A Feminist Is a Person Who Answers "Yes" to the Question, "Are Women Human?:" An Argument Against the Use of Preimplantation Genetic Diagnosis for Gender Selection

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Recommended Citation
Kimberly K. Downing, A Feminist Is a Person Who Answers "Yes" to the Question, "Are Women Human?:" An Argument Against the Use of Preimplantation Genetic Diagnosis for Gender Selection, 8 DePaul J. Health Care L. 431 (2005)
Available at: https://via.library.depaul.edu/jhcl/vol8/iss2/6

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INTRODUCTION

India's social climate reflects a strongly patriarchal culture, where for many years, female infants were killed at birth for the sole reason that they lacked a "Y chromosome.‖ As new technologies emerged, more palatable ways to rid Indian society of females became available. A UNICEF study reported that in 1984, 8,000 Indian women underwent abortions after obtaining the results of sex-determination ultrasounds. Of the fetuses aborted, 7,999 were female. With the emergence of assisted reproductive technology, Indian families were faced with innovative and unique ways to manipulate genetics to obtain the desired obstetric outcome: delivering a male infant. The result in contemporary Indian society is a gender population shift so severe many worry that, even with immediate public action, India will never be able to make up for the missing females.

In America, the social environment is considerably different. But, gender bias and discrimination are still present, albeit, more subtly. The new gender selection technologies available in India are thriving in

* J.D. 2005, DePaul University College of Law, Associate at Donohue Brown Mathewson & Smyth in Chicago, Illinois. Many thanks to Professor Michelle Goodwin for her support and direction in the creation of this article; to my husband Joel, without whom law school itself would not have been possible; and to the DePaul University Health Law Journal for their hard work and professional assistance in editing and strengthening this article.


2 Josh Ulick, The Science of Sex Selection, NEWSWEEK, Jan. 26, 2004, at 48. Females are created when an egg is fertilized with sperm carrying the X chromosome; sperm carrying the Y chromosome creates males.


the United States, and given the collective pressures of gender discrimination that are present in our own country, these technologies are bound to create damaging results within our population as well.

This paper examines, through a feminist lens, new reproductive technology that allows families to choose, prior to conception, whether they wish to deliver a boy or girl. This paper maintains a primal feminist perspective; that is, that women must command social, economic, and political power equal to their male counterparts.\(^5\) If this paper tends towards one sub-group of feminism, it is the libertarian perspective, which focuses on individual autonomy, liberty, and diversity.\(^6\) Part I of the paper provides background on the expanding reproductive choices that are accessible to couples today. Alarmingly, despite rapidly improving technology and heated debates regarding a parent’s ability to select the gender of a child, United States clinics that offer families the ability to choose the gender of an infant remain largely unregulated. Part II of this paper explores the question of whether we should regulate these technologies, and more specifically, should regulation forbid families access to reproductive technology for the sole purpose of selecting fetal gender. Following an examination of societal pressures and the current state of American law, this paper concludes that in order to ensure a continued movement towards equality for women, our country must prohibit preimplantation genetic diagnosis for the purpose of gender selection. This conclusion draws from the fundamental ideology that women have “intrinsic value as persons rather than contingent value as a means to an end for others: fetuses, children, the ‘family’ [and] men.”\(^7\) Although both are influential, it is this individualistic respect for the inherent value of a woman, rather than a superficial appreciation of women’s rights collectively, that demands regulation of gender selection vis-à-vis reproductive technologies.

### I. BACKGROUND


\(^7\) Woman’s Studies Program at SUNY New Paltz, \textit{supra} note 1.
Assisted reproductive technology (ART) is an umbrella term describing fertility treatments where both the female egg and male sperm are handled or manipulated. One form of ART, which became publicly available in 1990, is Preimplantation Genetic Diagnosis (PGD). Averaging 15,000 American dollars per attempt, PGD allows a physician to screen a fertilized embryo for genetic disorders and gender selection. When a woman undergoes in vitro fertilization, prior to implantation of the embryo, one cell, called a blastomere, is “removed from a cleaving embryo and tested for the genetic or chromosomal condition of concern.”

A. Preimplantation Genetic Diagnosis
Currently, PGD is used in two primary circumstances. The first situation occurs when an individual is at risk for bearing a child with a certain genetic disorder, like Huntington’s disease or hemophilia, and PGD techniques are used to determine the absence of the disorder prior to embryonic implantation. The second circumstance occurs when a woman undergoes in vitro fertilization later in life, and prophylactic screening of the embryo for any genetic disorders is done to increase the potential that the woman will successfully complete the pregnancy. Although these two circumstances are the primary medical reasons for choosing to use PGD, an increasing number of individuals, both in the United States and abroad, are using PGD technology exclusively for sex selection. Although globally, civilizations throughout history have tried to control the gender of an

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11 Robertson, supra note 9, at 213.
12 See generally Karen Sermon et al., Preimplantation Genetic Diagnosis for Huntington’s Disease With Exclusion Testing, 10 EUROPEAN J. HUM. GENETICS 591 (2002).
15 Id.
16 Bob Meadows et al., supra note 10.
unborn child, and various folkloric advice\textsuperscript{17} and earlier technologies\textsuperscript{18} have promised to produce a child of a specific gender, PGD offers the most reliable results, virtually guaranteeing the parent’s chosen gender.\textsuperscript{19} A recent survey showed that 28% of Americans endorse PGD for gender selection, and 74% approve of the technology for genetic testing.\textsuperscript{20}

1. Regulation of Preimplantation Genetic Diagnosis

Assistive reproductive technology as a whole, and therefore PGD, subsists largely below the radar of both federal and state regulations. One of the few laws to address PGD is the Fertility Clinic Success Rate and Certification Act of 1992 (Act), which requires all United States clinics performing ART procedures to report their success rates to the Center for Disease Control (CDC).\textsuperscript{21} However, the Act does not create a system for reporting adverse events that occur during an ART procedure.\textsuperscript{22}

The Food and Drug Administration (FDA) retains the broad authority to regulate many of the “materials and components” used in the ART process.\textsuperscript{23} The FDA issued a rule, which became effective on January 21, 2004, providing that all “manufacturers” of “human cells,

\footnotesize{\textsuperscript{17} Rachel E. Remaley, “The Original Sexist Sin”: Regulating Preconception Sex Selection Technology, 10 HEALTH MATRIX 249, 249-50. Folklore included pinching a man’s right testicle or arriving to the marriage bed dressed in men’s clothing to encourage production of a male. \textit{Id.} Also, recommended was “having sex in dry weather when the moon is full, the nut harvest is plentiful, and there is a north wind.” \textit{Id.}
\textsuperscript{18} Ulick, supra note 2, at 48. One previous technology was called the MicroSort Method. The method essentially screens sperm, using a fluorescent dye, to determine if the sperm carries an X chromosome, thereby producing a girl, or a Y chromosome, to produce a boy. \textit{Id.} Another method is the Ericsson Method, where sperm are poured onto a layer of fluid. The sperm generally swim down, and the sperm carrying Y-chromosome typically move faster than the sperm carrying X-chromosome, thereby separating the sperm into girl or boy producing material. This is a low cost method, but supporters only claim a 78 to 85% success rate, where critics claim the odds are at no better than 50%. \textit{Id.}
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{22} Lars Noah, Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation, 55 FLA. L. REV. 603, 615 (2003).
\textsuperscript{23} GENETICS AND PUBLIC POLICY CENTER, REGULATORY BRIEF 2 (Apr. 2003), available at http://www.dnapolicy.org/policy/art.jhtml#1.}
tissues, and cellular and tissue-based products” must register with the FDA.\textsuperscript{24} The agency clarified that this regulation applies to “establishments engaged in egg donation, retrieval, semen processing, and IVF.”\textsuperscript{25} However, an exception provides that FDA reporting is not mandated when a clinic only "recovers reproductive cells or tissue for immediate transfer into a sexually intimate partner of the cell or tissue donor."\textsuperscript{26} Therefore, the law will not consistently apply when married couples, or any sexually intimate couples, seek the assistance of ART in the conception of a child.

The Clinical Laboratories Improvement Act of 1988 (CLIA) provides that all laboratories managing semen or blood must be federally certified, and, among other things, must have written quality control procedures in place.\textsuperscript{27} Although the law clearly affects ART clinics through regulation of blood and semen, the extent to which CLIA applies to embryology laboratories involved in ART-related experimentation and management is presently under debate.\textsuperscript{28}

\textsuperscript{24} Current Good Tissue Practice for Manufacturers of Human Cellular and Tissue-Based Products; Inspection and Enforcement, 21 C.F.R. § 1271 (2001).

\textsuperscript{25} See GENETICS AND PUBLIC POLICY CENTER, supra note 23, at 3.

\textsuperscript{26} Id. at 3; see also Current Good Tissue Practice for Manufacturers of Human Cellular and Tissue-Based Products; Inspection and Enforcement, 66 Fed. Reg. 1508, 1511 (2001).


Some argue that it would only take a telephone call by the Secretary of Health and Human Services to include eggs and embryos under CLIA. However, there is “powerful lobbying” by the “fertility industry” against the extension of CLIA, as applicability of the statute would “increase their costs and reduce profitability.” This lobbying seems to have been heard at the highest government levels, as the phone call has yet to be made. Judy Peres, Setting Limits on High-Tech Babymaking-The Law Has Not Kept Up with Reproductive Science, Partly Because the Issues Are Difficult to Discuss, CHI. TRIB., July 26, 1998, at 1. The American Association of Bioanalysts, “a national professional organization representing over three thousand professionals working in the field of laboratory examinations of material derived from the human body for medical purposes” sought a court order to direct the Secretary of Health and Human Services to declare CLIA applicable to all laboratories dealing in assistive reproductive technology. American Ass’n of Bioanalysts v. Salala, 2000 U.S. Dist. LEXIS 2603, at *1-2 (2000). The United States District Court for the District of Columbia held that plaintiffs had not suffered a cognizable injury and therefore lacked standing to bring such an enforcement order. Id. at *13.
Finally, a few states have enacted laws to oversee and regulate fertility clinics.\(^{29}\) However, the interest at the state level appears to be focused on advocacy for informed consent of embryonic donors or recipients.\(^{30}\)

In 1998, the CDC, RESOLVE\(^ {31}\) and the National Advisory Board on Ethics in Reproduction sponsored a joint conference to examine insufficiencies in the regulation of ART. Conference participants agreed that critical gaps exist in the oversight of ART in the United States. Specifically, the current regulatory system hinders accountability: the system is void of both effective sanctions and comprehensive practice regulations.\(^ {32}\)

Scholars debate whether any intrusive regulation of ART would be upheld as constitutional, since ART procedures are entwined with the fundamental right of procreation.\(^ {33}\) If a court determined that access to ART was a fundamental right, any state or federal regulation would need to be narrowly tailored to serve a compelling purpose.\(^ {34}\) Although the question of whether ART is a fundamental right is, in itself, highly controversial and debatable, this paper examines a related controversy: that is, should we regulate ART to disallow certain marvels that

\(^{29}\) Noah, supra note 22, at 615. See also Sperm or Ova Reimplantation Consent, CAL. BUS. & PROF. CODE § 2260 (West 2004) (stating that, the “physician and surgeon who removes sperm or ova from a patient shall, before the sperm or ova are used for a purpose other than reimplantation in the same patient or implantation in the spouse of the patient, obtain the written consent”); Unauthorized Use of Sperm, Ovum, or Embryo, LA. REV. STAT. § 14: 101.2 (2004) (stating that, “[n]o person shall knowingly use a sperm, ovum, or embryo, through the use of assisted reproduction technology, for any purpose other than that indicated by the sperm, ovum, or embryo provider’s signature on a written consent form”).

\(^{30}\) GENETICS AND PUBLIC POLICY CENTER, supra note 23, at 3.


\(^{33}\) See Kelly M. Plummer, Comment: Ending Parents’ Unlimited Power to Choose-Legislation is Necessary to Prohibit Parents’ Selection of Their Children’s Sex and Characteristics, 47 ST. LOUIS. L. J. 517 (2003) (arguing that preimplantation genetic diagnosis will not receive constitutional protection as part of the fundamental right of procreation); but see John A. Robertson, Genetic Selection of Offspring Characteristics, 76 B.U.L REV. 421, 426 (1996) (“If the Constitution protects coital reproduction from state interference, it should also protect infertility treatments because such treatments are essential to allowing coitally infertile individuals to reproduce.”).

\(^{34}\) See Robertson, supra note 33, at 426.
technology is capable of realizing, like gender selection? Since the "should we regulate" analysis examines the perils created by the unregulated use of PGD, it offers insight into the “can we regulate” question by providing the government with compelling reasons (should the government need to meet the burden of strict scrutiny) to regulate technological reproductive advances that allow for gender selection.

II. SHOULD WE REGULATE? A FEMINIST VIEWPOINT

Over the past five years, the American Society of Reproductive Medicine’s Ethics Committee (Committee) has wavered regarding its stance on the morality of gender selection. In 1999, the Committee issued a statement discouraging the selection of embryos based on gender. However, a report issued by the Committee in May of 2001 offered the opposite proposition: in certain situations, like when a family seeks gender selection for family diversity, PGD for gender selection is ethically acceptable. The Committee found that although reasonable minds may differ regarding the proper use of gender selection, there is no “clearly persuasive ethical argument” or compelling “empirical evidence” that gender selection harms the child conceived through PGD. In fact, the Committee stated, “if the child is born with the desired gender, the child presumably will be wanted and loved.” Implicit in this argument is the assumption that a child of the “non-desired” gender would be less likely to receive parental unconditional love.

This control and manipulation of future offspring allows society, through science, to exert a tremendous amount of influence over the unborn. The potential for baby shopping — selecting a child's gender (or, hypothetically, eye-color, intelligence, and athletic ability)

36 ETHICS COMMITTEE OF THE AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, PRECONCEPTION GENDER SELECTION FOR NONMEDICAL REASONS, 75 FERTILITY AND STERILITY 861, 863 (2001). The Committee also recommends that (1) parents are fully informed of all risks, (2) parents express a desire to accept a child of the opposite sex if the procedure fails, and (3) parents are counseled about unrealistic expectations. Id.
37 Id.
38 Id. at 862.
commoditizes fetuses,\textsuperscript{39} poses the threat of discrimination, and undermines diversity in our society.\textsuperscript{40}

Such control over human nature, merged with continuing genetic advances in reproductive technology must be approached with great caution. Recent history has shown us that when physicians and scientists are given the authority to manipulate demographics, in an effort to "better" the human race, problems may arise. Where our parents were forced to accept whatever gender nature provided, future generations of parents will possess the means to select a disability-free, athletic female with blond hair who will be unlikely to develop diabetes or heart disease (created only for the right price). As one commentator said in regards to physicians of the Third Reich in Nazi, Germany:

the sense of morality was not impaired by these killers. They knew how to differentiate between good and evil. Their sense of reality was impaired. Human beings were not human beings in their eyes. They were abstraction. . . . The respect for human rights in human experimentation demands that we see persons as unique, as ends in themselves.\textsuperscript{41}

\textsuperscript{39} See generally Knox, supra note 35, at 448-49.

\textsuperscript{40} See Roberston, supra note 9, at 214. Currently, PGD technology only enables scientists to select gender, screen for a number of genetic diseases, and select the trait of perfect pitch (the ability to recall musical notes from memory, a common trait of many successful musicians). However, there is developing potential for researchers to screen for genes pertaining to traits such as memory, intelligence, aggression, beauty, sexual orientation, eye color, hair color and height. But see Julian Savulescu, Procreative Beneficence: Why We Should Select the Best Children, 15 BIOETHICS 413, 422-25 (2001).

\textsuperscript{41} Malowinski, supra note 32, at 162. The Nazi eugenics movement got its inspiration from the academic work of American scientists and physicians, who practiced regular sterilization of "epileptics, the insane, and idiots." Id. at 140. In America in 1917, at least 16 states had passed sterilization laws and many universities were teaching lessons of eugenics in medical, public health, biology and social work curriculums. Id. at 139. When the Nazi community began a policy of forced sterilization, they "regularly quoted American geneticists" and initially followed the example of sterilization organized in several of America's individual states. Id. at 142. It was a slippery downward slope from there: in Germany, the experience with forced sterilization, which at the time was in many ways considered morally and socially acceptable, "made euthanasia acceptable to many—even palatable as a logical policy progression." Id. at 145. There are two obvious connections between Nazi eugenics and the current PGD analysis. The first is that the Nazi movement and PGD research both started as an attempt to improve upon the human condition. See id. The second similarity is that, as reproductive physicians currently operate in an unregulated field with broad professional discretion, the physicians operating in the Nazi regime essentially had unfettered discretion in assuming power over life and death. Id. at
History demands that we respect and cautiously approach new genetic technologies. The imprudent genetic manipulations of yesteryear illustrate that communal pressures, combined with the emergence of superlative technology, can create devastating, shameful, and permanently scarring results. It is unclear how people with congenital disabilities will fit into society once reproductive ingenuity allows the prevention of such defects.\(^4\) One geneticist’s view illustrates the willingness of some in the scientific community to buy into the “societal improvements” that could occur with PGD.\(^3\) Margery Shaw, an attorney and geneticist, stated that it is fetal abuse to “knowingly bring a child to birth with a genetic condition,” in a world where PGD, ultrasound, and eugenic abortions are available, and that the delivery of such offspring should be made analogous to child abuse.\(^4\) In a feminist analysis of PGD for gender selection, it is important to remain cognizant of whose reality of genetic manipulation we employ: “Feminism directly confronts the idea that one person or set of people [has] the right to impose definitions of reality on others.”\(^4\)\(^5\) Unfortunately, we need not look as far back as World War II to evaluate the circumstances created when social pressures, new realities, and fresh genetic technologies merge. Such results are today being felt in countries like India, who have long practiced female infanticide, but are today aided in sex selection by reproductive technology that offers a more moral route to obtain much-desired male offspring.

A. India: A Case Study

For centuries, patriarchal India has harbored a strong preference for male children.\(^4\)\(^6\) This discriminatory inclination stems from the central

premise that Indian females are considered an economic or social burden. In fact, an old Indian saying pronounces, “Grooming a girl is like watering a neighbor’s garden.” It is customary in India for the wife’s family to pay a marriage dowry to the husband’s family. The dowry originated from a system called streedhan, in which a wife’s family gifted property to the husband at the time of marriage. As women traditionally lacked the ability to inherit familial wealth, the system allowed for women to share in the parental assets. Today in India, a bride’s family must pay the groom in property, money or goods—a transaction that often does not end at the point of marriage, but represents a continuing obligation that can potentially impoverish and financially devastate poorer families.

Although the dowry represents the strongest reason that Indian families often prefer male offspring, Indian society favors males in other capacities as well. First, sons are economically preferred because they are able to participate in, and promote a family business. Second, where sons carry the responsibility of tending to parents in their old age, daughters typically leave their parents, and often partake in tending to their aging parents-in-law. Finally, India historically practiced hypergamy, a Hindu Indian custom where women were encouraged to marry men of a higher social standing. Since this was impossible for women in the highest castes, and a single woman was viewed as a disgrace, high caste, female newborns were often killed to prevent this problem.

48 Id.  
51 Aruna Gnanadason, Dowry (India), at http://members.tripod.com/Akshar/dowry/DOWRY.HTML (last visited Nov. 20, 2004).  
52 Id.  
53 Rahman, supra note 47, at 38.  
54 Farrell, supra note 49, at 257.  
All these factors, influencing both the indigent and wealthy in India, contributed to the unfortunate practice of female infanticide. Inhumane and painful deaths often await female infants, such as live burial in sand bags, poisoning with opium or heavily salted milk, or suffocation. As early as 1870, the Indian government attempted to prohibit this practice, passing the Act for the Prevention of Female Infanticide. Today, infanticide remains a problem in India; however, the emergence of new medical technology has added considerable complexity to the problem.

The first Indian clinic for sex determination sprang up in Amritsar, Punjab in 1979. The clinic provided women with access to ultrasound techniques to determine the sex of a fetus. These gender-revealing ultrasounds were often followed by selective abortions, a form of feticide to dispose of unwanted female fetuses. This procedure was seen as "more ethical" than typical infanticide, and sex determination centers, coupled with abortion clinics, began appearing throughout cities and rural parts of India.

In response to this trend, the Indian parliament passed the Prenatal Diagnostic Techniques Act (PDTA) in 1994. The PDTA, among other things, made it illegal to determine and communicate the

58 Rahman, supra note 47, at 38.
59 Id.
60 Sharma, supra note 58, at 1553. Sadly, there are also reports of women simply dumping unwanted female children into garbage cans or gutters. One baby in Calcutta was "pecked to death by scavenger birds." Rahman, supra note 47, at 38.
61 Satadru Sen, The Savage Family: Colonialism and Female Infanticide in Nineteenth-Century India, 14(3) J. WOMEN'S HISTORY 53, 53 (2002). This act was passed during the British colonization of India. Id. Therefore, arguably this act was not just about "social reform," but was part of a greater westernizing attempt to "colonize the 'areas of darkness' in native society by exposing, disrupting, and capturing political relationships that were seen as immoral and indifferent to British authority...." Id. at 74.
64 Gezari, supra note 46, § 1, at 4.
65 Farrell, supra note 49, at 260
66 Rahman, supra note 47, at 38.
results of any gender screening analysis. The PDTA, however, had many loopholes, including the fact that it was only applicable to pregnant women. Therefore, when technology allowing for gender screening prior to pregnancy became available, there was no law in effect to prohibit use of the technology.

Following the introduction of PGD, the Indian parliament amended PDTA and renamed the legislation Pre-conception and Prenatal Diagnostic Techniques Act. Under the current law, any individual who uses technology to determine the sex of an infant is subject to a three-year jail sentence, and any physician who assists in a gender determination could lose her license.

Unfortunately, the law in India is largely unenforced. Whether this is related to an inability to regulate the private decisions of Indian families, deeply rooted cultural practices, or as one researcher suggests, corruption and bribe taking among police and health officials, the practice of gender determination continues, and its effects are readily apparent and enormously disconcerting. Between 1991 and 2001, the number of females per 1000 males in the zero to six-year age group, fell from 945 to 927. In New Delhi and Bombay, fewer than 900 girls were born for every 1000 boys. And in one district in Punjab, the census revealed 754 girls for every 1000 boys—the “lowest ratio in the country.” The disparity is of such concern that the United Nations Population Fund warned, “[a] stage may soon come when it will be extremely difficult, if not impossible, to make up for the missing girls.”

In a recent effort to address the worsening gender imbalance, activists filed a suit in the Indian court system, seeking to bolster enforcement of the law that prohibits the use of gender-screening technologies. In 2001, in Centre For Enquiry Into Health & Allied
Themes v. Union of India, the India Supreme Court released its opinion in this public interest case. The court recognized that "developed medical science is misused to get rid of a girl child before birth," but held that no further direction was required, and that previous orders issued by the court, such as an order to the central government to create public awareness regarding the dangers of female feticide or PGD misuse, should be enforced.

Today in India, the preference for male children continues to flourish, perpetuated by all the previously mentioned methods, but also by the introduction of PGD. This technology allows for wealthy Indian families to choose the sex of their children prior to conception. And, although theoretically PGD can be used to determine with almost a 100% guarantee the sex for either a female or male infant, all of the 26 families that used the service at a Bombay clinic successfully delivered male infants after utilizing the procedure. The distressing situation in India proves that widespread experimentation with genetic technologies, under certain social pressures, and without proper legal oversight or enforcement, can result in concrete and alarming results.

B. The United States

Although social pressures in the United States differ tremendously from those abroad, Americans live in a public environment that exerts unique strains on families and often perpetuates gender discriminatory practices. With the current female crisis in India as a backdrop, it is important for Americans, especially American women, to be aware of existing pressures, as we evaluate the appropriate place for PGD and gender selection in our own society. In evaluating the possible effects of using PGD for gender selection, it is helpful to first reflect upon the reality of gender inequalities that endure in the United States. This examination is important because, as India's experience teaches, using PGD for gender selection intensifies underlying discriminatory practices.

American society still does not seek equal contributions from men and women: "[f]or all the changes of the last decades, it is still

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79 See generally CEHAT, 5 SCC 577.
80 Id.
81 Id.
82 Gezari, supra note 46, § 1, at 4.
83 Robertson, supra note 9, at 214.
84 Ulick, supra note 2, at 48.
85 Gezari, supra note 46, § 1, at 4.
women, not men, who adjust their lives to accommodate the needs of children; women who do what is necessary to make a home; [and] women who forego status, income, advancement, and independence.”

In 2003, 5.4 million mothers, compared to 98,000 fathers, put work “on hold” to stay home with their children. The United States Department of Labor reported in 2002 that among workers of both genders ages 45 to 54, women workers earned 74.6% of the earnings taken home by their male counterparts. A 2004 article revealed that female physicians earn 63 cents for every dollar earned by male physicians. American women today are still denied membership at “male-only” golf clubs known to “provide unparalleled business and professional networking opportunities to their members.” Statistics suggest that each year four million women suffer a “serious assault” at the hand of an intimate male partner. Although distressing to acknowledge, the reality is, that with all the advancement American women have made in

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87 Sharon Jayson, Census: 5.4 Million Mothers Are Choosing To Stay At Home, USA TODAY, Dec. 1, 2004, at 3A. Actually, of the 98,000 men who did not work in 2003, only 16% attributed their stay-at-home status to childcare; 45% cited disability, 11% said they could not find work, and 9% were attending school. Id. Some may find this statistic self-explanatory, since historically women have chosen the primary care giver role, will often be breast feeding, and typically earn less (making their financial contribution to the home easier to sacrifice); however, this paper argues that the “self explanatory” line of reasoning only supports and furthers a patriarchal dominated culture. The author of the Feminist Mystique, Betty Friedan, often described as “one of the founding mothers of feminism's Second Wave,” argued explicitly for women to find their inherent value outside of their roles as housewives and mothers. See Joanne Boucher, Betty Friedan and the Radical Past of Liberal Feminism, 35 NEW POLITICS 23, 23 (2003), available at http://www.wpunj.edu/~newpol/issue35/boucher35.htm; see generally BETTY FRIEDAN, THE FEMINIST MYSTIQUE (1963). Moreover, although certainly not without inconveniences, women who wish to return to a professional career while breast feeding an infant, can pump during the day or develop other creative solutions that allow for both mother and baby to thrive. See Margot Slade, Have Pump, Will Travel: Combining Breast-Feeding and a Career, N.Y. TIMES, Dec. 14, 1997, § 3, at 12.


the last 100 years, muted forms of discrimination still permeate our patriarchal milieu.

In the United States, PGD is currently most commonly sought for sex selection of a third child, when a family already has two children of the same sex. 92 However, as the technology gains popularity and becomes more readily available, an increasing number of families may potentially use PGD to select the gender of a first child. A recent survey of 561 patients seeking the assistance of reproductive technology revealed that 41% of study participants would use PGD for gender selection if no additional fees were involved. 93

At this time, the studies regarding American preference for the gender of a first infant vary tremendously in result. One study, appearing in the March 2005 publication of Fertility and Sterility suggested that if PGD were offered for sex selection of a first born child, women would choose males and females in “approximately equal numbers.” 94 Yet, earlier research, published in Professor Lori Andrew’s book The Clone Age, indicated that within the sector of the population interested in using sex selection techniques, 81% of men and 94% of women expressed a desire to ensure that their first born was a male. 95 A 2000 survey of the general American population found that, if individuals were limited to only having one child, 42% expressed a preference for a boy, where only 27% desired a girl. 96 Another study, jointly conducted by economists at University of Rochester and University of California at Los Angeles, found that “American fathers stubbornly prefer sons to daughters by a margin of more than two to one.” 97 More alarmingly, these economists found that the patriarchal preference for male infants shapes important familial decisions regarding money management; they speculated that as technology allowing parents to choose the sex of infants becomes increasingly available, the gender-ratio in America may slowly become male dominated. 98 Also increasing the risk of a gender imbalance in

93 Choosing Sex of Child Popular Among Infertile Women, OBESITY, FITNESS, & WELLNESS WEEK, Apr. 2, 2005, at 86.
94 Id.
95 Roberts, supra note 92, at 26 (citing LORI ANDREWS. THE CLONE AGE 143 (1999)).
96 Dore Hollander, Americans are Boy-Crazy, 33 FAMILY PLANNING PERSPECTIVES 98, 98 (2001).
98 Id.
The United States is the fact that PGD clinics have used "niche marketing" to target the cultural sensitivities and infant preferences in the Indian-American community, which is one of America's fastest-growing ethnic populations. The primary argument against allowing PGD for gender selection is that it will promote discrimination against women. Regardless of whether Americans possess a modest desire or a deeply rooted longing for a male child, allowing gender selection perpetuates the "societal belief that women are a greater burden and of less inherent value than men." Since it is the wealthy that will be able to afford sex selection, and there is an unfortunate preference for male children, some fear that allowing gender selection will further decrease a woman's ability to access "the nation's assets." In other words, PGD would result in a disproportionate number of males in the powerful upper class, as compared to the lower economic class, where individuals would not be able to take advantage of PGD.

Additionally, allowing parents to use gender selection technology would increase the number of first born males, thereby providing a further advantage to the male sex. Not only do first-born children possess a "monopoly on their parents' time and attention early in life," but research has shown that first-born children "tend to be independent, active, dominant, intelligent, and responsible"—a recipe for future success. Roberta Steinbacher, a social psychologist from Cleveland State University, argues that since first born children are more successful in their general achievements and education, PGD for gender selection generates concern that a "second class citizenship of women would be institutionalized by determining that the first born would be a boy."

Also of great concern is the potential gender imbalance of the population if PGD is regularly used for gender selection. For example, in China, where female infanticide was common practice for many years, the country currently has the largest "gender disparity

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100 Remaley, *supra* note 17, at 273.
101 *Id.* at 274.
102 *Id.* at 275.
103 *Id.*
105 Andrews, *supra* note 95, at 144.
among newborns of any country in the world."\textsuperscript{107} One region of China recorded the birth of 144 boys for every 100 girls.\textsuperscript{108} Although these numbers offer staggering proof that gender selection affects population demographics, some critics argue that when the population of women decreases, "market demand" for women will increase, and the overall population will balance itself accordingly.\textsuperscript{109} However, an unfortunate realistic market experiment proved this theory untrue: In China, there are an insufficient number of women to marry the current population of bride-seeking men. However, rather than recognizing the lack of women, [the county] has blamed men for not being wealthy or secure enough to obtain a wife. So, in order to balance this out, there has been a national call to increase men's salaries and social status. Therefore, the result of sex selection against women has been to increase men's salaries without a resulting increase in women's salaries—thereby detracting from equality in the workforce.\textsuperscript{110}

Moreover, some argue that a significant decrease in the number of American women could result in a "violent and less cultured society."\textsuperscript{111} This forecast is based on statistical evidence that men commit a greater number of violent crimes, that women attend church more frequently than men, and that women extend greater support to the arts and other "cultural events."\textsuperscript{112}

One author, after examining several of the crucial arguments made above commented:

Still, it is not clear that practices that prevent other females from being born harm \textit{existing and future} females. Of course, such strong preferences for males may well be sexist, and reflect a sexist society that strongly devalues females and manifests this in an array of other practices. But it is not clear how selecting male rather than female offspring hurts \textit{existing and future} women. A significant change in the gender ratio may well create major societal disturbances, but these are felt

\textsuperscript{107} Eckholm, \textit{supra} note 106, at A3.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} Remaley, \textit{supra} note 17, at 278.
\textsuperscript{110} \textit{Id.} at 278-79.
\textsuperscript{111} Faust, \textit{supra} note 104, at 291.
\textsuperscript{112} \textit{Id.} at 290-91.
by males and females alike. Surplus males will be unable to find mates and companions, and, given the traditional gender distribution of labor, elderly parents may end up receiving less care from the boys they preferred than they would have received from girls. Indeed, it is likely that gender ratio imbalances are ultimately self-correcting. As the shortage of females bids up their value and leads to greater demand for them, their numbers will increase.\textsuperscript{113}

Although the author attempts to argue that use of PGD for gender selection does not harm existing American women, and in fact may make women "more valuable as a result of their shortage,"\textsuperscript{114} he raises another critical issue with PGD for gender selection. There are certain things in a matured society that we do not do, simply because they are wrong. Although undertones of discrimination seep through our society in overt and hidden ways, discrimination is something we, as a country, should seek to eradicate. One physician at the Society for Assisted Reproductive Technology commented, "[s]ex selection is sex discrimination, and I don't think that is ethical."\textsuperscript{115} The idea of a market for women surging and falling objectifies and discriminates against women by making them a commodity. The proposition that women are a faceless market product, that could simply be restocked if ever depleted, is a disturbing concept. This market ideology loses sight of the individual contributions of each woman that would be lost as a result of allowing gender selection. The individual ideas and contributions, not the mass merchandise effects, are of central importance to this discussion. Feminism itself and the fundamental principles necessary to combat gender discrimination maintain that gender equality is "about justice, fairness, and access to the broad range of human experience. It's about women consulting their own well-being and being judged as individuals rather than as members of a class with one personality, one social function, one road to happiness. It's about women having intrinsic value as persons...."\textsuperscript{116} Moreover, the notion that a woman's "market value" would increase once the dominant male was unable to find a mate perpetuates what many

\textsuperscript{113} Robertson, \textit{supra} note 33, at 458 (emphasis added).
\textsuperscript{114} \textit{Id.} at 459.
\textsuperscript{115} Knox, \textit{supra} note 35, at 450
\textsuperscript{116} \textsuperscript{WOMAN'S STUDIES PROGRAM AT SUNY NEW PALTZ, supra note 1 (emphasis added).}
thought was a long-forgotten discriminatory ideology: that women are of lesser value and dependent on the male figure for inherent worth.

C. I Want Damages: I Didn’t Want A Girl

Probing into how courts would handle physician negligence in the area of PGD and gender selection furthers the examination of whether or not families should be allowed to use this technology for such a purpose. In light of recent developments in tort law, especially in the area of wrongful birth, the legal actions that would follow from allowing a physician to screen an embryo for gender selection, prior to implantation, create bizarre and offensive results. A recent trend in negligence law, and a tort that is now recognized in a majority of jurisdictions is wrongful birth. Wrongful birth actions are brought by the parents of a disabled child and essentially allege that, “but for” the medical services, often including genetic counseling and ultrasound interpretation, provided by the defendant physician, “the parents would have aborted the fetus, thereby preventing the birth of the child.” Courts were initially hesitant to recognize wrongful birth, struggling to find liability since the physician did not cause the birth defect, but

118 Etkind et al. v. Suarez, 519 S.E.2d 210, 211 (Ga. 1999). Wrongful birth actions must be distinguished from claims for wrongful life and wrongful conception. Wrongful life claims are those brought by a “defective child” who seeks to claim damages from a physician on behalf of himself based on a “failure to warn the parents of potential defects.” See generally Glascock v. Laserna, 30 Va. Cir. 366 (1993). The child alleging wrongful life essentially claims that “she was the beneficiary of” the physician duty, she had a “right not to be born,” and never being born would essentially be preferable to her current disabled condition. Id. at 369. The large majority of courts have refused to recognize wrongful life actions, often making philosophical arguments regarding the absurdity of a child claiming that he would be better off if he were never born. One court, in refusing to recognize an action for wrongful life stated, “A legal right not to be born—to be dead, rather than to be alive with deformities—is a theory completely contradictory to our law.” See generally Bruggeman v. Schimke, 718 P.2d 635 (1986). Another court, finding itself in a similar position stated, “[t]here comes a point at which three judges on an intermediate appellate court should restrain themselves from making new law. The decision whether a life with birth defects has a greater or lesser value than no life at all is beyond such a point.” See generally Taylor v. Kurapati, 600 N.W.2d 670 (Mich. Ct. App. 1999). But see generally Deana A. Pollard, Wrongful Analysis in Wrongful Life Jurisprudence, 55 ALA. L. REV. 327 (2004) (arguing that the analysis in wrongful life cases is flawed and presenting policy considerations advocating for the recognition of such a tort in American jurisprudence).
simply failed to recognize it.\textsuperscript{119} However, following \textit{Roe v. Wade},\textsuperscript{120} which provided a woman with the opportunity to abort an afflicted fetus, a post-conception remedy became available. With the availability of legal abortions, proper prenatal and pre-conception testing became crucial to the decision in some families to conceive or continue with a pregnancy.\textsuperscript{121} Restated, since following \textit{Roe} a mother can legally choose to terminate a pregnancy, a physician’s negligent prenatal or pre-conception testing is highly relevant; if, in reliance on the physician’s advise, a woman chooses to continue with a pregnancy that she could have legally terminated had she possessed the proper information, the physician who wrongfully counseled her can now be held liable. But, prior to \textit{Roe}, the physician’s advice was essentially irrelevant, since regardless of the medical counseling provided, the mother had no legal post-conception remedy (that is, abortion). Courts allowing wrongful birth claims typically find the judicially created tort to be indistinguishable from other medical malpractice cases.\textsuperscript{122} One court analogized a wrongful birth claim to a situation where a physician negligently failed to diagnose a patient with cancer.\textsuperscript{123} The court reasoned, “Even though the physician did not cause the cancer, the physician can be held liable for damages resulting from the patient’s decreased opportunity to fight the cancer, and for the more extensive pain, suffering and medical treatment the patient must undergo by reason of the negligent diagnosis.”\textsuperscript{124} Essentially, secondary to the physician’s negligence, the cancer victim lost the chance to obtain

\textsuperscript{119}Keel v. Banach, 624 So. 2d 1022, 1024 (Ala. 1993)
\textsuperscript{120}See generally Roe v. Wade, 410 U.S. 113 (1973). This case was of seminal importance in wrongful birth actions. See Hummel v. Reiss, 608 A.2d 1341 (N.J. 1992)(holding that there is no wrongful life cause of action that exists for children who were born before Roe v. Wade).
\textsuperscript{121}Ibid.
\textsuperscript{122}Greco v. United States, 893 P.2d 345 (Nev. 1995) at 349. However, some states have passed Wrongful Birth and Wrongful Life Statutes, prohibiting a parent from bringing such a cause of action. See 42 PA. CONS. STAT. §8305 (a) (2004) (stating in part, “there shall be no cause of action or award of damages on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born.”). See also, Dansby v. Jefferson, 623 A.2d 816 (Penn. Super. Ct. 1993) (upholding the constitutionality of Pennsylvania’s wrongful birth statute and stating the statute was “rationally designed to meet a legislative state interest). Ibid. at 820. The Dansby court found that the statute “reflected the state’s view that a handicapped child should not be deemed better off dead and of less value than a ‘normal’ child. Ibid.
\textsuperscript{123}Ibid.
\textsuperscript{124}Ibid.
certain medical treatments that could have benefited her. Similarly, in a wrongful birth action, a chance was lost: the "legally protected right to choose whether to abort a severely deformed fetus."

Although initially wrongful birth actions were brought alleging a lost opportunity to abort a “defective” fetus, these actions are increasingly used for physician negligence in the area of pre-conception genetic testing and counseling. The technology of PGD is virtually 100% guaranteed, but human error is certain to occur. If PGD is allowed for gender selection, and physician negligence causes a mother to conceive a girl rather than the desired boy, it seems that the mother would have a cause of action against the physician. In fact, one court, in refusing to recognize an action for wrongful birth, specifically inquired as to where the boundaries of the tort would be drawn:

When will parents in those jurisdictions [recognizing wrongful birth] be allowed to decide that their child is so ‘defective’ that given a chance they would have aborted it while still a fetus and, as a result, then be allowed to hold their physician civilly liable? When a fetus is only the carrier of a deleterious gene and not itself impaired? When the fetus is of one sex rather than the other?

Although courts have expressly recognized the concern that unregulated fetal and pre-conceptual screening technologies could allow parents to sue physicians for negligent gender screening, as of yet, there is no documentation of such a legal action. But, by way of example, a claim for what has been referred to by some as the legal absurdity of wrongful birth would emerge as follows: A mother in a recent wrongful birth case alleged that due to the physician’s negligence, her child, created using PGD to avoid certain genetic diseases, was born with cystic fibrosis, and damages were due for medical costs related to caring for the disabled infant, and for emotional pain and suffering related to defendant’s breach. A claim that a physician negligently placed a female ovum using the PGD procedure when a male ovum was requested would develop similarly; a mother would claim that PGD was used to conceive a male infant, and due to the physician’s negligence a female infant was delivered,

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128 Paretta, 760 N.Y.S.2d at 642.
causing compensatory damages and emotional pain and suffering on behalf of the mother. With the continued advertising by law firms, regarding the multi-million dollar settlements obtained for families who "wish they, or their children, had never been born," the continued momentum for expansion of these lawsuits is bound to occur.¹²⁹ And in a frontier of legal development, where parents are allowed to make the chilling claim in open court that their child would be better off dead,¹³⁰ a claim for physician negligence during gender selection is not an exceedingly unimaginable stretch.

The question of damages in an erroneous gender case is where the issue becomes provocative. The traditional rule of "tort compensation is that the plaintiff should be put in the position that he would have been in absent the defendant's negligence."¹³¹ A negligent physician is liable for any damages proximately caused by his or her negligence.¹³² Within states recognizing the tort of wrongful birth, there is little agreement as to damages.¹³³ The majority of states refrain from awarding damages for the cost of rearing a normal healthy child, and allow families to recover only for "extraordinary medical and custodial expenses."¹³⁴ Within a community that exerts social pressures such as those felt in India, it is highly plausible that a court would consider awarding compensatory damages suffered by the family as a result of the physician's negligence: that is, the dowry expenses and the expenses associated with preparing an Indian woman for marriage. Although certainly more subtle, but nonetheless present, are the differences in economic worth between an American boy and girl. In our country, a family could argue for recovery of the difference in potential earning power. If as a whole, a woman in the latter part of her career makes 74.6% of what a man collects for the same job,¹³⁵ a family may argue that they are entitled to recovery of that 25.4% of an average man's salary throughout his life span because the family reasonably relied on the presumption that a male child would be in a better place to support them during their aging years. If a family were to present convincing statistics, as those recently published by the Department of Labor, and demonstrate that they relied upon the

¹²⁹ Webber, supra note 127, at 10.
¹³⁰ Id.
¹³¹ Keel, 624 So.2d at 1029.
¹³² Id.
¹³³ Id.
¹³⁴ Greco, 893 P.2d at 350.
¹³⁵ United States Department of Labor, supra note 88, at 1.
difference in potential earning, courts’ directional movement of compensation in wrongful birth claims would demand that a judge at least review the merits of the claim.\footnote{But see Thibeault v. Larson, 666 A.2d 112, 113 (Me. 1995). Maine has a Wrongful Birth Statute that denies recovery of certain damages and in wrongful birth and wrongful life cases. See ME. REV. STAT. ANN. tit. 24, § 2931 (West 2004). Part of the statue provides that no person “may maintain a claim for relief or receive an award for damages based on the claim that the birth and rearing of a healthy child resulted in damages to him.” Id. at § 2. Therefore, it seems that in states like Maine, a family could not maintain an action for wrongful birth of a healthy female child, when a male child was requested, even when the “error” was due to physician negligence.}

Even if compensatory damages awarded for the actual financial loss due to the delivery of an American female infant were, in relevant terms, minimal, we have an obligation to recognize the influence of our laws on the international community. If Americans award compensatory damages for the birth of a female infant, but then continue to condone the practices of female degradation in India and other devotedly patriarchal cultures, we impart a considerable double standard.\footnote{Marcy Darnovsky, Revisiting Sex Selection: The Growing Popularity of New Sex Selection Methods Revives an Old Debate, 17 GENEWATCH 1, 13 (2003).} As a model for other countries, we cannot practice a “do as I say, not as I do” philosophy. The “the increased use and acceptance of sex selection in the U.S. would legitimize its practice in other countries, while undermining opposition by human rights and women’s rights groups there.”\footnote{Id.}

A more plausible method of recovery for a family who desired a male infant is the claim of emotional distress. Over an objection by the defendant that it was “morally, ethically, and legally” wrong to treat a child’s life as something that should have never happened, a New Jersey court allowed for a mother’s recovery for the emotional distress of raising a disabled child.\footnote{Lodato v. Kappy, 803 A.2d 160 (N.J. Super. Ct. App. Div. 2002).} The court did not apply the “benefits rule,” a rule that could have offset the mother’s monetary reward for emotional distress by the “percentage of joy and benefit” she received from raising the disabled child.\footnote{Id. at 164.} Some courts are deeply offended by the mere examination of these claims, and one court, denying recovery for a “wrongful birth” because of the benefits rule wrote, “to maximize their recovery under the benefits rule, parents must demonstrate that they did not want their child and that the child is of minimal value to
The court found this "unseemly spectacle of parents disparaging the 'value' of their children or the degree of their affection for them in open court" to be undesirable.\textsuperscript{142}

However, in states like New Jersey, where emotional distress claims are allowed to proceed, and such distress is not offset by the benefit of raising a child, a family could recover for the emotional distress of delivering a baby of a sex they did not want and were unprepared to raise. For example, in a wrongful birth action brought by the mother of an infant with multiple congenital defects, an Alabama court allowed the mother to proceed with an emotional anguish claim based on the allegations that negligent pre-natal testing "directly deprived her" of the "option to accept or reject a parental relationship with the child and thus caused [her] to experience mental and emotional anguish" after she discovered that "she had given birth to a child afflicted with severe multiple congenital abnormalities."\textsuperscript{143} A mother, after giving birth to a female infant due to a physician's negligent completion of a PGD procedure, could easily claim that she suffered emotional anguish at the birth of a female infant that she did not want, and moreover, was denied the right to decide whether to carry the infant to term.

American law is not far from recognizing a mother's claim for physician negligence related to the birth of a female infant when the mother had specifically requested a male. Courts have proclaimed that public policy actually "supports rather than militates against, the proposition that [a] mother not be impermissibly denied a meaningful opportunity to make [the] decision whether to have an abortion."\textsuperscript{144} With this underlying public policy, a woman is free to argue that "but for" the negligent counseling by a physician, she would have aborted her female fetus due to her ardent preference for a male child.

D. Why Would A Mother Prefer a Son?: An Examination of the Conflict Between Mothers and Daughters

One question necessarily emerges from this examination of using PGD for gender selection and the potential resulting discrimination: why do mothers internationally seek to perpetuate discriminatory practices by

\textsuperscript{141} Taylor, 600 N.W.2d at 680.
\textsuperscript{142} Id. at 680 (quoting Cockrum v. Baumgartner, 447 N.E.2d 385 (Ill. 1983)).
\textsuperscript{143} Keel, 624 So.2d at 1030.
\textsuperscript{144} Robak v. United States, 658 F.2d 471, 474 (7th Cir. 1981); Berman v. Allan, 404 A.2d 8, 14 (N.J. 1979); Blake v. Cruz, 698 P.2d 315, 318 (Idaho 1984). See also Webber, supra note 127, at 11.
continuing to prefer male children at the expense of little girls, and, eventually to the detriment of the female society as a whole? One possible answer is that there is an inherent generational animosity or misunderstanding between women of different ages and backgrounds, such that women are left without the necessary resources to bind together to fight discrimination. Therefore, they instinctively, without taking time to question the rationale, rely on the preferences and intuitions taught by women before them, and make choices, like preferring male offspring, that further the suppression of women. Another potential explanation is that women are simply seeking to protect their daughters from the hardships that they experienced simply on account of their gender. The answer, it seems, is that both are somewhat correct. That is, that each woman, under different societal pressures, in different personal circumstances, makes decisions regarding her female offspring reflective of the history that she, as a woman, has so far experienced.

1. The Cycle of the Maternal-Child Relationship and How It Perpetuates Discrimination

Literature examining the relationship between mother and daughter traditionally assumes conflict and tension.\textsuperscript{145} This perceived hostility is so engrained in the mother-daughter relationship that it is often described as a universal generational burden, rather than an individual experience.\textsuperscript{146} Our culture perpetuates the myth that “the role of the mother is to initiate her daughter into the patriarchal family romance—heterosexual pursuit of a mate, marriage, [and] motherhood.”\textsuperscript{147} In feminist writings, however, “the heroine in [the] story is the feminist daughter who establishes herself—her singularity—by refusing to enact the plot. She eschews the cultural conventions of femininity and identifies herself in opposition to the mother; she is empowered by striving to get free of patriarchy.”\textsuperscript{148} This conflict between a woman’s place in traditional American society and the rejection of conventions


\textsuperscript{146}Alicia Ostriker, Praying For the End to Anger, 20 WOMEN’S REV. BOOKS 10 (2003). See also Ruth E. Ray, The Uninvited Guest: Mother/Daughter Conflict in Feminist Gerontology, 17 J. AGING STUD. 115 (2003). See also Brenda Wade & Yanick Rice, Mamma Drama, ESSENCE, May 1997, at 128 (stating that the misunderstanding and tension between a mother and daughter is “a chain of unexpressed heartache that can reach back for generations.”) \textit{Id.} at 128.

\textsuperscript{147}Ray, supra note 146, at 115.

\textsuperscript{148}\textit{Id.}
by an autonomous woman potentially creates anger within the mothering relationship. Society’s expectations that girls will grow up to marry and raise children and the resistance of young women to yield to these discriminatory expectations causes conflict between mother and daughter. One female college professor observed that so many female students had an “image of mothers who had disappointed them: through their failure to confront or to wield authority, through their repression of their daughters’ spirit and energy, or through their inability to grow old in challenging and dynamic ways.”

This inherent tension potentially resolves in one of two ways. The resolution involves an understanding that much of the tension between mother and daughter is a symptom of living in a patriarchal society where women are expected to fervently resist and desperately fear becoming like their mothers. This option, that is, recognition of the conflict, can result in a strengthened relationship between mother and daughter, who may seek to eradicate discrimination together. The second manifestation is that the differences and tensions between mother and daughter might lead to a general inability of the woman to cope with or relate to females in nontraditional relationships. The “significant material consequences” of this outcome are noteworthy: “lack of communication and networking among feminists, self-promotion without regard for other women’s career advancement, failed job searches and tenure cases due to lack of collegial support, and inability to mobilize for collective action and institutional change.”

It is these outcomes that cause women as a whole to fail to work together to create positive change and cause women to disregard the discriminatory results of using PGD to choose a male infant. If women are kept apart, separated by generational tensions and then divided further by the intrinsic tensions of living in a patriarchal society, they will not find the inner strength to unite to combat societal discrimination.

2. Choosing Never to Bring into Existence: An Act of Love?

Another, albeit rather radical, reason for women to choose a male infant over a potential daughter is to save a future girl from the tribulations

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149 Ostriker, supra note 146, at 10. In fact, one woman writes that we are angry “at out mothers not because they are so much stronger then we are, but because we do not want to be trapped by their weakness.” Id.
150 Ray, supra note 146, at 118.
151 Ostriker, supra note 146, at 10.
152 Ray, supra note 146, at 118.
that that the mother was forced to endure: to choose not to bring into existence out of love. A story reflecting upon this situation is presented in the literary work of Toni Morrison, *Beloved*. In this novel, a mother bound by slavery, endures appalling and inhumane treatment including beatings, measurements taken for "anthropological reasons," and having white students hold her down and steal her breast milk (seen as a "capturing" of her "motherhood"). In an act of love, she attempts to murder her children and successfully kills her baby girl. Her actions were "the ultimate gesture of a loving mother," as she killed to save her child from death of the "profoundest kind:" a "death of one's humanity" by the "brutalization of slavery." Her act of killing stemmed from protective love and a desire to save her children from the inhumanity she experienced. Cumulative negative life experiences forced this mother,

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to push her children through the veil, out, away, over there where no one could hurt them. Killing her children under such circumstances, where the prospect of life seem[ed] bleaker than the finality of death, seem[ed] merciful rather than cruel. It is not an innate badness which leads her to such desperate measures but a society which [had] denied and distorted her ability to love and to choose.156
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Moreover, contemporary research indicates that maternal filicide is not necessarily motivated by mental health psychosis, as so many assumed, but is instead committed by "mothers who cannot parent their children under the circumstances dictated by their particular position in place and time." Restated, a common theme internationally among mothers who practice filicide is that they are desperate and without viable options for raising and providing a good life for a child. One author wrote of mothers who committed infanticide: "Deep in their

155 *Id.*
156 *Id.*
157 Oberman, *supra* note 3, at 494. *See also* Diane Jennings & Ed Timms, *More Visible, Not More Common*, DALLAS MORNING NEWS, Aug. 4, 2002, at 6J. Stating that mothers often kill their children due to a lack of extended family and social support, but that 100 years ago mothers often killed to spare an infant from a "life of misery." *Id.*
hearts, these women feel they can’t be good mothers and the child would be better off not being raised by them, because they’re going to fail them.”

The choice to use PGD to ensure a male offspring, at the expense of the female community, can be viewed as a form of protective love. Consider, for example, the situation of a woman in India, who acquires her societal worth through her marriage, and is, therefore, forced to obey her husband when directed to abort or kill a female fetus or infant. In this social reality, the use of PGD, even when a mother is not forced to choose a female, will perpetuate the male dominant culture. Women will be inclined to choose males to protect a phantom future daughter from the ills of a society that the mother experienced.

Contemporary societal pressures in the United States differ dramatically from the unfortunate favoritism for male offspring that exists in countries like India and China. Clearly, unregulated use of PGD for gender selection threatens to increase overt discrimination in countries with a blatant patriarchal lifestyle. However, Americans maintain their own societal challenges, which potentially influence a mother’s decision to choose the sex of an infant. For example, a mother, who had struggled with her own career, who had fought with her own mother, who was inclined to marry to avoid being named an old maid, or who suffered physical abuse at the hand of a male partner may be inclined to use PGD to rear male offspring out of protective love. Even if not seeking out the technology for that purpose, when confronted with the choice, a woman might subconsciously wish to save her daughter from theoretical struggles.

Bolstering this argument is the fact that American’s generally perceive boys as the easier gender to raise. A 2001 Gallup poll reported that 53% of adults interviewed opined that raising a boy was easier, in comparison to 28% who thought that girls were easier to raise. Donna Lenhoff, general counsel at the National Partnership for Women and Families opined that families may be less likely to wish for a girl since the American woman’s existence, due to “persuasive ongoing discrimination—may in fact look less promising” to future

158 Clare Dyer, Law: Not Guilty as Charged: Killing Your Own Baby is Horrific But, in the Case of Women Such as Angela Cannings, Conviction for Murder—and a Life Sentence—are Wrong, GUARDIAN, May 14, 2002, at 16.
159 Oberman, supra note 3, at 503.
161 Id.
parents than a young boy’s potential life path.\textsuperscript{162} Ms. Lenhoff also rationalized the result of the Gallup poll by arguing that parents of little girls worry about potential sexual discrimination, harassment, and violence that the female child will eventually face.\textsuperscript{163} Kim Gandy, former executive vice president of the National Organization for Women in Washington rationalized the American preference, stating, “There’s no question that boys and men in general have an easier time of it in this world, so people view boys as easier to raise.”\textsuperscript{164}

Certainly, Americans themselves are not “rabid” sexists, but some argue that Americans believe others to be “rabid” sexists.\textsuperscript{165} For example, one proud first time father was surprised when people repeatedly came up to him with comments like, “[y]ou must be so proud it’s a boy.”\textsuperscript{166} The father did not understand; he was pleased just to have a healthy child. This kind of sexism seems somewhat self-perpetuating.\textsuperscript{167} And, women who experience different treatment on account of their gender, in any culture, may potentially wish to protect a future daughter from whatever type of discrimination was present in the society the women lived in.

CONCLUSION

Considering the current Indian demographics, which resulted in part from the use of PGD for gender selection and the discrimination against women, which persists in our own country, there is the potential in America for unregulated use of PGD for gender selection to perpetuate discrimination against women. There is also the possibility that this misuse of PGD will open the door to genetic manipulation that might decrease the existing population of women and worsen the subtle and overt discriminatory practices that exist in our society. Moreover, the legal actions that could potentially follow from the unregulated use of PGD for gender selection illustrate the bizarre and offensive results of allowing physicians to screen embryos, specifically with an eye towards male embryo implantation. The reason for, and the degree to

\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id. Kim Gandy is now the president of the National Organization for Women. See generally National Organization for Women, NOW Officers, at http://www.now.org/officers/kg.html (last visited Apr. 13, 2005).
\textsuperscript{165} Tyson, supra note 160, at 1.
\textsuperscript{167} Tyson, supra note 160, at 1.
which, mothers choose male infants to the detriment of female children is debatable. But, at the very least, this paper seeks to demonstrate that American women should be keenly aware of the possibility that PGD for gender selection could potentially undermine the progress made by American women and increase gender discriminatory practices in the United States.

The conclusion demands a particular answer: we should prohibit families from using PGD for gender selection for the sole purpose of obtaining a child of a particular preferred gender. PGD should be regulated because it allows domination of women through the discriminatory practice of disallowing their existence and creates yet another method for society to perpetuate discrimination against women. Feminism teaches that women are unique beings—ends within themselves. We should be guided by this philosophy when considering the use of PGD for sex selection.¹⁶⁸

Although the question of whether we can regulate PGD remains open, as PGD for gender selection is so tied to procreation that a state regulatory statute must stand up to strict scrutiny, this article has provided several compelling reasons for a state to enact a statute forbidding gender selection via PGD. Women must join together against PGD, against the furtherance of commoditization of women, and against discrimination. Women must together embrace the ultimate realization: that “feminism is the radical notion that women are human beings.”¹⁶⁹

¹⁶⁸ Woman’s Studies Program at SUNY New Paltz, supra note 1.