SAVE OUR GIRLS:
AN ANALYSIS OF METHODS TO PRECLUDE SEX-SELECTIVE ABORTION IN THE UNITED STATES

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ABSTRACT: *The abortion debate usually focuses on the competing interests of women having the right to chart their life's course by choosing when to bear children versus the state's interest in protecting fetal life. Often overlooked are abortion decisions based not on a woman's quest for personal autonomy but on immutable fetal characteristics, particularly sex. In this Note, Brown argues that sex selective abortions can be prohibited both inside and outside the Supreme Court of the United States's abortion jurisprudence. He distinguishes the issue of sex selective abortions from the abortion issue as framed by Roe v. Wade and Planned Parenthood of Se. Pa. v. Casey. Sex selective abortion creates a Fourteenth Amendment Equal Protection Clause issue because the practice typically targets female fetuses. This places sex selective abortion at the crossroads of two Fourteenth Amendment clauses: the Equal Protection Clause and the Due Process Clause. Congress could use its enumerated powers, as interpreted by the Supreme Court, to pass legislation proscribing sex selective abortion. Further, he rebuts criticism that current state sex selective abortion prohibitions are merely unenforceable, symbolic statutes. In the United States, where opportunities for women abound, women need not favor bearing sons over daughters. The federal and state governments have the constitutional power and moral obligation to prohibit sex selective abortions.*

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INTRODUCTION

The right to an abortion in the United States is, in a legal sense, unquestioned.[1] Public opinion on abortion rights in the United States, however, is split nearly fifty-fifty.[2] Perhaps the reason for such a divide is that when individuals consider the question of abortion, their opinions are guided more by their moral beliefs, rather than the Supreme Court's substantivedueprocess pronouncements. If the issue is re-framed as abortion for the purpose of selecting a child's sex, then public opinion in the United States aligns much more clearly.[3]

Sex-selective abortion, due to its tendency to terminate more female than male fetuses, can be constitutionally prohibited both within and around the current framework of abortion laws in the United States. Furthermore, it should be prohibited by both federal and state governments within the United States because it demeans the equal importance of raising both girls and boys in a society. The following analysis proposes possible ways of distinguishing sex-selective abortion from the existing constitutional reproductive rights framework. It also discusses

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

2 In a May 2014 Gallup poll, 47% of Americans identified as pro-choice and 46% identified as pro-life. Lydia Saad, *U.S. Still Split on Abortion: 47% Pro-Choice, 46% Pro-Life*, GALLUP (May 22, 2014), http://www.gallup.com/poll/170249/split-abortion-pro-choice-pro-life.aspx?utm_source=position4&utm_medium=related&utm_campaign=tiles (last visited Mar. 15, 2015).

3 Jeff Jacoby, *Choosing to Eliminate Unwanted Daughters*, THE BOSTON GLOBE (Apr. 6, 2008), http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/04/06/choosing_to_eliminate_unwanted_daughters/ (using a 2006 Zogby poll to show 86% of Americans agreeing that sex-selective abortions should be illegal).

enforcing sex selective abortion prohibitions and the role such laws provide to society.

I. Prohibiting Sex-Selective Abortion Despite *Casey* and *Roe*.

Because *Casey* essentially retooled the Supreme Court's decision in *Roe*, proposed solutions to the sex-selective abortion issue must satisfy the holdings in *Casey*: The easiest sex-selective law reform is to pass a statute prohibiting abortion for either the sole reason of the fetus's sex, or if the sex of the fetus is a substantial factor for the woman receiving the abortion. To ensure that a statute fits within *Casey*, the statute must apply only after the fetus achieves viability, while also preserving an exception allowing a woman to receive an abortion if her life or health is endangered.[4] While this proposal would hold up against constitutional scrutiny, its effectiveness in actually preventing a sex-selective abortion are doubtful for two primary reasons.

First, maternal blood tests, such as Acu-Gen Biolab's Acu-Gender test, may determine the sex of a fetus as early as the fifth week of pregnancy.[5] Other scholars state that the detection of cell-free fetal DNA in its mother's bloodstream is possible at

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4 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (explaining that a state may regulate or prohibit abortion after fetal viability except when necessary to preserve the mother's life or health).

5 Ashley A. Bumgarner, *Right to Choose: Sex Selection in the International Context*, 14 Duke J. Gender L. & Pol'y 1289, 1292 (2007) (showing the relationship between sex-selective abortion and sex-selection).

four weeks into the pregnancy, which reveals the sex of the fetus.[6] If the mother learns the sex of her fetus prior to its achievement of viability, the woman can terminate the fetus under *Casey*,[7] making the prohibition of sex-selective abortion less effective, as it would only theoretically prevent abortions of fetuses on the basis of sex after the fetus achieves viability. A prohibition of sex-selective abortion would also be superfluous if a state already prohibited abortions in general after a fetus becomes viable.

Second, questions exist as to whether any sex-selective abortion prohibition is practically enforceable. For instance, a physician may be unaware of a person's exact motivations for seeking an abortion, regardless of any questions a physician may be required to ask when providing an abortion and a woman's answers to such questions.[8] The Arizona sex-selection prohibition[9] requires a prosecutor to prove the specific intent of a defendant, most likely a physician, through evidence that the doctor had actual or direct knowledge[10] that a woman sought an abortion in which the sex of the fetus was a factor.[11] Other motivations for sex-

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6 Kevin. L. Boyd, Comment, *The Inevitable Collision of Sex-Determination by Cell-Free Fetal DNA in Non-Invasive Prenatal Genetic Diagnosis and the Continual Statewide Expansion of Abortion Regulation Based on the Sex of the Child*, 81 UMKC L. REV. 417, 427 (2012) (explaining how revealing the fetus' DNA simultaneously demonstrates the sex of the fetus).

7 *Casey*, 505 U.S. at 870.

8 Krissa Webb, *Gender Mis-Conception: The Prenatal Nondiscrimination Act as a Remix of the Abortion Debate*, 11 GEO. J.L. & PUB. POL'Y 257, 274 (2013) (discussing the potential enforceability of the Prenatal NonDiscrimination Act ("PRENDA"), which applies as well to enforceability of other sex-selection abortion-prohibiting statutes).

9 *Ariz. Rev. Stat. Ann.* § 13-3603.02 (2011).

10 Boyd, *supra* note 6, at 438.

11 *Id.* at 439.

selective abortion statutes also emerge in the academic discussions of their enforceability. One line of thought argues that despite the enforceability issues implicit in sex-selective abortion bans, these statutes likely have a chilling effect on abortion providers.[12] Individuals arguing against sex-selective abortion as a means of chipping away at *Roe* and *Casey* likely find that argument appealing.

II. Distinguishing *Roe* and *Casey* under the Current Constitutional Framework.

The best method a pro-life litigant could use to defend the constitutionality of sex-selective abortion bans is to argue that *Roe* and *Casey* are distinguishable, having no applicability to the issue of sex-selective abortion. For the purposes of this section of this Note, assume that a state proscribed sex-selective abortion throughout a woman's pregnancy. This Note advocates three reasons that *Roe* and *Casey* are distinguishable in the context of sex-selective abortion.

A. A State's Compelling Interest in Preserving the Dignity of Women as a Class is not an Undue Burden.

Proponents of a sex-selection abortion prohibition could propose that it is not an undue burden under *Casey* because the state has a compelling interest in protecting female fetuses to preserve the dignity of women as a class under the Fourteenth

12 *Id.* at 443.

Amendment Equal Protection Clause.[13] By arguing this way, a state could force the courts to consider whether a state's compelling interest of protecting female fetuses (and thus the dignity of women altogether) is an undue burden, especially when argued as an Equal Protection Clause issue.

If such an argument reached the Supreme Court, its outcome may not be as clear-cut as opponents of sex-selection abortion bans would like. Some scholars argue against pro-choice individuals solely relying on *Roe* to defend their right to an abortion because the Roberts Court is "[l]ess sympathetic to abortion rights arguments than any Court since *Roe*."[14] For instance, in 2007, the Supreme Court held in *Gonzales v. Carhart* that the Partial-Birth Abortion Act of 2003 was constitutional because it placed no substantial obstacle (or undue burden) on late-term, previability abortions.[15] The Court even noted in *Gonzales* that the government has an interest in protecting the integrity and ethics of physicians, as their performance of a late-term abortion procedure known as intact dilation and extraction appeared similar to infanticide.[16]

One reason why the Partial-Birth Abortion Act of 2003 was held constitutional was that alternative means

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13 U.S. CONST. amend. XIV, § 1; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

14 Scott A. Moss and Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U.L. REV. 175, 178 (2008) (suggesting that litigating abortion rights issues in state court, instead of federal court is a better route to protecting gender equality and personal autonomy). After Justice Scalia's death, the Roberts court is likely considered less sympathetic to anti-abortion arguments, although this may change depending on how the next Justice views the issue.

15 Gonzales v. Carhart, 550 U.S. 124, 156 (2007).

16 *Id.* at 157, 139, 158.

of abortion were available before the late-term abortion procedure scrutinized in Gonzales would be necessary.[17] However, the Court's willingness to rule in favor of a pro-life position in Gonzales demonstrates that other pro-life decisions may occur. Perhaps the conflict between the Due Process Clause, Equal Protection Clause, the undue burden test, and a state's compelling interest in protecting the dignity of women may compel courts to hold that sex-selective abortion prohibitions are constitutional.

B. A Complete Sex-Selective Abortion Prohibition is not an Undue Burden.

A second way a litigant may distinguish sex-selective abortion prohibitions from the current Constitutional reproductive rights jurisprudence is arguing that a full prohibition itself is not an undue burden. The Court, in *Casey*, leaves a substantial opening for regulating abortions, stating that "[n]ot all burdens on the right to decide whether to terminate a pregnancy will be undue."[18] The Court defines the undue burden test as a state regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[19] Additionally, state statutes supporting the state's interest in potential life must inform the woman's free choice instead of hindering it.[20]

Defining exactly what an undue burden is or what

17 *Id.* at 164.
18 *Casey*, 505 U.S. at 876.
19 *Id.* at 877.
20 *Id.*

constitutes a substantial obstacle to a woman seeking an abortion is difficult. One possibility is picturing the undue burden test as a balancing test between a woman's right to an abortion versus a state's conflicting interest.[21] If the state's interest is in protecting life, it is highly likely that many judges will value life much higher than any burden affecting the abortion right.[22] As one author states, fetal life "is unmatched in its profundity."[23] Thus, a state's interest in fetal life always outweighed by the woman's interest if the undue burden test is conceived as a balancing test.[24] Under this analysis, if the state asserts its interest in banning sex-selective abortion in order to protect potential female human life developing in the womb, many judges would uphold the state statute as constitutional.

Even if judges do not agree that the undue burden test represents a balancing test between the governmental interest in prohibiting abortion and a woman's interests in reproductive liberty, a pro-life litigant could still address the issue through the undue burden test. The Supreme Court, in *Casey*, neglected to mention whether substantial obstacles to abortion included procedural legal hurdles for women prior to receiving an abortion, restrictions on permissible abortion methods, or substantive prohibitions of abortions done for a particular reason, such as sex-selection.[25] The ambiguity regarding the applicability of the undue burden test casts doubt on whether the test can apply at all to a substantive

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21 Khiara M. Bridges, *"Life" in the Balance: Judicial Review of Abortion Regulations*, 46 U.C. DAVIS L. REV. 1285, 1315 (2013).

22 *Id.* at 1317.

23 *Id.* at 1335.

24 *Id.* at 1335–37.

25 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, at 877 (1992).

prohibition on an abortion performed due to the presence of an undesired immutable fetal trait, such as sex.

Analyzing the text of applicable Supreme Court cases demonstrates the restrictions that the undue burden test applies to and supports the argument that sex-selective abortion bans are not undue burdens. In *Stenberg v. Carhart*, the Supreme Court held that a Nebraska statute banning partial-birth abortion imposed an undue burden on a particular type of abortion procedure, which unduly burdened the right to choose an abortion.[26] The statute targeted one method of partial-birth abortion, but because its language was vague, the Court held that its plain language additionally covered a second method of partial-birth abortion that blocked access to pre-viability, late-term abortions.[27] *Stenberg* thus demonstrates a restriction on an abortion method being held unconstitutional under the undue burden test, differing from the sex-selective abortion context, which emphasizes an abortion restriction based on the reason a woman seeks the abortion—a substantive matter.

Gonzales v. Carhart upheld a federal statute prohibiting a particular method of partialbirth abortion because the restriction was not an undue burden upon a woman's overall right to seek an abortion.[28] This is because alternative abortion procedures remained available to women beyond the particular type of partial birth abortion prohibited by the federal statute.[29] *Gonzales* emphasizes restricting the method of abortion, which is, like *Stenberg*,

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26 Stenberg v. Carhart, 530 U.S. 914, 930 (2000).

27 *Id.* at 939–940.

28 Gonzales v. Carhart, 550 U.S. 124, 147 (2007).

29 *Id.* at 164.

different than the rationale behind sex-selective abortion bans, which preclude abortions for the reason of fetal sex, a substantive consideration separate from how an abortion is physically done.

Gonzales additionally aids the argument for sex-selective abortion because it accepts the principle that, pre-viability, a state may not prohibit any woman from aborting a fetus.[30] This statement, while at first appearing hostile to sex-selective abortion bans that cover the pre-viability period of fetal development, actually provides constitutional backing for sex-selective abortion bans because every state with a sex-selective abortion statute does not punish the woman for actually receiving a sex-selective abortion.[31] Substantively, the abortion itself is not prohibited. Even *Casey* alludes to this point when the Court states that restrictions on abortion "must be calculated to inform the woman's free choice, not hinder it."[32]

Sex-selective abortion prohibitions do not hinder women's free choice in seeking an abortion, since the statutes do not punish women for their abortions[33] and because women can receive the abortion by simply lying, which is an expression of a woman's free

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30 *Id.* at 146.

31 ARIZ. REV. STAT. ANN. § 13-3603.02 (2011); KAN. STAT. ANN. § 65-6726 (West 2013); N.C. GEN. STAT. ANN. § 90-21.121 (West 2013); N.D. CENT. CODE ANN. § 14-02.1-04.1 (West 2013); OKLA. STAT. ANN. tit. 63, § 1-731.2(B) (West 2010); 18 PA. STAT. ANN. § 3204(c) (West 1989); S.D. CODIFIED LAWS § 34-23A-64 (2014).

32 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

33 ARIZ. REV. STAT. ANN. § 13-3603.02 (2011); KAN. STAT. ANN. § 65-6726 (West 2013); N.C. GEN. STAT. ANN. § 90-21.121 (West 2013); N.D. CENT. CODE ANN. § 14-02.1-04.1 (West 2013); OKLA. STAT. ANN. tit. 63, § 1-731.2(B) (West 2010); 18 PA. STAT. ANN. § 3204(c) (West 1989); S.D. CODIFIED LAWS § 34-23A-64 (2014).

choice. Additionally, the expressive nature of sex-selective abortion prohibitions inform women about society's expectation that women not use an immutable characteristic as fundamental as sex for the basis of having an abortion.

One final reason sex-selective abortion bans are not undue burdens is because the Supreme Court previously upheld a substantive law as not being an undue burden on the right for women to receive abortions. In *Mazurek v. Armstrong*, the Court upheld the constitutionality of a Montana statute preventing non-physicians from performing abortions because the statute was not an undue burden.[34] This implies that the obstacles referred to in the undue burden test are not substantive in nature, meaning that sex-selective abortion bans, which are substantive, are not obstacles a court could hold a law unconstitutional for under the undue burden test in *Casey*.

C. Roe *and* Casey *are not Applicable to Sex-Selective Abortion Bans.*

A third way of distinguishing the sex-selective abortion issue from the existing Constitutional framework is to argue that neither *Roe* nor *Casey* speak to the issue of sex-selective abortion bans in the United States.[35] One difference between the sex-selection abortion issue and the general abortion right conferred by *Roe* and *Casey* is that the woman's liberty interest in the sex-selective abortion context requires positive pro-

34 Mazurek v. Armstrong, 520 U.S. 968, 974 (1997).

35 Roe v. Wade, 410 U.S. 113 (1973); *Casey*, 505 U.S. at 833.

tection of the law because preventing sex-selective abortion preserves women's reproductive autonomy by promoting the birth of daughters who can benefit from the reproductive liberty provided under *Roe* and *Casey*.[36] Further, sex-selective abortion perpetuates discrimination directly against the female fetus to be terminated and indirectly on all girls in society because the existence of sex-selective abortion shows girls that society values their presence less than boys, causing emotional damage.[37] Individual women discriminating against women as a class through the practice of aborting female fetuses is a crucial distinguishing factor between sex-selective abortion and the focus of *Roe* and *Casey*.[38]

Roe and *Casey*, in contrast, speak to allowing a woman to choose the number of children she plans to birth.[39] Having zero, one, or two or more children in referring to the woman's right to privacy and autonomy, bodily integrity, and maintenance of her health, especially in the context of women assuming more responsibilities than a mere homemaker, is *Roe*'s primary focus.[40] The argument that by limiting sex-selective abortion, one protects the foundation of the right to reproductive privacy—protection of the privacy and autonomy of women—differs considerably from the rationale discussed in *Roe* and *Casey*.[41]

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36 Webb, *supra* note 8, at 272.

37 *Id.*

38 *Id.*

39 *Id.*

40 *See* Roe, 410 U.S. at 153 (1973) ("Maternity, or additional offspring, may force upon the woman a distressful life and future.").

41 Webb, *supra* note 8, at 272.

III. Jurisdictional Hook for a Federal Sex-Selective Abortion Ban.

If the federal government passes a nationwide ban on sex-selective abortion, the ban will have to be tied to an enumerated power of Congress. One such power of Congress is the ability to regulate interstate commerce.[42] Congress may regulate interstate commerce in three categories: (1) channels of interstate commerce; (2) instrumentalities of, and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce.[43]

In the context of sex-selective abortion, categories (2) and (3) are the most likely way a sex-selective abortion ban will properly be tied to the interstate commerce power. Category (2), regarding the instrumentalities of, and persons or things in interstate commerce, is most applicable because it is virtually certain that at least one of the devices a physician uses during a sex-selective abortion will arrive in the physician's office after traveling across various state borders. For instance, Congress forced restaurants to serve African Americans because food served by the restaurants moved through interstate commerce.[44] Though sex-selective abortion bans would focus on the procedure's instruments moving through interstate commerce, rather than food, the logic applies similarly and allows Congress to regulate sex-selective abortion through category (2) of its Commerce Clause powers.

Using category (3), activities that substantially affect

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42 U.S. Const. art. I, § 8, cl. 3.

43 Gonzales v. Raich, 545 U.S. 1, 16–17 (2005).

44 Katzenbach v. McClung, 379 U.S. 294, 298–305 (1964).

interstate commerce, is also a viable alternative for Congress to justify banning sex-selective abortion. Sex-selective abortion itself substantially affects interstate commerce, even though a sex-selective abortion only occurs within the borders of a particular state, because the aggregate effect on interstate commerce by many localized activities may be regulated as stated in *Wickard v. Filburn*.[45] Some of the consequences of sex-selective abortion may include increased illicit activities such as prostitution, kidnapping, and sex trafficking.[46] Though these activities are generally held to be illegal, Congress may nonetheless restrict them through making sex-selective abortion illegal under its power to regulate interstate commerce, even without particularized findings of the effect sex-selective abortion has on interstate commerce.[47] All Congress needs is a rational basis for the restriction, and reducing prostitution, kidnapping, and sex trafficking through prohibiting sexselective abortion meets the rational basis test.[48] Therefore, Congress has the ability to prohibit sex-selective abortion through its enumerated power to regulate interstate commerce.

IV. Enforcing a Sex-Selective Abortion Ban.

The practicality of enforcing sex-selective abortion prohibitions is commonly questioned. One author noted "[if]

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45 Wickard v. Filburn, 317 U.S. 111, 128–29 (1942).

46 Bumgarner, *supra* note 5, at 1301 .

47 Raich, 545 U.S. at 21–22.

48 *Id.* at 22. This Note assumes that banning sex-selective abortion is constitutional. Therefore, within the jurisdictionalhook section of this Note, a rational basis is all Congress needs to effectuate such a ban through its power to regulate interstate commerce.

abortion remains legal in the United States, it will be almost impossible to discern whether a couple chooses not to have a child for purposes of family planning or the sex of the fetus."[49] Though this is a weak distinction, this statement still highlights the difficulty of enforcing a sex-selective abortion prohibition.

Statute and amendment writers have options at their disposal to aid enforcement of a sex-selective abortion ban. One model, for instance, is to incorporate the enforcement mechanisms of PRENDA, which contains a reporting requirement to the authorities for physicians, physicians' assistants, nurses, counselors, or medical or mental health professionals who know of or suspect someone will attempt a sex-selective abortion, into sex-selective abortion prohibitions.[50] To facilitate the reporting requirement, abortion providers must question women about their reasons for choosing to abort under PRENDA.[51] Writers of proposed statutes and amendments precluding sex-selective abortion should note the possibility of modeling their ideas after PRENDA's reporting requirement, with necessary questioning of women who seek an abortion as a possible means of enforcement. However, questioning abortion-seeking women before their abortion begins is not a foolproof means of enforcement.

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49 Deidre C. Webb, Note, *The Sex-Selection Debate: A Comparative Study of Sex Selection Laws in the United States and the United Kingdom*, 10 S.C. J. INT'L L. & BUS. 163, 200 (2013). Distinguishing between aborting a fetus on the basis of sex versus doing so for family planning purposes (referring to raising a certain number of boys or girls) is illogical because the sex of the fetus is the basis of the abortion.

50 Mary Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232, 265 (2013).

51 *Id.*

Enforcing a sex-selective abortion ban by questioning women regarding the reasons they seek abortions is problematic because they may lie. Despite the efforts of a state or federal government to enact statutes precluding sex-selective abortions and to enforce these prohibitions, individuals will inevitably disguise their true reasons for seeking an abortion. After careful consideration, bearing in mind the likelihood of this statement being true, the question of whether it is appropriate to utilize political capital to pass sex-selective abortion bans and amendments seems to speak for itself as doing so would be a prudent endeavor.

In responding to this issue, explaining the effects of laws is a great starting point. Laws contain two primary roles: (1) instrumental and (2) symbolic.[52] A law's instrumental role involves its enforcement effects, while a law's symbolic role acts through its promulgation or public announcement.[53] Sex-selective abortion bans may serve both purposes in that they symbolize society's moral standards[54] and could serve an instrumental purpose in creating a questioning requirement for individuals seeking an abortion, which may deter some individuals from aborting a fetus due to its sex. Laws which appear primarily symbolic usually contain an instrumental purpose too.[55] Symbolic laws, even if one

52 John F. Galliher and John Ray Cross, *Symbolic Severity in the Land of Easy Virtue: Nevada's High Marihuana Penalty*, 29 SOC. PROBS. 380 (1982).

53 *Id.*

54 *Id.* at 385.

55 Helgi Gunnlaugsson and John F. Galliher, *Prohibition of Beer in Iceland: An International Test of Symbolic Politics*, 20 LAW & SOC'Y REV. 335, 337 (1986).

concludes that they lack any instrumental purpose, are nonetheless useful.

Symbolic laws can "call attention to injustice, confer legitimacy upon civil rights activists, and encourage political mobilization against discrimination."[56] A sex-selective abortion prohibition calls attention to the issue of fetuses being terminated due to an immutable trait—their sex. Sex-selective abortion bans are not the only laws operating in such a manner. Local human rights ordinances are symbolic laws in that they communicate to the community that discriminatory conduct toward anyone is unacceptable. Some argue that their focus is the strength of the message the law delivers, not necessarily whether the law's presence decreases discrimination.[57]

Those who dismiss sex-selective abortion bans as merely symbolic laws must grapple with the underlying reality that their statement is an assumption. It may be more likely that the presence of sex-selective abortion bans dissuade some women from undergoing an abortion. Effectively halting all sex-selective abortions is not possible. But our society is not demanding the repeal of homicide prohibitions just because some killings go unpunished. In a similar vein, opposing sex-selective abortion bans because they will not practically prevent all sex-selective abortions is illogical.

Determining how laws influence each individual's

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56 Christopher E. Smith, *Law and Symbolism*, 1997 DET. C.L. REV. 935, 939 (1997)

57 Robert Salem, *The Strengths and Weaknesses of Local Human Rights Ordinances*, 48 Clev. St. L. Rev. 61, 63 (2000).

decision-making process is a difficult endeavor. But in arguing that the presence of sex-selective abortion prohibitions have no instrumental effect—that they are merely society's toothless statement on a moral issue—one must unequivocally dismiss the possibility that these laws enter the moral and emotional calculus behind the decision to abort. Regardless of whether one considers sex-selective abortion bans symbolic or instrumental, these bans describe society's view on a pervasive problem: selectively aborting female fetuses because of their sex.

Conclusion

The termination of female fetuses is a practice the United States should not endorse. It reduces the social worth of women as a class. As such, the states and federal government have the collective means to enact statutes prohibiting sex-selective abortion both within the nation's reproductive rights framework, as well as to distinguish sex-selective abortion from the existing constitutional framework. Though some may argue that sexselective abortion bans are merely symbolic, it is just as likely that the laws would influence the decision calculus of a woman thinking of aborting a fetus due to its sex.

No girl should lose a chance at a successful life, despite potential difficult circumstances, merely because her sex is perceived to receive less opportunities than males or because of reasons such as family balancing. The opportunities for women to be successful in the United States is enough that female fetuses should not be aborted due to their most fundamental immutable

trait: their sex.