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## A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice

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## A FEMINIST UNDERSTANDING OF SEX-SELECTIVE ABORTION: SOLELY A MATTER OF CHOICE?

*April L. Cherry\**

### I. INTRODUCTION

Demographers of international population trends have found that adults prefer male offspring.<sup>1</sup> This desire for male children is currently being realized by the use of both pre-conception and post-conception sex-selective reproductive techniques and technologies.

While there are many ways for a woman to attempt to select the sex of her child before conception,<sup>2</sup> there are essentially two proce-

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1. NANCY E. WILLIAMSON, *SONS OR DAUGHTERS: A CROSS-CULTURAL SURVEY OF PARENTAL PREFERENCES* (1976); Sanford Winston, *Birth Control and the Sex-Ratio at Birth*, 38 AM. J. OF SOC. 225 (1933). Preference for male children is not quite universal. For example, among some societies in New Guinea, female children are more highly valued than male children. MARGARET MEAD, *SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES* 171 (1963).

2. The medical advice is varied on pre-conception sex-selective techniques. For those who are uncomfortable with sex-selective abortion, but still want a male child, bookstores are filled with "how-to books" designed to help couples procure a male

dures now used which can positively identify the sex of the fetus after conception: chorionic villi sampling (CVS),<sup>3</sup> and the most popular technique — amniocentesis.<sup>4</sup> After identifying the sex of the fetus, the fetus may be aborted for the purpose of sex-selection.

child. The techniques usually suggested include advice on the timing of intercourse with respect to ovulation, douching, shallow versus deep penetration of the penis, as well as advice regarding whether or not the woman should have an orgasm. See, e.g., LANDRUM B. SHETTLES & DAVID M. ROVIK, *HOW TO CHOOSE THE SEX OF YOUR BABY* (1989); TRACEY HOTCHNER, *PREGNANCY AND CHILDBIRTH: THE COMPLETE GUIDE FOR A NEW LIFE* 35-37 (1984); M. Ruth Nentwig, *Technical Aspects of Sex Preselection*, in *THE CUSTOM MADE CHILD?: WOMEN-CENTERED PERSPECTIVES* 181, 183-84 (Helen B. Holmes et al. eds., 1981); Nancy E. Williamson, *Boys or Girls? Parent's Preferences and Sex Control*, 33 *POPULATION BULL.* 1, 18-21 (Jan. 1978) [hereinafter *Boys or Girls?*]. Another popular pre-conception sex selection technique employed by fertility clinics is the separation of androgenic and gynogenic sperm. Nentwig, *supra*, at 183-84. One such separation method is differential centrifugation. This process separates the androgenic and gynogenic sperm, which can then be artificially inseminated in a woman. In some clinics the gynogenic sperm are destroyed after the separating process. Thus, in these clinics, only couples wanting to insure the birth of a male child can be serviced. *Id.* at 181, 182-83. Another sperm separation technique differentiates androgenic from gynogenic sperm by their mobility. The faster swimming androgenic sperm are separated from the slower moving gynogenic sperm. *Id.* at 183. This procedure is said to have an approximately 80 percent success rate for women wanting male children. See, e.g., Stephen L. Corson et al., *Sex Selection by Sperm Separation and Insemination*, 42 *FERTILITY & STERILITY* 756, 759 (1984). For a description of other methods of sex selection, see Betty B. Hoskins & Helen B. Holmes, *Technology and Prenatal Feticide*, in *TEST TUBE WOMEN* 237, 238-39 (Rita Arditti et al. eds., 1989).

3. Chorionic villi sampling is a procedure conducted during the first trimester of a woman's pregnancy. A suction tube is inserted through the cervix (or less often through the abdominal wall) which aspirates sloughed fetal cells. The DNA of the cells is examined for indication of the fetus' sex. See Hoskins & Holmes, *supra* note 2, at 241-42. This test may be performed in the ninth to eleventh weeks of the pregnancy. Aliza Kolker & B. Merideth Burke, *Deciding About the Unknown: Perceptions of Risk of Women Who Have Prenatal Diagnosis*, 20 *WOMEN & HEALTH* 37, 38 (1993); see also Aliza Kolker et al., *Attitudes About Abortion of Women Who Undergo Prenatal Diagnosis*, 9 *RES. IN SOC. OF HEALTH CARE* 49, 52 (1991). Thus, if an abortion is performed, it can be performed in the first trimester when the physical risks, and perhaps the emotional trauma, is lower or reduced. The procedure carries a risk of miscarriage "from less than 1 percent in some centers to 10 percent or higher in others, depending on the physicians' experience with the procedure." Kolker & Burke, *supra*, at 38; see also Nentwig, *supra* note 2, at 185. Also, first trimester abortions are more readily available and less expensive than second trimester abortions. Thus, CVS done for sex identification purposes permits abortions done for the purpose of sex-selection to be less emotionally traumatic for the women and provides greater access to women who wish to abort their fetuses for the purpose of sex-selection.

4. Frances E. Kobrin & Robert G. Porter, Jr., *Sex Selection through Amniocentesis and Selective Abortion*, in *SEX SELECTION OF CHILDREN* 47, 47-48 (Neil G. Bennett ed., 1983). Amniocentesis is usually used to determine whether the fetus has chromosomal abnormalities, metabolic abnormalities, or neural tube defects. It is also used when medically indicated to determine the sex of the fetus in order to diagnose the possibility of certain sex-linked diseases. *Id.*

Amniocentesis can be performed any time between the fourteenth and twentieth week of pregnancy. It usually takes about four weeks for the physician to receive the results from the laboratory. In amniocentesis, a needle is inserted into the amniotic

Currently two states have prohibited the use of abortion for the purpose of sex-selection: Pennsylvania and Illinois.<sup>5</sup> Under Pennsylvania's statute, no abortion is to be performed except by a physician after either: "1) She determines that, in her best clinical judgment, the abortion is necessary; or 2) She receives what she reasonably believes to be a written statement signed by another physician . . . certifying . . . that the abortion is necessary."<sup>6</sup> Further, the statute provides that "[i]n determining . . . whether an abortion is necessary, a physician's best clinical judgment may be exercised in light of all factors (physical, emotional, psychological, familial and the woman's age) relevant to the well-being of the woman. No abortion which is sought solely because of the sex of the unborn child shall be deemed a necessary abortion."<sup>7</sup>

Illinois' abortion law also prohibits sex-selective abortion. The statute does not include a requirement that the physician find the abortion to be "necessary," as in Pennsylvania; rather, it prohibits aborting viable fetuses,<sup>8</sup> and abortions which are performed "with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus."<sup>9</sup> In addition, subsection (8) provides that this prohibition shall not be construed to proscribe the perform-

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cavity which surrounds the developing fetus. Amniotic fluid is removed and analyzed by the karyotypic technique, which provides the physician with genetic information regarding the fetus. Amniotic fluid cells cultivated in this manner have been shown to successfully predict the sex of the fetus/infant in 99.93 percent of the cases studied. M.S. Golbus et al., *Prenatal Genetic Diagnosis in 3000 Amniocenteses*, 300 NEW ENG. J. MED. 157, 162-64 (1979), cited in Kobrin & Potter, *supra*, at 47. The risk of miscarriage as a result of the procedure is between .005 and .01 percent, see Kolker et al., *supra* note 3, at 51, and the trauma of losing a pregnancy in the second trimester is well documented: "[b]y that stage in the pregnancy the fetus has a social as well as a physical and emotional reality. . . . Neither the fetus' life, its death, nor the parents' participation in that death can be denied," *id.*; see also Susan Hodge, *Waiting for Amniocentesis*, 320 NEW ENG. J. MED. 63, 63-64 (1989). Fetal sex can also be determined by the use of ultrasonic scanning during the third trimester. Because third trimester abortions are often prohibited by state statute, this method is not used for the purpose of sex-selection. See generally MARY ANNE WARREN, *GENDERCIDE: THE IMPLICATIONS OF SEX SELECTION* 7 (1985).

5. Cf. The Abortion Act 1967 (Great Britain) as amended, does not permit the termination of pregnancy solely on the grounds of fetal sex. As a result of the passage by Parliament of the Human Fertilisation and Embryology Act of 1990 (HFE Act), the Human Fertilization and Embryology Authority has sought to determine whether pre-conception or pre-implantation techniques for sex-selection are "necessary or desirable" for social or medical reasons in order to determine whether to grant licenses to centers providing these services. HUMAN FERTILIZATION AND EMBRYOLOGY AUTHORITY, *SEX SELECTION: PUBLIC CONSULTATION DOCUMENT 5* (Great Britain 1993).

6. 18 PA. CONS. STAT. ANN. § 3204(a) (1983).

7. 18 PA. CONS. STAT. ANN. § 3204(c) (1994).

8. ILL. ANN. STAT. ch. 720, para. 510/5 (Smith-Hurd 1993).

9. ILL. ANN. STAT. ch. 720, para. 510/8 (Smith-Hurd 1993).

ance of an abortion on account of the sex of the fetus because of a genetic disorder linked to that sex.<sup>10</sup>

While there are millions of abortions performed each year in the United States,<sup>11</sup> relatively few appear to be performed for sex-selective purposes. Although the number of sex-selective abortions is almost impossible to determine because women are not required to disclose why they are choosing abortion, one 1988 survey of obstetrician/gynecologists suggests that approximately 100 abortions for sex-selection are performed each year in the United States.<sup>12</sup>

Although seemingly small numbers of abortions are performed for the purpose of sex-selection, sex-selective abortion nevertheless presents important questions in the development of feminist thinking about abortion rights. Sex-selective abortion challenges feminist thinking with regard to the development of new methods or strategies for extending women's freedom and autonomy. Sex-selective abortion highlights weaknesses in choice rhetoric. Furthermore, the problem of sex-selective abortion demonstrates the importance of continuing feminist critique of whether the doctrines of choice and privacy, in the area of reproductive rights, empower women or allow men or the state to secure their own misogynist, familial, or population control agendas.

Often the issue of abortion is framed as a feminist issue of choice and respect for women's bodily integrity. Under this rubric, a woman chooses whether or not to have an abortion, at least until the point of fetal viability. Her decision may be based on her private circumstances, so she need not give any reason for requesting an abortion.

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10. *Id.* For a further discussion of legislative proposals regarding sex-selective abortion, see Owen D. Jones, *Sex Selection: Regulating Technology Enabling The Predetermination of a Child's Gender*, 6 HARV. J. L. & TECH. 1 (1992); George Schedler, *Benign Sex Discrimination Revisited: Constitutional and Moral Issues in Banning Sex-Selection Abortion*, 15 PEPP. L. REV. 295, 296-97 (1988); John Schaibley, *Sex Selection Abortion: A Constitutional Analysis of the Abortion Liberty and A Person's Right to Know*, 56 IND. L. J. 281 (1981).

11. In 1988 there were approximately 1.59 million legal abortions performed. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 83 (1993).

12. *USA Today* on TV (WTNH television broadcast, Feb. 7, 1989). It is interesting that although ten percent of geneticists and physicians in a survey stated that they were willing to perform an abortion based on sex-selection, the number of acknowledged abortions for sex-selection purposes is quite low. *Id.* One physician, Dr. Haig H. Kazazian, at the Johns Hopkins Hospital, which performs sex selection abortions with mandatory counseling, suggests that American women are not willing to take the risks necessary in a second trimester abortion in order to choose the sex of their child:

[T]he clinic has not experienced an increase in requests for sex selection, and it has not yet terminated a pregnancy for sex selection alone. Our overall experience during the past eight years leads us to believe that couples desiring sex selection who are willing to undergo midtrimester abortion are uncommon in American society.

Haig H. Kazazian, Jr., *A Medical View*, 10 HASTINGS CENTER REP. 17, 18 (Feb. 1980).

Many feminists have supported sex-selective abortion in these terms, viewing any restriction regarding pre-viability access to abortion as working against the goal of equality for women. For example, although feminist ethicist Tabitha Powledge understands that in the context of sex-selection of children, "to prefer males is, unavoidably, to denigrate females,"<sup>13</sup> she nevertheless takes the position vis-à-vis sex-selection that

[i]mprovements in the position of women depend on women being able to obtain abortions without needing to justify their decisions to anyone but themselves. Restrictions retard that goal. . . . [T]o preserve what improvements in their lot women have achieved, society should seek no legal restrictions on reproductive freedom, even on a technology that will be used selectively against females. I recognize its irony, but view this position as part of the price of furthering the goal of equal treatment.<sup>14</sup>

Thus, the substantive outcome is subordinated to process neutrality. In this instance process neutrality is embodied in the abstract moral and legal concepts of "choice" and "privacy," which are derived from a male-dominated tradition of classical liberalism. Classical liberalism assumes that all citizens have a zone of liberty in which to make intimate decisions. While liberalism protects individuals from unwarranted government intrusion into decisions regarding the private sphere, it does not require nor encourage individuals to behave in ways that further the interests of the community. Nor does it promote women's interests in equality.<sup>15</sup> Thus, by focusing on the process of whether bodily integrity and liberty are protected, feminists like Powledge fail to pay close attention to the substantive outcome — the abortion of female fetuses.

The dilemma, of course, is that feminism has traditionally stressed the importance of women's control over their bodies and reproductive control in achieving social, political, and economic equality.<sup>16</sup> Sex-selective abortion, like other "new" reproductive technologies, challenges this traditional liberal feminist position. The effects of an individual woman's use of the technology goes beyond herself. The technology affects women as a social class. In the case of sex-selective abortion, "the paradox posed by individual choices eventually alter[s] every woman's experience of maternity and mother-

13. Tabitha Powledge, *Toward A Moral Policy for Sex Choice*, in *SEX SELECTION OF CHILDREN*, *supra* note 4, at 201, 206.

14. *Id.* at 207.

15. As Janice Raymond has noted, "[c]hoice resonates as a quintessential U.S. value, set in a context of a social history that has gradually allowed all sorts of oppressive so-called options, such as prostitution [and] pornography, . . . to be defended in the name of women's right to choose." JANICE RAYMOND, *WOMEN AS WOMBS* ix-x (1993).

16. ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY AND REPRODUCTIVE FREEDOM* 289-302 (1985).

hood."<sup>17</sup> Feminists must be circumspect and cautiously evaluate the social, political, and economic forces that constrain women's "free choice" and the technical means heralded as *liberating* their choice. Liberal individualism, then, may be unhelpful when dealing with the issue of sex-selective abortion, because ultimately, the use of sex-selective abortion will determine whether women will exist.<sup>18</sup>

I imagine that some conservatives may fear sex-selective techniques, in the power and control of women, because these techniques can be used to threaten male power and the existence of men. Thus, conservatives may fear the use of such powerful tools for the actual benefit of women. Such apprehension is in opposition to reality. Women do not have control of the technology, and because women lack real social, political or economic power, sex-selective technologies, including abortion, are being used to annihilate women before they are born. Women are therefore being required to participate in their own pre-victimization<sup>19</sup> through the use of sex-selective techniques which ensure the birth of male children.

This essay consists of five sections. The first section describes the problem of sex-selective abortion, including an analysis of sociological data regarding adult preference for male children and its current effects. In Section Two, I discuss various philosophical paradigms and analyses of sex-selective abortion with the goal of developing a coherent philosophical base from which to argue for a policy regarding sex-selective abortion which furthers the goals of gender equality. Because of the importance of the context of women's lives in the modified pragmatist analysis, I believe that a modified pragmatic philosophical approach is best suited to the task.<sup>20</sup> Section Three addresses the constitutionality of sex-selective abortion prohibitions in light of the Supreme Court's pronouncement in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>21</sup> In Section Four, I outline the liberal feminist response to sex-selective abortion and address the inadequacy of traditional legal doctrines to deal with the issue. Finally, in Section Five, I propose a feminist treatment of sex-selective abortion. My construction of a radical feminist analysis moves away from a view of the procedure as one of individual choice, and acknowledges sex-selection as an issue affecting women as a class. I place the decision whether to abort on the basis of gender clearly within the feminist dilemma of double-bind choices.

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17. Laura R. Woliver, *The Deflective Power of Reproductive Technologies: The Impact on Women*, 9 WOMEN AND POL. 17, 19-20 (1989).

18. See Helen B. Holmes and Betty B. Hoskins, *Prenatal and Preconception Sex Choice Technologies: A Path to Femicide?* in MAN-MADE WOMEN, *supra* note 25, at 1, 25.

19. Janice Raymond, *Introduction*, in THE CUSTOM-MADE CHILD?, *supra* note 2, at 177, 177.

20. See discussion *infra* at pp. 181-87.

21. 112 S. Ct. 2791 (1992).

My purpose is not necessarily to suggest a model of law reform. As Powledge and others have noted, law reform or other types of government intervention may, under the current political climate and conditions of oppression, further jeopardize the abortion right.<sup>22</sup> Instead, my principal goal is to present a prologue for the consideration of the role of law in organizing these relationships. I wish to develop a feminist analysis<sup>23</sup> of sex-selective abortion which acknowledges the failures of both traditional privacy and equal protection doctrine to expose the victimization of women in the reproductive context, which recognizes the needs of women with regard to the sexual compositions of their families, and which questions why women are required to pay the price for "balanced" families by jeopardizing their emotional and physical health. Above all, it is my intention to focus on the issue of reproductive justice.<sup>24</sup> As social psychologist Robyn Rowland

22. See Powledge, *supra* note 13, at 206; see also Hoskins & Holmes, *supra* note 2, at 245.

23. Political theorist and feminist scholar bell hooks has described feminism as "a commitment to eradicating the ideology of domination that permeates Western culture on various levels — sex, race, and class, to name a few — and a commitment to reorganizing U.S. society so that self-development of people can take precedence." BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 194-95 (1981). In her work, Mary Anne Warren describes what it means to write from a feminist perspective: This book is written from a feminist perspective. To say this is not to admit a bias, but to declare a belief in certain facts that I hold to be objectively demonstrable, and certain values I regard as morally essential. The basic empirical belief that unites all feminists is that women of many societies have been and still are severely oppressed because of their sex. The basic moral belief is that this oppression is wrong and must be ended.

WARREN, *supra* note 4, at 2-3. I wish to develop a critique which takes the experiences of women seriously and focuses more on the impact of this technology and the policy surrounding the technology on women (as engendered as a socially constructed group) and less on the issue of individual choice as it is understood by many liberals, including liberal feminists.

24. Although I am concentrating exclusively on the issue of abortion, there are other reproductive rights that are vital to women if we are to achieve equality and reproductive justice, and accordingly, self-determination. These issues include the right to have children, i.e., the right not to be sterilized without informed consent. See, e.g., *Madrigal v. Quilligan*, No. CV75-2057 (C.D. Cal. June 30, 1978), *aff'd*, 639 F.2d 789 (9th Cir. 1981); Adele Clark, *Subtle Forms of Sterilization Abuse: A Reproductive Rights Analysis*, in *TEST TUBE WOMEN*, *supra* note 2, at 188; ANGELA Y. DAVIS, *WOMEN, RACE, AND CLASS* (1983); Susan E. Davis, *Contraception, Abortion, and Sterilization Today: What Choices do Women Really Have?*, in *WOMEN UNDER ATTACK: VICTORIES BACKLASH AND THE FIGHT FOR REPRODUCTIVE FREEDOM* 15-30 (Susan E. Davis ed., 1988); Carlos Velez, *Se Me Acabó La Canción: An Ethnography of Non-Consenting Sterilizations Among Mexican American Women in Los Angeles*, in *MEXICAN WOMEN IN THE UNITED STATES* 71 (Magdalena Mora & Adelaida R. Del Castillo eds., 1980).

These issues also include the right to be free from forced medical treatment while pregnant. See e.g., *In re A.C.*, 573 A.2d 1235 (1990) (en banc) (recognizing mother's right to bodily integrity as against state's right to protect fetus); *In re Jamaica Hospital*, 491 N.Y.S.2d 898 (1985); *Raleigh Fitkin v. Anderson*, 201 A.2d 537 (N.J. 1964); George Annas, *Forced Cesareans: The Most Unkindest Cut of All*, 12 *HASTINGS CENTER REP.*, June 1982, at 16-17, 45 (1982); Janet Gallagher, *Prenatal Invasions and*



noted: "We need to challenge our own thinking and the current technology without eroding the hard-won gains we have made in reproductive choice. In the end, does the new technology mean a transfer of *power* to women as a social group?"<sup>25</sup>

# I. SOCIOLOGICAL DATA: DEMOGRAPHICS AND PREDICTIONS

*Daughters and dead fish are no keeping wares.*  
— 18th Century English proverb

*A girl lets you down twice, once at birth and the second time  
when she marries.*  
— A common Korean saying

Demographers have reported that there are 100 million women missing from the world's population.<sup>26</sup> According to United Nations' estimates, there were only 987 females for every 1,000 males in 1990. The crisis is much more severe among female children than among adult women. Fewer and fewer female children are being born.<sup>27</sup> Although the popular media in the United States would have us believe that these "missing girls" are solely a "third world" or non-Western problem,<sup>28</sup> the shortage of girl children is as severe in Western "developed" nations as it is in the "developing" world. Although in 1990, the "developing" world had approximately 954 girls (nineteen years old and younger) for every 1000 boys, the "developed" world had only 952 girls for every 1000 boys. While much of the social commentary on these "missing" women has focused on "son fixation"<sup>29</sup> of South Asian, particularly Indian, culture, the demographics indicate that Western nations, including the United States, are also involved in producing this precarious and "unnatural" condition of world-wide sex ratios.

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*Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987). See generally Gayle Binion, *Reproductive Freedom and the Constitution: The Limits on Choice*, 4 BERKELEY WOMEN'S L.J. 12 (1988).

25. Robyn Rowland, *Motherhood, Patriarchal Power, Alienation and the Issue of 'Choice' in Sex Preselection*, in MAN-MADE WOMEN 74, 86 (Gena Corea et al. eds., 1987).

26. Amartya Sen, *More than 100 Million Women Are Missing*, N.Y. REV. BOOKS 61 (Dec. 20, 1990); Nicholas D. Kristof, *Stark Data On Women: 100 Million Are Missing*, N.Y. TIMES, Nov. 5, 1991, at C1; Irene Sege, *The Grim Mystery of the World's Missing Women*, BOSTON GLOBE, Feb. 3, 1992, at 25.

27. The normal ratio of women to men is 1:1. *The World's Women, 1970-1990*, Statistical Office of U.N.'s Secretariat, U.N., Series K, No. 6, at 13 (1991). The biological normal sex ratio at birth is 105 or 106 boys for every 100 girls born. Susan Greenhalgh & Jiali Li, *Engendering Reproductive Policy and Practice in Peasant China: For a Feminist Demography of Reproduction*, 20 SIGNS 601, 601 (1995).

28. See, e.g., Jo McGowan, *In India, They Abort Females*, NEWSWEEK, January 30, 1989 at 17; Steven R. Weisman, *No More Guarantees of a Son's Birth*, N.Y. TIMES, July 20, 1988, at A1. (Both Articles discuss amniocentesis for the purpose of sex-selection as a problem in India, with no mention of the phenomenon in the Western World.)

29. Nera Kuckreja Sohoni, *Where Are the Girls?*, Ms., July-Aug. 1994, at 96.

The focus of social commentators on sex-selection in non-Western cultures is due in part to the West's understanding of religious, cultural and economic factors in those cultures which make the birth of sons crucial. For example, post-conception sex-selective techniques are used quite frequently among the well-educated in countries such as South Korea and China, where there is a strong commitment to the Confucian dictate that only men can perform the required rites of ancestor worship.<sup>30</sup> There is also evidence that in the People's Republic of China the policy of encouraging couples to have only one child has led to greatly decreasing numbers of female children being born and of women in society as a whole.<sup>31</sup> In India, the prevalence of post-conception sex-selective techniques is understood in the context of the cultural tradition of dowry, which causes daughters to be enormous economic hardships, and in which an unmarried daughter is a negative "social stigma."<sup>32</sup> Also, many Indian girls face female infanticide and the discriminatory allocation of food and health care.<sup>33</sup>

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30. Neil G. Bennett, *Sex Selection of Children: An Overview*, in *SEX SELECTION OF CHILDREN*, *supra* note 4, at 8, 9; Alison Dundes Renteln, *Sex Selection and Reproductive Freedom*, 15 *WOMEN'S STUD. INT'L F.* 405, 410-11 (1992).

31. Greenhalgh & Li, *supra* note 27, at 601. In fact, between 1982 and 1989 the number of boys born per 100 girls rose from 107 to 114, well above the biological normal level of 105 to 106. *Id.* For third or higher-order children the ratio of boys to girls exceeds 125. *Id.* As Greenhalgh and Li note, these "numbers tell a frightening story: little girls are being eliminated from Chinese society . . . the largest society on earth — on a massive scale." *Id.*

32. Dowry is defined as the property that a woman brings to her husband when she marries. *BLACK'S LAW DICTIONARY* 443 (5th ed. 1979). Although the dowry has been outlawed in India by the Central Dowry Prohibition Act of 1961, it is still quite prevalent. See Weisman, *supra* note 26, at A1. In fact, it seems as if the size of the dowries that are demanded by the bridegroom and his family are growing rapidly. *Id.* at A9. One reporter noted that "dowries as high as \$10,000 are common among families who earn that kind of money in a year's work." *Id.* As a response to the continued prevalence of dowry, the Indian Parliament amended the dowry prohibition Act in 1984, to introduce more stringent penalties for the giving and taking of dowry. Indira Jaising, *Violence Against Women: The Indian Perspective*, in *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 51, 54 (Julie Peters & Andrea Wolper eds., 1995). Nevertheless, daughters continue to be a severe economic hardship and because unmarried daughters are viewed with scorn, there continues to exist great cultural and economic incentives for families to severely limit the number of female children they have. *Id.*

33. Viola Roggencamp, *Abortion of a Special Kind: Male Sex Selection in India*, in *TEST TUBE WOMEN*, *supra* note 2, at 267; Williamson, *Boys or Girls?*, *supra* note 2, at 9-10; see also Austin Hughes, *Female Infanticide: Sex Ratio Manipulation in Humans*, 2 *ETHOLOGY & SOCIOBIOLOGY* 109, 110-11 (1981) (recognizing existence of differential female infanticide through neglect of female infants). Under these circumstances, sex-selective abortion becomes an attractive, viable, and rational solution for those who can afford it! (On rationality see Elster, *infra* note 59). See Madhu Kishwar, *The Continuing Deficit of Women in India and the Impact of Amniocentesis*, in *MAN-MADE WOMEN*, *supra* note 25, at 32. Mothers under these circumstances can also be understood as fulfilling their maternal duties of care. Just as African-American slave mothers were understood as protecting their children from the cruelty of slavery through infanticide, women under these conditions can be understood as protecting their potential

Some girls and women are killed by their husbands in so-called "dowry deaths."<sup>34</sup> These conditions have led to the use of abortion for the purpose of sex-selection in India.<sup>35</sup>

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female children from a life of neglect and violence through sex-selective abortion. Regarding the protection of children from slavery through infanticide, see A. Leon Higginbotham, Jr., *Race, Sex, Education and Missouri Jurisprudence: Shelley v. Kraemer in a Historical Perspective*, 67 WASH. U. L.Q. 673, 694-95 (1989) (citing *Jane (a slave) v. The State*, 3 Mo. 45 (1831)); see also J. CALIFORNIA COOPER, FAMILY 34-38 (1991); TONI MORRISON, BELOVED 149, 158, 165 (1987).

34. Roggencamp, *supra* note 33, at 270. "Dowry death" occurs in many cases where the husband or his family believes that the dowry should have been higher or where the full dowry has not been paid. Commentators often note that the reasons given for the murders of these women are pretextual. The term "dowry death" has only recently been included in the Indian Penal Code. "It is defined as the death of a woman caused by burns or other-than-normal circumstances within seven years of marriage, and in which the death has been preceded by dowry-related harassment." Nikki Lastreto & William Winans, *The High Price of Marriage in India: Burning Brides*, THIS WORLD, July 2, 1989, at 10. In 1986 the Indian Penal Code was amended to address the offense of dowry death. Section 304B of the Penal Code states that when a woman's death is caused by burns or bodily injury "or occurs under other than normal circumstances within seven years of her marriage, and when it is shown that shortly before her death she was subjected to cruelty in connection with any demand for dowry . . . and the husband or relative shall be deemed to have caused her death." Jaising, *supra* note 32, at 54. One researcher has reported that in 1987 there were 1,418 dowry deaths in India according to police records. Vibhuti Patel, *Sex-Determination and Sex-Preselection Tests in India: Modern Techniques for Femicide*, BULL. OF CONCERNED ASIAN SCHOLARS, Feb. 1989, at 6. Another commentator asserts that more than 5,000 dowry deaths occur each year in India. Jaising, *supra* note 32, at 54.

35. There is a general consensus among doctors, commentators and others that the practice of sex-selective abortions is fairly common in India, though official or reliable numbers are hard to find. One survey found that of 8,000 abortions performed in Bombay, 7,999 were female fetuses. R. Jeffrey et al., *Female Infanticide and Amniocentesis* 19 (11) SOC. SCI. & MED. 1207-12 (1984); see also Lastreto & Winans, *supra* note 34, at 11; Jo McGowan, *In India, They Abort Females*, NEWSWEEK, Jan. 30, 1989, at 12. A joint committee of the Indian Parliament found that between 1986 and 1987, as many as 50,000 female fetuses were aborted in India after sex identifying tests were performed. Ajoy Bose, *Abortion: Who Believes in A Woman's Right to Choose?* GUARDIAN FEATURES, Aug. 11, 1992, at 15.

One Indian province, Maharastra, (the state in which the city of Bombay lies), has made abortion for the purpose of sex-selection illegal. It has done so by the regulation of amniocentesis. See Weisman *supra* note 26, at A1. This law provides that amniocentesis is only permitted when medically indicated to determine possible birth defects. It provides prison sentences and fines for doctors who perform amniocentesis for sex-selective purposes and for the female patients and their families who procure these services. Maharastra Legislature Secretariat, L.C. Bill No. VIII of 1988; see also Dorothy C. Wertz & John C. Fletcher, *Fatal Knowledge? Prenatal Diagnosis and Sex Selection*, 19(3) HASTINGS CENTER REP., 21, 25 (1989); Weisman, *supra* note 28, at A1. According to some observers, however, there are sufficient "loopholes" to allow the use of amniocentesis for the selective abortion of female fetuses. Many Indian gynecologists have expressed the view that the selective abortion of female fetuses is a permissible and legitimate family planning tool. Vimal Balasubrahmanyam, *Women As Targets in India's Family Planning Policy*, in TEST TUBE WOMEN, *supra* note 2, at 153, 160-61.

The sociological data indicates that Americans also have a strong preference for male children. Researchers of American parental sex preferences for children have consistently found that, although most Americans strive for "balanced" families (equal number of male and female children), Americans prefer male children as first-born children and as only children.<sup>36</sup> In families with an odd number of children, Americans prefer to have more boys than girls.<sup>37</sup> Studies show that women's attitudes toward the sex of their children are strikingly similar to those of men. Both women and men in the United States prefer to have male children rather than female children.<sup>38</sup> Sons are still expected to carry on the family name as well as provide economic support to their parents when they are older.<sup>39</sup> Sons are also preferred in Western culture because sons are still seen as proof of the father's masculinity.<sup>40</sup> Lastly, sons are preferred because potential parents believe that boys will have vastly greater opportunities than girls.<sup>41</sup> In one study of the sex preference for first-born children, researchers found that 60 percent of those studied preferred a boy as a first-born child, while only 5 percent preferred a girl as the first-born child. There was little variation in the preferences of men and women.<sup>42</sup> An earlier study of married women showed that one-half of the women studied had a general preference for sons, while only one-third preferred daughters.<sup>43</sup>

In a 1989 study, undergraduate college students without children were asked to state a preferred sex for their first child, as well as their willingness to use sex-selective technology (not abortion).<sup>44</sup> Researchers found that 58 percent of men and 39 percent of women in the

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36. See, e.g., Nancy E. Williamson, *Parental Sex Preferences and Sex Selection*, in *SEX SELECTION OF CHILDREN*, 129, 131 (Neil G. Bennett ed., 1983) [hereinafter *Parental Sex Preferences*]; Gerald E. Markle, *Sex Ratio at Birth: Values, Variance and Some Determinants*, 11 *DEMOGRAPHY* 131, 133-37 (Feb. 1974).

37. See, e.g., Markle, *supra* note 36, at 132.

38. Pebley & Westoff, *supra* note 36, at 177-89; see also Nora Frenkiel, "Family Planning": *Baby Boy or Girl?*, N.Y. TIMES, Nov. 11, 1993, at C1.

39. Renteln, *supra* note 30, at 408; WARREN, *supra* note 4, at 14.

40. Renteln, *supra* note 30, at 408.

41. See *id.*; Michael Shapiro, *A boy or a girl? Should you be permitted to choose?*, LOS ANGELES DAILY J., Aug. 2, 1989, at 7.

42. Markle, *supra* note 36, at 133-37; cf. Williamson, *Parental Sex Preferences*, *supra* note 36, at 131.

43. Williamson, *Boys or Girls?*, *supra* note 2, at 8. The only exception to this preference seems to be regarding adoption. Williamson, *Parental Sex Preferences*, *supra* note 36, at 131. Americans prefer girls for adoption. Researchers note that "apparently adoptive parents are somewhat reluctant to risk the family name on an adopted male child." Renteln, *supra* note 30, at 411.

44. Roberta Steinbacher & Faith Gilroy, *Sex Selection Technology: A Prediction of Its Use and Effect*, 124(3) J. OF PSYCHOL. 283, 285 (1990) (The question posed to the volunteers: "Imagine a time when you are married, or if you are currently married, when you could inexpensively purchase a device or a pill that would allow you to select a boy or girl for your first child. Would you buy it and use it? If you answered 'Yes', what sex would you select?").

study preferred boys as first children. Only 8 percent of the men and 24 percent of women preferred girls as first-born children. Hence, the study showed a significant overall preference of college students for first-born boys, and that men preferred first-born boys significantly more than women.<sup>45</sup> These researchers also found that there were no significant differences in sex preferences of first-born children due to class, age or race.<sup>46</sup> Only 18 percent of the students surveyed expressed a willingness to use sex-selective technologies in order to realize their preferences; among those who did, 73 percent preferred first-born sons.<sup>47</sup>

The cultural similarities and contrasts between South Asian and United States practices indicated that although son preference or son fixation is not culturally uniform and the intensity of the phenomenon varies from culture to culture, it is nevertheless a feature of many developed and developing nations.<sup>48</sup> Son preference and fixation are widespread because patriarchy is widespread<sup>49</sup> and son preference and fixation are products of patriarchy. As Mary Anne Warren notes,

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45. *Id.* at 285. Steinbacher and Gilroy also found that while white men preferred sons significantly more than white women, black women are equally likely to prefer male children as black men, and that black women are more willing to use sex-selective technology than white women. *Id.* at 286-87.

46. *Id.* at 287. *But see contra*, Roberta Steinbacher & Faith Gilroy, *Preference for Sex of Child Among Primiparous Women*, 119(6) J. OF PSYCHOL. 541, 544 (1985). Their study found that in a study of primiparous women (women who are pregnant for the first time) 59 percent of the women expressed no preference for the gender of their first child while approximately 23 percent preferred girls and 18 percent preferred boys. One possible explanation for this deviation from previous research is that "it is not considered appropriate today for an expectant mother to verbalize a choice of sex for her offspring. . . . Perhaps pregnant women are motivated by cognitive dissonance to express satisfaction with infants of either sex because, in their cases, such determination has already been made." *Id.*

47. Steinbacher & Gilroy, *supra* note 40, at 286. In a study of women who had either amniocentesis or CVS, these researchers found that 19.2 percent of the women surveyed believed that a woman should have the right to obtain a legal abortion for the purposes of sex-selection. But only 5.3 percent of the women surveyed would consider an abortion for herself in order to choose the sex of her child. Aliza Kolker et al., *supra* note 3, at 59-60.

48. *See, e.g.*, Williamson, *Boys or Girls?*, *supra*, note 2, at 6-12; Williamson, *Parental Sex Preferences and Sex Selection* *supra* note 36, at 131-34.

49. With regards to patriarchy, Heidi Hartmann has explained that:

Radical feminists use patriarchy to refer to a social system characterized by male domination over women. . . . [It is] a set of social relations between men, which have a material base, and which, though hierarchical, establish or create interdependence and solidarity among men that enable them to dominate women . . . *Patriarchy is not simply hierarchical organization*, but hierarchy in which *particular people fill particular places*.

Heidi Hartmann, *The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union*, in *WOMEN AND REVOLUTION* 1, 14, 18 (Lydia Sargent ed., 1981); *see also* GERDA LERNER, *THE CREATION OF PATRIARCHY* 239 (1986).

patriarchy is maintained *inter alia* through patriliney and patrilocality;<sup>50</sup> through the denial of women's rights to sexual and reproductive independence, ownership and inheritance of property, education, freedom of movement, economic employment and political participation; and through violence or threat of violence against women and girls.<sup>51</sup>

The sociological predictions regarding the effects of sex-selective abortion on society highlight the dangers to which abortion for the purpose of sex-selection subjects American women.<sup>52</sup> The first of these predictions is that the use of sex-selective abortion (and other sex-selection techniques) will result in a gender imbalance. Demographers have predicted that because of the overwhelming preference among American women and men for boys as first children, for boys as only children, and for more boys than girls in families with an odd number of children, the use of sex-selective procedures will further reduce the number of women in our society.<sup>53</sup> Second, it has been predicted that this reduction will lead to greater discrimination against women and girls.<sup>54</sup> Women in societies with such unbalanced sex ratios suffer from substantial constraints on their behavior, such as

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50. WARREN, *supra* note 4, at 13. Two components of patriarchy are patriliney and patrilocality. Patriliney is the inheritance of family names and property through the male line. Patrilocality is the practice where husbands determine where the married couple lives, usually with the husband's family group. *Id.* at 30 n.32. Female infanticide is higher in preindustrial cultures practicing patrilocality. *See, e.g.,* Hughes, *supra* note 33, at 109. Patrilocal societies are much more numerous than societies practicing any other type of residential pattern. *Id.* at 110. Most patriarchal cultures are both patrilineal and patrilocal.

51. WARREN, *supra* note 4, at 13.

52. There are, of course, some predictions in favor of the use of sex-selective techniques. These predictions include that sex-selection would reduce the number of sex-linked diseases such as hemophilia and muscular dystrophy, *see* Jane Friedman, *Legal Implications of Amniocentesis*, 123 U. PA. L. REV. 92 (1974); *see also* WARREN, *supra* note 4, at 160-63, reduce population growth, as women will have fewer children because they can be certain of getting precisely the child with the sex that they or their families want, *see, e.g.,* Nathan Keyfitz, *Forward*, in *SEX SELECTION OF CHILDREN*, *supra* note 4, at xi, xiii, and be psychologically beneficial to all children, in that all children would know that they were wanted children and would reap the benefits of self-confidence from that knowledge, *see* WARREN, *supra* note 4, at 173-75; Edward Pohlman, *Some Effects of Being Able to Control Sex of Offspring*, 14(4) *EUGENICS QUARTERLY* 278 (Dec. 1967) (discussing the psychological effects on both parents and children when child is the "wrong" sex). On the issue of population control, *see infra* notes 58-60; on the issue of sex-linked disease *see* materials regarding abortion and disability, *see infra* note 112.

53. CHRISTINE OVERALL, *ETHICS AND HUMAN REPRODUCTION: A FEMINIST ANALYSIS* 34 (1987).

54. It has been predicted that an increase in first-born boys will lead to further discrimination against women in numerous areas, but particularly in education and employment. It is predicted that as a result of the "over-achiever" status of first-born children, where there are more men than women and where the men have the advantage of first-born status, women will be able to acquire even less education and training than we currently receive, and as a result will be less able to compete for comparable employment. Schedler, *supra* note 10, at 299-301.

significant penalties for non-virginity before state recognized marriage, proscriptions against adultery, extensive control by men over their wives and daughters, and the marriage of girls and women at younger ages.<sup>55</sup> Women in these societies are also endangered by female infanticide and neglect,<sup>56</sup> and by strong sex role ideologies, which socially and legally require women to behave according to models of submission and subordination.<sup>57</sup>

The acceptance of sex-selection by a society will also result in the targeting of women and our fertility as a method of gender demographic politics. For example, Clare Boothe Luce argued that the invention and use of a "male-child birth pill" would control overpopulation in two ways: (1) women would have fewer children because they could predictively get the socially required number of male children, and (2) if women had more male children than female children, then there would be fewer wombs and hence fewer babies. Luce argues that sex-selection is not merely one possible solution to the problem of population growth, but rather the only practical solution to the dilemma of population control.<sup>58</sup> For example, Luce writes:

The determining factor in the growth of all animal populations . . . is the [birth] of female offspring. Only women have babies. And only girl babies grow up to be women . . . . In the overpopulated countries, the preference for males amounts to an obsession . . . . A pill . . . which . . . would assure the birth of a son would come as man-ah from Heaven.<sup>59</sup>

What arguments such as Luce's neglect is that the choice of male children over female children is a result of gender bias and that gender bias and gender discrimination are sometimes intractable obstacles for women.<sup>60</sup>

Finally, the acceptance and use of sex-selective techniques will cause what sociologist Norma Juliet Wikler has called distributive concerns.<sup>61</sup> Distributive concerns relate to the uneven, racist, heterosex-

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55. See Hoskins & Holmes, *supra* note 2, at 247 (discussing feminist values and the case against sex preselection; arguing that sex-selection would yield more males and consequently exacerbate international male misbehavior); MARCIA GUTTENTAG & PAUL SECORD, *TOO MANY WOMEN? THE SEX RATIO QUESTION* 79 (1983) (discussing traditional role of women within Jewish community, a population with high sex ratio).

56. Hoskins & Holmes, *supra* note 2, at 247.

57. GUTTENTAG AND SECORD, *supra* note 55, at 79.

58. Clare Boothe Luce, *Only Women Have Babies*, NATIONAL REVIEW, July 7, 1978, at 826-27; see also PAUL EHRLICH, *THE POPULATION BOMB* (1971).

59. Luce, *supra* note 53, at 826.

60. This was an important issue at the United Nations Conference on Population Control in Cairo in 1994. See, e.g., Reena Shah Stamets, *Women's Bodies; Women's Rights*, ST. PETERSBURG TIMES, Sept. 25, 1994, at 1D (discussing how women and their reproductive abilities throughout the world are pawns of government policy).

61. Norma Juliet Wikler, *Society's Response to the New Reproductive Technologies: The Feminist Perspectives*, 59 S. CAL. L. REV. 1043, 1047-48 (1986); see generally Rowland, *supra* note 25, at 74-87.

ist and classist barriers to access the technology required to select the sex of children. In the United States, amniocentesis, chorionic villi sampling, and abortion are costly, and, as a result, will be available only to women of the middle and upper classes. Poor women, then, because of their financial inability to access these procedures, will continue to have female children. The result will be that women in our society will be poorer and darker. And as political scientist Laura Woliver suggests, "[c]lass inequalities in the future might even more closely follow gender [and race] as the rich have privileged first-born sons, and the poor have both sexes."<sup>62</sup> In sum, the social effects of sex-selective abortion on women will be deleterious: patriarchal societies will use the technology in ways which will further the values of patriarchy — male preference and control over women and resources.<sup>63</sup>

## II. THE MORALITY OF SEX SELECTION: SOME PHILOSOPHICAL PARADIGMS

*[T]he impinging reality of sex preselection [has] moved our discussion of manipulative medical technologies into the realm of previctimization, i.e., the spectre of women being destroyed and sacrificed before being born.*

— Janice Raymond (1981)

Arguments concerning the morality of abortion for the purpose of sex-selection, or abortion more generally, typically take one of three analytic forms: deontological, consequentialist, or pragmatic.<sup>64</sup>

62. Woliver, *supra* note 17, at 25; see also Roberta Steinbacher, *Futuristic Implications of Sex Preselection*, in *THE CUSTOM MADE CHILD? WOMEN CENTERED PERSPECTIVES*, *supra* note 2, at 187, 188.

63. For example, artificial insemination results in a preponderance of male offspring. Approximately 160 boys are born via artificial insemination for every 100 girls. This disparity is caused by the timing of the procedure. Most physicians insist on performing the procedure as closely as possible to the time of ovulation. Because Y chromosome sperm have greater mobility, there is a greater chance that they will reach the ova before X chromosome sperm. Hence children born via artificial insemination are most often male. See SHETTLES & ROVIK, *supra* note 2, at 68.

64. Rational-choice theory offers another method for assessing the cultural acceptance or disapproval of abortion for the purpose of sex-selection. Rational-choice theory is a normative explanatory theory which "tells us what we ought to do in order to achieve our aims as well as possible. It does not tell us what our aims ought to be. . . . Unlike moral theory, rational-choice theory offers conditional imperatives, pertaining to means rather than to ends." Jon Elster, *Introduction*, in *RATIONAL CHOICE* 1, 1 (Jon Elster ed., 1986) (footnotes omitted). That is, rational choice is properly defined as "a choice among alternative ends, on the basis of a given set of preferences and a given set of opportunities (i.e., a given set of available alternatives)." John Harsanyi, *Advances in Understanding Rational Behavior*, in *RATIONAL CHOICE*, *supra*, at 85-86. Under this construction, the appropriateness of behavior or choices can only be determined if the choice is made without unjustified or unreasonable constraints.



### A. A Deontological Perspective

Deontological ethics holds that certain acts are morally right or wrong regardless of their consequences for human happiness or sadness.<sup>65</sup> A deontological philosophical understanding of abortion maintains that abortion may be right or wrong because the act of killing is right or wrong in and of itself. Morally good acts commonly entail fulfilling one's responsibilities toward others and respecting the rights of others. Under this rights-based theory, moral rights are first determined and then defended without the knowledge of whether these rights will increase the public welfare.<sup>66</sup> "Once the scope of these protected interests is defined, any interference with these interests is said to be a violation of the rights of the person or group."<sup>67</sup> Most deontological thinkers would agree that abortion under any circumstance is morally unacceptable because they believe a fetus is a human life,<sup>68</sup> and it is always wrong to take an innocent life or poten-

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Many contemporary thinkers in law, philosophy, and social theory have argued that prescriptive moral discourse should be characterized by a view toward expanding the scope of morally relevant options and effects. See, e.g., ROBERTO M. UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK* (1987) (criticizing Marxian determinism and "positivist" social science for failing to explain how social routines are preserved and subverted); LAWRENCE E. HAZELRIGG, *CLAIMS OF KNOWLEDGE: ON THE LABOR OF MAKING FOUND WORLDS* (arguing in accord with Unger that necessitarian explanations in the social sciences enjoy unmerited normative force); Noam Chomsky, *Equality*, in *THE CHOMSKY READER* 182-202 (James Peck ed., 1987) (arguing that the conditions we create, not those that occur "naturally," inform the ethical responsibilities of social reformers). These authors share the characteristic of emphasizing the ethical importance of recognizing that the context in which social reforms and normative discourse take place is man-made and contingent, and therefore subject to being understood and radically revised by ordinary people.

65. See 2 *ENCYCLOPEDIA OF PHILOSOPHY* 343 (1967); Schedler, *supra* note 10, at 305 n.40. Deontological theories are associated with the natural rights tradition. Natural rights theory is one of individual entitlement. It disavows any suggestion that the consequences of any legal rule could justify the adoption or rejection of that rule. See Richard Epstein, *The Utilitarian Foundations of Natural Law*, 12 *HARV. J.L. & PUB. POL'Y* 713, 713 (1989).

66. See WARREN, *supra* note 4, at 27; see also JOHN RAWLS, *A THEORY OF JUSTICE* 28 (1971) ("in a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interests").

67. Randy E. Barnett, *Forward: Of Chickens and Eggs — The Compatibility of Moral Rights and Consequential Analysis*, 12 *HARV. J.L. & PUB. POL'Y* 611, 613 (1989).

68. As Jeff McMahan notes, when opponents of abortion defend their position by claiming that the fetus is a human they mean "that the fetus shares those attributes, whatever they may be, the possession of which by normal adult human beings grounds the special presumption against killing them, making killing them considerably more difficult to justify than, for example, the killing of animals." Jeff McMahan, *The Right to Choose and Abortion*, 22 *PHIL. & PUB. AFF.* 331, 331 (1993); cf. VATICAN, CONGREGATION ON THE DOCTRINE OF THE FAITH, *Instruction on Respect for Human Life in its Origins and Dignity of Procreation: Replies to Certain Questions of the Day*, in 16 *ORIGINS* (Mar. 19, 1987) [hereinafter VATICAN], reprinted in part in *THE ETHICS OF REPRODUCTIVE TECHNOLOGY* 83-97 (Kenneth D. Alpern ed., 1992) (human life begins at conception).

tial life.<sup>69</sup>

In contrast, some deontological philosophers argue that sex-selective abortion is morally wrong because sexism<sup>70</sup> is morally wrong. For these deontologists, a woman may take a fetal life for almost any reason she chooses so long as she does not choose a sexist reason.<sup>71</sup> Underlying this reasoning is the belief that it is wrong to take a human life without just cause. Under either of these rationales, the conclusion that sex-selective abortion is morally unacceptable is reached by considering the fetus as a human life. Thus abortion is wrong because it is the unjustified killing of an innocent human being.

A deontological argument in opposition to prohibitions on sex-selective abortion would insist that the moral value to be protected is to be found in the individual's right to moral autonomy. Under such a construction, sex-selective abortion *may be* morally justified in that the decision to bear a child under any conditions or circumstances or for whatever reason is an essential part of moral autonomy. Interfering with that autonomy would be morally wrong as a violation of deontological principles.<sup>72</sup>

In many ways, the deontological analysis offers an "easy way out." There is no way to defend the deontological position outside of its own dogma. For example, the deontological position in favor of prohibiting sex-selective abortion does not explain why the fetus is morally relevant, nor does it help us to identify why the fetus has more

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69. See, e.g., J. Finnis, *The Rights and Wrongs of Abortion: A Reply to Judith Jarvis Thomson*, in *THE PHILOSOPHY OF LAW* 129-52, (R. M. Dworkin ed., 1977) (previously published 2 *PHIL. & PUB. AFF.* 117-45 (1977) (fetus as innocent) (a reply to Judith Jarvis Thomson, *A Defense of Abortion*, 1 *PHIL. & PUB. AFF.* 47-66 (1971)). See also R. M. Hare, *A Kantian Approach to Abortion*, in *RIGHT CONDUCT* 147 (Michael D. Bayles & Kenneth Henley eds., 1989); cf. Paul Ramsey, *Genetic Therapy*, in *THE NEW GENETICS AND THE FUTURE OF MAN* 157, 175 (M. Hamilton ed., 1972).

70. As feminist philosopher Marilyn Frye notes:

The term "sexist" characterizes cultural and economic structures which create and enforce the elaborate and rigid patterns of sex-marking and sex-announcing which divide the species, along lines of sex, into dominators and subordinates. Individual acts and practices are sexist which reinforce and support those structures, either as culture or as shapes taken on by the enculturated animals. Resistance to sexism is that which undermines those structures by social and political action and by projects or reconstruction and revision of ourselves.

Marilyn Frye, *Sexism*, in *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 17, 38 (1983).

71. See, e.g., Tabitha Powledge, *Unnatural Selection: On Choosing Children's Sex*, in *ETHICAL ISSUES IN MODERN MEDICINE* 428, 430 (1983); Powledge, *supra* note 13, at 207; see also Schedler, *supra* note 10, at 305 n.42.

72. See, e.g., Elizabeth A. Schneider, *Workability of the Undue Burden Test*, 66 *TEMPLE L. REV.* 1003, 1036 (1993) (pro-choice view satisfies Kantian ethical approach); cf. Judith Jarvis Thomson, *A Defense of Abortion*, 1 *PHIL. & PUB. AFF.* 47 (1971).

moral relevancy than unfertilized ova or sperm.<sup>73</sup> It presumes obviously questionable moral or ethical values to be universal and provides women with a moral defense, albeit questionable, of their choice to abort for sex-selective purposes.<sup>74</sup> In addition, the deontological position that sex-selective abortion is wrong because it is the unjustified taking of a human life is troubling because it negates the pregnant woman's moral agency and her biological role in reproduction. The fetus is alive because the pregnant woman has made it viable. To ignore her contribution to the fetus' existence by giving the fetus equal moral standing with the pregnant woman denies the pregnant woman, and women generally, full moral status.<sup>75</sup> To view the moral status of the fetus as equal also devalues the social contributions provided by women who give birth and raise children.<sup>76</sup>

### B. *Consequentialism*

Consequentialism is also known as utilitarianism. There are two major categories of utilitarian thought: rule utilitarianism and act utilitarianism. Rule utilitarians believe that an act is morally wrong if the act violates a prescribed moral rule. Rule utilitarians regard a clear normative system as essential to an ordered society. In other words, rule utilitarians believe that the best approach is to follow moral rules and evaluate the consequences of following those rules in the category of circumstances in dispute. "The theory is utilitarian in that it estimates the value of actions by reference to their consequences, but the actions are not divorced from the obligation to follow moral rules."<sup>77</sup> Act utilitarians, on the other hand, make moral judgments based on the consequences to others of specific acts or patterns of action. That is to say, act utilitarianism is "an ethical method based on an assessment of consequences for *individual* situations."<sup>78</sup> As such, act utilitarianism eschews adequate confrontation of large socio-ethical issues like sex selection.<sup>79</sup>

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73. WARREN, *supra* note 4, at 94; see also Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 127 (1989).

74. The moral status of the human fetus has been the subject of some controversy, particularly since 1973. For differing views, see e.g., Michael J. Flowers, *Neuro-maturation of the Human Fetus*, 10 J. MED. & PHIL. 237, 246-48 (1985); VATICAN, *supra* note 68.

75. See GENA COREA, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS* 61 (1985) (noting that women must bear the discomfort and socially adverse consequences of sex selection); Mary Anne Warren, *The Moral Significance of Birth*, in *FEMINIST PERSPECTIVES IN MEDICAL ETHICS* 198, 209 (Helen Bequaert Holmes & Laura Purdy eds., 1992); see also ADRIENNE RICH, *OF WOMAN BORN* 266-67 (1976) (internal citations omitted).

76. Cf. Sylvia A. Law, *Abortion Compromise — Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 936 (1992) [hereinafter *Abortion Compromise*].

77. John C. Fletcher, *Ethics and Public Policy: Should Sex Choice be Discouraged*, in *SEX SELECTION OF CHILDREN*, *supra* note 4, at 213, 222-23.

78. *Id.* at 223 (emphasis added).

79. *Id.*

When referring to consequentialist philosophy in the context of sex-selective abortion, I am referring to the moral theories of rule utilitarianism which "hold that we should consider first the consequences that follow from applying the moral practices of the community to the decisions at hand."<sup>80</sup> And if "it can be shown that consistently following this moral policy leads to reprehensible amounts of pain . . . or long-term social upheaval, we are obligated to reassess the ordering of moral rules."<sup>81</sup> Contemporary consequentialist philosophy is concerned not only with principles of right and wrong, but also with historical circumstances and institutional arrangements. It "takes seriously the wide-reaching and highly dispersed effects that the actions of individuals and associations may often have on others."<sup>82</sup> Hence consequentialist analysis is often understood as protecting the public sphere from the harmful acts of individuals. Under this ethical tradition, abortion generally is morally defensible if the net beneficial consequences to society of permitting abortion are greater than the net benefits of prohibiting abortion. It is generally understood, although by no means uncontested, that the social benefits to women (and hence to society) of permitting abortion are greater than the benefits of prohibiting it.

One consequentialist position is that sex-selective abortion in a society with institutional biases directed against women would result in harms to women over time. As previously noted, the sociological data indicates that a smaller population of women, particularly if their smaller numbers were due to sex-selection, would be disastrous for women.<sup>83</sup> As George Schedler recognizes, the social costs of sex-selective abortion may not be borne solely by the woman seeking the abortion. Rather, the costs are borne by future generations of women in the form of increased discrimination against them: "It is beyond question, however, that women would pay the cost for the preponderance of males in terms of their disappointment, trauma, and lowered expectations."<sup>84</sup> This analysis is in line with the tradition of liberal utilitarian thinking: "the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others."<sup>85</sup>

Although this consequentialist analysis seems to present a coherent argument against the use of abortion or pre-conceptive techniques for the purpose of sex-selection, such a position fails to address

80. *Id.* at 224.

81. *Id.*; see also John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

82. Barnett, *supra* note 67, at 618; see also Epstein, *supra* note 65, at 715.

83. See *supra* pp. 173-75 regarding the effects of further gender imbalance.

84. Schedler, *supra* note 10, at 310.

85. JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rappaport ed., 1978); see JOEL FEINBERG, HARM TO OTHERS (1984) (discussing what types of power the state may rightly exercise over individuals in the form of criminal sanctions to prevent harms to others); Schedler, *supra* note 10, at 308-11, 310 n.53.

the problem of indeterminacy:<sup>86</sup> the outcome of sex-selective abortion may be difficult to predict given the variables involved. This consequentialist position also fails to consider the problem of uncertainty: the fact that we cannot know with complete accuracy whether these negative social consequences will ever occur.<sup>87</sup> Our societal interest in liberty does not allow us to restrict the liberty of citizens without good cause — it is unclear whether predictions regarding deleterious consequences would constitute harm sufficient to warrant limitations on liberty. Finally, this consequential analysis fails to recognize that the individual decision to use abortion for the purpose of sex-selection can be viewed as a morally correct decision under other types of consequentialist thinking. Oppressive circumstances in a woman's life or environment may make the choice of sex-selective abortion morally defensible, even under a consequentialist analysis. The morally relevant circumstances for these women are the amount of discrimination, and hardship, and perhaps the violent death their daughters will face if they are born. Warren makes a similar point with respect to the rationality of individual sex-selection choices.<sup>88</sup>

A consequentialist analysis can also be used to discourage the prohibition of sex-selective abortion. This analysis is based on the belief that the consequence of prohibiting sex-selective abortion is the deepening and reinforcing of the misogyny that women already encounter in patriarchal society by denigrating women as moral decision-makers and reinforcing our role as sexual objects.<sup>89</sup> As women are increasingly viewed as irresponsible moral and sexual agents, greater restrictions on women's sexuality and reproductive capacities are deemed acceptable.<sup>90</sup> Hence, consequentialist analysis can also be used convincingly to argue that a prohibition on sex-selective abortion

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86. Indeterminacy is distinct from uncertainty. Indeterminacy refers to the quality of a problem which makes an outcome difficult or impossible to predict because the variables involved do not necessitate a specific answer. Uncertainty refers to the accuracy of a predictive model.

87. See WARREN, *supra* note 4, at 179; Powledge, *supra* note 13, at 195.

88. See WARREN, *supra* note 4, at 79-80; see also *infra* pp. 208-12 for a discussion of liberal feminism; Hannah Arendt, *What is Freedom?*, in BETWEEN PAST AND FUTURE 155 (1969) (rights have value in "the realm where freedom is a worldly reality, tangible in words which can be heard and deeds which can be seen"); see generally CATHARINE MACKINNON, *ONLY WORDS* (1993).

89. See Olsen, *supra* note 73, at 121; see also Law, *Abortion Compromise*, *supra* note 76, at 940 (mandating waiting periods sends a powerful message: women make rash decisions and women are not competent moral or practical decision-makers).

90. Carol Smart, *Disruptive Bodies and Unruly Sex: The Regulation of Reproduction and Sexuality in the Nineteenth Century*, in REGULATING WOMANHOOD: HISTORICAL ESSAYS ON MARRIAGE, MOTHERHOOD AND SEXUALITY 7 (1992); The Republican Party's proposed Personal Responsibility Act in the CONTRACT WITH AMERICA, *quoted in* 94 TAX NOTES TODAY 222 (Nov. 14, 1994) (asserting that "government should encourage people to work, not to have children out of wedlock").

would work against the goal of sex equality by reinforcing the socio-political subordination and oppression of women.<sup>91</sup>

### C. Pragmatism

Pragmatists belong to a philosophic school of thought which is founded on the belief that philosophy should examine the consequences of proposed theories when investigating issues of truth and the probable effects of solving human needs and problems.<sup>92</sup> Pragmatists believe that it is necessary to examine context when evaluating any proposed action, that "it is critical to pay attention to particular details of problems and to the effects of the solutions."<sup>93</sup>

Feminist philosopher Mary Anne Warren, in her work concerning the moral question of the sex-selection of children, adopts a pragmatic moral approach. Instead of determining the moral status of sex-selection through an analysis of the "formal moral theories," Warren "adopts the more pragmatic procedure of first exploring the context within which sex selection must be viewed."<sup>94</sup> She considers each of the moral objections to sex-selection in the light of this overall context. She views both moral rights and consequential analyses as components of a coherent moral theory.<sup>95</sup> As a result Warren derives her moral conclusions from both sociological predictions regarding the effects of sex-selection on women and the assertion of rights. In her view, rights should or should not be advanced based exclusively on their value to the goal of gender equality.<sup>96</sup> Central to Warren's analysis of sex-selection is her view that "gendercide" is morally wrong.<sup>97</sup>

91. Regarding liberal feminism and its use of consequentialism to argue against prohibitions, see discussion *infra* pp. 209-12.

92. Pragmatism is an anti-foundational moral philosophy, for which "the validation of knowledge-claims rests on practical judgments constituted by and constructed in, dynamic social practices." Knowledge, for the pragmatist, is acquired by "self-critical and self-correcting human processes." Cornel West, *The Limits of Neopragmatism*, in PRAGMATISM IN LAW AND SOCIETY 121, 121-22 (Michael Brint & William Weaver eds., 1991) [hereinafter *The Limits of Neopragmatism*]. Pragmatism is contextual and instrumental, emphasizing both context and culture of "which we can never be fully aware," and shaping and testing thought by its use toward the realization of human goals. Thomas Grey, *What is Good Legal Pragmatism?* in PRAGMATISM IN LAW AND SOCIETY, *supra*, at 9, 15; see also Margaret Jane Radin, *The Pragmatist and the Feminist*, in PRAGMATISM IN LAW AND SOCIETY, *supra*, at 127, 134.

93. Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1610 (1990).

94. WARREN, *supra* note 4, at 27-28.

95. *Id.* at 31 n.60. On the compatibility of deontological theory and consequentialism, see also Barnett, *supra* note 67, at 612, 614; Hare, *supra* note 69; and RAWLS, *supra* note 66.

96. WARREN, *supra* note 4, at 27; see generally Arendt, *supra* note 88, at 155 (rights have value in "the realm where freedom is a worldly reality, tangible in words which can be heard and deeds which can be seen"); MACKINNON, ONLY WORDS, *supra* note 88.

97. According to Warren, a law or policy is genocidal if "(1) it results in an absolute or relative reduction in the number of persons of a particular [sex]; and (2) the

For Warren, gendercide, like genocide, is a crime against humanity, because it deprives everyone of the contribution that would be made by the particular class of persons who are its victims, and because of the implicit devaluation of all members of the victimized gender.<sup>98</sup>

Warren points to the indeterminacy of consequentialist thinking as a reason for rejecting that view, and argues for "freedom of choice." Warren asserts that even though she believes that sex-selection is morally wrong, we should not seek to discourage sex-selective abortion by either legal prohibition or moral persuasion. Instead, she claims that the right to make reproductive decisions is a deeply personal right to be defended with care. Accordingly, the moral presumption regarding sex-selective abortion should be in support of the freedom to choose, which cannot be nullified by the mere possibility of harmful effects to women's equality.<sup>99</sup> She defines the freedom of choice as a "positive value" which ought to be maintained "in the absence of powerful countervailing arguments."<sup>100</sup> In order to override this presumption, the proponents must demonstrate that the prohibition on sex-selection would produce greater benefits than tolerance. According to Warren, "[e]ven an action which is inherently immoral should not be legally prohibited unless there are good reasons to believe that prohibition will be beneficial."<sup>101</sup> Because freedom of choice is a positive value, as well as a method for the realization of other positive values, it requires more than a substantial risk of net social harm to show that it ought to be prohibited.<sup>102</sup> She describes this philosophical position as having both a meta-ethical component and a pragmatic component. She attributes her emphasis on freedom of choice to the metaethical value in giving presumptive "respect for persons as autonomous agents." Accordingly, mentally competent adults are morally entitled to as much freedom as is consistent with the equal freedom and basic moral rights of others.<sup>103</sup> Warren defends her position by attesting to the danger that a legal prohibition on sex-selective abor-

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means whereby this result is brought about are morally objectionable for independent reasons — e.g., because they violate certain individuals' right to life, liberty, or security against wrongful assault." WARREN, *supra* note 4, at 22-24. Example of gendercidal, or more specifically gynocidal, institutions and practices include female infanticide, witch burning, genital mutilation, widow-sacrifice, and the denial of reproductive freedom. See generally *id.* at 32-55.

98. WARREN, *supra* note 4, at 24. Warren uses the gender-neutral term "gendercide" to describe the decline of the number of women due to sex-selection instead of the gender-specific terms "gynocide" or "femicide," because she believes that sex-selection can be used against men or biased in favor of female fetuses. Warren asserts that sex-selection can be used by women as a feminist tool. For example, Warren suggests that women can use sex-selection technology to refuse to birth and raise sons as a means of combatting patriarchy. *Id.* at 175-76.

99. WARREN, *supra* note 4, at 25-26.

100. *Id.* at 180.

101. *Id.*

102. *Id.* at 182 (emphasis in the original).

103. *Id.* at 180.

tion would have on all other aspects of women's reproductive freedom in the contemporary and historical context of patriarchal opposition to women's reproductive freedom.<sup>104</sup>

#### D. *Pragmatism Modified*<sup>105</sup>

Many radical thinkers have sought to redefine pragmatism and pragmatic method with the goal of using a modified pragmatism as a tool in a political theory of liberation for oppressed peoples. These scholars focus on a social context which has a socio-economic structure of political and economic struggles, as well as racial, gendered, religious and sexual identities.<sup>106</sup> For neo-pragmatist philosopher Cornel West, pragmatism's focus on context reflects a political theory. It enables forms of cultural criticism that challenge hierarchical political and social arrangements that have harmed people of color, women of all races, and poor peoples.<sup>107</sup> Thus "context" in a modified pragmatic framework refers less to the experiences of uniquely situated individuals, but instead refers to the structures of historical and contemporary discrimination based on race, gender, sexual orientation or preference and class. As a result, modified pragmatic method facilitates challenges to political and philosophic theories which, like traditional pragmatism, speak in the language of liberalism and individual rights.<sup>108</sup>

Mary Anne Warren argues, for example, that the moral presumption in favor of the freedom of choice should not be overridden by the mere possibility of harmful effects, such as the sociological predictions of increases in violence and discrimination against women if sex-ratios suffer further imbalances in favor of men and boys. What Warren's construction of the context (the sociological data) fails to consider is the additional relevance of the sex-identified fetus as a representative of its gender. Warren's contextual emphasis is upon the rights of individuals, or the unique experiences of individuals. Warren's contextual focus is not historical or contemporary discrimination on the basis of race and gender. Although Warren believes that the morally relevant context is that male-biased sex-selection would have the consequence of harming future generations of women, Warren does not believe that these consequences to women as a social group surpass the importance of individual liberty. In other words, although she acknowledges the moral relevance of male bias in sex-selection, it is not enough, even as a reality, to overcome her lib-

104. *Id.* at 184.

105. This phrase is taken from Mari Matsuda's article, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990), concerning the use of a modified pragmatic philosophy in critical race theory.

106. CORNEL WEST, *THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM* 208-10, 215 (1989) [hereinafter *THE AMERICAN EVASION OF PHILOSOPHY*].

107. *Id.*

108. Minow & Spelman, *supra* note 93, at 1627.



eral presumptions concerning the importance of "liberty". The failure of Warren's framework, as well as most other traditional philosophic paradigms, is that it considers the issue of the morality of sex-selective abortion in isolation from other relevant questions regarding social, political, and economic practices that oppress women. Feminist philosopher Susan Sherwin notes that traditional philosophies "are generally grounded in masculinist conceptions of freedom (e.g., privacy, individual choice, individuals' property rights in their own bodies) that do not meet the needs [and] interests . . . of many . . . women."<sup>109</sup>

As do most feminists, I view the fetus in abortion as having no independent moral status, but it may, under some circumstances, be morally relevant to the discussion of abortion. Because the fetus grows and lives inside a woman's body, it is the experiences and the lives of women that set the parameters of the moral inquiry. While the fetus does not have an independent existence, its life tied to the woman inside whose body it grows, the fetus' existence has a profound impact on the lived experience of the woman. Hence, my view of the moral status of the fetus and the morality of abortion is grounded in the reality of women's lives which make abortion necessary.<sup>110</sup> This is the context in which the abortion of an ungendered fetus must be considered. Sex-selective abortion requires the consideration of other relevant aspects of the social world, including the effect of sex-selective abortion on women as a social group.

Therefore, in contrast to Warren, I am arguing that the morally relevant consequences of sex-selection are not the harm to the particular fetus, but rather the injuries to future generations of women *and* the moral relevance of the decision to abort a particular fetus based on its *gender*. My contextual focus is shaped by the historical and contemporary discrimination and other harms done to women as a social group. As a result, it is morally relevant to me that the fetus is terminated *because* she is a girl and not because she is a fetus — gender neutral.

When a woman decides to abort a fetus because of its sex, she forecloses the "easy way out" for moral philosophy wherein the fetus is or is not a morally relevant being. Sex-selective abortion, because it is selective, makes the characteristics of the fetus to be aborted morally relevant. By describing the fetus as morally relevant, I am not subscribing to a view of fetal personhood, nor am I equating the moral status of the fetus with the moral status of the pregnant woman. I can

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109. Susan Sherwin, *Abortion Through a Feminist Ethics Lens*, in *LIVING WITH CONTRADICTIONS: CONTROVERSIES IN FEMINIST SOCIAL ETHICS* 314, 314 (Alison M. Jaggar ed., 1994).

110. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 184-94 (1989). Rosalind Petchesky also notes that this foundational aspect of feminist think about abortion is often inchoate and unarticulated. See PETCHESKY, *supra* note 16, at 327.

think of no situation or circumstance in which I would make such an equation. Instead I believe that choosing or not choosing a particular fetus on account of its sex makes the sex-identified fetus relevant. It is the use of invidious criteria for selection that imparts morally relevant attributes to the fetus; it is the desire to "de-select" for those characteristics that gives the fetus greater moral standing or presence. The sex-identified fetus is no longer the generic fetus in the abortion not motivated by fetal gender. By identifying its sex we have particularized it, and hence decisions regarding aborting it are based on its projected individual characteristics instead of, or in addition to, concerns about the woman, her bodily integrity, and her life circumstances. The decision to abort is then a decision based on the fetus' qualities, not the circumstances of the woman's life.

The sex-identified fetus subject to abortion becomes engendered because a decision to abort the fetus is made based on cultural notions of what it means in the society to be gendered male or female. Thus, a particular sex-identified fetus becomes representative of its gender.<sup>111</sup> Under these circumstances the aborting of a female fetus would be a declaration concerning the social value of women or girls: that we are, as a group, less valuable and unwanted. A pragmatist might also argue that sex-selective abortion is wrong because of the historical and contemporary devaluation of women and girls as a social group. Women's lower status is perpetuated by this type of choice and because of what it says about the value of women and girls in this society. We can thus consider sex-blind abortions justified by a woman's right to decide her future or because we believe that fetuses lack morally relevant characteristics, and at the same time consider sex-selective abortions morally unjustified because the abortion impliedly and immediately asserts that the lives of women and girls are less valuable or less desirable.<sup>112</sup> This position is supported by my un-

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111. "Sex" is a term describing the biological/physiological differences between male and female. On the other hand, "gender" "is the cultural definition of behavior defined as appropriate to the sexes in a given society at a given time. Gender is a set of cultural roles. It is a costume, a mask, a straightjacket in which men and women dance their unequal dance." LERNER, *supra* note 49, at 238. Jane Flax, another feminist scholar, shares Lerner's view. Flax writes: "Gender connotes and reflects the persistence of asymmetric power relations rather than 'natural' (biological/anatomical) 'differences' (e.g., mind/body, reason/emotion, public/private) is identified as differences and as salient to and constituent of gender." Jane Flax, *Beyond Equality: Gender, Justice and Difference*, in *BEYOND EQUALITY AND DIFFERENCE: CITIZENSHIP, FEMINIST POLITICS AND FEMALE SUBJECTIVITY* 193, 193 (Gisela Block & Susan James eds., 1992); see also CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 160 (1989).

112. Similar arguments can be made with respect to the abortion of mentally or physically disabled fetuses. Women who decide to abort disabled fetuses are making decisions regarding how they think these children will affect their lives and what they want their experience of motherhood to be. Women who make these decisions (along with the rest of society) are also making a statement about the appropriateness of our goals of physical and mental perfection for our children and ourselves which

derstanding of social context which includes an examination of patriarchal structures, historical and contemporary gender discrimination.<sup>113</sup>

Considering the overall historical and contemporary social context in which the decision to abort a fetus on the basis of fetal sex occurs, contemplating the liberal value of "tolerance" in the context of the goal of gender equality, and weighing the sociological and historical evidence that a moral policy of tolerance will lead to continued and exacerbated long-term social upheaval, we may be obligated to

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serves to demean, devalue and isolate members of our society who currently live with disabilities. Cultural acceptance of abortion under these circumstances also overlooks the reality that many disabilities can be managed through technology, early intervention programs for young disabled children, social programs, and social change. Deborah Kaplan, *Disability Rights Perspectives on Reproductive Technologies and Public Policy*, in *REPRODUCTIVE LAWS FOR THE 1990's* 241, 245 (Sherrill Cohen & Nadine Taub eds., 1989). Thus, in many respects, disabled fetuses can be understood as representative of disabled members of our society, and perhaps we should rethink whether it is morally permissible to encourage women to abort these fetuses. Cf. Adrienne Asch, *Reproductive Technology and Disability*, in *REPRODUCTIVE LAWS FOR THE 1990's*, *supra*, at 69, 86; Adrienne Asch & Michelle Fine, *Shared Dreams: A Left Perspective on Disability Rights and Reproductive Rights*, in *FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT* 233, 237-38 (Marlene Gerber Fried ed., 1990); Martha Field, *Killing "the Handicapped" — Before and After Birth*, 16 *HARV. WOMEN'S L.J.* 79, 115 (1993).

113. The question remains whether the sex-selective abortion of male fetuses gives me the same level of philosophical and political angst. The answer, of course, is — well, it depends. While the decision to abort a fetus identified as white and male may be an expression of an individual woman's devaluation of white men and boys, such an abortion takes place in a context that is supportive and affirming of men and boys — patriarchy. Patriarchy as a social, legal and economic structure in this country has supported white male power. As a result, white men do not suffer from conditions of historical or contemporary discrimination or physical and economic violence as women of all races do. Therefore, the abortion of a white male fetus does not represent the devaluation men as a social group. Instead, such an abortion can be viewed as a form of cultural criticism — challenging hierarchial political and social institutions. See WEST, *THE AMERICAN EVASION OF PHILOSOPHY*, *supra* note 106 at 208-10, 215.

The ethical and political implications of aborting a black male fetus because of its gender are much different from the implications of aborting of a white male fetus. Although the abortion of a black male fetus arises in the same social context of the abortion of a white male fetus — a context in which white men enjoy higher status and value — the consequences of aborting a black male fetus due to its gender are more complex. Notwithstanding the cultural support and acknowledgement that black boys and men receive because they are male, the context for the abortion of a fetus identified as black and male also includes the context of Black boys and men as victims of patriarchy, because racism (like misogyny) is one of the many tools of our patriarchal social, economic and political structure. For example, black men, like women of all races, suffer from systemic discrimination in education and employment, as well as physical and psychic violence. So while the abortion of fetuses identified as black and male could be understood as challenging patriarchal political and social institutions, it could also be understood as a response to the devaluation of black men and boys in our society and as facilitating this cultural norm.

reassess our commitment to the rhetoric of abortion on demand and to consider which values we sincerely want to advance.<sup>114</sup>

### III. THE PRIVACY DOCTRINE

*... appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree.*  
— Justice Blackmun, *Roe v. Wade*, 410 U.S. 113, 153 (1973).

#### A. The Old Guard: Constitutional Right to Abortion

The Supreme Court first articulated the right to privacy, as applied to contraception, pregnancy, and abortion, in *Griswold v. Connecticut*.<sup>115</sup> The Court held unconstitutional a Connecticut statute which prohibited the sale to and use of contraceptive devices by married couples.<sup>116</sup> The *Griswold* Court reasoned that a right to privacy was inherent in the marriage relationship and included the right to decide about the use of contraception. In *Eisenstadt v. Baird*, the Court later expanded this right to privacy in contraception to include single people as well.<sup>117</sup> These decisions served as the constitutional basis for the Court's decisions in *Roe v. Wade*<sup>118</sup> and its companion case, *Doe v. Bolton*.<sup>119</sup> In these cases, the Supreme Court prohibited the criminalization of most abortions. In *Roe*, the Court articulated a right to privacy "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>120</sup> While neither *Roe* nor *Doe* guarantees women access to abortion on demand,<sup>121</sup> both cases

114. Feminists have begun to develop analyses regarding feminine and feminist methods of ethical reasoning. Examples of this work include: CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (Gilligan refers to an "ethic of care" under which non-violence, relationships, responsibility for self and others, compassion, and self-sacrifice influence women's reasoning and decision-making); Sara Ruddick, *Maternal Thinking*, 6 FEMINIST STUD. 342 (1980) ("Maternal thinking" refers to the union of reflection, judgment, and emotion. Intellectual activities are distinguishable, but not separate, from feeling); see also Nancy Chodorow et al., in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah L. Rhode ed., 1990).

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

116. *Id.* at 485-86. For an analysis of the history of contraception and abortion, see LINDA GORDON, WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA (1976).

117. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). As Justice Brennan stated, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453 (emphasis in original).

118. 410 U.S. 113 (1973).

119. 410 U.S. 179 (1973).

120. *Roe*, 410 U.S. at 153.

121. *Id.* at 154, 155; *Doe*, 410 U.S. at 189; see also *Planned Parenthood of South-eastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2826 (1992) (even the broadest read-

clearly state that in the first and second trimesters women must be free to consider the circumstances of their lives that would make the birth of a child physically or emotionally undesirable. The Court in *Roe* reasoned:

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent . . . There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically or otherwise, to care for it . . . All these are factors the woman and her responsible physician necessarily will consider in consultation.<sup>122</sup>

Due to these factors, the majority in *Roe* seems to have recognized a woman's right to abort a non-viable fetus as a fundamental right.<sup>123</sup> The Court reasoned that the state's interest in preserving potential human life and protecting maternal health is not sufficiently compelling to justify the prohibition of abortion in the first and second trimesters of a pregnancy.<sup>124</sup> The Court found that only during the third trimester, at the point of fetal viability, is the state's interest compelling enough to justify regulation of the abortion right.<sup>125</sup>

*Roe*, however was not without its problems. The Court also structured the abortion right as the right of a physician to perform a medical procedure, thus upholding abortion both as a woman's right to choose whether to continue a pregnancy, and as the physician's right to make a medical decision for his<sup>126</sup> patient.

The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.<sup>127</sup>

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ing of *Roe* does not suggest that there is a constitutional right to abortion on demand).

122. *Roe*, 410 U.S. at 153.

123. *Id.* at 153, 155.

124. *Id.* at 163, 164.

125. *Id.* at 163-64. Although the Court held that at no point may the state prohibit abortion where the abortion is necessary to preserve the life or health of the pregnant woman, the Court in *Roe* held that the state's interest in the preservation of maternal health is sufficiently compelling after the first trimester of pregnancy. After the first trimester, the state "may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id.* at 163.

126. According to the American Medical Association, seventy-seven percent of all obstetrician/gynecologists are male. AMERICAN MEDICAL ASSOCIATION, DEPARTMENT OF PHYSICIAN DATA SERVICES, *Characteristics of Physicians*, Table 4 (Jan. 1, 1990).

127. *Roe*, 410 U.S. at 165-66. The Court's trimester analysis suggests it foresaw the role of physicians in decision-making as involving, according to physician's judgment, the best interest of the pregnant woman's health. Although the Court fashions the abortion right/decision as a joint decision of the pregnant woman and her physi-

As Ellen Wright Clayton and other scholars have noted, the Court's conclusion that the abortion decision be made by two people is a position that utterly contrasts the general rhetoric incorporated in informed consent cases, that the patient is the one who decides whether or not a medical procedure is to be performed. The power that the Court gives to the physician is not warranted. As Clayton states, "It is certainly clear that decisions whether or not to continue a pregnancy usually involve value judgements for which doctors have no particular claim to expertise. Furthermore, this formulation of two party decision-making grants physicians and the institution of medicine unusual power over the destiny of women."<sup>128</sup> Moreover, the abortion right in *Roe* was conceived of, and constructed, as a negative right, allowing the Court to articulate the right without ensuring a constitutional right to access abortion services. For example, the Court has continuously held that the state's or federal government's denial of funding of abortions for indigent women is permissible because these denials:

place no obstacles absolute or otherwise in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the services she desires. The state may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there.<sup>129</sup>

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cian, I am not sure how important this construction is to women's choice or access to abortion. Physicians are ethically disinclined from encouraging elective surgical procedures on patients (but see cases regarding forced sterilizations), and as a colleague pointed out, except where the woman is coerced or otherwise forced by friends, family members, or her lover, it is always up to the pregnant woman to schedule the appointment for the abortion, as well as show up at the appointed hour.

128. Ellen Wright Clayton, *Women & Advances in Medical Technologies: The Legal Issues*, in *WOMEN & NEW REPRODUCTIVE TECHNOLOGIES: MEDICAL, PSYCHOSOCIAL, LEGAL AND ETHICAL DILEMMAS* 89, 96 (Judith Radin & Aila Collins eds., 1991).

129. *Maier v. Roe*, 432 U.S. 464, 474 (1977); see also *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Harris v. McRae*, 448 U.S. 297, 315 (1980). In *Webster*, the challenged Missouri law prohibited *inter alia* the use of public employees and public hospitals to perform even privately paid abortion services that were not necessary to save the life of the pregnant woman. The Court held that like the statutes and federal regulations at issue in *Maier* and *McRae*, the Missouri statute was simply another way in which the state may permissibly encourage childbirth over abortion. *Webster*, 492 U.S. at 519-20. The Missouri law also includes: 1) a legislative finding that life begins at conception; 2) mandatory viability tests to be performed after 20 weeks gestation to determine whether or not the fetus is viable; and 3) the prohibition of the use of public employees or facilities to counsel women about the option of abortion. See also *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (extended state's right to articulate preference for childbirth by prohibiting clinics receiving federal Title X monies from counseling clients regarding abortion). It has been estimated that approximately twenty percent of women in this country who want abortions cannot get them due to poverty or inaccessibility of clinics which are located almost exclusively in urban areas. According to the Alan Guttmacher Institute, by 1989, 83 percent of counties in the United States had no doctors, clinics, or hospitals that

Thus, the Court concluded that there was a fundamental distinction between directly hindering or interfering with a woman's right to access abortion services, and creating an affirmative obligation of the government to guarantee that all women could realize that right. By constructing the abortion right as an individual privacy right and as an individual private choice in *Roe v. Wade*, the Court in these later cases was able to ignore the issues of class and race. Because of poverty, those women with the fewest options and little to no discretionary resources will not be able to exercise their "fundamental right" to abortion.<sup>130</sup>

B. *The New Guard: Planned Parenthood of Southeastern Pennsylvania v. Casey*

While the Court in *Roe* maintained that legislative interference with unfettered decisionmaking regarding abortion was presumptively invalid, the Court in *Casey* abandoned this presumption. The *Casey* Court held that only if a regulation places a substantial burden on a woman's right to have an abortion will it fail to meet a constitutional challenge. If the regulation is deemed *not* to place a substantial or undue burden on the woman seeking to access abortion services, the reviewing court must assess the constitutional validity of the regulation with a rational relationship review: determining whether the state's regulation is rationally related to the state's legitimate interest in preserving potential life.<sup>131</sup> In *Casey*, abortion clinics and physicians challenged, on due process grounds, the constitutionality of a Pennsylvania abortion statute which included the following: a mandatory 24-hour waiting period; an informed consent provision, requiring a physician to deliver a government-directed litany of information including the availability of additional information providing in great detail the fetus' development, the possibility of state-funded prenatal care, and the liability of the man who impregnated the woman

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would perform abortions. BERNICE LOTT, *WOMEN'S LIVES: THEMES AND VARIATIONS IN GENDER LEARNING* 200 (2d ed. 1994).

130. As Rosalind Petchesky notes:

the denial of a collective or social basis of women's need and right of access to abortion, its portrayal as a 'private choice' rather than a condition of a decent life, serves to perpetuate class divisions *among* women. In a class-divided society, leaving individuals to their own private resources to secure a right means inevitably to exclude those who lack the resources.

PETCHESKY, *supra* note 16, at 295; see generally LOTT, *supra* note 129, at 289-302.

131. *Casey*, 112 S. Ct. at 2820, 2821. Justice O'Connor first suggested this standard in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 453 (1983) [hereinafter *Akron I*] (O'Connor, J. dissenting); see also O'Connor's opinions in *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) [hereinafter *Akron III*]; Webster, 492 U.S. 490. In *Akron I* Justice O'Connor stated that a statute imposes an undue burden only if it imposes absolute obstacles or severe limitations. *Akron I*, 462 U.S. at 464 (O'Connor, J., dissenting). She has since moderated her position.

for child support; parental consent for minors; a reporting requirement which required information about each abortion to be reported to the state; and a spousal notification provision.<sup>132</sup>

While calling abortion a fundamental right,<sup>133</sup> the Court in *Casey* destroyed the protections it had previously required.<sup>134</sup> The Court rejected the trimester system of *Roe*, despite the fact that the Court in *Roe v. Wade* did not simply declare that abortion is a fundamental right, but also set up "a structure designed to protect that right from regulatory burdens that do not have a compelling justification."<sup>135</sup> Instead, the majority held that the trimester framework articulated in *Roe* was "a rigid prohibition on all pre-viability regulation aimed at the protection of fetal life."<sup>136</sup> The Court found that the trimester framework "misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life."<sup>137</sup> The State, according to the court in *Casey*, has a substantial interest in the potential life of the fetus throughout the pregnancy.<sup>138</sup> By rejecting the trimester structure, "*Casey* departed significantly enough from *Roe* to lessen its vaunted 'legitimacy.' *Casey* can be seen as just the kind of unprincipled politically opportune decision making made 'unnecessarily and under pressure' that the majority claimed it wanted to avoid."<sup>139</sup>

In rejecting the structure of protections set up by the Court in *Roe*, the *Casey* Court not only rejected the protections afforded by the trimester analysis of *Roe*, but also rejected the application of strict scrutiny traditionally applied in cases concerning fundamental rights. Strict scrutiny requires that the regulation in question be strictly necessary to promote a compelling governmental interest. The *Casey* Court rejected this standard in favor of an intermediate form of review. The Court's intermediate review is structured as an undue burden test which questions whether a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seek-

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132. See 18 PA. CONS. STAT. ANN. § 3205 (1990) — Appendix to Opinion in *Casey*, 112 S. Ct. at 2833-38.

133. *Casey*, 112 S. Ct. at 2804. Fundamental rights are rights that the Court deems to be "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" so that "neither liberty nor justice would exist if they were sacrificed." Anita L. Allen, *Autonomy's Magic Wand: Abortion and Constitutional Interpretation*, 72 B.U. L. REV. 683, 687 (1992); see also *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937).

134. *Casey*, 112 S.Ct. at 2818.

135. Rhonda Copelon, *From Rhetoric to Reality: The Challenge of Casey*, in REFLECTIONS AFTER CASEY: WOMEN LOOK AT THE STATUS OF REPRODUCTIVE RIGHTS IN AMERICA 9, 10 (Center for Constitutional Rights 1993).

136. *Casey*, 112 S. Ct. at 2818.

137. *Id.*

138. *Id.* at 2805.

139. Allen, *supra* note 133, at 685 (footnotes omitted).



ing the abortion of a non-viable fetus.<sup>140</sup> The court stated, "A statute with this purpose is invalid because the means chosen by the state to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."<sup>141</sup> An undue burden, as conceptualized by Justice O'Connor "is one that has a 'severe' or 'drastic' impact on the availability of legal abortion or absolutely vetoes a woman's choice."<sup>142</sup>

By significantly overruling the basic structures and prophesies of *Roe*, the *Casey* Court answered the previously unanswered question of "when is a fundamental right not a fundamental right?"<sup>143</sup> The answer is, when the fundamental right is abortion. Hence, regulations designed to foster the health of the pregnant woman or to persuade her to choose childbirth instead of abortion are valid unless they erect a substantial obstacle to the exercise of the woman's right to choose abortion.<sup>144</sup> Under this new constitutional framework, regulations that do not unduly burden a woman's right to access abortion services but rather are designed to persuade her to choose childbirth over abortion are analyzed under the reasonable relationship standard.<sup>145</sup>

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140. Martha Field has argued that the "establishment of this new constitutional framework with which to evaluate the constitutionality of abortion regulation" is probably the most significant holding of *Casey*. See Martha Field, *Abortion Law Today*, 14 J. LEGAL MED. 3, 12-13 (1993).

The "unduly burdensome" standard of the Court seems to be more conclusory than a clearly articulated analytical framework. In their 1991 article, *Mediating the Polar Extremes: A Guide to Post-Webster Policy*, 1991 B.Y.U. L. REV. 403, 440, Richard Wilkins, Richard Sherlock, and Steven Clark speculated that three factors would influence the Court's decision of whether an abortion regulation is unduly burdensome. Wilkins et al. posit that in order for a regulation to avoid being found unduly burdensome: (1) it must be firmly grounded in an articulated state interest; (2) it must not completely bar access to abortion services; and (3) it must actually further the articulated state interest. Many scholars have argued that the unduly burdensome standard is inherently unworkable. Elizabeth A. Schneider, for example, asserts that the new standard is unworkable because it "invite[s] courts to ground their decisions in judges' subjective analysis. This becomes especially problematic when judges have limited knowledge about the availability of abortion" and because the test fails to assess each woman's individual needs in the unique situation of an abortion. Elizabeth A. Schneider, *supra* note 72, at 1031-34.

141. *Casey*, 112 S. Ct. at 2820; see also *Hodgson v. Minnesota*, 497 U.S. 417, 480 (Kennedy, J. concurring in part and dissenting in part); 455 (Stevens, J., dissenting) (both noting that two-parent notification is not significantly burdensome); 460 (O'Connor, J., concurring in part and concurring in the judgment).

142. Law, *Abortion Compromise*, *supra* note 76, at 924; *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting).

143. See Patricia J. Williams, *Court Speak: When is a Fundamental Right Not a Fundamental Right?*, VILLAGE VOICE, July 14, 1992 at 40.

144. *Casey*, 112 S. Ct. at 2821; see also Justice O'Connor's opinion in *Akron v. Akron Reproductive Health, Inc.*, 462 U.S. 416, 453 (O'Connor, J., dissenting).

145. *Casey*, 112 S. Ct. at 2821.

### C. *Casey and the Prohibition of Sex-Selective Abortion*

*What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulation which does no more than create a structural mechanism by which the state . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.*

— Justice O'Connor, *Plurality Opinion*,  
*Planned Parenthood v. Casey*.

In *Casey*, the Court once again reiterated that in the context of an abortion, the state has an interest in the potentiality of the life of the fetus. In reiterating this principle, the Court defined the state's interest in the life of the fetus as "substantial," allowing the state to regulate abortion so long as the purpose or effect of the statute does not place a "substantial obstacle" in the path of a woman seeking an abortion of a non-viable fetus.<sup>146</sup> Thus, the state may enact measures that are designed to persuade a woman to choose childbirth over abortion even if those measures are solely "persuasive" in nature and in no way further a health interest.<sup>147</sup> However, the state may use only those means "calculated to inform the woman's free choice, not hinder it."<sup>148</sup> In applying the undue burden standard in *Casey*, the Court held that all of the challenged provisions, save one, passed constitutional muster.

In upholding the informed consent provision of the Pennsylvania statute, and overruling its earlier decisions in *Akron v. Akron Center for Reproductive Health*<sup>149</sup> and *Thornburgh v. American College of Obstetricians and Gynecologists*,<sup>150</sup> the *Casey* Court found that the informed consent provision of the Pennsylvania statute furthers a legitimate state goal "of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."<sup>151</sup> As long as the information that the state requires to be made available to the woman is not misleading, the statute does not amount to an undue burden to a woman seeking an abortion.<sup>152</sup> Consequently, as Anita Allen noted, *Casey* carries on the process of dismissing the First Amendment rights of women seeking abortions and abortion providers by mandating what abortion providers must say to their patients.<sup>153</sup>

146. *Id.* at 2820.

147. *Id.* at 2825.

148. *Id.* at 2820.

149. 462 U.S. 416 (1983).

150. 476 U.S. 747 (1986).

151. *Casey*, 112 S. Ct. at 2823.

152. *Id.* at 2824. The Court's analysis here seems to follow the scheme presented by Wilkins, Sherlock, and Clark in their 1991 article. See *supra* note 140.

153. The process of dismissing women's First Amendment rights in reference to abortion began with the Court's decision in *Rust v. Sullivan*. See discussion *infra* pp.

The relevant constitutional question in the context of sex-selective abortion is whether the state may forbid a woman from having access to certain information — namely the sex of her fetus — or forbid the consideration of this information, when she is deciding whether to obtain an abortion.<sup>154</sup> In other words, would a prohibition on sex-selective abortion be an undue burden on the exercise of a woman's right to choose, given that such a prohibition would exclude the consideration of information that she deems relevant? Would such a measure be calculated to inform the woman's individual choice or to impede it?<sup>155</sup>

### 1. Restricting Knowledge of the Fetus' Sex

In upholding the informed consent provision of the statute, the Court in *Casey* held that a state could *require* a woman to take certain information into account when deciding whether to obtain an abortion. This decision seems to be in line with some of the principles of our First Amendment jurisprudence, which disregards free speech implications of state abortion restrictions.<sup>156</sup> Information is deemed a benefit: the more information the better. The Court stresses that informational requirements lead to better decisions for all women.<sup>157</sup>

Earlier, however, in *Rust v. Sullivan*<sup>158</sup> the Court upheld as constitutional a federal regulation which forbade physicians or other employees of family planning clinics that received Title X<sup>159</sup> funds from counseling pregnant patients about the option of abortion.<sup>160</sup> The regulation, no longer in effect, limited many poor women's access to abortion information, but was not viewed by the Court as impermissibly restricting the "speech" of the physicians, other clinic employees, or their pregnant patients, by imposing viewpoint discriminatory conditions on government subsidies, or impermissibly restricting a woman's right to procure abortion services. According to the Court, the regulation was constitutional because physicians remained free to counsel patients about abortion outside of the government-funded clinic and because all women are "free" to obtain advice and counseling from a physician or other health care worker not restricted by the

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194-96; see also Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587 (1993); Allen, *supra* note 133, at 691-92.

154. See discussion of Pennsylvania and Illinois statutes *supra* p. 163-64.

155. *Casey*, 112 S. Ct. at 2820.

156. See Allen, *supra* note 133, at 691-92.

157. *Casey*, 112 S. Ct. at 2823.

158. 111 S. Ct. 1759 (1991).

159. Title X of the Public Health Service Act, 84 Stat. 1506, as amended, 42 U.S.C. §§ 300-300a-6, provides federal funding for family planning services. Section 1008 of the Act provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6 (1989).

160. Regulation Governing Grants for Family Planning Services, 42 C.F.R. §§ 59.2, 59.8, 59.10 (1988).

regulation. With regard to the free speech rights of physicians and other clinic employees, the Court stated:

Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral. The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project. . . . The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.<sup>161</sup>

The Court in *Rust* reasoned that because the restrictions did not affect all women and physicians, but only those who relied on the government subsidized clinics, and because this reliance was due solely to the woman's poverty or to the physician's choice of employment — "obstacles" not of the government's making — these restrictions did not unduly burden the woman's choice.<sup>162</sup> Moreover, the Court stressed that the regulation at issue was just another way by which the government may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds."<sup>163</sup> This allocation of resources, the Court reasoned, is not viewpoint discrimination; rather, it is merely the encouragement of one activity to the exclusion of another.<sup>164</sup>

Denying access to full information concerning her fetus may be viewed as burdensome by a woman who wishes to factor the sex of her fetus into her abortion decision. However, application of the undue burden standard as articulated in *Casey* would probably yield a verdict of no "undue" burden or substantial obstacle. By not allowing a woman to factor the sex of the fetus into her decision, or to abort on the basis of the sex of her fetus, or by blocking her access to sex information gathered by amniocentesis or CVS, the State would not be placing obstacles in the path of a woman who wishes to have an abortion. The woman would still be permitted to abort her fetus; she would only be unable to factor the sex of her fetus into the decision.<sup>165</sup> Prohibiting access to fetal sex information could be simply another way in

161. *Rust*, 111 S. Ct. at 1775.

162. *Rust*, 111 S. Ct. at 1778; see also *Harris v. McRae*, 448 U.S. 297, 315, 317; *Maier v. Roe*, 432 U.S. 464, 474. President Clinton responded to this "gag rule" with "The Title X 'Gag Rule' Memorandum for the Secretary of Health and Human Services," January 22, 1993, which removed the restrictions from family planning clinics receiving Title X funds.

163. *Rust*, 111 S. Ct. at 1772 (quoting *Maier*, 432 U.S. at 474).

164. *Id.*

165. John Schaibley makes this point in his analysis of *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 (1976). Schaibley, *supra* note 10, at 303 ("A state regulation of abortion is not constitutionally infirm merely because it makes the abortion decision more difficult. Indeed the informed consent requirement upheld in *Danforth* was designed to influence a woman's abortion decision and could discourage a wo-

which the state may permissibly encourage childbirth over abortion: that is, by effectively discouraging women from aborting in fear that they will mistakenly abort a fetus of the "correct" sex.

Yet, would such a statute or regulation be "calculated to inform the woman's free choice," as required by the Court in *Casey*, or designed to hinder the exercise of free choice?<sup>166</sup> The statute at issue in *Casey*, as construed by the Court, was designed to "create a structural mechanism by which the State . . . may express profound respect for the life of the [fetus],"<sup>167</sup> and to persuade the pregnant woman to choose childbirth over abortion.<sup>168</sup> The Court found the informed consent provision constitutional because the measure did not create a "substantial obstacle" to the exercise of her right of choice. The woman could still choose abortion, so there is no hinderance of her exercise of "free choice."<sup>169</sup> By "choice," the Court seems to refer to whether or not the regulation creates a substantial obstacle to obtaining an abortion somewhere.<sup>170</sup> "Choice" does not mean that the pregnant woman has at her disposal as much or as little information as she wants. Clearly, the lesson of *Casey* and *Rust* is that the state can regulate what types of information, if any, pregnant women receive regarding abortion. Pregnant women may be given too much information — designed to encourage them to choose childbirth — or no information — again designed to encourage them to choose childbirth. As long as the pregnant woman still has the "choice" of whether or not to abort, the quality and amount of the information she receives is constitutionally unimportant. The State may prevent sex-selective abortions by prohibiting doctors from informing pregnant women and their partners of the fetus' sex if the doctors know that the information is sought for the purposes of sex-selection. This type of regulation could be viewed as a means of "encouraging" childbirth over abortion (that is, because the state believes that women who want sex-selective abortion will not abort for fear of aborting the wanted sex). A prohibition of this type would not act as an obstacle to the "ultimate decision" of whether to abort.<sup>171</sup>

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man from having an abortion, but the Court did not consider this an undue burden.").

166. *Casey*, 112 S. Ct. at 2820.

167. *Id.* at 2821.

168. *Id.* at 2824.

169. In *Rust*, the Court held that the "gag rule" at issue did not impermissibly burden a woman's constitutional right to abortion because the Due Process Clauses of the Fifth and Fourteenth Amendments do not confer an affirmative right to governmental aid. *Rust*, 111 S. Ct. at 1776.

170. Similarly, the Court in *Rust* reasoned that women's due process rights were not violated by the agency's regulations because "a woman's right to receive information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered." *Id.* at 1777.

171. *Casey*, 112 S. Ct. at 2821.

## 2. The Mandatory Waiting Period and the Spousal Notification Requirements

The Court in *Casey* also analyzed the Pennsylvania law's twenty-four hour waiting period provision, which required a woman seeking an abortion to wait twenty-four hours after the required information is furnished to her. The Court held that the provision did not cause an undue burden and, hence, was a constitutionally permissible provision. In contrast, the spousal notification provision, which required a pregnant woman to notify her spouse of her decision to abort her fetus, was held unduly burdensome and therefore unconstitutional. With regard to the twenty-four hour waiting period, the Court found that the waiting period was a "reasonable measure to implement the State's interest in protecting the life of the [fetus],"<sup>172</sup> despite the fact that the regulation would cause hardships to women who had to travel a great distance to the abortion provider, forcing them to explain their whereabouts to husbands, employers and others; increase the costs and the risk of delay of abortions; and pose the greatest burden on women who had the fewest financial resources.<sup>173</sup> The Court held that the district court's findings of fact, that the waiting period was "particularly burdensome," did not include a finding that the increased costs and potential delays amount to "substantial obstacles" to abortion.<sup>174</sup>

We also disagree with the District Court's conclusion that the "particularly burdensome" effects of the waiting period on some women require its invalidation. A particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group. And the District Court did not conclude that the waiting period is such an obstacle even for the women who are the most burdened by it.<sup>175</sup>

The Court thereby maintained that although poor women in Pennsylvania may be foreclosed from having an abortion, the mandatory

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172. *Id.* at 2825. In his dissent, Justice Blackmun noted the District Court's findings that requiring a doctor, rather than an assistant, to give the patient the requisite informed consent materials increased the cost of the abortion, making it even more financially burdensome for poor women. *Id.* at 2850 (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part); see also Schneider, *supra* note 72, at 1024-25 ("increased cost of the physician-only requirement literally puts abortion out of [poor women's] financial reach").

173. The District Court found that the twenty-four hour waiting period was "particularly burdensome." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 744 F.Supp. 1323, 1352 (1990).

174. *Casey*, 112 S. Ct. at 2825.

175. *Id.* at 2825-26. The Supreme Court in *Casey* did not explain why there is a significant difference between a finding of "particularly" burdensome as found by the District Court, and "especially" or "substantially" burdensome as required by the Court. Of course, the District Court could not have known that the "magic words" were going to be "unduly burdensome".

waiting period "merely makes abortions a little more difficult or expensive to obtain."<sup>176</sup> Hence, it is *not* the waiting period that causes the obstacle and forecloses access to abortion services for poor women, but their poverty. It is poor women's lack of financial resources that makes them unable to effectuate this right.<sup>177</sup>

At first glance, the Court's analysis of Pennsylvania's mandatory waiting period, as well as the Court's decisions in analogous abortion funding cases, is supported by the theoretical underpinnings of privacy and the Court's autonomy rhetoric. The abortion right is conceived as a purely personal or individual right. The funding cases, as well as the Court's decision regarding the mandatory waiting periods in *Casey*, seem to logically extend this understanding of liberty — as rights that are exercised solely by the citizen using the citizen's own resources. As Pamela Karlan and Daniel Ortiz have noted, "[abortion] is a private decision in a dual sense: the state cannot interfere and the woman cannot invoke state aid."<sup>178</sup> But if Karlan and Ortiz are correct in their assessment of the Court's conceptualization of the liberty interest, then if the state is permitted to interfere with the woman's autonomy and her decisionmaking, the woman should be able to invoke more state resources to protect her interests. The Court's opinion in *Casey* clearly allows for increased state intervention in a pregnant woman's decision to abort her fetus. The decreased level of constitutional scrutiny permits more state intervention. After *Casey* the abortion decision is no longer a private one — the state significantly interferes *inter alia* by prescribing waiting periods and informational requirements. Accordingly, the woman should be able to depend on state assistance in securing access to the right, particularly given that the state has forced the woman to spend more of her resources to exercise her rights. I doubt that the Court's abortion jurisprudence will confront this theoretical inconsistency, but this inconsistency is further evidence of the Court's politically opportune decision making.<sup>179</sup>

Regarding the spousal notification provision, the Court relied on the overwhelming data of domestic violence against women in the United States, and held the spousal notification provision unconstitutional because it is likely to prevent a significant number of women from obtaining abortions. The Court believed that this provision

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176. *Id.* at 2829 (emphasis added).

177. In a post-*Casey* abortion case, the Court has tried to flesh out the parameters of the undue burden standard. For example, in *Fargo Women's Health Organization v. Schafer*, Justice O'Connor in her concurrence noted that the Court in *Casey* "made clear that a law restricting abortions is invalid, if 'in a large fraction of cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice.'" *Fargo Women's Health Organization v. Schafer*, 113 S. Ct. 1668, 1669 (1993) (O'Connor, J., concurring).

178. Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 Nw. U. L. Rev. 858, 879 (1993).

179. See, Williams, *supra* note 143, at 40.

"[did] not make abortions a little more difficult or expensive to obtain; for many women, it imposed a substantial obstacle."<sup>180</sup> Although the State argued that the provision would affect only 1 percent of the women who obtain abortions in the Commonwealth of Pennsylvania,<sup>181</sup> the Court found this fact insignificant, noting that the "proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."<sup>182</sup> The Court suggested that the number of actual women who will be burdened by the statute is inconsequential, so long as a large fraction of the relevant group of women will be unduly burdened. Nevertheless, the Court did not use this reasoning when applying its new standard to the mandatory waiting period.<sup>183</sup> Instead, the Court declared that although the opportunity for access by large numbers of women may be foreclosed as a result of the waiting period, the waiting period was not unduly burdensome because it only increased the external costs. Hence the Court's substantial burden test is both inconsistent and contradictory. It appears that what is required is the formalistic declaration by the district court that the particular burden, falling on a particular group of women, is a substantial obstacle<sup>184</sup> and that the obstacle is not caused by poverty or other financial constraints. By defining the obstacle posed by the mandatory waiting period as solely financial,<sup>185</sup> the Court disregards the fact that many women will be unable to receive abortions due to the restrictions.

### 3. *Casey* and Sex-Selective Abortion

The remaining issues are whether the Court's analysis in *Casey* relates to the issue of sex-selective abortion and whether the Court may (or is likely to) allow states to limit women's access to information concerning fetal sex. In *Casey*, the social science data relied upon by the Court in testing the constitutionality of the spousal notification provision was statistical evidence about the abuse of women by their spouses which has already occurred and continues to occur. The abuse has already been "proven." In contrast, the sociological data regarding sex-selective abortion speaks to predictions which can only be "proven" or "unproven" at some time in the future. In other words, the validity of sociological predictions is indeterminate. Inde-

180. *Casey*, 112 S. Ct. at 2829.

181. Brief for Robert Casey at 83-86, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992).

182. *Casey*, 112 S. Ct. at 2829.

183. *Id.* at 2829-30. The meaning of "large fraction" and "relevant group" are unclear, and as a result, manipulatable. See *id.* at 2848 (Blackmun, J. concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2877 (Scalia, J., concurring in the judgment in part and dissenting in part).

184. See *id.* at 2819-20. (Court's re-writing of district court's "particularly burdensome" finding.)

185. See Court's discussion in *Harris*, 448 U.S. at 316-17 and *Maher*, 432 U.S. at 474.



terminate speculative outcomes are discountable by the Court.<sup>186</sup> If the new doctrine articulated by the Court in *Casey* requires that the state regulation of abortion must actually further the articulated state interest, as Wilkins, Sherlock and Clark suggest,<sup>187</sup> then the sociological predictions fall short of that standard.

In *Casey*, the Court seemed to give weight to "external" obstacles which are not economic in nature. In discussing the spousal notification provision, the Court seriously considered and deemed relevant the ways in which some social conditions, such as domestic violence, affect a woman's ability to access the right to abortion. The Court was swayed by the district court's findings regarding the prevalence of spouse abuse.<sup>188</sup> That a "significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion" if they are required to notify their spouses, constitutes a substantial burden.<sup>189</sup> Like the sociological data on spouse abuse, the sociological data concerning sex-selective abortion is not based on the issues of class or the availability of financial resources. After *Casey*, the question remains whether the analysis of what constitutes a "substantial" obstacle examines the conditions under which a decision is made, like the mandatory waiting period and the spousal notification provision, or looks at what motivates the decision itself.<sup>190</sup>

Although the right of privacy with regard to abortion can mean the protection of one's sovereignty over personal decisions,<sup>191</sup> the privacy doctrine provides an inadequate basis for understanding abortion decisions generally and sex-selective abortion in particular. The privacy doctrine argues for the support of abortion on the basis of freedom from unwarranted state intrusion in one's sphere of individual discretion. It does not argue for abortion on the basis of women's right to reproductive control,<sup>192</sup> bodily integrity, freedom of sexual expression, or the right to equality. By operating in the realm of the private sphere, the privacy doctrine obscures the political nature of the private sphere<sup>193</sup> where women are often beaten, raped or otherwise sexually coerced, including coerced into producing male chil-

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186. See *supra* note 86.

187. See *supra* note 140.

188. The District Court's findings were based on the testimony of numerous experts at the trial and other studies of domestic violence which demonstrate that a significant number of married women are physically and emotionally abused by their spouses. *Casey*, 744 F.Supp. at 1332-33.

189. *Casey*, 112 S. Ct. at 2829.

190. See JON ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES 13-21 (1989).

191. Ronald Dworkin, *Feminism and Abortion*, N.Y. REV. BOOKS 27, 27 (June 10, 1993).

192. But see Court's opinion in *Casey*, 112 S. Ct. at 2807.

193. But see *Casey*, 112 S. Ct. at 2806. (Court implies that the abortion right is based on the notion that states have a limited ability to interfere in basic decisions about family and parenthood, as well as the bodily integrity of the pregnant woman.).

dren for their husbands and families.<sup>194</sup> This conception of rights protects behavior that is arbitrary or even injurious provided that the injurious behavior falls in the protected sphere.<sup>195</sup> In the context of abortion for the purpose of sex-selection, the privacy rights doctrine does not take into account the harms done to women's individual or social goals of gender equality.

#### IV FEMINSIMS AND EQUAL PROTECTION APPROACHES TO SEX-SELECTION

*I will never be in a man's place, a man will never be in mine. Whatever the possible identifications, one will never exactly occupy the place of the other — they are irreducible the one to the other.*

—LUCE IRIGARAY, *ÉTHIQUE DE LA DIFFÉRENCE SEXUELLE*  
19-20 (1984).

Feminists are not a homogeneous group even though we are all guided by similar moral and philosophical principles and share the goals of gender equality and justice. Hence, there is no single feminist analysis of any political, legal, or social issue, including sex-selective abortion. In this section I shall discuss the traditional approach of the equal protection doctrine to issues related to women's biological difference from men and feminist proposals of alternative equal protection approaches. I shall also analyze liberal and radical feminist evaluations of sex-selective abortion under these alternative equal protection frameworks.

##### A. A Note on Traditional Equal Protection Analysis

Feminist scholars from across the political spectrum have criticized traditional equal protection doctrine because of its failure to protect women from the harms of many gender-based discriminatory laws which involve women's capacity to become pregnant, gestate the fetus, or terminate a pregnancy. Traditional equal protection analysis seeks to treat alike those who are alike, and allow differential treatment of those who are not similarly situated. Since women are not like men when it comes to true biological differences, such as the ability to conceive and bear children, laws that treat women differently often pass constitutional muster under the traditional analysis.<sup>196</sup> The

194. See generally SUSAN BROWNMILLER, *AGAINST OUR WILL. MEN, WOMEN, AND RAPE* (1975).

195. See generally, ROBERTO UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 7 (1986).

196. *Geduldig v. Aiello*, 417 U.S. 484 (1973), is a prime example of the Court's reasoning on the issue of gender equality and the equal protection doctrine. At issue in *Geduldig* was a California disability insurance program which covered workers temporarily disabled by illness or injury. Elective surgery was covered under the policy, as were disabilities unique to men, but disability related to a normal pregnancy was not. The Court held that the program was not impermissibly discriminatory under the

goal of traditional equal protection analysis is assimilation: to the extent that women are able to be like men (since the standard for equal treatment is maleness),<sup>197</sup> they are similarly situated and therefore should be treated equally — not discriminated against.<sup>198</sup> Under this test, the biological fact that women get pregnant and men do not

equal protection clause. The Court concluded that there was no risk from which women were protected and men were not. *Id.* at 496-97. The majority insisted that the California program did not exclude anyone from eligibility for benefits because of their gender, but rather "merely removes one physical condition—pregnancy—from the list of compensable disabilities," dividing potential recipients in two groups: pregnant women and nonpregnant persons. *Id.* at 496 n.20. *Cf.* Michael M. v. Sonoma County, 450 U.S. 464 (1981) (Statutory rape law effectively allowed men to legally engage in sexual intercourse at an earlier age than women based on notion that consequences of sexual intercourse for women is different).

By allowing the California disability program to cover disabilities that were male gender specific while not covering pregnancy, a condition that is female gender specific, the Court implicitly declared that the standard is male. *See Geduldig*, 417 U.S. at 497 (Brennan, J., dissenting). In other words, the Court's acceptance of the insurance program which covered conditions that were specifically male, such as circumcisions, and not pregnancy, is indicative of the Court's use of men as the standard to which others are compared when deciding issues of equality and equal protection. *See generally* Ann Scales, *Toward a Feminist Jurisprudence*, 56 IND. L.J. 375, 435 (1981) (uniqueness of women is a trap in equal protection analysis which assumes maleness as a norm); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984) (pregnancy has been negatively treated because it is an ascension into "no man's land." Normal—male-like—status for women is non-pregnant).

After the Court announced its decisions in *Geduldig*, and a factually similar Title VII case, *General Electric v. Gilbert*, 429 U.S. 125 (1976), Congress passed the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(K) (1982), which prohibited this type of discrimination under Title VII; but note, *Geduldig* is still good constitutional law. For a fuller analysis of this issue see, e.g., Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in PERSPECTIVES ON WOMEN'S SUBORDINATION AND THE ROLE OF LAW (David Kairys ed., 1990) (Taub and Schneider note that in *Michael M.*, "the Court's focus on the physical fact of reproductive capacity serves to obscure the social bases of its decision. Indeed, it is striking that the Court entirely fails to treat pregnancy as sex-discrimination when discrimination really is in issue, while using it as a rationale in order to justify differential treatment when it is not in issue.").

197. Catharine MacKinnon makes this point when she states:

Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his measure. Gender neutrality is thus simply the male standard . . . Approaching sex discrimination in this way—as if sex questions are difference questions and equality questions are sameness questions—provides two ways for the law to hold women to a male standard and call that sex equality.

CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 34 (1987).

198. *See* ZILLAH R. EISENSTEIN, THE FEMALE BODY AND THE LAW 66-67 (1988); CATHARINE A. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979) [hereinafter SEXUAL HARASSMENT]; CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987).

makes discrimination permissible. Hence, laws biased against pregnant women are not viewed as gender discrimination; instead, they have been understood as laws that are neutral.<sup>199</sup> In the context of reproduction, the sexes are not similarly situated and thus equal protection and treatment principles simply are not applicable.<sup>200</sup> In addition, under its current equal protection jurisprudence, the Court ignores the "context" of discrimination based on women's capacity to reproduce. Historically, legislation limiting women's rights regarding reproduction, including abortion, have been enmeshed in society's conception of women as mothers.<sup>201</sup> Equal protection seeks to either impose generality in law or to correct for generalities in law that impede individuals from exercising discretion in determining the course of their lives.<sup>202</sup> It does not seek to correct for trends in social practices that tend to pose difficulties for individuals or groups based on commonly held views about them. Hence, by validating differential and discriminatory treatment toward women as a result of women's capacity for childbearing, and confusing the differences between women's biological difference from men and the gendered expectations society holds for women, the Court continues to legitimize gender inequality. Due to its foundational structures and philosophy, traditional equal protection analysis is inadequate to address the issue of sex-selective abortion.

#### B. *Feminist Approaches to the Equal Protection Clause*

Many feminist scholars have rejected the assimilationism of the traditional model of equal protection, and have instead argued for a framework which moves closer to the goal of gender equality. They have rejected the anti-discrimination model of equal protection and

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The current level of equal protection review for issues of gender discrimination is intermediate or heightened scrutiny, which means that the government's regulation must be substantially related to an important governmental interest. This standard was first applied in *Craig v. Boren*, 429 U.S. 190 (1976), a case involving a statute which permitted women to buy and drink 3.2 percent beer at an earlier age than men. The statute was struck down under intermediate scrutiny. See generally LAURENCE A. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1561-65 (2d ed. 1988) (tracing the development of heightened review standard for gender discrimination).

199. EISENSTEIN, *supra* note 198, at 66.

200. See generally Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L. REV. 1281, 1287-88 (1991) [hereinafter *Reflections on Sex Equality*] (issues of sexual violence and reproduction not considered equal protection issues or issues of sex inequality by early feminists); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 634-42 (1986) [hereinafter *The Dialectic of Rights and Politics*]; Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 352-53 (1992) [hereinafter *Reasoning from the Body*] (equal protection clause as currently construed places no restraints on state regulation of women's reproductive lives).

201. See Siegel, *supra* note 200, at 351; see also RICH, *supra* note 75 at 41-55.

202. See UNGER, *supra* note 195, at 44-45.

have substituted models based on anti-subordination. As Reva Siegel has noted, a growing number of constitutional scholars have argued that equal protection analysis should be reoriented "so that it directly consider[s] the impact of state action on the citizens affected by it."<sup>203</sup> The fundamental principle of feminist equal protection models is this paradigm shift from anti-discrimination to anti-subordination. The anti-subordination principle is that women deserve equality and justice whether or not they are like men. The proponents of these models assert that the legal and social discrimination, the differential treatment that women face, "has left [us] dissimilarly situated from men with regard to any number of traits typically addressed by discriminatory laws. Rather than excusing the differential treatment as the traditional equal protection doctrine suggests, this disparity is simply another symptom of the discrimination that women face."<sup>204</sup>

Catharine MacKinnon has developed such a feminist equal protection model.<sup>205</sup> Under her approach, any statute, regulation, rule or practice which "contributes to the maintenance of an underclass or a deprived position because of gender status" would be constitutionally impermissible as a violation of the equal protection clause.<sup>206</sup> Under MacKinnon's analysis:

The social problem addressed is not the failure to ignore woman's essential sameness with man, but the recognition of womanhood to woman's comparative disadvantage. In this approach, few reasons, not even biological ones, can justify the institutionalized disadvantage of women. Comparability of sex characteristics is not required because policies are proscribed which transform women's sex-based difference from men into social and economic deprivations. All that is required are comparatively unequal results.<sup>207</sup>

Application of MacKinnon's approach requires an analysis of whether the law or regulation at issue preserves women's economic, social, and political subordination.

While many feminist scholars have adopted MacKinnon's approach to equal protection problems, Sylvia Law has criticized it for improperly presuming that judges will be able to recognize, and find

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203. Siegel, *supra* note 200, at 368. This paradigm shift is often referred to as the anti-subordination model of equal protection jurisprudence. See *infra* note 248.

204. Catherine Grevers Schmidt, *Where Privacy Fails: Equal Protection and the Abortion Rights of Minors*, 68 N.Y.U. L. REV. 597, 611 (1993) (citations omitted).

205. MacKinnon first articulated the parameters of the new approach to equal protection in *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979). See also MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 105, at 215-34. As Catherine Grevers Schmidt notes, many feminist legal scholars have adopted a "MacKinnonesque" equal protection test. See Schmidt, *supra* note 204, at 617 n.124.

206. MACKINNON, *SEXUAL HARASSMENT*, *supra* note 205, at 117.

207. *Id.*; see also *id.* at 127.

unconstitutional, laws that oppress women.<sup>208</sup> Law is concerned that MacKinnon's framework unrealistically relies on the subjective and personal experience of judges to know the oppression of women when they see it.<sup>209</sup> In response, Sylvia Law has created an alternative feminist equal protection formulation that also focuses on the impact of the law or regulation at issue. However, her formulation applies only to laws or regulations that are explicitly based on women's biological difference from men because she believes that such laws are conceptually similar to the types of racially discriminatory categories that are judged by means of strict scrutiny analysis under the traditional equal protection doctrine. Pregnancy, like race, is a facial classification.<sup>210</sup> Under Law's analysis, the court must ascertain whether the regulation has a "significant impact in perpetuating either the oppression of women or culturally imposed sex-role constraints on individual freedom"<sup>211</sup> and whether "it is justified as the best means of serving a compelling state purpose."<sup>212</sup> Thus under Law's equal protection test, the state has the burden of justifying its law in light of the history of women's subjugation based on their reproductive capacities only when the regulation is explicitly based on biological sex.<sup>213</sup> Of course the problem with this analysis is that it gives women *no* recourse when the bias they face is due to their gender. Much discrimination against women is based on gender as socially constructed, and not on biological sex. Indeed, courts and legislatures often confuse the social construction of women with their biological abilities.<sup>214</sup> Hence Law's analysis permits much of the bias that women face, particularly in the reproductive arena, to evade an equal protection challenge.

### C. A Liberal Feminist Equal Protection Analysis of Sex-Selection

In the United States, classic liberalism has as its foundation the political principle of liberty: the right of the individual (read male) to be free from undue government interference in his personal, familial and business affairs, except where government interference protects

208. Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1005, 1011 (1984) [hereinafter *Rethinking Sex and the Constitution*].

209. *Id.* at 1005. Elizabeth A. Schneider makes a similar point in her critique of the undue burden standard articulated by the Court in *Casey*, see *supra* note 72, at 1004, 1031-33.

210. Law, *Rethinking Sex and the Constitution*, *supra* note 208, at 1008, 1010.

211. This part of Law's analysis is subject to the same criticism that Law makes of MacKinnon's analysis — that the analysis relies on the same type of subjective analysis of the judge, and that the regulation at issue oppresses women. Law seeks to cure this weakness by insisting that all biologically-based laws are presumed to be oppressive to women. *Id.* at 1009.

212. *Id.* at 1008-09.

213. *Id.* at 1009.

214. See e.g., MacKinnon, *Reflections on Sex Equality Under Law*, *supra* note 200, at 1308-09; Rich, *supra* note 75, at 21-40.

private property and business interests in the public sphere and male control of the biological family in the private sphere. Some principles of liberalism — that is, the worship of individuality and autonomy — are accepted by women espousing a liberal feminist political position. The liberal feminist generally accepts the validity of a political theory which puts a premium on individual power and discretion, but argues that liberalism, as practiced in the United States, excludes women from fully realizing these goals. Consequently, the liberal feminist advocates for formal legal equality between men and women, as well as equal educational, economic, and employment opportunities. Liberal feminists believe that through legal equality and equal access of opportunities, women will be provided with the needed opportunities for full participation in public life as promised by liberal political theory. Thus liberal feminism's vision of equality for women is a commitment to equality between men and women based on the sameness of treatment and equal opportunity, without any analysis of the social/cultural relationship of power that exists between men and women. As Zillah Eisenstein has written:

The discourse of liberalism, which espouses a commitment to equality for all individuals, articulates an important and necessary view regarding the treatment of women. The fact that liberalism has always privileged the phallus and the social relations of patriarchal society explains why the tension between women's similarity (to) and difference (from men) is embodied *within* liberal law. As a gendered discourse, liberal law ends up exposing the phallus, because in its view men and women are supposedly homogeneous individuals and not sex classes. Liberalism thus establishes the expectation that women will be treated as individuals, not as women, classified by their sex.<sup>215</sup>

In the reproductive arena, liberal feminists advocate for reproductive liberty on the grounds of personal autonomy (again a foundational aspect of classic liberalism) and the protection of privacy, that is, freedom from unwarranted government intrusion into the private sphere.<sup>216</sup> As a result, liberal feminists argue against legal prohibi-

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215. EISENSTEIN, *supra* note 198, at 77 (emphasis in original).

216. See *Doe*, 410 U.S. at 213-15. J.S. Mill, Harriet Taylor Mill, and Mary Wollstonecraft are three important figures in the early articulation of liberal feminism. In *A VINDICATION OF THE RIGHTS OF WOMAN* (Carol H. Poston ed., 1988), Mary Wollstonecraft, in 1792, argues for the right of women to a quality, equal education. J.S. Mill and Harriet Taylor Mill in the mid-19th century advocated both formal legal equality and equal educational opportunities. See, e.g., HARRIET TAYLOR MILL, *ENFRANCHISEMENT OF WOMEN* (1851) (advocating equal education; equal access to occupations and equal access to public office and public/political life, as well as suffrage); J.S. Mill & Harriet Taylor, *Early Essays on Marriage and Divorce*, in J.S. MILL AND HARRIET TAYLOR MILL, *ESSAY ON SEX EQUALITY* (Alice S. Rossi ed., 1970) (advocating marriage and divorce reform). Cf. Randy E. Barnett, *supra* note 67, at 628. Barnett, in discussing natural rights which is at the heart of liberalism, explains:

For persons to live and pursue happiness in society with others, persons need to act at their own discretion. This is made possible by recognizing a

tions on sex-selective abortion. The principles of liberalism and liberal feminism demand that each individual woman be permitted to make choices regarding the continuation of her pregnancy using whatever criteria she wishes. Prohibitions against sex-selective abortion are in conflict with these principles. There is also some concern in feminist circles across the political spectrum that because the right to access abortion services is so precarious in the United States, any prohibitions on the abortion right would irreparably weaken that right. Feminist philosopher Tabitha Powledge is one scholar who has forcefully voiced this position: "To make it illegal to use prenatal diagnostic techniques for sex choice is to nibble away at our hard-won reproductive control, control that I think most of us believe is the absolute rock-bottom minimum goal we have got to keep achieved before we can achieve anything else."<sup>217</sup>

This view is supported by a consequentialist philosophical approach which focuses on the consequences of a decision to prohibit abortion for the purpose of sex-selection on both the current and future generations of women.<sup>218</sup> In this form of consequentialist inquiry, a good moral decision is one that takes into account the moral and social consequences of an act. A liberal feminist analysis, adopting a consequentialist philosophical approach, would argue that the social consequences of a legal prohibition of sex-selective abortion would be the reinforcement of women's subordinate status and the denigration of women as irresponsible decisionmakers, which would "nibble away at our hard won reproductive control." The overriding consequence of a prohibition on sex-selective abortion according to liberal feminism would be the constriction of women's autonomy, which is in direct opposition to liberal feminism's belief in the importance of preserving legal rules which embody a view of women as responsible adults.<sup>219</sup> As a result, many liberal feminists have turned to equal protection law as a source of potential protection against any

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sphere of jurisdiction over physical resources — including their own bodies — that provides persons with discretionary control — liberty — over these resources. Put another way, persons need to be at liberty to act within the realm of their jurisdiction — a jurisdiction that has both temporal and spatial dimensions.

217. Tabitha M. Powledge, *Unnatural Selection: On Choosing Children's Sex*, in *THE CUSTOM MADE CHILD?*, *supra* note 2, 193, at 197; *see also* WARREN, *supra* note 4, at 183; Hoskins & Holmes, *supra* note 2, at 245 (sex-selection is simply a more sophisticated method of family planning and any legal restriction on family planning also jeopardizes other aspects of women's precarious reproductive futures); Fletcher, *Ethics and Amniocentesis for Fetal Sex Identification*, 301 NEW ENG. J. MED. 550 (1979), *reprinted in* 10 HASTINGS CENTER REP. 15, 15-16 (Feb. 1980) (to employ public or medical tests of women's decision to abort provides opportunities for obstruction and defeat of women's freedom to determine their own reproductive futures).

218. *See discussion supra* pp. 178-81.

219. For a fuller discussion of consequentialist philosophy *see supra* pp. 178-81.



prohibition of the abortion right,<sup>220</sup> including prohibitions on the use of abortion for sex-selective purposes.

### 1. Liberal Feminism and Issues of Moral Agency

In large part, the failure of the legal system to ardently protect women's reproductive and abortion decisionmaking as equal protection issues stems from our cultural perception of women as irresponsible moral agents who cannot be trusted with such important decisions.<sup>221</sup> This is evidenced by various state statutes, eventually held unconstitutional, regarding spousal consent and notification provisions in abortion laws.<sup>222</sup> Spousal consent and notification provisions, as well as mandatory waiting periods in abortion laws, are symptomatic of a society that does not believe that pregnant women will make good choices concerning their fetuses.<sup>223</sup> Such restrictions demonstrate the cultural assumption that women cannot make reproductive decisions without the help or direction of men (or the State

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220. See, e.g., Ruth Bader Ginsberg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992); Ruth Bader Ginsberg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 382-83, 386 (1985).

221. See, e.g., Samuel W. Buell, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1820 (1991) (criminal abortion laws often reflect understanding of women as incapable or irresponsible decisionmakers). This theme of woman as untrustworthy can also be seen in traditional rape laws. The definition of rape, the concept of consent, and the burden of proof are all examples of this concept. See Berger et al., *The Dimensions of Rape Reform Legislation*, 22 LAW & SOC'Y REV. 329 (1988) (images of women as seductive and untrustworthy are, under traditional rape laws, combined with socio-legal conceptions of women as property of males, and produce a wide range of prejudicial criminal justice system practices in handling rape cases.) MacKinnon also offers some insight into the law's mistrust of women and its male perspective of the law of rape. I think that the parallels to abortion law are clear. MacKinnon writes:

It seems to me we have here a convergence between the rapist's view of what he has done and the victim's perspective on what has been done to her. . . . A rape victim has to prove that it was not intercourse. She has to show that there was force and she resisted, because if there was sex, consent was inferred. Finders of fact look for 'more force than usual during the preliminaries.' Rape is defined by the distinction from intercourse — not nonviolence, intercourse. They ask, does this event look more like fucking or like rape? But what is their standard for sex, and is this question asked from the *woman's point of view*? The level of force is not adjudicated at her point of violation, it is adjudicated at the standard of the normal level of force. *Who sets this standard?*

MACKINNON, FEMINISM UNMODIFIED, *supra* note 198, at 88 (emphasis added).

222. See, e.g., *Casey*, 112 S. Ct. 2791; *Bellotti v. Baird*, 443 U.S. 622 (1979); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

223. In this context a good choice is one that both favors the status quo of patriarchy and women's disempowerment and one that is morally responsible in the patriarchal moral/ethical framework in which we currently operate. Thus, a good choice is one that does not threaten men's power or existence. Women could, *if* they had the power to make such a decision, abort men out of existence. But instead, because we lack real social, political or economic power, we are participating in our own annihilation.

conceptualized as male).<sup>224</sup> Moral agency is, in this context, defined as autonomous decisionmaking. "Prohibiting abortion denigrates women as decisionmakers, and it reinforces their role as sexual objects by undermining their ability to act as sexual agents. It further reduces the limited power that women are allowed to exercise over their bodies and their sexuality in our society."<sup>225</sup> Feminists and other supporters of women's empowerment generally recognize that respect for all human beings requires that a woman's autonomy and individual moral responsibility be the standards that govern the final resolution of conflicts about reproduction and abortion.<sup>226</sup> The more difficult question for feminists, and other like-minded folk, is whether, given the fact that most, if not all, of the fetuses aborted due to their sex are female, sex-selective abortion is nevertheless called for by the principles of individual dignity, liberty and autonomy. For liberal feminism, the balancing of harms must sway in favor of its foundational principles of the protection of liberty and autonomy.

The refusal of society, through law, to protect and support women's ability to make and carry out reproductive decisions, including a decision to abort a fetus because of its sex, also seems to derive from the deontological ethical consequences of the view that a fetus is a person, which equates the moral status of the fetus with the moral status of the pregnant woman.<sup>227</sup> It is not that feminists believe that

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224. See, e.g., Law, *Abortion Compromise*, *supra* note 76, at 940 (mandating waiting periods for abortion sends powerful message that women make rash decisions and are not competent moral decisionmakers); Law, *Rethinking Sex and the Constitution*, *supra* note 208, at 1035 (consent and notification requirements reflect contempt for women as law abiding citizens).

225. Olsen, *supra* note 73, at 121. In fact some jurisdictions are beginning to prosecute women for alcohol and drug use during pregnancy. See, e.g., *Johnson v. Florida*, 602 So. 2d 1288 (1992) (Supreme Court overturned conviction of woman convicted of the delivery of a controlled substance to baby through umbilical cord after birth). One California jurisdiction went so far as to charge a woman with child abuse and neglect for the death of her newborn baby because she failed to follow her physician's advice. Pamela Rae Stewart was charged in California via California Penal Code § 270, which was designed to punish the willful omission of "necessary clothing, food, shelter or medical attention." The allegations against Stewart were that in failing to follow her physician's advice, she contributed to her child's death. Her physician's advice included: abstaining from sexual intercourse and the active care of her two children, to maintain bed-rest, and to promptly report to the hospital when she observed vaginal bleeding. Jim Schacter, *Woman Accused of Contributing to Baby's Demise During Pregnancy*, LOS ANGELES TIMES, Oct. 1, 1986, part II, at 1. Charges against Ms. Stewart were dismissed on a pre-trial motion on the grounds that the statute did not encompass the conduct alleged. LOS ANGELES TIMES, Feb. 27, 1987, part I, at 3. But I think that the important fact to note is that jurisdictions are trying to control women's bodies and sexuality through law.

226. Fletcher, *supra* note 217, at 16. The Supreme Court recognized this principle in *Thornburgh v. American College of Obstetricians and Gynecologists*, where the Court reasoned that "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy." *Thornburgh*, 476 U.S. at 772.

227. See discussion *supra* pp. 176-78.

the fetus is of no moral significance or consequence. Rather, most feminists believe that the fetus does not have any moral "rights" of its own. In contrast, feminists believe that women, undoubtedly, have full moral status. According to liberal philosophy, this status must include personal autonomy, if it is to have any meaning at all. Women's autonomy overrides concerns about harm to the fetus. Because of the physical and emotional nature of pregnancy, the fetus' health and rights must be subordinate to the health and the rights of the woman carrying it. Treating the fetus as if it were the moral equal of a born person is intolerable because such treatment is also indicative of society's sexism and its denigration of women: "Treating a fetus as morally equivalent to a child obscures the active role that mothers play in procreation and is yet another example of society's tendency to devalue the work that mothers do."<sup>228</sup> Pregnancy is a creative, emotional and physical process.<sup>229</sup> The fetus is alive because the pregnant woman, through gestation, has made it viable. Thus, even if fetuses are considered persons either morally<sup>230</sup> or constitutionally, the comparative moral status of the woman and the physical and emotional/psychic nature of pregnancy may demand access to abortion for any reason the pregnant woman wishes, including sex-selection.<sup>231</sup>

Support for liberal feminist opposition to prohibitions on sex-selective abortion can also be found in Mary Anne Warren's pragmatic analysis of sex-selection where she argues from the principle of freedom of choice. As previously discussed, Warren asserts that the moral presumption regarding sex-selection should be in support of the freedom to choose "in the absence of powerful countervailing arguments."<sup>232</sup> The liberal feminist analysis, in focusing on the principles of autonomy and liberty, maintains that the harm of prohibitions is to the autonomy of women in decisionmaking. The harm to women suggested by the sociological evidence regarding sex-selection does not approach the sufficiency of harm necessary to override the liberty of the woman in her decisionmaking due to the indeterminacy of such predictions.<sup>233</sup>

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228. Olsen, *supra* note 73, at 121.

229. RICH, *supra* note 75, at 21-40 (who discusses the psychological, physical, and emotional sufferings and crises of pregnancy and motherhood, and exposes the "institution" of motherhood as it exists under patriarchy as the ghettoization and degradation of female potentialities).

230. There is much debate among theologians and ethicists regarding the moral status of the fetus. For an example of differing views see Flowers, *supra* note 74, at 246-48; VATICAN, *supra* note 68.

231. One commentator has suggested that restricting abortion or denying women independent decisionmaking in this area denies women the opportunity to act as moral agents. See Schmidt, *supra* note 205, at 621-23.

232. WARREN, *supra* note 4, at 180.

233. For a fuller analysis of Warren's pragmatic method, see *supra* pp. 181-83 and corresponding footnotes.

Hence, a liberal feminist analysis of sex-selective abortion first recognizes, through analysis and adoption of consequentialist and pragmatic philosophic methods, that the consequences of any legal prohibition of sex-selective abortion would fail to legally recognize women as responsible moral agents, and that any such law would by implication further the view that women cannot be trusted to make responsible decisions concerning reproduction. Under a liberal feminist approach, all regulations and prohibitions surrounding pregnancy, abortion, and childbirth are issues of gender inequality. That is to say, it is a question of whether the State can permissibly discriminate against women and thereby maintain their subordinate legal status. This analysis focuses on the authority of the pregnant woman, and the fact that a fetus is a part of a pregnant woman's body, and is nourished and sustained inside a woman's body; hence anything done for the benefit of the fetus is done to the pregnant woman. Under a liberal feminist construction, the principle of liberty and autonomy and the legal philosophies of privacy and equal protection demand the legal protection of women's decisionmaking in this arena, including the decision to abort on the basis of fetal sex. This is not to assume that future generations of women will not be disadvantaged socially, economically, or politically by sex-selective abortion, as the sociological data indicates. Rather, it is an acknowledgement of the current consequences of such restrictions — that women are also disadvantaged by laws which are founded on the notion of women's inability to make responsible decisions and as a result severely curtail or prohibit women's self-determination.

Given the full moral status of women, the physical and emotional nature of pregnancy and childbirth, the ways in which a forced pregnancy is oppressive to women, and of course, the historical and current oppression of women, abortion and sex-selective abortion still raise equal protection issues, regardless of the moral or legal status of the fetus. These are issues which ordinarily must be decided in favor of women's rights to bodily integrity and self-determination:

The differential burden that denying access to contraceptives imposes upon women is not a facially neutral policy having a disparate impact upon different groups of people — no man faces the physical risks of pregnancy. Even assuming that both parents bear equal responsibility for the child after birth, only women are confronted with the choice of obtaining an abortion or enduring the physical burdens of pregnancy.<sup>234</sup>

A liberal feminist would assert that under either MacKinnon's and Law's analyses, any State regulation or prohibition of sex-selective abortion would be constitutionally impermissible. Under these analyses, the regulation or prohibition would fail because it "contributes to the maintenance of an underclass or a deprived position because of

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234. Law, *Rethinking Sex and the Constitution*, *supra* note 208, at 978.

gender status."<sup>235</sup> Powerlessness and subordination accompany the inability to control reproduction and bodily integrity. Women would be forced to bear fetuses that they did not wish to bear. This would indeed contribute to the maintenance of women's second class status due to their reproductive capacity, which is, of course, gender status.

#### V. TOWARD A RADICAL ANALYSIS OF SEX-SELECTIVE ABORTION: THE NECESSITY OF FEMINIST VISION

*What does it mean when the tools of a racist patriarchy are used to examine the fruits of that same patriarchy? It means that only the most narrow perimeters of change are possible and allowable. . . . For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.*

— Audre Lorde, *The Masters Tools Will Never Dismantle The Master's House* (1984)

Arguments in favor of liberty, autonomy in decisionmaking, and self-determination for women in the reproductive sphere are legally and morally compelling. The constitutional right to safe and legal abortion was fought for by many women on these grounds. On the other hand, the critical legal studies and feminist movements have taught us that this ideology of liberty has, on numerous occasions, deflected our attention from the investigation of reproductive technology as an institution of patriarchy.<sup>236</sup> The focus on individual rights has allowed us to neglect larger issues of social need and justice.<sup>237</sup>

235. CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN*, *supra* note 205, at 117.

236. As Janice Raymond has noted:

[T]his ideology prevents us from examining technological and contractual reproduction as an institution and leads us to neglect the conditions that create industrialized breeding and the role that it plays in society. Choice so dominates the discussion that when critics of technological reproduction denounce the ways in which women are abused by these procedures, we are accused of making women into victims and, supposedly, of denying that women are capable of choice. To expose victimization of women is to be blamed for creating women as victims.

RAYMOND, *WOMEN AS WOMBS*, *supra* note 15, at x; *see also* MACKINNON, *SEXUAL HARASSMENT*, *supra* note 205, at 99.

237. This of course is the critical legal studies critique of rights. Critical legal theorists assert that rights talk is harmful because when rights are balanced against vital social issues of need, the emphasis on the importance of individual rights creates conditions where social needs are continuously ignored. *See, e.g.*, UNGER, *supra* note 195, at 597; Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984) (pursuit of rights is foolish and misled); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1582 (1984). For a fuller explanation and critique of the critical legal studies view of rights, *see* Elizabeth M. Schneider, *The Dialectic of Rights and Politics*, *supra* note 200, at 593-

Radical feminist legal theory also offers a critique of classic individualism and rights-talk. The radical feminist analysis of women's oppression focuses on the existence of patriarchy as a system of comprehensive power and authority under the control of men. Through entrenched systems of racism and classism, these men, somewhat successfully, dominate and control other men of different races and men of lower economic status. As Alison Jaggar has noted in her analysis of radical feminism, radical feminists believe that in order to legitimize the domination of others, white male culture "invents ideologies that define subordinate groups as inferior for one reason or another: as lazy, shiftless, stupid, greedy, emotional, sly, childish, barbaric, or uncultured. Under patriarchy, many of these attributes are applied to women as well as to subordinated groups not defined primarily by sex."<sup>238</sup>

Also central to radical feminism is the understanding that women are oppressed in ways that are directly related to their gendered status as women. Through systems of gender oppression, men dominate women. Women under patriarchy are viewed as human beings whose most important role is that of mother and caretaker: to have and raise children and to satisfy the sexual and emotional needs of men. As MacKinnon has explained regarding the importance of women's sexuality to patriarchy:

If women are socially defined such that female sexuality cannot be lived or spoken or felt or even somatically sensed apart from its enforced definition, so that it is its own lack, then there is no such thing as a woman as such, there are only walking embodiments of men's projected needs. For feminism, asking whether there is, socially, a female sexuality is the same as asking whether women exist.<sup>239</sup>

In addition, "[t]his ideology limits what women may do under patriarchy and delegitimizes whatever they in fact do that goes beyond the limits of the patriarchal definition."<sup>240</sup> Hence radical feminism often

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96. But even Duncan Kennedy acknowledges that rights claims should not be completely abandoned:

[T]he critique of rights as liberal philosophy does not imply that the left should abandon rights rhetoric as a tool of political organizing or legal argument. Embedded in the rights notion is a liberating accomplishment of our culture: the affirmation of free human subjectivity against the constraints of group life, along with the paradoxical countervision of a group life that creates and nurtures individuals capable of freedom. We need to work at the slow transformation of rights rhetoric, at dereifying it, rather than simply junking it.

Duncan Kennedy, *Critical Labor Law Theory: A Comment*, 4 INDUS. REL. L.J. 503, 506 (1980-81).

238. ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 255 (1988).

239. Catharine MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7(3) SIGNS 515 (1982).

240. JAGGAR, *supra* note 238, at 255.

focuses on the gender domination of women in the institutions of motherhood and family, as well as the gender domination of women's sexuality and reproductive capabilities — all of which are maintained and enforced through social and legal structures.<sup>241</sup> This theory of the male domination of women through family institutions has been extended to include an analysis of the state: an institutional surrogate for male control of women inside and outside of the family.<sup>242</sup>

Many radical feminists are critical of rights-talk due to its justifications of state power based on the enforcement of individual rights.<sup>243</sup> Rights and claims to rights are part of the patriarchal system of law which is represented by the belief in the importance of objectivity, distance and abstraction.<sup>244</sup> "Abstract rights", according to MacKinnon, "authorize the male experience of the world,"<sup>245</sup> and as a result, rights-talk tends to delegitimize women's experience of the world, such as their treatment under the law governing reproductive technologies, and the importance of women's material needs.<sup>246</sup> As one radical feminist scholar and activist noted: "It is from rights-thinking that we get that curious abstraction of the fetus without a womb. Sooner

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241. Radical feminism has been historically criticized by many feminists, particularly feminist and other women of color for its proclivity to universalize the experience of white women as the experience of all women, ignoring differences of race, class, and ethnicity among women, and the separation of its understanding of patriarchy from other features of the political economy. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). But see Susan Christian, *Woman (Modified)*, 4 YALE J.L. & FEMINISM 171 (1991) ("A perspective defined by a focus upon a form of inequality which affects all women, albeit in different ways depending on our characteristics and resources, is not inherently 'essentialist.'"); e. christi cunningham, *Unmaddening: A Response to Angela Harris*, 4 YALE J.L. & FEMINISM 155 (1991) ("MacKinnon cannot define Black women, but in deconstructing male definitions that have been imposed on women, she creates space for new definitions.").

242. See, e.g., MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 110, at 170; Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 400 (1984); cf. Siegel, *supra* note 200, at 377 (abortion restrictions coerce women to perform the work of motherhood without altering the conditions that make such work a principal cause of women's secondary status). For a brief history and analysis of radical feminism, see also MIMI ABRAMOVITZ, REGULATION OF THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 22-24 (1988); JAGGAR, *supra* note 238, at 249-302. See also FEMINIST LEGAL THEORY: FOUNDATIONS (D. Kelly Weisberg ed., 1993).

243. See, e.g., RAYMOND, *supra* note 15, at 191.

244. See Schneider, *The Dialectic of Rights and Politics*, *supra* note 200, at 597, 600.

245. Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 658 (1983); see also *id.*, at 644-45; Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L. J. 83 (1980).

246. See also John O. Calmore, *Critical Race Theory, Archie Shepp and Fire Music Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. Cal. L. Rev. 2129, 2215 (1992) ("Th[e] process whereby rights are defined by law, however, is substantially isolated from the very needs that generated those rights and the values they envisaged.").

or later we have to expose rights-based perspectives . . . for what they are: a poorly disguised way of preserving things just as they are."<sup>247</sup>

Although rights-talk can divert political vision and discourse from issues of group oppression by reinforcing individualism, for many, rights and rights-talk fills an important social need. As critical race scholar Patricia Williams has explained regarding African-Americans: "For the historically disempowered, the conferring of rights is symbolic of all of the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one's status from human body to social being."<sup>248</sup> Williams also explains that: "The vocabulary of rights speaks to an establishment that values the guise of stability, and from whom social change for the better must come (whether it is given, taken, or smuggled)."<sup>249</sup> Furthermore, historically, the assertion of needs, in addition to the assertion of rights, or in place of the assertion of rights, as advocated by critical legal studies scholars, has been unsuccessful for disenfranchised groups in our society. Again, Williams notes: "For blacks, describing needs has been a dismal failure as political activity. . . . The history of our need is certainly moving enough to have been called poetry, oratory and epic entertainment — but it has never been treated by white institutions as a statement of political priority."<sup>250</sup> As a result of these observations, critical race theorists, as well as other scholars of color, have encouraged the fight for rights. Rights, they have found, serve a dual purpose. Rights "facilitate our access to a variety of legal norms and enforcement mechanisms by which we try to indicate . . . important claims."<sup>251</sup> Rights rhetoric and ideology are also useful "to mobilize support for a particular agenda."<sup>252</sup> As John Calmore observes: "Until the subjugated group feels a sense of moral outrage, the group will almost certainly fail to resist the injustice that is oppressing it."<sup>253</sup> Hence, although rights-talk can be liberating as well as alienating for the disenfranchised,<sup>254</sup> the enhancement of rights' liberatory potential is at the heart of critical race theory. Many feminists have agreed with Williams, Calmore, and other critical race theorists on these points, asserting that rights and rights-talk have pos-

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247. RAYMOND, *supra* note 15, at 191 (quoting Sherene Razack, *Wrong Rights: Feminism Applied to Law*, 10 LE BULLETIN / NEWSLETTER, INSTITUT SIMONE DE BEAUVOIR 13 (1990)).

248. PATRICIA J. WILLIAMS, *ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 153 (1991). As Raymond notes, the movement from body to social being is also relevant in women's struggle for reproductive justice. See RAYMOND, *supra* note 15, at 192.

249. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 410 (1987).

250. *Id.* at 412.

251. Calmore, *supra* note 246, at 2211.

252. *Id.*

253. *Id.* (footnote omitted).

254. See Roberts, *supra* note 153, at 591.



itive value. Elizabeth M. Schneider has noted that critical legal theorists as well as feminist theorists opposed to rights-talk "see only the limits of rights, and fail to appreciate the dual possibilities of rights discourse. . . . [Rights discourse] can help to affirm human values, enhance political growth, and assist in the development of collective identity."<sup>255</sup> For example, rights have historically helped to move the nation's thinking and actions along regarding some matters of civil rights and racial justice. Rights have also empowered women as a social group by giving some women power, although limited, over whether and when they choose motherhood.

Even in light of the criticism placed on the value of rights in our society, rights and rights discourse have been, and will continue to be, useful to disenfranchised groups in our struggle for a just society. Rights-talk speaks to the interpretive community. It speaks in the language of those who hold power.<sup>256</sup> In order for any dissenting view to be seriously considered in legal discourse, those in control must understand the claims of the dispossessed and take those claims seriously. Nevertheless, individual rights are the "tools of a racist patriarchy," to use Audre Lorde's metaphor, and "will never dismantle the master's house."<sup>257</sup> While rights discourse, as currently framed by liberalism, permits reform, it will never allow the destruction of patriarchy and hence will never allow the radical changes needed to truly transform women's social and political status.

A. *Another Way to Think about Rights: Transforming Feminist Consciousness*

Feminism must mean something more than liberalism for women. Feminism becomes impoverished liberalism if its only meaning is "anything goes."

When a woman's right to do whatever she wants to her body is valorized as feminism, feminism is stripped of its collective content and becomes little more than an individual woman's ability to adopt herself to the bourgeois image of the self-centered man.<sup>258</sup>

Rights, too, become meaningless when they are not used as a tool to advance social justice. Rights, as we have seen in various civil rights contexts, can assist in the diminution of subordination. But rights and rights rhetoric can only be useful if they are not separated from issues of social justice and other ethical concerns. Therefore, in order to ethically support rights in the reproductive arena, feminists must

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255. Schneider, *Dialectic of Rights and Politics*, *supra* note 200, at 597-98.

256. Cf. Carol Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 84-85, 88 (1985) (common law theory of possession gives preference to those who articulate their intentions in a specific vocabulary and in a structure that is approved of and understood by those in power).

257. Audre Lorde, *The Masters Tools will Never Dismantle the Master's House*, in *SISTER OUTSIDER* 110-13 (1984).

258. RAYMOND, *supra* note 15, at 194.

seek to ensure that the rights sought do not create new forms of subordination for women of any race or class, or for members of other subordinated groups.<sup>259</sup> Feminism must consider whether the right to choose abortion, as it is currently framed by liberalism, increases women's reproductive freedom or increases the exploitation of women's reproductive capacities. It must consider the ways in which reproductive technologies, like sex-selective abortion, will affect the value or status of women in this gender-based society. Even many feminists who have argued against the legal regulation of sex-selective abortion have recognized that the principle of freedom of choice must be secondary to the principles of social fairness and equal protection if women's subordination is to be reduced or eradicated.<sup>260</sup> There must be a point at which the rights of individual women impinge so strongly on women as a social group that social or legal regulation is required.<sup>261</sup> Therefore, if rights-talk is to be a useful tool of feminist discourse in this area, freedom of choice must be weighed against the commitment to ending subordination.<sup>262</sup> In the final analysis, rights discourse must include an understanding of the historical and contemporary injustices towards women, as well as an understanding of women's social training in patriarchy which often requires women to collude with patriarchy to their own disadvantage.

For example, when considering issues of substantive justice and their connection to ethical considerations, we must consider whether rights-talk fully considers the social, economic and political contexts in which women make "choices" concerning the abortion of gendered (female) fetuses. In bringing attention to the context of these choices, I am not arguing that women cannot make moral choices under conditions of oppression. Women, like other subordinated groups, are always forced into double-bind choices: "situations in which options are reduced to a very few and all of them expose one to penalty, censure or deprivation."<sup>263</sup>

In the context of sex-selective abortion, women are forced to make double-bind choices. The choices for a woman, once she knows the sex of her female fetus, are few. A woman can choose to abort the female fetus because of its sex for any of several reasons. There may be financial pressures for her to produce male children. She may con-

259. Cf. Matsuda, *supra* note 105, at 1771.

260. See, e.g., Powledge, *supra* note 71; Roberta Steinbacher & Helen B. Holmes, *Sex Choice: Survival and Sisterhood*, in MAN-MADE WOMEN, *supra* note 25, at 52, 61.

261. See Rowland, *supra* note 25, at 84.

262. Several feminist and critical race scholars have stressed the importance of an anti-subordination principle in the quest for equality, and in their critique of liberal rights-talk. See, e.g., MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 110, at 215-34; Mari J. Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988); Ruth Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986).

263. Marilyn Frye, *Oppression*, in THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 1, 2 (1983).

sider the cultural denigration of women and girls; she knows that her daughter's life will be difficult as a woman because of the social, economic, and political obstacles under patriarchy. Or she may have her own preference for male children, which is also culturally produced.<sup>264</sup> If the woman chooses not to abort the female fetus, she may face, at the very least, the disappointment and ridicule of her family, especially if she doesn't have any male children already. She may also face pressure to have additional children so that perhaps she will be "lucky enough" to have a boy. In some circumstances, the woman may face death or divorce; her daughter may face a life of discriminatory treatment in education and employment, as well as discrimination in access to health care and nutrition.

On the other hand, the choices for a woman, once she knows the sex of her male fetus, are similarly constrained. A woman who elects to abort the male fetus because of its sex, based on her desire to raise female children, may be viewed with scorn by her partner and her family. She may be viewed as foolish and imprudent under the best circumstances. Under the worst circumstances, she may face divorce or death. If she decides not to have or raise male children, as a method of non-participation in her own oppression, she challenges patriarchal political and social institutions. Her refusal to support patriarchy by having male children can be understood as a form of the pragmatic social criticism to which Cornel West refers.<sup>265</sup> The woman who aborts a male fetus because of its gender may indeed be committing a revolutionary act.<sup>266</sup> But like the decision not to abort a female fetus, the decision to abort a male fetus may have dire social consequences for the pregnant woman.

Being in this double-bind means that the choices of a pregnant woman with an engendered fetus are restrained and conditioned by the tenets of patriarchy which devalue the lives of women and girls. The patriarchal values at work here are "not accidental or occasional and hence avoidable, but are systematically related to each other in such a way as to catch one (ie. woman) between and among them and restrict or penalize motion in any direction."<sup>267</sup> Therefore, I am not asserting that women are *incapable* of making positive choices within the contexts of powerlessness and vulnerability. Women are forced to make double-bind choices all of the time. However, where women's lives are so devalued by society, how much value do those choices have when made from a position of subordination and powerlessness? How much value do those choices have when they may ultimately increase

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264. *Id.* at 14 ("[m]any of the restrictions and limitations we live with are more or less internalized and self-monitored, and are part of our adaptation to the requirements and expectations imposed by the needs and tastes and tyrannies of others."). Cf. RAYMOND, *supra* note 15, at 99, 100.

265. See *supra* note 113.

266. *Id.*

267. FRYE, *supra* note 263, at 4.

the subordination and vulnerability of women? In other words, by valuing "choice" in this context, do we minimize or devalue the discrimination and powerlessness that women face under patriarchal systems? Catharine MacKinnon, in explaining why sex-selective abortion should not be permitted in the context of patriarchy, has written:

[I]n a context of mass abortions of female fetuses, the pressures on women to destroy potential female offspring are tremendous and oppressive unless restrictions exist. While under conditions of sex inequality monitoring women's reasons for deciding to abort is worrying, the decision is not a free one, even absent governmental intervention, where a male life is valued and a female life is not.<sup>268</sup>

I believe that the importance of this context is what Cornel West is referring to when he talks about the necessity of prophetic pragmatism and pragmatism as political theory.<sup>269</sup>

Many reproductive rights, such as the right to buy and use contraception and the right to choose abortion, gave women with economic resources power and control over their lives. These rights allowed women to choose whether or when to have children. Women with financial resources no longer had to continue unplanned pregnancies or have back-alley abortions.<sup>270</sup> Sex-selective abortion is different because its consequences do not lie in the dismantling of patriarchal domination. We have seen that the overwhelming majority of women who make choices regarding sex-selective abortion make the choice to destroy the female fetus. Thus, while abortion gives *women* control over whether or when to have children, sex-selective abortion gives *men* (husbands and families)<sup>271</sup> greater influence over women's reproduction and the sexual composition of future generations. Sex-selective abortion also increases the possibilities of expanded discrimination of women based on gender.<sup>272</sup> Instead of eliminating the subordination of women and girls, sex-selective abortion increases women's social, economic, political and reproductive exploitation. It makes women vulnerable to a new set of pressures by giving prospective moral status to the fetus she carries.

The current use of sex-selective abortion is based on patterns of male preference and female subordination. In viewing the use of the technology from a radical feminist and modified pragmatic position, support for the selective abortion of female fetuses is impossible. Sex-

268. MacKinnon, *Reflections on Sex Equality Under Law*, *supra* note 200, at 1317 n.157.

269. West, *The Limits of Neopragmatism*, *supra* note 92; and WEST, *THE AMERICAN EVASION OF PHILOSOPHY*, *supra* note 106.

270. Because of the severe limitations on federal funding for abortion, many poor women have been forced to continue unplanned pregnancies or have abortions performed by unlicensed providers. See *Harris v. McRae*, 448 U.S. 297 (1980) (Hyde Amendment, which restricts federal funding for most abortions for poor women, held constitutional).

271. LERNER, *supra* note 49 (The nuclear family is an institution of patriarchy).

272. See *supra* pp. 173-75 and accompanying notes.

selective abortion, if available on a large scale, would be used to victimize women and girls both individually and as a social group, serving to disempower women and continue their subordination. Sex-selective abortion used under patriarchy strengthens patriarchy. This result is in direct opposition to the tenets and goals of feminism and modified pragmatism used as political theory.

### B. *The Possibility of a Feminist Solution*

The question remains: Do we prohibit the practice of the selective abortion of female fetuses in light of the precariousness of women's reproductive rights?

As previously noted, constitutional abortion jurisprudence would seem to allow the State to restrict abortion for the purpose of sex-selection. Under the constitutional test articulated in *Casey*, a state regulation burdening the abortion decision would be unconstitutional only if the regulation were unduly burdensome.<sup>273</sup> In other words, the State may not severely limit access to legal abortion. Under the *Casey* rationale, the state could "express (its) profound respect for the life of the (fetus),"<sup>274</sup> encourage childbirth over abortion,<sup>275</sup> or even express its commitment to sex equality and prohibit the selective abortion of female fetuses.<sup>276</sup> Under the rationales found in *Casey* and *Rust*, the state might be able to constitutionally limit a pregnant woman's access to the sex identification information of her fetus, if such a regulation is designed to persuade women to choose childbirth over abortion,<sup>277</sup> or designed to foster the non-subordination of women and girls, and if the regulation does not have a severe impact on the availability of legal abortion.<sup>278</sup> In either of the above scenarios, the woman seeking an abortion for the purpose of sex-selection would still have access to legal abortion; she would only be unable to factor the sex of her fetus into the decision.<sup>279</sup>

Despite the possible constitutionality of a prohibition of sex-selective abortion, feminist scholars have refused to support law reform measures which would restrict a woman's right to choose abortion on any grounds, because such restrictions would be anathema to the goals and aspirations of the women's movement.<sup>280</sup> Many feminist scholars who have approached the problem of sex-selective abortion have argued that legal prohibition of sex-selective abortion is politi-

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273. *Casey*, 112 S. Ct. at 2820.

274. *Id.* at 2821.

275. *Id.* at 2824.

276. Note, however, that the courts have been reluctant to use fundamental rights to promote equality. See, e.g., *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

277. *Casey*, 112 S. Ct. at 2824.

278. See *supra* pp. 190-201 for a discussion of *Casey*.

279. Cf. Schedler, *supra* note 10, at 328-30.

280. See, e.g., Powledge, *supra* note 13; Renteln, *supra* note 30, at 421.

cally imprudent, given the precarious nature of women's reproductive rights in this country and around the globe. Many of these scholars believe that if it becomes legally permissible or required for the state or the medical establishment to question women's judgment regarding the abortion decision, the very foundation of women's reproductive freedom will be shattered, and women will be subject to increased scrutiny over all reproductive decisions, furthering the subordination of women.<sup>281</sup> Thus, they argue, any restrictions on abortion are insupportable in the present context. In addition, many scholars concerned about the impact of the selective abortion of female fetuses on the status of women have argued against legal prohibition of the abortion and in favor of informal social deterrence. Some of these scholars have advocated deterrence by encouraging doctors and genetic counselors to intentionally withhold information regarding fetal sex except in the context of sex-linked diseases.<sup>282</sup> Others have suggested a program of social deterrence that would eliminate funding for sex-selection research.<sup>283</sup> Still other feminist scholars have suggested that the proper way to combat the problem of sex-selection is through consciousness-raising.<sup>284</sup>

While some forms of social deterrence and consciousness-raising may be important components of a feminist and modified pragmatic approach to the problem of the selective abortion of female fetuses, there has been little feminist exploration regarding why and whether legal control of the knowledge of fetal sex is appropriate.<sup>285</sup> Dorothy Roberts is one scholar who has considered restrictions on the access to information in the abortion context. With regard to the "gag" rule at

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281. Wertz & Fletcher, *supra* note 35, at 26.

282. See, e.g., John C. Fletcher & Dorothy C. Wertz, *Genetics and the Law: Ethic, Law, and Medical Genetics: After the Human Genome is Mapped*, 39 EMORY L.J. 747, 789-90 (1990) (law prohibiting abortion for sex-selection appropriate only where there is evidence of abuse; where no abuse, legal prohibition may set harmful precedents restricting abortion choices); Wertz & Fletcher, *supra* note 35.

283. Powledge, *supra* note 13, at 208-09.

284. See, e.g., Renteln, *supra* note 30, at 422. Consciousness-raising, "the collective critical reconstitution of the meaning of women's social experience, as women live through it," has been an important feminist political tool in that it has helped women to name their oppression and develop tools to fight their oppression within themselves (internalized oppression), as well as against their oppressors. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 110, at 83; see Schneider, *The Dialectic of Rights and Politics*, *supra* note 200, at 602-03. In this way, consciousness-raising is both educative and a form of political practice and resistance. Therefore it seems quite clear that consciousness-raising can be an important tool in the development of feminist discourse in the area of sex-selective abortion of female fetuses. As Alison Renteln has noted, "it is necessary to challenge those who consciously endorse the tenets and goals of the women's movement but who still exhibit the desire for firstborn male; why is this so? . . . Only through consciousness raising will women come to value themselves and their daughters." Renteln, *supra* note 30, at 422.

285. Schedler argues that a prohibition on access to fetal sex information is constitutionally permissible. See Schedler, *supra* note 10, at 311-28.

issue in *Rust v. Sullivan*,<sup>286</sup> which prohibited doctors and others working at federally funded health care clinics from giving pregnant women information about abortion and abortion services, Roberts notes that the regulations at issue banned information that was vital to poor women's "well-being, autonomy, and participation in the community."<sup>287</sup> Roberts concludes that by intentionally fostering ignorance among poor black women, these regulations "are an example of the control of knowledge that helps to maintain the existing structure of racial domination."<sup>288</sup> The denial of reproductive freedom has been a principal means of subjugating Black women in the United States.<sup>289</sup> The denial of information about abortion denied poor Black women the knowledge necessary to control their lives and hence was part of that continued subordination and subjugation.

Whether and how Roberts' analysis of the control of knowledge bears upon the problem of sex-selective abortion is not self-evident. Would the denial of information regarding fetal sex deny women the knowledge necessary to control their lives? Without access to fetal sex information, women will still be able to access legal abortion. Additionally, denying women the opportunity to choose male children has not historically been a means of gender oppression, but just the opposite: Son preference has been one method of gender oppression in patriarchal systems. Limiting sex identification information might in fact circumscribe some of the oppression faced by women. Unlike the restriction of information at issue in *Rust*, which supported existing social arrangements,<sup>290</sup> a restriction on access to fetal sex information may permit the oppressed to take steps to change their status.<sup>291</sup> Again, such a restriction would act as a social criticism of a system where the institutionalization of misogyny is so great that we must act in such a radical manner. A restriction on fetal sex information challenges the social and political arrangements that have harmed women of all races in the United States.

### CONCLUSION

The issue of abortion is often framed as a feminist issue of choice and respect for women's bodily and moral integrity. Many feminists have opposed the legal regulation of sex-selective abortion on these terms without sufficient regard for negative sociological predictions, the meaning for women of the abortion of almost exclusively female fetuses, and the possibility that rights are limiting as a liberatory practice. Individual rights in the reproductive context are often devoid of

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286. See discussion regarding *Rust v. Sullivan*, *supra* pp. 194-96.

287. Roberts, *supra* note 153, at 616.

288. *Id.*

289. *Id.* at 641; see also DAVIS, *supra* note 24.

290. Roberts, *supra* note 153, at 618.

291. See *id.* at 617.

substantive justice. The effects of an individual woman's right to use sex-selective abortion goes beyond herself and can augment the oppression that she and other women ultimately face. Moving away from a liberal conception of rights and insisting that rights theory and practice embrace substantive justice and other ethical concerns allows a shift from the conception of reproductive decisions as based on individual choice to a practice of rights that sufficiently considers group harm, and permits a critique of current social arrangements that encourage and sometimes require women to actively participate in their own annihilation. The resulting social outcomes are no longer subordinated to "process neutrality" but rather informed by substantive justice. As a result, the importance of individual choice or preference to the question of the permissibility of sex-selective abortion becomes secondary to the issue of substantive justice for women as a social group. Because the current use of sex-selective abortion is based on patterns of male preference and female subordination, and because of the deleterious social consequences of sex-selective abortion for women, a restriction on the availability of fetal sex information is warranted under this modified pragmatic and feminist framework. The right to choose does not necessarily facilitate liberty; choosing justice does.





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