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Benign Sex Discrimination Revisited: Constitutional and Moral Issues in Banning Sex-Selection Abortion*

GEORGE SCHEDLER†

I. INTRODUCTION

The availability of prenatal testing and abortion on demand will soon present American society with a peculiar problem that is likely to produce uncommon bedfellows: anti-abortionists and some feminists may unite in seeking the same statutory restrictions on these procedures.¹ This article will show why legislatures are morally justified in enacting such restrictions and suggest how statutes can be couched so as to comport with the procreative rights announced in Roe v. Wade.² This introduction will briefly explain the problem and present the organization of the arguments within the article.

Pregnant women are presently able to discover the sex of their fe-

* The topic of this paper was first suggested to me by Professor Richard Delgado of the University of California at Davis School of Law, and I am indebted to him for the structure of the argument in Part IVA. See Delgado & Keyes, Parental Preferences and Selective Abortion: A Commentary on Roe v. Wade, Doe v. Bolton, and the Shape of Things to Come, 1974 WASHINGTON U.L.Q. 203. I am also grateful for comments from Professor James Sterba of the Philosophy Department at Notre Dame, from Professors Thomas McAffee and Norman Vieira at the Southern Illinois University School of Law, from Marsha Ryan, M.D., J.D., and from Carol Jackson, Esq.

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1. See infra text accompanying notes 41-43.

2. 410 U.S. 113 (1973). The reader will note that one can adhere to the trimester analysis of Roe and still find these restrictions constitutional. See infra text accompanying notes 132-41. Those who view the Roe viability standard as conflicting with its trimester division will, of course, not even pause to consider whether prohibitions on sex-selection abortion conflict with Roe. See, e.g., Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 458 (1983) (O’Connor, J., dissenting).
tuses by availing themselves of amniocentesis. Women who prefer firstborn male children may choose to follow amniocentesis by abortion if the fetus is discovered to be female. The available evidence indicates that a substantial minority of American women would avail themselves of gender selection techniques and would prefer male over female children. Although the precise percentage of women who are likely to utilize abortion for gender selection is uncertain, the use of amniocentesis and abortion for gender selection by even a minority of women is likely to lead to serious social dislocation, namely, imbalance in the proportion of males to females, more violent crime, and more discrimination against women. States should, therefore, enact legislation prohibiting physicians from disclosing the gender of the fetus to pregnant women when that knowledge is not needed to predict a sex-linked genetic defect. Also, states should

3. Amniocentesis involves the insertion of a needle into the amniotic cavity, removal of some amniotic fluid, and analysis of the fluid to obtain information about the medical condition of the fetus. 4B R. Gray & L. Gordy, ATTORNEY’S TEXTBOOK OF MEDICINE 305-28, ¶ 305.13(5) (3d ed. 1986). To ensure that the fetus or its placenta is not penetrated, ultrasound may be used to determine their locations.

4. See infra text accompanying note 35.

5. See infra notes 29, 35-37 and accompanying text.


7. Sex-selection abortion enables couples who desire to have a firstborn son to realize this goal by simply aborting female fetuses, rather than continuing to “try” to have a son after the births of several daughters. If this were practiced by even a substantial minority of American couples, the size of the female population would diminish. See Wikler, Society’s Response to the New Reproductive Technologies: The Feminist Perspective?, 59 S. Cal. L. Rev. 1043, 1045 (1986), (citing Holmes & Hoskins, Prenatal and Preconception Sex Choice Technologies: A Path to Femicide (Paper presented at Second International Interdisciplinary Congress on Women, Gronigen, Neth., Apr. 17-21, 1984)).

8. More crimes are perpetrated by males than by females. See infra note 31. Therefore, all things being equal, more crimes would occur if there were a greater proportion of males to females as the population remains stable or increases. It should be noted that although this is a broad generalization, it is based upon the assumptions that not only will women in general avail themselves of this technique, but that women of all classes will do so. Although the abortion procedure was utilized primarily by wealthy women before it was legalized by Roe, increasingly greater numbers of lower income women have availed themselves of the procedure. B. Brody, Abortion and the Sanctity of Human Life 55 (1975) (citing Population and the American Future (New York: Commission on Population Growth and the American Future) 175 (1972)). As a result, it is likely that women of all income levels will utilize amniocentesis to gain the information necessary to determine the sex of their fetuses, thereby allowing them the option of aborting the pregnancy based upon this information.

9. See Wikler, supra note 7, at 1045-46.

10. The more accurate term here is “x-linked recessive inheritance,” which refers to certain conditions, such as hemophilia A, where the blood fails to clot normally, which most commonly arises in male offspring. Females, although rarely affected, may be “carriers,” i.e., they can pass the condition on to their sons. J. Thompson & M. Thompson, Genetics in Medicine 70-71 (1980). Besides hemophilia, other x-linked genetic disorders include Duchenne muscular dystrophy and fragile x syndrome (a form of retardation). Id. at 71; Turner, Robinson, Laing & Purvis-Smith, Preventive Screening for the Fragile X Syndrome, 315 New Eng. J. Med. 607-09 (1986). Until recently,
follow the State of Illinois' lead and prohibit physicians from performing abortions on women who seek them solely to control the gender of their children. Both legislative solutions will, of course, encounter constitutional objections. However, as will be demonstrated in this article, these constitutional objections to interference with the availability of abortions and the doctor-patient relationship can be overcome.

The arguments presented below are undoubtedly familiar to liberals and feminists who support the justifications for "benign sex discrimination." However, the unique factual circumstances surrounding the sex-selection abortion problem may obscure the familiarity of the arguments presented in this Article. To clarify matters, we might imagine a situation in which men had the power, by consuming certain chemicals, for example, to produce sperm cells containing only Y chromosomes—thus ensuring all their offspring would be male. Some feminists might feel justified in proposing restrictions on men's freedom to reproduce in this way, in order to spare future generations of women from the oppression that would surely follow. This would be a form of benign sex discrimination of the clearest sort; i.e., the reproductive freedom of one sex is restricted to compensate or protect future members of the disadvantaged sex.

The proposals offered in this Article have the same goals; the difference, however, is that I propose restricting the reproductive freedom of some members of the disadvantaged sex to compensate many more members of the same sex. To the extent that men participate in creating imbalances in future generations, they too will be punished, but those most frequently disadvantaged under the statutes will probably be women.

12. "Benign sex discrimination" refers to the unequal treatment a statute bestows on the sexes, whether due to explicit gender classifications or to disparate effects by disproportionately burdening males in order to compensate females for past discrimination or to reduce future discrimination. See generally 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.23, at 535-36 (1986) [hereinafter ROTUNDA].
13. See infra note 37 and text accompanying notes 153-55.
I have organized my argument in the following way: In the first part, I discuss the sociological evidence about attitudes toward sex-selection and abortion and conclude that prospective mothers (and fathers) would be willing to abort female fetuses to have male firstborn children and that adverse psychological and social consequences would result from a failure to restrict sex-selection abortion. I then reject the view that the practice should be restricted regardless of these consequences and explain the view that these consequences constitute a moral justification for prohibiting sex-selection abortion.

In the second part I consider the constitutional objections to prohibiting the doctor from communicating the sex of the fetus to the mother and conclude that privacy and free speech considerations would be insufficient to invalidate such a prohibition suitably circumscribed to allow for certain exceptions. I point out, however, that it is not clear that the first amendment leaves the doctor’s communication entirely unprotected.

In the third part, I discuss the constitutionality of a statute forbidding physicians from performing an abortion when the mother seeks the abortion solely because she does not desire a child of the sex of her fetus. My conclusion is that this restriction on abortion would withstand attack on constitutional grounds. In the last part of this Article, I offer some reflections on the constitutionality of similar restrictions on preconception gender determination techniques that might be developed in the future.

II. THE MORAL JUSTIFICATION FOR PROHIBITING SEX-SELECTION ABORTION

In evaluating the constitutional objections to restrictions on women’s procreative rights, the interests of the parents must be balanced against the state’s interests which are furthered by the restrictions. To understand the state’s interests, we must examine the evidence concerning the desire of American women and couples to control the gender of their children, and their willingness to avail themselves of amniocentesis and abortion to achieve such control. Initially, however, the potential effects of sex-selection abortion will be addressed. It will become clear that unregulated use of abortion and amniocentesis is likely to jeopardize equal opportunity for future generations of women.

14. Reproductive rights fall within the constitutional right to privacy, and statutes restricting such rights are subject to “strict scrutiny,” a constitutional test requiring the state to demonstrate a “compelling” interest advanced by the statute which is narrowly tailored to advance that end. See generally 2 ROTUNDA, supra note 12, § 18.26, at 554-93.
A. The Sociological Predictions

Two sociological predictions must be understood in order to fully appreciate the threat that sex-selection abortion poses to American women. First, if there were a greater proportion of male firstborn and “only-children” in the population, American women would be likely to suffer more discrimination and generally lead more unhappy lives. The second prediction is that the proportion of male firstborns (and male only-children) would increase because of the willingness of American women to use sex selection abortion to ensure a male, firstborn child. There are, of course, certain contingencies which could prove the sociological claims wrong. Before discussing those possibilities, however, the basis for these primary sociological predictions will be discussed.

1. More firstborn sons would cause greater unhappiness for women.

An increase in the number of firstborn sons over firstborn daughters would adversely affect women in several ways. First, women would be less likely to acquire the education and training needed to secure comparable employment; second, they would be less likely to secure employment comparable to men even if properly trained; and third, apart from suffering from the effects of heightened job discrimination and decreased motivation to succeed, a higher number of women would suffer the general disadvantages that laterborn children are destined to suffer.

a. Firstborn children are more likely to “succeed” than laterborns.

Firstborn children, regardless of sex, are more likely to be “achievers” than laterborns, largely because “first born children are thought to be more assertive, independent, and achievement oriented.” Studies show that the larger the family and the later in the birth order a child is situated, the lower the child’s overall intellec-

15. Westoff & Rindfuss, Sex Preselection in the United States: Some Implications, 184 Sci. 633, 636 (1974) (the conclusions of this article are based on data obtained from the 1970 National Fertility Study by Norman B. Ryden and Charles F. Westoff of the Office of Population Research, Princeton University). Socio-psychological studies indicate that firstborn children are more readily influenced by their social environment and are therefore more likely to achieve higher educational and economic goals.

tual development will be\(^{17}\) and, in particular, the lower the child’s verbal development will be at high school age.\(^ {18}\) The explanation for this is that the quality of the intellectual climate in the family deteriorates as the number of younger and less mentally developed siblings increases.\(^ {19}\)

b. The presence of more males who are firstborn or only-children would deprive women of significant opportunities.

As one would expect, there are researchers who disagree with the finding that priority in birth order confers such advantages.\(^ {20}\) However, theorists who believe birth order is significant have found the skeptics’ research to be flawed.\(^ {21}\) There is research indicating that, should there be increasing numbers of firstborn males or males who are only-children, coupled with decreasing numbers of firstborn females, prospects for women would be dim. Specifically, research shows more men would have a higher academic self-concept, fewer women would distinguish themselves academically, and more men would be less willing to accept women as managers. One study has shown that academic self-concept is highest among males who are only-children.\(^ {22}\) Another study shows that firstborn women are over-represented among students receiving honors at the undergraduate levels, while this is not so for males.\(^ {23}\) A third study shows firstborn

\(^{17}\) Belmont & Marolla, *Birth Order, Family Size and Intelligence*, 182 SCI. 1096 (1973) (this study involved a Dutch population of some 400,000 19-year-old boys). One study showed firstborns tend to “overachieve” relative to second-borns, even when second-borns are intellectually more gifted. Pfouts, *Birth Order, Age-Spacing, I.Q. Differences, and Family Relations*, 42 J. MARRIAGE & FAM. 517 (1980).


\(^{21}\) The theorist who defends the relation between birth order and intellectual achievement explains that contradictory results in other studies are due to other researchers’ failure to take into account the intellectual level of parents. Zajonc, *Validating the Confluence Model*, 93 PSYCHOLOGICAL BULL. 457, 463-64 (1983). Zajonc admits that a study of Mormon families contradicted his theory, but he found socioeconomic factors unique to Mormon families that explained this result. Id. at 468-69.


\(^{23}\) Finlay, *Birth Order, Sex, and Honors Students’ Status in a State University*, 49 PSYCHOLOGICAL REP. 1000 (1981).
males have the least favorable attitude toward women as managers.\textsuperscript{24} These results suggest that, in a world consisting largely of secondborn daughters, firstborn sons, and only-children who are males, even well-trained and educated women (who would be fewer in number) would face increased competition from more achievement-oriented males and would confront greater discrimination in their search for managerial positions.

c. Other effects.

Apart from an enhanced struggle for equality in education and employment opportunities, women would face other untoward effects due to the dwindling number of firstborns in their ranks. For example, a higher female infant mortality rate could be expected because research shows that high-risk, laterborn infants receive less maternal stimulation than firstborns.\textsuperscript{25} If more premature or sick laterborns are female, their prospects for survival would be dimmer than males'. Women would suffer this disadvantage not because of male chauvinism or any inherent advantages male infants enjoy, but simply because a greater proportion of women would be laterborn daughters.

2. Availability of sex-selection abortion would increase the proportion of sons who are firstborn and only-children.

Of course, none of these studies would be cause for alarm if there were no evidence to indicate that couples are likely to use prenatal testing and abortion to predict and determine the sex of their children. However, American women and couples undoubtedly prefer to have firstborn sons.\textsuperscript{26} One somewhat dated study of American wives showed that they are much more likely to prefer a firstborn son to a daughter.\textsuperscript{27} A more recent study of college students shows that eighty-one percent of the women and ninety-four percent of the men


\textsuperscript{25} Bendersky & Lewis, \textit{The Impact of Birth Order on Mother-Infant Interactions in Preterm and Sick Infants}, 7 J. DEV. & BEHAV. PEDIATR. 242 (1986). "First-time mothers generally spend more time stimulating, caregiving, and interacting with their infants than multiparous mothers." \textit{Id.}


\textsuperscript{27} Coombs, \textit{supra} note 26, at 259 (In 1973 a U.S. National Survey of Family Growth study found that "about one-half of married women have an underlying pref-
surveyed preferred a firstborn son. Among those surveyed, about 23-24% of the college men and women indicated they would use preselection techniques. If this became true generally, the proportion of males to females in the population would increase.

Use of these techniques would also diminish the absolute number of women in the population because couples who are desirous of a firstborn son would simply preselect the first child's sex rather than continue to "try" to have a son after the births of several daughters. If these predictions are correct, and if the use of sex-selection abortion becomes more widespread, men would greatly outnumber women in the next generation. Even if societal preference for male children should swing the other way in the following generation, society would be asked to accommodate these fluctuations and to pay the price for this widespread and erratic use of reproductive technology. In particular, American women would pay the price for even a temporary imbalance in the ratio of men to women, since the likely results would not only include the increased job discrimination and developmental difficulties just discussed, but also an increase in violent crime and prostitution and would certainly dilute voting power for women. The only question is whether these untoward

28. Id. Contra Dixon & Levy, supra note 16, at 269. The findings of the study were based upon a self-administered questionnaire distributed to 309 adults. The aim was to determine attitudes concerning gender preferences of prospective children. This study was published in 1985.


30. See Wikler, supra note 7, at 1045 n.6.

31. Arrests of males in the United States for violent crimes in 1985 exceeded arrests of females by a factor of greater than 8 to 1. See FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 181 (1985). Assuming the disproportionate number of arrests of males indicates that a disproportionate number of crimes are perpetrated by men, it follows that the number of crimes committed would increase as the numbers of men increased. The reader should note that this prediction of an increase in crime as a result of unrestricted use of sex-selection abortion is purely statistical and is not based on any theory about male aggressiveness, the influence of male hormones, or sociobiology. I claim only that, because males statistically have been involved in violent crime far out of proportion to their numbers in the population, an increase in their representation in the population would result in an increase in violent crime. This empirically grounded prediction is therefore immune from the attack one feminist has launched against predictions based on these other esoteric theories. See M. WARREN, supra note 20, at 108-29.

32. It is this author's opinion that, as the number of women relative to the number of men declines, the demand for prostitutes would correspondingly increase. In turn, one would expect that this demand would be satisfied.

33. Since the United States Constitution requires only a one person-one vote ratio, as women diminish in numbers with respect to men, the relative voting strength of men would increase. See Reynolds v. Sims, 377 U.S. 533 (1964) (holding that the equal protection clause of the fourteenth amendment requires a one person-one vote ratio). See generally 2 ROTUNDA, supra note 12, § 18.35-36, at 654-72.
consequences would afflict society on a permanent or on a temporary basis.

3. Possible Countervailing Tendencies.

There are, of course, various contingencies that could falsify these predictions. One possibility is that a public awareness campaign describing the adverse consequences for women might convince couples not to utilize the technology. The success of such a campaign would, however, depend on the truth of several suppositions. An examination of these assumptions reveals how difficult it would be to wage a successful campaign.

For such a campaign to succeed, most couples would have to be sympathetic with what is loosely called the "women's movement." Couples not convinced that women need more "liberation" would be unpersuaded. Moreover, such a campaign would fail with respect to prospective mothers highly pressured by their husbands to preselect a firstborn son, since success requires that women of their own accord would be responsive to such a public education program apart from any pressure from spouses or lovers. Furthermore, there is no evidence that women would respond positively to such a campaign, but there is evidence that they would be unresponsive. One study of college women, for example, found a two-to-one preference for first-born sons even among women who moderately or strongly supported the women's movement.34

So, there is good reason to doubt the effectiveness of a public education campaign about the potential deleterious consequences of preselecting sons. Of course, a public education campaign coupled with criminal sanctions for sex-selection abortion would send a stronger social message and would provide couples otherwise inclined to select a firstborn son with real incentive to refrain.

There may yet materialize another possibility that would obviate

34. Gilroy & Steinbacher, supra note 29, at 674. Gilroy and Steinbacher suggest that while college women supported the movement, they did not internalize the values which the movement represented. Id. The authors offer this as an explanation for these statistical results. Id. It should also be noted that there is an increasing trend among males to indicate no preference for a firstborn of a particular sex. Id. at 675-76. Another study of expectant parents found that 46% expressed no preference, and 63% of the remainder preferred a boy. Pharis & Manosevitz, supra note 26, at 766. These researchers hypothesize that, since it is less socially acceptable to express a preference for a son, some couples may conceal their real preferences. Eighty-three percent of mothers expressing no preference believed they were carrying a boy at the time of their pregnancy. Id. at 767.
any need for public education or criminal sanctions. Even though women express a willingness in the abstract to preselect sons, they might take a different perspective if abortion were the only method offered for gender preselection. In other words, it might be that women who would use abortion would not choose it for a trivial reason such as gender selection, but would reserve it for eliminating unwanted children or fetuses with severe birth defects. However, the empirical evidence for this proposition is ambiguous. When researchers posed the specific question, i.e., whether abortion was an acceptable means of sex selection, between 4.2% and 40.3% of the respondents answered affirmatively. This variance in attitudes was largely due to religious beliefs and practices held by some interviewees—the less religious interviewees being more willing to use abortion as a method of gender preselection.

Though no studies have been conducted about factors actually influencing women in their decisions to abort, it is likely that the influence of husbands or lovers plays an important role. In the situation where the pressure of husbands or lovers is overwhelming, it would be unfair to punish women for yielding to their mates. The existence of a statutory prohibition would at least provide women with a rationale for refusing to abort. Without a prohibition, women would be left to overrule their mates for little else than purely personal reasons. However, with a statutory prohibition, women could at least allege the risk of criminal punishment as an overriding reason for refraining from sex-selection abortion.

B. The Rationales for Restricting Sex-Selection Abortions

Punishing women for seeking sex-selection abortions would seem to raise another difficulty: such statutes seem to place more value on fetal life than on a woman's privacy right. This view would seem to conflict directly with Roe v. Wade. This potential problem will be discussed in more detail later, but it should be made clear at the outset that the state would not be prohibiting sex-selection abortion because fetal life is sacrosanct. Instead, the state's goal would be to

36. Id. at 271.
37. There is an additional way to make allowances for this possibility: any criminalization of sex-selection abortion could be coupled with punishment imposed upon the husband or lover who negligently or deliberately failed to object. Various defenses might also be extended, such as a showing that objection would have been futile or that the father could not have known about the decision. Such a statute would not only discourage men from pressuring women to abort female fetuses, it would also encourage them to take steps to prevent an abortion when they otherwise might not.
38. 410 U.S. 113 (1973). I assume throughout this essay that, regardless of any changes in the Supreme Court's composition, Roe v. Wade will not be overturned.
ensure future equality of opportunity for future generations of women. Any fetuses whose lives are saved by such statutory prohibitions are not thereby possessed of any serious “right to life.”

A deontological justification based entirely on the intrinsic wrongfulness of destroying a fetus in order to control the gender of one's children would confer rights on the fetus incompatible with Roe. A utilitarian justification similar to the one I have offered, based solely on the morally objectionable consequences for the rest of society, would not conflict with the holding in Roe. I will first briefly show how a deontological approach is constitutionally defective. Then I will discuss the consequentialist rationale in more detail.

1. The deontological rationales.

State legislatures could conceivably offer two deontological justifications for banning sex-selection abortions. They could advance, as one state legislature has done, a “pro-life” approach, that fetuses have as meaningful a right to life as post-natal human persons. Under this view, the desire to control the sex of one's offspring is one among many unjustifiable reasons for taking fetal life.

The second deontological rationale is that, although women are free to take fetal life for almost any reason they choose, they may not do so for a grossly sexist reason. Under this feminist view, sex-

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39. See id.

40. A deontological theory of ethics holds that there are some acts human beings have a moral duty to perform or refrain from performing regardless of the unhappiness performing these duties may cause others. See 2 ENCYCLOPEDIA OF PHILOSOPHY 343 (1967). Warren dubs this approach “nonconsequentialist” and adds that sex-selection is an unnatural act which is tantamount to playing God. M. WARREN, supra note 20, at 78-83.

41. The General Assembly of Illinois prefaced its prohibition on sex-selection abortions with a declaration of its policy that “the unborn child is a human being from the time of conception ... and is entitled to the right to life from conception under the laws and Constitution of this State.” ILL. ANN. STAT. ch. 38, ¶ 81-21 § 1 (Smith-Hurd Supp. 1987); cf id. ¶ 81-26 § 6(8) (text of statute prohibiting sex-selection abortion).

42. Powledge, Unnatural Selection: On Choosing Children's Sex, in ETHICAL ISSUES IN MODERN MEDICINE 428, 430 (1983). The philosophical basis for Powledge's position seems to be Thomson's 1971 article granting that aborting a pregnancy caused by rape is permissible, but asserting that abortion for a trivial reason is “indecent.” See id. at 462. This view contrasts sharply with that of Tooley, who believes neither fetuses nor newborns have any serious right to life, and any objections to the practices of abortion and infanticide must rest on other grounds. Tooley, Abortion and Infanticide, 2 PHIL. & PUB. AFF. 37 (1972).

Warren argues, however, that sex-selection abortion is not an inherently sexist act because the individuals who engage in it may do so for motives that are not sexist. M. WARREN, supra note 20, at 83-88. She notes that some women choose to have daughters because they are less violent than sons. Id. at 87. She further points out that the
selection abortion is one of many sexist practices that are inherently wrong.

According to either of these positions, evidence about the harmful effects of sex-selection abortion on American society is irrelevant, because it is intrinsically morally wrong to treat fetuses as having no value unless they are of the desired gender. All acts of sex-selection abortion would be punishable under this view, regardless of how many or how few in number they are, just as other intrinsically wrongful acts, such as murder and employment discrimination, are punishable even if they are only isolated acts.

Both of the above justifications for sex-selection abortion will encounter serious constitutional difficulties, but the feminist view may avoid one that the other does not. First, neither justification entails any weighing of the competing interests, a requirement recognized in the United States Supreme Court’s analysis of equal protection challenges under the fourteenth amendment. The Court allows states...

"son one might have had . . . cannot have been treated unjustly," since he never came into existence. Id. Her argument, then, that sex-selection abortion is not inherently sexist rests on at least two questionable assumptions: that the purity of the woman’s motive renders her act moral, and that the absence of a victim obviates the possibility that the woman acted unjustly. However, even in Warren’s example, the motives are not entirely pure because women who abort male fetuses on the grounds that males are more violent arguably perpetuate stereotypes about the violent tendencies of males. Warren herself was careful to only go so far as to say males are more aggressive than females, not that they are more violent. Id. at 110-13.

Warren’s assumption that pure motives render one’s actions morally right is also questionable from a deontological standpoint because actions must first be shown to be right in themselves before a deontologist can approve them. See O. NELL, ACTING ON PRINCIPLE: AN ESSAY ON KANTIAN ETHICS 32-34 (1975). Indeed, Kant’s insistence that one cannot tell a lie even to save a life may be interpreted as his strongest way of insisting that good motives alone cannot render a morally bad action good. See KANT, On a Supposed Right to Tell Lies from Benevolent Motives, in KANT’S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS 361-65 App. (T. Abbott trans. 6th ed. 1959).

For similar deontological reasons, the fact that no one is injured by another’s action cannot render the action good if the action is wrong in itself. See 2 ENCYCLOPEDIA OF PHILOSOPHY 343 (1967). An example illustrating both of these points would be the case of an employer who desired to hire an aggressive salesperson but refused to interview women because he believed in good faith that women are too easily intimidated, not that they are in any way inferior. We might imagine, additionally, that no women choose to apply for the position. If it is inherently wrong and sexist to discriminate in employment on the basis of sex, it does not seem that a good motive—or the absence of a victim of discrimination—can render the employer’s intent to refuse to interview women nonsexist or morally right. Yet, this example seems in all morally relevant respects to correspond to Warren’s allegedly nonsexist case of sex-selection abortion.

43. See generally 2 ROTUNDA, supra note 12, § 18.3, at 322-35. It should be noted, however, that there are very few categories of state interests deemed “compelling.” L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-13 at 1465-66 (1988). See also Roe v. Wade, 410 U.S. 113 (1973) (holding that the state’s interest in protecting the life of the fetus becomes compelling at the beginning of the third trimester); Korematsu v. United States, 323 U.S. 214 (1944) (holding that national security was a sufficiently “compelling” state interest to permit Japanese internment camps).
to override fundamental rights only if the state can show that there is a compelling interest for doing so, and that the classification involved is the least restrictive means to effectuating that interest.\textsuperscript{44}

The views outlined above affirmatively deny that a woman has a legitimate right to abort her pregnancy in order to control the gender of her offspring. As a result, her interest or desire to control the gender of her child does not even weigh in the balance against the state's interest in protecting fetal life.\textsuperscript{45} To hold that a woman's interest in controlling the gender of her children automatically overrides any state interest is totally foreign to the balancing test employed by the \textit{Roe} Court.\textsuperscript{46}

A second difficulty is that the pro-life view elevates the status of the fetus beyond that which was pronounced by the \textit{Roe} Court.\textsuperscript{47} The Court made it clear that a fetus enjoys no constitutional protection as a "person" under the equal protection clause of the fourteenth amendment.\textsuperscript{48} Although "pro-lifers" embrace the view that a fetus has such protection at inception,\textsuperscript{49} feminist groups dispute this contention.\textsuperscript{50} One must bear in mind that condemning sex-selection abortion as sexist entails the view that the value of the fetus should not hinge on its gender. If the act of destroying a fetus to conceive

\begin{itemize}
\item \textsuperscript{44} 2 Rotunda, \textit{supra} note 12, § 18.3, at 324-26. In \textit{Roe}, the Court declared that "[W]here certain 'fundamental rights' are involved, [it] has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." \textit{Roe}, 410 U.S. at 155. The Court went on to note that the state's interest in protecting the life of the mother becomes "compelling" at the end of the first three months of pregnancy (first trimester). \textit{Id.} at 163. At the point of "viability," the state's interest in protecting the "potential life" becomes equally "compelling." \textit{Id.} Viability has been roughly defined as occurring at that point when the fetus is capable of sustaining life outside the womb. \textit{Id.}
\item \textsuperscript{45} These analogies are appropriate because all forms of abortion are tantamount to murder in the eyes of most "pro-lifers." \textit{See}, \textit{e.g.}, L. Sumners, \textit{Abortion and Moral Theory} 81-88 (1981). Sex-selection abortion, on the other hand, is "stupendously sexist" for some feminists. Powledge, \textit{supra} note 42, at 430. Under either view, women seeking sex-selection abortions commit injustice for they seek to satisfy legitimate aims, i.e., control over their futures, by means that are unjust. \textit{See} J. Rawls, A \textit{Theory of Justice} 439 (1971).
\item \textsuperscript{46} \textit{See infra} notes 131-135 and accompanying text.
\item \textsuperscript{47} \textit{See supra} note 42.
\item \textsuperscript{48} \textit{Roe}, 410 U.S. at 156-59. The text of the fourteenth amendment declares that no state may "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added). In \textit{Roe}, the court held that "person" did not include an unborn fetus. \textit{Roe}, 410 U.S. at 157-58. The Court went on, however, to note that although the fetus itself has no protection under the Constitution, the state has a significant interest in the fetus' well being. \textit{Id.} at 163.
\item \textsuperscript{49} \textit{See} L. Sumners, \textit{supra} note 45 at 81-88.
\item \textsuperscript{50} \textit{Id.} at 40-49.
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another fetus of the desired gender is in itself morally wrong, the rights of the first fetus must have been violated. If so, it must have some constitutionally protected right to continue to exist because it would be immoral to kill it for trivial reasons. While the Court may not have intended to preclude the possibility that the fetus has such a right, the fact is that it simply did not address this issue. So, the feminist view of the status of the fetus goes beyond the narrow holding in *Roe*.

These views clash with *Roe* in another way. The Court allowed states to grant statutory protection to an unborn fetus in the third trimester of pregnancy. Those who hold a deontological view could not limit protection of the fetus this way, and still remain consistent with their premise: If it is intrinsically wrong to sacrifice fetuses to control the gender of one's children, then it is wrong to do so regardless of the gestational age of the fetus. For these reasons, it will be difficult for a deontological rationale to command serious attention from the Supreme Court, or at least from those members of the Court unwilling to overturn *Roe*.

However, adherents to the feminist view could couch their argument in consequentialist terms and still remain consistent with their premise. In addition to their primary argument that sex-selection abortion is improper because it is sexist, it can be asserted that sex-selection abortion is wrong, not because its effects on the fetus are immoral, but because gender selection would have substantial harmful consequences for American women. Such a justification, as I will demonstrate after explicating the consequentialist argument, would be attractive to those Justices satisfied with the holding in *Roe v. Wade*.

2. The utilitarian rationale.

To better understand the consequentialist rationale for criminalizing sex-selection abortion, it is helpful to discard the notion that women and couples are wrongdoers who need to be punished. Instead, their activities are in themselves innocent, but they result in the imposition of unfair burdens on an unconsenting minority. In other words, the state should restrict abortion only because sex-selection abortion, if left unchecked, would have morally objectionable consequences. Although there may be few if any other innocent practices with morally comparable results, we can clarify matters by considering the appropriate social response to a recognized innocent activity that becomes a social threat by its untoward consequences.

51. *Roe*, 410 U.S. at 159. The Court stated that, “We need not resolve the difficult question of when life begins.” *Id.*
52. *Id.* at 163-65.
a. A hypothetical scenario in which private drunkenness could be prohibited.

At present, private drunkenness that has ill effects only on the (voluntary) participants is not subject to any criminal sanction, at least until others who do not or cannot consent are placed at risk (as when the drunkenness involves physical abuse of other family members, child neglect, or driving an automobile). So long as the effects are confined to the participants' health and work productivity, such behavior presently goes unchecked by the law. If we consider what at first blush seems to be the least costly effect, decreased worker productivity, it appears that private drunkenness could become significantly costly if it became widespread. Thus, if over half of the population chose to become inebriated in private every night, the resulting absenteeism and decreased work productivity, not to mention increased health insurance premiums, would no longer seem insignificant. The abstainers and moderate drinkers in the work force would be called on to compensate for the decreased productivity of their co-workers, and they, in turn, would be morally justified in seeking some state intervention with respect to private drinking.

It might be thought that until American society reaches such a condition, the government would have no moral right or social obligation to restrict or forbid private drunkenness. Let us, however, alter this hypothetical scenario so that there are no moderate drinkers in society—only a majority of heavy drinkers, and a minority of abstainers. Assume further, for purposes of illustration, that once the opportunity for private drunkenness presents itself to the masses, most choose not to resist the temptation. In this situation, the “isolated decision” to become drunk in private would quickly lead to adverse effects on worker productivity throughout society. It would no longer be a merely private decision. Assuming society is entitled to expect the usual level of job performance and the productivity that results, the abstainers would be under no obligation to compensate for the poor performance of their unrestrained coworkers. The abstainers could, of course, elect to bear the loss, but they would be under no obligation to bear the burdens occasioned by the existing protection of the freedom to drink. In this hypothetical scenario, the government would have a clear moral justification for raising the cost of private drunkenness to the drinker.
b. **Comparison of the sex-selection problem to the imaginary drinking problem.**

This hypothetical problem involving alcohol is similar to the sex-selection abortion problem in three relevant respects: (1) both involve private decisions that in isolated cases have little impact on society; (2) if a large number of individuals came to the same private decision, a minority of the population would be forced to bear these significant social costs without receiving any compensating benefits; and (3) most important, large numbers of people simply would not resist the temptation to engage in these activities absent the imposition of some criminal sanction on the activity at issue. A brief discussion of each of these conditions will emphasize how their combined presence provides a justification for state interference with such decisions.

The first condition is an example of what John Stuart Mill referred to in *On Liberty* as "self-regarding conduct." The individual decision to seek an abortion for gender selection, like the individual decision to become drunk, standing by itself has little, if any, impact on society, so the state has no basis for interfering. Likewise, there is no basis for state interference merely because the second condition is satisfied, for it asserts simply that there would be a significant social cost imposed on an unwilling minority if the majority decided to engage in otherwise self-regarding behavior. When the third condition is fulfilled, however, social costs are certain to be imposed on others, and they, in turn, are entitled to some government intervention to reduce these costs.

In the case of sex-selection abortion, the costs would be borne by future generations of women, even if sex-selection abortion does not become a permanent, widespread sexist practice. That is, there would be at least some generations in which men would greatly outnumber women, firstborn males would outnumber firstborn females, and in which discrimination against women would be likely to greatly increase. It is possible that this would be the case in every generation, so the number of women who are the victims of crime and discrimination might be higher or lower in number depending upon how widespread the practice were to become. It is beyond question, however, that women would pay the cost for the preponderance of males in terms of their disappointment, trauma, and lowered expectations. Since women have no apparent compensating benefits in all this,

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53. "[T]he only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others." *J. Mill On Liberty* 9 (A. Castell ed. 1947).

54. *See supra* section II.A.1.
they would be entitled to some relief—some effort on society’s part to reduce the number of female victims of crime and discrimination.

It should be noted that the relief called for here is similar to that commonly found in state measures taken to minimize the occurrence of free riders. That is, equality of opportunity between the sexes is much like a public good which can be achieved only if couples restrain their inclination to choose the gender of their children. Couples who do not restrain themselves are not so much wrongdoers as free riders. Punishment of those who fail to restrain themselves is justified, not because choosing the gender of one’s children is inherently morally wrong, but because punishment effectively reduces the incidence of free riders.

C. Criminal Penalties

1. Possible legislative responses; terminology.

Still, it might be asked whether criminal punishment is an appropriate response to this type of free-rider problem. The governmental response to free riders in the tax context, for example, is imposition of fines to compensate for the additional expense the government incurs in tax collection, and to deter other potential tax delinquents. In the sex-selection abortion setting, however, fines would not begin to compensate for the opportunities women would lose, let alone the suffering they would endure. Also, it would be difficult if not impossible to determine which women suffered because of sex-selection abortion and which would have suffered even if sex-selection abortions never occurred. Furthermore, some couples who would participate in the practice would undoubtedly lack sufficient financial resources to pay the fines imposed. This would make adequate compensation of the affected women even more unlikely. Finally, very wealthy couples would be able to absorb the fines associated with several sex-selection abortions. Not only would this situation be unfair, it would further disadvantage women, since females would be born into poor families in greater proportions than would men.

It might be said that, given that punishment is the appropriate societal response, perhaps it would be more effective to punish the behavior leading to sex-selection abortions rather than the act of having the abortion itself. One suggestion would be to outlaw amniocentesis altogether, but society, as well as pregnant women, would lose a great deal by this exaggerated response. Impending complications in a pregnancy, for example, could not be disclosed if amniocentesis were
banned, and it would be more difficult to assist women in giving birth safely.\textsuperscript{55}

A narrower suggestion would be to punish the practice of aborting normal female fetuses after prenatal testing disclosed fetal gender but indicated no fetal abnormalities. The \textit{mens rea} element in such a statute would be an awareness on the part of the couple of the test results coupled with the subsequent intent to secure an abortion of that fetus.\textsuperscript{56} Under this approach, the prosecution would not be required to present evidence that the couple sought the abortion because they knew the fetus was female but wanted a son.

A broader approach would be to outlaw all sex-selection abortions. The \textit{mens rea} element might be roughly defined as “having knowledge of fetal gender and a desire not to have a child of that sex.” Both proposals might be dubbed “prohibition statutes.” The one involving the narrow approach of banning abortions of normal female fetuses only, might be called the “sex-specific prohibition statute.” The broader approach of banning all sex-selection abortions could be dubbed a “sex-neutral prohibition statute.” Though not exhaustive of the possibilities, these two proposals represent a moderate and an extreme approach. The gender-specific statute is narrowly focused to protect only female fetuses, but would nevertheless have maximum deterrent effect by imposing a minimal burden of proof on the prosecution. On the other hand, the gender-neutral statute is broader in scope since it protects normal fetuses of both sexes, but avoids convictions of those who have acted in good faith by placing a far heavier burden of proof of \textit{mens rea} on the prosecution.\textsuperscript{57} Both statutes would exculpate women seeking to abort fetuses likely to be afflicted with an x-linked genetic defect that could not be diagnosed in utero.

A more preventive approach would involve punishing physicians for revealing fetal gender when it is not medically relevant.\textsuperscript{58} A statute of this sort might be labeled a “nondisclosure statute.”

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\item[55.] Dickens, \textit{Prenatal Diagnosis and Female Abortion: A Case Study in Medical Law and Ethics}, 12 J. MED. ETHICS 143 (1986).
\item[56.] The reader will note that this proposal is closer to a strict liability statute. A couple who knew the fetus’s gender and did not desire a child of that sex might seek an abortion because they decided to postpone childbearing. The couple would be in violation of the statute even though they did not seek an abortion to select the gender of their children. \textit{See generally} Prosser And Keeton On The Law Of Torts § 81 (5th ed. 1984) (discussing statutes imposing strict liability).
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tors might prefer to enact this statute alone, or they might deem it more appropriate to maximize deterrence by enacting both a nondisclosure statute and a prohibition statute. Both possibilities will be considered.

Perhaps the most desirable approach would be for the medical profession to preempt state legislatures by subjecting physicians to professional discipline for performing gender-selection abortions. Once it had been determined that the physician performed this procedure with the knowledge or reason to believe the abortion was being sought for gender-selection purposes only, or for disclosing fetal gender when it was not relevant to medical care, disciplinary measures could be taken.59

This proposal is a better alternative for several reasons. First, professional medical groups would be better able to keep abreast of relevant technological developments than would legislators. Second, professional medical groups would be better informed about possible ways couples might subvert the system, such as by falsely representing a history of x-linked diseases in the family. Finally, litigation concerning the constitutionality of restrictions on sex-selection abortion might be avoided because state action may be absent.60

However, physicians might not be able to agree on the restrictions, if any, that should be imposed on the uses of abortion and prenatal testing. Or, it might turn out that the courts would deem impositions of professional discipline to be state action for constitutional purposes.61 In either event, even professional disciplinary procedures may be subjected to the same constitutional challenges discussed in this Article.

Regardless of what legislative option the states choose, there will

59. Dickens, supra note 55, at 143-44. Still another possibility would be to prohibit only that part of the amniocentesis procedure that involves the determination of fetal gender. There is no indication in the medical literature that this would be possible, given present techniques. Evidently, a physician can determine the sex of the fetus upon examination of the chromosomes for abnormalities. Telephone interview with Marsha Ryan, M.D., J.D. (Aug. 28, 1987). For the advantages that this prohibition enjoys, even when enacted by state legislatures, see infra note 68 and accompanying text.

60. All amendments to the Constitution protecting individual liberties, except the thirteenth, address themselves to actions taken by a state or the United States. See generally 2 ROTUNDA, supra note 12, § 16.1, at 156-58. The individual challenging the constitutionality of a particular action by another must typically show that the act which caused the injury was performed or ratified by a governmental entity. Id.

61. This conclusion could be based on the fact that medical professionals are licensed by the state, that medical groups are encouraged by the state to impose discipline, or that the groups perform a public function. See id. at 156-58 (discussing state action doctrine).
be some precautions legislators could take to avoid certain controversies. Before considering the constitutional problems inherent in such statutes, ways in which state legislatures can anticipate difficulties will be discussed.

2. Some legislative precautions.

A sex-neutral prohibition statute would specify as an element of the crime the specific intent of seeking an abortion on the basis of the fetus' gender. In close cases, the courts would be required to determine the guilt of a woman who preferred a male firstborn, knew her baby was female, but nevertheless acted in good faith. For example, a woman's overriding reason for seeking an abortion might be financial considerations or fear of a serious defect. Such determinations would not be easy to make, but it must be remembered that finders of fact regularly make determinations about good faith states of mind in various sorts of cases. In a sales transaction, for example, a holder in due course can recover what the purchaser owes the seller (even though the seller breached), provided, inter alia, the holder is shown to have acquired the note from the seller in good faith.62 Similarly, in some jurisdictions, an accused rapist may raise the defense that he mistakenly believed the victim consented.63 In such cases, the trier of fact decides whether there was in fact a reasonable mistake.

The burden of making these critical determinations in sex-selection abortion cases would be eased somewhat by the likelihood that in such questionable cases the fetus might also have a serious disorder, since the sex-neutral prohibition statute would exclude from liability women seeking to abort defective fetuses anyway. Women preferring a firstborn male are more likely to have discovered the gender of their fetus through amniocentesis and they would most likely have undergone the procedure to determine whether the fetus was defective.64

Legislators should specify which defects are sufficiently serious to

62. See U.C.C. § 3-302(1)(b) (discussing good faith of holders in due course).
63. The English House of Lords, in a far-reaching decision, held that an accused is innocent of rape if he believed the victim consented, even though a reasonable person in the place of the defendant would have realized the victim did not consent. Regina v. Morgan, [1976] A.C. 182. The Model Penal Code defines rape in part as compelling a woman "to submit [to sexual intercourse] by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping ...." MODEL PENAL CODE § 213.1(1)(a) (1974). By contrast, the Code provides that a male commits gross sexual imposition if he compels a woman "to submit by any threat that would prevent resistance by a woman of ordinary resolution ...." Id. § 213.1(2)(a).
64. See T. KELLY, CLINICAL GENETICS AND GENETIC COUNSELING 368-69 (2d ed. 1986); see also J. THOMPSON & M. THOMPSON, supra note 10, at 344 (listing conditions indicative of fetal disorder and for which amniocentesis is appropriate).
merit a legal abortion. This would do much to relieve the courts of the burden of deciding such matters on a case-by-case basis. The list could not, of course, be all-inclusive. To avoid unfairness, legislators would certainly want to allow for disclosure of the fetal gender when the fetus might be a carrier of an x-linked defect not diagnosable prenatally.65

In cases where a sex-neutral statute was enacted, the legislature could deal with this problem in another way. It could specifically allow the finder of fact to infer an impermissible motive whenever the facts are ambiguous. To avoid due process difficulties, the judge would have to instruct the jury clearly that it was not required to draw this inference.66 The prospect that juries could draw this inference would encourage women preferring firstborn males to give birth to female babies rather than risk conviction under the prohibition statute. This in turn would increase the number of female children and make imbalances in future generations less likely. There is, of course, some risk that a few women will be found guilty even though they acted with proper motives, but this number is likely to be extremely small.

Another legislative precaution would be to include a preamble to any prohibition statute precisely stating the legislative purpose. The equal protection advantages of this, along with a proposal as to the specific content of such a preamble, will be subsequently discussed.67 For now, it will be sufficient to note that prohibition statutes will present various procedural and constitutional difficulties. It is tempting, therefore, to conclude that it would be far simpler and less controversial to enact only a nondisclosure statute. But nondisclosure statutes raise serious constitutional questions as well. We now turn our attention to those issues.

65. Carriers of x-linked defects are invariably female. J. THOMPSON & M. THOMPSON, supra note 10, at 74-76. Thus, a couple concerned that the fetus might be a carrier of a disease that could not be diagnosed prenatally would need to know the gender of the fetus to estimate the probability that the fetus was a carrier. See T. KELLY, supra note 64, at 67-69; see also J. THOMPSON & M. THOMPSON, supra note 10, at 340-43. To deny parents knowledge of the gender of the fetus in cases where the couple is concerned about the carrier status of the fetus, but grant access to such information when the couple is concerned about the fetus expressing the disorder, would be unfair. In both cases the couples are concerned about transmitting genetic defects, though admittedly the transmission is more remote in the case of a carrier child.

66. The state cannot shift its burden of proof in a criminal case by presenting a mandatory presumption to the jury. Sandstrom v. Montana, 442 U.S. 510, 524 (1979) (holding that defendant's due process rights deprived if judge instructs jury that burden of proving any element of crime has shifted to defendant to disprove).

67. See infra text following note 163.
III. CONSTITUTIONAL DIFFICULTIES WITH A STATUTE PROHIBITING PHYSICIANS FROM DISCLOSING THE SEX OF THE FETUS

Any statute imposing a duty on physicians to conceal the gender of a fetus from a pregnant patient, or forbidding a physician from performing tests to determine fetal gender would seem not only to impinge on the woman's privacy right and her first amendment right to acquire information, but would also affect the physician's right to free speech. However, the impact on the woman's privacy right would not be as serious as it might first appear because she would still be able to obtain medically relevant information. The nondisclosure statute at issue would also allow the physician to reveal the gender of the fetus when prenatal diagnosis would be unable to detect whether the fetus is afflicted with, or is a carrier of, an x-linked defect. A woman's right to benefit from her physician's judgment was mentioned in *Roe v. Wade* by way of dicta, but this was limited to professional medical judgment.

A. A Woman's Constitutional Right to Her Physician's Advice Does Not Extend to Identification of Fetal Gender

In *Roe*, Justice Blackmun suggested that a woman's privacy right includes a right to benefit from her physician's medical judgment about abortion. He stated that, during the first trimester, “the abortion decision . . . must be left to the medical judgment of the pregnant woman's attending physician.” He also stated that “the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated.” Assuming *arguendo* that these statements in *Roe* were intended to constitutionalize a woman's right to receive her physician's medical opinion, there is no suggestion that a woman has a right to receive information apart from that which is embodied in a medical opinion. Thus, under *Roe*,

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68. See *supra* note 65 and accompanying text. The reader should also note at this point that a state could preclude any objection that the statute interferes with privacy or free speech rights by banning the performance of that part of the amniocentesis procedure which reveals fetal gender when no x-linked disease is in question. Such a ban would affect the physician's actions, not the communication of the test results. Nevertheless, a state may want to enact a nondisclosure statute in addition to this ban in the event that fetal gender is obvious by inference or is inadvertently revealed. Note also that there are practical difficulties in separating the determination of fetal sex and the search for abnormalities. See *supra* note 59.

69. 410 U.S. 113, 163 (1973). The Court noted that during the time prior to the "compelling" point where the state has a legitimate interest in the woman's choice to have an abortion, she has the right to consult with a physician in order to determine whether this action should be taken.

70. *Id.*

71. *Id.* at 164.

72. *Id.* at 163.
a woman has a right only to receive her physician's medical judgment based on the facts of the case and generalizations based on medical experience and research. Indeed, normative judgments of any sort, whether medical or nonmedical, are a blend of fact and values, never facts alone.73 Hence, a woman's constitutional right to privacy, even if it includes a right to benefit from a physician's judgment, cannot include a right to receive information alone. *A fortiori*, the privacy right cannot include information identifying fetal gender.

It might nevertheless be contended that the state may not restrict the flow of information from the physician to the woman. Indeed, in *Akron v. Akron Center for Reproductive Health*,74 Justice Powell invalidated an informed consent statute in part because it intruded "upon the discretion of the pregnant woman's physician."75 Taken out of context, Justice Powell's remarks suggest that a physician should be free from all state interference in deciding what information the patient should receive. But the ordinance in *Akron* imposed a *duty* to convey information to the patient before an abortion could be performed.76 By imposing a duty to act on the part of a physician as a prerequisite to administering an abortion, the *Akron* ordinance went far beyond a nondisclosure statute. A physician acting pursuant to such a statute is not required to convey any information, and the duty the statute does impose is not a prerequisite to a woman's obtaining an abortion in any case.

Of course, it might be argued that the nondisclosure statute could interfere with a physician's exercise of his or her discretion to an extent equal to the informed consent ordinance, since a physician's discretion might in some cases dictate that information about fetal gender be conveyed to patients. The nondisclosure statute, however, does not impose a blanket duty to withhold the information. Physicians can reveal fetal gender when x-linked defects are at stake. Therefore, the nondisclosure statute is not nearly as sweeping as the *Akron* informed consent statute. Moreover, the nondisclosure statute is also less intrusive, insofar as the physician's performance of this duty is unrelated to the woman's general right to seek an abortion. In those jurisdictions that allow sex-selection abortion, the patient

73. Normative judgments are, *inter alia*, recommendations about the goodness or absence thereof in some course of action. See 8 *ENCYCLOPEDIA OF PHILOSOPHY* 177-78 (1967); cf. 1 id. at 54 (discussing the mixture of fact and value in aesthetic judgments).


75. Id. at 445.

76. Id. at 442.
would be free to obtain an abortion whether her physician has com-
pleted with the nondisclosure statute or not.

In those jurisdictions in which a nondisclosure statute is combined
with a prohibition statute, however, the similarity to the Akron in-
formed consent requirement is much closer, because there would be
a nexus between a woman's access to an abortion and the physician's
duty not to disclose. However, the connection is still not as tight as
that existing in Akron, where the physician's performance of duties
was a precondition for access to an abortion.

To be sure, under such a statutory configuration, a woman could
not abort her fetus based solely on its gender, but whether the physi-
cian has told her the fetus's gender or she has learned it from an-
other source, her right to an abortion would not automatically be
precluded. In Akron, however, her right to an abortion could not be
collected unless her physician gave her the information.

In short, there is some suggestion in dicta in Roe and Akron that a
woman's privacy right entitles her to the benefit of her physician's
medical judgment.77 However, even if the privacy right were ex-
tended that far, it is not at all clear that it would encompass factual
information apart from that which is embedded in a physician's medi-
cal judgment.

B. A Nondisclosure Statute Does Not Clearly Violate A Physician's
or Patient's Right of Free Speech

A more promising constitutional argument against a nondisclosure
statute is one based on the free speech right of the physician to in-
form the patient and the woman's free speech right to receive infor-
mation.78 It might be argued that the force of any free speech
objection could be circumvented by imposing the restrictions on the
test for fetal gender identification itself, rather than forbidding com-
munication of the results of the test, on the grounds that banning the
test is forbidding an action, while restricting the communication of
the test results is a restriction on speech. However, it would be im-
prudent for a legislature to ban the use of such tests for all purposes.
Rather than imposing a blanket ban, the legislation would most
likely specify that the test may not be performed for the sole purpose
of disclosing the sex of the fetus. It would then be clear, however,
that the purpose of the statute was to restrict the flow of information
between the physician and the patient, since it would not have to do
with the time, place, or manner of the communication, but rather the
content of the speech itself. Such a restriction would be tantamount
to an outright ban on the conveying of information and would there-

77. See supra notes 69-72 and accompanying text.
78. See U.S. CONST. amend. I.
fore be likely to encounter free speech difficulties anyway.\textsuperscript{79}

A nondisclosure statute aimed at restricting the actual content of the speech clearly does not fall into any of the recognized exceptions to the regulation of protected speech, namely obscenity\textsuperscript{80} and fighting words;\textsuperscript{81} nor does it seem to create a clear and present danger of imminent lawless action.\textsuperscript{82} Such a statute might pass first amendment muster, however, if construed as a regulation of a form of “private” speech not subject to significant first amendment protection,\textsuperscript{83} or as a form of commercial speech that the states can regulate more freely than noncommercial speech. Each of these possibilities will be considered in turn.

1. Communication of the identity of the gender of an unborn fetus is a form of private speech.

The Supreme Court has carved out an exception to the requirement of serious first amendment protections for certain types of speech that are private in nature. A salient characteristic of such unprotected speech is that it touches “upon matters of public concern in only a most limited sense ...”\textsuperscript{84} In \textit{Connick v. Myers}, the speech for which a public employee was ultimately fired was “most accurately characterized as an employee grievance concerning internal office policy.”\textsuperscript{85} Even though the Court refused to lay down specific rules for all employer-employee disputes, it did emphasize that “the First Amendment’s primary aim is the full protection of speech upon is-

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\item \textsuperscript{79} See generally 3 \textit{Rotunda}, supra note 12, § 20.47 at 235-38.
\item \textsuperscript{80} See \textit{Miller v. California}, 413 U.S. 15 (1973) (discussing standard for obscenity exception to free speech right).
\item \textsuperscript{82} See \textit{Hess v. Indiana}, 414 U.S. 105 (1973) (per curiam). The defendant, a college demonstrator, was arrested under Indiana’s disorderly conduct statute for yelling an obscenity in protest of police intervention regarding the demonstration. The Supreme Court held that this form of speech was not legally obscene nor could it be construed as “fighting words.” \textit{Id.} at 107-08. \textit{See also Brandenburg v. Ohio}, 395 U.S. 444 (1969) (per curiam) (discussing clear and present danger rule).
\item \textsuperscript{83} \textit{Connick v. Myers}, 461 U.S. 138 (1983) (employer’s discharge of public employee for refusing to accept transfer and distributing questionnaire among other public employees complaining about working environment held not in violation of employee’s free speech rights).
\item \textsuperscript{84} \textit{Id.} at 154.
\item \textsuperscript{85} \textit{Id.}
\end{itemize}
sues of public concern . . . .”

In an earlier case, *Givhan v. Western Line Consolidated School District*, the Court had granted first amendment protection to a public employee's objection about the school district's allegedly racially discriminatory policies to her employer made in a private, rather than public, setting. The reason articulated for protecting the speech was that it raised issues of public concern. First amendment freedom is not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.”

In *Connick*, the Court denied that it was suggesting that speech about private matters, like obscenity, was entitled to no protection. The Court simply announced that a "federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." The Court made it clear that private speech about public figures would still be entitled to first amendment protection in a libel action.

Of course, the nondisclosure statute does not prevent the physician from communicating anything of public concern to the patient. Nevertheless, it could be argued that when a physician reveals information about a patient's fetus, an impact on the public will result (at least in a collective sense) if enough doctors were to communicate such information to enough patients. This impact would be the result of female patients' action or inaction, as the result of being informed of the gender of their fetuses.

At issue in the nondisclosure statute, however, is the prohibition on communication—not upon hypothetically possible subsequent action. Moreover, as in all free speech cases, the issue is the nature of the individual communication, not the collective question of what would happen if large numbers of people shared the same communication.

There is no question but that the communication at issue here is purely private. Certainly, no patient could plausibly claim that the information the doctor provides her is anything but a purely private

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86. *Id.*
88. *Id.* at 415-16.
89. *Connick*, 461 U.S. at 147.
90. *Id.* (citations omitted).
91. *Id.*
92. For example, "fighting words" and "hostile audience" cases focus upon the actions likely to be taken by listeners upon hearing the words. See supra note 81. No Supreme Court holding about the right to freedom of speech has ever hinged on the answer to the hypothetical question of what actions would have followed if large numbers of people had heard the words at issue.
matter between her and her doctor. The desire of a woman to know the gender of her fetus does not imply a concomitant desire to discuss her abortion decision in a public forum. As any woman would confirm, such decisions are not, individually, any matter of public concern.

Still, it might be thought that the Court left the door open to first amendment protection of a doctor's identification of the gender of the fetus with its suggestion that "private" speech is worth something more than obscene remarks or fighting words. However, the Court's opinion was intended to address libel actions to obtain compensation for damage to the reputation of a party that was the subject of the communication. Here, the fetus is the subject of the communication, and even if it were subsequently born alive, that person could not conceivably suffer compensable injuries as a result of the physician-patient dialogue.

Moreover, in a subsequent "private" speech case, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., the Supreme Court afforded little protection to such communications by allowing a corporate plaintiff to recover presumed and punitive damages from a credit reporting agency that falsely and negligently reported to five of its subscribers that the plaintiff had filed for bankruptcy. Justice Powell's plurality opinion stressed the private nature of the communication and the lower value placed by the first amendment on private speech. If the door to first amendment protection of identification of fetal gender was open in Connick, the door would seem to have effectively been closed in Greenmoss Builders. Connick merely allowed for the possibility that "private" speech could be insulated to some extent from libel actions, but Greenmoss Builders showed that, absent an issue of public concern, insulation from damages for libel is not available. Because the first amendment does not protect private communications from damage suits in libel, it would seem that a physician's disclosure of the gender of the fetus to the pregnant patient is without serious first amendment consequences.

However, these appeals to Greenmoss Builders and Connick are

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93. Connick, 461 U.S. at 147.
94. Id.
96. Id. at 761-63.
97. Id. at 758-61.
98. Connick, 461 U.S. at 147.
misleading in two crucial respects. First, the contexts are different. Whereas Greenmoss Builders and Connick dealt with commercial transactions and employer-employee relations, respectively, a nondisclosure statute would restrict communications within the private and personal relation between physician and patient. Second, the sanctions at issue in Connick and Greenmoss Builders were non-criminal. Had the Court been presented with a doctor's imprisonment for revealing information about a patient's fetus—regardless of whether the revelation was trivial, such as eye color, or of serious significance, such as the prospects of stillbirth—the result would most likely have been different.100

There are no judicial decisions supporting this prediction, because no state has seen fit to restrict fetal information to the mother. Indeed, there are many private relationships, such as husband and wife and priest and penitent, involving private communications, the first amendment protection of which will remain uncertain until a state dares to restrict these communications. The absence of case law to support this assertion does not serve to falsify it. Likewise, the absence of relevant case law should not warrant rejecting the prediction that the Court would find criminal punishment of a doctor for revealing fetal gender to his patient to be a violation of the first amendment. At the very least, these reflections show that the "private" speech cases are not a reliable basis for asserting that the Court would not afford any serious first amendment protection to disclosures of fetal gender.

The uncertainty of the degree of first amendment protection the Court would afford doctor-patient communications is further underscored by the strong interest of the state in restricting such communications. In Connick and Greenmoss Builders, the state had no reason to protect the communications. Conversely, it had no reason to restrict them because publication of false credit reports and continued employee disputes present no threat to future generations. On the other hand, routine disclosure of fetal gender does present such a threat. Therefore, the degree of first amendment protection the Court would afford disclosure of fetal gender is especially unclear.

100. In Griswold v. Connecticut, 381 U.S. 479 (1965), a doctor was convicted of distributing advice and information concerning contraception to married couples. The Court struck down the statute, in what has become a significant case involving the constitutional right to privacy. The Court noted that the doctor was subject to a criminal fine and possible imprisonment. Id. at 480.
2. A state may restrict a doctor's communication even if it constitutes commercial speech.

A prohibition statute might escape exacting constitutional scrutiny if doctors' communications are a form of commercial speech.101 As one student note points out, there is a basis in the commercial speech doctrine for the state's calling "into question the 'legitimacy' of the information sought by a woman who desires a sex-selection abortion . . ."102 Although the reasons given for this conclusion may not be as persuasive as they could be, the conclusion is basically correct in that, if a doctor's communication were commercial speech, it could nevertheless be restricted.103 However, as will be shown in this section, the author of that case note incorrectly assumed that doctors' communications are commercial speech. First, it will be shown that this is not commercial speech in any recognizable sense, and then the reasons why such speech may be restricted even if it were commercial speech will be discussed.

a. A doctor's communication is not commercial speech.

The student note mentioned above contains no support for the proposition that a doctor's informing the patient of the gender of her fetus is commercial speech. The author seems to assume that, because the communication occurs in fulfillment of a commercial agreement, it is commercial speech.104 However, the Supreme Court's definition of commercial speech is restricted to speech that precedes, and is designed to induce, such transactions. Justice Blackmun's majority opinion in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council105 made this clear. Interestingly, the challenge to the Virginia statute prohibiting advertising of prescription drug prices in that case106 was brought, not by a "speaker," but by members of the "audience"—two consumer groups and a Virginia

101. See infra notes 111-13 and accompanying text.
104. See Note, supra note 102 at 313.
106. Id. at 744-50. The statute provided that any licensed pharmacist in Virginia who published the price for or promoted any prescription drug would be guilty of unprofessional conduct. Id. If convicted under this statute, a pharmacist could lose his license. Id. at 732.
resident in need of prescription drugs.\footnote{107} After observing that the issue of commercial speech was squarely before the Court, Justice Blackmun pointed out that neither editorializing, nor reporting of newsworthy facts was at issue.\footnote{108} He then implied that purely commercial speech does no more than propose a commercial transaction: "The 'idea' [the pharmacist] wishes to communicate is simply this: 'I will sell you the X prescription drug at the Y price.' "\footnote{109} If purely commercial speech is that which proposes a commercial transaction and raises no issue of public concern, speech that occurs as part of the transaction that follows the proposal could not be characterized as commercial speech. Thus, it is incorrect to characterize a doctor's communication of test results as commercial speech.

\begin{itemize}
  \item[b.] \textit{If a doctor's communications were commercial speech, states which ban sex-selection abortion may ban associated communications.}
\end{itemize}

Assuming \textit{arguendo} that a doctor's conveying such information was commercial speech, there are several grounds for the validity of a nondisclosure statute. The aforementioned student author concluded that a state's interest in prohibiting the communication of such information outweighed that of a physician because the widespread use of amniocentesis might threaten maternal health, and because the state is entitled to maintain a balanced gender ratio and to discourage sexism in society.\footnote{110} However, the author incorrectly assumed that the state's interests could be weighed in the balance before determining whether the physician's disclosure overcomes the first hurdle the Court placed before commercial speech in \textit{Central Hudson Gas & Electric Corp. v. Public Service Commission}.\footnote{111} In that case, Justice Powell required that commercial speech "at least must concern lawful activity and not be misleading" before it can be protected by the first amendment.\footnote{112} Only when this has first been determined may the court ask whether the regulation is "not more extensive than is necessary" to achieve a "substantial" governmental interest.\footnote{113} Thus, in those states in which sex-selection abortion is illegal, the nondisclosure statute would prohibit speech concerning an unlawful activ-

\footnotesize{\begin{itemize}
  \item\footref{107} \textit{Id.} at 753.
  \item\footref{108} \textit{Id.} at 769-61. The court distinguished several previous cases which involved more than just commercial speech. \textit{Id.} at 759-61.
  \item\footref{109} \textit{Id.}
  \item\footref{110} Note, \textit{supra} note 102, at 317.
  \item\footref{111} 447 U.S. 557 (1980) (New York Public Service Commission's order to cease all advertising promoting "use of electricity" held in violation of first and fourteenth amendment free speech rights).
  \item\footref{112} \textit{Id.} at 566.
  \item\footref{113} \textit{Id.}
\end{itemize}}

324
In these jurisdictions, therefore, the question of the extensiveness of the regulation would not be reached. The speech would be unprotected. However, if the validity of a nondisclosure statute were at issue in a state that permitted sex-selection abortion, the governmental interests in protecting maternal health, discouraging sexism, and maintaining a balanced gender ratio would weigh heavily in the balance as the student note suggested.

Prenatal testing, however, may become safer and less costly in the future, so concerns about maternal health and safety may prove to be insignificant. Moreover, prenatal test results may become widely available early enough in the first trimester so that second-trimester abortions could be avoided. The crucial question, then, would be whether discouraging gender discrimination and maintaining a balanced gender ratio are sufficiently substantial governmental interests.

i. The governmental interests are sufficiently substantial.

There is ample precedent for the state’s preventing individuals from receiving information that they might use to discriminate on the basis of gender or race. Inquiries about a job applicant’s sex, for example, are prohibited by EEOC guidelines, unless based on a bona fide occupational qualification. The Court has upheld an ordinance prohibiting newspapers from running separate classified advertisements for men and women job applicants. HUD guidelines on fair housing not only prohibit overtly discriminatory advertising for housing, but also prohibit selective use of media in advertising so as to fo-

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115. See supra text accompanying note 110.
116. Fetal death and other serious complications for mothers or fetuses occur in experienced centers in less than 0.5% of cases. Dickens, Abortion, Amniocentesis and the Law, 34 AM. J. COMP. L. 249, 250 (1986). The procedure is still costly. Id. at 252-53.
117. Chorionic villi sampling is a diagnostic test that can detect some but not all of the disorders identifiable by amniocentesis and is available in the eighth to tenth week of pregnancy. Id. at 251. See also T. KELLY, supra note 64, at 369-72. Results are available in one or two days. Dickens, supra note 116, at 252-53. By contrast, amniocentesis can be performed in the sixteenth week, but results are not available for another six weeks. Id. at 249. There is also a variation on traditional amniocentesis that yields reliable results earlier in many cases. Findley, Potter & Findley, Alternative Strategies of Fetal Sex Diagnoses and Sex Preselection, 31 SOC. BIOLOGY 120, 137 (1984).
118. 29 C.F.R. § 1604.7 (1987).
cus appeals for housing on members of a particular race.\textsuperscript{120} Also, the District of Columbia Circuit went beyond \textit{Shelley v. Kraemer},\textsuperscript{121} and held that the mere recording of discriminatory restrictive covenants in real estate deeds, "even if no effort is made to enforce them," violated Title VIII of the Fair Housing Act of 1968.\textsuperscript{122} Thus, even speech that involves no advertising may be regulated by federal statutes prohibiting discriminatory notices or statements.

It may be argued that fair housing and equal employment guidelines are distinguishable from the nondisclosure statute since the communications at issue in those cases were discriminatory on their face. Moreover, the recipients of the information in those cases, the employees and landlords, had no legitimate need to know the race of their employees or tenants. Here, however, a woman may have a legitimate need to discover information about her future child's gender. For instance, such information would be useful in planning what clothes or toys to buy, or how to decorate the baby's bedroom. Furthermore, the information involved here is entirely factual; it simply identifies the fetus more precisely.

In response, one may point to entirely legal adoption laws that prevent people from discovering information about their blood relatives, despite strong desires, or even legitimate needs to acquire it.\textsuperscript{123} The justification for such laws is, in part, that the interest of the natural mothers in remaining anonymous to their children once they put their children up for adoption is of far greater social importance than the right of adopted children to know the identity of their natural mothers.\textsuperscript{124} Courts have upheld the constitutionality of such laws by weighing the competing interests in this fashion.\textsuperscript{125} Similarly, a pregnant woman's need to know the gender of her child, when no genetic defects are at issue, pales in comparison with the state's need to prevent future oppression of women and maintain a balanced ratio of

\textsuperscript{120} R. Schwemm, \textit{Housing Discrimination Law} 176 (1983) (discussing guidelines for implementing 42 U.S.C. § 3604(c)).
\textsuperscript{121} 334 U.S. 1 (1948) (invalidating enforcement of racially restrictive covenants on equal protection grounds).
\textsuperscript{122} Mayers v. Ridley, 465 F.2d 630, 631 n.1 (D.C. Cir. 1972) (en banc) (per curiam).
\textsuperscript{124} \textit{E.g.}, Alma Soc'y, Inc. v. Mellon, 601 F.2d 1225, 1234-36 (2d Cir. 1979) (laws barring adult adoptees from access to records upheld against substantive due process and equal protection attacks); \textit{In re Janice Assalone}, 512 A.2d 1383, 1390 (1986) (rejecting adult adoptee's claim of fundamental right to learn identity of biological parents); \textit{see also} Humphers v. First Interstate Bank of Or., 298 Or. 706, 696 P.2d 527 (1984) (en banc) (right of action recognized in biological mother for breach of confidential relationship against physician who revealed her identity to daughter given up for adoption shortly after birth).
\textsuperscript{125} \textit{See cases cited supra} note 124.
the sexes in the population. Thus, the existence of a legitimate need to know is not enough; instead, the crucial question is how heavily that need to know weighs in comparison with the legitimate interests advanced by the action of the state.

ii. The nondisclosure statute would not be unnecessarily extensive.

Assuming that the dual goals of discouraging sexism and maintaining a balanced gender ratio are sufficiently substantial, there is little doubt that a court would view the nondisclosure statute as properly tailored to achieve these goals. If the statute made no exception for women who could not otherwise predict the presence of an x-linked disease in the fetus, the statute would most certainly be deemed overinclusive. But, properly circumscribed, the statute would keep in ignorance only those women lacking a legitimate medical need to know the sex of their fetuses. The statute would, therefore, be only broad enough to have an impact on only those women with at most a trivial reason to know.

C. Summary

A nondisclosure statute would not interfere with a woman's right to privacy so long as the statute allowed her to benefit from her physician's medical judgment. The statute could provide for this by making exceptions for women whose fetuses could not be diagnosed as having an x-linked disease. Although it is unclear whether the courts would view the statute as a regulation of unprotected private speech, the above-mentioned exception clause would ensure that the statute would not unduly violate any free speech right, should the courts deem the physician's communication of fetal gender to the woman to be commercial speech. Such a clause would ensure that the statute was no more over-inclusive than needed to accomplish its goals of discouraging sexism and preserving a balanced gender ratio in the population. Before a court reaches the question of unnecessary

126. Cases will undoubtedly arise in which there will be a legitimate nonmedical need to know fetal sex. One such case might involve an older woman with several daughters who would continue the pregnancy only if she knew the fetus were male. See T. Kelly, supra note 64, at 389. The mother would predictably abort the fetus if the physician refuses to test for fetal sex. The physician in such a situation would have an opportunity to save a male fetus. From the legislator's point of view, however, making exceptions for cases like this would swallow the rule. Those parents who find themselves unable psychologically to relate to children of a certain sex would similarly seem to have a legitimate need to know.
overinclusiveness, however, it is likely to conclude that the doctor's communication is not commercial speech, because the communication involved here is not an invitation to a commercial transaction.

IV. CONSTITUTIONAL DIFFICULTIES WITH PROHIBITIONS ON SEX-SELECTION ABORTIONS

Legislators may want to couple a nondisclosure statute with a prohibition statute for a number of reasons. The nondisclosure statute alone may not be effective since couples may discover the gender of the fetus by inadvertence or by design (e.g. falsely reporting to the physician a family history of an x-linked disease not diagnosable in utero). Also, a prohibition statute would strengthen the case for the constitutionality of any nondisclosure statute, since the prohibition statute would declare illegal the activity with which the doctor's communication (banned by the nondisclosure statute) is concerned. Thus, the nondisclosure statute would restrict speech about unlawful activity and would satisfy the *Central Hudson Gas* test.127

Nevertheless, the prohibition statute itself would face serious constitutional objections. This Article will next explore the statute's effects on women's privacy rights and the possibility of generating an equal protection claim. Unless indicated otherwise, the difficulties discussed will be those associated with an existing sex-neutral prohibition statute that outlaws sex-selection abortions of any fetus, male or female.128

A. A Prohibition Statute does Not Violate a Woman's Privacy Rights

The constitutional basis for a woman's right to obtain an abortion during early pregnancy is familiar enough. The Court reasoned in *Roe v. Wade*129 that a state's interests in preserving fetal life and protecting maternal health were not sufficiently compelling to justify a ban on abortion in the first and second trimesters.130 The Court conceded, however, that a state could regulate abortion in the second trimester to protect maternal health.131 It is tempting to conclude that *Roe* precludes a governmental ban on sex-selection abortion during the first or second trimester. But this conclusion would be unwarranted because the factual situation in *Roe* is radically different from the situation presented by sex-selection abortion cases.

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128. ILL. ANN. STAT. ch. 38, ¶ 81-26 § 6(8) (Smith-Hurd 1987). *See supra* text preceding note 59 for comparison of an example of a sex-neutral prohibition statute with an example of a sex-specific prohibition statute.
129. 410 U.S. 113 (1973).
130. *Id.* at 164.
131. *Id.*
To appreciate the significance of the different factual settings, we must bear in mind that the *Roe* Court engaged in a balancing of competing interests prior to concluding that a woman is entitled to obtain an abortion in the early stage of pregnancy. When the interests in the balance are different, however, one would expect the Court to reach a different conclusion. As will be shown, sex-selection abortion presents interests on the part of the woman and the state that are fundamentally different from those balanced by the *Roe* Court.

1. The woman's interests.

The woman's interests in obtaining an abortion may be measured in at least three ways:

1. by what she is willing to endure to avoid pregnancy and birth;
2. by the likelihood that she will regret giving birth; and
3. by the likelihood she will regret having obtained a successful abortion.

There is little doubt that, using any of these measures, a woman faced with an unwanted pregnancy has a far weightier interest in obtaining an abortion than a woman who wants only to preselect her child's sex.

First, a woman with an unwanted pregnancy is likely to accept any safe abortion—and would perhaps risk an unsafe one, while a woman wanting a child of a certain gender wants a safe abortion only if she can be reasonably sure that she has accurately determined the sex of the fetus. Thus, the latter will take fewer chances in her search for an abortion than the woman who seeks to avoid parenting altogether.

Conversely, a woman seeking a sex-selection abortion has far less to lose if she is denied an abortion than did Jane Roe. A woman seeking an abortion only to determine the sex of her future child would clearly be willing to suffer the discomfort and inconvenience of pregnancy, to endure the pain of childbirth, and to raise the child. She is not only emotionally prepared for parenthood, she is also more likely to be prepared to make the necessary financial expenditures. Jane Roe, on the other hand, was unmarried and did not want to give birth at all, regardless of the gender or condition of the fetus.

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132. *Id.* at 162-64.
133. *Id.* at 120.
134. Jane Roe became pregnant through rape and never saw the child again after leaving the hospital. F. FRIENDLY & M. ELLIOTT, THE CONSTITUTION: THAT DELICATE BALANCE 202-04 (1984). It is reasonable to infer that she would not have wanted to give birth regardless of these circumstances.
She would bear the child only if she were unable to obtain an abortion, but she clearly had no plans to raise the child.\(^{135}\)

The respective probabilities that these women would be willing to carry their fetuses to term are telling in themselves. There is a fifty percent chance that a woman who does not know the gender of her fetus and is denied a sex-selection abortion would be disappointed or regretful should she bring the fetus to term.\(^{136}\) But it is virtually certain that a woman with an unwanted pregnancy would be disappointed and regretful if required to complete the pregnancy.

Finally, there is the likelihood that these women will regret having obtained an abortion. There is only a small probability that a woman like Jane Roe would regret it because she was confronted with an unwanted pregnancy. There is a far greater probability, however, that a woman seeking a sex-selection abortion would regret having an abortion, because the fetus was not entirely unwanted. That is, the woman would realize there is a certain probability that she may be prevented from giving birth to a normal child of the desired gender at a later time. Since she, unlike Jane Roe, is prepared to raise the child, there would be a greater likelihood of regret over the abortion decision later.

In short, a woman seeking a sex-selection abortion would be more likely to regret having obtained a "blind" abortion, is more selective about the conditions under which she will agree to one, and has far less to lose from denial of an abortion than a woman with an unwanted pregnancy. While a woman with an unwanted pregnancy may be desperate and willing to seek a "back-alley" abortion, it seems doubtful that many women seeking sex-selection abortions would settle for this. These radically different attitudes toward abortion clearly demonstrate that a woman seeking to control the gender of her children has a far less weighty interest in obtaining an abortion than does a woman in the position of Jane Roe.

2. The state’s interest.

Not only do the two women discussed above have radically different attitudes toward the outcomes of their pregnancies, but the state

\(^{135}\) Jane Roe claimed she could not afford to obtain an abortion in another state. Roe, 410 U.S. at 120. She had no job skills. P. BABBITT, CONSTITUTIONAL FATE 165 (1982). Given her meager financial circumstances and her poor prospects for a significant income, it is unlikely she harbored any plans to raise the child. In any event, she did not raise it.

\(^{136}\) Presumably, if a woman who desired a firstborn male delivered a male child, she would be satisfied with this result. However, if she delivered a female, she would be presumably disappointed relative to the position she would have obtained if she had delivered a male. Each individual woman’s chances of delivering a particular gender are extremely speculative, but for purposes of illustrating the point, a 50% standard is sufficient. See THOMPSON & THOMPSON, supra note 10, at 279.
has radically different interests at stake in imposing regulations on those respective outcomes. The differing state interests stem from the different ramifications the respective terminations of the pregnancies have for society. If Jane Roe terminates her pregnancy—even at public expense—society’s expense is minimal from a cost-benefit point of view, even if all similarly situated women were to follow her example. Indeed, cost-benefit analysis might well show that society is actually better off paying for the termination of unwanted pregnancies than providing for the care of unwanted children, or enduring the other likely effects of carrying unwanted pregnancies to term, such as child abuse and juvenile crime. To be sure, there may be anguish on the part of some members of society (“pro-lifers”) who regard fetal life as equivalent to any other human life, and these effects must be weighed in the balance. Offending the sensibilities of bystanders, however, is appropriately given greater weight than the effects on participants only in cases in which participants have no legitimate stake in pursuing the activity. For example, legislators have given great weight to the effects on bystanders in enacting prohibitions on cruelty to animals, because torturers of animals have no legitimate claim to the outcome of the cruelty. Women seeking to rid themselves of an unwanted pregnancy surely have a legitimate claim to do so, apart from the controversial question of whether they have a right to kill the fetus. At most, the example of animal cruelty laws shows that fetuses have a right to painless abortions. The woman’s interest remains far more substantial than that of the sensibilities of antiabortionist bystanders.

Of course, if “pro-lifers” are correct in asserting that fetal life is equally as valuable as other human life, the costs of abortion on demand are much higher than the Court has been willing to admit. Abortion on demand would amount to a harsh form of age discrimination unprotected by federal law. The Court, however, denied in Roe v. Wade that non-viable fetuses are “persons” for fourteenth amendment purposes.137 This finding considerably simplifies the analysis.

Perhaps the Supreme Court in Roe had this sort of analysis in mind when it recognized only two state interests, protection of fetal life and preservation of maternal health.138 It was undoubtedly this refusal to classify non-viable fetuses as persons which permitted the

137. Roe, 410 U.S. at 156-58.

138. Id. at 162.
Court to dismiss protection of fetal life as a justification sufficient to warrant the imposition of a blanket ban on abortion.\textsuperscript{139} The Court recognized that in order to justify a blanket ban, it would have to adopt "one theory of life"\textsuperscript{140} and dismiss all other views of the significance of fetal life. The Court may have felt that the palpable social effects of forcing women to carry unwanted fetuses to term were too overwhelming a price to pay to spare those who equate fetal life with post-natal human life, the anguish they would otherwise experience. In other words, the Court viewed the hurt experienced by "pro-lifers" as a much smaller price to pay than the pain, trauma, and other ill effects that pregnant women and their offspring must pay. Therefore, it might be said that granting a woman with an unwanted pregnancy her request for an abortion has a minimal utilitarian impact on society.

Even if the "pro-life" premise that fetal life is sacred is rejected, the state's interest in regulating sex-selection abortion outweighs the state interests in regulating the abortion of unwanted pregnancies. In addition to the concern for fetal life and the ill effects of forcing women to carry to term, there are the governmental interests in achieving equal opportunity between the sexes and maintaining a balanced proportion of sexes in the population. Granting requests for sex-selection abortions today would undoubtedly result in large numbers of requests in the future, and in the births of more sons and more firstborn sons. Whereas Jane Roe's abortion, like any termination of an unwanted pregnancy, may be said to have affected only those acquainted with or biologically related to her, the effects of sex-selection abortions radiate out beyond those affected by terminations of unwanted pregnancies. Denying requests for sex-selection abortions would thus have beneficial effects that go beyond relieving the anxieties of those who hold fetal life sacred. In addition, future generations of women would likely be spared being the victims of sexual harassment, assault, job discrimination, and other more subtle forms of oppression.

3. Weighing these interests in the balance.

Regardless of how important the state's interests in protecting fetal life and maternal health are, clearly the state protects other interests in denying sex-selection abortions. Conversely, a woman seeking to obtain such an abortion has interests even narrower than those of Jane Roe. Whereas the \textit{Roe} Court had to weigh Jane Roe's unwillingness to be a parent against the state's concern for her health and

\begin{flushleft}139. \textit{Id.}
140. \textit{Id.}\end{flushleft}
the life of the fetus, a court facing a challenge to a statute prohibiting sex-selection abortion would have to weigh the woman's desire to give birth to and raise to adulthood a child of her chosen gender, against the state's concerns for her health, fetal life, and the adverse impact on future generations of women. Should the Court ever be faced with a state statute banning only sex-selection abortions, the Court could advance convincing reasons for reaching a result different from that reached when it confronted the blanket ban on abortion in Roe v. Wade.

B. Equal Protection Challenges to a Prohibition Statute

A state ban on sex-selection abortion would be certain to face a more subtle challenge based on the equal protection clause of the fourteenth amendment. The equal protection clause protects individuals from discrimination due to their membership in a disadvantaged group. Laws that discriminate on the basis of race are subject to "strict scrutiny." Those that discriminate on the basis of sex, however, are currently subject to "intermediate scrutiny." That is, "classification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."

A successful equal protection challenge of a sex-selection abortion prohibition statute would entail proving that the statute's purpose is to burden women exclusively, and either that the statute achieves no important governmental objective or that there is no substantial relation between the prohibition and the attainment of that objective. The discussion which follows will show that a ban on sex-selection abortion cannot be faulted on any of these grounds. The chief reason why a prohibition statute would survive an equal protection attack is because it burdens women disproportionately more than men in order to alleviate future discrimination and oppression of women.
No better governmental objective could be advanced for a statute with a disproportionate impact on one of the sexes than that of preventing such future discrimination against members of that sex.147

1. Discriminatory purpose.

If a gender-neutral prohibition statute is facially neutral, in that it does not appear that it would focus solely on women, then a person litigating an equal protection challenge would have to show either that the statute was applied in a discriminatory manner or that it was merely a pretext for oppressing women.148 The Supreme Court made it clear in *Geduldig v. Aiello*149 that classifications based on pregnancy are not gender-based, since they distinguish between pregnant women and other nonpregnant people, and not solely between women and men.150 A prohibition statute designed and enforced to punish all persons seeking to determine the gender of their children—as opposed to the purpose of generally punishing women, pregnant or not—could pass constitutional muster.

First, the statute could be supplemented with a provision rendering fathers criminally liable for failing to object to a mother’s decision to abort. Second, a statute prohibiting pregnant “persons” (or some other synonym)—not just pregnant “women”—from obtaining sex-selection abortions might also survive equal protection attack, since the statute would leave open the theoretical possibility that pregnant *males* could be prosecuted thereunder. A fetus in New Zealand de-

147. The Court has upheld preferential treatment of women in cases where the disparate treatment compensates for past discrimination against women. *E.g.*, Califano *v.* Webster, 430 U.S. 313 (1977) (social security provision allowing women to compute their benefits using a more favorable formula than that which men could use); Schlesinger *v.* Ballard, 419 U.S. 498 (1975) (federal statute granting longer tenure to female naval “line” officers before discharge); Kahn *v.* Shevin, 416 U.S. 351 (1974) (property tax exemption for widows but not widowers). The Court has also upheld classifications according to gender when they advance some other important state interest. *E.g.*, Rostker *v.* Goldberg, 453 U.S. 57 (1981) (exemption of females from military draft registration); Michael M. *v.* Superior Court, 450 U.S. 464 (1981) (“statutory rape” defined to protect women only). The state interests in the second set of cases are difficult to distinguish from overly protective legislation which the Court regards as perpetuating stereotypes. *E.g.*, Mississippi Univ. for Women *v.* Hogan, 458 U.S. 718 (1982) (nursing school’s claim that female-only admissions policy helped compensate women for past discrimination rejected as perpetuating stereotypes).


150. *Id.* at 496-97 n.20.
veloped to full term from a fertilized egg that lodged in a woman's abdomen. It is theoretically possible that the same result could occur in a man's body.

Both the careful wording of the statute and the medical possibility of male pregnancy serve as effective responses to the contention that statutes which discriminate between pregnant and nonpregnant people violate the equal protection clause. That is, critics of the Court have argued that laws protecting fetuses violate equal protection because only "women can suffer the great intrusions of such laws, for only women have the ability to bear children." However, a prohibition statute does not protect fetuses as much as it protects future generations of women. Moreover, a prohibition statute does not violate equal protection since it may also intrude on the lives of men, not only as codefendants, but possibly as sole defendants in the future.

This argument does not deny that women would undoubtedly be punished under a prohibition statute in far greater numbers than would men. The Supreme Court, however, could find precedent with which to counter such an equal protection attack in Personnel Administrator of Massachusetts v. Fenney, in which a state statute giving a lifetime preference to veterans in civil service jobs had a severely disparate impact on women. The Court nevertheless held the legislation to be a noninvidious, neutral classification intended to aid all veterans, and not merely to prefer men over women. It is unlikely, therefore, that the United States Supreme Court would find purposeful discrimination in a gender-neutral prohibition statute.

2. The governmental objective.

Although it is unlikely that a court would find purposeful discrimination in a gender-neutral prohibition statute, it would surely find a discriminatory intent embodied in a sex-specific prohibition statute. Once that finding were made, there would be the further question of whether the purpose of the statute—reducing future discrimination

152. Id.
155. Id. at 274-80. The Court allowed for the possibility, not raised in this case, that discriminatory intent could be established by showing that a facially neutral rule nevertheless had a "gender-biased" nature or an impact so adverse it must have been intended. Id. at 276.
against and oppression of women—is important enough to enable the statute to survive an equal protection challenge.

In *Mississippi University for Women v. Hogan*, Justice O'Connor emphasized the importance of the governmental objective of compensating women for past discrimination when faced with a challenge to a state policy of admitting only women to a university program. She could not understand, however, how refusing to admit men to Mississippi's School of Nursing for Women compensated women for past discrimination in the nursing profession. Nevertheless, *Hogan* demonstrated that compensating women for past discrimination may be in principle a sufficiently important governmental objective to justify a policy of gender discrimination.

The further question *Hogan* raises but does not answer is whether classifications based on gender are inherently suspect. If the Court should rule in a future case that gender classifications are inherently suspect, then, like racial classifications, they would be subject to strict judicial scrutiny. If such a ruling were issued, it is unclear whether compensation for past sexual discrimination would be a sufficiently weighty state interest to survive strict scrutiny.

3. The substantial relation analysis.

The most intriguing questions under equal protection analysis would be whether the gender classification bears a substantial relation to an important governmental purpose; and, if strict scrutiny should ever apply, whether the classification is narrowly tailored to a compelling state interest. Unfortunately, the Court has set out only the necessary conditions of the substantial relation—those conditions which, if not satisfied, render a relation insubstantial for equal protection purposes. In *Hogan*, for example, Justice O'Connor found the relation between Mississippi's gender-based classification insubstantially related to its objective of compensating women for past discrimination. In fact, her belief was that the single-sex admissions policy actually reinforced the stereotype of nursing as "an exclusively woman's job." *Hogan* thus shows that just because a state's policies profess to remedy past gender discrimination, there is no guarantee they will pass the substantial relationship test.

156. See supra part II.A.1.b.
158. Id. at 728-29.
159. Id. at 729-30. "Rather than compensate for discriminatory barriers faced by women, M.U.W.'s Policy of excluding males . . . tends to perpetuate the stereotyped view of nursing as an exclusively woman's job." Id. at 729. The Court did not decide whether the classification under this statute involved a suspect class. Id.
160. Id. at 724 n.9.
161. Id. at 730.
162. Id. at 729.
There is some question whether prohibition statutes would affect sexual stereotypes. Whether gender-specific or neutral, these statutes would have the effect of discouraging couples from clinging to the stereotypical ideal of having a family with firstborn sons. Nevertheless, there can be no serious question about whether a statute punishing sex-selection abortion would prevent gender ratio imbalances in the population and thereby relieve some oppression of women by maintaining their relative numbers. Similarly, a gender-specific statute punishing women who abort normal female fetuses after prenatal testing disclosed the gender of the fetus would help increase the number of women in the future. The only controversial question would be whether the statutes have any other markedly undesirable effects.

This question would be especially crucial to a prohibition statute facing strict scrutiny, since the legislature would not have as much leeway in achieving its ends at this level of review. Even so, there would be little of which a reviewing court could complain. For example, a gender-specific statute is narrowly drawn insofar as it permits couples to abort normal male fetuses without fear of prosecution. A gender-specific statute thus goes to the heart of the problem by attacking male chauvinism, while a gender-neutral statute casts the net more broadly and attacks sexist attitudes generally by punishing all sex-selection abortions.

Legislators could improve the odds of an enactment’s passing the substantial relation test by stating in a preamble to the statute the precise ends which the enactment is designed to achieve. They should take care, however, not to claim that the statute will accomplish more than is necessary. The sponsors should not, for example, claim that a statute punishing abortions of normal female fetuses is designed to discourage sexist attitudes, because the statute would be underinclusive to the extent it leaves couples free to abort normal male fetuses. Instead, they should state that the statute is designed to prevent population imbalances of females to males and to offer more opportunities to females in subsequent generations. On the

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163. See generally 2 ROTUNDA, supra note 12, § 18.3 at 324-26. Justice Brennan, joined by Justices Marshall, White, and Douglas, in a plurality opinion, striking down obstacles for dependency allowances offered only to servicewomen, argued that classifications based on gender are “inherently suspect” and should be subjected to “strict judicial scrutiny.” Frontiero v. Richardson, 411 U.S. 677, 688 (1973). On the other end of the spectrum, some justices have argued that benign racial classifications are “inherently suspect and presumptively invalid.” Fullilove v. Klutznick, 448 U.S. 448, 522-26 (1980) (Stewart, J., joined by Rehnquist, J., dissenting).
other hand, legislators sponsoring a gender-neutral prohibition statute should mention more general goals, such as preventing imbalances in sex ratios and combatting sexist stereotypes about the family.

C. Summary

A prohibition statute would likely face constitutional challenges on both privacy and equal protection grounds. Although a privacy challenge, based on Roe v. Wade, may seem formidable, a close examination of Roe would reveal that the state has a far stronger interest in banning sex-selection abortions than it has in banning all abortions. By prohibiting sex-selection abortions, the state spares future generations of women a good deal of misery, while no such benefits are enjoyed from a blanket ban. Moreover, a woman seeking a sex-selection abortion has much less at stake than Jane Roe, who was faced with an entirely unwanted pregnancy. Given these competing interests, the Roe Court would likely have found the balance weighted in favor of the state and approved a ban on abortion for gender selection.

A prohibition statute would also survive an equal protection challenge in gender-neutral form because it is facially non-discriminatory. Even in its sex-specific form, its discriminatory effect is a variant of benign discrimination. Furthermore, given the serious effects on women that would result from the absence of any restriction on sex-selection abortion and the narrow scope of the ban imposed by a prohibition statute of either kind, the prohibition statute would likely be found to bear a substantial relation to an important governmental purpose and thus survive equal protection attack.

V. REFLECTIONS ON FURTHER DEVELOPMENTS

Even though both nondisclosure statutes and prohibition statutes would ultimately pass constitutional muster, advancing medical technology may introduce a new dimension into the debate. Should medical science develop a preconception method of gender selection, women could select the gender of their children prior to pregnancy. Under such circumstances, abortion would be considered only if the procedure went awry. Moreover, medical advances could allow a couple to carry out the procedure of prenatal testing themselves, which would eliminate the need for a physician's intervention. The enforcement of any state prohibition on the use of such techniques would be far more intrusive.

Advances in medicine could, however, proceed in another direction. If gender selection became possible by using a unique manufactured device, fewer constitutional issues would be raised by banning the
manufacture and sale of such a device, although enforcement of the ban could encounter practical difficulties.\textsuperscript{164} If, on the other hand, there were no special device, then couples would need to obtain medical information from their physicians to accomplish sex selection. Any associated free speech and privacy objections could be defeated by arguments similar to those raised to defend the nondisclosure statute: the information would be used only for unlawful activity and would be “private” speech in any case. Therefore, a ban on medical advice in selecting the sex of one’s children would likely be found constitutional.

By far the thorniest problem would involve the intrusiveness of enforcement of a ban on the utilization of gender selection techniques in one’s home. Such a ban would be at least as intrusive as judicial recognition of a child’s cause of action against its mother for negligent prenatal behavior.\textsuperscript{165} Both intrude upon basic constitutional liberty and privacy interests by forcing women to carry to term fetuses they want to abort. It might even be argued that bans on the private use of gender preselection techniques are more intrusive, since they subject women to criminal sanctions, whereas granting children remedies against their mothers for birth defects merely involves civil liability that may be covered by homeowner’s insurance.\textsuperscript{166} Where such insurance coverage is available, a pregnant woman’s conduct would be only minimally affected by the prospect of suits alleging prenatal negligence. The same cannot be said with respect to the threat of criminal sanctions which would cause a woman either to resign herself to giving birth or to seek an illegal abortion.

There would, however, be important procedural differences between enforcing the duty to behave as a reasonable pregnant mother and the duty to refrain from practicing unlawful gender selection. The criminal sanction could be imposed only if the specific intent of aborting an undesired fetus were shown beyond a reasonable doubt. The duty to conduct oneself as a reasonable mother, on the other hand, involves only a showing of negligence by a preponderance of the evidence. Thus, even though the criminal sanction is more severe, it is correspondingly more difficult to prove.

\textsuperscript{164} There would be no question of interference in the doctor-patient relationship. There may, however, be a privacy problem; but unlike Griswold, Eisenstadt, or even Roe, the government is not preventing women from avoiding conception or childbirth.\textsuperscript{165} Note, supra note 153, at 614-15.\textsuperscript{166} Schedler, Women’s Reproductive Rights: Is There a Conflict with a Child’s Right to be Born Free from Defects?, 7 J. LEGAL MED. 357, 358 & n.4 (1986).
Moreover, the privacy problems of enforcement may be overestimated. The decision most often cited in support of a broad constitutional protection of individual freedom in one's home is *Stanley v. Georgia*. But the Court has also upheld a Georgia sodomy statute in *Bowers v. Hardwick*. The respondent there was charged with committing the act of sodomy in the bedroom of his home. The enforcement problems in the case were similar to those presented in *Stanley*. Justice White's majority opinion in *Hardwick* interpreted *Stanley* as having protected a first amendment right to view pornographic materials in one's home, but not a generalized right to do in one's home what would otherwise be unprotected outside the home. Indeed, Justice White cited *Stanley* for the proposition that individuals have no protection from "victimless" crimes, such as the possession of drugs or of stolen goods in one's home. The use of gender-selection techniques in one's home would be comparable to the drug-possession example since both practices have severe adverse effects on those who do not consent. When individuals store drugs in their homes, unconsenting bystanders are placed at risk in numerous ways, including being the victims of robberies performed to finance drug purchases. With sex-selection techniques, other women whose births did not result from the use of such techniques will be victims and will be forced to pay the price of the unrestricted use of the techniques. Restrictions in both cases are necessary to avoid this harm. The Court would most likely find no constitutional difficulty raised by the intrusiveness of these restrictions.

Two other Supreme Court decisions that might be cited in support of the unconstitutionality of banning home use of the techniques are *Griswold v. Connecticut* and *Eisenstadt v. Baird*. These are more persuasive precedents, since they elevated reproductive freedom to a constitutionally protected right. However, the statutes in *Griswold* and *Eisenstadt* differ from a proscription on the use of sex-selection techniques in a fundamental way. Both *Griswold* and *Eisenstadt* protected the right to avoid procreation, while the prohibition at issue here would not affect that right. A prohibition statute

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169. Id. at 2846 (Georgia's sodomy statute upheld against equal protection challenge, as well as challenge on grounds of right to privacy).
170. Id. (citing *Stanley*, 394 U.S. at 568 n.11).
171. 381 U.S. 479 (1965).
173. The *Griswold* Court referred to the right of privacy as being older than the Bill of Rights itself, and held that it was implicit in the first, third, fourth, fifth, and ninth amendments. *Griswold*, 381 U.S. at 482-84, 486. The *Eisenstadt* Court stated that the right to privacy meant nothing if it did not insulate from governmental intrusion the decision "to bear or beget a child." *Eisenstadt*, 405 U.S. at 453.
would still leave women free to regulate their fertility or the odds of conception; they simply would be forbidden from manipulating the odds of conceiving a fetus of a certain sex. Such a prohibition does not really affect their right to bring to term any fetus they choose, nor to abort a fetus with defects. This is not to deny that there is an inherent element of intrusiveness in such a statute. It is clear, however, that a statute prohibiting sex-selection abortion does not intrude on the core of procreative rights.

Even granting, however, that such a ban would impinge on a woman's procreative right as protected in Griswold, the Court would most likely approve the ban as narrowly advancing a compelling state interest. Safeguarding women from discrimination would be equally as compelling in the context of reproductive rights as it is in privacy and free speech questions. Moreover, specific threats to the future equal opportunity for women are created by those couples who attempt to determine the gender of their children. Since the statute would target these couples only, it would be as narrowly tailored as possible to effectuate the statute's legitimate governmental objectives.

VI. CONCLUSION

There will be certain recurring constitutional issues surrounding any prohibitions on gender preselection of children, regardless of the degree of advancement of the associated medical technology. Whether there will be public impetus to enact such prohibitions will depend on the degree to which the factual picture developed at the outset of this article is accurate, as well as the extent to which legislators will seek to avoid the evils that might result. The following is a summary of the factual assumptions and the constitutional issues that bans on sex-selection abortion would raise.

First, present attitudes of prospective American parents about the sex of their future children show that couples are likely to utilize the combination of prenatal testing and abortion on demand to pre-determine the gender of their children. Many of them are also likely to have firstborn sons followed by daughters. As a result, there may very well be a far greater proportion of males to females in the population, as well as absolute declines in the female population. Assuming this, the resultant increase in male children may lead to more crime (especially rape and sexual assault and increased prostitution) and job discrimination against women.
To avoid this, states should consider denying pregnant women information about the sex of the fetuses they carry, as well as outlawing abortion for sex selection purposes. Both measures would constitute a variant of benign sex discrimination since women in the present generation would suffer restrictions on their reproductive rights to relieve oppression on future generations of females.

Both measures would face serious but not insuperable constitutional challenges. Any statute restricting the flow of information between a doctor and patient would face both privacy and free speech objections. But the flow of factual information from doctor to patient, as opposed to information imbued with medical generalizations, does not fall into the constitutionally protected area of privacy. A doctor's communication of the gender of the fetus to a mother as it relates to the procurement of an illegal sex-selection abortion would accordingly be unprotected by the first amendment.

A statute prohibiting women from obtaining sex-selection abortions would also be likely to encounter privacy objections, largely on the basis of Roe's invalidation of blanket bans on abortion. But a careful reading of Roe reveals that the state's interest in prohibiting sex-selection abortions is much more compelling than Texas' interest in prohibiting abortions in Roe v. Wade. Conversely, the woman's interest in securing a sex-selection abortion is less serious than that of a woman in the position of Jane Roe.

An equal protection argument could also be raised against sex-selection abortion. But the Court's treatment of such programs as veterans' benefits shows that, absent evidence of purposeful discrimination, the fact that women alone are disadvantaged under a statute will not be enough to invalidate it. Moreover, medical technology is rapidly developing the possibility of male pregnancy. Although this may prove to be exceedingly rare and expensive, a legislature familiar with the possibility could show that the legislators envisioned the possible punishment of males as well as females, and thus had no discriminatory intent.

In spite of this, a court might find discriminatory intent when faced with a sex-specific prohibition statute. However, a reviewing court would likely find that the discriminatory purpose of such a statute bears a substantial relation to the important governmental purpose of either preventing imbalanced sex ratios in the population or decreasing future oppression of women. Legislators could improve the chances of such a finding by prefacing the statute with a narrowly drawn statement of legislative purpose.

Of course, as we have just seen, advances in medical science may

introduce a complication into this debate by uncovering a method of sex predetermination that does not require the obtaining of an abortion. But even if no assistance from a physician were required, the prevention of oppression of women would still likely constitute a state interest compelling enough to overcome privacy objections, and the means used would be as narrow as they could be to prevent population imbalances. Thus, the prohibition of home-use sex-selection techniques would also likely be constitutional.