measures in India").

202. *See* 131 CONG. REC. S. 4133 (daily ed. Apr. 4, 1985) (statement of Jeremiah Andrew Denton, Jr.). In response, in 1984, the Reagan Administration issued a now infamous executive order that prohibited recipients of U.S. foreign aid, such as women's rights non-governmental organizations outside of the United States, from offering abortion services (unless there was a threat of rape, incest, or a threat to a woman's life), providing counseling or referral for abortion, or lobbying for liberalized abortion laws. This order, also known as the "global gag rule," has been a partisan issue. President Ronald Reagan introduced it in 1984, President Bill Clinton repealed it in 1992, President George W. Bush reinstated it in 2001, and most recently, President Obama repealed it in 2009. Democrats in the House of Representatives offered an unsuccessful bill to permanently repeal the global gag rule. Global Democracy Promotion Act, H.R. 2639, 112th Cong. (2011).

203. Connelly, *supra* note 192, at 3, 9.

204. *See* HVISTENDAHL, *supra* note 113, at 121–22 (noting how feminist groups and others on the left organized and advocated for a more humane approach to population control); *see also* Reed Boland, *The Environment, Population, and Women's Human Rights*, 27 LEWIS & CLARK J. ENVTL. L. 1137, 1160, 1164 (1997) (discussing the difficulties of implementing population control measures that respect human rights). *But see* Mary Ziegler, *The Framing of a Right to Choose:* Roe v. Wade *and the Changing Debate on Abortion Law*, 27 LAW & HIST. REV. 281, 282 (2009) (noting the complicated relationship between the population control movement and the abortion rights movement in the United States).

rights to reproductive decision-making.[205] Women's rights advocates committed time and organizing efforts to change the conversation from birth rates to reproductive wellness and choice. They achieved remarkable success in reshaping the population and development agenda to include gender equality and reproductive rights.[206] The 1994 ICPD, which emphasized both human rights and women's empowerment, represents the culmination of that activism.[207]

The means by which countries should curb sex selection, however, remained a thorny issue. Women's rights advocates, on the one hand, condemned son preference, but on the other hand, resisted laws restricting abortion or testing decisions. Reproductive rights supporters have taken two approaches to this issue. The first is an anti-discrimination approach, now adopted by United Nations bodies, such as the UNFPA, and advocated by women's rights organizations. The goal of this approach is to root out gender inequality through positive law reform and educational campaigns, which are solutions that notably avoid banning sex-based abortion. International organizations and women rights groups have been very careful about how they refer to sex-selective abortion.[208] The second approach treats sex selection as violence, casting son preference both as private violence against women and public violence affecting society when men outnumber women. These narratives coexist in PRENDA, but PRENDA capitalizes

205. Rep. of the U.N. World Population Conference, 1974, ¶ 32, U.N. Doc. E/CONF. 60/19 (1974).

206. Feminists intervened to shape the population control agenda in the 1960s and 1970s. For example, graduate students in 1969 founded Concerned Demography. HVISTENDAHL, *supra* note 113, at 121.

207. Alicia Ely Yamin, *Sexual Reproductive Health, Rights, and MDG 5: Taking Stock, Looking Forward*, *in* THE MILLENNIUM DEVELOPMENT GOALS AND HUMAN RIGHTS: PAST, PRESENT AND FUTURE 232, 235 (Malcolm Langford, Andrew Sumner & Alicia Ely Yamin eds., 2013); *Int'l Rep. on Population & Dev.*, *supra* note 188, ¶ 4.1. Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, ch. 1, 3, U.N. Doc. DPI/1766/Wom, Annex 1 (Feb. 1996) [hereinafter *Beijing Platform for Action*]; Dianne Otto, *The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade*, 10 MELB. J. INT'L L. 11, 18–19 (2009).

208. The World Bank's World Development Report, "Gender Equality and Development," calls for two actions, although it does not mention abortion: "First, laws need to be enacted and enforced to deal with the abuse of sex selection technologies," and second, policies should "enhance household perceptions of the value of daughters." THE WORLD BANK, WORLD DEVELOPMENT REPORT 2012: GENDER EQUALITY AND DEVELOPMENT 23–24 (2012).

on the latter's ambivalence toward banning sex-selective abortion.[209]

1. The Discrimination Approach

PRENDA begins, "Son preference is reinforced by the low value associated . . . with female off spring . . . . 'Son preference' is one of the most evident manifestations of sex or gender discrimination in any society."[210] This language could have been lifted from a 2011 United Nations inter-agency statement on sex selection. As stated by UN Women, "[p]re-natal sex selection and sex selective abortions are forms of discrimination against women and are symptomatic of the devalued status of women in society."[211] U.N. documents—publications that may not share PRENDA's regulatory solution—explain son preference as a problem of legal and cultural discrimination made possible with technology for sex determination.[212]

International human rights bodies and women's rights advocates call for formal law reform that puts women and girls on equal footing with men and boys. This includes amending inheritance laws, guaranteeing equal pay and access to paid employment, and eradicating dowry practices.[213] In addition, reports call for financial incentives for parents with daughters, such as housing and pension payments, college and school scholarships for girls, and "awareness-raising programmes conducted by both governments and nongovernmental organizations."[214] As a complement to formal law reform, advocates press for community ed-

209. There is rich and substantial literature on the nature and meaning of violence against women. In describing the limited accounts of the violence of sex selection, this article does not intend to conflate societal, individual, state, cultural, or other forms (and consequences) of violence against women. *See generally* KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 7–15, 18–30 (2008) (complicating types of violence, state power, and feminist activism). For a full discussion of the feminist arguments on violence described in this and the following section, see section two of chapter one of JANET HALLEY ET AL., GOVERNANCE FEMINISM: AN INTRODUCTION (forthcoming 2015) (on file with the author).

210. PRENDA § 2(a)(1)(E).

211. UN WOMEN, HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN: "HARMFUL PRACTICES" AGAINST WOMEN 4 (2012).

212. *See id.* at 4; *see also* WHO INTERAGENCY STATEMENT, *supra* note 189, at 6; Cherry, *supra* note 18, at 161–63, 168–73.

213. WHO INTERAGENCY STATEMENT, *supra* note 189, at vi.

214. *Id.* at 7.

ucation and political awareness aimed at the reasons parents might prefer boys to girls.[215]

Preference for non-discrimination measures reflects discomfort with or distrust of restrictions on abortion. Mara Hvistendahl recounts an interview with a UNFPA officer who stated, "[H]ow do you hold on to this discrimination tag and at the same time talk about safe abortion and access to it?"[216] In accord with an international reproductive rights agenda, U.N. documents try to dissuade countries from restricting abortion (based on the reason for termination) or overly limiting access to ultrasound or other technology. Hvistendahl argues that by the 1990s most women's rights advocates were too attached to abortion rights to contemplate laws prohibiting sex-selective abortions.[217] Indeed, since the 1994 ICPD, women's rights advocates have gained clearer recognition of abortion rights at international and regional levels; there is a global movement of women's rights activists that has won international support for unencumbered rights to abortion.[218]

215. Some advocates connected sex selection to women's experiences as mothers who negotiate cultural sexism for strategic reasons. Bans on certain practices (as well as educational campaigns) were instituted by "outsiders" who "change community by force" by enacting a type of "cultural imperialism." Rosemarie Tong, *Blessed Are the Peacemakers: Commentary on Making Peace in Gestational Conflict*s, 13 THEORETICAL MED. 329 (1992); Deniz Kandiyotti, *Bargaining with Patriarchy*, 2 GENDER & SOC'Y 274, 274 (1988) (discussing woman-based strategies for optimizing life options in the face of oppression). Gail Weiss, for example, applied work on the ethic of care to the sex selection debate. Drawing from the work of Sara Ruddick, Weiss argued that women use "maternal thinking" when they deploy sex selection for the economic and social standing of their families. Gail Weiss, *Sex-Selective Abortion: A Relational Approach*, 10 HYPATIA 202, 207 (1995) (citing SARA RUDDICK, MATERNAL THINKING: TOWARD A POLITICS OF PEACE (1989)); *see also* Sarah Ditum, *Why Women Have a Right to Sex-Selective Abortion*, GUARDIAN (Sept. 19, 2013 7:40 PM), http://www.theguardian.com/commentisfree/2013/sep/19/sex-selective-abortion-women-right ("But what about when a pregnant woman lives in a society that gives her real and considerable reason to fear having a girl? . . . In those situations, a woman wouldn't just be justified in seeking sex selective abortion; she'd be thoroughly rational to do so.").

216. HVISTENDAHL, *supra* note 113, at 150.

217. *Id.* at 150–51; *see also* MARY ANN WARREN, GENDERCIDE: THE IMPLICATIONS OF SEX SELECTION 104 (1985) (discussing whether sex selection is an acceptable reason for abortion, and noting that because early abortion in general "raises no serious moral issues, then early sex-selective abortion is morally no more problematic than preconceptive sex selection"). *See generally* ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM v–vii, 286–92, 295–301 (1984) (describing strategies that advance autonomy and privacy arguments, but noting that abortion advocates in the 1980s understood those arguments' limitations and contradictions).

218. *See also* Rachel Rebouché, *How Reproductive Rights Travel*, 24 SOC. & LEGAL STUD. 3–4 (forthcoming 2015) (describing the culmination of women's rights activism around an international right to abortion).

That activism borrows from liberal feminist ideas about women's rights to autonomy—ideas that have been formative to U.S. abortion rights.[219] As described by April Cherry, "[T]he principles of liberalism and liberal feminism demand that each individual woman be permitted to make choices regarding the continuation of her pregnancy using whatever criteria she wishes. Prohibitions against sex-selective abortion are in conflict with these principles."[220] The UNFPA's position is the same—that restricting access to certain reproductive technologies or to safe abortion threatens the human rights of women.

At the same time, evidence of sex-selective practices has made education and political awareness campaigns seem insufficient.[221] Sex selection as violence, with an implicit support for prohibition or criminalization, identifies son preference as a universally abhorrent and abusive practice—an argument available for cooptation by anti-abortion activists.

2. The Violence Approach

Sex selection as violence—both violence against individual women and society-level violence—also characterizes international human rights law. The Fourth World Conference on Women, the Beijing Declaration and Platform for Action (the "Beijing Platform for Action") defines sex selection as an act of violence: "Acts of violence against women also include forced sterilization and forced abortion, coercive/forced use of contraceptives, female infanticide and prenatal sex selection."[222] UN Women lists sex selection with "harmful cultural or traditional practices," which include "female genital mutilation, female infanticide, . . . child marriage, forced marriage, dowry-related violence, acid at-

219. Sital Kalantry notes, however, that "advocating for a universal opposition to prohibitions on sex selection is another form of imperialist feminism—exporting mainstream American feminism to other parts of the world." Sital Kalantry, *Sex Selection in the United States and India: A Contextualist Feminist Approach*, 18 UCLA J. INT'L L. & FOREIGN AFF. 61, 78 (2013).

220. Cherry, *supra* note 18, at 207.

221. *See generally* Kalantry, *supra* note 219, at 71–78.

222. *Beijing Platform for Action*, *supra* note 207, ¶ 115. Hvistendahl reports that UNFPA officers are warned to "stay away" from the Beijing definition, because the Platform's treatment of sex selection could imply support for abortion restrictions and for fetal personhood. HVISTENDAHL, *supra* note 113, at 153.

tacks, . . . 'hounor' crimes, and maltreatment of widows."[223] The United Nations Department of Public Information grouped sex-selective abortion with infanticide and neglect or denial of nutrition, basic health care, or education for daughters: "Some females fall prey to violence before they are born, when expectant parents abort their unborn daughters, hoping for sons instead."[224]

Violence claims hold individual women blameless: Women who abort female fetuses suffer coercion and are the likely subjects of domestic violence.[225] Internal directives of the UNFPA "instruct employees to emphasize the powerlessness of women requesting sex selection."[226] Likewise, PRENDA asserts that pregnant women are subject "to varying degrees of verbal and physical abuse, which may be to the point of actually inducing a sex-selection abortion."[227] Pregnant women are thus victims and not decision-makers.[228] Radical feminists have made a similar argument in that they question if women can ever exercise free choice in contexts in which men subordinate women.[229] Catharine MacKinnon and Adrienne Rich, for example, entered the post-*Roe* debate to argue that because all sex was coerced, abortion liberalization was a means to provide cover for men's sexual exploitation of women.[230] Thus, it would be impossible to speak of unwanted

223. U.N. Dep't of Econ. & Soc. Affairs, *Supplement to the Handbook for Legislation on Violence Against Women: "Harmful Practices" Against Women*, 1, U.N. Doc. ST/ESA/331 (2011), *available at* http://www.un.org/womenwatch/daw/vaw/handbook/Supplement-to-Handbook-English.pdf. Specifically, "[m]edical professionals have in recent years become perpetrators of some forms of violence against women, particularly female genital mutilation and pre-natal sex selection." *Id.* at 16.

224. *Incest, Rape and Domestic Violence*, *supra* note 186, at 2.

225. *See supra* text accompanying notes 86–89, 158–61 and accompanying text; *see also* Vardit Ravitsky, *Is Gender Selection of a Fetus Ethical?*, CNN OP. (Aug. 16, 2011), http://www.cnn.com/2011/OPINION/08/15/ravitsky.gender.selection/index.html?iref=allsearch.

226. HVISTENDAHL, *supra* note 113, at 151.

227. PRENDA § 2(a)(1)(L)(ii).

228. *See e.g.*, *Hearing on India's Missing Girls*, *supra* note 201, at 2–4 (statement of Jill McElya, Vice President, Invisible Girl Project), *available at* http://docs.house.gov/meetings/FA/FA16/20130910/101285/HHRG-113-FA16-Wstate-McElyaJ-20130910.pdf (recounting anecdotes of women in India pressured by family members to abort because the fetus was female or to kill a newborn female baby).

229. *See* Cherry, *supra* note 18, at 218–19 ("How much value do [women's] choices have when made from a position of subordination and powerlessness? . . . In other words, by valuing 'choice' in this context, do we minimize or devalue the discrimination and powerlessness that women face under patriarchal systems?").

230. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, 184–85 (1989) ("Women feel compelled to preserve the appearance . . . of male direction of sexual expression."). MacKinnon posits that sexual intercourse cannot "simply be presumed [to]

pregnancy without talking about unwanted sex and laws should punish reproductive practices that re-inscribe such coercion. This argument puts radical feminism on a collision course with the autonomy claims of liberal feminists: "[W]hile abortion gives *women* control over whether or when to have children, sex-selective abortion gives *men* (husbands and families) greater influence over women's reproduction and the sexual composition of future generations."[231] In an oft-cited footnote, Catharine MacKinnon argued sex-selective abortion should not be permitted.[232] She wrote, "the decision [to abort because of sex] is not a free one, even absent governmental intervention, where a male life is valued and a female life is not."[233]

With arguments about individualized violence, there are purported societal harms that result from sex selection. In the same article cited above, MacKinnon argued that "aborting female fetuses may further erode women's power as women make up less and less of the population."[234] Predictions of violence erupting on a large scale when men outnumber women—what one demographer dubbed "rampant demographic masculinization"—also pervade sex selection literature.[235] A 2011 Council of Europe Resolution described the wider societal consequences in this way:

> The Assembly wishes to warn Council of Europe member states against the social consequences of prenatal sex selection, namely population imbalances which are likely to create difficulties for men to find spouses, lead to serious human rights violations such as forced prostitution, trafficking for the purposes of marriage or sexual exploitation, and contribute to a rise in criminality and social unrest.[236]

be coequally determined." *Id.* at 184. Instead women often feel compelled to preserve the appearance of male control during sexual expression. *Id.* at 184–85. She argues that abortion allows men to ignore "the one real consequence" of having intercourse. *Id* at 190; ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 269, 274 (1976) ("Abortion is violence: . . . It is the offspring, and will continue to be the accuser of a more pervasive and prevalent violence, the violence of rapism.").

231. Cherry, *supra* note 18, at 219.

232. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1317 n.157 (1991).

233. *Id*.

234. *Id*.

235. HVISTENDAHL, *supra* note 113, at 5.

236. EUR. PARL. ASS. 29th Sess., ¶ 6, Res. 1829 (Oct. 3, 2011) [hereinafter Eur. Res. 1829], *available at* assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/ERES1829.htm.

Women's rights advocates have argued that sex selection will result in fewer daughters and, thus, fewer women to be wives or sexual partners.[237] The 2013 U.S. Trafficking in Persons Report listed China's sex ratios as a cause of concern.[238] The report stated: "The [Chinese] government did not address the effects its birth limitation policy had in creating a gender imbalance and fueling trafficking, particularly through bride trafficking and forced marriage."[239] Hvistendahl argued that with a surplus of men, sex trafficking, bride buying, and forced marriages will abound: "In . . . China and India, [men] visit brothels staffed by prostitutes who have often been forced into sex work . . . . [As sex selection continues,] the supply of women will dry up."[240] However, a review of writings on son preference does not reveal definitive evidence that countries with more men than women have higher rates of trafficking or forced marriages; these claims appear predictive at best.[241]

The solutions of community education and incremental cultural change appear to be weak solutions to what has been characterized as a terrible problem.[242] The response to liberal feminist and philosopher, Mary Anne Warren, is emblematic. Warren argued that women's autonomy rights required recognition of a right to abort because of fetal sex in her 1985 book, *Gendercide*.[243] She

237. *See, e.g.*, Remaley, *supra* note 18, at 279 ("The problems likely to arise from a preponderance of males go beyond the sadness experienced by the men unable to find mates or spouses. These harms include decreased political power of females as well as the return of the notion that women should resume their traditional family roles and should retain their virginity for marriage. In total, the effects of a population imbalance are likely to be extremely negative for women and affect all of society.").

238. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 129 (2013) (explaining that the skewed sex ratio may have led to the trafficking of women to be brides and for forced prostitution).

239. *Id*. at 131.

240. HVISTENDAHL, *supra* note 113, at 15–16.

241. Eur. Res. 1829, *supra* note 236; *see also* Therese Hesketh & Zhu Wei Xing, *Abnormal Sex Ratios in Human Populations: Causes and Consequences*, 103 PROC. NAT'L ACAD. SCI. U.S. AM., 13271, 13273–74 (2006) ("There is much anecdotal evidence regarding increases in trafficking of women, both for the sex industry and marriage, in both India and China, although it is impossible to say whether gender imbalance is a contributory factor in this rise."); Kalantry, *supra* note 219, at 83 (citing Gary Becker's argument that the market will eventually eliminate sex selection because women's value increases when women are scarce).

242. *Cf.* Cherry, *supra* note 18, at 220–22 (noting that there is little research exploring the efficacy or appropriateness of interventions that restrict the information pregnant women obtain about the sex of their pregnancies).

243. *See* WARREN, *supra* note 217, at 183.

chose the term "gendercide" because it was gender neutral.[244] For some of her contemporaries, "gendercide" was the "watered down" depiction of sex selection: "Using 'gendercide' rather than 'gynecide' blurs this fact in the same way that a term like 'spouse abuse' hides the fact that it is almost always wives and other female partners (not husbands and male partners) who are beaten in instances of so-called domestic violence."[245]

A violence approach urges that law can be the tool to eradicate practices that harm women, including sex selection. For example, the Beijing Platform for Action asks states to:

> Enact and enforce legislation against the perpetrators of practices and acts of violence against women, such as female genital mutilation, female infanticide, prenatal sex selection and dowry-related violence, and give vigorous support to the efforts of non-governmental and community organizations to eliminate such practices.[246]

Criminal prohibitions may not seem extreme because advocates characterize the prevalence of sex selection in bold terms. Indeed, comparisons between sex selection and other social problems are stark. Scholar and demographer Christophe Guilmoto compared the sex selection epidemic to the global spread of HIV/AIDS: "AIDS has claimed an estimated 25 million lives worldwide—a mere fraction of the number of missing females."[247] Moreover, in recent testimony before the Congressional Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations, a researcher for India's Campaign against Sex Selection, Sabu George, stated that more girls were "eliminated" than the "number of Jews killed in the Holocaust by the Nazis."[248]

244. *Id*. at 22.

245. Christine Overall, *Critical Notice of Mary Anne Warren Gendercide: The Implications of Sex Selection*, 17 CAN. J. PHIL. 683, 683–92 (1987); *see also* CHRISTINE OVERALL, ETHICS AND HUMAN REPRODUCTION: A FEMINIST ANALYSIS 21–22 (1987) (critiquing Mary Anne Warren's work on "gendercide").

246. *Beijing Platform for Action*, *supra* note 207, ¶ 124(i).

247. Isabelle Attané & Christophe Z. Guilmoto, *Introduction*, *in* WATERING THE NEIGHBOUR'S GARDEN: THE GROWING DEMOGRAPHIC FEMALE DEFICIT IN ASIA 3 (Isabelle Attané & Christophe Z. Guilmoto eds., 2007). Hvistendahl referred to Guilmoto's comparison between AIDS and the number of missing females to emphasize the lack of attention and global spending on issues related to women's rights. HVISTENDAHL, *supra* note 113, at 15–16.

248. *Hearing on India's Missing Girls*, *supra* note 201, at 22 (statement of Sabu George).

These ideas have translated to national legislation in some countries. Of the over thirty countries with limits on sex selection, six countries have total prohibitions on all forms of sex determination as well as terminations.[249] Some bans on sex-selective abortion or sex-determination technologies are expressions of feminist concerns about the practice, not necessarily of anti-abortion politics.[250] In India, for example, feminist activism drove the prohibition of any form of sex determination.[251] The Bombay Women's Center led the campaign: "For [the Center], it's the survival of women that's at stake. The social implications of sex-selection are disastrous. It's a further degradation of the status of women."[252]

On the regional level, the Council of Europe has called on member states to "introduce legislation with a view to prohibiting sex selection in the context of assisted reproduction technologies

249. W. Dondorp et al., *ESHRE Task Force on Ethics and Law 20: Sex Selection for Non-Medical Reasons*, 28 HUM. REPROD. 1448, 1450 (2013) ("An overview of all 36 countries with laws or policies regarding sex selection, including 25 European countries, . . . shows that (with Israel as a qualified exception) none of these allow sex selection for non-medical reasons. . . . ").

250. John Parkinson, *House Rejects Ban on Sex-Selection Abortions*, ABC NEWS (May 31, 2012), http://abcnews.go.com/blogs/politics/2012/05/house-rejects-ban-on-sex-selection-abortions/ ("Many nations with staunchly pro-choice/pro-abortion rights laws and protections nevertheless ban sex-selection abortions. Canada, the United Kingdom, France, Germany, Switzerland, Sweden, Norway, Finland and the Netherlands all have laws banning sex-selection abortions."); *see also* Dondorp, *supra* note 249, at 1452 ("[Banning abortion] may not be easy, as it might readily interfere with women's rights to ask for an abortion on 'social grounds'. One option . . . is the withholding of test results that would provide information about fetal sex, at least for so long as an abortion would still be legally possible.").

251. Steven R. Weisman, *No More Guarantees of a Son's Birth*, N.Y. TIMES, July 20, 1988, at A1, *available at* http://www.nytimes.com/1988/07/20/world/no-more-guarantees-of-a-son-s-birth.html (noting that feminist groups and others in Bombay led effective protests outside of clinics offering sex selection in a move to promote a ban). India's Medical Termination of Pregnancy Act provides that abortion may not be performed, except to save the life or physical or mental health of the mother, though the Act gives districts power to regulate abortion. In practice, it appears the law is interpreted broadly or often ignored. Siddhivinayak S. Hirve, *Abortion Law, Policy and Services in India: A Critical Review*, 12 REPROD. HEALTH MATTERS 114, 115–19 (2004).

252. Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment, Rule No. 74 of 2003, INDIA CODE (2003) ("PNDT Act"). Advocacy groups brought a Public Interest Litigation petition, claiming that the Act was poorly enforced. The Supreme Court of India issued opinions in 2001 and 2003 denouncing the practice of sex-selective abortion. The PNDT Act was renamed the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) and amended to increase penalties and further delineate prohibited uses of ultrasounds. Ctr. For Enquiry into Health & Allied Themes (CEHAT) v. Union of India (2003) S.C.R 3309; CEHAT v. Union of India, (2001) 3 S.C.R. 534.

and legal abortion, except when it is justified to avoid a serious hereditary disease."[253] The Council justifies its recommendation in the violence approach: "[T]he social and family pressure placed on women not to pursue their pregnancy because of the sex of the embryo/foetus is to be considered as a form of psychological violence and that the practice of forced abortions is to be criminalised."[254] This and similar statements suggest that *all* abortions motivated by fetal sex are the product of violence. It is what Maneesha Deckha has called "a steady and overwhelming discourse of tragedy and victimization,"[255] and it is a discourse that sits too comfortably with colonialist narratives of the "orientalism" of China and India.[256] Conservative or religious interests rely on similar arguments for their own purposes, forging an uneasy alliance between radical feminist politics and neo-conservative prohibition. In 2013, "gendercide" was the term of choice for anti-abortion advocates, appearing in *Christianity Today* and the *National Catholic Register*.[257] The proposition that sex-selective abortion is inherently violent and coercive invites regulation.[258]

B. *The Response to Bans in the United States*

Elements of the anti-discrimination and violence approaches have travelled back to the United States in recent sex-selective abortion bans.[259] Skeptics of bills like PRENDA respond, with good reason, that this legislation is a thinly veiled attempt to ad-

253. Eur. Res. 1829, *supra* note 236, ¶ 8.7.

254. *Id.* ¶ 5.

255. Maneesha Deckha, *(Not) Reproducing the Cultural, Racial and Embodied Other: A Feminist Response to Canada's Partial Ban on Sex Selection*, 16 UCLA WOMAN'S L.J. 1, 9 (2007).

256. EDWARD W. SAID, ORIENTALISM: WESTERN CONCEPTIONS OF THE ORIENT 3 (1978) ("Orientalism as a Western style for dominating, restructuring, and having authority over the Orient. . . .").

257. Marian V. Liautaud, *Genocide in Shades of Pink*, CHRISTIANITY TODAY (Dec. 28, 2012), http://www.christianitytoday.com/ct/2012/december/genocide-in-shades-of-pink.html; Celeste McGovern, *'The Ugliest Form of Misogyny': Sex-Selective Abortions and the War on Baby Girls*, NAT'L CATH. REG. (Apr. 8, 2013), http://www.ncregister.com/daily-news/the-ugliest-form-of-misogyny-sex-selective-abortions-and-the-war-on-baby-gi/.

258. *See* Liautaud, *supra* note 257.

259. For example, last spring during a Senate Judiciary Committee hearing, a North Dakota legislator cited Hvistendahl's book, *Unnatural Selection*, and her argument that 160 million women are missing. Nick Smith, *Abortion Bills Kick Up Debate*, BISMARK TRIB. (Mar. 12, 2013, 11:14 PM), http://bismarcktribune.com/news/local/govt-and-politics/abortion-bills-kick-up-debate/article_706928b8-8b94-11e2-9ae8-0019bb2963f4.html.

vance an anti-abortion agenda.[260] After all, unlike the laws of some other countries, PRENDA does not ban sex determination technologies but focuses only on abortion.[261] A review of the scholarly and popular literature opposed to PRENDA reveals two arguments: The United States Constitution does not permit bans on a woman's reasons for abortion, or there is insufficient proof that sex selection actually occurs.

1. Constitutional Cures

The Center for Reproductive Rights described PRENDA as a dangerous and unconstitutional attack on access to health services.[262] In accord with legal advocacy groups, legal scholars interpreting *Roe* and *Casey* assert similar constitutional claims. For example, Jaime King, writing about NIPT, has argued that constitutional privacy rights protect the practice of sex-selective abortion, and few legal academics have disagreed.[263]

260. *See* Mohapatra, *supra* note 85, at 720 ("In the United States, PRENDA and the sex-selective state laws seem more concerned with weakening a general right to choose rather than a sincere commitment to gender equality.").

261. *See id.*; *see also* Dov Fox, *Interest Creep*, 82 GEO. WASH. L. REV. 273, 332–33 (2014) (calling bans on sex-selective abortion, that do not address the methods of sex determination, insincere).

262. *See Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011*: *Hearing on H.R. 3541 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 198 (2011) [hereinafter 2011 PRENDA Hearing] (statement of the Center for Reproductive Rights); CTR. FOR REPROD. RIGHTS, 2013 MID-YEAR REPORT 3 (2013), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/crr_2013_MidYear_Legislative_Report.pdf (stating that bans are "nothing more than attempts to diminish the rights of women to control their reproductive lives.").

263. King, *Not This Child*, *supra* note 24, at 31–34; *see also* Fox, *Interest Creep*, *supra* note 261, at 328; Justin Gillette, Note, *Pregnant and Prejudiced: The Constitutionality of Sex- and Race-Selective Abortion Restrictions*, 88 WASH. L. REV. 645, 649 (2013) ("Although motive-based abortion laws may find some support in [the *Gonzales*] decision—upholding a federal ban on "partial-birth abortions"—these laws differ from the Partial-Birth Abortion Act in that they do not prohibit actions that are analogous to criminal actions, protect women's mental health, or target specific medical procedures. . . . [C]ourts reviewing motive-based abortion restrictions should find the laws unconstitutional."). John Robertson also argued,

> If a couple would not reproduce if a child had gene A but would if it had gene B, procreative liberty should protect their decision not to reproduce in the first case and to reproduce in the second. Denying them information about A or B, or denying them the ability to make reproductive choices based on that information, will interfere with their procreative liberty.

Robertson, *Genetic Selection*, *supra* note 18, at 427. *But see* Rao, *supra* note 7, at 1486 (arguing there may not be a constitutional right to sex-selective abortion and "if the government chose to enforce a policy against sex-selection not by banning certain abortions, but

Scholars and activists argue that the Constitution protects women's right to abortion for any reason before viability. In 1992, a plurality of the Supreme Court in *Casey* preserved constitutional protection for abortion, but rejected *Roe*'s trimester framework and gave states much more discretion to restrict access to abortion.[264] The Court held that states may restrict abortion before viability so long as regulation does not create an "undue burden" on a woman's choice to terminate a pregnancy.[265] An undue burden is "a state 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."[266] The *Casey* Court also held that states have an interest in protecting women's health and in respecting fetal life throughout pregnancy.[267] Those questioning the constitutionality of PRENDA argue that prohibiting abortion before viability, based on the woman's reason for terminating the pregnancy, constitutes an undue burden under *Casey*.[268]

Applying *Casey*'s undue burden standard, the Court in *Gonzales v. Carhart* upheld a federal law that barred physicians from using an abortion method clinically described as intact dilation and evacuation ("intact D&E"), but referred to as "partial-birth abortion" by abortion opponents.[269] The Court upheld the law even though intact D&E could be performed before viability.[270] The Court held that the law did not impose an undue burden because, based on congressional findings, the prohibited method of abortion was not medically necessary and did not prohibit any identifiable group of women from obtaining pre-viability abortions.[271] In

rather by prohibiting prenatal testing to obtain information regarding the sex of the fetus, such a law would likely be constitutional").

264. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 844–46, 872–76 (1992) (plurality opinion).

265. *Id.* at 874.

266. *Id.* at 877.

267. *Id.* at 846. The Court noted that after viability, the state could ban abortion except when pregnancy threatened "the life or health of the mother." *Id.* at 879 (quoting Roe v. Wade, 410 U.S. 113, 164–65 (1973)).

268. *See* Robertson, *Abortion and Technology*, *supra* note 5, at 374–77.

269. Gonzales v. Carhart, 550 U.S. 124, 136–37, 168 (2007) (explaining the intact D&E procedure).

270. *Id.* at 147, 156–67. The Court also dismissed claims that the federal law was vague or was overbroad. *Id.* at 148–50, 168.

271. The Court stated that other procedures were safe and available to women who might otherwise have intact D&Es and that whether the procedure was necessary to protect women's health was contested by the medical profession. *Id.* at 158, 162–65.

further support of the law, the Court affirmed state interests in protecting the value of fetal life[272] and the emotional health of women, who, according to the Court, suffer from regret after intact D&E.[273] Justice Ginsburg, writing in dissent, argued that the majority had "blur[red] the line, firmly drawn in *Casey*, between previability and postviability abortions."[274]

The state interests described in *Gonzales* are at the center of the sex-selection debate. Sonia Suter interprets *Gonzales* as addressing two interconnected questions: Does a ban constitute an undue burden by prohibiting abortion for a group of women before viability; and if so, are state interests sufficiently important to defend it?[275] The *Gonzales* Court justified "blurring" the viability line by broadening a "range of state interests that can justify limiting reproductive decisions," such as protecting the integrity of physicians, society as a whole, and the health and mental well-being of women.[276] The issue then to consider, as Dov Fox recently argued, is whether the state interests described in *Gonzales* could be sufficiently important to justify a pre-viability, reason-based restriction.[277]

Anti-abortion advocates drafted PRENDA to fit with the holding of *Gonzales*, and such justifications for PRENDA by anti-abortion forces complement feminist arguments made in the international arena. First, the *Gonzales* Court held that outlawing intact D&E protects maternal health, shielding women from post-

272. *See id.* at 145, 160.

273. *Id*. at 159–60.

274. *Id.* at 171 (Ginsburg, J., dissenting).

275. *See* Suter, *The "Repugnance" Lens*, *supra* note 28, at 1568–69, 1576 (discussing how *Gonzales* weakens the undue burden test regarding bans on abortion before viability and strengthens the range of state interests that justify such bans).

276. *Id*. at 1519.

277. Fox, *Interest Creep*, *supra* note 261, at 327–28 (contending that the "key state interest question for selective abortion analysis under *Casey* is whether, and if so by how much, the interest in potential life is more strongly implicated when a woman seeks to terminate her pregnancy for proscribed reasons"). A related question, but unexplored here, is whether there is a general right to prenatal genetic information. John Robertson argues that access to such information would be a protectable interest of pregnant women. *See* Robertson, *Genetic Selection*, *supra* note 18, at 427 ("[D]enying a person information about the package of burdens, benefits, and rearing responsibilities that will ensue, or denying her the ability to avoid or engage in reproduction based on that information, would affect her decision whether to reproduce at all and would interfere with her procreative liberty.").

abortion regret.[278] In a well-known passage, Justice Anthony Kennedy wrote in *Gonzales*, "[w]hile we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."[279] PRENDA states that women terminating pregnancies based on fetal sex experience mental health consequences, such as "guilt, shame and sadness."[280] PRENDA continues that women who have sex-selective abortions "are at increased risk for psychological and physical morbidity, documented by their descriptions of depression, anxiety, chronic pain, [and] physical abuse."[281] Reproductive rights supporters contest evidence purporting to establish that abortion inflicts deep regret or mental illness.[282] But in the context of sex-selective abortion, violence-based claims may support this narrative of coercion and regret. Legal interventions, described in the previous section, focus on the powerful cultural forces that shape women's decisions and tend to treat all women who have sex-based terminations as coerced.[283] Indeed, a strategy that shifts all responsibility for sex selection from women to cultural or patriarchal forces, as the discrimination and violence approaches do, may inadvertently invite the type of paternalism expressed in *Gonzales.*

Second, the Court in *Gonzales* explained the state's interest in protecting the integrity of the medical profession. The *Gonzales* decision describes physicians as "abortion doctor[s]."[284] In *Gonza-*

278. *Gonzales*, 550 U.S. at 159–60; *see also* Suter, *The "Repugnance" Lens*, *supra* note 28, at 1577.

279. *Gonzales*, 550 U.S. at 159. But note Justice Ginsburg's dissent where she states that while abortion may be a "painfully difficult decision," having an abortion is no more harmful in the long run than having a child the woman "did not intend to have." *Id*. at 183 n.7 (Ginsburg, J., dissenting).

280. PRENDA § 2(a)(1)(L)(iii).

281. *Id.* § 2(a)(1)(M).

282. *See, e.g.*, *Congress Should Not Legitimize the Mythical "Post-Abortion Syndrome"*, NARAL PRO-CHOICE AM. (Jan. 1, 2014), http://www.prochoiceamerica.org/media/fact-sheets/abortion-mythical-post-abortion-syndrome.pdf; *Report of the APA Task Force on Mental Health and Abortion*, AM. PSYCH. ASS'N 92 (2008), *available at* http://www.apa.org/pi/women/programs/abortion/mental-health.pdf. *But see* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1008 n.78.

283. *See supra* Part III.A.2; *see also* Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1193 (2010) (arguing the "legal discourse of abortion trauma grows out of ideas about psychological trauma that have become pervasively familiar in the law through the rise of feminism.").

284. Justice Ginsberg, writing in dissent, challenged the majority's language:

les, the Court implied that abortion providers could not be trusted to apply a health exception under the law because they stood to gain financially from performing abortion procedures.[285] PRENDA implies that physicians cannot be trusted or expected to manage the use of new sex determination technology.[286] The typical description of ultrasound's use for sex determination is that it is too easy and too available for providers to resist.[287] Applied to NIPT, sex-selection opponents could point to the scant advice available to physicians on the appropriate standard of care.[288]

Also, the Court in *Gonzales* suggested that intact D&E was so distasteful that its performance cheapened the practice of medicine.[289] PRENDA's description of sex selection as uncivilized, barbaric, and abhorrent captures that distaste.[290] Those descriptions play on stereotypes about other cultures: "[T]he parade of (bodily) horrors relating to non-Western women that Westerners, including Western feminists, have historically used to demonstrate the supposed inherent misogyny and gender backwardness of non-Western cultures."[291] International standards that describe sex selection as a harmful cultural practice, listed with acid attacks and

"Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label 'abortion doctor.'" *Gonzales*, 550 U.S. at 186–87.

285. *See id*. at 159.

286. PRENDA § 250(b) (discussing civil remedies that can be obtained against a physician who knowingly aborts a child based on a determination of fetal sex). Suter, *The "Repugnance" Lens*, *supra* note 28, at 1586 ("If we understand Kennedy's opinion as intended to bolster the strength of the state interest in previable life then the opinion is much more radical than he lets on. It begins to undo the well-established precedent that the state may not prohibit previable abortions and opens the door to future bans of previable abortion procedures based on visceral concerns about the sensibilities of the community and the medical profession."); Siegel, *Dignity and the Politics of Protection*, *supra* note 161, at 1735 (discussing how Justice Kennedy used the idea of "dignity" to put more emphasis on the protection of potential life, thus providing more leeway to government actors when enacting laws restricting abortion).

287. *See* Devaney et al., *supra* note 3, at 634.

288. *See* Swanson et al., *supra* note 43, at 113–14 (noting that only 15% of participating women's healthcare providers "reported having a 'high level of knowledge' about NIPT").

289. *Gonzales*, 550 U.S. at 160.

290. PRENDA § 2(a)(1)(D) (stating that sex selection abortion is barbaric); *id*. § 2(a)(1)(P) (stating that sex selection abortion has no place in a civilized society); 158 CONG. REC. H3665, E945 (daily ed. June 1, 2012) (statement of Rep. McCollum) (stating that gender selection is an abhorrent practice); *Statement by Live Action on PRENDA Vote*, LIVE ACTION BLOG, http://liveaction.org/blog/statement-by-live-action-on-prenda-vote/ (last updated May 31, 2012) (discussing sex selection abortion as an abhorrent practice).

291. Deckha, *supra* note 255, at 9.

honor crimes, lend implicit support to PRENDA's language. The characterization of "harmful cultural practices" can be part of the often-problematic feminist claim that women, particularly women in other countries, are "dupe[s] of patriarchy."[292]

Third, the Court upheld states' efforts to protect the integrity of potential life. One of PRENDA's central claims is that sex selection values men over women, leading to dehumanization.[293] This concern connects to PRENDA's invocation of genetic engineering—the slippery road to "neo-eugenic" technologies if individuals have unencumbered choice to select genetic characteristics prenatally.[294] Fox, for example, considers three ways in which state interests seek to protect societal values by protecting potential life: defending prenatal welfare (discrimination against certain types of fetuses),[295] promoting fair social values (resisting genetic manipulation),[296] and curbing negative social effects (having the right balance of girls and boys).[297] Fox finds bans unconstitutional, but he may underestimate the persuasive pull of state interests in social values and social effects.[298] Concerns about genetic engineering tap into broader fears that genetic technologies will allow potential parents to design children *in utero*.[299] As disability rights advocates have long maintained, the selection of genetic characteristics has profound symbolic and practical consequences, a concern PRENDA repeats.[300]

292. Uma Narayan, *Minds of Their Own: Choices, Autonomy, Cultural Practices, and Other Women*, *in* A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 418, 418–19 (Louise M. Antony & Charlotte E. Witt eds., 2002).

293. PRENDA § 2(a)(1)(K) (citing a working paper on bioethics). For the working paper, see *Ethical Aspects of Sex Control* (The President's Council on Bioethics, Staff Working Paper 2003), *available at* http://bioethicsarchive.georgetown.edu/pcbe/background/sex_control.html.

294. *See* STERN, *supra* note 37, at 12 (assessing the potential for people to select superior biologically fit genetic characteristics).

295. Fox, *Interest Creep*, *supra* note 261, at 328 (stating that there is no precedent protecting fetuses under the Equal Protection Clause of the Fourteenth Amendment).

296. *Id*.

297. *Id*.

298. *Id.* at 328, 334 ("[T]hese concerns are legitimate, but inadequate to override rights, and that others might be categorically forbidden.").

299. *See* Specter, *supra* note 4 (explaining that because the entire genome of an embryo can be sequenced, fetuses could soon be implanted with certain desired traits).

300. *See, e.g.*, Adrienne Asch, *Disability Equality and Prenatal Testing: Contradictory or Compatible?*, 30 FLA. ST. U. L. REV. 315, 339 (2002); Darrin P. Dixon, *Informed Consent or Institutionalized Eugenics? How the Medical Profession Encourages Abortion of Fetuses with Down Syndrome*, 24 ISSUES L. & MED. 3, 12–16 (2008); Pergament, *supra* note 8, at

Moreover, *Gonzales* addressed the symbolic meaning of abortion practices in ways similar to concerns about the societal effects of sex selection. Women's rights advocates have theorized that women and men lend distinct perspectives and participate in society in sex-defined ways.[301] This is at the heart of the argument that militancy, commodification, and violence will dominate if men outnumber women. When feminists make connections made between the rise of trafficking and sex selection, they add credibility to claims of negative social effects, though seldom with the critique of the stereotypes about women—even the seemingly benign stereotypes of peacefulness—they promote.[302] Returning to Etzioni's writings in the 1960s, labeling women as "agents of moral education" harkens back to assertions of women's docility that feminists have challenged and rejected. [303]

In light of *Gonzales* and the restrictions on abortion after *Casey*, it is not clear that the Supreme Court will protect abortion rights against these state interests.[304] Reproductive rights arguments depend on constitutional defenses because a reason-based ban could spur any manner of restrictions. If the state can police the reasons for abortion, it is no longer a woman's choice that controls the purpose of terminating a pregnancy and the state

75–76; Teresa Santin, *Is Down Syndrome Doomed? How State Statutes Can Help Expectant Parents Make Informed Decisions About Prenatal Down Syndrome Diagnoses*, 6 J. ENVTL. & PUB. HEALTH L. 239, 249–50 (2012).

301. *See* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 53–54 (2d ed. 2003) (describing cultural feminism as "different voice" feminism).

302. In a review of materials on the relationship between trafficking and son preference, I did not find evidence that was more than predictive of "how bad the male surplus will be." *See* HVISTENDAHL, *supra* note 113, at 15. The leading demographer on the issue, Christophe Guilmoto, predicts "trouble in the marriage market," but both he and Hvistendahl offer only anecdotal accounts of trafficking and bride buying, de-emphasizing other data that might account for both practices. *Id.* Hvistendahl, echoing arguments made by Etzioni in the late 1960s, offers only: "Historically, societies in which men substantially outnumber women are not nice places to live. Often they are unstable. Sometimes they are violent." *Id.*

303. Etzioni, *supra* note 114, at 1109.

304. It is also important to consider the size of the group of women affected by an abortion restriction. The *Gonzales* Court suggested that women affected by a ban on intact D&E were too small in number to matter. Gonzales v. Carhart, 550 U.S. 124, 155 (2007) ("A fetus is only delivered largely intact in a small fraction of the overall number of D&E abortions."). Thus, the argument that sex-selective abortions rarely occur may not support the argument that a ban on the practice would be unconstitutional. *But see* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 894 (1992) (rejecting the state's argument that a spousal notification requirement was not invalid because "only one percent of the women who obtain abortions" were affected by the requirement).

can set the grounds for permission. It is thus understandable why reproductive rights advocates employ constitutional arguments as a defense; indeed, commitment to the right to choose "has been the driving force in the mainstream liberal feminist movement in the United States."[305] But relying on a constitutional shield is risky; it is uncertain that the current Supreme Court would agree with the assessment of some scholars and advocates that bans are unconstitutional.

2. Empirical Answers

Almost every opponent of bans on sex-selective abortion in the United States also asserts that sex selection practices are rare or non-existent and are thus not of concern. For example, the Guttmacher Institute, a pro-choice research group, reported in 2012 that sex selection is extremely uncommon and even if sex selection infrequently occurred, parents are as likely to prefer girls to boys.[306] The National Asian Pacific American Women's Forum ("NAPAWF"), in testimony opposing PRENDA before the House of Representatives, argued that there is little evidence sex-selective abortions are so widespread as to cause concern in the United States.[307] Even if sex-selective abortion occurs, NAPAWF argued, too small a percentage of the population (less than 2%) engages in the practice of son preference for it to make a difference.[308]

The World Health Organization and others have called for more research on the prevalence of sex selection and on the factors that influence parents' decisions.[309] But better data neither

305. *See* Kalantry, *supra* note 219, at 75–76. Kalantry cites Tabitha Powledge, who states: "To make it illegal to use prenatal diagnostic techniques for sex choice is to nibble away at our hard-won reproductive control, control that . . . is the absolute rock-bottom minimum goal we have got to keep achieved." 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)).

306. *See* Barot, *supra* note 90, at 21; *see also supra* note 179. *See generally* HVISTENDAHL, *supra* note 113, at 251–52, 256–57.

307. 2011 PRENDA Hearing, *supra* note 262, at 68.

308. *Id*.

309. *See* WHO INTERAGENCY STATEMENT, *supra* note 189, at 8. Fox, *Interest Creep*, *supra* note 261, at 329–30 (stating that there is insufficient proof of sex selection in the United States, and arguing "[t]o establish whether selective abortion threatens objectionable demographic disparities, a court would need to consider, namely, both empirical evidence linking birthrate statistics to selective abortion and normative reasons about why it

meets concerns about the symbolic harm of selecting fetal sex nor satisfies the desire to punish or eliminate violence against women, even if the practice occurs infrequently or happens only in discrete communities. Ross Douthat, a conservative columnist for the *New York Times*, argued:

> Try to imagine a similar sentence being written about a different practice or problem. "The problem with criminalizing female genital mutilation is that it's not entirely clear there is a problem. The practice is a huge tragedy in parts of Africa, but to the extent it's happening in this country, it's mostly among African immigrants." Or: "The problem with criminalizing human trafficking is that it's not entirely clear there is a problem. The practice is a huge tragedy in parts of the developing world, but to the extent it's happening in this country, it's mostly among Third World immigrants."[310]

There are many reasons to criticize analogies of sex-selective abortion to female genital cutting or trafficking. For instance, terminating a pregnancy in the United States receives constitutional protection, and an abortion ban raises the types of questions posed by the previous section. Douthat's point, though contentious, is that claiming a practice is rare or infrequent does not dampen the moral opposition to that practice.

In response, and related to empirical claims, abortion rights advocates typically argue that not only do sex-selective abortion bans fail to work,[311] but they also threaten the reproductive rights of women.[312] Though the preferred solutions are policies that re-

would be bad to allow any resulting decline").

310. Ross Douthat, Op-Ed, *When Is Sex-Selective Abortion a 'Problem'?*, N.Y. TIMES (May 31, 2012), http://douthat.blogs.nytimes.com/2012/05/31/when-is-sex-selective-abortion-a-problem/.

311. *See, e.g.*, CTR. FOR REPROD. RIGHTS, *supra* note 262, at 3 (arguing that a ban on sex selection does not work and instead bans threaten "health and human rights of women"). South Korea is often cited as an "exception" to unenforceability of bans, reducing imbalanced sex ratios by a ban on sex determination and a "Love Your Daughters" media campaign. However, Woojin Chung and Monica Das Gupta argue that sex ratios changed because the economy improved, thus undercutting the basis for son preference, not necessarily because of publicity or legal reform. Woojin Chung & Monica Das Gupta, *The Decline of Son Preference in South Korea: The Roles of Development and Public Policy*, 33 POPULATION & DEV. REV. 757, 777–78 (2007); Vogel, *supra* note 172, at 288.

312. *See, e.g.*, CTR. FOR REPROD. RIGHTS, *supra* note 262, at 3. However, some human rights and women's rights advocates in India, for example, embraced the legal tool of prohibition. *See* ANNE GALLAGHER, U.N. POPULATION FUND & ASIA PAC. FORUM OF NAT'L HUM. RIGHTS INSTS., INTEGRATING REPRODUCTIVE RIGHTS INTO THE WORK OF NATIONAL HUMAN RIGHTS INSTITUTIONS OF THE ASIA PACIFIC REGION: A PRELIMINARY STUDY OF CURRENT VIEWS AND PRACTICES, CHALLENGES AND OPPORTUNITIES 26 (2011), *available at* http://www.asiapacificforum.net/files/NHRIs_and_Reproductive_Rights.pdf.

vise existing laws to expand rights and to change attitudes about sex and gender, it is not clear those solutions make sense in the United States.

In terms of reforming law on the books, the United States does not face a crisis in legal sex inequality. Many discriminatory federal and state laws have been held unconstitutional under the Fourteenth Amendment's Equal Protection Clause.[313] There is formal equality *by law* between men and women, in inheritance, education, work, pay, and other fields.[314] This is not to suggest that the U.S. legal system (or cultural life) is free from gender inequalities. However, the challenge in the United States is not the revision of positive law so that it is sex neutral, but challenging the discriminatory effects of law.[315]

Reproductive rights advocates also highlight discriminatory attitudes, not just law, as a cause of sex selection. This position typically supports calls for public education campaigns. In a hearing on son preference before a House Committee, Mallika Dutt, President of Breakthrough, a human rights advocacy organization, testified:

> [T]he *only* way to achieve long-lasting social change on issues of gender bias, especially sex selective practices, is through working to fundamentally shift attitudes and culture at the community level and to comprehensively address the underlying issues that propagate inequity.[316]

313. *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 124, 135–38 (2010) (reviewing different cases that addressed the constitutionality of discriminatory laws based on sex); *cf.* REPLACING MYTHS WITH FACTS, *supra* note 91, at 25 (noting that laws, such as laws governing inheritance and other potentially discriminatory policies that incentivize sex selection in countries like India do not exist in the United States).

314. *See* Robertson, *Genetic Selection*, *supra* note 18, at 457–58 ("In the United States and Europe, where there are few population restrictions, weaker cultural attitudes or preferences for males, and legal protection for women's rights, the feared harm to women appears unlikely [and in fact] . . . it is likely that gender ratio imbalances are ultimately self-correcting. As the shortage of females bids up their value and leads to greater demand for them, their numbers will increase.").

315. *See, e.g.*, *Constitutional and Legal Provisions for Women in India*, NAT'L LEGAL RES. DESK, http://nlrd.org/womens-rights-initiative/legislations-laws-related-to-women/constitutional-and-legal-provisions-for-women-in-india (last visited Nov. 24, 2014) ("The Constitution of India not only grants equality to women but also empowers the State to adopt measures of positive discrimination in favour of women for neutralizing the cumulative socioeconomic, education and political disadvantages faced by them.").

316. *Hearing on India's Missing Girls*, *supra* note 201, at 39 (statement of Mallika Dutt, President, Breakthrough).

A 2011 United Nations report similarly argued that "empowering education" and policies that promote "attitudes . . . supportive of greater equality" were successful in reducing son preference.[317] However, there is seldom discussion of how these anti-discrimination strategies work, what concrete proposals to advance them would entail, and how to measure success. This is not to discount the importance of community or public education campaigns; it is only to suggest that arguments about "what works" make the same assumptions as arguments about the need for criminal bans. Indeed, this last point has been a source of feminist disagreement:

> While some forms of social deterrence and consciousness-raising may be important components of a feminist and modified pragmatic approach to the problem of the selective abortion of female fetuses, there has been little feminist exploration regarding why and whether legal control of the knowledge of fetal sex is appropriate . . . . a [r]estriction would act as a social criticism of a system where the institutionalization of misogyny is so great that we must act in such a radical manner.[318]

Advocates for reproductive rights are in a bind. They want to argue bans are unconstitutional or that sex selection does not occur, but they also do not want to diminish the public condemnation of son preference abroad or at home.[319] As a consequence of this dilemma, there is little room for solutions that are not about legislating against abortion or protecting established abortion rights. The final part of this article considers ways in which reproductive rights advocates can move past the current impasse of sex-selective abortion defined as discrimination or violence.

IV. RESPONSES TO NEW REGULATION

The current debate that NIPT has helped inspire is at a standstill. Neither proponents nor opponents of sex selection bans can claim victory. Constitutional arguments attempt to neutralize the debate by relying on courts to shield the public from irresponsible laws or irresponsible practices. For reasons set out in Part III, both PRENDA opponents and supporters could be disappointed

317. WHO INTERAGENCY STATEMENT, *supra* note 189, at 7.
318. Cherry, *supra* note 18, at 221–22.
319. *Id*. at 222–23.

with courts' answers.[320] Courts could further blur the viability line, as the Supreme Court did in *Gonzales*. Additionally, courts might enjoin sex selection bans, a possibility anticipated in clauses applying a bill after viability, if a court finds the law unconstitutional.[321]

Empirical arguments also cut both ways. For reproductive rights advocates, it is impossible to prove that sex selection never happens, and if it does, it would be difficult to prove that the act is never directed at avoiding the birth of a girl. For the anti-abortion movement, laws like PRENDA will continue to be difficult to enforce. A pregnant woman could have NIPT in one facility and seek an abortion in another; patients can withhold and misrepresent their reasons for testing or for abortion. Without a more intrusive state mechanism for assessing truthfulness, it is easier to skirt around reason-based bans.[322]

Both "sides" view law as the problem and answer—there is either too much or too little of it, and the Constitution's application or new legislative enactments must protect or eliminate existing rights. Those opposing abortion will continue to pursue legislative bans, likely with continued success and with problematic legislative line drawing. Constitutional and empirical retorts have not stemmed legislative enthusiasm for abortion bans based on any genetic or physical abnormality, as seen recently in the passage of the North Dakota law.[323] Moreover, leaving to state legislatures the task of deciding what genetic conditions are serious and what conditions are not is a disconcerting prospect for not only reproductive rights advocates, but also for the disability rights community.[324]

320. *See supra* notes 282–86 and accompanying text.

321. *See, e.g.*, PRENDA § 4 (copying verbatim Section C of the AUL Model Legislation, which preserves bans applied after viability if the law is found unconstitutional (if applied before viability)).

322. *See* Kohm, *supra* note 18, at 120. As noted, states are increasingly legislating to capture and vet reasons for abortions (requiring patients to sign affidavits, for example), and those supportive of abortion rights may not want to invite anti-abortion legislators to attempt to solve problems of enforceability. *See supra* text accompanying note 174.

323. H.B. 1305, 63d Leg. Assemb., Reg. Sess. (N.D. 2013).

324. For example, North Dakota lists what it considers "abnormalities" under the statute: "any physical disfigurement, scoliosis, dwarfism, Down syndrome, albinism, amelia, or any other type of physical or mental disability, abnormality, or disease." *Id*. § 14.-02.1-02(6). This is the kind of legislative line drawing—what is "abnormal" and what is not—that the disability rights community has resisted. *See, e.g.*, Asch, *supra* note 300, at 339;

And both proponents and opponents of sex-selective abortion bans are defined and limited by their political commitments. Abortion rights advocates might agree that sex-selective abortion is a problematic practice, but their justifiable commitment to keeping reason-based bans off the books make those concerns difficult to confront. Reproductive rights advocates are thus hesitant to acknowledge that some terminations involve coercion; abortion opponents reject that many abortions greatly improve women's lives or that the "cost" to fetal life may be "worth it." The priority for abortion opponents has been fetal personhood; women who choose abortion undermine the moral value that the pro-life community places on fetuses.[325]

At this impasse, health care providers manage the testing for fetal sex. Decisions after prenatal testing, as noted in Part II, are largely unregulated and almost entirely shaped by professional medical ethics. Because of the lack of enforcement, bills like PRENDA do not actually disrupt the status quo in which obstetricians and genetic counselors oversee testing and abortion decisions. This may also be an uncomfortable place for both opponents and proponents of sex-selective abortion bans. Those supporting abortion worry about physician paternalism; indeed, the dicta of *Casey* cemented a shift in thinking about abortion as a physician's decision, as set out in *Roe*, to abortion as a woman's right.[326] Anti-abortion advocates suspect that physicians are economically and politically beholden to an "abortion industry."[327]

What will happen in the offices of physicians and genetic counselors is an open question.[328] What is known is that abortion is an

Mary Crossley & Lois Shepherd, *Genes and Disability: Questions at the Crossroads*, 30 FLA. ST. U. L. REV. xi, xi–xii (2003); Martha A. Field, *Killing "The Handicapped"—Before and After Birth*, 16 HARV. WOMEN'S L.J. 79, 110 (1993).

325. *See, e.g.*, DENISE M. BURKE & MARY T. NOVICK, *Primer on Legal Personhood: Legal Recognition of Unborn & Newly Born*, AMS. UNITED FOR LIFE, DEFENDING LIFE 2013 (2013), *available at* http://www.aul.org/wp-content/uploads/2013/04/04_Recognition-of-Unborn-Section.pdf .

326. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 846–53 (1992).

327. *See* William Saletan, *The Abortion Industry: The Hidden Factions of the Abortion Trade: Feminists, Doctors, and Entrepreneurs*, SLATE (Feb. 17, 2011, 12:41 PM), http://www.slate.com/articles/news_and_politics/the_back_alley/2011/02/the_abortion_industry.html (describing an "abortion industry" as "a postulated alliance of clinic operators and their apologists, chiefly Planned Parenthood[, . . . in which] clinic owners and abortion rights activists often banded together").

328. For a full discussion of challenges and changes in genetic counseling after the wider introduction of NIPT, see Rachel Rebouché, *Non-Invasive Testing*, *Non-Invasive*

essential, though complicated, choice after prenatal testing.[329] Some women feel pressure to abort for certain disorders, experiencing guilt and sadness, and some women experience relief after the procedure. Those experiences cannot be easily categorized in boxes marked "pro-choice" or "pro-life."[330]

But abortion politics promise to monopolize debates about regulating genetic testing for sex or for any other fetal characteristic.[331] NIPT will invite more regulation of the information and counseling that patients receive in the form of laws that do not ban abortion entirely but attempt to restrict and manage pregnant women's decisions.[332] Recent Virginia and Nebraska statutes permit genetic counselors to refuse to explain test results or options after testing if, in the words of the Virginia law, the counseling "conflicts with [the counselor's] deeply-held moral or religious beliefs."[333] A question for reproductive rights advocates is not only how to react to anti-abortion measures, but what are the regulatory choices abortion supporters should make.

In regard to sex selection, this article does not offer a regulatory answer. Rather, it asks reproductive rights advocates to consider their options and to contemplate the consequences of their choices. Until this point, abortion supporters have offered constitutional or empirical defenses, but they have not offered a way

Counseling, 42 J.L. MED. & ETHICS (forthcoming 2015) [hereinafter Rebouché, *Non-Invasive Testing*]; *see also* STERN, *supra* note 37, at 147 (describing the evolution of genetic counseling as more patients sought prenatal diagnosis).

329. STERN, *supra* note 37, at 9 (describing the responsibilities of genetic counselors to explain the option of terminating pregnancy after testing).

330. *See generally* R. Alta Charo & Karen H. Rothenberg, *"The Good Mother": The Limits of Reproductive Accountability and Genetic Choice*, *in* WOMEN AND PRENATAL TESTING: FACING THE CHALLENGES OF GENETIC TECHNOLOGY 105, 106–07 (Karen H. Rothenberg & Elizabeth J. Thompson eds., 1994); Barbara K. Rothman, *The Tentative Pregnancy: Then and Now*, *in* WOMEN AND PRENATAL TESTING: FACING THE CHALLENGES OF GENETIC TECHNOLOGY 260, 260–62, 267–70 (Karen H. Rothenberg & Elizabeth J. Thompson eds., 1994); Karen H. Rothenberg, *The Law's Response to Reproductive Genetic Testing: Questioning Assumptions About Choice, Causation, and Control*, 8 FETAL DIAGNOSIS & THERAPY 160, 162 (1993).

331. Rebouché, *Non-Invasive Testing*, *supra* note 328, at 13.

332. An increasing number of disorders can be treated *in utero*, making testing information all the more important to potential parents. Moreover, test results aid in planning post-natal care for certain conditions. The question of decision-making after test results is not solely one that concerns termination decisions. *See* Benn & Chapman, *Ethical Challenges in Providing Non-Invasive Prenatal Diagnosis*, *supra* note 43, at 131.

333. VA. CODE ANN. § 54.1-2957.21 (Supp. 2014); *see also* NEB. REV. STAT. § 38-3424 (Cum. Supp. 2012) (refusal rights for genetic counselors).

out of the sex-selection dilemma. NIPT's wider introduction suggests that abortion opponents need to find common strategies with the medical professionals that shape prenatal testing practices.

As noted, professional societies such as ACOG and ASRM hesitate to ban sex determination because of concerns about patient autonomy, believing that a patient should have the right to learn information about her pregnancy. At the same time, however, professional organizations are skeptical about the use of NIPT for fetal characteristics like sex. Reproductive rights advocates express a similar position: they too are committed to women's rights to autonomy, but worry about the ethics of prenatal sex determination. Perhaps abortion supporters should stop contesting sex selection bans, which is distinct from accepting or supporting bans, and direct some of their energies to the daily management of testing and options counseling. As reproductive rights advocates have argued, sex-selective abortion bans are difficult to enforce. However, even with obstacles to enforcement, advocates need to come to terms with the negative impact of bans on some pregnant women—e.g., patients that are uninformed, new to the country, or otherwise vulnerable.

As a way forward, reproductive rights advocates could support policies that influence the delivery of NIPT and minimize the costs of bans—scripts for abortion providers, training manuals, or tailored informed consent standards, for example. This requires embracing, rather than rejecting, how sex determination works and why sex-selective abortions occur. It also suggests recognizing how sex selection currently operates outside of the law and how the practice will likely change in the future. With the introduction of NIPT, for example, sex determination could turn into an entirely at-home exercise with home testing kits.

The purpose of this article is to suggest that reproductive rights advocates have policy choices; they are not wholly marginalized in their support of abortion and they have legal tools at their disposal other than resisting prohibition. Although this article does not take a position as to what reproductive rights advocates should do, it urges PRENDA's opponents to abandon unconvincing responses to sex-selective abortion and to accept some regulatory power. More importantly, advocates should decide what compromises are worthwhile. Because the reasons to govern

are policy arguments not rights claims, they are not empirical truths but grounded in the practical realities of new tests and new markets for those tests.

CONCLUSION

This article has argued that sex-selective abortion debates have shifted understandably to respond to an important new technology for prenatal testing, but that this noisy and frequently frustrating debate has stolen attention from the complex reproductive health issues that NIPT and its regulation create. This is a pressing problem for policy makers because this country's understanding of sex selection has developed within the long history of activism around discrimination and violence against women. Constitutional and empirical arguments have not given proponents or opponents of reform a way out—they have only sidelined and sidetracked debates about how law, medical ethics, and prenatal diagnosis should intersect. A reproductive justice perspective could add much more to debates on genetic counseling, informed consent, and physician oversight. At present, however, that voice is almost entirely lent to a legislative conversation it cannot seem to sway.