

Sex-Selective Abortion Law in China and
Corresponding Conception in the United States

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I. INTRODUCTION

The debate over the regulation of birth is still in its infancy. Nowhere is this more apparent than in China and India, where the use of modern medical technology to determine gender for purposes of sex-selective abortion has ignited a debate over how to regulate and remedy the largest known gender imbalance in human history.¹

The Chinese government has been directly and indirectly regulating its skewed sex ratio for decades, to little effect. Recent evidence that this practice is also prevalent in the U.S. among communities of Asian and Indian descent sparked substantial interest among state and congressional legislators. It is believed that the prevalence of son preference in such communities in the U.S. stems from the same cultural norms underlying such preferences in China, India, and South Korea,² though little is known about Chinese legal redress for pre-natal sex discrimination. This paper explores the Chinese legal and cultural conception of sex-selection in birth and discusses its impact on current and impending U.S. efforts to regulate

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1. Mara Hvistendahl, *Unnatural Selection: Choosing Boys Over Girls and the Consequences in a World of Men*, 6 PUBLIC AFF. (2011). China and India alone account for about 1/3 of the global population. However, the skewed birth totals of the two countries are so severe that they have ratcheted up the world gender ratio from 105 men for every 100 women (the natural ratio) to 107 men for every 100 women. *Id.*

2. Generations Ahead, Nat'l Asian Pacific American Women's Forum & Asian Communities for Reproductive Justice, Taking a Stand: Tools for Action on Sex Selection 3 (2009), available at <http://napawf.org/wp-content/uploads/2010/01/Toolkit-final.pdf>.

this area.

II. REGULATING BIRTH

After several decades of regulations aimed at balancing the birth ratios, China's male to female sex ratio is still rising.³ In the 1960s and 1970s, the national birth ratio was 106 male births for every 100 female births.⁴ In 2009, the Chinese Academy of Social Sciences (CASS) stated that the national birth sex ratio had erupted to 121.⁵ Regional disparities are also striking. Some rural and urban provinces have seen such breathtaking disparities as 190 (Anhui) and 192 (Jiangsu) for second births and 227 for third (Anhui).⁶ Building upon the work of Nobel-laureate economist Amartya Sen nearly two decades ago,⁷ Mara Hvistendahl, author of *Unnatural Selection*, estimates the number of missing girls to be approximately 160 million and counting.⁸ In 2005, the United Nations Population Fund (UNFPA) placed the total number of missing girls at 163 million in Asia alone.⁹

The perverted parity in birth ratios from the first-born to later births represents an equally disturbing component of this distortion in China and is perhaps the most significant indication of the widespread utilization of

3. Lesley Wexler, *Allowing Girls to Hold Up Half the Sky: Combining Norm Promotion and Economic Incentives to Combat Daughter Discrimination in China*, 7 *CHI. J. INT'L L.* 79, 79 (2006).

4. Y Zeng, *Sex Ratio of China's Population Deserves Attention*, 9 *CHINA POPUL. TODAY* 1, 3-5 (1992).

5. VALERIE M HUDSON & ANDREA M. DEN BOER, *Bare Branches: Security Implications of Asia's Surplus Male Population*, 68 (MIT Press 2004).

6. Wei X. Zhu, *China's Excess Males, Sex Selective Abortion, and One Child Policy: Analysis of Data from 2005 National Intercensus Survey*, 338 *BRITISH MED. J.* 1211, T3 (2009).

7. See generally, Amartya Sen, *More Than 100 Million Women Are Missing*, in 37 *N.Y. REV. BOOKS*, Dec. 20, 1990, available at <http://ucatlus.ucsc.edu/gender/Sen100M.html>.

8. Hvistendahl, *supra* note 1, at 6. Not all missing girls are aborted or murdered following birth, of course, but sex-selective abortion has been attributed to the vast majority of this unnatural disparity. *Id.*

9. Christophe Guilmoto, *Sex-Ratio Imbalance in Asia: Trends, Consequences, and Policy Responses*, UNITED NATIONS POPULATION FUND (UNFPA), 1 (2005).

sex-selective abortion. In 1989, the sex ratio at birth was 105 for firstborns, but reached 121, 125, and 132 for second, third, and fourth parity births, respectively.¹⁰ In 2005, the sex ratio had increased only to 108 for first parity births, but exploded to 143 and 157 for second and third parity births.¹¹ The extremely high incidence of boys among second births where first parity births are near normal ratios indicates that gender manipulation through sex-selective abortion is aggressively utilized in later pregnancies to ensure that later children are male.¹²

The scale of this misogynistic practice adduce drastic societal effects, particularly in China. Sex-selection has been tied to “bride trafficking”¹³ from neighboring countries, increased suicide rates among Chinese women,¹⁴ and increased crime (particularly rape), murder, and delinquency.¹⁵ A 2009 review (published in the British Medical Journal (BMJ)) of the Chinese Academy of Social Sciences (CASS) study on population disruption noted that in 2005, there were just under 33 million Chinese men under the age of 20 in excess of natural birth ratios and that 1.1 million excess males were born just that year.¹⁶ However, other

10. Zeng, *supra* note 4, at 3-5.

11. Zhu, *supra* note 6, at T3.

12. Research suggests that sex-selective abortion of potential female children is significantly more common when the first child born is female. See, e.g., Jason Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data*, 1 AMER. ECON. J. 1, 23-27 (2009) (noting that for families with two female children, the likelihood of trying for a third child is substantially higher than the second, as is the incidence that a boy will be born. . .).

13. *Add Sugar and Spice*, THE ECONOMIST, Apr. 7, 2011; see also Hvistendahl, *supra* note 1, at 159-166. Among Chinese bachelors, Vietnamese women serve as an important source for “mail-order” brides due to their cultural “sameness” and subservience.

14. *The Worldwide War on Baby Girls*, THE ECONOMIST, Mar. 4, 2010. Chinese female suicide rates are already among the highest in the world, according to the World Health Organization. *Id.* Suicide is the most common form of death among Chinese rural women aged. *Id.* Frequently, young mothers drink agricultural fertilizers, which are easy to come by. *Id.* Journalist Xinran Xue attributes most of these suicides to the fact that young mothers cannot live with the knowledge that they have aborted or killed their baby daughters. *Id.*

15. Hvistendahl, *supra* note 1, at 197-201.

16. Zhu, *supra* note 6, at 1213.

estimates suggest that the Chinese government grossly underestimates the magnitude of the problem, placing current bachelor estimates at 90 million.¹⁷ Gita Aravamudan argues in her 2007 book, *Disappearing Daughters: The Tragedy of Female Feticide*, “female infanticide is akin to serial killing. But female feticide is more like a holocaust. A whole gender is getting exterminated.”¹⁸

Sex-selective abortion is not exclusive to China. It occurs in Korea, Taiwan, Vietnam, Singapore, India,¹⁹ Pakistan, and the Caucasus (Armenia, Georgia, Azerbaijan).²⁰ Moreover, sex-selection abortion occurs in the United States as well. A 2008 study of the 2000 U.S. Census by the Proceedings of the National Academy of Sciences (PNAS) in the U.S. found substantial evidence of manipulation, particularly among children of higher parity births.²¹ In 2009, an analysis of California’s population exhibited a strong son bias among Chinese, Indian, and Korean families and surprisingly noted that empirical results suggested that gender selection was not being used to achieve a gender mix within a given family,²² but rather, to have as few girls as possible. A 2011 study on Indian immigrants in the U.S. found that forty percent of the women interviewed had terminated

17. HUDSON, *supra* note 5, at 179-81.

18. Gita Aravamudan, *Disappearing Daughters: The Tragedy of Female Feticide*, xv-xvi (Penguin Books 2007).

19. Arindam Nandi & Anil Deolalikar, *Does a Legal Ban on Sex-Selective Abortions Improve Child Sex Ratios? Evidence from a Policy Change in India*, CENTERS FOR DISEASE DYNAMICS, ECON. AND POLICY, 2, (April 2011), available at http://www.cddep.org/publications/does_legal_ban_sex_selective_abortions_improve_child_sex_ratios_evidence_policy_change.

20. Carl Haub, *Surprising Son Preference in the Caucasus*, Popul. Reference Bureau (May 4, 2011), <http://prbblog.org/index.php/2011/05/04/surprising-son-preference-in-caucasus/>. Reference Bureau, May 4, 2011, available at <http://prbblog.org/index.php/2011/05/04/surprising-son-preference-in-caucasus/>. In the Caucasus, too, there was a large disparity in later parity birth sex ratios. In 2000-2004, the parity for third births in Armenia was about 140; in Azerbaijan, about 150; and in Georgia, about 145. *Id.*

21. Douglas Almond & Lena Edlund, *Son-Biased Sex Ratios in the 2000 United States Census*, 105 PROC. OF THE NAT’L ACAD. OF SCI. (PNAS) 5681, 5681-82 (April 15, 2008). See also, Jeff Jacoby, *Choosing to Eliminate Unwanted Daughters*, BOSTON GLOBE, Apr. 6, 2008.

22. Abrevaya, *supra* note 12, at 28.

prior pregnancies with female fetuses and that eighty-nine percent of women carrying female fetuses in their pregnancy at the time of interview later proceeded to abort.²³

Many U.S. clinics have capitalized on this practice and directly advertise in Chinese-American and Indian-American newspapers and magazines offering various sex-selection techniques, termed “family balancing”.²⁴ But this practice of fetal gender discrimination occurs among the broader American public as well. Sociological data indicates that while American parental sex preferences tend towards an equal number of male and female children, Americans have also exhibited strong son preference for first-born and only children.²⁵

The debate over the role of government in regulating natural diversity in human birth has evolved remarkably little over time, despite thousands of years of cultural, medical, and legal progress. Consider two substantially contradictory views: in Pope Paul VI’s *Humanae Vitae*, he argues that respect must be granted the natural course of reproduction which no man or government may overcome.²⁶ Paul VI’s conception of the role of

23. Sunita Puri et al., “*There is Such a Thing as Too Many Daughters, But Not Too Many Sons*”: A Qualitative Study of Son Preference and Fetal Sex Selection Among Indian Immigrants in the United States, 72 SOC. SCI. & MED. 1169, 1169-76 (2011). Another important finding in the study was that the women studied remained highly vulnerable to family violence and coercion even in the U.S., where cultural and societal influences for son preference are far less pervasive.

24. Sam Roberts, *U.S. Births Hint at Bias for Boys in Some Asians*, N.Y. TIMES, June 14, 2009.

25. April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?* 10 WIS. WOMEN’S L. J. 161, 171 (1995).

26. “. . . if the mission of generating life is not to be exposed to the arbitrary will of men, one must necessarily recognize insurmountable limits to the possibility of man’s domination over his own body and its functions; limits which no man, whether a private individual or one invested with authority, may licitly surpass. And such limits cannot be determined otherwise than by the respect due to the integrity of the human organism and its functions. . .” Paul VI, Encyc. Letter, *Humanae Vitae: On the Regulation of Birth* (1968) available at <http://www.papalencyclicals.net/Paul06/p6humana.htm>. Charles Darwin also wrote on the natural course of reproduction, “individual differences between the members of the same species are admitted by every one to occur under a state of nature. . . I had always perceived, that rare and strongly-marked deviations of structure, deserving to be called

government is limited to only such role that permits the preservation of natural diversity of birth. Plato, in one of the earliest known precursors to modern eugenic theory,²⁷ posited instead that it is instead the obligation of a government of men to ensure that they produce only the most desirable offspring with the most desirable features²⁸ and advocated limiting diversity in birth through infanticide.²⁹ When viewed in a historical sense, sex-selective abortion differs remarkably little in effect from its predecessor, sex-selective infanticide.³⁰ So, too, our current understanding of government's role in regulating undesirable offspring has evolved remarkably little from that which accorded Plato's conception of "purity" in reproduction several thousand years ago.

The two most obvious candidates for the regulation of sex-selection in birth are to either interfere with access to information concerning the sex of the child or to begin regulating (or even criminalizing)³¹ the personal nature

monstrosities, could seldom be preserved through natural selection. . ." CHARLES DARWIN, *DESCENT OF MAN AND SELECTION RELATED TO SEX* 221 (Penguin Classics, 2nd ed. 1874), (Republished, 2004).

27. Eugenic theory, the selective breeding for certain desirable traits, is now often associated with the "racial hygiene" campaigns of Nazi Germany, selecting Jews, homosexuals, and the "hereditarily sick" for mass extermination. Christine A. Khalili-Borna, *Technological Advancement and International Human Rights: Is Science Improving Human Life or Perpetuating Human Rights Violations?* 29 MICH. J. INT'L L. 95, 101 (2007).

28. "'The offspring of the good, I suppose, they will take to the pen or crèche, to certain nurses who live apart in a quarter of the city, but the offspring of the inferior, and any of those of the other sort who are born defective, they will properly dispose of in secret, so that no one will know what has become of them.' 'That is the condition,' he said, 'of preserving the purity of the guardians' breed.'" PLATO, *Republic*, Book 5, 460(c), vers. *Plato in Twelve Volumes*, Vols. 5 & 6 (Harv. Univ. Press 1987).

29. DIANE B. PAUL, *CONTROLLING HUMAN HEREDITY: 1865 TO THE PRESENT* 5 (Humanities Press 1995) (where Plato analogized animal and human breeding, elaborating that just as shepherds and breeders must purge their herds, so must the legislator purify the state). Eugenics was defined broadly enough by early medical geneticists so as to include prenatal diagnosis and other technologies. *Id.* at 3. Thus, post-natal infanticide is not the only mechanism thought to exist within the purview of modern eugenics. *Id.* Many argue that our enhanced ability to make reproductive choices has already ushered in an era of "new eugenics" that goes beyond mere bioethics debates in medicine. *Id.*

30. David M. Smolin, *The Missing Girls of China: Population, Policy, Culture, Gender, Abortion, Abandonment, and Adoption in East-Asian Perspective*, 41 CUMB. L. REV. 1, 13-14 (2011).

31. H.R. 3541, 112th Cong. (Dec. 1, 2011).

of the choice made. However, if the U.S. federal and state governments are to regulate in this area, they will have to tread very carefully to avoid running afoul of established law. How, then, to regulate the choice to manipulate the natural diversity in birth without interfering with the right to choose? These are questions that U.S. legislators are just beginning to explore.

It may concededly be overly simplistic to translate the legal solutions of one society to another. But a brief exploration of Chinese regulatory efforts, if not determinative, is certainly instructive.³² First, China has been directly and indirectly regulating this problem for decades by attempting to adjust demographic behavior on state and provincial levels.³³ Second, Indian and South Korean birth sex ratios have regressed as a result of economic, land, and women's liberalization policies³⁴ that have, for the most part, already been implemented in China (and currently exist in the U.S.) to no avail. Despite this development in legislation, China's birth sex ratio is still rising. Finally, the Chinese understanding of sex-selective abortion in societal and legal relations contrasts significantly with our own. If no attempt is made to understand the historical regulatory regime and cultural motivations behind the decision to abort, future U.S. attempts at regulation cannot expect to have any impact.

III. SEX-SELECTION IN CHINESE LAW

Though references to birth control appear in Chinese medical books as early as 2000 B.C., the earliest laws regulating access to abortion in Chinese culture appeared towards the end of the Qing dynasty (1644-1911

32. "Laws are organic and they benefit from cross-pollination. We should keep our eyes open for innovations in foreign jurisdictions that, with some grafting and pruning, might be transplanted to our own legal system." Sandra Day O'Connor, *Secundum Legem*, INT'L JUD. OBSERVER, No. 4 (1997), available at <http://bulk.resource.org/courts.gov/fjc/intobs04.pdf>.

33. Wexler, *supra* note 3, at 84.

34. See, e.g., Aravamudan, *supra* note 18.

A.D.).³⁵ Regulations dating back to the early Tang Dynasty (618-906 A.D.) created special legal codes protecting pregnant women from assault, certain methods of execution, and *duotai* (procured abortion) where the pregnancy was noticeable.³⁶

The legal conception of fetal “personhood” in Chinese society, however, never developed in a manner similar to the Christian life beginning at conception or the Western legal life beginning at birth.³⁷ In Chinese society, human life evolves through stages of worthiness based not only on age and ability, but also on gender and class.³⁸ In a historically patrilocal society, where inheritance passed through the son and couples reside at the husband’s parent’s home,³⁹ daughters were not expected to support their parents when the parents reached advanced age.⁴⁰ Males inherited property and controlled land and effectively worked to support health, retirement, and pension costs of their parents.⁴¹ A family was not “complete” without a son. The “worth” of a daughter was thus limited enough to justify infanticide on a significant scale.⁴² As such, infanticide, while illegal, was

35. Bernard Luk, *Abortion in Chinese Law*, 25 AM. J. COMP. L. 372, 374 (1977). A list of toxic herbs crushed for pregnant women due to their purported abortifacient properties include: croton fruit, morning glory seed, Peking spurge, blister beetle, India pokeberry, musk, burred rhizome, zedoary tumeric rhizome, peach kernel, safflower, rhubarb root, immature bitter orange, and the bark of the Chinese cassia tree. *Id.* See also, C.K. Yun et al., *Potential Anti-Fertility Plants from Chinese Medicine*, 4 AM. J. CHIN. MED. 105, 107 (1976).

36. Susan M. Rigdon, *Abortion Law and Practice in China: An Overview with Comparisons to the United States*, 42 SOC. SCI. MED. 543, 544 (1996).

37. *Id.* at 546. However, the purported incompatibility does not bespeak a lack of value of the worth of the fetus in Chinese society. For example, a common expression upon the death of a pregnant woman was “one corpse, two lives”. *Id.*

38. *Id.* at 547. Consistent with this view, the Chinese government has also imposed draconian eugenic controls mandating sterilization for those stricken by mental retardation, disease, and deficiency. Nicholas Kristof, *Chinese Region Uses New Law to Sterilize Mentally Retarded*, N.Y. TIMES, Nov. 21, 1989.

39. Wexler, *supra* note 3, at 100.

40. Rigdon, *supra* note 36, at 550.

41. Smolin, *supra* note 30, at 40-41.

42. Reports attributed largely to infanticide of a ratio of males to females as high as 135 to 100 in Jiangsu Province in the 1930s indicates that daughter discrimination is hardly a new phenomenon in China. X.T. FEI, *PEASANT LIFE IN CHINA* 34 (Oxford Univ. Press 1946).

not considered immoral. It was a “product of rational decision-making embedded in a peculiar cultural attitude toward life.”⁴³

Abortion has replaced infanticide (described by some as “post-natal abortion”)⁴⁴ as the primary means of daughter discrimination. China’s 1979 abortion law legalized abortions at up to twenty-eight weeks of gestation;⁴⁵ a significant change from the 1953 cap of ten weeks. But it was the introduction of ultrasound and amniocentesis in China in the mid-1980s which made gender-selective abortion procedures possible. Ultrasound and amniocentesis are both able to identify gender with nearly 100% accuracy in the first half of the pregnancy,⁴⁶ which allowed Chinese women to determine the sex of the child and subsequently abort based on the determined gender. A consequence of economic progress, there were more than 100,000 ultrasound machines in China in 1994.⁴⁷

Since the mid-1980s, legal promulgations governing the regulation of birth have taken a wide variety of forms, often accompanying significant and sweeping changes to Chinese domestic polity. Between 1979 and 1985 alone, China passed and subsequently implemented over 400 new statutes and regulations, the majority of which dealt with economic reforms.⁴⁸ A new Chinese constitution was executed in 1982, offering broad pledges of gender equality.⁴⁹

43. JAMES Z LEE & WANG FENG, *ONE QUARTER OF HUMANITY: MALTHUSIAN MYTHOLOGY AND CHINESE REALITIES, 1700-2000* 60-61 (Harv. Univ. Press 1999).

44. *Id.* at 61.

45. Rigdon, *supra* note 36.

46. Abrevaya, *supra* note 12, at 5. Amniocentesis, generally performed between the fourteenth and eighteenth weeks of pregnancy, and ultrasound, generally performed between the sixteenth and twentieth weeks of pregnancy are both technologies introduced in the 1970s. *Id.* But evidence shows that neither medical technology was particularly prevalent in China until much later.

47. Khalili-Borna, *supra* note 27, at 118.

48. YuFan S. Wang, *The Triumph of Confucianism: How a Subjugated Legal System is Failing a Generation of Chinese Women and Girls*, 15 *CARDOZO J. L. & GENDER* 691, 706 (2009).

49. *Id.*

The 1980 Marriage Law proscribed female infanticide, stating, in relevant part, “infant drowning, deserting and any other acts causing serious harm to infants and infanticide shall be prohibited.”⁵⁰ The 1992 Women’s Protection Law established a progressive regime of women’s interests, introducing a wide variety of legal rights pertaining to women’s ability to inherit property, obtain fair labor wages, equal status in family matters, and achieve equality in education.⁵¹ Its provisions also expressly prohibited discrimination and cruel treatment against women who gave birth to female babies.⁵² This discrimination ban reflects some of the earliest focused efforts by the Chinese government to specifically combat the cultural misogyny underpinning the practice of sex selection. In addition, the “cruel treatment” language may properly be construed to reiterate restrictions going back to the Tang Dynasty forbidding assault of pregnant women and the subsequent causing of abortion by means of violence.

The 1994 Maternal and Infant Health Care Law shifted its focus to regulating the information received by the aborting mother by prohibiting the use of medical technologies such as ultrasound and amniocentesis to identify the gender of the fetus.⁵³ The regulation provided a necessary exception for medical grounds reviewed and certified by a physician.⁵⁴ This was later supplemented by the Regulation On Prohibiting Fetal Sex Identification and Selective Termination of Pregnancy for Non-Medical

50. Law of the People’s Republic of China on Marriage, Art. 21, Sept. 10, 1980, amended with Decision Regarding the Amendment of Marriage Law of the People’s Republic of China, Apr. 28, 2001.

51. *See generally*, Christine M. Bulger, *Fighting Gender Discrimination in the Chinese Workplace*, 20 B.C. THIRD WORLD L.J. 345, 364-65 (2000).

52. Law of the People’s Republic of China on the Protection of Rights and Interests of Women, Art. 35, amended with the Decision Regarding the Amendment of the Law of the People’s Republic of China on the Protection of Rights and Interests of Women, Aug. 28, 2005.

53. Law of the People’s Republic of China on Maternal and Infant Health Care, Art. 32, Oct. 27, 1994.

54. *Id.*

Reasons in 1998⁵⁵ and the Population and Family Planning Law in 2002.⁵⁶ Both banned determination of fetal sex for non-medical services. Article 35 of the Population and Family Planning Law also expressly banned sex-selective pregnancy termination for non-medical reasons.⁵⁷ The impact of the technological ban has largely gone unmeasured, due to poor enforcement and easy means of avoiding prosecution. Where enforced, however, a possible effect of the technology ban would likely be a lower fertility rate where couples may be less inclined to have children for fear of having a girl.

IV. RECONCILING POLICY SUCCESSES & FAILURES

Chinese attempts to directly regulate this problem have proven largely ineffective.⁵⁸ Direct legal regulation was stunted by easily identifiable, macro-scale oversights: decades of lax enforcement; widespread availability of ultrasound and amniocentesis technology; no legal barrier to abortion; and potential abortion subsidization by the Chinese government.⁵⁹ A 2011 study done in India suggested that upon India's 1994 enactment of the Pre-Natal Diagnostics Techniques (PNDT) prohibiting diagnostic methods to identify the sex of the unborn child, the sex imbalance rose less rapidly than it otherwise would have had the law never been enacted, despite concessions that the PNDT was "unevenly and weakly enforced."⁶⁰ A

55. See Law of the People's Republic of China on the Regulation On Prohibiting Fetal Sex Identification and Selective Termination of Pregnancy for Non-Medical Reasons.

56. See Law of the People's Republic of China on Population and Family Planning, Art. 35, Dec. 29, 2001. Art. 35 states, in relevant part:

"Use of ultrasonography or other techniques to identify fetal sex for non-medical purposes is strictly prohibited. Sex-selective pregnancy termination for non-medical purposes is strictly prohibited."

57. *Id.*

58. See generally, AVRAHAM Y. EBENSTEIN & ETHAN J. SHARYGIN, *The Consequences of the "Missing Girls" of China*, 23 WORLD BANK ECON. REV. 399, 418-21 (2009).

59. Valerie M. Hudson, *The Missing Girls of China and India: What is Being Done?*, 41 CUMB. L. REV. 67, 69-70 (2011).

60. Nandi, *supra* note 19, at 20. This all despite the fact that the policy was largely

similar study has yet to be done on the equivalent Chinese prohibition, though the study clearly suggests an increase in enforcement would be quite beneficial. In 2006, Chinese authorities closed down 201 medical clinics and fined hundreds of others in the northern Hebei province when it was determined they were helping detect and abort female fetuses.⁶¹ Frequent prosecution and publicizing of major crackdowns such as this would go much further in returning regional disparities to normal ratios.

Another failure of direct regulation is cultural. Family planning guidelines in China are generally considered “policy,” not “law,” and compliance is thus voluntary.⁶² As noted above, abortion is envisaged in the context of economic and family well-being,⁶³ not individual “right” and is typically not regarded as improper.⁶⁴ The failure to criminalize an otherwise strictly cultural practice is a considerable policy flaw in the promulgation of the prohibition on sex selection. In addition to campaigns pressuring medical professionals not to release information regarding the sex of the child, a principal reason for South Korea’s successful reduction of sex selection has been its criminalization of the practice.⁶⁵ China has not capitalized on the success of its neighbor and taken the necessary steps to

considered a failure. The authors further expressed optimism that India’s expansion of provisions of PNDT in 2003 and strengthening of enforcement would positively shift the imbalance back in favor of female births. *Id.*

61. Joseph Kahn, *China: Crackdown on Abortion of Girls*, N.Y. TIMES, June 1, 2006, available at http://www.nytimes.com/2006/06/01/world/asia/01briefs-brief-003.ready.html?_r=5.

62. Rigdon, *supra* note 36, at 545.

63. A first born son is estimated, on average, 1.85 years of his parent’s income whereas a first born daughter is worth 0.43 years of income, with regressive values attributable to second and third children. Avraham Ebenstein, *Estimating a Dynamic Model of Sex Selection in China*, Population Association of America, 4 (2011), available at http://www-leland.stanford.edu/group/SITE/SITE_2009/segment_9/segment_9_papers/ebenstein.pdf.

64. Pro-choice activists in the U.S. tend to think of access to abortion as a matter of individual freedom and female empowerment. In Chinese thinking, however, the birth is considered within the social context of family and state and much less credence is given to the individual nature of the choice. Sulamith Potter, *China’s Peasants: The Anthropology of a Revolution* 231 (Cambridge Univ. Press 1990).

65. Guilmoto, *supra* note 9, at 10-11.

protect the next generation of young girls.

Authors on this subject have frequently posited that sex-selective abortion is an unintended consequence of China's one-child policy, but the connection remains tenuous at best. A primary reason cited in support of this theory is that population control policies push families to take the step of eliminating daughters because the policy "cuts off" the possibility of having an additional child.⁶⁶ In theory, a low fertility rate may be thought to provide an impetus for resort to sex-selective abortion in areas where son preference is strong.⁶⁷ However, if the one-child policy was the driving force behind the substantial growth in sex-selective abortions, the birth sex ratio parity would be significantly higher among first-born children. It would also be true that the sex ratio imbalance would have begun to increase almost immediately after the policy was implemented instead of nearly a decade later.⁶⁸ Finally, it would have been true that the Chinese government's efforts to limit population control enforcement and supplement a "two child" policy in provinces with highly skewed birth ratios would have changed sex-selection rates instead of exacerbated them.⁶⁹ As we have seen in the U.S. and other countries without such population controls, the absence of the one-child policy is not likely to significantly impact gender discrimination in affected communities.

Other indirect policies have also met with limited success. China has yet to provide a comprehensive economic and health insurance security

66. Smolin, *supra* note 30, at 6.

67. Haub, *supra* note 20, at 1.

68. Monica Das Gupta et al., *Why is Son Preference So Persistent in East and South Asia? A Cross-Country Study of China, India, and the Republic of Korea*, WORLD BANK POLICY RESEARCH WORKING PAPER, 3 (2003). These researchers noted that the sex-ratio didn't begin to rise sharply until after 1985, 6+ years following the implementation of the Chinese "one-child" policy in 1979. *Id.* While it has been argued that China's family planning program may have exacerbated son preference, South Korea's similar sex ratios at birth absent such strict limitations lend to the argument that this problem is culturally-based rather than the unfortunate bi-product of an oppressive policy. *Id.*

69. Ebenstein, *supra* note 63, at T3.

program for its elderly population.⁷⁰ Fiscal security is one of the principal economic justifications for son preference,⁷¹ though implementation of such a program for nearly two billion people is admittedly no easy task. Alternatively, the Chinese government has focused much of its national policy on reducing high poverty levels and low education, a correlation that is often cited in the U.S. to correspond to higher incidence of abortion (though not particularly sex-selective abortion).⁷² However, the Economist noted a seemingly counterintuitive trend – that disparate sex ratios actually tend to rise with income and education.⁷³ In China, the “higher a province’s literacy rate, the more skewed its sex ratio. The ratio also rises with income per head.”⁷⁴

A frequent solution offered by feminist observers of this problem – liberalization of women’s rights – has also had practically no measurable effect on the Chinese sex ratio imbalance. In the early 1990s, South Korean birth sex ratios saw a remarkable recovery, largely due to laws concerning who may be head of household, inheritance rights, provision of credit, and other initiatives to promote the economic status of women.⁷⁵ All of these initiatives have been credited with South Korea’s near-normalization of birth sex ratios.⁷⁶ China, too, has substantially improved the role of women in Chinese society in the last few decades and has been credited with “some of the world’s most progressive gender-equality and women’s protection

70. EBENSTEIN, *supra* note 58, at 419.

71. *Id.* at 416.

72. Lawrence B. Finer & Stanley K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001*, 38 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH, 90–96 (2006). China has seen some success in this area. It has made some strides in the last two decades in its efforts to provide compulsory education and drive economic growth for targeted rural areas. Zhang Tiedao et al., *Universalizing Nine-Year Compulsory Education for Poverty Reduction in Rural China*, WORLD BANK, 1 (2004).

73. The Economist, *supra* note 14.

74. *Id.*

75. Hudson, *supra* note 59, at 77.

76. *Id.*

laws on its books⁷⁷ However, China has yet to see the results experienced by South Korea. The principal difficulty in furthering liberalization policies in China is that the current policies are weakly enforced and the potential effects of increased enforcement immeasurable.⁷⁸

Targeted campaigns in regions with the highest disparities in birth sex ratio have proven most successful in reducing the disproportion. The Chinese government implemented a “Care for Girls” campaign in 2005 that offered cash and other incentives to families with daughters, scholarships for girls, and better housing or loans for targeted families.⁷⁹ The campaign also included several awareness-raising campaigns, as well as repressive measures against illegal abortions and infanticide.⁸⁰ The program experienced initial success, as the sex ratio imbalance has decreased in 24 counties from an average of 133.8 in 2000 to 119.6 in 2005.⁸¹ Another venture entitled the Chaohu Experimental Zone Improving Girl-Child Survival Environment, jointly funded by the Ford Foundation and the United Nations Children’s Fund (UNICEF), succeeded in lowering the sex ratio at birth from 125 in 1999 to 114 a mere three years later.⁸²

The lessons from Chinese regulation are relatively straightforward: (1) criminalization of sex selection must serve as the cornerstone of any successful policy; (2) strict and thorough enforcement of the law must be a priority while retaining a commitment to promote influencing factors such as women’s rights; (3) legislators must target through sagacious legislation the cultural and economic motivations for the prevalence of son preference; (4) legislators must simultaneously employ directed campaigns in areas with high incidences of sex-selective abortions which offer funding and

77. Wang, *supra* note 48, at 694.

78. *Id.*

79. Guilmoto, *supra* note 9, at 12.

80. *Id.*

81. Smolin, *supra* note 30, at 42.

82. Ebenstein, *supra* note 63, at 418-19.

other incentives to raise awareness of the issue in a given community or family unit and promote the equality, importance, and worth of girls in affected communities.

V. REGULATING “CHOICE” IN THE U.S.

Nearly forty years after *Roe v. Wade*, the difficulty of regulating “choice”⁸³ under a legal regime of individual, reproductive “privacy rights”⁸⁴ in the U.S. “prevents action on a problem of great importance”.⁸⁵ One of the principal obstructions in employing a law that regulates “choice” on the U.S. federal or state level is that there is no requirement for women to disclose either privately or on the record their reasoning in coming to their choice. The application of heightened scrutiny under *Roe* and its progeny have torn to tatters nearly any look into the nature of “choice” as a facially invalid attack on such right.⁸⁶ Any legislation intended to regulate choice within a given cultural or communal context may be found to disparately impact immutable characteristics of alienage, national origin, or race. Any further attempt to implement policy initiatives to ban such abortions have been consistently obfuscated by powerful reproductive rights organizations such as the National Abortion Rights Action League (NARAL), National Abortion Federation (NAF), and Planned Parenthood.⁸⁷

Yet, when gender becomes the basis upon which a gender right is effectuated, sex discrimination is necessarily implicated.⁸⁸ Many state and

83. *Roe v. Wade*, 93 S.Ct. 705, 727 (1973).

84. *Id.*

85. Hvistendahl, *supra* note 1, at 43.

86. *See generally*, Text of Senate testimony of Edward Whalen on *Roe v. Wade*, President of Ethics and Public Policy Center, June 22, 2005, *available at* http://www.eppc.org/programs/constitution/publications/pubID.2377,programID.39/pub_detail.asp.

87. *See, e.g.*, Pam Belluck, *If You Really, Really Wanted a Girl* . . ., NY TIMES, August 20, 2011.

88. Khalili-Borna also contends that developments in genetics technology may give rise to human rights violations pertaining to “discrimination based on genetic characteristics”, which is banned by the United Nations Educational, Scientific, and Cultural Organization’s

federal lawmakers have voiced their support for this construction during the most recent decade and have indicated increasing sensitivity to the need to implement regulations that limit this practice accordingly.⁸⁹ Illinois (1975)⁹⁰ and Pennsylvania (1982)⁹¹ were the first to ban an abortion sought solely on the basis of the sex of the unborn. The 2008 introduction (and subsequent failure) of the first Pre-Natal Non-Discrimination Act (PreNDA) in the U.S. House of Representatives (House)⁹² revitalized interest in the issue, as Michigan, Minnesota, and Oklahoma introduced bills banning sex-selective abortions in 2009.⁹³ Oklahoma and Arizona signed similar bills into law effective 2010 and 2011, respectively.⁹⁴ In 2010, Idaho, New Jersey, Georgia, Mississippi, and West Virginia all proposed eliminating sex-selection as well.⁹⁵ Finally, a second version of PreNDA was put forth in December 2011, citing a remarkable amount of national support for a blanket ban (86%),⁹⁶ passed through U.S. House Committee on the Judiciary on February 16, 2012 by a 20-13 vote and, at the time of this publication, awaits approval by the House.⁹⁷

(UNESCO) Universal Declaration on the Human Genome and Human Rights. Khalili-Borna, *supra* note 27, at 102-105.

89. It is noteworthy to point out that the U.S. is not the only developed country to consider a ban. Much of Europe already bans sex-selection in abortion, particularly the United Kingdom (which hails from the same common law tradition). PARLIAMENTARY OFFICE OF SCIENCE AND TECHNOLOGY, *Sex Selection Postnote*, No. 198 (July 2003) available at <http://www.parliament.uk/post/pn198.pdf>.

90. 720 Ill. Ann. Stat. 510/6(8) (1975).

91. 18 P.A. C.S.A. § 3204 (1982).

92. H.R. 1822, Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2009. H.R. 1822 was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties on April 27, 2009 and effectively died therein.

93. S.B. 799/H.B. 5125 (Mich. 2009); S.F. 1073/H.F. 1196 (Minn. 2009); H.B. 1595 (Okla. 2009).

94. AZ Rev. Stat. Ann. § 13-3603.02; 63 Okl. St. Ann. § 1-731.2.

95. H.B. 693 (Id. 2010); A. 162 (N.J. 2010); S.B. 529/H.B. 1155 (Ga. 2010); S.B. 2166 (Miss. 2010); H.B. 2302/S.B. 62 (W. Va. 2010).

96. HR 3451, Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011. Recent polls evidence eighty-six percent (86%) of Americans object to the knowing and deliberate choice to abort based on the sex of the child, including a substantial proportion of those who consider themselves pro-choice. *Id.* at 5-6.

97. Bill Summary and Status, 112th Congress (2011-2012), HR 3541, available at

The Arizona statute, upon which PreNDA II appears to be modeled, is particularly notable for its depth and attempt to address some of the gaps left by Chinese legislators. Arizona criminalizes only the “knowing” seeking of an abortion “based on the [sex] of the child. . .”,⁹⁸ a standard that does not contemplate liability for negligent or even “reckless perform[ance]” of the act.⁹⁹ Arizona’s choice to target close family members gets to the core of the coercive nature and motivations behind some discrimination that are often no fault of the woman seeking abortion. Husbands may threaten divorce, abandonment or violence.¹⁰⁰ One mother-in-law threatened to take poison if her daughter-in-law failed to produce a son.¹⁰¹ Under Arizona law, a person who “uses force or threat of force to intentionally injure or intimidate any person for the purpose of coercing [sex-selection]” may be criminally liable.¹⁰² Arizona also holds liable providers who “knowingly [do] not report known violators”¹⁰³ and prohibits acceptance of “monies to finance a sex-selection abortion.”¹⁰⁴ While this would not prevent all sex-selective abortions from taking place in Arizona, this method has proven quite successful in China, where several well-publicized arrests served as sufficient warning to discourage others from operating clinics that offer selection-based services.¹⁰⁵ Finally, Arizona, like all states, jointly funds and operates with the federal government Medicare and Medicaid programs that provide social safety nets for families

<http://thomas.loc.gov/cgi-bin/bdquery/z?d1112:HR03541:@@L&summ2=m&>

98. AZ Rev. Stat. Ann. § 13-3603.02(A)(1).

99. 63 Okl. St. Ann. § 1-731.2(B).

100. Richard Minitier, *America’s Male Only Child Policy?*, FORBES, Dec. 5, 2011.

101. *Id.* Societal discrimination is sometimes threatened as well, where female feelings of worthlessness may lead to suicide or difficulties living in a state of extreme familial conflict. Wexler, *supra* note 3, at 82.

102. AZ Rev. Stat. Ann. § 13-3603.02(A)(2).

103. AZ Rev. Stat. Ann. § 13-3603.02(D).

104. AZ Rev. Stat. Ann. § 13-3603.02(A)(3).

105. In Shenzhen, China, a reward money policy was used with great success to report to local police ultrasound “clinics” that were specifically used for sex-determination. Hudson, *supra* note 59, at 71. Over 2,200 clinics were put out of business by Chinese officials. *Id.*

in need of fiscal security.

However, such efforts should not be limited to legal proscription. The federal government, pursuant to civil prosecution of offending health practitioners under PreNDA, might also be able to limit access to Medicaid dollars for those practitioners that have been found to engage in “selectionist” practices that offend equal protection of the laws.¹⁰⁶ In addition, an advisory opinion was issued by the American College of Obstetricians and Gynecologists (ACOG) determining that it was unethical for physicians to participate in sex selective abortions where the parents request an abortion based on family balancing, cultural grounds, or personal preferences.¹⁰⁷ Likewise, the American Society for Reproductive Medicine has opined that “serious ethical concerns” are implicated where such practice is pursued.¹⁰⁸ These ethical guidelines, though not typically binding on practitioners, should be binding on the profession and enforceable through licensing and associational mechanisms.

Other initiatives may include targeted state education programs and information campaigns in areas heavily populated with residents of Chinese, Indian, and Korean descent. These programs can promote the importance of women in U.S. society and discourage family in-laws and grandparents from pressuring pregnant women to produce sons. Adoption programs and orphanages that specifically cater to girls born of such

106. The Office of Inspector General (OIG) in the Department of Health and Human Services (HHS) is already equipped to enforce such laws, as they possess the authority to exclude as a remedy for misconduct any person or entity from federal health program benefits. OIG Special Advisory Bulletin, *The Effect of Exclusion from Participation in Federal Health Programs* (Sept. 1999), available at <http://oig.hhs.gov/fraud/docs/alertsandbulletins/effectd.htm>. Were the statutory scope of “misconduct” expanded to include such detestable ethical practices suggested above, such authority could serve as a powerful disincentive to engage in such conduct.

107. American College of Obstetricians and Gynecologists (ACOG) Committee Opinion, *Sex Selection*, 4, No. 360 (Feb. 2007), available at <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Ethics/co360.pdf?dmc=1&ts=20120212T1600368190>.

108. Ethics Committee of the American Society of Reproductive Medicine, *Preconception Gender Selection for Nonmedical Reasons*, 861 (Jan. 18, 2001).

circumstances, coupled with eased restrictions on adoption procedures, cost, and counsel, may encourage the proliferation of young girls while simultaneously demonstrating a state's commitment to birth.¹⁰⁹

VI. CONCLUSION

The opportunity to implement in the U.S. any lessons gleaned from Chinese regulation of this issue is limited by our legal conception of a choice to abort as an individual right, which differs greatly from the Chinese conception.¹¹⁰ This should not, however, consequently limit alternative government efforts to combat gender-based discrimination in the womb to unenforceable or indirect legislation. A cursory review of Chinese regulation nominally implies that government must be permitted to directly censure the practice of sex-selective abortion where the intent to dispose based on gender can be clearly established. Further, state and local governments must be granted sufficient latitude in fashioning additional remedies to combat the use of sex-selection within their respective jurisdictions. As the debate over the regulation of birth continues into the coming decades, our laws must strive to preserve the natural diversity in birth by opposing the seed of misogyny that endeavors to dilute it.

109. "The Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth." *Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3053 (1989).

110. While the Supreme Court's jurisprudence appears to protect a right to abortion, even for reasons of sex-selection, it is likely that a narrowly-framed statute may avoid the court's undue burden examination. In *Casey*, "the fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more [difficult] to procure an abortion cannot be enough to invalidate it." *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992).