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“We just don’t want a baby girl”

Preventing abortions based on the gender of the unborn child

Courtney Shanney

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Abstract

Sex-selection abortions are abortions performed solely on account of the gender of the fetus. It is typically a cultural issue, affecting families of Asian descent, where there is a strong preference to have a male child over a female child. To combat what the government sees as a problem, the Federal Government introduced the Pre-Natal Non-Discrimination Act, H.R. 3541, which failed in the House of Representatives in 2009. This Bill sought to make it illegal for an abortion provider to perform an abortion on a woman if they believed the reason for the abortion was the gender of the child. Among the penalties for performing such an abortion were criminal penalties, including fines, imprisonment, and revocation of their medical license, and civil penalties such as monetary and statutory damages owed to the woman, her husband, and/or her parents. After the Federal bill failed, states took matters into their own hands. Currently, six states have a sex-selection abortion ban (Arizona, Illinois, Kansas, North Dakota, Oklahoma, and Pennsylvania), and a similar bill has been proposed in 20 other states.

I. Introduction

Advancements in science and medicine always open new doors, but they frequently pose ethical quandaries for doctors and patients alike. Abortions have been performed as far back as 2700 BCE in China¹ and have been controversial ever since.² Medical abortions as we know them today have been prevalent since the late 19th century.³ However, this paper will not discuss the ethics of abortions. It will not mention *Roe v. Wade* or *Planned Parenthood v. Casey*.⁴ The paper will not include a discussion about my personal opinions regarding abortion. Instead, this paper seeks only to analyze one particular limitation to the right to have an abortion which is gaining momentum in state legislation in the United States.

Although the abortion controversy has never quite left politics, it has recently been in the forefront of legislation yet again.⁵ However, current legislation is not seeking to ban abortions altogether but rather just to limit a woman's ability to seek an abortion.⁶ The present abortion dispute has arisen over the legality of abortions performed for the reason of the gender of the future child.⁷ Selective abortions have been a controversial issue for many years, with parent's decisions frequently hinging upon whether they want a male or female child, or whether they want a child who will be born with a genetic defect such as Down Syndrome.⁸ Studies in the United States suggest that up to ninety percent of prenatal diagnoses of Down Syndrome result in

¹ CAROLE JOFFE, *MANAGEMENT OF UNINTENDED AND ABNORMAL PREGNANCY 1* (Backwell Publishing 1st ed. 2009), http://media.wiley.com/product_data/excerpt/62/14051769/1405176962.pdf.

² *Id.*

³ *Id.*

⁴ *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁵ H.R. 3541, 112th Cong. (2009).

⁶ *Id.*

⁷ *Id.*

⁸ Peter Dominiczak, *MPs call for doctors to record the sex of aborted fetuses*, THE TELEGRAPH (Jan. 18, 2013, 2:01 PM), <http://www.telegraph.co.uk/news/politics/9811202/MPs-call-for-doctors-to-record-the-sex-of-aborted-foetuses.html>.

abortions.⁹ To combat such a problem, some states have begun to pass Fetal Non-Discrimination Acts.¹⁰ These statutes typically aim to prevent a mother from having an abortion based upon the sex of the child, and require that a physician who believes that a woman is making such a decision not perform the abortion and report it to the proper authorities.¹¹ These statutes have been passed in 6 states and have been proposed in 20 others.¹²

Abortions generally are permitted throughout the United States since *Roe v. Wade* was decided by the Supreme Court in 1973.¹³ However, the right to have an abortion is not above the law entirely.¹⁴ Abortions can, and are, subject to regulation.¹⁵ Gender discrimination abortion statutes are just one area in which the legislature, both state and federal, seeks to regulate.¹⁶ But is this truly an area which needs or requires regulation? Or is this a private and personal decision, one which should be left up to the parents and the physicians?

A poll conducted by Zogby International, as cited by the Pre-Natal Non-Discrimination Act (Pre-NDA), in March 2006 showed that eighty-six percent of Americans felt that gender-based abortions should be illegal.¹⁷ With such an overwhelming segment of the population feeling so strongly about the legality of such abortions, it is no wonder that so many states as well as the federal government have attempted to take action by proposing bills prohibiting

⁹ Amy Julia Becker, *The Social Construction of Selective Abortion*, THE ATLANTIC (Jan. 22, 2013, 10:28 AM), <http://www.theatlantic.com/sexes/archive/2013/01/the-social-construction-of-selective-abortion/267386/>;

¹⁰ Nick Smith, *Bill bans abortions for genetic abnormalities*, THE BISMARCK TRIBUNE (Jan. 22, 2013, 1:43 PM), http://bismarcktribune.com/news/local/govt-and-politics/bill-bans-abortions-for-genetic-abnormalities/article_0b7cba6c-64cc-11e2-8a18-0019bb2963f4.html.

¹¹ Kate Sheppard, *House GOP's 'Prenatal Nondiscrimination' Bill Fails*, MOTHER JONES, (May 31, 2012, 12:36 PM), <http://www.motherjones.com/mojo/2012/05/house-gop-abortion-sex-selection>.

¹² Currently, these types of bills have been passed in Arizona, Illinois, Kansas, North Dakota, Oklahoma, and Pennsylvania. The bills have been proposed in Colorado, Florida, Georgia (failed), Iowa, Idaho, Indiana, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, North Carolina, New Jersey, New York, Ohio, Rhode Island, Texas, Utah, Virginia, Wisconsin, and West Virginia. See *infra* Section III.

¹³ *Roe v. Wade*, 410 U.S. 113 (1973);

¹⁴ See, i.e., Carole Joffe, *Roe v. Wade and Beyond: Forty Years of Legal Abortion in the United States*, DISSENT: A QUARTERLY OF POLITICS AND CULTURE (Winter 2013), <http://www.dissentmagazine.org/article/roe-v-wade-and-beyond-forty-years-of-legal-abortion-in-the-united-states>.

¹⁵ *Id.*

¹⁶ H.R. 3541, 112th Cong. (2009).

¹⁷ *Id.*

gender-based abortions.¹⁸ Although the Pre-NDA failed in the Federal legislature, six states have passed similar legislation which prohibits performing abortions when the reason for the abortion is the gender of the child; twenty other states have proposed similar bills.¹⁹ Two of these statutes, in North Dakota and Kansas, have been passed as of March 2013, and Florida and North Carolina may soon also introduce the legislation, as similar statutes are currently being seriously considered by their legislatures and have already passed in one of their houses.²⁰

Part II of my paper will provide an overview of what sex selective abortions and will describe some of the arguments made in favor and in opposition to gender-based abortions. Part III of my paper will detail the sex-selection abortion bills which have been proposed and enacted, covering both state and federal bills. Part IV will analyze these statutes and discuss the various strengths and benefits of the bills. And Part V will conclude that this area of law should remain unregulated because it poses an unnecessary burden on abortion providers and limits women's medical privacy rights.

II. Overview of Sex-Selective Abortions

Sex-selective abortions are defined as abortions which are performed solely on account of the sex of the child.²¹ Generally, the targets of sex-selective abortions are female babies.²² This is typically a cultural issue, affecting those of Asian descent, particularly Chinese, Indian, and Korean.²³ This is not believed to be a large-scale problem in the United States; it only affects particular demographics.²⁴ According to the federal government, it is approximated that 100 abortions are performed each year in the

¹⁸ *Id.*

¹⁹ *Id.*; see also *infra* Section III.

²⁰ See *infra* Section III.

²¹ H.R. 3541, 112th Cong. (2009).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

United States for sex-selection reasons.²⁵ However, it should be noted that this is just an approximation, as women are not required to disclose the reason or reasons why they are seeking an abortion.²⁶ Sex-selection abortion problems are more common in India and China.²⁷ In these two cultures, it is considered desirable to have a male child as opposed to a female child.²⁸ However, in the past fifteen years, both India and China have imposed a ban on sex-selective abortions because of the large disparity in the male to female ratio in their population.²⁹ However, it is believed that these bans are not well enforced and that many doctors will perform the procedures regardless of the regulations.³⁰

A. Arguments in favor of sex-selective abortion statutes

The concept of gender-based abortions is really quite alarming, to think that a parent would choose to abort a child because they do not want a son or a daughter. As such, it should come as no surprise that eighty-six percent of Americans have expressed a belief that abortions for this reason should be illegal.³¹ As a result of this strong American opinion, legislators on both a state and federal level have proposed bills which seek to ban sex-selective abortions by imposing liability on the abortion providers if they perform an abortion that they know is sought based on the gender of the child. These bills are targeted at prohibiting gender discrimination and “genericide,” the targeted killing of members of one gender, through the abortion of a fetus based on its sex.³² What is most distressing about gender-based abortions is that many of the fetuses which are aborted based on their gender are would-be females.³³ It has been estimated

²⁵ *Id.*

²⁶ *Id.*

²⁷ B. M. Dickens, *Can sex selection be ethically tolerated?*, JOURNAL OF MEDICAL ETHICS, <http://jme.bmj.com/content/28/6/344.full>

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ H.R. 3541, 112th Cong. (2009).

³² *Id.*

³³ *Id.*

that more than 100 million women are “demographically missing” from the world due to sexist practices such as sex-selective abortions.³⁴

Sex-selection is most common in families of Indian, Chinese, and Korean descent. Socially, it is deemed better in these cultures to have a male offspring than a female, and, as such, many females suffer as “undesirables.”³⁵ According to the federal government, there exist “[u]nnatural sex-ratio balances within certain segments of the US population, primarily those segments tracing their ethnic or cultural origins to countries where sex-selection abortion is prevalent.”³⁶ This “son preference,” and the abortions that result from it, advance gender discrimination in the United States as they increase the gender imbalance.³⁷

Son preference is reinforced by the low value associated, by some segments of the world community, with female offspring. Those segments tend to regard female offspring as financial burdens to a family over their lifetime due to their perceived inability to earn or provide financially for the family unit as can a male. In addition, due to social and legal convention, female offspring are less likely to carry on the family name.³⁸

To Americans who do not come from these cultures and who do not share these beliefs, the idea of aborting a child for these reasons is abhorrent.

Another argument that has been raised in favor of the gender-selection abortion statutes is to prohibit the United States as acting as a “safe-haven” for individuals who wish to have a gender-based abortion, but for whom it is illegal to do so in their home country.³⁹ As discussed above, in some countries, such as India and China, it is highly desirable culturally to have male offspring.⁴⁰ As such, gender-based abortions had previously been prevalent among these

³⁴ *Id.*, citing a 1990 report by Harvard University economist Amartya Sen.

³⁵ *Id.*

³⁶ *Id.*

³⁷ H.R. 3541, 112th Cong. (2009)..

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

societies, thus creating a large gender imbalance.⁴¹ As a result, countries such as India and China have prohibited gender-based abortions in an attempt to remedy this imbalance.⁴² Legislators are afraid that individuals from these countries who still desire to have a gender-based abortion will seek to have the procedure performed in the United States instead.⁴³ The United States would be acting in a sense as a “safe haven” where our doctors would be performing abortions on them that would otherwise be illegal in their home country.⁴⁴ Believing that this is immoral and unethical, Congress has used this as a reason for prohibiting gender-based abortions entirely.⁴⁵

B. Arguments against sex-selective abortion statutes

As with any limitation on abortion rights, pro-choice supporters have strong opinions regarding the sex-selection abortion statutes. Sex-selection only occurs in small portions of the American population and can be accomplished in two ways – through sex-selection abortions, in which a mother has an abortion after determining the gender of the fetus, or through sex-selection abortions or through Preimplantation Genetic Diagnosis (PGD), in which the chromosomes of an embryo can be tested to determine genetic abnormalities and gender before placing the fetus in the womb.⁴⁶

Most pro-choice advocates feel that bills such as this are just another way of “chip[ping] away” of abortion rights and that it is just a “[t]hinly veiled attempt to limit abortions.”⁴⁷ Essentially, limiting this abortion right is viewed as a restriction to a woman’s access to abortion services, regardless of her reason, because it makes abortion providers “more vulnerable to law suits and less include to provide abortion

⁴¹ *Id.*

⁴² *Id.*

⁴³ H.R. 3541, 112th Cong. (2009).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Whitney Akchurin and Ryan Kartzke, *The Ethics of Gender Selection*, ETHICA PUBLISHING, <http://ethicapublishing.com/3CH2.htm>.

⁴⁷ National Asian Pacific American Women’s Forum, *Race and sex selection fact sheet* (July 2010), <http://napawf.org/wp-content/uploads/2011/06/Race-and-sex-selection-fact-sheet.pdf>.

services.”⁴⁸ The most liberal of the pro-choice advocates believe that abortion rights should not be limited by the government, that there should not be restrictions placed on a woman’s right to choose. A woman’s decision to have an abortion is a highly personal decision, and the gender of the child may be the sole factor or one of a variety of factors that the mother considers when making this choice. But regardless of the reason why the woman ultimately follows through with the decision to have an abortion, pro-choice advocates do not believe that the reason for that choice should be a restriction placed on the right.

There is also a concern for a mother’s well being when she is carrying an “undesired” female child.⁴⁹ Because having female offspring is so objectionable in certain cultures, many women or their husbands seek to have the female fetuses aborted.⁵⁰ It is not uncommon for some women to be tortured by their husbands or mothers-in-law for failing to have a male offspring.⁵¹ Furthermore, female children who are born into these cultures could be subject to a difficult lifestyle, to punishment or cruelty, or to being abandoned.⁵² While the devastating effects of having a female child in certain cultures is more prevalent in their native countries, this does not mean that it does not exist here in the United States as well. The cultural stigma associated with being a female can be very difficult for a woman being brought up in these cultures and can be a burden on their family members’ lives.

⁴⁸ Sujatha Jesudason and Susannah Baruch, *Race and Sex in Abortion Debates: The Legislation and the Billboards*, GENERATIONS AHEAD, <http://www.generations-ahead.org/files-for-download/success-stories/RaceAndSexSelection.pdf>.

⁴⁹ Noah Berlatsky, *Neither Pro-Life Nor Pro-Choice Can Solve the Selective Abortion Crisis*, THE ATLANTIC (Mar 6, 2013, 8:11 AM), <http://www.theatlantic.com/sexes/archive/2013/03/neither-pro-life-nor-pro-choice-can-solve-the-selective-abortion-crisis/273704/>.

⁵⁰ *Id.*

⁵¹ Annie Moskavian, *Bans on Sex-Selective Abortions; How Far is Too Far?*, 40 HASTINGS CONST. L.Q. 423, 427 (2013).

⁵² *Id.*

III. Proposed and Enacted Statutes

Prior to 2000, only two states had abortion statutes which covered gender discrimination abortions, Illinois and Pennsylvania.⁵³ A Federal bill covering such abortions, the “Pre-Natal Nondiscrimination Act” (Pre-NDA)⁵⁴, was introduced to the House of Representatives in 2008.⁵⁵ Its introduction and subsequent failure to pass in 2009 spurred similar statutes to be proposed in at least twenty-one other states.⁵⁶ These states include Arizona, Colorado, Florida, Iowa, Idaho, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, North Carolina, North Dakota, New Jersey, New York, Ohio, Oklahoma, Rhode Island, Texas, Utah, Virginia, Wisconsin, and West Virginia. At the time this paper was written, the statutes had been passed in Arizona (2011), Kansas (2013), North Dakota (2013), and Oklahoma (2009), and both North Carolina and Florida had passed the legislature in the House and the bills were poised to be discussed by the state Senate.⁵⁷ Georgia had proposed a sex-selection abortion bill but this bill failed.⁵⁸ Figure 1 is a map of the sex-selection abortion legislation trends in the United States. States that have passed this legislation are highlighted in red, while states that have proposed the bills are in blue. North Carolina and Florida are in green because the bill has passed in one House and is currently before the Senate in their respective states. And Georgia is in brown, signifying that the statute was proposed but failed in the state legislature. This sudden influx of gender-based abortion statutes makes one realize that this is an issue that needs to be dealt with

⁵³ National Asian Pacific American Women’s Forum, *supra* note 40.

⁵⁴ H.R. 3541, 112th Cong. (2009).

⁵⁵ National Asian Pacific American Women’s Forum, *supra* note 40.

⁵⁶ *Id.*

⁵⁷ Associated Press, *NC House votes to bar sex-selective abortions*, SALISBURY POST (May 8, 2013, 9:31 AM), <http://www.salisburypost.com/article/20130508/SP01/130509744/1058/nc-house-votes-to-bar-sex-selective-abortions>; Nicole Zakrzewski, *Ban on race-, gender- selective abortions reviewed*, THE INDEPENDENT FLORIDA ALLIGATOR (Apr. 18, 2013, 12:15 AM), http://www.alligator.org/news/local/article_37fbc9e-a7db-11e2-b292-001a4bcf887a.html.

⁵⁸ Charles Butts, *A fifth state considers ban on sex-selective abortions*, NEWS NOW (Oct. 31, 2012), <http://ww2.onenewsnow.com/pro-life/2012/10/31/a-fifth-state-considers-ban-on-sex-selective-abortions>.

immediately, as it is something that legislators throughout the country believe is of the upmost current importance.

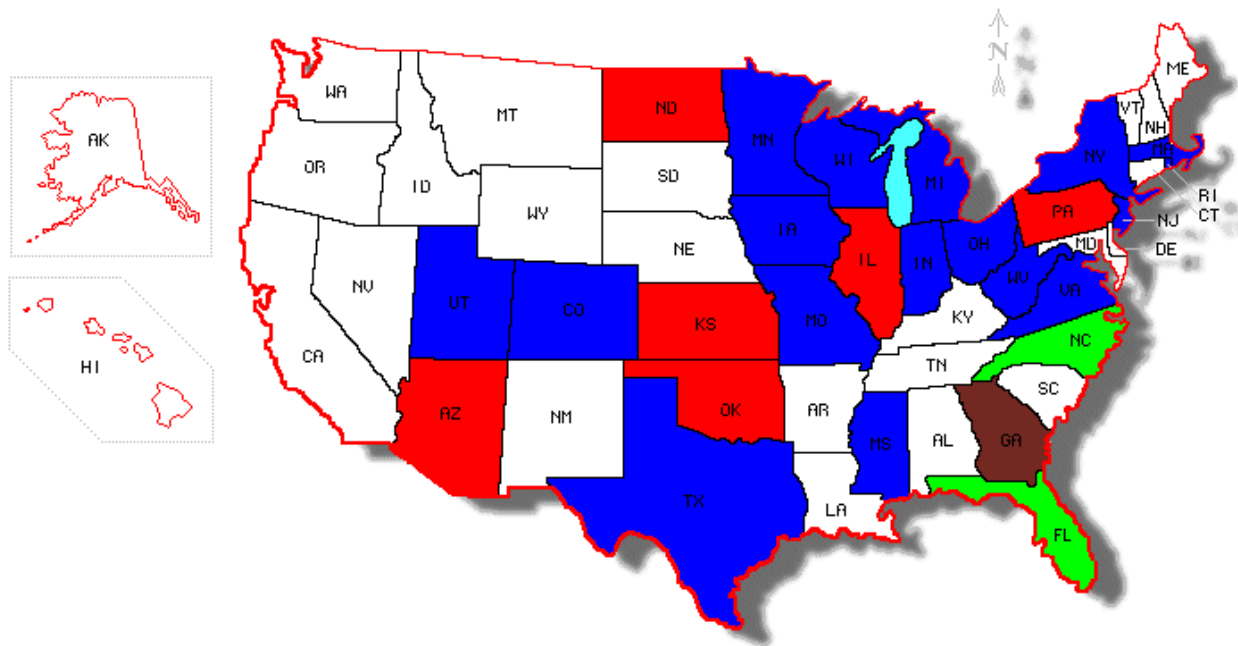


Figure 1

Although so many states have introduced these so-called gender-based abortion statutes, each state seems to have gone about it in their own way. There are a variety of ways of handling the situation which have been proposed, from holding the abortion provider criminally liable to providing civil damages to the father or maternal grandparents. Each of these options is effective as well as ineffective in their own way. The texts of the Federal Pre-Natal Nondiscrimination Act and the state proposed and enacted bills are largely the same and will be discussed and analyzed contemporaneously.

It is important to note here that while there are six states which currently have imposed legislation regarding sex-selection abortions, these statutes have yet to be enforced against any abortion providers. Therefore, the statute language can only be analyzed as it is written, as it has yet to be interpreted by the courts. Furthermore, many of the bills that will be discussed below

have not been passed by their respective states and are not enforceable statutes. A significant number of the bills were only introduced within a few months of this paper being written. These bills are discussed for the purpose of showing how far-reaching the potential of these bills are, regardless of whether they have been passed yet.

A. What is prohibited by sex-selection abortion bills

Sex-selection abortion statutes have been proposed “[t]o prohibit discrimination against the unborn on the basis of sex or race, or for other purposes.”⁵⁹ They all define a “sex-selection abortion” as “an abortion undertaken for the purposes of eliminating an unborn child of an undesired sex.”⁶⁰ The bills hold the abortion provider liable for providing an abortion that was sought based on the sex of the child.⁶¹ The statutes utilize a three-prong statutory system to regulate against gender-based abortions.⁶² The method of achieving their purpose, “to intimidate abortion providers,”⁶³ essentially puts the duty on the part of the medical practitioners or abortion providers to ensure that abortions are not performed on the basis of the gender of the fetus.

The bills provide a ban for three particular actions – “perform[ing] an abortion knowing that such abortion is sought based on the sex ... of the child”; “use[] of force or the threat of force to intentionally injure or intimidate any person for the purpose of coercing a sex-selection ... abortion”; and “solicit[ing] or accept[ing] funds for the performance of a sex-selection abortion.”⁶⁴

⁵⁹ H.R. 3541, 112th Cong. (2009).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*, see also National Asian Pacific American Women’s Forum, *supra* note 40.

⁶⁴ H.R. 3541, 112th Cong. (2009).

B. Criminal liability for abortion providers

Most of the proposed and enacted bills have included a provision that holds the abortion provider criminally responsible for performing a gender-based abortion.⁶⁵ For the purpose of fluidity, the model statute language as proposed by the Americans United for Life will be used to illustrate the general consensus of the proposed and enacted legislation, and deviations from this model language will be noted.

1. Fines and Imprisonment

Under the model statute, “[a]ny physician or other person who intentionally or knowingly performs or attempts to perform an abortion prohibited by this Act shall be fined..., or be imprisoned,... or both.”⁶⁶

The federal bill as well as Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Illinois, Kansas, New Jersey, New York, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, North Dakota, Pennsylvania, Ohio, Oklahoma, Rhode Island, Texas, Virginia, make it a felony to provide such an abortion, while Rhode Island and West Virginia impose lesser criminal penalties such as misdemeanors.⁶⁷ Such felonies and prohibitions vary in degree of

⁶⁵ BAN ON ABORTIONS FOR SEX SELECTION AND GENETIC ABNORMALITIES MODEL LEGISLATION & POLICY GUIDE (2012), <http://www.aul.org/wp-content/uploads/2012/01/Sex-Selective-and-Genetic-Abnormality-Ban-2012-LG.pdf>, hereinafter “Model Legislation”.

⁶⁶ *Id.*

⁶⁷ H.B. 2443, 50th Leg. (Az. 2011); S.B. 13-056, 69th Gen. Assemb., Reg. Sess. (Co. 2012); H.B. 845 Gen. Assemb., Reg. Sess. (Fl. 2013); H.B. 1155, Gen. Assemb., Reg. Sess. (Ga. 2009-2010); H.B. 693, 60th Leg. (Id. 2010); S.B. 183, Gen. Assemb., Reg. Sess. (In. 2013); S.F. 13, Gen. Assemb., Reg. Sess. (Ia. 2013); Illinois Abortion Law of 1975, 720 ILCS § 510 (1975); S.B. 141, Gen. Assemb., Reg. Sess. (Ks. 2013); H.B. 2157, 215th Leg. (N.J. 2013); S02286, Gen. Assemb., Reg. Sess. (N.Y. 2013); H.B 1567 (Ma. 2013); H.B. 5125, Gen. Assemb., Reg. Sess. (Mi. 2009); H.B. 1196, 86th Leg. (Mn. 2009); S.B. 2166, Gen. Assemb., Reg. Sess. (Ms. 2010); H.B. 386, Gen. Assemb., Reg. Sess. (Mo. 2013); H.B. 1305, 63rd Leg. Assemb. (N.D. 2012); Pennsylvania’s *Abortion Control Act*, 18 Pa. Cons. Stat. § 3201(1982); H.B. 570, 129th Gen. Assemb., Reg. Sess. (Oh. 2011); H.B. 1595, 52nd Leg. (Ok. 2009); H. 5566, Gen. Assemb., Reg. Sess. (R.I. 2013); H.B. 309, Gen. Assemb., Reg. Sess. (Tx. 2012); H.B. 1316, Gen. Assemb., Reg. Sess. (Va. 2013); H.B. 2371, Gen. Assemb., Reg. Sess. (W.V. 2013). Full text of all bills and statutes on file with author.

severity as well as the degree of punishment, ranging from \$500 in fines to \$15,000 and having imprisonment terms of up to 5 years.⁶⁸

Iowa has an interesting caveat that the abortion provider must certify in writing that the abortion is not being performed based on the gender of the child and that the provider has no knowledge that the abortion may be sought for that reason.⁶⁹ It is the only state to have such a requirement.

2. Revocation of Medical License

The federal bill and five states (Missouri, New York, Rhode Island, and Texas) impose criminal penalties beyond fees and imprisonment.⁷⁰ These bills even go so far as to revoke or suspend the license of any professional found guilty of performing the prohibited abortion.⁷¹ “Any physician or person who intentionally or knowingly violates this Act shall be liable for damages and shall, if applicable, have his or her medical licenses suspended or revoked.”⁷²

C. Reporting requirement

Additionally, Pre-NDA and five states, Arizona, Iowa, Idaho, New Jersey, and Minnesota, have a reporting requirement.⁷³ This requirement is an attempt to compel the enforcement of the bill.⁷⁴ This section requires that “[a] physician, physician’s assistant, nurse, counselor, or other medical or mental health professional who knowingly does not report known or suspected violations of this section to appropriate law enforcement authorities is guilty of a felony.”⁷⁵

⁶⁸ West Virginia imposes a \$500 fine whereas New Jersey imposes a \$15,000 fine; Idaho imposes imprisonment terms of up to 5 years. West Virginia bill, *supra* note 59; New Jersey bill, *supra* note 59; Idaho bill, *supra* note 59.

⁶⁹ See *supra* note 59.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Model legislation, *supra* note 57.

⁷³ See *supra* note 59.

⁷⁴ *Id.*

⁷⁵ Model legislation, *supra* note 57.

Violation of this requirement could result in fines or imprisonment.⁷⁶ Such requirements mandate that a physician, physician’s assistant, nurse, counselor, or other medical or mental health professional must report a suspected violation, or else risk liability for themselves as well.

D. Civil liability for abortion providers

The bills also provide civil remedies for parties, namely family members, which the legislators believed may have been affected by an abortion performed on the basis of gender.⁷⁷ Certain relatives of the woman, and in some cases the woman herself, “may commence a civil action for any knowing or reckless violation of the Act and may seek both actual and punitive damages.”⁷⁸ Damages may include “money damages for all injuries, psychological and physical, including loss of companionship and support, occasioned by the violation of this section” as well as punitive and/or statutory damages.⁷⁹

There is some variation among the federal and state bills as to who may recover for civil damages. The federal bill and some states allow the father of the unborn child to seek liability (Iowa, Minnesota, New York, Rhode Island, and Texas). Other states only provide for the father to recover if he is married to the mother at the time of the abortion (Arizona, Idaho, Illinois, Kansas, and New Jersey). The federal bill and several states provide for civil damages to be awarded to maternal grandparents if the mother is under 18 years of age at the time of the abortion (Arizona, Idaho, Illinois, Kansas, Minnesota, Missouri, New Jersey, New York, Rhode Island, and Texas) or the legal guardian of a mother who is deemed incompetent (Missouri).⁸⁰ A

⁷⁶ *Id.*

⁷⁷ H.R. 3541, 112th Cong. (2009).

⁷⁸ Model legislation, *supra* note 57.

⁷⁹ *Id.*

⁸⁰ *See supra* note 59.

select few states provide for the “pregnant woman on whom a prohibited abortion has been performed” to seek civil damages (Georgia, New York, Missouri, Rhode Island, and Texas).⁸¹

Relief may be sought for a variety of injuries, including psychological, physical, or financial, including loss of companionship and support. Attorneys fees may also be rewarded in some states.⁸² The Kansas statute allows for statutory damages for three times the cost of the abortion, injunctive relief, and attorneys fees⁸³ while Rhode Island allows for \$10,000 in punitive damages.⁸⁴

E. Injunctive relief

The proposed bills also allow for injunctive relief to prevent an abortion provider from performing abortions based on the gender of the child.⁸⁵ This injunction can be sought by a “woman upon whom an abortion is performed or attempted in violation of this section; any person who is the spouse of parent of a woman upon whom an abortion is performed in violation of this section; or the Attorney General.”⁸⁶ The injunction provision can also be seen in the state bills for Kansas, New Jersey, and Rhode Island. The Rhode Island bill is expanded to also allow any parent or guardian of the woman to seek an injunction, as well as any current or former licensed healthcare provider of the woman upon whom an abortion is being performed or attempted.⁸⁷

⁸¹ *See supra* note 59.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ H.R. 3541, 112th Cong. (2009).

⁸⁶ *Id.*

⁸⁷ *See supra* note 59.

F. Exclusion of liability for woman

All of the proposed bills and enacted statutes shield a woman from liability if she seeks or has an abortion based on the gender of the child.⁸⁸ “Any woman upon whom an abortion in violation of this Act is performed or attempted may not be prosecuted under this Act.”⁸⁹ Many states also allow for the anonymity of any woman in a civil or criminal proceeding who has had such an abortion.⁹⁰

IV. Analysis of the Legislation

While the vague concept of having an abortion based on the gender of the fetus is quite upsetting to most individuals, these proposed bills and enacted statutes are unworkable and are inefficient at achieving their goals. There are four general categories that are covered by the bills – criminal liability for an abortion provider who knowingly performs an abortion that was sought based on the gender of the child, a reporting requirement that any other medical practitioner who believes that an abortion provider is performing an abortion that is being sought on the basis of the gender of the child must report the abortion provider to the proper authorities, civil liability for an abortion provider who knowingly performs an abortion that was sought based on the gender of the child, and injunctive relief against an abortion provider who may perform an abortion that is being sought based on the gender of the child. In the foregoing subsections, I will analyze the effectiveness and practicability of these four elements of the bills.

⁸⁸ See *supra* note 59.

⁸⁹ Arizona bill, see *supra* note 59.

⁹⁰ See *supra* note 59.

A. Criminal liability for abortion providers

The most challenging part of the proposed legislation to deal with is how the entire burden is placed on the abortion provider to determine whether a woman is seeking the abortion based on the gender of her child. This detail is ineffectual and impractical. It can ultimately lead to discouraging abortion providers from performing any abortion because they will be afraid of whether or not they are acting within the limitations of the law.

To begin with, a decision to have an abortion is a largely personal decision and many factors weigh into the mother's ultimate conclusion. Gender may or may not be one of those factors, but even if it is a factor it does not mean that it was a dispositive one. Women can seek abortions for a variety of reasons. It may even be difficult for them to determine exactly what the ultimate reason or reasons are that brought her to the abortion clinic. And women are not required to disclose to their doctors their reason for seeking an abortion. Forcing the abortion provider to determine the reason for the abortion and to specifically make a determination as to whether the gender of the child played a role in the mother's decision leaves room for much uncertainty. The legal mens rea standard provided in these statutes is most commonly a "knowing" standard, requiring a conscious awareness as to the result. This will force medical practitioners to delve deeper into the decision making process of the woman before she has an abortion, thereby violating her right to keep the reasons for her decision private.

Placing the burden of knowledge on the abortion provider makes it difficult for the provider to ever truly feel confident that they are working within the confines of the law. It may be difficult for the provider to ascertain whether gender is a deciding factor. Or whether gender is just one of many factors that are being considered by the mother. And yet, the medical

practitioner may be held liable if he is found to have performed an abortion that is in violation of these statutes once they are enacted.

Additionally, there are so many ways to get around these statutes that they become overall ineffective at achieving their goal. The mother may say to her abortion provider that there are alternate reasons for the abortion even though privately her decision, or her and the father's decision, was based on the gender of the child. But the question becomes, how far does the abortion provider have to go in order to truly feel confident that they *know* that the abortion is not being sought for reasons of the child's gender? A woman has the right to keep the reasons for her abortion private, and can easily disclose other reasons if she knows she will be barred from having the procedure based on her true reasons.

The most difficult part of these bills is the "knowing" standard. The federal Pre-NDA bill and most of the state bills prohibit abortions when the abortion provider "knows" that the abortion is sought because of the gender of the child.⁹¹ Knowledge is a difficult standard. It forces the doctors to take steps in ensuring that they have been provided with the reasons for the abortion, that those reasons have nothing to do with the child's gender, and that they are confident that the parents are making a decision for reasons that do not fall within the realm of the statutory ban. But there are only so many steps that can be taken to try to ascertain this information, and the true reasons for the abortion can be easily hidden or suppressed by the parents if they are afraid the abortion will be prevented.

Other proposed bills, including the Pre-NDA, have portions where knowledge is not even a required standard.⁹² The third prong of the Pre-NDA provides liability for accepting funds for the performance of a sex-selection abortion, without regard to whether the practitioner had

⁹¹ See *supra* note 59.

⁹² See *supra* note 59.

knowledge that this was the reason for the abortion being sought.⁹³ This is particularly troublesome as it leaves the medical practitioners open to liability for a much broader scope of abortions. All that has to be proven is that gender was a factor in a parent's decision to seek an abortion, and whether or not the abortion provider knew or even had reason to suspect that gender was a reason, the provider can be liable for severe penalties. It is inherently unfair to subject an individual to such liability, especially if they have taken steps to ensure that they are providing a service that is medically ethical.

B. Reporting requirement

The reporting requirement was established as a means to enforce the sex-discrimination abortion ban. This element requires that a medical professional must report an abortion provider if they believe or have reason to believe that the abortion provider is performing an abortion on a woman who sought the abortion on the basis of the gender of the child. However, this places a heavy burden on other medical professionals, putting them at risk if they do not report even something as small as a suspected behavior. The knowledge standard here also poses some difficulty, as it leaves the medical professionals in a very grey area as to when to report and when it is not necessary to report. Having to report even a suspicion of a violation of the law is a difficult requirement and could have medical practitioners theoretically reporting every abortion that they see provided. After all, it is in the medical practitioner's best interest to report even the slightest hint of a possible gender-based abortion because they do not want to put themselves at risk for not reporting it. The statutes that do have a reporting requirement make the failure to report as significant of an offense as performing the prohibited abortions, imposing hefty fines and imprisonment time.

⁹³ H.R. 3541, 112th Cong. (2009).

This does, however, have to balance with the knowledge that their peers and coworkers will be placed under severe scrutiny and possibly be fined, imprisoned, and lose their medical license if they are found guilty. Knowing that your coworkers are always looking over your shoulder to find even the slightest suspicion of failure to comply with the law is essentially the best way to force medical practitioners to actually comply. It is one thing for there to be a law, it is another for there to be a self-reporting mechanism to enforce the law. It is, of course, a double-edged sword, for just as you can report any one of your colleagues, any one of your colleagues could in turn go and report you for the same.

C. Civil liability for abortion providers

Many, if not most, of the proposed and enacted legislation have a section devoted to civil remedies for those who are assumed to have been harmed by the performance of a gender-based abortion.⁹⁴ The individuals covered under this section as entitled to civil damages include the mother of the unborn child, the father of the unborn child, and the maternal grandparents or the unborn child and/or the guardian of the mother of the unborn child, if the mother is under the age of eighteen or considered incompetent. As of yet, this portion of the state bills has yet to be enforced.

It should be noted that while maternal grandparents are entitled to civil damages, there is no provision for damages to be awarded to paternal grandparents. Furthermore, damages can only be awarded to the maternal grandparents and/or guardian of the mother if the mother is under the age of eighteen or is mentally incompetent. This severely limits their ability to receive damages. Additionally, only five states have provisions for the mother to receive civil damages if an unwanted sex-selective abortion is performed on her. Culturally, there is a strong chance

⁹⁴ See *supra* note 59.

that many of these abortions are being performed on women who are being forced or coerced into having the medical procedure because of the cultural stigma associated with having a female child. The mother seems like it should be a demographic which is more cautiously taken care of, as there is the possibility that women are being forced to have these prohibited abortions against their will. To provide no outlet for them to recover for damages associated with the prohibited abortions seems unfair and prejudicial.

One challenge that will arise is that courts will be required to determine whether an individual is, indeed, entitled to damages, and, if so, how much should be awarded in damages. A mother may be entitled to damages if the abortion is forced upon her, but surely this could be covered under a different statute, one that did not limit its coverage to abortions that were based on the gender of the child. Any woman who is coerced or otherwise forced into having an abortion should be entitled to damages regardless of the reason for the abortion. A more generally worded statute could prohibit coercing or forcing a woman to have an abortion against her will, regardless of the reason or reasons that the abortion was sought, and could entitle her to certain rights such as injunction privileges and civil and statutory damages. Forcing a woman to have an abortion, no matter what the reason, is detestable and should be prevented. But it doesn't have to be prevented in such a limiting way as to only account for abortions that were provided for the reason of gender-selection.

Similarly, the father of the child is entitled to damages under this section. It is understandable here as well that if an abortion is performed and the father disagreed with the decision, he might be entitled to damages as a result. However, there appears to be absolutely no reason why this also cannot be covered under a more broad statute, one that did not limit damages to abortions that were determined to have been based on the gender of the child. And

finally, the maternal grandparents of the unborn child and/or the guardian of the mother of the unborn child are also entitled to statutory civil liability damages under the gender-based abortion bills but only if the woman is under eighteen or incompetent. Primarily, it is difficult to grapple with whether these the father and/or the maternal grandparents should be entitled to any damages, as an abortion is a woman's decision and affects primarily herself and the father of the child. Secondly, there is no reason why this should not fall under a different statute, for the same reasons as mentioned above for both the mother and the father of the unborn child.

D. Injunctive Relief

Injunctive relief is perhaps the most effective way of preventing gender-based abortions in the first place. However, to seek injunctive relief, one must first know that the woman is seeking an abortion for reasons relating to gender preference. The majority of the statutes only allow the husband and the parents of the woman who is seeking the abortion to seek an injunction to prevent the abortion from occurring. However, many abortions are sought without consulting other individuals, particularly those who are allowed to seek such relief. Without their first having knowledge of the abortion, and the secondarily knowing that the abortion is being performed for gender discrimination purposes, it is difficult for these individuals to seek the injunction. Furthermore, it has been discussed in depth that these types of abortions are most prevalent in specific cultural groups. In these cultural groups, it is the decision of both the woman and her husband, or more commonly just her husband, and often their families to seek the abortion. Providing an injunction privilege to the very individuals who are seeking the abortion for the woman or who are forcing her to have the abortion makes very little sense.

There is also a noticeable absence of a lack of rights for the paternal grandparents. While maternal grandparents are able to seek an injunction, the paternal grandparents are not afforded the same rights.

The injunction, however, works particularly well in cases where the woman is seeking the injunction for herself. However, very few states provide the right to the woman.⁹⁵ This would apply in particular to situations where the woman is being forced or coerced into having the abortion by another individual, such as her husband, her parents, or her in-laws, for the purpose of the gender of the child. In the cultural demographics that are most affected by sex-selective abortions, this is typically the case. When a woman finds out that she is carrying a female child, her husband or her family insists that the child is aborted regardless of whether the mother wants to keep the baby. This injunction is an effective legal way for the woman to prevent the abortion if she so chooses. However, when her cultural situation is thought through in its entirety, seeking such an injunction would also mean risking losing her family. In instances where this forced abortion might occur, the gender-based abortions should be barred. But again it becomes a challenge for an abortion provider to have to be the one who is determining the true reason behind the abortion and whether a woman is entering into the medical procedure willingly or under duress. While we as a country might want to prevent these types of abortions from being provided, it is still an unfair burden to place on the abortion provider to have to determine when an abortion is being sought for legitimate reasons and when it is done against a woman's very quiet wishes.

⁹⁵ See *infra* Section III.E.

V. Conclusion

By punishing the medical practitioners, the individuals who are performing the abortions, this proposed legislation is chipping away at the holding of *Roe v. Wade*. Each time a bill is introduced that poses new limitations on abortions, we are as a society moving further and further away from the rights that were provided to us in this seminal Supreme Court case. Women were entitled to the right to choose whether or not they wanted to have an abortion, not whether or not they wanted to have one, but only under certain circumstances. This result is not what was intended by the Supreme Court. And regardless of how one feels about abortion rights or even on sex-selection abortion rights, the way these statutes have been written make them largely ineffectual.

These statutes are not just limiting abortions that are sought based on the gender of the child, it is limiting all abortions. Liability is so high for the abortion providers that it almost does not make sense for them to perform abortions at all in states that have passed these statutes. If the abortion providers are found liable for having performed an abortion that violates this statute, they are at such a high risk of fines, imprisonment, and/or losing their medical license. While these statutes do seem like the most effective way of preventing gender-based abortions, it will ultimately cause abortion providers to severely limit the abortions they actually perform to only include those which are completely non-controversial and not likely to fall within the confines of these strict statutes. This is not just limiting gender-based abortions, it is limiting all abortions for all women.

Furthermore, there is a risk that these statutes will increase discrimination against certain ethnic groups. It is known and has been thoroughly discussed that abortions for the purpose of gender selection is most common among individuals of Asian descent, particularly Chinese and

Indian cultures. For self-preservation reasons, abortion providers will be forced to more closely screen individuals of those cultural backgrounds who seek to have an abortion. As it is these individuals who are in the high probability category for seeking the abortion, these statutes may lead to discrimination against these racial groups by abortion providers who are worried about being held liable under the statute. This places an unfair burden on individuals from those ethnic groups who are seeking abortions that are truly not in violation of the sex-selection abortion bans.

Even in cases where gender is the reason that the abortion is sought, the mother may choose not to mention this and refer to other reasons for seeking the abortion, or not provide any reasons at all. A woman is not required to disclose her reasons for seeking an abortion to her abortion provider. As a result, this does not mean that gender-based abortions are being prevented by these statutes. Lying to a doctor about the reason for the abortion is just one of many possible ways that people are able to avoid the statute altogether. A vague reason, such as “It’s just not the right time” or “I’m not ready for children” might allow the abortion to be performed, even when the secret reason behind the abortion is “We just don’t want a baby girl” or “A baby boy isn’t going to work for our family unit.” People who genuinely are seeking a sex-selection abortion because they have a strong preference for one gender child over another are not going to disclose to their doctor what their true reason is for having the abortion. And for those individuals and families, these bills will provide absolutely no prevention mechanism for the abortion. While these bills have a good intent, but they ultimately fall short.

These bills undermine what is ultimately the mother’s decision, or the mother and father’s joint decision: whether to have an abortion or to have a child. While I am reluctant to assert my own personal opinion regarding abortions in this paper, the basic legal framework

remains that we are a country which provides women with the so-called “right to choose.” It is not up to the Congress or the state legislatures to determine whether a woman can or cannot choose to have an abortion. It is not up to Congress or the state legislatures to determine what reasons a woman can or cannot have for seeking an abortion. The decision to have an abortion is up to the woman, as are her reasons for seeking it. There are some notable exceptions to this general right to choose, such the limitation on late-term abortions where it is believed that the fetus is developed enough to survive outside the womb. However, the general right to have an abortion remains and limitations such as this should not be placed on that right. This is not something that is up to Congress or state legislatures to determine. It is a decision that should be left up to the parents and their physicians.