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THE SEX SELECTION DEBATE: A COMPARATIVE STUDY OF SEX SELECTION LAWS IN THE UNITED STATES AND THE UNITED KINGDOM

*Deidre C. Webb**

INTRODUCTION

Sex selection, also commonly known as gender selection, refers to the use of reproductive technologies for the deliberate and unnatural selection of a fetus's gender, which can occur before or after conception. Couples use sex selection for a variety of medical and nonmedical reasons. For example, a couple may use sex selection to have a daughter if they already have a few sons or they may choose to have a daughter if there is a family history of a hereditary disease linked to the male gene. Though historically more common in certain countries, the moral, ethical, and legal implications of sex selection have placed the practice at the center of a global debate for centuries. As of 2009, thirty-six nations from Europe, Asia, North America, and the Oceanic Islands had passed laws pertaining directly to the topic of sex selection, with five of the countries explicitly prohibiting it under any circumstances, thirty-one countries explicitly prohibiting it for 'nonmedical' reasons, and no countries explicitly permitting it.¹ Currently, sex selection is

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¹ Memorandum from Marcy Darnovsky, Ctr. for Genetics & Soc'y on Countries with Laws or Policies on Sex Selection to the N.Y.C. Sex Selection Meeting 1 (Apr. 2009), available at http://geneticsandsociety.org/downloads/200904_sex_selection_memo.pdf. The five countries explicitly prohibiting sex selection for any reason are Austria, New Zealand, South Korea, Switzerland, and Vietnam. *Id.* at 2. The thirty-one countries prohibiting non-medical sex selection are Australia, Belgium, Bosnia & Herzegovina, Bulgaria, Canada, China, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Israel, Italy, Latvia, Lithuania, Netherlands, Norway, Portugal, Russia, San Marino, Singapore, Spain, Turkey, and the United Kingdom. *Id.* See also *infra* Part III.B.1 for an analysis of the implied effects of current U.S. law.

impliedly permitted in the United States for both medical and nonmedical reasons,² while the United Kingdom explicitly prohibits sex selection for nonmedical reasons.³

As modern society practices sex selection for both medical and nonmedical reasons, the customary methods of infanticide and abortion have been joined by newly-developed scientific procedures and innovative reproductive technologies.⁴ From an ethical and moral perspective, most societies seem to accept the use of sex selection for medical reasons, while opposing its use for nonmedical reasons.⁵ Such medical reasons typically include preventing a child from inheriting a genetic disorder or a disease, such as hemophilia or muscular dystrophy when those disorders have been linked to sex.⁶ On the other hand, nonmedical, or “social,” reasons for sex selection have included “family balancing,” family rebuilding,⁷ or simply a general preference for a child of one sex over the other.⁸ Most of the controversy surrounding sex selection relates to these nonmedical

² See, e.g., *House Rejects Sex-selection Abortion Ban*, USA TODAY, <http://usatoday30.usatoday.com/news/washington/story/2012-05-31/house-vote-gender-based-abortion/55312258/1> (last updated May 31, 2012, 6:09 PM).

³ Human Fertilisation and Embryology Act, 1990, 37, §§ 3-4, sch. 2 (Eng.) (providing some allowances for certain methods of sex selection subject to regulatory licensing requirements); see, e.g., *supra* note 1, at 6-7.

⁴ See, e.g., PARLIAMENTARY OFFICE OF SCIENCE AND TECHNOLOGY, SEX SELECTION, 2003, POSTNOTE NO. 198, at 1, available at <http://www.parliament.uk/documents/post/pn198.pdf> [hereinafter, SEX SELECTION]; Heather Stranger, *Non-Medical Sex Selection: Ethical Issues*, 94 BRIT. MED. BULL. 7, 8 (2010), available at <http://bmb.oxfordjournals.org/content/94/1/7.full.pdf+html>.

⁵ See, e.g., Julian Savulescu & Edgar Dahl, *Sex Selection & Preimplantation Diagnosis: A Response to the Ethics Committee of the American Society of Reproductive Medicine*, 15(9) HUMAN REPROD. 1879 (2000).

⁶ SEX SELECTION, *supra* note 4, at 1; see also Ashley Bumgarner, Note, *A Right to Choose?: Sex Selection in the International Context*, 14 DUKE J. GENDER L. & POL'Y 1289, 1291 (May 2007).

⁷ An example of family balancing is when a couple already has multiple sons and desires to have a daughter. An example of family rebuilding is when a couple's daughter dies and it wishes to make their family whole again by having another daughter.

⁸ SEX SELECTION, *supra* note 4, at 1.

reasons, as evidenced by the distinction between laws and regulations in the United States and the United Kingdom.

Many international organizations have weighed in on the topic of sex selection, generally advocating for women's rights and access to reproductive technologies while condemning gender discrimination and violence against women. In terms of sex selection, the World Health Organization (WHO) has expressed concern for the underlying gender biases embedded in certain cultures rather than the reproductive technology itself.⁹ The WHO has stated that "[r]estricting access to certain reproductive technologies . . . to prevent an imbalanced [sex] ratio in a . . . society should not" infringe upon the "human rights of women."¹⁰ The WHO's reasoning is that it is not technology, but rather the "social, cultural, political and economic" causes of gender biases within the society that are at the heart of the sex selection problem.¹¹ Further, the WHO asserts that restrictions on the use of reproductive technology are acceptable as long as they "[p]romote responsible use;" "[a]void reinforcing gender discrimination;" "[a]void reinforcing [economic, social, and geographic] inequities;" and "[e]nsure women's access to safe abortion and other [reproductive] services."¹²

According to the United Nations (UN), restrictions on sex selection practices can lead to negative consequences for women in countries with a strong preference for sons, including violence against women and forced sex-selective infanticide.¹³ The UN's Special Rapporteur on Violence against Women defines forced sex

⁹ WORLD HEALTH ORG., PREVENTING GENDER-BIASED SEX SELECTION: AN INTERAGENCY STATEMENT: OHCHR, UNFPA, UNICEF, UN WOMEN AND WHO 4, 10 (2011) [hereinafter WHO].

¹⁰ *Id.* at 4.

¹¹ *Id.* at 4, 10.

¹² *Id.* at 10.

¹³ U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, *Ending 'Son Preference' to Promote Gender Equality* (July 15, 2011), <http://www.ohchr.org/EN/NewsEvents/Pages/GenderEquality.aspx>; Int'l Conference on Population and Dev., Cairo, Egypt, Sept. 5–13, 1994, *Report on the International Conference on Population and Development*, ¶ 4.16(a), U.N. DOC. A/CONF.171/13 (Oct. 18, 1994), *available at* <http://www.un.org/popin/icpd/conference/offeng/poa.html>. ("The objectives are . . . [t]o eliminate all forms of discrimination against the girl child and the root causes of son preference, which results in harmful and unethical practices regarding female infanticide and prenatal sex selection . . .").

selection as a form of violence against women and asserts that the only solution is to challenge established gender roles in countries with a preference for male offspring.¹⁴ Similarly, the Center for Reproductive Rights (CRR) takes a “rights-based approach” to sex selection.¹⁵ The CRR expresses its outrage over the practices of sex selection and sex-selective abortion, but argues that an outright prohibition could lead to more unsafe reproductive practices and violence against women in countries with a clear preference for sons.¹⁶

For its part, the Council of Europe has taken a distinctly stricter approach to sex selection. Twenty-eight of the forty-seven members of the Council of Europe (CoE) and sixteen of the twenty-seven members of the European Union (EU) have ratified the *Convention of Human Rights and Biomedicine* (CHRB), which reflects a far more cautious attitude toward sex selection than that of groups like the WHO, UN, and CRR.¹⁷ Article 14 of the CHRB asserts that sex selection should only be permitted for medical reasons in cases where a “serious hereditary sex-related disease” is at issue.¹⁸ The CoE has also tasked the Working Party on the Protection of the Human Embryo and Foetus (Working Party) with drafting reports

¹⁴ Special Rapporteur on Violence Against Women, its Causes and Consequences, *15 Years of The U.N. Special Rapporteur on Violence Against Women, Its Causes and Consequences* 5, Comm’n on Human Rights, U.N. Doc. A/HRC/11/6/Add.5 (May 27, 2009) (by Yakin Ertürk), available at <http://www.ohchr.org/Documents/Issues/Women/15YearReviewofVAWManDate.pdf>; U.N. DEP’T OF PUB. INFO., *Women & Violence*, U.N. (Feb. 1996), <http://www.un.org/rights/dpi1772e.htm>; see also Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979).

¹⁵ Johanna Westeson, *IntLawGrrls: Rights-Based Approach to Sex-Selection*, CTR. FOR REPROD. RIGHTS (Jan. 23, 2012), <http://reproductiverights.org/en/press-room/intlawgrrls-rights-based-approach-to-sex-selection>.

¹⁶ *Id.*

¹⁷ Convention on Human Rights and Biomedicine pmbl., Apr. 4, 1997, C.E.T.S. No. 164. Note that the U.K. is not a signatory to this Convention. *Id.*

¹⁸ “The 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.” *Id.*, ch. IV, art. 14; see also COUNCIL OF EUR., *Human Embryo & Foetus* (2012), http://www.coe.int/t/dg3/healthbioethic/Activities/04_Human_embryo_and_foetus_en/default_en.asp.

pertaining to “the protection of the human embryo *in vitro*.”¹⁹ In this capacity, the Working Party has produced studies on ethical concerns as well as the biological effects on the embryo related to reproductive technologies that assist in procreation.²⁰ It seems clear that many European governments are willing to commit to greater restrictions on sex selection than those advocated by leading organizations in the global community.

This note will seek to increase the reader’s awareness of the issues surrounding sex selection and will forecast the future of sex-selection laws in the United States by means of a comparative law analysis. Part I will establish the historical background of sex selection through a discussion of its use in ancient China and India to fulfill a widespread cultural preference for sons, as well as its continuing influence in those cultures today. Part II will examine sex-selection techniques that have become available as a result of modern advances in reproductive technologies, and will discuss the concerns and moral dilemmas that have emerged along with them. Part III will compare sex-selection laws in the United Kingdom and the United States, as well as the respective public opinion of each regarding sex selection and the techniques employed. As there is currently no federal law explicitly pertaining to sex selection in the U.S., the discussion will focus on its relevant case law and proposed legislation. Alternatively, the analysis of U.K. law will focus on the specific legislation that lays out its legal framework for regulating sex selection. Finally, Part IV will discuss possibilities for the future of sex-selection law in the United States. It will consider whether it would be feasible for the U.S. to establish a legal framework similar that of the U.K. in light of current U.S. case law and reproductive rights. In conclusion, Part IV will recommend a legal course of action for the U.S. in terms of its use of reproductive technologies for sex selection as well as other genetic characteristics.

I. THE TRADITIONAL PRACTICE OF SEX SELECTION

Throughout history, societies have striven “to control the sex of offspring” because of their underlying cultural beliefs,²¹ particularly

¹⁹ *Id.*

²⁰ *Id.*

²¹ Owen D. Jones, *Sex Selection: Regulating Technology Enabling the Predetermination of a Child’s Gender*, 6 HARV. J.L. & TECH. 1, 3 (1992).

in societies with a cultural, social, economic, and legal preference for males.²² While early methods of sex selection were either “biologic” or “symbolic,”²³ modern methods of sex selection primarily involve the use of reproductive technologies. Countries like China and India that have exhibited a historical cultural preference for sons, often along with a propensity for violence against women, infanticide, and sex-selective abortion, are now seeing an increase in the use of the modern reproductive technologies for the purpose of sex selection.²⁴

A. CHINA

China represents the quintessential example of a culture that historically places more worth on sons than daughters.²⁵ While sons have traditionally supported their parents in their old age and eventually inherited the family property after they died, daughters stayed with their families until they married and eventually shared in their husband’s inheritance.²⁶ As a result of making males more essential to the survival of the family unit, cultural attitudes allowed for sex selective abortion as well as the practices of female infanticide through drowning, starvation, and poisoning.²⁷

²² See, e.g., Bumgarner, *supra* note 6, at 1295.

²³ “Biologic” methods involved techniques such as manipulating the female’s diet prior to sexual intercourse and changing sexual positions during intercourse. Jones, *supra* note 21, at 4–5. “Symbolic” methods involved the use of superstitious techniques such as placing certain good luck charms near the bed to encourage the creation of a male or a female during intercourse. *Id.* See also Naryung Kim, *Breaking Free From Patriarchy: A Comparative Study of Sex Selection Abortions in Korea and the U.S.*, 17 UCLA PAC. BASIN L.J. 301, 302 (Fall 1999/Spring 2000).

²⁴ Timothy R. Loveland, *Sex-Selective Abortion Law in China & Corresponding Conception in the U.S.*, 21 ANNALS HEALTH L. ADV. DIR. 173, 173 (2012); see, e.g., Bumgarner, *supra* note 6, at 1294; see *infra* Part II for a discussion on modern reproductive technologies.

²⁵ “In Chinese society, human life evolves through stages of worthiness based not only on age and ability, but also on gender and class.” Loveland, *supra* note 24, at 179 (citing Susan M. Rigdon, *Abortion Law & Practice in China: An Overview with Comparisons to the U.S.*, 42 SOC. SCI. MED. 543, 544 (1996)).

²⁶ *Id.* at 180; see also Frank van Balen & Marcia C. Inhorn, *Son Preference, Sex Selection & the “New” New Reproductive Technologies*, 33(2) INT’L J. HEALTH SERV. 235, 238 (2003).

²⁷ Loveland, *supra* note 24, at 180–81; van Balen & Inhorn, *supra* note 26, at 238.

Consequently, laws regulating abortion and protecting pregnant women from violence date back to as early as the Qing and Tang Dynasties.²⁸

While China's male-to-female ratio has been historically high compared to the rest of the world, the male majority has continued to increase despite years of laws, regulations, and policies aimed at easing the disparity.²⁹ Toward the end of the 20th century, China's male-to-female birth ratio was 106 males to every 100 females.³⁰ By 2009, this number had increased to 121 males for every 100 females.³¹

One explanation for this increase in the male majority is the astounding number of girls that go missing in China every year. The United Nations Population Fund (UNFPA) estimated the "total number of missing girls"³² to be "163 million in Asia alone" in 2005.³³ In today's China, the nation's One-Child Policy exacerbates the continuing effects of a deep-rooted cultural preference for males,³⁴ and pressure is greater than ever on expectant mothers to

²⁸ The Qing Dynasty lasted from 1644 to 1911 A.D., and the Tang Dynasty lasted from 618 to 906 A.D. Loveland, *supra* note 24 at 179–80.

²⁹ See Loveland, *supra* note 24, at 174; see also van Balen & Inhorn, *supra* note 25, at 238.

³⁰ Van Balen & Inhorn, *supra* note 26, at 238.

³¹ Loveland, *supra* note 24, at 174.

³² The term "missing girls" refers to girls that have not been born or that have been killed via abortion or infanticide as a result of the widespread use of sex-selective practices. Amartya Sen, *Missing Women – Revisited: Reduction in Female Mortality has been Counterbalanced by Sex Selective Abortions*, 327 BRIT. MED. J. 1297, 1297 (Dec. 6, 2003), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC286281/>.

³³ Loveland, *supra* note 24, at 174 (citing MARA HVISTENDAHL, UNNATURAL SELECTION: CHOOSING BOYS OVER GIRLS AND THE CONSEQUENCES IN A WORLD OF MEN 6 (2011)); see also Sen, *supra* note 32, at 1297; van Balen & Inhorn, *supra* note 26, at 238.

³⁴ China's One-Child Policy is a forced birth control policy that came about in 1980 when the nation's leaders determined "that forcibly restricting population growth would" benefit the Chinese economy following a period of food shortage and famine during a national voluntary birth control campaign. Generally, the One-Child Policy mandates that families have no more than one child each. Families are also required to have a birth permit when a child is born, and will be heavily fined if they do not. *History of the One-Child Policy*, ALL GIRLS ALLOWED, <http://www.allgirlsallowed.org/one-child-policy> (last visited Feb. 8, 2014).

produce a son.³⁵ Unfortunately, this dynamic often results in violence against the mother including banishment from the family, increased health risks from repeated pregnancies, and in more extreme cases, murder, suicide, and bride trafficking.³⁶

The Chinese government has responded to such violence against women by implementing several protective laws over the past few decades. For example, the Marriage Law of 1980³⁷ prohibits any act that causes harm or death to infants, and the Law on the Protection of Rights and Interests of Women of 1992³⁸ allows women “to inherit property, obtain fair labor wages, [gain] equal status in family matters,” and receive an education equal to that of men, and prohibits violence against women bearing daughters.³⁹ Furthermore, as modern reproductive technologies have become available throughout China, the Law on Maternal and Infant Health Care of 1994⁴⁰ “prohibits the use of medical technologies such as ultrasound . . . to identify the gender of the fetus”⁴¹ in order to prevent Chinese women (and their husbands) from detecting the sex of their prenatal child and

³⁵ Loveland, *supra* note 24, at 175; *see also* Bumgarner, *supra* note 6, at 1297.

³⁶ *See* Bumgarner, *supra* note 6, at 1297–98, 1301; WHO, *supra* note 9, at v, 5–6.

³⁷ Marriage Law of the People’s Republic of China (中华人民共和国婚姻法) (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 10, 1980, effective Jan. 1, 1981), ch. 3, art. 21, *translated at* http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content_21897930.htm.

³⁸ Law of the People’s Republic of China on the Prot. of Rights and Interests of Women (中华人民共和国妇女权益保障法) (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 3, 1992, effective Oct. 1, 1992), *translated at* <http://www.china.org.cn/english/government/207405.htm>.

³⁹ Loveland, *supra* note 24, at 182.

⁴⁰ Law of the People’s Republic of China on Maternal and Infant Health Care (中华人民共和国母婴保健法) (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 27, 1994, effective Jun. 1, 1995), *translated at* http://www.china.org.cn/china/2010-03/04/content_19522945.htm [hereinafter Law on Maternal & Infant Health Care].

⁴¹ Loveland, *supra* note 24, at 182; *see* WHO, *supra* note 9, at v; *see also* van Balen & Inhorn, *supra* note 26, at 239. *See generally* Law on Maternal & Infant Health Care, *supra* note 40.

aborting the pregnancy before it is born.⁴² Though sex-selective abortions have been more prevalent in China's urban centers due to their affordability and accessibility in the cities, evidence suggests that sex-detecting technologies are nonetheless making their way into rural areas and producing similar results.⁴³

The battle against sex selection hinges on changing Chinese culture, and despite government implementation of laws banning and criminalizing sex-selective practices, China has a long way to go.⁴⁴ First, while the anti-sex-selection laws represent a step forward, the government has been lax in enforcing them.⁴⁵ Part of the problem is that enforcement can be problematic due to the difficulty of proving that violators are using ultrasound technology specifically for abortion or prenatal sex-determination rather than some other legitimate medical reason.⁴⁶ Second, in attempting to combat discrimination against females, China has sought to emphasize the value of women by "broadcasting positive messages about girls, [giving] incentives to the parents of daughters, [distributing] housing and pension payments for rural parents with daughters," and ". . . [encouraging] matrilineal marriages."⁴⁷ On the other hand, because many Chinese couples still feel the traditional societal pressure to bear a son, China's One-Child Policy⁴⁸ indirectly reinforces the preference for males in spite of laws protecting infants and women. Ultimately, the key to overcoming China's cultural preference for

⁴² See WHO, *supra* note 9, at v (discussing that in China, abortion has become the new norm for discrimination against female babies whereas infanticide, or "post-natal abortion," has become less common); see also Loveland, *supra* note 24, at 181.

⁴³ See WHO, *supra* note 9, at 2; see also van Balen & Inhorn, *supra* note 26, at 239.

⁴⁴ See WHO, *supra* note 9, at 7; see also Loveland, *supra* note 24, at 184.

⁴⁵ Bumgarner, *supra* note 6, at 1304; see also Loveland, *supra* note 24, at 184-85.

⁴⁶ WHO, *supra* note 9, at 6.

⁴⁷ See WHO, *supra* note 9, at 13. "Matrilineal" means that property is inherited through the female line of the family, while "patrilial" means that property "is inherited through the male line" of the family. *Id.*, at 7.

⁴⁸ Population and Family Planning Law of the People's Republic of China (中华人民共和国人口与计划生育法) (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2001, effective Sept. 1, 2002), translated in http://www.china.org.cn/china/2010-09/25/content_21001026.htm.

males will be a continued effort to attack the idea that males are more valuable than females.

B. India

Like China, India has a long tradition of favoring sons over daughters. The increasing disparity in its male-to-female ratio “reflect[s] a preference for boys as a result of deeply embedded social, cultural, political, and economic factors.”⁴⁹ India’s history demonstrates its preference for sons from the ancient Hindu scriptures to modern population censuses.⁵⁰ India’s principal religion, Hinduism, teaches that life passes through the male as men recreate themselves through the agency of their sons.⁵¹ Furthermore, sons play an important role in the Hindu “notions of self-worth, fruitfulness and salvation” through their sacrificial duties,⁵² which “serve to liberate [their souls] and free [them] from the unending

⁴⁹ WHO, *supra* note 9, at 1.

⁵⁰ See van Balen & Inhorn, *supra* note 26, at 237.

⁵¹ *Id.* (citing Aditya Bharadwaj, *Why Adoption is not an Option in India: The Visibility of Infertility, the Secrecy of Donor Insemination & Other Cultural Complexities*, 56(9) SOC. SCI. MED. 1867 (2003)). Hinduism teaches that man progresses through life in four stages: ashrama, grihastha dharma, vanaprastha, and sannyasa. During the first stage, the man acts as a student, devoting his time to “learn[ing] scriptures, philosophy, science and logic” under the guidance of his guru in addition to learning to live in accordance with “a strict code of conduct.” Around age 20, the man enters the second stage of life, in which he returns home and provide for his wife and children and support his parents while performing daily religious duties. When the man reaches his fifties and has grandchildren, he enters the third stage of life, transferring his duties as the head of the family over to his son and devotes himself to God in preparation for the fourth stage of life. By the time the man enters the fourth and final stage, his wife is under the care of their children, and the man devotes himself completely to the scriptures and meditation until he dies. In this manner, the Indian man teaches his son to fill his role, and then lets his son take that role so that he may devote the final stage of his life to religious practices. Satguru Bodhinatha Veylanswami, *Advancing Through Life’s Four Stages*, HINDUISM TODAY (last visited Nov. 14, 2013), <http://www.hinduismtoday.com/modules/smartsection/item.php?itemid=5333>.

⁵² Hindu sacrificial duties refer to duties to honor ancestors. This practice usually involves offering prayers for those who have passed. See van Balen & Inhorn, *supra* note 26, at 237.

cycles of birth and death.”⁵³ As in China, sons in India cared for their parents in their old age, families traditionally passed property to the son upon the parents’ death, and daughters were considered “temporary visitors” because they were only joined to their husband’s family through marriage.⁵⁴ Moreover, daughters were considered an economic burden due to the practice of a bride’s family paying a dowry to the groom’s family upon marriage.⁵⁵ Over the years, these societal and economic pressures have compelled many Indian women to betray their maternal instincts by engaging in infanticide and sex-selective abortion.⁵⁶

The availability of ultrasound technology has led to an even more pronounced disparity in India’s male-to-female ratio.⁵⁷ In 2001, the Indian state of Haryana had a sex ratio of 861 females per 1000 males.⁵⁸ In 2011, the sex ratio was 879 females per 1000 males, which was still below India’s national average sex ratio of 940 females per 1000 males despite the slight improvement.⁵⁹ Like China, India has also taken legal measures in an attempt to combat the availability and use of ultrasound and other new reproductive technologies for sex-selection purposes. For example, the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act of 1994⁶⁰ prohibits “doctors, clinics, and all other persons from using prenatal diagnostic techniques, including ultrasound, to determine the sex of a fetus.”⁶¹ However, the Act allows use of such technology if

⁵³ *Id.*

⁵⁴ *Id.* at 238.

⁵⁵ *Id.*; see also Bumgarner, *supra* note 6, at 1307.

⁵⁶ See van Balen & Inhorn, *supra* note 26, at 238.

⁵⁷ See WHO, *supra* note 9, at 1; see also Stranger, *supra* note 4, at 18.

⁵⁸ *Haryana Population Census Data 2011*, CENSUS2011, <http://www.census2011.co.in/census/state/haryana.html> (last visited Nov. 18, 2013).

⁵⁹ *Id.*; see also Kate Gilles & Charlotte Feldman-Jacobs, *When Technology and Tradition Collide: From Gender Bias to Sex Selection*, POPULATION REFERENCE BUREAU (Sep. 2012), available at <http://www.prb.org/pdf12/gender-bias-sex-selection.pdf>; PTI, *Sex Ratio in Haryana Worst Among All States*, DNA INDIA (Apr. 30, 2013), <http://www.dnaindia.com/india/report-sex-ratio-in-haryana-worst-among-all-states-1829031> (listing the three Indian states with the worst sex ratios as Haryana, Uttar Pradesh, and Bihar).

⁶⁰ The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, No. 57, Acts of Parliament, 1994 (India), translated in <http://www.childlineindia.org.in/CP-CR-Downloads/PNDT%20Act.pdf>.

⁶¹ Bumgarner, *supra* note 6, at 1302.

there is a medical need independent of sex determination.⁶² In 2003, the Act was amended to include portable ultrasound machines, which were being installed in automobiles so that people living in rural areas could have access to the technology.⁶³

Nevertheless, merely restricting access to reproductive technology does not go to the heart of the issue. The preference for males in India results from a deep-seated cultural attitude about females, and the only way to effectively combat this discrimination is to change the Indian people's perception.⁶⁴ In a step toward changing this paradigm, the Indian government passed the Hindu Succession Act of 2004⁶⁵ which allowed "daughters to inherit family property almost on par with sons" thereby making matrilineal succession possible for families with only daughters.⁶⁶ In 2007, the Maintenance and Welfare of Parents and Senior Citizens Act⁶⁷ recognized a woman's right of inheritance in families with both daughters and sons by requiring that "both sons and daughters" care for their elderly parents "in proportion to the share of property" they would inherit.⁶⁸ Such legal measures strike at the heart of male-to-female inequality at the familial level, and will play an important role in the coming years as modern reproductive technologies only make it easier to accomplish sex selection in India.

II. MODERN TECHNIQUES OF SEX SELECTION

While traditional methods⁶⁹ of sex selection, such as abortion and infanticide, remain in use today, advancements in reproductive

⁶² *Id.*

⁶³ *See id.* at 1303 (estimating mobile ultrasound machines comprise a \$100 million business in India).

⁶⁴ WHO, *supra* note 9, at 7.

⁶⁵ The Hindu Succession (Amendment) Act, 2005, No. 39, Acts of Parliament, 2005 (India), *translated in* <http://indiacode.nic.in/fullact1.asp?tfnm=200539>.

⁶⁶ WHO, *supra* note 9, at 7.

⁶⁷ The Maintenance and Welfare of Parents and Senior Citizens Act, Act No. 56 of 2007, *translated in* <http://socialjustice.nic.in/oldageact.php>.

⁶⁸ WHO, *supra* note 9, at 7.

⁶⁹ In addition to infanticide, abortion, and the use of reproductive technology, there are also some supposed natural methods of sex selection including, but not limited to, using certain sexual positions and eating certain foods. Jones, *supra* note 21, at 4-6.

technology have allowed for the development of new techniques that do not involve killing the fetus or embryo.⁷⁰ Modern sex selection methods fall under two basic categories: prenatal and pre-implantation.⁷¹

Prenatal procedures occur post-conception, that is, after the fetus is already in the mother's uterus, allowing parents to determine the sex of their fetus and accordingly terminate the pregnancy by abortion if they choose to do so.⁷² The most commonly used prenatal procedures include ultrasound, amniocentesis, chorionic villus sampling (CVS), and maternal blood tests.⁷³ Ultrasound technology, the least invasive of the four methods,⁷⁴ involves "direct[ing] a high-frequency sound source at the fetus" to produce a black and white image⁷⁵ of the fetus from which a physician can determine the sex.⁷⁶ By comparison, amniocentesis is a far more invasive procedure. In order to determine the sex, the doctor withdraws some "of the amniotic fluid . . . surround[ing] the fetus within the amniotic sac"⁷⁷ and analyzes the genetic material of the cells.⁷⁸ CVS is a similar method, except that the physician uses a sample of the placenta to determine the sex of the fetus.⁷⁹ Finally, in maternal blood testing, the doctor screens a sample of the mother's blood for certain sex-determinative genetic markers.⁸⁰

⁷⁰ HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY (HFEA), SEX SELECTION: OPTIONS FOR REGULATION: A REPORT ON THE HFEA'S 2002-03 REVIEW OF SEX SELECTION INCLUDING A DISCUSSION OF LEGISLATIVE & REGULATORY OPTIONS, 2003, 2, ¶ 2 (U.K.) [hereinafter HFEA Report], available at http://www.hfea.gov.uk/docs/Final_sex_selection_main_report.pdf.

⁷¹ Bumgarner, *supra* note 6, at 1291; Jones, *supra* note 21, at 7-10.

⁷² Jones, *supra* note 21, at 7.

⁷³ Bumgarner, *supra* note 6, at 1291-92; Jones, *supra* note 21, at 7.

⁷⁴ Bumgarner, *supra* note 6, at 1292.

⁷⁵ The black and white image is produced as a result of the echoes from the high-frequency sound varying with the density of the fetus. Jones, *supra* note 21, at 7.

⁷⁶ *Id.*

⁷⁷ Bumgarner, *supra* note 6, at 1292.

⁷⁸ Jones, *supra* note 21, at 7. "This method is the most prevalent internationally." *Id.* at 8.

⁷⁹ Bumgarner, *supra* note 6, at 1292.

⁸⁰ *Id.*; van Balen & Inhorn, *supra* note 26, at 236.

In contrast to prenatal methods, pre-implantation procedures are implemented prior to conception, that is, before the fetus is even in the mother's uterus,⁸¹ in order to "facilitate conception" of a fetus with a predetermined sex.⁸² The most commonly used pre-conception procedures are sperm sorting, pre-implantation genetic diagnosis (PGD), and in vitro fertilization (IVF).⁸³ Sperm sorting involves the use of "a laser beam to detect fluorescent-dyed chromosomes within individual sperm."⁸⁴ While a sperm contains either an X or Y chromosome,⁸⁵ X chromosomes contain 2.8% more DNA than Y chromosomes and consequently appear brighter under the laser after the sperm is dyed with fluorescents.⁸⁶ Once the sperm are identified as either X or Y, an automated sorting machine yields a sample containing primarily those sperm of the sex that the potential parents desire.⁸⁷ Finally, the sperm and egg are joined together by IVF, artificial insemination, or intrauterine insemination.⁸⁸

In comparison to sperm sorting, a PGD is far more reliable.⁸⁹ In addition to its use for sex selection, PGD is commonly utilized to screen for genetic disorders.⁹⁰ During this procedure, the doctor

⁸¹ Bumgarner, *supra* note 6, at 1291; Jones, *supra* note 21, at 8.

⁸² Van Balen & Inhorn, *supra* note 26, at 235.

⁸³ Bumgarner, *supra* note 6, at 1293; J.A. Robertson, *Extending Preimplantation Genetic Diagnosis: Medical and Non-Medical Uses*, 29 J. MED. ETHICS 213 (2003).

⁸⁴ Bumgarner, *supra* note 6, at 1293. The method of sperm sorting by use of a laser beam to detect the brightness of fluorescent dye was developed in 1995 and is known as the Microsort method. Microsort is the most commonly used method of sperm sorting today. SEX SELECTION, *supra* note 4, at 2. Its predecessor, the Ericsson technique, developed in the 1970s and involved the separation of sperm based on "their swimming ability." *Id.*

⁸⁵ SEX SELECTION, *supra* note 4, at 1.

⁸⁶ Bumgarner, *supra* note 6, at 1293; SEX SELECTION, *supra* note 4, at 2.

⁸⁷ Bumgarner, *supra* note 6, at 1293; SEX SELECTION, *supra* note 4, at 1.

⁸⁸ Bumgarner, *supra* note 6, at 1293. Intrauterine insemination is "a form of artificial insemination where the sperm are introduced directly into the woman's womb." Artificial insemination is a more cost-friendly option for many couples as opposed to IVF, and it more closely resembles natural conception more because "fertilization . . . occur[s] naturally inside the woman's body." *Id.* With IVF, the sperm sample would be used to create an embryo that would be inserted into the woman. SEX SELECTION, *supra* note 4, at 2.

⁸⁹ Bumgarner, *supra* note 6, at 1294.

⁹⁰ *Id.*

removes one cell from each embryo in order to analyze their chromosomes and DNA.⁹¹ After identifying which embryos contain the preferred genetic characteristics, the doctor implants only those embryos into the woman's uterus.⁹²

While PGD is more reliable than sperm sorting, it is also more expensive and often requires multiple attempts costing roughly \$15,000 apiece.⁹³ Furthermore, the use of IVF for either sperm sorting or PGD poses health risks to the mother including "ovarian hyper-stimulation syndrome [and] dangerous multiple births."⁹⁴ Especially because of these cost considerations and health dangers, modern reproductive technologies for both prenatal and pre-implantation sex selection remain at the heart of the sex selection debate in many countries today.

III. SEX SELECTION IN THE UNITED KINGDOM AND THE UNITED STATES

The debate over sex selection is not limited to countries that have traditionally exhibited a preference for males. On the contrary, sex selection has spurred much legal, moral, and ethical debate throughout the world in recent years.⁹⁵ In the United Kingdom and the United States, surveys and polls demonstrate that socially, the two nations host a similar variety of opinions on sex selection. On the other hand, an examination of existing case law and legislation regarding sex selection in both nations reveals that legally, they have approached the issue in vastly different ways, which has led to vastly different reactions and consequences.

A. UNITED KINGDOM

1. EXISTING LEGAL FRAMEWORK FOR SEX SELECTION IN THE U.K.

First and foremost, sex-selection law in the United Kingdom differs from the United States in that the British government has chosen to regulate many aspects of sex selection and to prohibit it for

⁹¹ Bumgarner, *supra* note 6, at 1294; SEX SELECTION, *supra* note 4, at 2.

⁹² Bumgarner, *supra* note 6, at 1294; SEX SELECTION, *supra* note 4, at 2.

⁹³ Bumgarner, *supra* note 6, at 1294.

⁹⁴ *Id.*

⁹⁵ SEX SELECTION, *supra* note 4, at 3–4.

nonmedical reasons. The Human Fertilisation and Embryology Act (HFE Act) of 1990⁹⁶ requires that anyone creating, keeping, or using an embryo have a medical license.⁹⁷ It also establishes the Human Fertilisation and Embryology Authority (HFEA)⁹⁸ for the purpose of reviewing information about embryos and treatments covered by the HFE Act and advising the Secretary of State about such matters.⁹⁹ In addition, the HFEA is responsible for issuing the HFEA Code of Practice (HFEA Code) to “secure the safety or efficacy of particular clinical or scientific practices . . . [raising] fundamental ethical and social questions,” such as sex selection.¹⁰⁰ The introduction to the HFEA Code provides that:

[The HFEA] was established in response to deep public concern about the implications which new techniques for assisted reproduction might have for the perception and valuing of human life and family relationships. The Authority’s principal task is to regulate, by means of a system of licensing, audit and inspection, any research or treatment which involves the creation, keeping and use of human embryos outside the body, or the storage or donation of human eggs and sperm.¹⁰¹

Under the HFE Act, licenses may only be granted for treatment services,¹⁰² nonmedical fertility services,¹⁰³ storage,¹⁰⁴ and research,¹⁰⁵ and an activity for which a license is required can only be performed at the location named in the license or “under the supervision of an individual designated in the license.”¹⁰⁶ Treatment centers in the U.K. cannot offer or use reproductive technologies to

⁹⁶ Human Fertilisation and Embryology Act (HFE Act), 1990, 37 (U.K.) (amended 2008).

⁹⁷ *Id.* § 3(1)(a)–(b).

⁹⁸ *Id.* § 5(1).

⁹⁹ *Id.* § 8(a).

¹⁰⁰ HFEA, CODE OF PRACTICE, pt. 8, § 8.9(i)–(ii)(6th ed. 2003) [hereinafter HFEA CODE].

¹⁰¹ *Id.*, Introduction, at 9.

¹⁰² HFE Act, *supra* note 96, sch. 2, § 1.

¹⁰³ *Id.* sch. 2, § 1A. Non-medical fertility services include procuring and distributing sperm. *Id.* sch. 2, § 1A(1)(a)–(b).

¹⁰⁴ *Id.* sch. 2, § 2.

¹⁰⁵ *Id.* sch. 2, § 3.

¹⁰⁶ *Id.* sch. 2, § 4(1)(a)–(b).

perform sex selection for social or nonmedical reasons, and only clinics licensed by the HFEA can perform sex selection for medical reasons.¹⁰⁷ The HFEA Code also prohibits treatment centers from “select[ing] the sex of embryos for social reasons or . . . attempt[ing] to produce embryos *in vitro*” by splitting the embryo.¹⁰⁸

When it became clear in 2002 that many British citizens were using new reproductive technologies to select the sex of their children for nonmedical reasons, the government tasked the HFEA with conducting a “review of sex selection” techniques, including their safety and reliability, as well as “arrangements for their regulation.”¹⁰⁹ In the course of its review, the HFEA employed qualitative and quantitative research methods to “investigate how individual members of the public approach and grapple with the complex issues surrounding sex selection.”¹¹⁰ In its final report, the HFEA recommended that: (1) abortion remain legal only for medical reasons under the Abortion Act of 1967;¹¹¹ (2) PGD be permitted only for medical reasons by a clinic and physician that meets the licensing requirements¹¹² under the HFE Act;¹¹³ and (3) the HFE Act only allow sperm sorting when used in furtherance of IVF treatments.¹¹⁴

In justifying its recommendations, the HFEA first asserted that IVF and PGD are extremely technical and risky procedures that should only be used “where there is a genuine health benefit to

¹⁰⁷ HFEA Report, *supra* note 70, ¶ 13, at 8.

¹⁰⁸ HFEA CODE, *supra* note 100, § 8.9(i)–(ii).

¹⁰⁹ Suzi Leather, *Chair’s Foreword* to HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY (HFEA), SEX SELECTION: OPTIONS FOR REGULATION: A REPORT ON THE HFEA’S 2002–03 REVIEW OF SEX SELECTION INCLUDING A DISCUSSION OF LEGISLATIVE & REGULATORY OPTIONS, 2003 (U.K.), available at http://www.hfea.gov.uk/docs/Final_sex_selection_main_report.pdf. The HFEA’s review was prompted by couples’ increasing use of reproductive technologies, such as PGD, to select the sex of their children for nonmedical reasons like family balancing. *Id.*

¹¹⁰ HFEA Report, *supra* note 70, at 9.

¹¹¹ *Id.* at 5; Abortion Act, 1967, c. 87 (U.K.).

¹¹² See HFE Act, *supra* note 96, sch. 2.

¹¹³ HFEA Report, *supra* note 70, at 5.

¹¹⁴ *Id.* Today, sperm sorting is banned under the HFE Act. Amanda Mitchison, *Sex Selection: Getting the Baby You Want*, THE GUARDIAN (Apr. 2, 2010), <http://www.theguardian.com/lifeandstyle/2010/apr/03/sex-selection-babies>.

balance these risks.”¹¹⁵ Moreover, the HFEA stated that it strongly considered the potential situation of a “child born as a result of sex selection.”¹¹⁶ Its main concerns were for the potential “psychological harm if a child [found] out that [he or] she had been sex-selected, the possibility of preferential or prejudicial treatment to fit parental expectations,” and “the potential for favoritism and neglect of existing children.”¹¹⁷ Further, the HFEA noted that its recommendations were greatly influenced by a finding that the public was generally “uncomfortable with the idea of choosing a child’s sex to balance a family” or to fulfill some other nonmedical purpose.¹¹⁸

The primary recommendations of the HFEA’s report were adopted and codified as an amendment to the HFE Act in 2008.¹¹⁹ As a result, nonmedical sex selection remains illegal in today’s United Kingdom, while medical sex selection is heavily regulated by licensing requirements.

2. SEX SELECTION IN BRITISH SOCIETY

a. Public Opinion

In its 2003 report, the HFEA made clear that it relied heavily on surveys and studies of public opinion in making its recommendations for the regulation of sex selection.¹²⁰ These studies revealed that while many British citizens were in favor of regulating sex selection because they believed it to be morally wrong and potentially negative for society,¹²¹ others felt it would deprive them of the right to create the family they desired.¹²²

¹¹⁵ HFEA Report, *supra* note 70, ¶ 101, at 26.

¹¹⁶ Nadja Kanellopoulou, *Sex Selection: Options for Regulation*, 1(1) SCRIPT-ED 217, 220 (2004).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 220–23. In 2005, the U.K. Department of Health (DoH) conducted a review, and in 2004, the Parliamentary Science and Technology Committee (SCT) “launched an inquiry into human reproductive technologies and the law,” hoping to put reproductive technology regulations before “Parliament for a debate.” *Id.* at 223.

¹²⁰ *See id.* at 222.

¹²¹ *See Sex Selection: Report Summary*, HUMAN FERTILISATION & EMBRYOLOGY AUTH., http://www.hfea.gov.uk/docs/Final_sex_selection_summary.pdf (last visited Feb. 8, 2014); *Sex Selection: Options for*

Over the course of the consultations it conducted for its report, the HFEA identified several common concerns related to sex selection including: (1) the reason for using sex selection (medical versus nonmedical); (2) the invasiveness of the technique utilized; (3) the reliability of the technique used; (4) the consequences of misdiagnosis; (5) the parents' attitude toward selecting the sex of their child; and (6) the overall impact on society of the widespread use of sex selection.¹²³

One survey conducted for the report indicated that married couples in both the United States and the United Kingdom desired to use sex selection with their second child for the purpose of family balancing without exhibiting an general preference for one gender over the other.¹²⁴ Another HFEA opinion poll taken of a representative sample of the British population revealed that the majority did not agree "that any parent should have the right to choose the sex of their child."¹²⁵ Similarly, a majority of those polled "thought that sex selection should be regulated,"¹²⁶ though most respondents also indicated that they supported the use of sex-selection techniques for medical reasons.¹²⁷ Only a minority¹²⁸ believed that such techniques "should be available for 'family balancing' . . . or 'other nonmedical reasons' such as social and cultural reasons."¹²⁹ Overall, many British citizens found it difficult to reconcile constraining the rights of others through legislation with

Regulation, HUMAN FERTILISATION & EMBRYOLOGY AUTH. 17–18 (last updated Feb. 1, 2012), http://www.hfea.gov.uk/docs/Final_sex_selection_main_report.pdf.

¹²² *Sex Selection: Report Summary*, *supra* note 121, at 19.

¹²³ *Id.* ¶ 38, at 12–13.

¹²⁴ HFEA Report, *supra* note 70, ¶ 26, at 10 (noting that a high percentage of those actively seeking selection in the U.K. were from ethnic populations originating outside Europe).

¹²⁵ *Id.* ¶ 45, at 14.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ The HFEA Report indicated that a minoring of the respondents reported feeling desperate for a child of one sex over the other. *Id.* ¶ 69, at 18.

¹²⁹ *Id.* ¶ 47, at 14.

their own moral opposition to a practice they felt interrupts the “virtuous course of Nature.”¹³⁰

b. Reproductive Tourism

In recent years, many British couples have traveled to the United States for sex-selection procedures, resulting in what has come to be known as “reproductive tourism.”¹³¹ Dr. Jeffrey Steinberg, a British IVF specialist practicing in the U.S., attributed this phenomenon to the strict regulation of the practice in the U.K.¹³² Dr. Steinberg, the director for the New York and Los Angeles offices of the Fertility Institutes,¹³³ claimed that he sees “around 40 British couples every year for [family balancing], with each IVF cycle costing £30,000.”¹³⁴

According to one news source, sex selection has become a “multimillion-dollar industry” in the U.S., largely due to reproductive tourism from countries like the U.K. that have banned sex selection for nonmedical reasons.¹³⁵ Many American sex-selection clinics engage in target marketing techniques toward British forums for

¹³⁰ *Id.* ¶¶ 63–64, at 17. The HFEA also polled colleges and universities in the U.K. that had included the topic of sex selection in their debate clubs or on certain courses’ syllabi and found that most students seemed to agree with the HFEA’s stance that sex selection should be allowed for medical reasons, but not nonmedical reasons. *Id.* ¶ 84, at 22.

¹³¹ *E.g.*, Mitchison, *supra* note 114; *Int’l Laws on Gender Selection*, GENDER-BABY, <http://www.gender-baby.com/lifestyle/legal-issues/international-laws-on-gender-selection/> (last visited Feb. 9, 2014) (“This new phenomenon is called ‘reproductive tourism’ where people travel for gender selection and general infertility treatments such as IVF.”).

¹³² Ayesha Ahmad, *Wealthy Couples Flock to USA to Avoid UK Sex Selection Ban, IVF Medic Claims*, BIONEWS (Sept. 3, 2012), http://www.bionews.org.uk/page_170956.asp.

¹³³ *About Us*, FERTILITY INSTS., <http://www.fertility-docs.com/about-us/clinics-and-staff.php> (last visited Feb. 9, 2014).

¹³⁴ Ahmad, *supra* note 132. Dr. Steinberg even claimed to have received business from some of the U.K.’s political leaders. *Id.* Further, Dr. Steinberg said that his typical “patients are . . . around 30 years old, educated, married, middle to upper class,” and already have at least one other child. Jasmeet Sidhu, *Gender Selection Has Become a Multimillion-Dollar Industry*, HUFFINGTON POST (Sept. 17, 2012, 10:33 AM), http://www.huffingtonpost.com/2012/09/17/gender-selection-_n_1889991.html.

¹³⁵ Sidhu, *supra* note 134.

mothers who desire a child of a specific sex.¹³⁶ One such website, in-gender.com, reported receiving “more than 10,000 British emails a year” from women expressing their “sadness,” “guilt,” and “desperation” due to their inability to choose the sex of their child.¹³⁷

c. Religious Organizations

In addition to the British public, the HFEA also surveyed various British religious organizations for their views on sex selection.¹³⁸ Most “[c]hurches and religious groups . . . argue[d] that sex selection was contrary to divine wisdom revealed through holy scripture since it . . . circumvent[ed] the will of God.”¹³⁹ Some even claimed that sex selection equated to playing God.¹⁴⁰ In its response to the HFEA consultation, the Catholic Bishops’ Conference compared sex-selection methods to manufacturing a child.¹⁴¹ The Church of England Public Affairs Unit (Church of England) “opposed the use of sex selection for non-medical reasons” due to the physical and psychological risks and possible social harms.¹⁴² However, it also commented that it did not view the use of reproductive technology as the equivalent of playing God; rather, it takes the position that God created humans with the expectation that they would use their intelligence and creativity to act as co-creators in producing offspring

¹³⁶ *See id.*

¹³⁷ Mitchison, *supra* note 114. These women are said to suffer from gender disappointment. “Some women feel a momentary twinge of sadness when they find out the gender of their baby. For others, the disappointment cuts deeper, and can even turn into depression.” Morgan Brasfield, *Gender Disappointment: Expectant Mothers Confess Secret Regrets*, TODAY (Jan. 29, 2013, 9:48 AM), <http://www.today.com/moms/gender-disappointment-expectant-mothers-confess-secret-regrets-1C8144610>.

¹³⁸ HFEA Report, *supra* note 70, ¶ 72, at 19.

¹³⁹ *Id.* Many of these religious organizations were also opposed to sex selection for medical reasons when methods like PGD were used. *Id.* ¶ 74, at 19.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* ¶ 73, at 19. The Catholic Bishops’ Conference also distinguished between “the acceptability of sex selection itself and the . . . acceptability of the methods for achieving it.” *Id.* While it compared the act of sex selection to that of manufacturing a child, it stated that sex selection undertaken in the normal course of “sexual intercourse in conditions . . . deliberately chosen by a married couple in order to maximize the change of having a child of one sex rather than the other” was permissible. *Id.*

¹⁴² *Id.* ¶ 72, at 19.

in God's image.¹⁴³ Thus, the Church of England opposes the use of sex selection for nonmedical reasons because of the possible risks to the child, and like other religious organizations, it seems to find the use of reproductive technology to be acceptable as long as people are using them to live in accordance with God's teachings.

d. Medical Institutions

Many medical organizations also responded to the HFEA's consultation, generally taking the position that sex-selection techniques should only be used for medical reasons when the health risks are minimal. The Royal College of Obstetricians and Gynaecologists (RCOG) supported the use of sex-selection techniques for medical reasons "only when [they have] been shown to be reliable and free from health risks."¹⁴⁴ The British Medical Association (BMA) maintained that sex selection should only be used for medical problems, namely "to avoid major genetic problems [for the child] in the future."¹⁴⁵ The British Infertility Counselling Association (BICA) expressed that it is mainly concerned with the child's welfare when it comes to sex selection, urging that couples seeking out sex selection receive counseling to increase their awareness of the implications of the procedure prior to treatment.¹⁴⁶ The licensed Assisted Reproductive Technology (ART) clinics surveyed took positions on both sides of the issue—some sympathized with couples and condoned the use of sex selection for family balancing purposes, while others disapproved of sex selection for any nonmedical reason.¹⁴⁷

¹⁴³ *Id.*

¹⁴⁴ *Id.* ¶ 80, at 21.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* The BICA responded that such counseling "should be an essential requirement for anyone contemplating [sex selection] treatment."
Id.

¹⁴⁷ *Id.* ¶ 82, at 22. The consulted ART clinics that approved the use of sex selection for family balancing explicitly disapproved of it for any purposes that could be categorized as moving toward designer babies. *Id.* One such HFEA-licensed ART clinic supported the use of PGD over sperm sorting for family balancing sex selection because it is more reliable, but other HFEA-licensed clinics openly opposed the use of sex selection for non-medical reasons. *Id.*

The British people and their government seem to agree that sex selection should be available for medical reasons like preventing a genetically linked disease. However, the government's ban on the use of sex selection for nonmedical reasons like family balancing is at odds with that of members of the British population who believe they should have the right to choose the sex of their child or because they have been suffering psychologically and emotionally due to their desire for a child of one particular sex for personal reasons. Despite the differences of opinion, there appears to be a general concern for both the child and the parents when it comes to the possible psychological, physical, and social harm to both as a result of using reproductive technology for sex selection. As evidenced by the absence of strict regulation of sex selection in the United States, having the right, or even the option, to use sex selection for both medical and nonmedical reasons does little to ease the debate.

B. UNITED STATES

1. CURRENT LEGAL TREATMENT OF SEX SELECTION IN THE U.S.

In contrast to the United Kingdom, there are currently no laws in the United States expressly restricting the practice of sex selection.¹⁴⁸ On the contrary, existing legislation and case law related to marital privacy, reproductive autonomy and abortion impliedly permits sex selection for both medical and nonmedical reasons.¹⁴⁹

In the 1960s and 1970s, the U.S. Supreme Court decided a line of cases defining an individual's constitutional right to privacy. In 1965, a landmark case in the realm of reproductive rights, *Griswold v. Connecticut*,¹⁵⁰ established that a husband and wife have a right to privacy in the context of their marriage.¹⁵¹ Two Connecticut statutes were at issue in the case: one of which criminalized the use of birth control, and another, which treated "[a]ny person who assist[ed] . . . another to commit any offense" in the same manner as the "principal offender."¹⁵² The defendants in the case, who were the Executive

¹⁴⁸ E.g., Elise Micheli, *Sex Selection in the U.S.: A Move Toward Legislation*, 18 NEW ENG. J. INT'L & COMP. L. 525, 527 (2012).

¹⁴⁹ See generally *id.* at 529 (citing *Roe v. Wade* to demonstrate a woman's right to control her own pregnancy).

¹⁵⁰ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁵¹ *Id.* at 480.

¹⁵² *Id.*

Director of the Planned Parenthood League of Connecticut, a licensed physician, and a medical school professor, had assisted married couples in selecting a method of birth control and were subsequently convicted under the second statute as accessories to the violation of the first statute.¹⁵³ The Court noted that these statutes directly impacted “an intimate relation of husband and wife and their physician’s role in one aspect of that relation.”¹⁵⁴ Determining that a marital relationship falls “within the zone of privacy created by several fundamental constitutional guarantees,”¹⁵⁵ the Court held that the government cannot interfere with a married couple’s choice to use contraceptives.¹⁵⁶

After its holding in *Griswold* that a married couple has a constitutional right to privacy as to whether or not it has children, the Supreme Court extended this right of privacy to unmarried individuals in *Eisenstadt v. Baird*.¹⁵⁷ Baird was convicted under a Massachusetts statute for demonstrating contraceptive products while giving a college lecture on birth control and for giving one of the contraceptives to an unmarried female student after his lecture.¹⁵⁸ The statute imposed one to five years of imprisonment for anyone distributing contraceptives who was not a licensed physician or licensed pharmacist filling a valid prescription for a married couple.¹⁵⁹ Similarly to *Griswold*, the Court determined that the statute “materially impair[ed] the ability of . . . persons to obtain contraceptives.”¹⁶⁰ As opposed to the statutes addressed in *Griswold*, the statute in *Eisenstadt* made a distinction between married and unmarried individuals. The Court found no rational explanation for

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 482.

¹⁵⁵ *Id.* at 485. The Court likened marriage to other rights of privacy that are not explicitly mentioned in the Constitution, but are implicitly included therein as a penumbra of constitutional rights free from governmental intrusion. *Id.* at 482.

¹⁵⁶ Concerning the zone of privacy surrounding a marital relationship, Justice Douglas, writing for the majority, asked, “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.” *Id.* at 485–86.

¹⁵⁷ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

¹⁵⁸ *Id.* at 440.

¹⁵⁹ *Id.* at 440–41.

¹⁶⁰ *Id.* at 446.

this unequal treatment,¹⁶¹ and held that the right of privacy protects both married and unmarried individuals from governmental interference with their choice of whether or not to have children.¹⁶²

A year after *Eisenstadt*, the Supreme Court granted certiorari on what would become the seminal case for abortion in the United States: *Roe v. Wade*.¹⁶³ In *Roe*, the Court addressed the constitutionality of Texas statutes that criminalized abortion for reasons other than the medical purpose of saving the mother's life.¹⁶⁴ The plaintiff in the case was a single pregnant woman who wanted to have an abortion "performed by a competent, licensed physician, under safe, clinical conditions," but was unable to do so legally because she did not qualify for the medical exception to the Texas statute.¹⁶⁵ She sought to have the relevant Texas statutes—as well as similar statutes in other states—ruled unconstitutional on the basis that they violated a woman's constitutionally protected right to personal privacy,¹⁶⁶ which included the right "to choose to terminate her pregnancy."¹⁶⁷ The Court concluded that the implied constitutional right of privacy "is broad enough to [include] a woman's decision" to terminate or not to terminate her pregnancy.¹⁶⁸ However, the Court also determined that this right should be subject to regulation due to states' interest in "safeguarding health, . . . maintaining medical standards, and . . . protecting potential life."¹⁶⁹

The crux of the issue hinged on the "personhood" of the fetus: if a fetus were the equivalent of a person, the Constitution would afford it protection.¹⁷⁰ On the ground that states have "a compelling . . . interest in protect[ing] prenatal life from and after conception,"¹⁷¹ the

¹⁶¹ *Id.* at 447. Among the State's arguments for upholding the statute were deterring premarital sex, protecting purity and chastity, and minimizing a health hazard, but the Court found none of these to be a permissible purpose in justifying the distinction between unmarried and married individuals using contraceptives. *Id.* at 448, 451.

¹⁶² *Id.* at 453.

¹⁶³ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁶⁴ *Id.* at 118.

¹⁶⁵ *Id.* at 120.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 129.

¹⁶⁸ *Id.* at 153.

¹⁶⁹ *Id.* at 154.

¹⁷⁰ *Id.* at 156–57.

¹⁷¹ *Id.*

Court held that the mother has a right to privacy with regard to her pregnancy until the fetus reaches viability,¹⁷² at which time the state may regulate abortion to promote its interest in the protection of potential human life.¹⁷³

While *Roe v. Wade* affords women a measure of reproductive freedom and privacy in one respect, it also limits that freedom in a manner that is directly applicable to the issue of sex selection. If a woman hopes to employ abortion as a means of sex selection pursuant to *Roe*, she is only permitted to do so up until the end of the first trimester.¹⁷⁴ Although *Roe* opened the door for modern sex selection by establishing that couples have the right to make reproductive decisions privately, it also subjected that right to government regulation on the ground that it involves compelling state interests. It is clear that when the Supreme Court made its decision in *Roe*, it did not contemplate the use of reproductive technologies for sex selection because parents-to-be did not discover the sex of their child until long after the first trimester.¹⁷⁵ Today, it is common to learn the sex of a fetus during the second trimester, and the first is easily within reach.¹⁷⁶ If this had been the case when the Supreme Court decided *Roe*, it is likely that the Court would have placed a time limitation on using reproductive technology as it did with abortion, which would have a significant effect on today's sex-selective practices. Furthermore, the Court would have been compelled to contemplate the point at which the fetus attains a personhood status so that genetic manipulation of the fetus becomes not only morally reprehensible, but also legally objectionable.

The collective effect of *Griswold*, *Eisenstadt*, and *Roe* is to firmly establish an individual's right to privacy and autonomy over his or her reproductive decisions in the United States. By implication, these rights include the freedom to engage in sex

¹⁷² *Id.* at 160 (defining viability as the potential for the fetus "to live outside the mother's womb, albeit with artificial aid").

¹⁷³ *Id.* at 164–65. The Court holds that the point of viability is approximately at the end of the first trimester; and prior to viability, the State only has an interest in protecting the life of the mother and can only regulate abortion "in ways that are reasonably related to maternal health." *Id.* at 164.

¹⁷⁴ *Id.*

¹⁷⁵ See, e.g., Tricia O'Brien, *Ultrasound: A Trimester-by-Trimester Guide*, JUSTTHEFACTSBABY.COM (Dec. 22, 2009), <http://www.justthefactsbaby.com/pregnancy/article/baby-development-by-trimester-75/2>.

¹⁷⁶ *Id.*

selection for both medical and nonmedical reasons. However, attempts have been made to limit sex-selective practices in the U.S. in recent years. In 2012, Republican Representative, Trent Franks, introduced the Prenatal Nondiscrimination Act (PRENDA) in the House of Representatives.¹⁷⁷ Though it was voted down in the House, PRENDA proposed a complete ban on abortion in the U.S. for purposes of sex selection.¹⁷⁸ Referring to sex selection as “[d]iscrimination against the unborn on the basis of race or sex,” PRENDA provided for a fine, a maximum five-year term of imprisonment, or both on anyone who knowingly performed an abortion, forced a woman to have an abortion, accepted funds to perform an abortion, or transported a woman into the U.S. to have an abortion for the purpose of sex or race selection.¹⁷⁹ The bill also included civil remedies for women—as well as for the unborn child’s father or maternal grandparent—forced to have selective abortion based on sex or race in the form of actual and punitive damages.¹⁸⁰ Opponents of PRENDA point out that sex-selective abortions are simply not as big a problem in the United States as in other countries.¹⁸¹ On the other hand, proponents of the measure argue that banning sex-selective abortions is an essential means to “combat gender bias.”¹⁸²

On January 24, 2013, Senator David Vitter re-introduced PRENDA in the Senate, where it was assigned to a congressional committee for consideration before going to the full House or Senate

¹⁷⁷ Prenatal Nondiscrimination Act (PRENDA) of 2012, H.R. 3541, 112th Cong. (2d Sess. 2012) (“To prohibit discrimination against the unborn on the basis of sex or race, and for other purposes.”) [hereinafter, PRENDA].

¹⁷⁸ The final vote on PRENDA in the House of Representatives was 246 votes for the bill and 168 against it, which failed to meet the two-thirds requirement. *House Rejects Sex-Selection Abortion Ban*, *supra* note 2. For a discussion of a recent controversy involving Planned Parenthood arranging sex-selective abortions, see Steven Ertelt, *Is Planned Parenthood Arranging Sex-Selection Abortions?*, LIFE NEWS.COM (Apr. 23, 2012), <http://www.lifenews.com/2012/04/23/is-planned-parenthood-arranging-sex-selection-abortion/>.

¹⁷⁹ PRENDA, *supra* note 177, § 3(a).

¹⁸⁰ *Id.*

¹⁸¹ Rachael Larimore, *PRENDA Shows Just How Far Apart We are on Abortion*, XXFACTOR: WHAT WOMEN REALLY THINK (May 30, 2012, 5:39 PM), http://www.slate.com/blogs/xx_factor/2012/05/30/the_prenda_debate_shows_just_how_far_apart_we_are_on_abortion.html.

¹⁸² *Id.*

for a vote.¹⁸³ On February 1, 2013, Representative Franks re-introduced PRENDA to the House of Representatives, where it was referred to a House committee for consideration.¹⁸⁴ To date, no further action has been taken in either the House or Senate regarding PRENDA 2013. Nevertheless, until such legislation is passed, or the Supreme Court reconsiders its position, sex selection remains legal in the United States for both medical and nonmedical reasons.

2. SEX SELECTION IN AMERICAN SOCIETY

a. Medical Ethics Committees

While U.S. lawmakers continue to debate sex selection in the legislatures and courts, it also remains at the heart of an ethical and moral debate in the field of medicine. The Ethics Committee of the American Society for Reproductive Medicine (ASRM) generally approves of sex selection,¹⁸⁵ but discourages its use for nonmedical reasons.¹⁸⁶ In its report on “Preconception Gender Selection for Nonmedical Reasons,” the ASRM stated that nonmedical sex selection carries a number of risks and hardships, including “gender discrimination, inappropriate control over nonessential characteristics of children, unnecessary medical burdens and costs for parents, . . . inappropriate and potentially unfair use of limited medical resources, . . . sex ratio imbalances, . . . and reinforcement of gender bias in society”¹⁸⁷ It also cautioned that parents of children born as a result of sex selection might expect them “to act in certain gender-specific ways,” which may lead to unwarranted disappointment if the

¹⁸³ *S. 138: Prenatal Nondiscrimination Act (PRENDA) of 2013*, GOV TRACK, <https://www.govtrack.us/congress/bills/113/s138> (last visited Feb. 9, 2014); see also Abby Ohlheiser, *Sen. Vitter Wants to Add an Anti-Abortion Measure to ENDA*, ATLANTIC WIRE (Nov. 5, 2013, 3:23 PM), <http://www.thewire.com/politics/2013/11/senator-vitter-wants-add-anti-abortion-measure-enda/71283/>.

¹⁸⁴ *H.R. 447: Prenatal Nondiscrimination Act (PRENDA) of 2013*, GOV TRACK, <https://www.govtrack.us/congress/bills/113/hr447> (last visited Feb. 9, 2014).

¹⁸⁵ Gina Kolata, *Fertility Ethics Authority Approves Sex Selection*, N.Y. TIMES (Sept. 28, 2001), <http://www.nytimes.com/2001/09/28/us/fertility-ethics-authority-approves-sex-selection.html?src=pm>.

¹⁸⁶ ASRM Ethics Comm., *Preconception Gender Selection for Nonmedical Reasons*, 75 FERTILITY & STERILITY 861 (2001).

¹⁸⁷ *Id.* at 862 (quoting ASRM Ethics Comm., *Preimplantation Genetic Diagnosis and Sex Selection*, 72 FERTILITY & STERILITY 595–98 (1999)).

child fails to conform to the gender-specific behavior the parents desire.¹⁸⁸ Furthermore, the ASRM expressed its concern that widespread use of sex selection could commodify children by placing emphasis on a child's genetic characteristics rather than "his or her inherent worth."¹⁸⁹ Similarly, it pointed out that the practice could dilute the effectiveness of the medical field to some extent if doctors increasingly allocate their skills and resources for nonmedical purposes.¹⁹⁰ In sum, ASRM recommended that couples considering sex selection for nonmedical reasons:

[1] . . . [be] fully informed of the risks of failure, [2] affirm that they will fully accept children of the opposite sex if the preconception gender selection fails, [3] are counseled about having unrealistic expectations about the behavior of children of the preferred gender, and [4] are offered the opportunity to participate in research to track and assess the safety, efficacy, and demographics of preconception selection.¹⁹¹

In a similar vein, the Ethics Committee of the American College of Obstetricians and Gynecologists (ACOG) has stated that it "supports the practice of [sex selection] for the purpose of preventing serious sex-linked genetic diseases," but it opposes sex selection for nonmedical purposes like family balancing "because of the concern that such requests may ultimately support sexist practices" by devaluing women.¹⁹² The ACOG also recognized that because couples in the U.S. have a legal right to learn the sex of their baby, it is extremely difficult for doctors to avoid unknowingly participating in sex selection.¹⁹³

b. Government Organizations

In the government sphere, the Centers for Disease Control and Prevention (CDC) gives its Division on Reproductive Health

¹⁸⁸ *Id.* at 862.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 863–64.

¹⁹² ACOG Ethics Comm., *Sex Selection*, 109 OBSTET. GYNECOL. 475, 477 (Feb. 2007) (Reaffirmed 2011).

¹⁹³ *Id.* at 477–88.

(Division) responsibility for “monitor[ing] the burden of disease, risk factors, preventive services, and other associated factors” and “support[ing] health research that contributes to effective, evidence-based and informed public health practices, programs, and policies.”¹⁹⁴ The Division conducts surveillance of Assisted Reproductive Technology (ART), which includes “fertility treatments in which both eggs and sperm are handled.”¹⁹⁵ The Division has concluded that ART carries multiple risks, including early delivery, low birth-weights, and increasing rates of multiples.¹⁹⁶ Though the CDC has not made its policy clear on the issue of sex selection, its main concern seems to be ensuring that reproductive technologies and procedures available in the U.S.—including those associated with sex selection practices—are medically safe.

The Food and Drug Administration (FDA) has explicitly denounced one particular method of sex selection. In 2011, the FDA banned a sex-selection procedure called MicroSort, which utilizes a device to facilitate sperm sorting, at the Genetics and IVF Center (GIVF) in Fairfax, Virginia.¹⁹⁷ Although the FDA concedes that MicroSort is “safe and effective,” it barred the procedure on the ground that there is “no ‘public health benefit’ [to] offering gender selection for nonmedical purposes.”¹⁹⁸ On the other hand, the FDA has not banned IVF or PGD, which are generally more effective methods of sex selection than sperm sorting. Due to the FDA ban,

¹⁹⁴ *About CDC’s Div. of Reproductive Health*, CDC, <http://www.cdc.gov/reproductivehealth/DRH/index.htm> (last updated Apr. 25, 2012).

¹⁹⁵ *Assisted Reproductive Technology (ART)*, CDC, <http://www.cdc.gov/ART/index.htm> (last updated Nov. 27, 2013). According to the CDC’s 2011 preliminary ART Fertility Clinic Success Rates Report, “the use of ART . . . has doubled over the past decade.” *Id.*

¹⁹⁶ *Id.*
¹⁹⁷ *E.g.*, Edgar Dahl, *FDA Bans Gender Selection Procedure*, INST. FOR ETHICS AND EMERGING TECH. (May 17, 2011), <http://ieet.org/index.php/IEET/more/4753>. Since the FDA banned MicroSort, the Virginia-based GIVF Center has not pursued further FDA approval of the procedure. *See What MicroSort Tells Clinical Trial Participants*, CHR BLOG (July 6, 2012), <http://www.centerforhumanreprod.com/blog/what-microsort-tells-clinical-trial-participants/>. The GIVF Center has had to cease accepting “new participants in the clinical trial for . . . ‘family balancing,’” but it could continue offering MicroSort for “‘genetic disease prevention for families with [an] increased risk . . . [of] sex-linked diseases.’” *Id.*

¹⁹⁸ Dahl, *supra* note 197.

the GIVF Center had to cease accepting “new participants in the clinical trial for . . . family balancing,” but it has continued to offer MicroSort for “genetic disease prevention” for families with “an increased risk of a sex-linked disease.”¹⁹⁹

c. Religious Organizations

In addition to medical and scientific organizations, various religious organizations in the U.S. have released official statements regarding gender selection. In general, these religious organizations disapprove of the use of reproductive technologies for purposes of gender selection. The Roman Catholic Church vehemently opposes abortion, and states that sex-selective practices “are contrary to the personal dignity of the human being and his or her integrity and identity,” and further, cannot be justified by any “possible beneficial consequences for future humanity.”²⁰⁰ In a similar manner, the National Catholic Bioethics Center has described sex-selection techniques as “chilling,” and categorically denounces their use.²⁰¹ For its part, the United Methodist Church takes the position that

¹⁹⁹ Marcy Darnovsky, *FDA Questions Sex Selection for “Family Balancing,”* BIOPOLITICAL TIMES (Apr. 11, 2011), <http://www.biopoliticaltimes.org/article.php?id=5668>; see also Norbert Gleicher, *Gender Selection (Sex Selection)*, CTR. HUM. REPROD. (Jun. 27, 2013), http://www.centerforhumanreprod.com/gender_selection.html (noting that PGD and IVF are still permissible methods of sex selection in the U.S.).

²⁰⁰ JOSEPH RATZINGER, CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN & ON THE DIGNITY OF PROCREATION: REPLIES TO CERTAIN QUESTIONS OF THE DAY 20 (1987), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html (citing John Paul, II, Commentary, *Discourse to those Taking part in the 35th General Assembly of the World Medical Association*, 76 ACTA APOSTOLICAE SEDIS 391 (Jan. 4, 1984), available at [http://www.vatican.va/archive/aas/documents/AAS%2076%20 \[1984\]%20-%20ocr.pdf](http://www.vatican.va/archive/aas/documents/AAS%2076%20[1984]%20-%20ocr.pdf)); see also *Sex Selection*, LORAS COLLEGE, http://www2.loras.edu/~CatholicHE/Arch/Sexuality/sex_selection.html#five (last visited Feb. 9, 2014) (citing CATHOLIC HEALTH ASS’N OF THE U.S., *Human Genetics: Ethical Issues in Genetic Testing, Counseling, and Therapy* 34–39 (1990)).

²⁰¹ *Washington Insider: The President’s Council on Bioethics*, NAT’L CATHOLIC BIOETHICS Q. (Nat’l Catholic Bioethics Ctr., Phila., Pa.), Summer 2004, at 246, available at <http://nbccenter.metapress.com/media/e7vd2jygtldxw226ua5y/contributions/m/7/0/2/m702737616663276.pdf>.

reproductive technologies “that intentionally generate ‘waste embryos’ that will knowingly be destroyed when the medical procedure or the research is completed” should be banned.²⁰²

In contrast, the Seventh-Day Adventist Church (Adventist Church) supports the use of reproductive technologies to aid procreation to the extent that they are used “within the bounds of the fidelity and permanence of marriage.”²⁰³ While the Adventist Church declines to address the issue of sex selection directly, it affirms that “[h]uman reproduction is part of God’s plan,” and concedes that “[m]edical technologies that aid infertile couples, when practiced in harmony with biblical principles, may be accepted in good conscience.”²⁰⁴

Additionally, even though the Presbyterian Church U.S.A. (PCUSA) generally opposes abortion, it takes the position that there are instances in which a woman’s decision “to terminate a pregnancy can be morally acceptable,” such as for a legitimate medical reason or when the pregnancy is the result of rape.²⁰⁵ However, PCUSA clearly states that “[a]bortion is not morally acceptable for gender selection.”²⁰⁶ Based on PCUSA’s stance on abortion, it is likely that it would find sex selection through reproductive technologies to be morally acceptable for medical reasons but unacceptable for nonmedical purposes.

²⁰² MARVIN W. CROUSEY, THE BOOK OF RESOLUTIONS OF THE UNITED METHODIST CHURCH 2012, at 306 (2013), available at <http://umc-gbcs.org/resolutions/new-developments-in-genetic-science-3181-2008-bor>.

However, the Methodist Church does provide for one exception to the general ban on reproductive technologies: IVF: “A woman is at risk for complications each time drugs are given to stimulate ovulation and ova are removed. Obtaining and fertilizing multiple ova may be justified to avoid the necessity of multiple attempts to obtain ova.” *Id.*

²⁰³ *Considerations on Assisted Human Reproduction*, SEVENTH-DAY ADVENTIST CHURCH (July 26, 1994), <http://www.adventist.org/information/official-statements/documents/article/go/0/considerations-on-assisted-human-reproduction/12/>.

²⁰⁴ *Id.*

²⁰⁵ OFFICE OF THE GEN. ASSEMBLY, PRESBYTERIAN CHURCH (U.S.A.), *Report of the Special Committee on Problem Pregnancies & Abortion* 11, para. e (1992), available at <http://www.pcusa.org/media/uploads/oga/pdf/problem-pregnancies.pdf>.

²⁰⁶ *Id.* para. g.

d. Public Opinion

The American public appears split over the use of reproductive technology for nonmedical sex selection.²⁰⁷ On one side, many Americans believe they should have the freedom to employ sex selection for nonmedical reasons.²⁰⁸ Some reason that sex-selection procedures are generally invasive, and it is unlikely that couples willing to undergo such procedures lack the justification for choosing to do so.²⁰⁹ Many in the U.S. support the nonmedical use of sex selection for family balancing, particularly for a family that already has multiple sons or daughters and wants a child of the opposite sex, or one that has lost a child, and hopes that another child of the same sex will make their family feel whole again.²¹⁰ On the other side, many Americans find sex selection immoral. Those who cite their religious values often believe that couples should accept their children exactly as they are given in the natural order of things.²¹¹ While a 2006 survey on abortion showed that most Americans oppose abortion for purposes of sex selection,²¹² a more recent study revealed that Americans are split over whether sex selection should be allowed for family balancing.²¹³ Many of those in favor of sex selection for the purposes of family balancing pointed out that it was particularly appropriate in cases where a medical purpose came into play.²¹⁴ On the other hand, many of those surveyed had moral

²⁰⁷ See David McCarthy, *Why Sex Selection Should be Legal*, 27 J. MED. ETHICS 302, 306 (2001).

²⁰⁸ See *id.* at 302–03.

²⁰⁹ See *id.*

²¹⁰ *Id.*; Savulescu & Dahl, *supra* note 5, at 1879.

²¹¹ McCarthy, *supra* note 207, at 303.

²¹² PRENDA, *supra* note 177, § 2(a)(1)(G); A.L. Kalfoglou, J. Scott & K. Hudson, *Attitudes About Preconception Sex Selection: A Focus Group Study with Americans*, 23 HUM. REPROD. 2731 (2008).

²¹³ Kalfoglou et al., *supra* note 212, at 2734. *But see, e.g.,* Poll: *Americans Incorrectly Believe ‘Pro-Choice’ Dominates US Abortion Views*, CBS DC (May 15, 2013), <http://washington.cbslocal.com/2013/05/15/poll-americans-incorrectly-believe-pro-choice-dominates-us-abortion-views/> (The same Gallup poll produced vastly different results with the first indicating that 51% of Americans think the public is pro-choice and 35% think it is pro-life, and the second indicating that 48% of Americans call themselves pro-life and 45% call themselves pro-choice.).

²¹⁴ Kalfoglou et al., *supra* note 212, at 2733–34 (finding that most participants of the study believed using sex selection for medical reasons was ethical).

objections to the practice of family balancing for nonmedical reasons and believed that couples engaging in the practice were being selfish, commodifying their children, and “[going] against God’s will.”²¹⁵

Moreover, many Americans disapprove of sex selection because they believe it to be a misallocation of the nation’s medical resources.²¹⁶ Others argue that the practice of sex selection is comparable to that of cosmetic surgery as couples are using their own private funds to pay for it, and although these procedures are expensive, those who can afford to, will pay for it.²¹⁷

Finally, some have expressed concerns that the widespread use of sex selection for nonmedical reasons will result in an imbalanced sex ratio not only in the United States, but also throughout the world.²¹⁸ It is likely that these concerns stem from the tangible effects of widespread sex-selective practices in China and India on those nations’ sex ratios.²¹⁹ Critics of this view argue that such fears are unfounded, due to the procedure’s invasiveness, cost, and the fact that most people will continue to leave the sex of their child up to nature.²²⁰

²¹⁵ *Id.*

²¹⁶ McCarthy, *supra* note 207, at 304.

²¹⁷ *Id.* at 305. Participants in an American study on sex selection for family balancing expressed concern that “only the wealthy would be able to afford to use the technology” to engage in the practice; Kalfoglou et al., *supra* note 212, at 2734.

²¹⁸ McCarthy, *supra* note 207, at 305; PRENDA, *supra* note 177, § 2(a)(1)(E); Kalfoglou et al., *supra* note 212, at 2731.

²¹⁹ *See infra* Part I.

²²⁰ McCarthy, *supra* note 207, at 305. It is disputed as to whether the U.S. exhibits a preference for sons or daughters when it comes to sex selection for non-medical reasons. *See* PRENDA, *supra* note 177, § 2(a)(1)(E) (claiming there is a son preference due to immigrants from countries exhibiting a son preference bringing their cultural practices with them to the U.S.); Douglas Almond & Lena Edlund, *Son-biased Sex Ratios in the 2000 U.S. Census*, 105 PROC. NAT’L ACAD. SCIENCES 5681–82 (Apr. 15, 2008); *Gender Preference in the U.S.*, INGENDER.COM, <http://www.ingender.com/XYU/Gender-Preference/> (last visited Feb. 9, 2014) (claiming there is a daughter preference). If most couples were using sex selection for family balancing, then the preference would exist on a case-by-case basis. *See id.*

3. THE SLIPPERY SLOPE

An emerging area of the sex selection debate is that it could lead society down a “slippery slope” by which genetically enhanced “designer babies” become the norm.²²¹ Proponents of nonmedical sex selection argue that because sex selection does not constitute a genetic enhancement, the two issues are completely separate.²²² Selecting sex is distinguishable from selecting a trait like height, hair color, or eye color because, for the most part, males and females are treated equally in the U.S.²²³ Proponents of nonmedical sex selection take the position that genetic enhancements like these are more likely to lead to the commodification of children because society views them as material characteristics. The widespread selection of traits that are determinative of a child’s appearance could cause social harm and could have a significant emotional impact on children and their parents. By way of example, if a child’s parents could not afford to genetically enhancement their child, and that child became the subject of harassment by peers at school who were genetically enhanced, the child might ultimately resent his or her parents and blame them for the psychological pain the child was experiencing.

It does not appear that it would be out of the question for the U.S. government to regulate, or even prohibit, the use of reproductive technologies for selection of genetic characteristics other than gender. However, a distinction must be made between the effects of couples selecting the gender of their child versus other characteristic like hair or eye color. When viewed in this light, using reproductive technologies for the selection of genetic characteristics other than sex is comparable to human cloning. Currently, there is no federal law banning human cloning in the U.S., but fifteen states do have laws explicitly prohibiting human cloning for reproductive purposes.²²⁴ Much like PRENDA, the proposed legislation that would ban sex-selective abortion, the Human Cloning Prohibition Act (HCPA) would ban human cloning in the U.S.²²⁵

²²¹ McCarthy, *supra* note 207, at 305; Robertson, *supra* note 83, at 213.

²²² McCarthy, *supra* note 207, at 306.

²²³ *Id.*

²²⁴ Jennifer Steinhauer, *House Rejects Bill to Ban Sex-Selective Abortions*, N.Y. TIMES, June 1, 2012, at A20; *see supra* notes 185–86.

²²⁵ *E.g.*, ARIZ. REV. STAT. ANN. § 13-3603.2 (2011); *see also* Sujatha Jesudason & Susannah Baruch, *Race and Sex in Abortion Debates: The Legislation and the Billboards*, GENERATIONS AHEAD, 1, 4–6,

It is relatively easy to argue that selecting a child's sex still falls within the realm of family planning and reproductive autonomy, which are protected from intrusion by the U.S. government. However, it is much more difficult to argue that selecting a child's hair or eye color relates to family planning as protected by the law. Any benefits of selecting these non-gender characteristics are likely substantially outweighed by the negative effects on the child.

As the law currently stands, it is not feasible for the U.S. to emulate the U.K.'s legal framework of the regulation of sex selection in the U.K as it stands in the HFE Act. Although many people consider practices like abortion and sex selection to be morally wrong, they are not willing to limit American liberties and privacy rights that individuals have and will continue to enjoy.²²⁶ On the other hand, it may be feasible for the U.S. to regulate the use of reproductive technologies for selecting genetic characteristics other than gender. One concern is that the widespread use of sex selection for nonmedical reasons would lead society down a slippery slope to the point that parents would be able to manufacture children into designer babies by choosing other genetic characteristics, such as hair color, eye color, or height. Although not banned in the U.S. yet, human cloning helps to clarify the difference between using reproductive technologies for selecting sex and using them for selecting other genetic characteristics and the more likely classification of the latter as the manufacturing of humans.²²⁷

Ultimately, despite diverse viewpoints among Americans about using sex selection for nonmedical purposes, many support the status quo because they fear regulation "could lead to an erosion of reproductive rights" and the individual autonomy established by

<http://www.generations-ahead.org/files-for-download/success-stories/RaceAndSexSelection.pdf> (last visited Feb. 9, 2014).

²²⁶ See *Poll: Americans Incorrectly Believe 'Pro-Choice' Dominates US Abortion Views*, *supra* note 214.

²²⁷ See Declaration on Human Cloning, G.A. Res. 59/280 A, U.N. Doc. A/RES/59/280 (Mar. 23, 2005), available at <http://www.nrlc.org/UN/UNGADeclarationHumanCloning.pdf> ("Member States are called upon to prohibit all forms of human cloning inasmuch as they are incompatible with human dignity and the protection of human life."); see, e.g., Wesley J. Smith, *Human Cloning: The Unethical Manufacturing of Human Life*, LIFE NEWS (Dec. 21, 2012), <http://www.lifenews.com/2012/12/21/human-cloning-the-unethical-manufacturing-of-human-life/>.

*Griswold, Eisenstadt, and Roe.*²²⁸ In sum, while it is evident that many Americans believe it may be morally wrong to select the sex of their children, they may not necessarily support an outright prohibition on the practice due to concerns for how it might affect their other reproductive rights.

IV. THE FUTURE OF REPRODUCTIVE TECHNOLOGIES IN THE UNITED STATES

As reproductive technology continues its inevitable advance, the issue of sex selection will remain a widely debated topic. In the coming years, it is likely that the U.S. government will be forced to make legislative decisions regarding the use of reproductive technologies for sex-selective practices. While legislators have already attempted to ban sex-selective abortion,²²⁹ they have not been successful in convincing a majority that sex selection is the underlying purpose for a nonmedical abortion.²³⁰ It is just as difficult to prove that a couple is using reproductive technologies for nonmedical sex selection for some reason other than family balancing, which likely falls within the constitutionally protected realm of family planning. As such, the U.S. should treat the use of reproductive technologies for both medical and nonmedical sex selection as it does abortion. However, it should prohibit, or at least regulate, the use of reproductive technologies for the selection of genetic characteristics other than gender that are not linked to any genetic disease or serve some other viable medical purpose as it does not fall under the constitutionally protected area of family planning.

While a few states have passed laws or introduced legislation prohibiting sex-selective abortions,²³¹ a federal law on sex selection has yet to be passed.²³² Given the current state of U.S. law, it seems unlikely that the federal government will choose to regulate the use of reproductive technologies for sex selection to the extent that they are regulated in the United Kingdom.

²²⁸ Kalfoglou et al., *supra* note 212, at 2734; *see supra* Part III.B.1.

²²⁹ Steinhauer, *supra* note 224; *see supra* notes 185–86.

²³⁰ *See supra* notes 185–86.

²³¹ *E.g.*, ARIZ. REV. STAT. ANN. § 13-3603.2 (2011); *see also* Jesuadason & Baruch, *supra* note 225.

²³² *See supra* Part III.B.1.

In one sense, it would be very difficult to restrict the use of sex selection for certain purposes—as the U.K. has done through the HFE Act—without infringing upon other well-established constitutional rights, including the right to privacy within the confines of marriage, reproduction, and family planning.²³³ Banning nonmedical sex-selection in the United States would almost certainly mean banning nonmedical sex-selective abortion as well. Such restrictions would essentially overturn well-established case law permitting abortions, marital privacy, and reproductive autonomy by imposing limitations to those rights and freedoms that Americans currently enjoy.

Furthermore, if family balancing indeed falls under the constitutionally protected right to privacy regarding the intimate aspects of reproduction and family planning,²³⁴ a restriction on sex selection for nonmedical purposes would infringe on that right as well. If abortion remains legal in the U.S., it will be almost impossible to discern whether a couple chooses not to have a child for purposes of family planning or the sex of the fetus. Consequently, if the American government is willing to allow its people to choose to terminate a pregnancy, it would be contradictory for it to disallow them to choose the sex of their child with reproductive technologies.

²³³ *Id.*

²³⁴ *Id.*