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## An Exploration of "The 'Wild West' of Reproductive Technology": Ethical and Feminist Perspectives on Sex-Selection Practices in the United States

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AN EXPLORATION OF “THE ‘WILD WEST’ OF  
REPRODUCTIVE TECHNOLOGY”: ETHICAL AND FEMINIST  
PERSPECTIVES ON SEX-SELECTION PRACTICES IN THE  
UNITED STATES

INTRODUCTION

- I. A BRIEF INTRODUCTION TO SEX-SELECTION PRACTICES
  - A. *Preimplantation Genetic Diagnosis*
  - B. *Sperm Sorting*
  - C. *Selective Termination of Pregnancies Based on Sex and Infanticide*
- II. FIGURES AND DATA IN THE UNITED STATES AND GLOBALLY
- III. BEYOND DEMOGRAPHICS: THE ETHICS OF SEX SELECTION
  - A. *“Family Balancing” Through Sex Selection*
  - B. *Ethical Considerations of Sex Selection and the Bounds of Reproductive Choice*
  - C. *Inherent Gender Discrimination*
  - D. *Inappropriate Control of Nonessential Characteristics of Children*
  - E. *Limited and Scarce Medical Resources for Nonessential Purposes*
  - F. *Concerns about the “Slippery Slope” and the Creation of “Designer Babies”*
- IV. THE FEMINIST DILEMMA
  - A. *The Rhetoric of “Choice” and the Western Liberal Conception of Reproductive Rights*
  - B. *A New Feminist Perspective Not Based on a Binary “Choice” Framework*
- V. REGULATORY OPTIONS AND NON-REGULATORY ALTERNATIVES FOR THE UNITED STATES
  - A. *Canada and the United Kingdom: Potential Models for the United States?*
  - B. *Constitutional Considerations*
  - C. *Professional Societies: The Best Option for the United States*

CONCLUSION

INTRODUCTION

Although a great many voices have been raised in the debate over ethical questions in the biotechnology arena, over the issue of

sex-selection practices<sup>1</sup> there is a disquieting silence in the United States. How is that silence to be accounted for? With the advent of technologies capable of profoundly expanding reproductive options and changing the very concept of reproduction itself, one might fully expect an outcry for regulation. Yet, sex-selection practices are virtually unregulated in the United States at both the federal and state levels, and there has been relatively little demand for such regulation.<sup>2</sup>

In fact, the United States is one of the few remaining countries that still allows non-medical sex selection.<sup>3</sup> Both the United Kingdom<sup>4</sup> and Canada<sup>5</sup> have significant pieces of legislation addressing sex selection as well as a number of other areas concerning reproductive technology.<sup>6</sup> Members of the Council of Europe have banned sex selection for non-medical purposes entirely.<sup>7</sup> In some places, sex-selection practices actually have criminal consequences. Of these, Germany and the Australian state of Victoria have some of the most

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1. Sex selection practices are methods, either preconception or prenatal, that allow for parental selection of the gender of the child. *See infra* Part I (discussing the various sex-selection technologies).

2. Michael J. Gerhardt, *The Ripple Effect of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 429 (1990); *See, e.g.*, Margaret Foster Riley & Richard A. Merrill, *Regulating Reproductive Genetics: A Review of American Bioethics Commissions and Comparison to the British Human Fertilisation and Embryology Authority*, 6 COLUM. SCI. & TECH. L. REV. 1, 8 (2005) (noting a Senate report stating that it is not "the responsibility of the Federal government to develop and establish moral principles").

3. Susannah Baruch, *Preimplantation Genetic Diagnosis and Parental Preferences: Beyond Deadly Disease*, 8 HOUS. J. HEALTH L. & POL'Y 245, 267 (2008). *See also* S. Soini, *Preimplantation Genetic Diagnosis (PDG) in Europe: Diversity of Legislation a Challenge to the Community and its Citizens*, 26 MED. & L. 309, 314 (2007) (examining the European Convention on Human Rights and Biomedicine's explicit ban on non-medical sex-selection practices found in article 14, which states "that '[t]he use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided'" (quoting Council of Europe, Convention on Human Rights and Biomedicine art. 14, Apr. 4, 1997, E.T.S. No. 164, reprinted in 36 I.L.M. 817)).

4. *See* Press Release, Human Fertilisation & Embryology Authority, HFEA announces sex selection recommendations (Nov. 12, 2003), <http://www.hfea.gov.uk/803.html> (stating that the British population exhibited "overwhelming support for sex selection techniques to be regulated," support that ultimately led to the United Kingdom's ban on non-medical sex selection practices in the Human Fertilisation and Embryology Act 2008).

5. *See* Colin Rasmussen, *Canada's Assisted Human Reproduction Act: Is it Scientific Censorship, or a Reasoned Approach to the Regulation of Rapidly Emerging Reproductive Technologies?*, 67 SASK. L. REV. 97, 97-99 (2004) (discussing Canada's proactive response to the reproductive-biotechnology debate: approval of the Assisted Human Reproduction Act, S.C. 2004, c. 2 (Can.)).

6. This legislation will be discussed in greater detail in Part V, when this Note examines the Canadian and British legislation as potential models for the United States.

7. Marsha Garrison, *Regulating Reproduction*, 76 GEO. WASH. L. REV. 1623, 1624 (2008).

severe penalties.<sup>8</sup> Germany's 1990 Embryo Protection Act<sup>9</sup> makes non-medical sex selection a criminal act with a penalty of up to one year's imprisonment,<sup>10</sup> and Victoria's Assisted Reproductive Treatment Act of 2008<sup>11</sup> makes non-medical sex selection a criminal offense for which individuals may face up to two years' imprisonment as penalty.<sup>12</sup>

There are a number of possible explanations as to why there has been relatively little debate on this issue in the United States. The rhetoric of "choice" supporting abortion rights may explain some of the disparity between the United States and other countries, or at least explain why feminists have not been at the forefront of the debate.<sup>13</sup> It is also possible that the issue has simply been ignored under the mistaken assumption that sex selection is not a pressing concern in the United States.<sup>14</sup> Demographic data, however, suggest otherwise.<sup>15</sup> Politicians themselves may be reluctant to enter into the debate because it is simply not politically advantageous to do so—these issues are too politically divisive.<sup>16</sup> Politicians are aware that they would likely have to address the status of embryos, an area of political discourse that frequently leads to a stalemate, with both sides often refusing to compromise their ideals, as has happened with the issue of abortion rights.<sup>17</sup>

It is true that sex selection is more prevalent and presents a greater threat in other parts of the world, particularly in Asian countries such as China and India.<sup>18</sup> Yet because these areas account

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8. Edgar Dahl, *Boy or Girl: Should Parents Be Allowed to Choose the Sex of Their Children?*, CARDIFF CTR. FOR ETHICS, LAW & SOC'Y, 1 (2005), <http://www.ccels.cf.ac.uk/archives/publications/2005/dahlpaper.pdf>.

9. Gesetz zum Schutz von Embryonen [ESchG] [Embryo Protection Act], Dec. 13, 1990, BGBl. I at 2746 (Ger.).

10. *Id.* § 3.

11. Assisted Reproductive Treatment Act 2008 (Vic.) (Austl.).

12. *Id.* c. 28.

13. See Mallika Kaur Sarkaria, Comment, *Lessons From Punjab's "Missing Girls": Toward a Global Feminist Perspective on "Choice" in Abortion*, 97 CAL. L. REV. 905, 939 (2009) ("[T]he hard-won 'right to choose' has enough detractors without feminists themselves questioning its appropriateness . . . . The difficulty of applying 'choice' to sex-selective abortions provides ammunition to anti-abortion activists in the United States. Anti-abortion activists argue that sex selection is yet another ugly aspect of abortion.").

14. See Nicholas Eberstadt, Address Before the United Nations General Assembly Third Committee: The Global War Against Baby Girls (Dec. 6, 2006), AM. ENTER. INST. FOR PUB. POL'Y RESEARCH, at 28 (noting that in the United States, although there is the tendency to think that sex selection is not a major concern, there is real data showing the contrary).

15. See *id.* at 27-28 (discussing the demographical trends in the United States towards sex selection).

16. Jaime King, *Predicting Probability: Regulating the Future of Preimplantation Genetic Screening*, 8 YALE J. HEALTH POL'Y L. & ETHICS 283, 321 (2008).

17. *Id.* at 322-23.

18. Eberstadt, *supra* note 14, at 9-12.

for approximately forty percent of the world's population,<sup>19</sup> a response by the United States is all the more necessary. Silence on this issue sends a message of complicity to the world. It has become increasingly important to address sex selection, because more and more couples from other countries are coming to the United States for sex-selection procedures to which they are denied at home.<sup>20</sup> In fact, the United States has been called "the 'Wild West of reproductive technology.'"<sup>21</sup> Sex selection is quickly becoming a multimillion-dollar industry in the United States alone,<sup>22</sup> an industry that must at least be acknowledged, if not regulated, by government. There is also concern that if fertility clinics continue to offer ethically questionable procedures without any oversight, the public's overall trust in the fertility field may be threatened.<sup>23</sup>

In Part I, this Note will provide a brief explanation of the different methods available for sex selection. Part II of this Note will provide a thorough examination of demographic data concerning sex selection and its effects, both globally and within the United States. Part III will examine the underlying ethical issues raised by sex selection. Part IV will look specifically at the feminist dilemma concerning reproductive rights and sex selection. Lastly, Part V will examine two potential models for the United States: Canada<sup>24</sup> and the United Kingdom,<sup>25</sup> along with alternatives to governmental regulation. As for alternatives to regulation, Part V will examine the possibility of using professional

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19. Monica Sharma, *Twenty-first Century Pink or Blue: How Sex Selection Technology Facilitates Gendercide and What We Can Do About It*, 46 FAM. CT. REV. 198, 200 (2008).

20. Baruch, *supra* note 3, at 267.

21. Sharma, *supra* note 19, at 206 (quoting Suzanne Leigh, *Reproductive Tourism*, USA TODAY, May 2, 2005, at 7D). *See also* Garrison, *supra* note 7, at 1623.

22. Sharma, *supra* note 19, at 198.

23. Nigel M. de S. Cameron, *Pandora's Progeny: Ethical Issues in Assisted Human Reproduction*, 39 FAM. L.Q. 745, 771 (2005); Bratislav Stankovic, "It's a Designer Baby!": *Opinions On Regulation of Preimplantation Genetic Diagnosis*, 2005 UCLA J.L. & TECH. 3, ¶ 27 (2005).

24. Assisted Human Reproduction Act, S.C. 2004, c. 2 (Can.).

25. Human Fertilisation and Embryology Act, 1990, c. 37 (Eng.). Note that this Act has been amended by the Human Fertilisation and Embryology Act of 2008, which put into statute the ban on non-medical sex selection that was previously in place only as a matter of policy. The regulatory scheme outlined in the 1990 Act remains intact. Human Fertilisation and Embryology Act, 2008, c. 22 (Eng.). *See also* Explanatory Notes to Human Fertilisation and Embryology Act, 2008, c. 22, ¶ 50 (Eng.) [hereinafter Explanatory Notes] ("This provision enables sex selection not only for conditions which are clearly linked to sex chromosomes . . . but also where there is a particular risk of gender-related conditions for example . . . breast cancer where the mother . . . wishes to avoid passing this condition on to a daughter."). This is actually somewhat of a more lax standard for sex-selection practices, as, previously, the more controversial use of sex selection for the prevention of the birth of a daughter who was a carrier of an X-linked *recessive* gene was generally not approved. Soini, *supra* note 3, at 314.

societies that issue guidelines as a means to monitor, and ultimately curb, sex-selection practices in the United States.<sup>26</sup>

This Note ultimately concludes that neither model would be a good choice for the United States, due to the models' various shortcomings as implemented in those countries,<sup>27</sup> and because they would be ill-suited as a federal model for oversight and regulation in the United States.<sup>28</sup> Moreover, there are serious questions as to whether these models of regulation could withstand constitutional scrutiny.<sup>29</sup> Therefore, while efforts must be made to address the issue of sex-selection practices, federal regulation would be the least appropriate or desirable response.<sup>30</sup> Relying instead on professional societies to issue guidelines and standards, as well as to use extensive efforts to promote education and awareness, is the best possible option.

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26. See Susannah Baruch et al., *Genetic Testing of Embryos: Practices and Perspectives of U.S. IVF Clinics*, 89 FERTILITY & STERILITY 1053, 1057 (2008), available at <http://www.dnapolicy.org/resources/GeneticTestingofEmbryos.pdf> ("A substantial majority of clinic directors surveyed agree or strongly agree that professional societies are best suited to create professional guidelines related to PGD and that they should do so.")

27. See Amel Alghrani & Margaret Brazier, 16 MED. L. REV. 469, 471 (2008) (reviewing RUTH DEECH & ANNA SMAJDOR, FROM IVF TO IMMORTALITY: CONTROVERSY IN THE ERA OF REPRODUCTIVE TECHNOLOGY (2007)) (quoting the House of Commons Science and Technology Committee calling the Human Fertilisation and Embryology Authority's policy development "highly unsatisfactory"); Rasmussen, *supra* note 5, at 97 (noting that the Assisted Human Reproduction Act ultimately "is flawed in that it tries to cover too much legislative ground").

28. See Alison Harvison Young, *Possible Policy Strategies for the United States: Comparative Lessons*, in REPROGENETICS: LAW, POLICY, AND ETHICAL ISSUES 226, 226 (Lori P. Knowles & Gregory E. Kaebnick eds., 2007) (arguing that the "broad, national regulatory framework like that provided by the British Human Fertilisation and Embryology Authority (HFEA) or . . . the Assisted Human Reproduction Act, is unlikely to be an effective or politically viable approach in the U.S. context").

29. Stankovic, *supra* note 23, ¶ 3.

30. See COLIN GAVAGHAN, DEFENDING THE GENETIC SUPERMARKET: THE LAW AND ETHICS OF SELECTING THE NEXT GENERATION 132 (2007) (noting that the prohibition by law of sex selection is probably doing more harm than good to women in India). A logical extension of this idea is that the same would be true of certain ethnic subgroups in the United States, particularly the groups that demographers have demonstrated are the most likely to use sex-selection practices. See Eberstadt, *supra* note 14, at 1 (setting forth the idea that there is a "global war against baby girls"); Part II, *infra* (discussing sex-selection figures); see also Sarkaria, *supra* note 13, at 942 ("Rather than focusing on forcing women to make the 'right' choice, cultural change campaigns should focus on expanding choices. Rather than punishing women for making the 'wrong' choice of sex selection, they should ensure that it is not the only choice for women."). Again, although the article is speaking out against governmental regulation or criminalization of sex selection in India, the same principle should be emphasized with respect to ethnic groups in the United States. Finding the balance between regulating sex selection and not punishing women for exercising their "right to choose" is the task undertaken in this Note. It is important for the United States to have a loud voice in what ultimately needs to be a global cultural discussion on sex-selection practices for there to be for any real change.

## I. A BRIEF INTRODUCTION TO SEX-SELECTION PRACTICES

Sex selection can be achieved in a number of ways. The focus of this Note will be on the first two methods discussed, preimplantation genetic diagnosis and sperm sorting, but it is important to bear in mind all of the methods used for sex selection when considering the significance of this issue and the appropriate responses to it.

### A. *Preimplantation Genetic Diagnosis*

Preimplantation genetic diagnosis, or PGD, involves egg extraction, in vitro fertilization (IVF), and the selection of embryos for transfer back to the woman's uterus.<sup>31</sup> PGD was originally developed for use by families that had known sex-linked genetic diseases in an effort to screen embryos for the disease before transfer and implantation.<sup>32</sup> Today, this technology is also being used for sex selection.<sup>33</sup>

In 2005, forty-two percent of IVF-PGD clinics reported providing non-medical sex selections in PGD cycles.<sup>34</sup> Forty-seven percent of these same clinics stated that they "are willing to defer to parental preferences and provide PGD for nonmedical sex selection under all circumstances."<sup>35</sup> Infertility patients have expressed a fairly strong interest in preimplantation sex selection if there is no additional cost to them.<sup>36</sup> This technology is still relatively expensive. The American Society for Reproductive Medicine stated that, in 2008, the average cost of an IVF cycle in the United States was \$12,400, while PGD cost as much as \$10,000 to \$12,000 per cycle.<sup>37</sup>

Several European countries have reacted to the expansive use of PGD, either through a total ban on the practice, or by limiting its use to medical sex selection only.<sup>38</sup> Germany, Ireland, Switzerland, and Austria have completely banned its use,<sup>39</sup> while France, Greece, Holland, Belgium, Italy, Norway, and the United Kingdom have limited its use to medical purposes only.<sup>40</sup>

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31. Baruch, *supra* note 3, at 247.

32. *Id.* at 248.

33. Riley & Merrill, *supra* note 2, at 58.

34. Baruch et al., *supra* note 26, at 1056.

35. *Id.* at 1057.

36. *See* Sharma, *supra* note 19, at 199 (discussing a 2005 study that found that forty-one percent of infertility patients would use preimplantation sex selection if there was no additional cost for the procedure, and that half of that group would still use sex selection even though it had to pay).

37. Baruch, *supra* note 3, at 251.

38. Stankovic, *supra* note 23, ¶ 50.

39. *Id.*

40. *Id.*

### B. Sperm Sorting

MicroSort,<sup>41</sup> or sperm sorting,<sup>42</sup> is the newest development in sex-selection technology.<sup>43</sup> It is both a less costly and less intrusive alternative to PGD.<sup>44</sup> Used before conception, MicroSort is a technique that separates sperm that is likely to produce boys from that which is likely to produce girls.<sup>45</sup> Intrauterine insemination (IUI) is then used to insert the sperm likely to create the desired sex.<sup>46</sup> Although MicroSort is more affordable than PGD,<sup>47</sup> MicroSort's probability of conceiving a child of the desired sex is lower: ninety-two percent of parents who requested a female baby ended up with a female baby, and eighty-one percent of parents who requested a male baby ended up with a male baby,<sup>48</sup> compared to the near-perfect success rate of PGD.<sup>49</sup> Like PGD, the primary medical purpose of sperm sorting is to allow couples with a known risk of a sex-linked genetic disease or disorder to select the sex of their child to avoid passing on the sex-linked trait.<sup>50</sup>

Although some commentators consider the ethical or moral issues to be the same for PGD and sperm sorting, others are far less comfortable with the use of PGD for sex selection.<sup>51</sup> For example, commentators recognize that while one technique, sperm sorting, merely increases the likelihood of a certain sex, the other, PGD, is nearly 100 percent effective.<sup>52</sup> In addition, Jeffery Kahn, the Director of the Center for Bioethics at the University of Minnesota, argues that "[s]orting sperm is one thing—it's quite another to create and test embryos before they are implanted in a woman's womb and discard those of the 'wrong' gender, at least for many professionals and

41. Dahl, *supra* note 8, at 1. This procedure is sometimes referred to as flow cytometric sperm separation. *Id.* at 2.

42. Garrison, *supra* note 7, at 1639. For a more thorough discussion of the science of the sperm sorting process, see Ethics Comm. Of the Am. Soc'y of Reproductive Med., *Preconception Gender Selection for Nonmedical Reasons*, 75 FERTILITY & STERILITY 861, 861 (2001) [hereinafter Ethics Comm.].

43. Sharma, *supra* note 19, at 200.

44. Ethics Comm., *supra* note 42, at 861.

45. Sharma, *supra* note 19, at 200.

46. *Id.*

47. Dahl, *supra* note 8, at 1 (noting that each attempt to artificially inseminate the woman costs approximately 1,250 British pounds); Garrison, *supra* note 7, at 1639.

48. Sharma, *supra* note 19, at 200.

49. Jason Christopher Roberts, *Customizing Conception: A Survey of Preimplantation Genetic Diagnosis and the Resulting Social, Ethical, and Legal Dilemmas*, 2002 DUKE L. & TECH. REV. 12, ¶ 18 (2002).

50. Dahl, *supra* note 8, at 2.

51. Roberts, *supra* note 49, ¶ 18.

52. *Id.*

members of the public.’”<sup>53</sup> Sperm sorting thus remains a particularly controversial method of sex selection.

### *C. Selective Termination of Pregnancies Based on Sex and Infanticide*

There are methods that are even more controversial for selecting sex. Parents may also have the option of selectively terminating a pregnancy once the sex of the fetus is known, a practice that is widespread in China (and other Asian countries) and India, in particular.<sup>54</sup> Although such practices have already revealed that female fetuses are the target of selective abortions in these countries, sociological polling on birth-order preference suggests that because a son is universally preferred to a daughter as a first child, female fetuses are those most likely to be the targets in *any* location.<sup>55</sup>

Scholar Nicholas Eberstadt, in an address before the United Nations in 2006, reported the startling statistic that, “[a]t the very minimum, half of all second-order (or higher) female pregnancies in China are terminated on a gender-selective basis.”<sup>56</sup> Additionally, infanticide, or the killing of the child after birth,<sup>57</sup> is still practiced if the child is not of the desired sex, and is most common in South Asia and India.<sup>58</sup> This practice almost exclusively results in the death of female babies.<sup>59</sup> One study reported that out of 8,000 abortions performed in India, 7,999 were on female fetuses.<sup>60</sup> Shockingly, female infanticide has only been outlawed in India since 1996.<sup>61</sup> Yet, clearly, the practice is still widespread.<sup>62</sup>

## II. FIGURES AND DATA IN THE UNITED STATES AND GLOBALLY

Demographers have reported some startling figures that reveal a disturbing trend toward sex selection in the pursuit of male children

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53. *Id.* (quoting Jeffery P. Kahn, *The Questionable Future of Unregulated Reproduction*, at <http://www.cnn.com/2002/HEALTH/02/18/ethics.matters/index.html>).

54. Eberstadt, *supra* note 14, at 9-12.

55. Lynne Marie Kohm, *Sex Selection Abortion and the Boomerang Effect of a Woman's Right to Choose: A Paradox of the Skeptics*, 4 WM. & MARY J. WOMEN & L. 91, 93 (1997).

56. Eberstadt, *supra* note 14, at 7. *See also* Sheila A.M. McLean, *Sex Selection: Intergenerational Justice or Injustice?*, 24 MED. & L. 761, 766 (2005) (discussing China's "notorious one child policy" that leads to the abortion of female fetuses and the infanticide of female children).

57. Roberts, *supra* note 49, ¶ 14.

58. Eberstadt, *supra* note 14, at 9, 23.

59. *Id.*; Sharma, *supra* note 19, at 200.

60. Roberts, *supra* note 49, ¶ 15.

61. *Id.* ¶ 14.

62. Eberstadt, *supra* note 14, at 23.

across the globe.<sup>63</sup> The United Nations Children’s Fund (UNICEF) has reported that forty-three million females are missing from India’s population.<sup>64</sup> In 2001, the city of Punjab’s male-to-female ratio was 127 boys for every 100 girls.<sup>65</sup> Economist Amartya Sen has similarly estimated that around fifty million women are missing from Chinese population figures.<sup>66</sup> Demographic reports from South Korea, Hong Kong, and Taiwan, and from Chinese ethnic groups in Singapore, also reflect equally disturbing male-to-female ratios.<sup>67</sup> Data have also revealed alarming sex ratios in many other parts of the world, including countries in Latin America and Europe.<sup>68</sup>

It is clear that, on a global scale, sex selection is having a profound effect on populations—namely on the male-to-female ratio.<sup>69</sup> Yet proponents of “choice” in sex selection tend to dismiss the claims about unbalanced sex ratios because they do not believe the imbalance is of real concern in the United States or other Western societies.<sup>70</sup>

Nevertheless, the numbers in the United States reveal that we, too, are not immune to this trend, particularly within certain ethnic subgroups.<sup>71</sup> Chinese-American, Japanese-American, Filipino-American, and other Asian-American populations exhibit the most disquieting sex ratios at birth.<sup>72</sup> Most alarming of these is the Japanese-American ratio, which rose from 99.7 boys to every 100 girls in 1975 to 108.9 boys to every 100 girls in 2002.<sup>73</sup> Thus, as some commentators have observed, allowing sex selection could introduce into American society inequality along ethnic lines, as well as along gender lines.<sup>74</sup>

It is important to bear in mind the prevalence of sex-selection practices globally and domestically, as well as the potential effect of

63. *Id.* at 9, 23; Sharma, *supra* note 19, at 200.

64. Sharma, *supra* note 19, at 200 (noting also that even the Indian government, in its 2001 census, reported the odd figure of only 927 girl babies for every 1,000 boy babies).

65. Eberstadt, *supra* note 14, at 13. This creates “the biologically impossible sex ratio of 110 to 100.” *Id.*

66. Sharma, *supra* note 19, at 200.

67. Eberstadt, *supra* note 14, at 9.

68. *Id.* at 16.

69. *Id.* at 3.

70. See Dahl, *supra* note 8, at 3-4 (“[A] readily available service for preconception sex selection . . . is highly unlikely to cause a severe imbalance of the sexes in Western societies.”); McLean, *supra* note 56, at 767 (“[E]vidence suggests that the spectre of demographic disaster is in fact a red herring.”).

71. Eberstadt, *supra* note 14, at 27.

72. *Id.* Further, “the odds against seeing the[se statistics] reported by Asian-American communities as an artifact of pure chance would rise into the tens of billions.” *Id.* at 28. See also Stankovic, *supra* note 23, ¶ 26 (noting that ethnic groups composed of immigrants from the Asian subcontinent and China “are on the rise,” and that they “have a tradition of overwhelmingly favoring male offspring”).

73. Eberstadt, *supra* note 14, at 27.

74. Stankovic, *supra* note 23, ¶ 26.

these practices on demographics, when considering sex-selection regulation or alternatives to regulation. The issue has been too long ignored in the United States, perhaps because there is little recognition of the startling data concerning population imbalances and the aborting of female fetuses and killing of female babies.

### III. BEYOND DEMOGRAPHICS: THE ETHICS OF SEX SELECTION

Although demographic data may alone suffice in demonstrating that sex selection needs to be addressed, the number of pressing moral and ethical concerns in the sex-selection debate present compelling arguments that the issue needs to be addressed *now*. Commentators on both sides of the issue, and particularly those against sex selection, speak about sex selection in heated tones. Some feminist commentators go so far as to claim that sex-selection technology “could mean the death of the female.”<sup>75</sup> Several commentators have termed the word “gendercide” to describe the disproportionate effect of sex-selection technology on women.<sup>76</sup> Those who do not condemn sex-selection practices emphasize the importance of reproductive autonomy and question whether the arguments advanced against sex selection are of sufficient weight to justify limiting reproductive autonomy.<sup>77</sup> Indeed, as philosopher Mary Anne Warren has stated, “the value of freedom ‘cannot easily be overridden by the mere possibility of harmful effects—even rather significant ones.’”<sup>78</sup> Proponents of this position point to the fact that although law, social practice, and ethics do not necessarily view procreative liberty as absolute, individuals are ordinarily given substantial latitude in reproductive matters.<sup>79</sup>

There is also the important argument that in any pluralistic society there are always irreconcilable differences on certain moral or ethical issues, and that, in those cases, there ought to be a “presumption in favor of liberty.”<sup>80</sup> Professor Julian Savulescu makes the point: “[i]t is easy to grant people the freedom to do what is agreeable to us . . . [but] freedom is important only when it is the freedom for

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75. Robyn Rowland, *Motherhood, Patriarchal Power, Alienation and the Issue of ‘Choice’ in Sex Preselection*, in *MAN-MADE WOMEN: HOW NEW REPRODUCTIVE TECHNOLOGIES AFFECT WOMEN* 74, 75 (Gena Corea et al. eds., 1987).

76. Sharma, *supra* note 19, at 199.

77. GAVAGHAN, *supra* note 30, at 128. See Stephen Wilkinson, *Sexism, Sex Selection and Family Balancing*, 16 *MED. L. REV.* 369, 370 (2008) (discussing the view of some that preserving the “free market” in sex selection trumps concerns about “the wrongness of ‘playing [G]od’”).

78. McLean, *supra* note 56, at 769 (citation omitted).

79. Ethics Comm., *supra* note 42, at 862.

80. Dahl, *supra* note 8, at 2.

people to do what is disagreeable to others.’”<sup>81</sup> Coupled with this idea are the principles that “[e]ach citizen should have the right to live his life as he chooses so long as he does not infringe upon the rights of others,”<sup>82</sup> and that “[t]he state may interfere with the free choices of its citizens only to prevent serious harm to others.”<sup>83</sup> While these may be valid assertions, many of the opponents to sex selection claim that the more compelling argument is that “[s]election somehow violates the child’s ‘right to an open future,’”<sup>84</sup> so these “free choices” do, in reality, cause serious harm to others.<sup>85</sup> Opponents of sex selection, therefore, argue that the state *does* have a legitimate right to intervene.<sup>86</sup>

#### A. “Family Balancing” Through Sex Selection

Perhaps the most defensible use of sex selection for non-medical reasons is for so-called “family balancing.”<sup>87</sup> Parents may have a legitimate interest in “evening things up [by] reducing or eliminating the sex differential” within the family.<sup>88</sup> There is some fairly persuasive evidence that in Western nations, couples with two boys or two girls are more likely to have a third child than families with only one child of each, leading to, perhaps, a fair conclusion: parents who do not have children of both sexes are attempting to “balance” their family with a third child of the “missing” gender.<sup>89</sup> This assertion is supported by data collected from the Gender Clinic in Fairfax, Virginia showing that more than ninety percent of couples who are seeking sex selection for non-medical reasons are parents who already have two or more children of the same sex and are attempting to have a child of the opposite sex.<sup>90</sup>

“Family balancing,” then, may be more defensible than other non-medical forms of sex selection because it is presumably less likely to be a sexist process continually favoring males over females, which is one of the primary concerns voiced by opponents of sex selection.<sup>91</sup> The argument is that, in “family balancing,” the focus is on achieving

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81. McLean, *supra* note 56, at 769 (citation omitted).

82. Dahl, *supra* note 8, at 2.

83. *Id.*

84. Wilkinson, *supra* note 77, at 374 (citation omitted).

85. See Ethics Comm., *supra* note 42, at 862 (noting several of the potential harms of sex selection to children and society in general, including increased marital conflict).

86. Garrison, *supra* note 7, at 1640.

87. Wilkinson, *supra* note 77, at 371.

88. *Id.*

89. Dahl, *supra* note 8, at 3.

90. *Id.* at 4.

91. Wilkinson, *supra* note 77, at 370-71.

gender *balance*, rather than on having a child of a particular sex, so it may be less likely that there are sexist motives at play.<sup>92</sup> This argument is not particularly strong, though, as the “balance” desired by the parents may have more to do with traits or assumptions about a particular sex, such as wanting children who are aggressive and who have “sporting prowess,”<sup>93</sup> than with the actual biological sex.<sup>94</sup> In that case, parents are engaging in sexist stereotyping just as much as any other parents using sex-selection methods for non-medical reasons.<sup>95</sup> Thus, although motivations for sex selection “may vary, by definition there are no non-sexist reasons for sex selection except in cases of preventing sex-linked diseases.”<sup>96</sup>

### *B. Ethical Considerations of Sex Selection and the Bounds of Reproductive Choice*

A number of the most significant ethical concerns of sex selection were addressed in the American Society for Reproductive Medicine’s 2001 Ethics Committee Report, including: “the potential for inherent gender discrimination, inappropriate control over nonessential characteristics of children, unnecessary medical burdens and costs for parents, and inappropriate and potentially unfair use of limited medical resources.”<sup>97</sup> Other concerns include “psychological harm to sex-selected offspring . . . and reinforcement of gender bias in society as a whole.”<sup>98</sup> There also exists the oft-cited “playing God” concern<sup>99</sup> and the question about whether such meddling is “unnatural.”<sup>100</sup> Each of these objections deserves attention.

### *C. Inherent Gender Discrimination*

The argument for inherent gender discrimination in sex selection is relatively clear: parents will select sex based on certain assumptions about appropriate or expected gender behaviors, thus inevitably

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92. *Id.* at 384. See also McLean, *supra* note 56, at 765 (noting that “Dickens has argued that “[p]rohibitions are unnecessary and oppressive where there is no sex bias but only a wish to balance a family with children of both sexes. . . .” (quoting B.M. Dickens, *Can Sex Selection be Ethically Tolerated?*, 28 J. MED. ETHICS 335, 336 (2002))).

93. Wilkinson, *supra* note 77, at 388.

94. *Id.*

95. *Id.*

96. Stankovic, *supra* note 23, ¶ 26.

97. Ethics Comm., *supra* note 42, at 861-62 (internal quotation marks omitted).

98. *Id.* at 862 (internal quotation marks omitted).

99. Dahl, *supra* note 8, at 2.

100. *Id.*

fostering discriminatory gender stereotypes.<sup>101</sup> Underlying sex-selection decisions is the idea that "one sex is superior to, or more appropriately suited for certain social tasks."<sup>102</sup> Coupled with this idea is the argument that the psychological well-being of the sex-selected child will be at stake, as the child will likely "be expected to act in certain gender-specific ways when the technique succeeds and who may disappoint parents when it fails."<sup>103</sup> There is also always the possibility that a "misdiagnosis" will lead to the birth of a child of the "undesired sex," in which case the child might then suffer due to "parental disappointment."<sup>104</sup>

Professor Rosamund Scott challenges the claim that sex-selection practices are not discriminatory, even in nations that "show 'no significant overall preference for one sex over the other.'"<sup>105</sup> She argues that even though there may not be an overall preference for one sex in a given society, *individuals* certainly do have preferences.<sup>106</sup> To demonstrate her point, she contrasts a society in which there is no racism with a society in which fifty percent of the population discriminates against black people and fifty percent discriminates against white people, concluding that the former society is the better society in which to live, even though the ratios in the latter society are ultimately even.<sup>107</sup>

She then asks and answers in the affirmative whether preference for one sex over the other is the same type of discrimination and raises the additional point that society may, in fact, be condoning inherent gender discrimination by allowing non-medical sex selection.<sup>108</sup> This is the exact concern expressed by those opposing non-medical sex selection.

#### *D. Inappropriate Control of Nonessential Characteristics of Children*

Opponents also note that the inappropriate control of nonessential characteristics of children is another ethical concern.<sup>109</sup> "Essential characteristics," although not a particularly well-defined term, seems

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101. Maneesha Deckha, *(Not) Reproducing the Cultural, Racial and Embodied Other: A Feminist Response to Canada's Partial Ban on Sex Selection*, 16 UCLA WOMEN'S L.J. 1, 15-17 (2007); Wilkinson, *supra* note 77, at 385, 388.

102. Wilkinson, *supra* note 77, at 385.

103. Ethics Comm., *supra* note 42, at 862.

104. Stankovic, *supra* note 23, ¶ 38.

105. ROSAMUND SCOTT, CHOOSING BETWEEN POSSIBLE LIVES: LAW AND ETHICS OF PRENATAL AND PREIMPLANTATION GENETIC DIAGNOSIS 320 (2007) (citation omitted).

106. *Id.*

107. *Id.*

108. *Id.* at 320-21.

109. Ethics Comm., *supra* note 42, at 861-62.

to be limited in scope to traits connected to “clinical expressions of disability or disadvantage.”<sup>110</sup> This includes selecting sex to avoid sex-linked diseases, which seems to be generally accepted.<sup>111</sup>

The World Health Organization (WHO) has a broader definition of “health,” which includes an affirmative right to both mental and social well-being, rather than just a right to the absence of disease or disability.<sup>112</sup> Some have invoked this definition to argue that the realm of “essential” characteristics should perhaps be expanded to traits that could affect the child’s mental and social “non-clinical” health as well.<sup>113</sup> The extension of “essential” characteristics would be problematic, though, for those who question the use of genetic screening even for genetic disorders because they fear that allowing screening and testing of fetuses for sex-linked diseases could lead to unfair discrimination against people with disorders.<sup>114</sup> Their primary concerns are that the dignity and human value of people with disorders will be questioned,<sup>115</sup> and that terminating fetuses with these disorders will “send[] a message that a life with the disability is not worth living at all.”<sup>116</sup> In response to this point, some commentators call attention to the important distinction between the actual disability and people with disabilities, noting that while “[s]election reduces the prevalence of the former, [it] is silent with respect to the value of the latter.”<sup>117</sup>

### *E. Limited and Scarce Medical Resources for Nonessential Purposes*

Tied to the argument against control over nonessential characteristics of children is the idea that sex-selection practices would deplete

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110. McLean, *supra* note 56, at 764.

111. *Id.*

112. *Id.*

113. *Id.*

114. Soini, *supra* note 3, at 316.

115. Deckha, *supra* note 101, at 16; Soini, *supra* note 3, at 316. Soini includes several different views regarding this argument. For example, Soini contrasts the idea that selecting an embryo for its desired health involves a valorization of human nature and the life worth living with the WHO’s statement that ultimately “knowledge-based, goal-oriented individual or family choices to have a healthy baby do not constitute eugenics . . . . Eugenics is directed against whole populations, whereas the work of today’s clinical geneticists is directed towards individuals and families.” *Id.* (citation omitted).

116. Roberts, *supra* note 49, ¶ 13. *See also* Deckha, *supra* note 101, at 16 (describing how sex-selection practices “send a discriminatory and demoralizing message to persons already living with disabilities that it would have been better for all concerned had they not been born”).

117. Roberts, *supra* note 49, ¶ 13. (emphasizing that “it would be a drastic step in favor of equality to inflict a higher risk of having a child with a disability on a couple . . . to promote social equality. . . . To attempt to prevent accidents which cause paraplegia is not to say that paraplegics are less deserving of respect” (quoting Julian Savulescu, *Procreative Beneficence: Why We Should Select the Best Children*, 15 *BIOETHICS* 413, 423 (2001))).

valuable and already scarce medical resources for nonessential medical purposes.<sup>118</sup> The obvious counter-argument is that, as a free society, we already allow for many nonessential medical procedures.<sup>119</sup> Cosmetic surgeries, such as face-lifts and liposuction, are clear examples.<sup>120</sup> Thus, even if these sex-selection practices were to have some aggregate downward effect on scarce medical resources, in a society that accepts non-medical cosmetic surgeries, “one could not, without calling [the entire] system into question, condemn a practice merely because it uses medicine for lifestyle or child-rearing choices.”<sup>121</sup>

*F. Concerns about the “Slippery Slope” and the Creation of “Designer Babies”*

Opponents of sex selection also invoke the “slippery slope” argument: allowing parents to select for the sex of their children will open the door to so-called “designer babies,” so that parents will be able to select several of the nonessential characteristics of their children, such as hair or eye color.<sup>122</sup> There is a general concern that allowing for sex selection or any other “designer” options may “turn[] the process of having child [sic] into a consumer experience, giving it a measurable, commodified value.”<sup>123</sup> Some believe that an inevitable consequence of this “consumer experience” will be the substantial and inappropriate emphasis placed on a child’s genetic make-up, rather than on the child’s “inherent worth.”<sup>124</sup>

Professor Dahl disagrees, ultimately concluding that the creation of “designer babies” is an unfounded concern.<sup>125</sup> He states that the arguments against sex selection are not actually against *sex selection*, but rather, “against its alleged consequences.”<sup>126</sup> He also argues that “[i]t is perfectly possible to draw a legal line permitting some forms of selection and prohibiting others.”<sup>127</sup> Finally, he concludes that he does not envision devastating social effects resulting from this sort of parental control: if “some parents [are] foolish enough to spend their hard-earned money on genetic technologies just to ensure their child

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118. Roberts, *supra* note 49, ¶ 16; Ethics Comm., *supra* note 42, at 862.

119. Dahl, *supra* note 8, at 3; Ethics Comm., *supra* note 42, at 863.

120. Dahl, *supra* note 8, at 3.

121. Ethics Comm., *supra* note 42, at 863.

122. Dahl, *supra* note 8, at 4.

123. Stankovic, *supra* note 23, ¶ 34.

124. Ethics Comm., *supra* note 42, at 862. There is also a strong argument that an increase in genetic testing in reproductive matters could lead to an entirely new understanding of parenthood, wherein genetic ties are emphasized over other forms of familial relationships. Stankovic, *supra* note 23, ¶ 38.

125. Dahl, *supra* note 8, at 4.

126. *Id.*

127. *Id.*

will be born with big brown eyes and black curly hair. . . . I cannot see that this would herald the end of civilization as we know it.”<sup>128</sup>

#### IV. THE FEMINIST DILEMMA

Feminists unquestionably face a dilemma when confronted with sex-selection practices. Abortion and reproductive rights are arguably at the core of feminism and women’s rights.<sup>129</sup> Yet sex-selection practices, which can be perceived as merely an extension of reproductive rights, simultaneously implicate a number of additional significant gender and feminist issues.<sup>130</sup> As discussed above, women are disproportionately the targets of sex selection, and there is a significant argument that sex selection leads to the furtherance of gender stereotypes and inherent gender discrimination.<sup>131</sup> As one commentator has noted, “[t]he conflict between preserving reproductive autonomy and ending gendercide is, of course, quite problematic. Resolution of the issue will require intensive effort and political acumen.”<sup>132</sup> It is of the utmost importance, then, that the feminist voice and, more generally, the female voice, contributes to the discussion.

##### *A. The Rhetoric of “Choice” and the Western Liberal Conception of Reproductive Rights*

One of the dilemmas underlying the feminist position in the United States with respect to sex selection is the rhetoric of “choice” surrounding abortion and reproductive rights.<sup>133</sup> Since *Roe v. Wade*<sup>134</sup>—the case in which the Supreme Court first recognized a woman’s right to not be denied an abortion (during the first two trimesters of her pregnancy)<sup>135</sup>—the emphasis has been on the fact that it is the woman’s choice to control her pregnancy.<sup>136</sup> The term “pro-choice” is now entrenched in the feminist vernacular: feminists and women who support abortion rights identify themselves as “pro-choice.”<sup>137</sup>

This rhetoric of “choice” has pervaded all reproductive areas, including sex-selection practices, to the detriment of feminists and

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128. *Id.* at 4-5.

129. Sarkaria, *supra* note 13, at 905.

130. *See supra* Parts II, III (discussing sex selection’s disparate impact on females and promotion of inherent gender discrimination).

131. *Id.*

132. Sharma, *supra* note 19, at 204.

133. Sarkaria, *supra* note 13, at 907-08.

134. 410 U.S. 113 (1973).

135. *Id.* at 164; Sarkaria, *supra* note 13, at 937.

136. Sarkaria, *supra* note 13, at 937.

137. *Id.*

women who might otherwise speak out against sex selection.<sup>138</sup> As one commentator notes, applying the "choice" paradigm to sex selection creates a potential double standard: some reproductive choices given to women, such as aborting a fetus for reasons other than sex selection, are acceptable, yet other reproductive choices, such as aborting a fetus as a means of sex selection, are not acceptable.<sup>139</sup>

The feminist emphasis on personal autonomy and reproductive choice has manifested itself in interesting ways. The 1985 Wertz study revealed that female doctors may actually be substantially more comfortable performing sex-selection procedures than male doctors.<sup>140</sup> The study showed that "U.S. women [doctors] were twice as likely as men to say that they would perform sex selection, usually out of respect for patient autonomy."<sup>141</sup> Women are understandably hesitant to undermine the "hard-won 'right to choose'" and the procurement of reproductive autonomy in the wake of sex-selection choices.<sup>142</sup> In fact, they may be the strongest advocates of providing such autonomous choices.<sup>143</sup>

Several commentators discuss the problem with framing reproductive rights as choice-based and suggest that perhaps there is an alternate approach that would be less problematic to feminists and women in general.<sup>144</sup> These commentators agree that "choice" is often a delusion, especially in non-Western societies, but also in developed, liberal societies.<sup>145</sup> For example, the reproductive justice movement acknowledges that many women do not have real "choice" due to racial, economic, physical or social constraints.<sup>146</sup> Even women in liberal societies may also feel these same pressures, including pressure from male partners to engage in sex selection.<sup>147</sup>

The "choice" paradigm, then, is somewhat misleading, in that sex-selection "choices" are often "less an expression of a woman's individual 'choice' for what is best for herself and more her response to the pressures created by" society.<sup>148</sup> Interestingly, even in the wake of a recognition of reproductive rights such as abortion, there was initial feminist opposition to the practice, based on the idea that abortion did

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138. *Id.* at 939 ("What was once hailed as the choice that would free all women has come to shackle the future of women as a gender.") (quoting Kohm, *supra* note 55, at 96).

139. Sarkaria, *supra* note 13, at 940.

140. Kohm, *supra* note 55, at 111.

141. *Id.* (citation omitted).

142. Sarkaria, *supra* note 13, at 939.

143. *Id.*

144. Kohm, *supra* note 55, at 125.

145. Sarkaria, *supra* note 13, at 940-41.

146. *Id.* at 940.

147. Kohm, *supra* note 55, at 116.

148. Sarkaria, *supra* note 13, at 941.

not actually empower women, but, in fact, relinquished male responsibility for pregnancy.<sup>149</sup> The issue of “choice” within reproductive autonomy has clearly never been a simple expression of a woman’s autonomy in the sex-selection context,<sup>150</sup> and so should not be treated as such.

Some commentators believe that feminists, and women as a whole, must work outside the paradigm of “choice” and individual autonomy to create a position that works to the benefit of women collectively.<sup>151</sup> Expanding on this point, one commentator recalls the philosophy of David Hume: “[p]ersonal liberty cannot be secured in solitary subsistence, but only through a strong connection with a society that respects and mutually protects that liberty.”<sup>152</sup> Noted feminist Catherine MacKinnon has similarly “proclaim[ed] that feminist jurisprudence is the analysis of law from the perspective of all women. All women, if truly meant to be all inclusive, ought to mean all women living, dead, and yet to live . . . .”<sup>153</sup> Feminists must, therefore, begin to take into account the disparate impact sex selection has had, and, undoubtedly, will continue to have, on the female population.

### *B. A New Feminist Perspective Not Based on a Binary “Choice” Framework*

Borrowing from MacKinnon’s view, perhaps the best possible approach for both feminists and women more generally is a view that does not focus on a binary right-or-wrong understanding of choice.<sup>154</sup> The focus of the feminist contribution to the sex-selection debate should not be on creating a regulatory structure that punishes women for making the “wrong” choices.<sup>155</sup> Instead, it should facilitate a greater understanding of the significance of these choices and ensure that sex selection is not the only option for women, particularly in cultures and societies where the practice is widespread.<sup>156</sup> One feminist commentator explains this approach best:

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

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149. Kohm, *supra* note 55, at 116.

150. Sarkaria, *supra* note 13, at 940.

151. *See id.* at 940-41 (“The global feminist approach . . . stems from the belief that the practical and philosophical difficulties that result from [using] . . . a rights-based frame of reference can be overcome only by accepting that rights are discursively constituted.”).

152. Kohm, *supra* note 55, at 102.

153. *Id.*

154. Sarkaria, *supra* note 13, at 942.

155. Deckha, *supra* note 101, at 37; Sarkaria, *supra* note 13, at 942.

156. Deckha, *supra* note 101, at 37-38; Sarkaria, *supra* note 13, at 942.

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.<sup>157</sup>

## V. REGULATORY OPTIONS AND NON-REGULATORY ALTERNATIVES FOR THE UNITED STATES

### A. *Canada and the United Kingdom: Potential Models for the United States?*

Canada and the United Kingdom have responded to the growth of sex-selection practices through legislative regulatory measures.<sup>158</sup> Both countries' measures offer a potential model for the United States, and yet, both models ultimately fall short. Non-regulatory options, such as the promulgation of professional guidelines and increased emphasis on expanding choices for women and promoting education and moral values, appear to be the best answers to the difficult questions that sex-selection practices present.<sup>159</sup> Furthermore, professional societies present less of a threat of limiting individuals' personal liberty, which is a concern of many who oppose sex-selection regulation.<sup>160</sup>

Canada's Assisted Human Reproduction Act<sup>161</sup> and the United Kingdom's Human Fertilisation and Embryology Act<sup>162</sup> both create a national ban on sex-selection practices for non-medical reasons.<sup>163</sup> The Assisted Human Reproduction Act bans “any procedure . . . that would ensure or increase the probability that an embryo will be of a particular sex, or that would identify the sex of an *in vitro* embryo, except to prevent, diagnose or treat a sex-linked disorder or disease.”<sup>164</sup>

England's legislation had a similarly narrow allowance for sex selection in 1990, but, in 2008, the scope was expanded to include “sex selection not only for conditions which are clearly linked to sex

157. Kohm, *supra* note 55, at 118.

158. Assisted Human Reproduction Act, S.C. 2004, c. 2 (Can.); Human Fertilisation and Embryology Act, 2008, c. 22 (Eng.).

159. Not only is this choice best in a liberal society that values individual freedom, it also works in conjunction with the feminist concerns discussed in Part IV.

160. See Dahl, *supra* note 8, at 2 (discussing the importance of the “presumption of liberty” in the political discourse of free societies when weighing reproductive rights).

161. Assisted Human Reproduction Act, S.C. 2004, c. 2 (Can.).

162. Human Fertilisation and Embryology Act, 1990, c. 37 (Eng.). Note that this Act has been amended by the Human Fertilisation and Embryology Act of 2008, which puts into statute the ban on non-medical sex selection that was supported by the HFEA's Code of Practice. Isabel Karpin & Roxanne Mykitiuk, *Going out on a Limb: Prosthetics, Normalcy and Disputing the Therapy/Enhancement Distinction*, 16 MED. L. REV. 413, 434-36 (2008).

163. Assisted Human Reproduction Act, S.C. 2004, c. 2 § 5(e) (Can.); Human Fertilisation and Embryology Act, 2008, c. 22 (Eng.).

164. Assisted Human Reproduction Act, S.C. 2004, c. 2 § 5(e) (Can.).

chromosomes . . . but also where there is a particular risk of gender-related conditions for example . . . breast cancer where the mother . . . wishes to avoid passing this condition on to a daughter.”<sup>165</sup> The Human Fertilisation and Embryology Authority (HFEA) issues licenses for PGD, and does so on a case-by-case basis under these guidelines.<sup>166</sup> As with any case-by-case decision-making process, the HFEA’s discretionary method inserts a high degree of uncertainty into the reproductive-technology field. Bright line rules promulgated through either a bureaucratic regulatory agency or professional societies would at least provide greater legal clarity for parties interested in sex selection.

Commentators have found numerous flaws in both Canada’s and the United Kingdom’s attempts to address the questions presented by sex-selection practices and other reproductive technologies.<sup>167</sup> The Assisted Human Reproduction Act is criticized for “lag[g]ing well behind reproductive technology,”<sup>168</sup> as the Act was passed in response to data contained in a report from the late 1980s.<sup>169</sup> Others have voiced concern that the Assisted Human Reproduction Act—and the Human Fertilisation and Embryology Act for the same reason—is flawed in that it does not prevent a woman who becomes pregnant naturally or through artificial insemination from finding out the sex of the fetus and then aborting the fetus if it is not the desired sex.<sup>170</sup> They claim, therefore, that the regulations only achieve a partial ban on sex selection.<sup>171</sup>

Britain’s House of Commons Science and Technology Committee has criticized the Act, stating that the HEFA’s policy development was “highly unsatisfactory,”<sup>172</sup> and acknowledging that a number of academics believe that “the HEFA’s ‘conditions were arbitrary and ethically muddled, and that overall the regulation . . . in the UK lacks coherence and consistency.’”<sup>173</sup>

Perhaps the greatest problem with bureaucratic regulation of new technologies like the various sex-selection techniques is the inability of such entities to respond to future changes in the technology<sup>174</sup> or to

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165. Explanatory Notes, *supra* note 25, ¶ 50.

166. Aaron R. Fahrenkrog, Note, *A Comparison of International Regulation of Pre-implantation Genetic Diagnosis and a Regulatory Suggestion for the United States*, 15 *TRANSNAT’L L. & CONTEMP. PROBS.* 757, 769 (2006).

167. *E.g.*, Deckha, *supra* note 101, at 7; Rasmussen, *supra* note 5, at 128-31.

168. Rasmussen, *supra* note 5, at 128.

169. *Id.*

170. Deckha, *supra* note 101, at 7.

171. *Id.*

172. Alghrani & Brazier, *supra* note 27, at 471.

173. *Id.* (citation omitted).

174. *See* Rasmussen, *supra* note 5, at 128 (arguing that this is one of the biggest problems with Canada’s Act).

properly define terms used in the regulations.<sup>175</sup> In its consultation document, the Health Canada Assisted Reproduction Office uses the “serious condition” standard to limit the use of sex-selection PGD, but acknowledges that it is a difficult term to define.<sup>176</sup> This inability to define terms or create any bright line regulation, like the HFEA’s case-by-case decision-making process, suffuses uncertainty into the reproductive-technology field.

Further, the *Brave New World* report notes that patient “access to PGD in Canada ‘is currently controlled by the medical profession,’” where clinicians define for themselves what constitutes a “serious condition.”<sup>177</sup> If this assessment is correct, then the bureaucratic regulations may, in fact, be less far-reaching and effective than oversight by professional societies. Professional societies would at least be composed of members of the medical field who have the expertise and the ability to promulgate more straightforward guidelines. Overall, with several of these technologies being so new, any “attempts to draft regulatory guidelines may suffer from ambiguous or uncertain language. [Yet d]espite the potential difficulty of interpreting words such as ‘serious,’ it and other similarly ambiguous words are commonly used in regulatory guidelines . . . .”<sup>178</sup> As such, guidelines promulgated by professional societies may be the better option for regulating sex-selection practices.

### B. Constitutional Considerations

Although these reasons alone may be enough to make Americans wary of adopting a similar regulatory structure, there are also a number of constitutional issues surrounding any potential sex-selection regulation adopted within the United States. There is certainly a strong argument that the Fourteenth Amendment of the Constitution,<sup>179</sup> which has been held to include a right of privacy,<sup>180</sup> encompasses the right to make all reproductive decisions, including those regarding sex selection, free from government intrusion.<sup>181</sup> Commentators have argued that making sex selection illegal could be seen as an

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175. Fahrenkrog, *supra* note 166, at 769; Karpin & Mykitiuk, *supra* note 162, at 431.

176. Karpin & Mykitiuk, *supra* note 162, at 431.

177. *Id.* (citation omitted).

178. Fahrenkrog, *supra* note 166, at 769.

179. U.S. CONST. amend. XIV.

180. *See* *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating a state law prohibiting the use of contraceptives and aiding or abetting the use of contraceptives). The Court described the protected interest in obtaining contraception as a “right of privacy.” *Id.* at 486.

181. *King*, *supra* note 16, at 326. *See* *Roe v. Wade*, 410 U.S. 113, 164 (1973) (striking down a Texas law banning abortion).

invasion of privacy and a restriction of fundamental liberties.<sup>182</sup> Furthermore, important Supreme Court decisions like *Lawrence v. Texas*<sup>183</sup> show that these commentators are perhaps correct in acknowledging a “judicially recognized preeminence of personal autonomy” and an end of “morals legislation.”<sup>184</sup>

To this point, leading voice on reproductive rights and liberty, Professor John Robertson has argued that “procreative liberty extends [even] to prebirth sex selection.”<sup>185</sup> Robertson claims that any decision “centrally connected with reproductive choice” should be within “the sphere of protected procreative liberties.”<sup>186</sup> Robertson also argues that “[o]nly substantial harm to tangible interests of others should . . . justify restriction.”<sup>187</sup>

Supporters of Robertson’s position argue that in a democratic society there exists “a presumption in favor of liberty, including rights to privacy and to procreative autonomy.”<sup>188</sup> A narrowly-tailored government regulation for which there is a “legitimate and significant state interest”<sup>189</sup> might pass constitutional muster, and it is very likely that any such regulation *will* face constitutional challenges, perhaps, first and foremost, from women who see any attempt to regulate as an abridgment of their reproductive rights and a threat to their reproductive autonomy. For feminists concerned about a state-authorized erosion of abortion rights, then, professional societies may be the most acceptable means of addressing sex selection.<sup>190</sup>

### *C. Professional Societies: The Best Option for the United States*

Non-regulation in the form of guidance from or action by professional societies is perhaps the best option for the United States at this time. In the first place, adding another layer of regulation might be unwise because sex selection involves areas that already are engrossed in a “complex web of regulation[],” namely genetic testing and assisted

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182. Stankovic, *supra* note 23, ¶ 9.

183. 539 U.S. 558 (2003).

184. Stankovic, *supra* note 23, ¶ 57. Although not directly pertaining to *reproductive* choices, the case does support the argument that the notion that “[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause,” *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring), may have application in the sex-selection context.

185. Garrison, *supra* note 7, at 1625-26.

186. King, *supra* note 16, at 327.

187. Garrison, *supra* note 7, at 1625 (quoting JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES, 39, 41 (1994)).

188. Stankovic, *supra* note 23, ¶ 20.

189. King, *supra* note 16, at 326-27.

190. See Sarkaria, *supra* note 13, at 939 (discussing the fact that the call for government regulation of sex-selection practices would only provide fuel for anti-abortion activists).

reproduction.<sup>191</sup> Furthermore, no entity currently collects or is able to provide comprehensive data about the use of these technologies within the United States.<sup>192</sup> Therefore, the first step should perhaps be collecting data on the status of sex-selection practices within the United States, which would provide a more complete picture when attempting to define the interest in regulation of the industry.

Some commentators argue that "[t]he medical profession is far better situated to self-regulate health practices, including the morally debatable ones," and that the government's role should be limited to "influenc[ing] and encourag[ing] the appropriate professional societies to take action."<sup>193</sup> Ninety-five percent of clinic directors surveyed in 2006 obviously agree, at least in the case of the use of PGD.<sup>194</sup> It is also significant that eighty-five percent of clinic directors recognize that the current industry ought to have more professional guidelines regarding PGD.<sup>195</sup> These statistics indicate the willingness of clinics to adhere to professional guidelines without the need for a bureaucratic regulatory and penal structure.

Medical and professional societies such as the American Society of Reproductive Medicine (ASRM) and the Society for Assisted Reproductive Technology (SART) could offer educational services and develop regulatory guidelines for practice.<sup>196</sup> Certainly the flexibility of regulation through professional societies is hugely advantageous, given the rapidly changing nature of the technologies.<sup>197</sup> Although professional societies do not have the power to criminally prosecute members for non-compliance, the power to revoke a clinic's membership might be a powerful incentive for members to comply.<sup>198</sup>

Similarly, the educational services component of the professional societies ought not to be dismissed, as creating a greater understanding of the consequences of sex selection might make clinics a lot less likely to offer or engage in such practices. Furthermore, expanding knowledge and education for women should be a primary objective of professional societies so that women have a framework for evaluating their decisions and assessing their priorities.<sup>199</sup> Ultimately there is a

191. Deckha, *supra* note 101, at 36-37.

192. Baruch, *supra* note 3, at 252.

193. Stankovic, *supra* note 23, ¶ 55.

194. Baruch, *supra* note 26, at 1057. "Ninety-five percent of clinic directors agree or strongly agree that professional societies are best suited to create standards and guidelines relating to PGD." *Id.*

195. *Id.*

196. King, *supra* note 16, at 324.

197. Fahrenkrog, *supra* note 166, at 778. This particular author, however, does not think this argument carries much weight. *Id.*

198. King, *supra* note 16, at 325.

199. See discussion *supra* Part IV (highlighting the conflict between preserving "choice" and ending gendercide). This is an important objective from the feminist

strong argument that professional societies, through a combination of their expertise, flexibility, and ability to respond to rapidly changing technologies, are capable of “more nuanced oversight” than is possible through legislative regulation.<sup>200</sup>

### CONCLUSION

With the advent of technologies capable of profoundly expanding reproductive options and changing the very concept of reproduction itself, it is imperative that the United States—“the ‘Wild West’ of reproductive technology”—recognize its responsibility to provide leadership in this field, both at home and abroad. The disquieting silence over the issue of sex-selection practices must come to an end.

“*Qui tacet consentit.*” America’s silence sends a message of complicity to the rest of the world. Most Americans would rightly be appalled if the experience of bringing a child into the world were reduced to a “consumer transaction,” with the child turned into a mere “commodity” through the use of sex-selection technology. Once a culture of commodification is established, it will become ingrained in American society, and resistance to it will begin to break down.

This relative silence over sex-selection practices in the United States has come about for several reasons: an ignorance within the general public of the realities of the practices; a reluctance on the part of politicians to enter the debate in the political arena; and an unwillingness among women, the group that suffers the most harm from such practices, to speak out against sex selection for fear of losing hard-won reproductive rights.

If the silence is not broken, the “Wild West” approach in which sex-selection practices are virtually unregulated will yield grim results. The consequences of inaction are undeniable. Demographic data clearly reveal the dangers of sex-selection practices; a resulting imbalance of the male-to-female sex ratio is very much a reality. The first step toward preventing this outcome is to acknowledge the frightening realities of sex selection which threaten our world.

Other consequences of sex selection are perhaps more subtle, but are equally problematic. There are significant arguments concerning: the inherent sexist motivations of sex selection; inappropriate control of nonessential characteristics of children; inappropriate use of scarce medical resources on nonessential procedures; harmful effects on children and the commodification of reproduction; and even the

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perspective in that it seeks to expand choices for women without stringently limiting their reproductive autonomy.

200. King, *supra* note 16, at 324.

creation of a “slippery slope” leading to a world of “designer babies.” Feminists have their own significant concerns about entering the debate, given their long fight for reproductive autonomy. Yet perhaps their voices ought to be the loudest: female babies, even in the United States, will be disproportionately targeted by sex selection.

Throughout its history, America has had a gift for choosing self-governance, on which real freedom rests, over government’s use of force through regulation, which denies freedom. In light of this tradition, bringing an end to the “Wild West” approach would be best served through action taken by professional societies, rather than through government regulation. With a far greater capacity to understand the rapidly-changing nature of biotechnologies than the government, these professional societies have shown a willingness to lead, something politicians clearly have not. That eighty-five percent of clinics support the idea that there should be more professional guidelines relating to PGD strongly attests to the willingness of clinics to follow professional guidelines. This path, which rests on winning over hearts and minds through education and building a consensus, is to be preferred over having to resort to regulation through bureaucracy. Finally, this approach to reproductive technologies is the one most in accord with the Constitution.

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