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SEX SELECTION ABORTION AND THE BOOMERANG EFFECT OF A WOMAN'S RIGHT TO CHOOSE: A PARADOX OF THE SKEPTICS

LYNNE MARIE KOHM*

Feminism becomes impoverished liberalism if its only meaning is "anything goes."  

Reproductive alternatives are growing at a profound rate. Legal implications abound because the law cannot keep up with changes in medical technology. As society witnesses on a daily basis what the medical research community has already performed or discovered, we try desperately to gasp for some ethical air and comprehend the myriad implications of such research. We think about moral implications later, and long term social outcomes rarely, if at all. It is past time for women to think about what women do to women by disregarding or failing to consider long term social consequences in light of reproductive alternatives, particularly sex selection abortion.

One of the most useful technologies to couples using artificial reproduction techniques is "selective pregnancy reduction," a medical procedure used to reduce a multiple pregnancy, often a multiple pregnancy induced by in vitro fertilization or drug therapy. Genetic technology and prenatal testing have allowed

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* Assistant Professor of Law, Regent University School of Law; J.D. Syracuse University College of Law, 1988; B.A. Albany University (S.U.N.Y.), 1980. It is with much appreciation and gratitude that I express my sincerest thanks to the American Center for Law and Justice for making this project possible. I am very grateful for the priceless work of Colleen Holmes in research, editing, and discussing these issues. Furthermore, I am blessed beyond imagination with my own daughter, to whom I dedicate this article. Kathleen, may you know that "strength and dignity are your clothing," as I have prayed those virtues on your behalf since we found out you were a girl. May you, therefore, as a woman, be able to "laugh at the days to come." Proverbs 31:25.

4. Elizabeth Villiers Gemmette, Selective Pregnancy Reduction: Medical Attitudes, Legal Implications, and a Viable Alternative, 16 J. Health Pol. Pol'y & L. 383 (1991). Gemmette discusses the irony of this sort of abortion. Pregnancy reduction abortion is generally performed because too many pregnancies have resulted from fertility therapy. A woman may want one child, but have achieved several pregnancies. These multiple pregnancies endanger each other, thus causing the need for elimination of all but one, which can only be
parents to choose numerous qualities and characteristics of their children, even to the point of "designing" their babies.\footnote{Miller & Kohm, \textit{supra} note 3, at 1; see also generally \textit{Rothblatt, supra note 2} (discussing reproductive technology and genetic research and their potential for good and harm). Genetic engineering is largely beyond the scope of this article, however, the matter is certainly noteworthy as it presents challenges to our traditional concepts of morality in reproduction. Since 1958 when Watson and Crick transformed biology by their work with DNA, "we have been racing toward a seemingly irreconcilable clash between medical technology and legal ethics." Id. at 1. A New York colleague of mine stated it this way:}

"... We are now entering an era in which technology has advanced to meet desire so that sex preferences may be realized through means that promise a technological utopia for sexist societies."\footnote{Jodi Danis, \textit{Sexism and "The Superfluous Female" Arguments for Regulating Pre-Implantation Sex Selection}, 18 \textit{Harv. Women's L.J.} 219, 220 (1995).} Sex selection technology can be achieved in numerous forms,\footnote{Local libraries and bookstores abound with books that offer "homemade" techniques for achieving the desired sex of a future child before conception, but after conception there are only a few ways to determine the sex of a fetus. During the performance of a routine ultrasound scan, the technician can often offer an educated guess as to the sex of the baby without guaranteeing results. Much more accurately, there are two procedures for identifying the sex of the fetus. During the first trimester of a woman's pregnancy, chorionic villi sampling is used. In this procedure fetal cells are obtained from a suction tube inserted through the cervix, and the DNA of the cells is examined for fetal sex determination. See Betty B. Hoskins & Helen Bequaert Holmes, \textit{Technology and Prenatal Femicide}, in \textit{Test Tube Women: What Future for Motherhood?} 237, 238-39 (Rita Arditti et al. eds., 1989). Amniocentesis is the most popular technique, however, and amniotic fluid is obtained in the second trimester of pregnancy to provide genetic information of the fetus. See Frances E. Kobrin & Robert G. Porter, Jr., \textit{Sex Selection Through Amniocentesis and Selective Abortion}, in \textit{Sex Selection of Children} 47 (Neil G. Bennett ed., 1985). The latter procedure is generally used to diagnose chromosomal or metabolic abnormalities, sex-linked diseases, or neural tube defects. Id.} however, this article will focus on the choice of abortion to plan the gender of a child. Sex selection achieved by abortion. The irony is that this mother desperately wanted to conceive a child, and now she has to choose which pregnancy is most wanted, and discard those of the surplus of "wanted" pregnancies. Gemmette suggests the fallacy of reasoning that abortion is performed only for "unwanted" babies, causing multiple pregnancy reduction to breakdown the abortion analysis. \textit{See id.} This article will further discuss the implications for sex selection in such a context.

\footnote{See Miller & Kohm, \textit{supra} note 3, at 1; see also generally \textit{Rothblatt, supra note 2} (discussing reproductive technology and genetic research and their potential for good and harm). Genetic engineering is largely beyond the scope of this article, however, the matter is certainly noteworthy as it presents challenges to our traditional concepts of morality in reproduction. Since 1958 when Watson and Crick transformed biology by their work with DNA, "we have been racing toward a seemingly irreconcilable clash between medical technology and legal ethics." \textit{Id.} at 1. A New York colleague of mine stated it this way: Genetics has thus been the source of an enormously dangerous temptation: to use genetic knowledge to improve on human nature, to give us more choice about our human traits, and to get rid of genetically based disease . . . or the people with disease . . . . In the eyes of its most enthusiastic supporters, genetic knowledge and application are expected to become the greatest of all scientific breakthroughs in the history of medicine. We will, finally, understand the deepest biological basis of illness and disease. Even those who are something less than true believers are impressed with the possibilities, for both good and ill. Daniel Callahan, \textit{The Genetic Revolution}, 66 N.Y. St. B.J. 30, 30-31 (1994). \textit{6. Jodi Danis, Sexism and "The Superfluous Female": Arguments for Regulating Pre-Implantation Sex Selection}, 18 \textit{Harv. Women's L.J.} 219, 220 (1995). \textit{7.} Local libraries and bookstores abound with books that offer "homemade" techniques for achieving the desired sex of a future child before conception, but after conception there are only a few ways to determine the sex of a fetus. During the performance of a routine ultrasound scan, the technician can often offer an educated guess as to the sex of the baby without guaranteeing results. Much more accurately, there are two procedures for identifying the sex of the fetus. During the first trimester of a woman's pregnancy, chorionic villi sampling is used. In this procedure fetal cells are obtained from a suction tube inserted through the cervix, and the DNA of the cells is examined for fetal sex determination. See Betty B. Hoskins & Helen Bequaert Holmes, \textit{Technology and Prenatal Femicide}, in \textit{Test Tube Women: What Future for Motherhood?} 237, 238-39 (Rita Arditti et al. eds., 1989). Amniocentesis is the most popular technique, however, and amniotic fluid is obtained in the second trimester of pregnancy to provide genetic information of the fetus. See Frances E. Kobrin & Robert G. Porter, Jr., \textit{Sex Selection Through Amniocentesis and Selective Abortion}, in \textit{Sex Selection of Children} 47 (Neil G. Bennett ed., 1985). The latter procedure is generally used to diagnose chromosomal or metabolic abnormalities, sex-linked diseases, or neural tube defects. Id.}
abortion, or sex preselection as it may also be labeled, is rapidly becoming an acceptable family planning alternative for Americans.

Most sociological polling research on birth order preference strongly suggests that because males are preferred as first borns, female babies will be the first to be reduced. Indeed, this has already occurred in many Asian nations. Sex selection abortion and female infanticide are widely known to be the most utilized method of family planning in India, China, and many other Asian countries. In these countries, sex selection abortion contributes to an already unbalanced sex ratio occasioned by neglect of female children. "Due to inadequate care afforded to female children and to women, an estimated sixty million to one hundred million women are 'missing' from the world's population, including twenty-nine million in China and twenty-three million in India."

It could be easily chronicled that women are not gaining respect and power by increasing their numbers, and yet this article seeks to show that neither is it an evil patriarchy that is inhibiting women from conception to birth. Rather, the culpability lies with biologically-adult women in a pop-culture that values abortion on demand for any reason, even if that reason be that an unborn woman is "unwanted."

8. Journalists may use the term "gender selection," but feminists will likely prefer the use of "gender" to refer to a social construct, while using the word "sex" to connote biological traits. Danis suggests that "people who wish to sex select children may really be seeking a child who has characteristics that stereotypically belong to a particular sex, so the term 'gender selection' might more accurately describe the psychological and social desire to select a child's sex." Danis, supra note 6, at 220 n.4.


11. See id. Male children are preferred for agrarian work, societal status and legal purposes, while the implications of a dearth of women in such societies could very well be female sex-slavery, wife-selling, rampant prostitution, and rampant male deviancy, as suggested by Sen. Already, the lack of women is evident in the small villages – there are very few girls in the school classroom. See id.


China leads the world in the oppression of women, forcing these women to undergo abortions if they violate the one-child-per-family policy and often requiring them to submit to sterilization or to the insertion of intra-uterine devices (IUDs). Communist Party population workers chart the menstrual cycles of millions of Chinese women in the workplace. Tragically, girl babies are frequently killed at birth and orphaned little girls are left to starve to death. According to a recent article in the London Times, Chinese women suffer the world's highest suicide rate. See China/MFN: Which Side Are You On?, WASHINGTON WATCH, Apr. 18, 1997, at 1.
Given the well-documented societal preference for male children — and the fact that millions of women, as well as men, in the western world, not just third world countries, still react to the births of daughters with disappointment, sorrow, and even economic and social penalties — the potential widespread commercial availability of sex preselection techniques opens up ominous possibilities.13

A critical account of the feminist plank of abortion on demand’s boomerang effect has only recently been popularly advanced,14 and not yet fully exposed in the national legal conversation. The goal of this project is to illuminate the backlash against the female gender inherent in the alternative of sex selection abortion, proving the disempowerment of pro-choice rhetoric and the disadvantage that Roe v. Wade15 and its progeny present to women in particular, and, as a result, to American society in general.

Women must bridge the chasm between feminist jurisprudence on abortion, and the truth of the legal precedent in light of current technology and culture. Feminists are unlikely to accept this task, due to obvious intrinsic conflicts. It must be done, nonetheless, by women. This gap can only be bridged by women who will reveal and confront the truth of the matter of life and liberty for a woman and an unborn woman, and the inalienable right, regard and respect each deserves. Women can (and should) be empowered to defend women, born and unborn, in the most altruistic and unselfish model. If feminism truly distrusts the new reproductive technologies,16 there is much room for the encouragement, if not outcry and demand, that all women wisely use their liberty for the


The first artificial womb is bound to be a million-dollar apparatus, tightly tethered to the laboratory during its first year of development . . . . There is, similarly, a broad continuum in terms of the immediacy of social impact of this new technology: at one end is the unlikely possibility of human-age hybrids, while at the other end lies the more pressing issue of sex preselection.

Id. at 1044.

14. See generally Cherry, supra note 1; Danis, supra note 6. Cherry and Danis have begun this conversation with superior scholarship and feminist courage. Unlike these women, however, I will use the notion of fetal personhood to place the decision to abort based on sex selection in the context of the community of all women.


16. See Winkler, supra note 13, at 1047 (stating that feminists also fear that “recent gains in women’s reproductive autonomy may be lost back to the medical establishment”).
good of all women, and therefore society. Women must determine to take back control, not through insistence upon autonomy via medical technology, not through anger or United Nations "legislation," but by maintaining strength, self-control, and wisdom, free of self-centered choice.

The present may mark one of those watersheds in which the interpretation of the basic goal of equality is reconsidered and in which its meaning for feminism’s political and social program is altered . . . prompting feminists to ask whether the movement’s current positions on motherhood, choice, and other issues of primary concern to women remain expressive of the egalitarian ideal.17

This egalitarian ideal rests on something much more formidable than temporal self interest.

This article will use sex selection abortion to expose the disempowerment of the philosophy and rhetoric of choice. Section One begins with a philosophical framework for gender equality, and the liberal twist on liberty. Section Two discusses how this framework was the basis for the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and further analyzes the concept of gendercide18 through abortion in light of these constitutional parameters. The current state of selective pregnancy reduction and other opportunities for genetic selection of offspring characteristics are examined in Section Three, while Section Four discusses the cultural and medical aspects of reproductive technology and the subconscious development of gendercide. This will set the stage for Section Five which will detail sociological studies on sex preference and birth order among American parents, and related socio-cultural material. Section Six reviews the case law in the area of abortion and relevant regulation thereof, and Section Seven confronts the problem of gender protection due to the lack of regulation of abortion providers. The conclusion challenges all women in general, and women’s right activists in particular, to cross the invisible abortion line that may have been drawn in the sand, to act nobly in

17. Id. at 1048 (in a section entitled “Feminist Dilemma Regarding Reproductive Technology”).

18. "Gynocide" or "femicide" might be more accurate terms when discussing sex selection abortion in the context of harm to all women, but I have chosen to adapt the gender neutral term "gendercide" as used by Mary Anne Warren, supra note 9, at 22, for convenience, and to note the potential use of the expression that women would use the practice to rid a society of all men, as well. The most accurate phrase for the purposes of this article, however, might be "self-gendercide."
favor of women, despite the right or opportunity to choose to terminate a pregnancy.

Moreover, an important objective of this article is to reach out to the feminist community with a concern for women as a gender, from women who are not represented by the feminist movement, but nonetheless are extremely concerned for women, their welfare, and for a civilized society where responsible liberty reigns. We, as women, think we’ve “come a long way, baby,” but in 1997 discrimination against women remains steadfast. “A sign near the driver’s seat showed an arrow pointing to the rear of the bus and in bold black letters, the word ‘women.’” This time it’s not religion that is harming women, it is other women.

This article will review how women are victimized by other women’s free exercise of self-centered and unlimited personal liberty. The salient point is that sex selection abortion is illustrative of the fact that abortion in general is destructive to women. What was once hailed as the choice that would free all women has come to shackle the future of women as a gender. Every woman can make a difference, and every woman deserves that opportunity, even in the face of being sent to the back of the bus, or being forced out of the womb.

I. PHILOSOPHICAL FRAMEWORK FOR LIBERTY AND EQUALITY AND THE POWER OF RHETORIC OVER REASON

John Stuart Mill advanced “one very simple principle” in his emphasis on liberty. In that principle, Mill declared,

19. A Virginia Slims cigarette ad jingle sang out “You’ve come a long way, baby, to get where you got to today.” This is interestingly analogous to the abortion industry. See infra § VII. The cigarette industry marketed their products to women appealing to their progress as a gender, and to their individuality, all the while killing them (see current cases against the tobacco industry for wrongful death claims) and endangering their potential offspring.

20. In Israel, It’s Women to the Back of the Bus, VIRGINIAN-PILOT, July 13, 1997, at A25. Subtitled, “The government is formalizing segregation in line with views of deeply observant Jews,” the article explains the decision to segregate the sexes based on religious orthodoxy in Israel. No mention was made of the value of lack thereof of one sex over the other, but one cannot help but think about Rosa Parks, in Selma, Alabama, (or Jackie Robinson in the U.S. Navy) and her refusal to be treated as less of a human because of her color. One has to wonder if Ms. Parks ever saw her gender as a strike against her too. One Israeli legislator, Naomi Hazan, was quoted as stating, “Public transportation as a vehicle for inequality is unacceptable.” Id. This is significant because women are still being sent to the back of the bus at the turn of the twenty-first century. This article will review the current state of discrimination against unborn women, or female fetuses, in light of sex-selection abortion, or what may be affectionately rather than clinically referred to as gender preference abortion.

the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection . . . . The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute.22

Elsewhere, Mill commended restraining discipline and the subordination of the aims and impulses of the individual to the ends of society.23 It appears that Mill either contradicted himself, or realized the dilemma of his one simple principle.24 A third possibility is that he assumed an inherent mutual reciprocity of rights and responsibilities in the context of a civilized society. The rule itself says very little about standards of conduct, and what happens when one individual’s ideas conflict with another’s. Furthermore, it ignores the necessity of responsible others in preserving that right for any one. The mutual reciprocity is either implicit or assumed, otherwise the rule is impossible.25

Liberty is based in this principle of reciprocity and in the notion that the inherent equality of all members of a society demands that all members equally enjoy that liberty. Thus, each individual who enjoys liberty must protect the liberty of the others. With every right, there is a corresponding duty.26

I have primarily chosen to pursue enlightenment philosophers as their work formed the basis for the American concept of liberty. Although other forms of philosophy and theories of feminism may also be appropriate to oppose sex selection abortion, they are dealt with elsewhere. See Cherry, supra note 1, at 175-87. Specifically, this article seeks to point out the liberty interests promoted by the skeptics, and how they viewed their own ideas with uncertainty at times.

22. Id. at 14.
24. See ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 59 (1996) (declaring that Mill’s principle is “both impossible and empty”).
25. See id. at 59-60. Bork states that the principle is impossible “because the complex relations of the individual and his society cannot be reduced to a single rule . . . . [A]ll of human history shows that is not the way any real society has ever operated.” Id.
The use of rights discourse affirms community, but it affirms a particular kind of community: a community dedicated to invigorating words with power to restrain, so that even the powerless can appeal to those words. It is a community that acknowledges and admits historic uses of power to exclude, deny, and silence— and commits itself to enabling suppressed points of view to be heard, to make covert conflict overt. Committed to making available a
There is a popular notion that expanding the sphere of liberty is always a net gain. That is, quite obviously, wrong. If it were true, our ultimate goal should be the elimination of all law and all the restraints imposed by social disapproval. That condition of moral anarchy seems to be one we are constantly approaching but can never finally reach.27

Mill's concept of liberty "points to a radical disjunction between the individual and society — indeed, an adversarial relationship."28 Some of Mill's other works indicate that he acclaimed this logic.29 The problem inherent in unrestrained liberty, and its natural end, liberalism, is that it results in a continual cycle.30 We will witness that cycle with sex-selection abortion. T.S. Eliot noted nearly fifty years ago: "That Liberalism may be a tendency towards something very different from itself, is a possibility in its nature . . . . It is a movement not so much defined by its end, as by its starting point; away from, rather than towards, something definite."31

Utilitarian in its motivation, sex-selection pregnancy reduction is designed to reduce the number of pregnancies, thereby reducing the number of children, while providing the parents with the children they desire. Parents can determine which gender child would be "best" for their family. Best can mean most wanted, most useful, or best fitted into the already-established family, but are these functional formulas appropriate?

rhetoric of rights where it has not been heard before, this community uses rights rhetoric to make conflict audible and unavoidable, even if limited to words, or to certain forms of words. If there is conflict experienced in the introduction of rights rhetoric to a new area, it is over this issue: Should the normative commitment to restrain power with communal dedication reach this new area? The power in question may be public or private.

Minow, supra at 1881-82 (citations omitted). It is notable that Professor Minow follows this paragraph with a section entitled, "Rights Do Not Presuppose Autonomy." Id. at 1882.

27. BORK, supra note 24, at 60.

28. GERTRUDE HIMMELFARB, ON LOOKING INTO THE ABYSS 103 (1993); see also HIMMELFARB, supra note 23, at 77-78.

29. Although these writings have served as some of the foundations of classical liberalism (and now radical or neo-liberalism), they nonetheless offer some evidence of Mill's clear advocacy of responsibilities to support rights. See generally, JOHN STUART MILL, Utilitarianism, in ON LIBERTY AND OTHER ESSAYS 129-201 (John Gray ed., Oxford Univ. Press 1991) (1859).

30. Bork discusses the dilemma of unrestrained liberty and it being the core of the liberal agenda: "The idea of liberty has continuous change built into it, precisely because it is hostile to constraints. Men seek the removal of the constraint nearest them. But when that one falls, men are brought against the next constraint, which is now felt to be equally irksome." BORK, supra note 24, at 61.

The father of utilitarianism, John Stuart Mill, even in the face of personal liberty, would dispute the utility of sex selection abortion.

[The principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong in itself, and now one of the chief hindrances to human improvement...it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.]

This subordination of one sex to the other is wrong with adults, and it is wrong with children. Let us consider a theoretical example of a sex selection abortion situation. If a woman discovers she is pregnant and she allows the fetus' gender to determine whether it is a "wanted child," wanting that child because it is a boy, and terminating the pregnancy because it is a girl is a direct example of Mill's concept of a chief hindrance to human improvement, with some semantic enhancement. A woman's desire to be pregnant with a particular fetus may often determine what her view is of that unborn child.

Modern society has frequently assumed a view of unborn children, nonetheless, as being the property of the woman who carries it, based on bodily autonomy and personal privacy. Since the unborn child is part of the mother, its fate therefore is subject

33. See Miller & Kohm, supra note 3, at 2.
34. The traditional feminist view, as advanced by Cherry, supra note 1, at 184, is that the fetus in abortion has no independent moral status. Because the fetus grows and lives inside a woman's body, it is the experiences and the lives of women that set the parameters of the moral inquiry.

While the fetus does not have an independent existence, its life tied to the woman inside whose body it grows, the fetus' existence has a profound impact on the lived experience of the woman. Hence, my view of the moral status of the fetus and the morality of abortion is grounded in the reality of women's lives which make abortion necessary.

Id. (citing CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 184-94 (1989)).

The funny thing is that when a woman is pregnant, she can communicate with her fetus, and is encouraged to do so by all the best obstetricians in all the best baby books. See, e.g., PENELOPE LEACH, YOUR BABY AND CHILD (1989), and ARLENE EISENBERG ET AL., WHAT TO EXPECT WHEN YOU'RE EXPECTING (1991). This communication, however, is not by mental telepathy, but by touch and sound communicated from one entity, the mother, to the other entity, the fetus. The fetus responds to the mother's communication, and is very often successful at communicating back to the mother with a kick in the right direction, a fist pushed in the opposite direction, etc. This reality would certainly seem to dictate the separation of, and independent moral status of, the two individuals. For the sake of consensus and the purposes of this article, however, this reality will not be pursued as much
to the mother's choice. American law often unwittingly treats children as their parent's property. Some may errantly surmise that this premise is derived from common law. Blackstone, however, began his chapter "On the Rights of Persons" with the concept of life and children. "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb." Seemingly drawing the life-line with viability, Blackstone clarifies in the immediately following paragraph.

An infant in ventre sa mere, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born.

The assumption of being born is made deliberately. Life is divinely bestowed, personal liberty is inferred, and personal security is assumed, or more accurately, taken for granted. The child is thereby served and protected by civil law, and by ecclesiastic law. New legal paradigms have emerged, however, with strength not in liberty or security, but in the name of the "family."

The law's apparent concern for children developed as vast changes in the scope and meaning of family were effectuated during the early years of the Industrial Revolution. Focusing on children as the essential, and most valued, component of family life served family law well. During a century of great transformation, the law, consistently presuming to serve the interests of children (and thus of decency), was able to accommodate startling changes under the rubric of one essential concern: the welfare of children and families.

36. 1 WILLIAM BLACKSTONE, COMMENTARIES *129.
37. Id.
38. Many infer this suggestion of viability, but "stirring" may have varied meanings and connotations. For example, could stirring mean when a foot kicks the uterine wall, when the heart begins to beat, or when brain waves are detectable?
39. BLACKSTONE, supra note 36, at *126 (citations omitted)(seeking to demonstrate the complete compatibility of natural law principles and civil law code.).
The law’s real concern with children in the past century and a half, however, has also proved a pretext, a mask for other concerns. Not only have children often been badly served by rules centered around the children’s interests, but these rules have consistently concealed other interests, including the diverse interests of adult society in both preserving and transforming patterns of traditional family life. Associating these other interests with images of children and childhood has protected the underlying interests by suggesting that, in the association, their proponents also support, or at least acknowledge, a moral order. Children have not been well served by the same association. As children’s interest are proclaimed — even apparently investigated and analyzed in detail — in case after case, they are subsumed by larger agendas, often unacknowledged — and almost as often, unrecognized.

Reproductive technology has simply propelled this masking effect at warp speed. “With the advent of the new reproductive technologies, the processes of change accelerated at a rate almost, if not actually, beyond society’s capacity to adapt.” Courts are floundering in their attempts to adjudicate reproductive technology concerns. Children represent tradition, but they also represent all that is post-modern. They are the language of family, and they are the silence of family. “[J]udicial invocations of the child’s interests mask other concerns more now than ever before” and represent the contradictions inherent in judicial interpretation of reproductive technologies, especially in light of further medical evidence.

Within the genres of feminist legal scholarship there should indeed be a debate in this area. Feminist theory declares that law and other disciplines work to keep women oppressed. This could not be more profoundly demonstrated then in the context of sex-selection abortion. Within feminist doctrine, however, because women and men are different only as defined by sexual relationships, it is of no consequence that female fetuses will be discarded more quickly than male fetuses, because fetuses do not have sexual relationships, and therefore have no impact on the debate. This

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40. Janet L. Dolgin, Suffer the Children: Nostalgia, Contradiction and the New Reproductive Technologies, 28 Ariz. St. L.J. 473, 474 (1996). Professor Dolgin sees the challenges that new reproductive technology pose to social and biological dimensions of family and states: “Underlying these varied claims lie other interests which serve adults far more than children, and which support the correlates of autonomous individuality more than those of holism and connection.” Id. at 503.
41. Id. at 475.
42. See id. at 476.
43. Id. at 475-76.
thinking keeps women myopically trapped within themselves, and those who are alive at that moment, and thus oppressed. Catharine MacKinnon proclaims that feminist jurisprudence is the analysis of law from the perspective of all women.\textsuperscript{44} All women, if truly meant to be all inclusive, ought to mean all women living, dead, and yet to live, which would include those living in gestation though not yet born. Therefore, the experiences of all unborn women, or female fetuses, would necessarily be included in the experiences of all women, even in MacKinnon’s view.

The impulse of extreme liberty, or liberalism, is only to offer more freedom. In this regard, liberty becomes license. Self, ethos, or a Freudian “id” replaces any sense of liberty preserved for another, and self becomes unrestrained, limitless, and hedonistic. For the concept of liberty to work pragmatically, each individual who enjoys that liberty must be willing to protect that same liberty for each other member of the society. Liberty and equality require either a conflict between individuals and society, or among different individuals, or a balancing of liberty with restraint and order. Self-discipline and wisdom were the virtues that once allowed an entire society to have true liberty.

“If there is no ultimate truth to direct political activity, then ideas can easily be manipulated for reasons of power . . . . [A] democracy without values easily turns into open and thinly disguised totalitarianism.”\textsuperscript{45} Modern conservatism might now be recognized as what used to be termed classical liberalism — a concept that accepts constraints upon total freedom due to a clear view of reality, and with an understanding of the depravity that is the natural result of unfettered liberty.

Liberty must have at its core social virtue. The enlightenment existentialist philosopher David Hume recognized social virtue as a basic tenet of politics and morals, and phrased this as the “paradox of the skeptics.”\textsuperscript{46} Personal liberty cannot be secured in solitary subsistence, but only through a strong connection with a society that respects and mutually protects that liberty. “As much as we value our own happiness and welfare, as much must we applaud the practice of justice and humanity, by which alone the

\textsuperscript{44} See Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 21-22 (1987).


\textsuperscript{46} David Hume, An Inquiry Concerning the Principles of Morals 42 (Charles W. Hendel ed., Bobbs-Merrill 1957) (1751).
social confederacy can be maintained, and every man reap the fruits of mutual protection and assistance." 47

Another scholar, philosopher and theologian stated the dilemma this way: "Everything is permissible for me — but not everything is beneficial. Everything is permissible for me — but I will not be mastered by anything." 48 In the face of great freedom will always come great opportunity — both for benefit and for harm. The fact that something which we believe, or are led to believe, will bring us happiness, is allowable or legal is not, in and of itself, reason to pursue that thing. We must be careful to pursue that thing for the intrinsic good it carries, with an eye toward the ramifications our choices will have on all of society.

Laws may indeed be designed to reflect and protect the welfare of society and its individual members. Laws and rules, however, do not determine one’s behavior. The individual is free to choose how and when it might be appropriate to exercise her liberty. Therefore, she must have a foundation beyond legality to make the best, most authentic, choice.

Feminists base much of their “critique of existing institutions on the claim that the social context of reproduction has been disadvantageous to women.” 49 This thinking leads to a fear that new developments in reproductive technology will similarly operate against the interests of women. 50 Women may still control their own decisions, as long as they are so empowered to make a choice from a selection of alternatives. The feminists’ fear that any benefit would likely accrue to men, while costs would accrue to women, 51 may be grounded in something more than battling misogyny. For nearly a century, the reforms the women’s movement has sought in order to better the lives of women have not had the positive effect hoped for, from the Married Women’s Property Acts and the detriment of separate property jurisdictions 52 to no-fault divorce

47. Id. at 43.
48. 1 Corinthians 6:12 (New International). The Apostle Paul goes on to note that issues concerning one’s body introduce a whole new set of concerns and issues, and thereafter admonishes the Corinthians to avoid inappropriate behavior and actions, and to “honor God with your body.” 1 Corinthians 6:20 (New International).
49. Winkler, supra note 13, at 1043 (meaning that the responsibility of bearing and raising children is a burden that inhibits development in other areas of a woman’s life).
50. See id. This is fueled by the concept that science and medicine are largely a man’s field, and will continue to reflect maleness in the development of new reproductive technologies.
51. See id.
52. “[T]he state legislatures began enacting statutes even before 1850 which had as their purpose the reduction or elimination of the married woman’s disabilities . . . . But they by no means succeeded in conferring full legal capacity upon married women.” HOMER CLARK,
and the feminization of poverty.\textsuperscript{53} Abortion has likewise contributed to the harm and suffering endured by women.\textsuperscript{54}

Amid the fierce controversy over abortion today, it is easy to lose sight of the highly personal nature of the decision to end a pregnancy . . . and the enormous emotional impact that decision can have on the woman who makes it. This emotional denial represents perhaps the most universal hardship imposed on women who have abortions today.\textsuperscript{55}

Damage can be done to the feminine gender as a whole when sex preference selection becomes a valid reason for terminating the life of another woman, though yet unborn. That tiny woman is a part of the fraternity and fellowship of all women, even if, as feminist doctrine theorists would argue, only by virtue of her tiny womb and even tinier ovum, which may be taken from her without her consent\textsuperscript{56} because she has not had the opportunity to enjoy the liber-


\textsuperscript{54} See generally MARK CRUTCHER, LIME 5: EXPLOITED BY CHOICE (1996); DAVID C. REARDON, ABORTION MALPRACTICE (1993); and VINCENT M. RUE, POSTABORTION TRAUMA: CONTROVERSY, DIAGNOSIS & DEFENSE (1994), each detailing the physical, psychological, physiological and personal devastation of abortion on women. See generally Joann Rosenfeld, Emotional Responses to Therapeutic Abortion, 45 AM. FAM. PHYSICIAN 137, 137 (1992) (stating “studies indicate that most women have a sense of relief after abortion, although the next most common emotional response is guilt”).

\textsuperscript{55} ANGELA BONAVOGLIA, THE CHOICES WE MADE at xxv-xxvi (1990).

ty of being born: Another woman has deprived her of that freedom of choice. We have heard of black-on-black violence and brutality of similar nature. Sex selection abortion is woman-on-woman violence. If women are truly the less favored gender, and sex selection abortion continues to be an opportunity for choice, the aborting of more female fetuses will be a likely outcome, and such at the hands of other women who could choose differently. Any capacity that sex preference abortion may have to free any individual woman will only serve to continue the oppression of women as a class.

As Americans, we find much of our liberty in “the pursuit of happiness.” This happiness, or liberty, is encased in a civilized society that offers mutual respect for one another based in those self-evident truths, that “all men are created equal.” Mill wrote, “liberty consists in doing what one desires.” From this declaration one could think Mill was either a rebel or a reprobate rather than a proponent of equality, but he was neither. Clearly he intended liberty to proceed and operate in a context, not a vacuum. That context for Mill would appear to be one in which individuals are viewed as intrinsically equal. Throughout the transformation of liberalism, however, his philosophical concepts have been transformed to mere rhetoric, encouraging those after him who would seek opportunity for rebellion, depravity, or both.

Edmund Burke articulated a response to Mill, which serves as a clarification, when he stated, “The only liberty I mean is a liberty connected with order; that not only exists along with order and virtue, but which cannot exist at all without them.” In order to preserve liberty, it must be balanced by the moral principles of restraint and order, achieving equality for all members.

II. DUE PROCESS AND EQUAL PROTECTION AS GROUNDED IN LIBERTY AND EQUALITY

The due process and equal protection liberty interest is derived from the constitutional concept that all citizens should be treated

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57. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
58. Id.
59. MILL, supra note 21, at 107.
60. See BORK, supra note 24, at 60-61.
61. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE AND ON THE PROCEEDINGS IN CERTAIN SOCIETIES IN LONDON RELATIVE TO THAT EVENT 66 (Conor C. O'Brien ed., Penguin Books 1968) (1790). Burke seemed to have an understanding of the nature of mankind, whether actively rebellious or passively indifferent; self-centered nonetheless.
alike in life circumstances, equally protected in similar situations, and that no person should be deprived of that liberty without fair notice and hearing of the government's intent to invade that liberty. The Fourteenth Amendment guarantees these citizens' liberty of equal protection and due process. Liberty for all requires equality for all who enjoy liberty, and equality for all similarly requires protection of liberty. Equality does not refer to an inherent quality, but rather an inherent like treatment of each of the members. Literal equality is an impossibility, as every individual is unique and different from another. Equal yet different, all remain equally valued, equally afforded liberty.  

The rise of legal formalism occurred by the twentieth-century when the law, which was "once conceived of as protective, regulative . . . and, above all, a paramount expression of the moral sense of the community, had come to be thought of as facilitative of individual desires and as simply reflective of the existing organization of economic and political power." Concepts of law were changed as a result. Due process was transformed from a methodology that was merely procedural in nature to a concept that was largely substantive in nature.  

Positivism emerged as the central force in redefining the origin of law. Robert Cover writes,

Law was perceived as operative and valid because of human constituent process and by virtue of valid lawmaking processes in pursuance of that Constitution. It was the will of men that gave law its force. But men look to various sources for the content of their law. And one very important kind of source is that which declares what is right and just.

62. This is not to say that equality mandates equalness, or for example, that each should be entitled to the same employment but that each may have the liberty to apply for that employment, and liberty is inferred to the employer in hiring. (The EEOC, however, may disagree with me.) Our culture habitually confuses the freedom to pursue happiness (a job) with the requirement that each be given happiness (entitled to that job *per se*).


64. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 158 (1992). In the context of Post-Civil War judiciary, Professor Horwitz explains the conflict between Classical Legal Thought and the Progressive Transformation in the concept of property. "It was easy to confuse the controversial expansion of federal judicial power under the Fourteenth Amendment with a supposed change in constitutional methodology from 'procedural' to 'substantive' due process. That confusion was largely produced by later critical Progressive historians intent on deligitimating the Lochner court." *Id.*

Cover was speaking of slavery, nonetheless, his point is well taken in the context of gender equality and liberty. Modern liberalism has done everything in its power to remove the sense of seeking what is right and just, largely due to the influence of moral relativism, stemming from the unbridled utilitarian manipulation of individual liberty. The result is that anything but a relative sense of liberty and equality are lost from the constitutional concepts of due process and equal protection. The higher good is indeed to seek values, priorities, and right attitudes rather than placement, roles, or gender. We have replaced values of intrinsic goodness and unwavering priorities with value-free values, changing roles, and situational desire.

The role of responsibility cannot be underestimated, and that responsibility undergirds the Fourteenth Amendment. In order for each individual to enjoy equal protection and due process, it is the responsibility of each individual to protect those same liberties attributed to other individuals. Only when each individual's liberty is upheld by every other individual will liberty ever prevail for a society. All rights must necessarily have corresponding responsibilities if those rights are to control and be upheld by any civilized society. Without responsibility, rights amount to nothing.

III. SELECTIVE PREGNANCY REDUCTION AND GENETIC SELECTION OF OFFSPRING: THE FUTURE IS NOW

The concept of sex selection has ancient roots and is contained in centuries of scientific and non-scientific experimentation. "The quest for sex selection technology dates back to ancient times, when Greek philosophers advised tying off the left testicle prior to intercourse in order to assure male children." Wertz and Fletcher have conducted the most cited and important studies on human genetics and ethics around the world. It is strongly suggested that fetal sex selection and selective abortion of male fetuses who are at

66. Danis, supra note 6, at 220 (citing Owen Jones, Sex Selection Regulation Technology Enabling the Predetermination of a Child's Gender, 6 HARV. J.L. & TECH. 1, 4 (1992) (stating that "[t]he philosopher Anaxagoras, who lived between 500 and 428 B.C., gave such advice").

fifty percent or greater for risk of severe medical problems or genetic disorders are the primary use of sex selection abortion. On the contrary, "[m]ost sex selection has no relationship to genetic disorders. It is used solely to permit the parents to choose the sex they desire."

A growing demand for fetal tissue may have some bearing on this debate. Currently, it is the free choice of a woman to make a fetal tissue donation. Also currently, payment may be rendered in consideration for access to fetal tissue. There is an underlying presumption that abortion of the fetus whose tissue is to be utilized is a given premise, without moral consequence. Professor Robertson, however, illuminates this presumption as he has little dilemma in articulating an ethical analysis in this regard. He states,

Some persons may object that such callous treatment of the body and fetus devalues the sanctity of human life because it treats the fetus as a mere means to a selfish end. It is difficult, however, for them to make this argument without contradicting a position that is generally in favor of abortion for unwanted pregnancy. One can just as reasonably argue that abortion to avoid an unwanted pregnancy also devalues human life because it treats the fetus as a means to the end of avoiding the burdens of unwanted pregnancy. If abortion in that case is nonetheless morally acceptable, abortion to obtain fetal tissue should also be acceptable. Indeed, one could argue that aborting to obtain tissue for transplant is the stronger case. Abortion in that case is not merely for the convenience of the woman who wishes to avoid pregnancy, but is done to save the life or health of a family member. If the reasons behind a woman’s decision to undergo an abortion have symbolic [sic] importance, aborting to obtain fetal tissue for transplant should rank very high.

This purpose is no more disrespectful of the intrinsic sanctity of human life than is ending an unwanted pregnancy."

68. See Wertz, supra note 12, at 1430 ("Identification of fetal sex and selective abortion of male fetuses who are at fifty percent risk may enable the parents to prevent the birth of a child with severe medical problems. This use of prenatal diagnosis falls within medically accepted uses of prenatal diagnosis to prevent serious genetic disorders.").

69. Id. Wertz continues with an interesting discussion about the two ethical issues she sees involved. "The first is whether families should be able to choose the sex of their children, and if so, under what conditions. The second is whether abortion is justified as a means to this end."


71. See id. at 1373 (suggesting that "a ban on payment might also be justified in order to protect free choice, though such a ban could deny patients who do not have a willing female relative access to the fetal tissue transplants they need").

72. Id. at 1377-78.
Robertson's classification, "merely an unwanted pregnancy" appears to be predicated on his own beliefs regarding the fundamental right to procreate. He argues that there are only two issues involving procreative rights, those being "(1) aborting to get fetal tissue for transplant and (2) conceiving in order to abort to donate tissue." The right not to procreate is a fundamental right grounded in the personal burden of unwanted reproduction. The Supreme Court has determined that individuals have a fundamental right not to procreate, and Professor Robertson bases his argument on this controversial determination. This ignores the argument that pro-creation has already occurred. Those who oppose abortion believe abortion terminates life, not that it prevents life from beginning at all. In other words, procreation has already occurred. This weakens Robertson's ideological foundation framing the matter as a right to avoid procreation. A portion of Professor Robertson's research is dedicated to implications of abortion for sex selection and discloses his inherent concept of moral relativism:

Analysis of this issue, is useful ... because it focuses attention on the outer limits of the right to abort, namely, on the issue of when and how reasons for abortion are morally and constitutionally relevant. The most immediate implication of such a

73. Id. at 1359.
74. Id. at 1380.
75. See Roe v. Wade, 410 U.S. 113 (1973) (discussing the burdens and harms that may result to women who are forced to carry fetuses to term); and Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), cert. denied sub nom, Stowe v. Davis, 507 U.S. 911 (1993) (arguing the right not to become a father when the marriage to a child's mother has been irretrievably broken).
76. Robertson states, as would most abortion advocates, that "[a]voidance of procreation is a fundamental right because of the personal burdens of unwanted reproduction." Robertson, supra note 70, at 1380. Yet he follows the reasoning by asking, what it appears he believes are, some tough questions.

Should the reasons that reproduction is seen as a burden matter? Is there a way to evaluate them as being more or less meritorious? Even if there were, it would appear that aborting to save the life of a family member or loved one would rank as a sufficient reason for not going forward with pregnancy ....

What about conceiving in order to abort to get tissue for transplant? Women might claim a fundamental right to conceive as part of a right to procreate or simply as an aspect of their right to use their body as they wish.

Id.

Robertson suggests that conceiving with the purpose of abortion is not an exercise of the right to procreate, but solves this dilemma by calling such conduct "a nonreproductive use of one's reproductive capacity." Id. I submit this is precisely the problem with abortion, and precisely why a woman would find higher ground in avoiding the action altogether. This article, however, focuses on one noble reason to avoid abortion — because it will hurt other women.
focus concerns abortions for sex selection . . . . Most ethicist commentators in the United States have assumed that such abortions are undesirable, if not immoral . . . . However, the reason for the abortion no more justifies restrictions designed to protect fetuses in sex selection cases than it does in the case of designated donations of fetal tissue. 77

Concluding that women must be free to abort for any reason, or for no reason at all, Professor John Robertson relies on a standard rights analysis and demands that any restriction on the fundamental right to abortion must necessarily be outweighed by a compelling state interest. 78 Heralding women's autonomy and the limitless right to control their own reproduction is one way a man might seek to control the impulses of those women. This may, on the contrary, be Professor Robertson's use of the autonomy and control argument to advocate his true concern that fetal tissue be more readily available. Caution may be appropriate here, as such an argument would provide for the capitalistic concept of tapping the abortion market for fetal tissue and asking women to oblige. This is not providing the best for women in any sense, and certainly not in the face of gender discrimination. We need to be collectively concerned about gender discrimination, exploitation, and the intersection of the two, in areas where we may least likely expect it to exist. That may include women being taken advantage of for what they can provide through abortion or society's universal preference for firstborn baby boys instead of firstborn baby girls.

IV. SOCIOLOGICAL CONCERNS REGARDING SEX PREFERENCE AND BIRTH ORDER

About one-third of the United States' public favors use of preconceptional methods of sex selection. 79 Those who approve of prenatal testing and abortion for the purpose of sex selection are relatively few, but the percentage drastically increases to a substantial minority (thirty-eight percent) who "would approve the use of abortion for sex selection if a couple already had three children of the same sex, regardless of whether these were boys or girls." 80

77. Id. at 1387.
78. See id. at 1388.
80. See Wertz, supra note 12, at 1430 (citing Eleanor Singer, Public Attitudes Toward Genetic Testing, 35 POPULATION RES. POLY REV. 255, 255 (1991) (discussing more than
In the Wertz study, questions on sex selection were presented to doctoral-level geneticists in 1985. Of those surveyed, the "U.S. women were twice as likely as men to say that they would perform sex selection, usually out of respect for patient autonomy." A previous 1975 study of 149 clinically-oriented counselors and geneticists revealed that, of those surveyed, fifteen percent would recommend amniocentesis for sex selection in general, and twenty-eight percent would do so for a couple with one girl who wanted to ensure the family name would be carried on and desired to have only two children. Wertz and Fletcher document "a clear trend toward a greater willingness to perform prenatal diagnosis for sex selection in all nations except India and Sweden" in their 1993-94 survey.

In giving reasons for acceding to parents' requests, many geneticists in the 1985 survey said that sex selection was a logical extension of parents' acknowledged rights to choose the number, timing, spacing, and genetic health of their children. These geneticists regarded withholding any service, including sex selection, as medical paternalism and an infringement on patient autonomy. Those who would refuse prenatal diagnosis said that it was a misuse of scarce medical resources designed to look for serious genetic abnormalities, that sex was not a disease, or that they disapproved of the abortion of a normal fetus. Most regarded sex selection as a private matter between doctor and patient. Few, except for geneticists in India, mentioned the societal implications of sex selection.

Most requests for sex selection in developed nations are probably covert, with women requesting prenatal diagnosis on the basis of anxiety about the health of the fetus. Information about fetal sex is usually communicated to the parents if they wish to know, though some clinics do not provide the information unless specifically requested. In effect, sex selection by prenatal diagnosis is therefore available to most families.

A myriad of arguments in favor of sex selection are advanced around the world, and many of them are offered as "ethical"
arguments tenacious with concerns regarding quality of life. Included among these arguments are the following: that sex selection would enhance the quality of life for a child of the “wanted” sex; that sex choice would provide a better quality of life for the family that has the sex balance it desires; that sex choice would provide a better quality of life for the mother, because she would undergo fewer births; that undergoing fewer births would somehow enhance and elevate the mother’s status in the family; and that sex selection would help to limit the general population.86 These arguments are all based on the outcome of happiness being achieved to a greater degree once the “desired sex balance” within the family is attained. They proceed with a justification that children of the less desired sex, or “the ‘unwanted’ sex, usually female, would be spared the abuse, neglect, and early death that is their documented fate in some developing nations.”87 Wertz adds that such a fate may occur to a less obvious extent elsewhere.88 Abuse of the mothers of female children is another argument sex selection proponents offer.89 The fact remains that in general every family wants “at least one child of the desired sex, usually a son.”90 This quality of life incantation is alarmingly Epicurean in nature. “Parents historically have used sex selection techniques to

86. See WARREN, supra note 9, at 163-174.
87. Wertz, supra note 12, at 1432-33 (citing Ishwar C. Verma & Balbir Singh, Ethics and Medical Genetics in India, in ETHICS AND HUMAN GENETICS: A CROSS-CULTURAL PERSPECTIVE 250, 259-60 (Dorothy C. Wertz & John C. Fletcher eds., 1989)).

It seems that in Philosophy 101 every student learns of Descartes’ basic logical sequence, “I think, therefore I am.” There is an underlying assumption of the intrinsic value of existence possessing goodness in and of itself. Inherent within is the assumption that life is better than no life at all (regardless of quality of life, but that might have passed with the 1980’s), as it is good to think, and it is good to exist. The thinking of the 90’s often appears to be that no life is better than a life of abuse, which is an unfortunate surmise in light of the possibility that circumstances could, at some point or any point, change for the better, at which time life would certainly be better than no life at all, and could render the premise of the 90’s as inherently flawed. This may depend on one’s view of hope.

88. See id. at 1433.
89. See id. “Women would not be abused by their husbands for not bearing children of the desired sex.” As I was reading this, I couldn’t help but empathize: “You mean, he wouldn’t have her beheaded if she bore him a son?” This type of Elizabethan ignorance is blatantly ridiculous, as today it is common knowledge (though that doesn’t impute such knowledge to the average male) that the sex of a child is determined by the chromosomal content of the sperm that fertilizes the ovum.

90. Id. One of the most disturbing arguments is that “couples could limit their family size and still have a son to support them in their old age, instead of continuing to have children until they have a son.” Id. There are daughters who can do that, too. However, parents who expect, or deem themselves entitled, to be supported by their children in their old age should understand that they have a problem even before they consider beginning to build their family.
select male offspring, and the birth of male children continues to be the desired outcome in the majority of sex selection attempts.\footnote{91}

V. GENDERCIDE, REPRODUCTIVE TECHNOLOGY, AND RESPONSIBILITY

The Second World Conference on Family Law and the Rights of Children and Youth took place in June 1997, in San Francisco, California.\footnote{92} New reproductive technologies comprised just one of the workshop sessions.\footnote{93} Sexual selection was among “the technologies and practices that raised fundamental questions about our concept of health and the value and meaning of human life.”\footnote{94} The essence of the conference was to “focus on the development of positive initiatives to improve the lives of children.”\footnote{95}

Opposition to sex selection through technological means rests on two basic premises. The first concern is the “potential creation of a sex-skewed society with devastating consequences for both men and women.”\footnote{96} The second is “the invidious sex stereotyping and sex discrimination inherent in virtually every decision to select the sex of a child.”\footnote{97} One might think that at the end of the twentieth-century, after all the hard-fought battles of the women’s movement, that American society would be somewhat free of discrimination, that at the very least women would understand the plight of

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\footnote{91}{Danis, supra note 6, at 220. Unlike Danis, I do not buy into the concept that this quest for male children reflects a societal preference for “maleness” which “has been a form of social, political, and economic entitlement.” Id. Part of the problem being discussed here is the feminist fixation with male entitlements. Yet when women do nothing to halt a contribution to that social program, our cries are pure hypocrisy. I submit that many of us, even women, believe subconsciously that “male” is somehow better than “female.” On the contrary, the genders are mutually dependent, as one has no meaning, and certainly no existence whatsoever, without relativity to and compatibility with the other. Homo Sapiens consists of male and female, both inherently holding equal intrinsic value — that is, until they are robbed of their purity and burdened with a social construct.}

\footnote{92}{See Second World Conference on Family Law and the Rights of Children and Youth, Conference Program, Jan. 1997. The World Congress was held in association with the 1997 Annual Conference of the Association of Family and Conciliation Courts.}

\footnote{93}{See id. Specifically, New Reproductive Technologies was workshop session 49.}

\footnote{94}{Id. at 16.}

\footnote{95}{Id. at 1.}

\footnote{96}{Danis, supra note 6, at 220.}

\footnote{97}{Id. In her article, Danis argues for federal legislation that would ban pre-implantation sex selection technology and its use by health care providers. Her proviso is that any such ban would have to be “consistent with established constitutional norms protecting reproductive rights.” Id. at 221. This is precisely my concern — that if women insist on hoarding the “norm” of the constitutional right to choose, raising self interests in reproductive capabilities supremely over social good, our gender will suffer a self-centered backlash, with no one to blame but ourselves.}
women. If women, however, insist on putting self desire for a child of a certain sex above common good to all women by aborting female fetuses, the gender is headed toward destruction. Gendercide may not be Orwellian fiction in light of human egocentrism characteristic of unconstrained feminism. Mary Anne Warren discusses the problematic context of sex selection abortion. She differentiates it from the now familiar practice of eugenic abortion and expresses apprehension at the possibility of responsible use for sex selection abortion.

The concept of selective pregnancy reduction involves not only the conflict between the mother's rights and the fetus' rights, but the additional conflict of the rights of fetus versus fetus. "Which fetuses are to be aborted? May they be chosen based on sex? Is there an equal protection argument to be made on their behalf?" Should selective abortion be used for purposes other than fetal reduction, medical advances allow women to learn the gender of their fetus early enough to abort based on sex. Thus, it is difficult to limit sex selection abortion when technology allows a woman to learn the sex of her child, and is free to abort her child for any reason.

Might it not be even easier to choose the sex of infants if selective abortion is indicated for other reasons also? If the procedure were being performed solely to select sex, the statute would be adequate, but if it is indicated for some other reason

98. See Warren, supra note 9, at 6-12.
99. See Gemmette, supra note 4, at 390. Fetal personhood status is a widely debated subject. It merits much consideration and discussion, but is, unfortunately, beyond the scope of this article.
100. Id. Gemmette carries the equal protection analysis with the assumption that the state may have a compelling interest in protecting the lives of fetuses from conception on, based on the four dissenters' views as expressed in Webster v. Reproductive Health Services, 492 U.S. 490 (1989). Gemmette reasons:

As far as selective pregnancy is concerned, the compelling state interest is in controlling medical technological advances to ensure that they do not create technological imperative where there is no real medical necessity. It is to ensure that physicians will not implant more than one or two or three embryos when the woman would want only one or two or three live babies. It is in trying to ensure that no one has to make a choice similar to the one dealt with by George Annas (1987) in his discussion of killing one Siamese twin to save the other.

Suppose there is no significant difference in the survival potential of the two twins. Then neither is "designated for death," but one must be chosen to die for the sake of the other. How is the decision to be made? . . . The compelling state interest is to ensure that these "objective medical criteria" are applied before the pregnancy.

Id. at 391.
also, then abortion is not “sought solely because of the sex of the unborn child.” Might an amendment (to such a prohibitive statute) be in order if it is ever discovered that sex selection is an option given to mothers facing the procedure?  

It is conceivable that abortion for sex selection might be rationalized as a medical necessity under the right circumstances. “The use of selective abortion as a possible tool for sex selection points to the continuing and future dilemmas raised by the use of the procedure for other than true medical necessities.”

In a somewhat radical tone, some are quick to condemn women for manipulating circumstances to birth boy babies preferentially. “Women have long used various means, ranging from consuming the penises of exotic animals to prayer to using modern concoctions designed to increase alkalinity and decrease acidity in the reproductive tract, in order to increase the chances of having a male child.”

Personal eugenics is a reality that must be considered when discussing the formulation of ethics and biotechnology of reproduction and birth. Although preconception sex selection is different in nature from sex selection abortion, the comparison is relevant for personal liberty analysis. “Sperm differentiation for sex-determination purposes is surely a form of personal eugenics. A decision has clearly been made that a baby of one sex is not as good, or as desirable or as perfect as a baby of the other sex — and something genetic is going to be done about it.” Individuals are often deciding, based on personal preference, which sex they would prefer to reproduce and birth at a given time under given conditions. Case precedent delineating constitutional rights to procreation indicates that women are largely the decision makers, and often the sole decision makers. “[T]here are feminists groups that vigorously oppose sperm differentiation” and the concerns it raises in terms of sex determination. Anti-abortion advocates need to consider bioethical questions and their related implications. This article is directed principally to women who have lost their sense of gender altruism; however, men are not relieved of their responsibility in this area of reproductive rights and responsibilities. Jodi Danis is correct when

101. Id. at 393 (citing 18 PA. CONS. STAT. ANN. § 3204(c) (West 1989) (stating that “No abortion which is sought solely because of the sex of the unborn child shall be deemed a necessary abortion”).
102. Id. at 394.
103. Gary L. Francione, Series Editor’s Foreword, in ROTHBLATT, supra note 2, at ix.
104. ROTHBLATT, supra note 2, at 43.
105. Id.
she argues that men and women together share the responsibility for discrimination in sex selection, but it must be added that universalism is the route to authenticity, particularly in this case.

Although I often refer to women selecting the sex of their children, it must be remembered that women alone should not shoulder the burden of moral scrutiny and responsibility for sex selection. When such technology is available, male partners may often pressure women towards sex selection. In other cases, the decision to sex select is a joint decision made by a couple. In either case, the societal pressures and rewards for having either male children or the "perfectly balanced" family may contribute to the decision to select one's offspring. Society as a whole thus must carry the moral, ethical, and legal burdens that sex selection technology presents.

But when women, via the constitutional vehicle of privacy, undermine shared societal concerns with selfish autonomy for the sake of individual liberty, that liberty is transformed to incongruity and self-contradiction; thus the paradox. Early feminist opposition to abortion recognized that abortion itself did not empower women, but rather allowed male relinquishment of responsibility for pregnancy. This paradox of the skeptics can only be eliminated by liberty with boundaries, empowered by the integrity of the individuals who enjoy that liberty. Allowing female fetuses to be aborted because they are female perpetuates powerlessness and subordination. Worst of all, it drags women into perpetuating this

106. See Danis, supra note 6, at 223.
107. See Kohm, supra note 52, at 278-84.
108. Danis, supra note 6, at 223.
109. See Amicus Brief of Feminists for Life at 19-20, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1991) (No. 90-985). One section of the brief reads:
D. Early Feminist Opposition to Abortion Was Joined to Condemnation of Male Sexual Irresponsibility and Coercion, and the Lack of Economic and Social Support for Pregnant Women Abandoned by the Fathers of Their Children.
1. The early feminists called for prevention of the circumstances giving rise to abortion. Their concern of the lives of unborn children did not preclude, but was interwoven with, a broader concern for women with crisis pregnancies, children already born, and their mothers . . . .
2. The early feminists condemned social attitudes, especially sexual double standards, which contributed to an increasing incidence of abortion.
Id. at 19-20. See also, MARY KRANE DERR, MAN'S INHUMANITY TO WOMAN MAKES COUNTLESS INFANTS DIE (1991) (detailing the opposition to abortion held by original feminists like Susan B. Anthony, Elizabeth Cady Stanton, Sarah F. Norton, Victoria Woodhull, Dr. Alice Bunker Stockham, and Tennessee Celeste Clafin). Susan B. Anthony called abortion "the horrible crime of child murder," in a July 8, 1869 article in her publication Revolution. Id. at 24. These brave and courageous icons for women and women's rights were not about to let men off the hook for responsibility in pregnancy.
misogynistic world view under the guise of “reproductive freedom.” As long as this societal value structure prevails, how can women ever be seen as valuable members of society?

The elimination of all forms of discrimination against women must remain a resolute goal without compromise. When individual women put their own corrupted selfish desires above truth, however, other relationships naturally dissipate. And roles shared between the sexes become marred and uncertain.\(^{110}\)

There are some feminist groups who vigorously oppose sex selection and particularly sperm differentiation.

In the words of Vibhuti Patel, whose Women’s Center leads the fight against demographic engineering in Bombay, India, “For us, it’s the survival of women that’s at stake. The social implications of sex-selection are disastrous. It’s a further degradation of the status of women.”\(^{111}\)

The problem with post-modern feminism is the myopic insistence on the concept that reproductive capacities are the only meaningful differences between men and women, and therefore are “the barrier to be overcome for full participation in the male world. Particularly when combined with the feminist emphasis on sexual ‘freedom,’ abortion becomes a necessary component of the mainstream feminist vision. Abortion technology makes possible the full ‘emancipation’ of women.”\(^{112}\) Women and men are different and complimentary in numerous ways, sexuality and reproduction being a significant difference, but not the lone meaning in the distinctions between femaleness and maleness. It would be loathsome to denigrate the beauty of gender differentiation to mere sexuality, rendering all non-sexual differences between men and women\(^{113}\) as scorned and despised.

\(^{110}\) Kohm, supra note 53, at 278.

\(^{111}\) ROTHBLATT, supra note 2, at 43-44.


\(^{113}\) Such distinctions include ethological and social behavior differences, limbic system differences, differences in cerebral organization, non-nervous system physiology, sex differences in stress management, etc. I do not believe that women (and men) are merely sexual (and reproductive) beings. See generally ELEANOR E. MACCOBY & CAROL NAGY JACKLIN, THE PSYCHOLOGY OF SEX DIFFERENCES 349-355 (1974); LAUREL RICHARDSON, DYNAMICS OF SEX AND GENDER: A SOCIOLOGICAL PERSPECTIVE (1988); ROBERT W. GOY & BRUCE S. MCEWEN, SEXUAL DIFFERENTIATION OF THE BRAIN 109-11 (1980); and EDWARD O. WILSON, SOCIOBIOLOGY 42-43 (1980).
Let us invoke the facultative model here for a moment to discuss the matter of responsibility. Women are capable of making their own decisions. "The facilitative model assumes that each woman — and not the government — is best situated ultimately to decide how to balance these competing risks and moral considerations."114 A facultative approach would find an opportunity to empower a woman to make a "good" choice in the face of social or emotional obstacles. A woman pregnant with a female fetus does not respond to punishment for her desire to have a son instead of a daughter, but might be encouraged to choose life for her daughter if she were given the moral framework for valuing baby girls as much as she values baby boys. This is about changing the hearts and minds of women, and changing how women think about themselves — encouraging us all to value ourselves and our unborn daughters as women.

The previous rounds of the abortion debate in America were merely echoes of the issue as the nineteenth century defined it: a debate about the medical profession’s right to make life-and-death decisions. In contrast, the most recent round of the debate is about something new. By bringing the issue of the moral status of the embryo to the fore, the new round focuses on the relative rights of women and embryos. Consequently, the abortion debate has become a debate about women’s contrasting obligations to themselves and others.115

One might think that gendercide would only be possible in a sexist society. Yet virtueless autonomy for women may be the key element in bringing about the annihilation of women if sex selection abortion is supported by women.116 Sex selection abortion is violence against women, two of them, a mother and a daughter. Current case law and related statutes support the right of women to choose,117 regardless of the reason.

116. See id.
117. In this context, the assumption is made that "the right to choose" automatically equals abortion, as few other choices are permissible within radical feminism in the context of reproductive choice.
Planned Parenthood v. Casey\textsuperscript{118} carries within its pages the noble air of a direct and intentional commitment to the comprehensive protection of women. At the same time, and somewhat more importantly, the Justices make clear their strong resolve to uphold the protected liberty interest of abortion, stating “[w]e affirm the central holding of Roe.”\textsuperscript{119}

Notwithstanding the fact that the abortion cases, by default, are in much disarray, the ruling in Casey now operates as the best current law on abortion.\textsuperscript{120} Since the Casey decision, abortion continues to be a protected liberty, judiciously designed to safeguard and preserve the liberty interests of all women.

The case was brought to test the frontiers of states' rights, as a challenge to Pennsylvania's abortion-limiting legislation.\textsuperscript{121} The Supreme Court, in seeking to delicately balance the undue burden of obtaining an abortion, against the substantial obstacles that those limits might create, sculpted the monolith of Casey.\textsuperscript{122} The Pennsylvania Abortion Control Act took measures, within the state's power, to regulate abortion.\textsuperscript{123} The law specifically prohibits abortion for the purpose of sex selection\textsuperscript{124} and requires that the mother's physician determine that the abortion be “necessary.”\textsuperscript{125} The statute states “[n]o abortion which is sought solely because of the sex of the unborn child shall be deemed a necessary abortion.”\textsuperscript{126}

Illinois also has specific legislation prohibiting abortion for the purposes of selection of sex.\textsuperscript{127} In the context of a prohibition on the abortion of a viable fetus, it extends this prohibition to sex-selective

\begin{thebibliography}{112}
\bibitem{118} 112 S. Ct. 2791 (1992).
\bibitem{119} Id. at 2794.
\bibitem{120} See id. The plurality opinion three years earlier in Webster v. Reproductive Health Services, 492 U.S. 490 (1989), eviscerated Roe without explicitly overruling the landmark case, giving states the right and authority to restrict abortion through state legislation. The Casey decision effectively exonerated Webster, thus rendering Casey the current landmark case on abortion. The decision in Casey blanketed and then recovered much of what Webster abandoned of Roe. At least for the time being, Casey appears to be the law of the land on the abortion right.
\bibitem{121} See generally 112 S. Ct. 2791.
\bibitem{122} Id.
\bibitem{123} 18 PA. CONS. STAT. ANN. §3204(a) (West 1983).
\bibitem{124} See id. The American Civil Liberties Union chose not to challenge the sex selection provisions of Pennsylvania's sex selection abortion law in its challenge via Casey to that law that reached the Supreme Court.
\bibitem{125} 18 PA. CONS. STAT. ANN. §3204(c).
\bibitem{126} Id. The sentence is actually the very last in that section of the statute. Taking the appearance of a legislative afterthought, it clearly is an intentional one, nonetheless.
\bibitem{127} 720 ILL. COMP. STAT. ANN. 510/6 (West 1993).
\end{thebibliography}
abortion performed “with the knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus.”

This statute, however, does not extend to sex selective abortions if the fetus suffers from a genetic disorder linked to that sex. Use of the language “solely” could render this statute virtually useless, because if the fetus is female, and the mother’s decision is to abort for any other reason in addition to the gender of the fetus, application of the statutory prohibition is avoided. The language “with the knowledge” is equally problematic, as the woman’s physician must seek to know the interest of his patient to gain such knowledge. This requirement is nonexistent in every abortion. Approximately 1.59 million abortions are performed each year in the United States. Of those, it is impossible to estimate how many are truly performed for purposes of sex selection, as women never have to disclose their reason for obtaining an abortion.

Limiting sex-selection abortion furthers the interests of protecting all women. Any such limitation cannot be promoted by regulating a woman’s intent, but good solutions would include regulation of the abortion procedure to foster protection of women. Women are capable, nonetheless, of making good decisions without state regulation. Being so empowered would also release women from any standard of constitutional analysis so thoroughly championed in Roe and Casey.

The “fundamental rights” language in Roe appears to be much stronger than the “undue burden” test in Casey, as clearly the former is only overcome with a compelling state interest. There is little to no discussion in Casey regarding the level of scrutiny afforded the undue burden, but it is clear that if the burden is indeed undue, the statute is struck down if it regulates pre-viability abortion. There is no imposition of any standard of regulation on post-viability fetal life. Furthermore, Casey provided that the Constitution does not require states to permit abortion on demand. States can forbid abortion after viability, provided maternal health

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128. Id.
129. See id.
131. Regulation of a woman’s reason to abort is therefore absurd. Instead, a woman needs to be empowered within to choose otherwise, rendering virtuosity as the remaining solution.
134. See generally 112 S. Ct. 2791.
135. Id.
is an exception. Essentially, the trimester framework in *Roe* was discarded for the undue burden framework of *Casey*. The substantive due process analysis of *Casey* is reflective of the uniqueness of abortion. Even so, applying that new and more utilitarian framework to sex selection abortion, the state has a compelling interest in protecting female fetuses from termination because of their gender due to the state's interest in ending gender discrimination.

Where do we draw the line on state intervention? More importantly, can morality be separated from liberty? It cannot. We speak of fundamental rights without even a hint of the founding concept of inalienable rights. The thrust of *Casey* was to limit abortion to protect women, yet a number of questions remain. Did that protection include all women, including those women yet to be, or just those who are pregnant? Is there a possibility that we may choose to protect those women who are able to voice their choice, as well as those who are not?

VII. REGULATION OF ABORTION PROVIDERS: GENDER PROTECTION AND ALTRUISM

The Pennsylvania Act contains provisions which impose reporting requirements on abortion clinics and other facilities that provide abortion services. “[S]tate regulations on abortion which are not deemed unduly burdensome, but which, nevertheless, hinder or otherwise affect a woman’s decision to obtain an abortion of a nonviable fetus, are constitutionally enforceable.” The passage and enforcement of record keeping requirements on abortion providers is designed to protect women — all women. This category would particularly include the pregnant woman, as well as the viable female fetus, as the law in this area clearly upholds the interests of a viable fetus.

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136. *Id.* Grateful appreciation is acknowledged for the assistance of Laura Hernandez, attorney at the American Center for Law and Justice, who diligently worked through the mire of the *Casey* analysis with me.

137. Without this analysis, a state interest in preventing the repression of women or in treating men and women equally may not be specific enough to satisfy the compelling interest standard for overriding fundamental rights.

138. 18 Pa. Cons. Stat. Ann. §§ 3207(b), 3214(a), 3214(f). These provisions were also subject matter in *Casey*, and were upheld by the Supreme Court in that decision. See 112 S. Ct. at 2833-2843.

139. Rebecca A. Cerny, Comment, *United States Supreme Court Upholds Right to Abortion Subject to Increased State Regulation*, 25 J. Health & Hosp. L. 212 (1992) (analyzing the *Casey* opinion).

140. This is clearly the case in *Roe*'s trimester analysis, and has been upheld since that time in cases that followed.
The final inquiry in Casey involved the constitutionality and validity of the Act’s reporting and record-keeping requirements. Therein, the Supreme Court upheld its ruling in Planned Parenthood of Central Missouri v. Danforth,\(^{141}\) that “record keeping and reporting provisions reasonably related to preserving a patient’s maternal health and confidentiality are permissible.”\(^{142}\) The Court’s final ruling was that such provisions are indeed constitutional.\(^{143}\)

I submit that their constitutionality is not the supreme issue in this matter. It is unfathomable that any person would allow medical surgery to be performed on their body without desiring that the doctor, facility, service and provider be subject to oversight and review, beyond any potential claims the patient might be capable of bringing in a malpractice action.\(^{144}\) Despite Casey and other decisions upholding regulation of abortion facilities, the laxity with which these standards are enforced can only be explained by political pressure on regulatory agencies and the cry of reproductive freedom from women’s rights activists. This should be unacceptable to any reasonable woman.

Catharine MacKinnon declares that abortion is “inextricable from sexuality.”\(^{145}\) She reasons that if this premise is not true, the genders are unequal in their power over their own bodies, and more importantly, over their own reproduction.\(^{146}\) MacKinnon further states that abortion is another way for men to control society and sexuality, cloaking that control in a woman’s right to privacy.\(^{147}\) While disagreeing with her theories on sexuality, the latter could not be more accurate. Abortion coerces women to handle crises that they did not create alone. Yet the men, who are at least equally

\(^{141}\) 428 U.S. 52 (1976).

\(^{142}\) Cerny, supra note 139, at 212 (discussing the implications of Casey and Danforth). The only record keeping requirement that was not constitutional was spousal notification. See 112 S. Ct. 2791. This is a fascinating area to which I hope to devote more attention in future work.

\(^{143}\) See Casey, 112 S. Ct. at 2797.

\(^{144}\) The area of abortion malpractice is a sleeping giant in personal injury litigation. The most difficult aspect of such a practice is connecting injured parties with trained attorneys, due to the stigma and emotional trauma of abortion and abortion related injuries. See generally Crutchers, supra note 54. The physician’s duty to protect women’s health is the focus of abortion malpractice, and unfortunately, that issue is beyond the scope of this article. It is well worth noting, however, that “[s]ince American abortion clinics are almost entirely self-regulated, malpractice litigation becomes the only way of ensuring that legal abortions are indeed safe abortions for the women who have them.” Reardon, supra note 54, at 1. The liberty interest that a woman may have in abortion is still subordinated to the woman herself.


\(^{146}\) See id.

\(^{147}\) See id. at 95.
responsible for the crisis, are relieved of any concern, torment, anguish or responsibility by a woman's choice of abortion. Indeed, the ultimate irony of abortion is that it inherently lets men off the hook.

In June, 1997, the United States Supreme Court upheld a Montana law prohibiting the performance of abortions by physician assistants. Using an undue burden analysis, the Court reasoned that the burden that such a prohibition might place on a woman's right to abortion was not formidable enough, particularly in light of the value of medical attention afforded to women by the legislation. Nonetheless, abortion advocates said this was an onerous ruling for women. Janet Benshoof of the Center for Reproductive Law and Policy said the ruling was a "devastating acceptance of discrimination against abortion providers." It is discouraging to note that her concern was not for women, but for abortion providers. One wonders which is more self-serving.

On the contrary, abortion providers seem quite adverse to record keeping requirements, and regulation of the industry in general, regardless of the health of women. Health and Rehabilitative Services (HRS) of Florida has been notoriously unaggressive in enforcing existing regulations on abortion providers, and HRS enforcement efforts have not been taken very seriously. One abortion clinic remained open for more than two and a half years without a license, despite warnings from HRS to cease operating . . . . Lack of paper work in files indicated that some clinics may not have been inspected at all in some years, the reports show, and when HRS did inspections and found problems, there were no follow-up surveys to see if the deficiencies were corrected.

Florida has considered recommendations of legislation for minimum sanitation and public health standards for abortion clinics to remedy the problem, but none is forthcoming even now, nearly a decade later. The Ohio Health Department has likewise been found

149. See id. at 1867.
151. See id.
153. Id.
154. See id.
keeping “poor records” on abortion.\textsuperscript{155} Cincinnati Planned Parenthood seemed to be the worst offender, with reports submitted that were not signed by a physician, that failed to indicate methods, procedures, and that lacked health and demographic data on the women who underwent abortions.\textsuperscript{156}

Indeed, abortion doctors and clinics have habitually rebelled against regulatory standards of the industry.\textsuperscript{157} Women must be concerned that if abortion is truly in the best interest of women: born, unborn, aborted, and unaborted: we must at least begin to ponder and discern the backlash. Is abortion “pro-women,” or are women, born and unborn, merely sources of revenue and subjects of the abortion industry’s use?

VIII. CONCLUSION

The conscience of American women is at stake. “Reading the familiar words of the Declaration of Independence is thus a rather sobering experience.”\textsuperscript{158} How shallow can our source of freedom and liberty be? “We hold these truths to be self-evident.”\textsuperscript{159}

Clearly, this great Declaration is indeed a charter for liberty but it is also a statement of the authority on which our claim to freedom and dignity rests. I believe that the smallest child among us could understand the consequence of ignoring this truth. If this authority is the ground on which we stand, if this authority is that which established our freedom and gives it a firm foundation, then if you use your freedom such a way as to contravene and deny that authority, do you not cut the ground out from under your claim to rights, to freedom, to dignity?\textsuperscript{160}

Naomi Wolf honestly remarked, “I could no longer tolerate the fetus-is-nothing paradigm of the pro-choice movement.”\textsuperscript{161} She admonishes the abortion rights movement to face the truth, or

\textsuperscript{155} Ohio: Health Officials Blasted for Abortion Record-Keeping, in AMERICAN POLITICAL NETWORK ABORTION REPORT, Mar. 9, 1994.
\textsuperscript{156} See id.
\textsuperscript{158} ALAN KEYES, OUR CHARACTER, OUR FUTURE 130 (1996).
\textsuperscript{159} THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (emphasis added).
\textsuperscript{160} Keyes, supra note 158, at 131. Although the chapter in Keyes’ book is about the “spiritual healing” of America, it is completely appropriate in this context as well.
\textsuperscript{161} Naomi Wolf, Our Bodies, Our Souls: Rethinking Pro-Choice Rhetoric, NEW REPUBLIC, Oct. 16, 1995, at 33-34. She states that she was several months pregnant, and “sick as a dog” at the time.
consequently, live at the height of hypocrisy.\textsuperscript{162} In her opinion, denying the truth is only hurting the abortion movement and the women it seeks to empower, or more often, as this article points out, exploit.

Yet the reality of American life, according to April Cherry, is that women are controlled by outside forces. In an unconsciously patronizing fashion, she states,

[women do not have control of the technology, and because women lack real social, political or economic power, sex-selective technologies, including abortion, are being used to annihilate women before they are born. Women are therefore being required to participate in their own pre-victimization through the use of sex-selective techniques which ensure the birth of male children.\textsuperscript{163}]

Although her stand against sex-selection abortion is greatly appreciated, Cherry fails to see women as responsible and capable moral agents, able to make their own decisions. The women who do the choosing are responsible for the choices they make. The “right to choose” goes beyond social construction and power, toward a feminization of coercion if abortion is truly the only choice women have. Cherry is more accurate when she states, “[f]eminism must consider whether the right to choose abortion, as it is currently framed by liberalism, increases women’s reproductive freedom or increases the exploitation of women’s reproductive capacities.”\textsuperscript{164}

\textsuperscript{162} See id.

\textsuperscript{163} Cherry, \textit{supra} note 1, at 166 (citing Janice Raymond, \textit{Introduction} to \textit{THE CUSTOM-MADE CHILD?: WOMEN-CENTERED PERSPECTIVES} 177, 177 (Helen B. Holmes et al. eds., 1981) (using the terminology of “pre-victimization”)).

Given the full moral status of women, the physical and emotional nature of pregnancy and childbirth, the ways in which a forced pregnancy is oppressive to women, and of course, the historical and current oppression of women, abortion and sex-selective abortion still raise equal protection issues, regardless of the moral or legal status of the fetus.”

Cherry, \textit{supra} note 1, at 211. I have trouble with her use of the term “forced pregnancy.” Forced pregnancy would certainly be the appropriate term in situations of pregnancy resulting from rape or incest. My concern, however, is that Cherry is assuming women have the inability to make the responsible decision to engage in self-control, birth control or pregnancy and family planning before conception. Or, are women absolved from such responsibility? I would like to give women a little more credit than to state that every pregnancy is a “forced pregnancy.”

\textsuperscript{164} Id. at 217. There is a dual exploitation of women’s reproductive capacities. The first is the reproductive exploitation of the mother, and the second is the reproductive exploitation of the female fetus, as fetal tissue research allows the use of the unborn woman’s womb and ovum, as well as any other part of the tiny female body, by the consent of another woman, her mother.
Arguments that sex selection will lead to a better quality of life for families, children, or women are comprehensible only in the context of a sexist society that gives preferential treatment to one sex, usually the male. Instead of selecting sex, it should be possible to improve quality of life by making society less sexist.\footnote{165}

True quality of life cannot be fixed by the bandage of abortion of female fetuses. The mere suggestion that it can evidences inherent sexism, i.e., fewer women will improve everyone's quality of life. Some consider abortion a problem rather than a solution, which ought to suggest that the solution is indeed part of the problem.

Although sex selection could prevent some abuse of unwanted female children and their mothers in the short run, it does not correct the underlying abuses, namely the social devaluation of women in many parts of Asia and the gender stereotyping of children of both sexes in the rest of the world.\footnote{166}

Furthermore, male superiority in developing nations will decrease with the lesser reliance on an agrarian society. To some extent, and possibly to a large extent, educational opportunities open to women will increase opportunities for their functional value, worth, and employability of women. Sex selection, even to obtain the “balanced family” only helps to perpetuate gender stereotyping and sexism.\footnote{167}

Stereotyping is no longer necessary in a post-modern society. Women as well as men can carry on the family name, they can inherit estates, they can do most jobs, and do them quite well.\footnote{168} Tasks that usually fall on women, like caregiving in particular, can be done by men, unless women refuse to allow men to do them.\footnote{169} Furthermore, parent’s natural desires to spend time with a child of the same sex as themselves, whether it be to participate together in anything from sports to shopping, can be done with either sex to an equal degree.\footnote{170} Women who use such excuses to choose one sex

\footnote{165. Wertz, supra note 12, at 1433.}
\footnote{166. Id.}
\footnote{167. See CHRISTINE OVERALL, ETHICS AND HUMAN REPRODUCTION: A FEMINIST ANALYSIS 17-39 (1987).}
\footnote{168. See MICHAEL D. BAYLES, REPRODUCTIVE ETHICS 35 (1984).}
\footnote{169. This type of refusal seems illogical and unwise. The goal of removing men from performing certain acts of caregiving may be motivated by a warped sense of pride, or some desire to maintain power.}
\footnote{170. Mary A. Warren brings this point up as the strongest argument for sex selection, supra note 9, at 84-85, but Wertz, supra note 12, at 1434, does an excellent job diffusing any}
over another, especially boys over girls, are defrauding any integrity that the women's movement might have ever had.

The choice to avoid sex selection abortion ought not be viewed as a limit on autonomy — such a fallacy holds no reason. It ought to be viewed as an opportunity for women to ensure that social control over reproduction is largely exercised by women and influenced by the choices they make. "The broader dispute over abortion is manifested by a division in feminist theory over whether 'women can [ever achieve the fulfillment of feminist goals in a society permissive toward abortion.'\textsuperscript{171}

The abortion inquiry has become "a debate about women's contrasting obligations to themselves and others,"\textsuperscript{172} namely each other, as members of a gender class. The choice of sex selection abortion is merely evidence of that equivocation. Women need not continue to allow liberty to be a self-contradiction. If reproductive liberty is properly put in a context of gender discrimination, then that liberty is preserved by empowered self-restraint and personal order on the part of all the individual members of that gender. Women have much more than reproductive power; moreover, we have the power to preserve liberty for all women with goodness, justice and virtue.

There is no consensus regarding abortion within feminist theory and rationale, nor does one exist among women in general. Feminists themselves have expressed in their writings the ways in which they have been hurt by abortion.\textsuperscript{173} Laws will not necessarily

\begin{quote}
There are additional arguments against sex selection if it takes place after conception. Prenatal diagnosis for this purpose is a misuse of a costly, and in some nations scarce, medical resource. Sex selection negates the medical uses of prenatal diagnosis to detect serious disorders in the fetus and undermines the primary moral reason that justifies prenatal diagnosis and selective abortion — the prevention of serious and untreatable genetic disease. Using prenatal diagnosis to select sex could lead to a slippery slope toward selection on cosmetic grounds, such as height, weight, or eye, hair, or skin color. If it ever becomes technically possible to predict such characteristics, some parents would select for such purposes, especially for weight.
\end{quote}

\textit{Id. at} 1434-35 (citing Dorothy C. Wertz et al, \textit{Attitudes Toward Abortion Among Parents of Children with Cystic Fibrosis}, 81 AM. J. PUB. HEALTH 992, 994 (1991)).


172. LUKER, supra note 115, at 193.

amend these wrongs, though they may provide some relief. Ultimately, the hearts and minds of women must be healed of the scars of gender discrimination promoted by sex selection abortion and attributable to the abortion preference itself. What was once hailed as the "choice" of individual liberty that would free all women has enslaved those seeking freedom at its borders, bringing to an ironic reality the paradox of the skeptics.