Chapter 4

FOETICIDE DISASTER: AMERICAN RESPONSE
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It was one of the most important issue on which the last presidential
election in the US was fought. It is an issue that has virtually divided the US
into two camps those for and those against the right to abortion. Heated
debates, massive demonstrations and often open clashes between the pro-
 lifers and those upholding the right to abortion, have rocked America. Also
the two U.S. Supreme Court judgments are at the heart of this controversy.

The United States Supreme Court has dealt a backhanded blow to the
rights of woman, in a leading 5 to 4 decision on the abortion case of Webster
v Reproductive Health Services. Although the court did not choose to
explicitly overturn Roe v Wade, the case which recognized a woman’s
constitutional right to decide whether or not to terminate her pregnancy;
Webster paves the way for states to impose significant and binding
restrictions on the availability of abortions and even the availability of
information on abortions.

Chief Justice Rehnquist, who authored the Webster opinion, claims
only to have modified and narrowed the principle of Roe v Wade. From
perhaps a more realistic perspective, Justice Scalia’s concurring opinion
cortices his colleagues for not openly overruling Roe v Wade, since the
consequences of Webster are expected to peruse precisely such a result.
Justice Blackmun, the author of Roe v Wade, also acknowledged that the
court had in effect overturned, the 1973 ruling. In his Webster dissent,
Blackmun stated, for today, at least, the law of abortion remains undisturbed.
For today, the women of this nation still retain the liberty to control their
destinies. But the sings are evident and very ominous and a chill wind blows.

1 (410 US113 (1973)
To understand the damaging effects of Webster on a woman’s right to abortion in the United States, it is necessary to briefly review the judicial history of the abortion dilemma in America.

**Right to Privacy**

A woman’s constitutional right to terminate her pregnancy was first recognized in *Roe v Wade* in 1973. The court found this right to be rooted in the constitutional right to privacy. The right to privacy is not specifically enumerated in the Constitution, but is has been regained and protected as a fundamental right since 1891. It is encompassed within the concept of liberty guaranteed by the Fourteenth Amendment provision, that no state shall deprive any person of liberty without due process of law. The court also acknowledged earlier decisions which found the right to privacy to be supported by the First Amendment, the Fourth and Fifth Amendments, the penumbras of the Bill of Rights, and the Ninth Amendment provision that the enumeration of certain rights in the Constitution shall not be construed to deny or disparage other rights trained by the people.

After a fairly lengthy review of the history of the right of privacy, the history of the abortion dilemma and the contemporaneous medical and legal philosophies concerning abortion, the *Roe* court found the right to personal privacy to be broad enough to include the abortion decision.

Although the right privacy is fundamental and constitutionally protected, it is not absolute, it follows that the right to decide whether or not to terminate a pregnancy is also not absolute. Nevertheless, because the right is fundamental, any regulation which limits the right must meet certain constitutional standards. *First*, the state may limit that right only through regulations that can be justified by a “compelling state interest”. *Second*, the regulating legislation must be narrowly drawn and must express only the

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legitimate state interest at stake. Legislation which does not promote a "compelling state interest" or that is vague or too broad would therefore be struck down as unconstitutional.

‘Compelling’ Interest

In relation to the right to abortion, the court found that the state has two legitimate and important interests which are separate and distinct. One is to preserve and protect the health of the pregnant woman. The other is to protect the potential human life embodies in the foetus. Despite these interests being "legitimate and important", the state is nevertheless prohibited from regulating the fundamental right to abortion until the time when these interests become "compelling". The court determined that these interests grow as the pregnancy develops and at different points in time during the terms of the pregnancy, each interest becomes "compelling". The determination of when each interest becomes compelling was based upon the medical technology available at the time of the *Roe* decision. The court divided the term of a woman’s pregnancy into three segments, now commonly known as the "trimester analysis." During the first trimester, which is the first, twelve weeks following conception, the state has not compelling interest which would uphold any but the most minor regulations regarding abortion. At this stage, the responsibility for the abortion decision rests with the pregnant woman’s attending physician. The state’s interest in the material health of the pregnant woman becomes compelling at approximately the end of the first trimester. From this point on, the state may regulate the abortion procedure to the extent that the life and health of the woman and is normally drawn to that end.

The state’s interest in potential life becomes compelling at the point when the foetus reaches viability, approximately at the end of the second

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3 *Griswold v Connecticut* 381 US 479, 485 (1965)
4 (10 US at 162, 163)
trimester. This is when the foetus has the capability of surviving outside the woman’s womb. At such a time, the state can even prohibit the abortion, except when it is necessary to protect the life or health of the pregnant woman.

**Criticism of Roe**

The *Roe v Wade* decision has been controversial since the day it was handed down. Opponents claim that no support for the right to abortion can be found in the constitution. Attacks have been levied against the court for having judicially created abortion legislation, when the abortion issue should have been decided by either the state or the federal Congress. Both opponents and supporters of abortion have criticized the trimester analysis set forth in the decision because the delineation of when the state’s interest becomes compelling is blurred and less certain as medical technology advances. Until Webster, the court itself has seemed uncertain about the course it would follow in the abortion arena, for in the years since *Roe v Wade*, it has significantly weakened the practical effect of *Roe*, while theoretically reaffirming the constitutional principles which it recognized.

**Major Abortion Decisions**

In the 1977 decision of *Maher v Roe*, the Supreme Court upheld a Connecticut law which limited Medicaid funds for abortions for poor women, only those which were medically necessary. Denied public funds, poor women were financially prevented from obtaining an abortion unless their health required one. The court rationalized that the law denying public assistance did not place an additional obstacle in a poor woman’s path to an abortion. The state was allowed to decide not to provide public funds to facilitate abortions. The state was allowed to decide not to provide public funds to facilitate abortion, but the court said it would not allow a state to

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¹ 432 US 464 (1977)
place additional obstacles or impose additional restrictions. Besides those that were already in existence.

In *Poeker v Doe*\(^6\), the availability of abortions for poor women was further restricted by upholding a city ordinance which banned publicly funded hospital care for women who had abortions that were not medically necessary. The court counted that *Poeker* presented the same questions as *Maher*, and that governments had the ability to decide not to allocate funds for purposes they chose not to promote. Although decide on the same principals as *Maher*, the impact of *Poeker v Doe* was significantly greater. Not only were public funds no longer available, but now states could prevent women from spending their own money to have an abortion in a publicly financed hospital.

In *Colautti v Franklin*\(^7\), the court struck down a Pennsylvania statute which required doctors to determine whether a foetus was viable, before performing an abortion. If the foetus was viable or "may be viable", doctors were required to take steps to save the life of the foetus. The court held that neither the legislature nor the courts could proclaim any one of the elements entering into the ascertainment of viability as a single determinant, because the point of viability may differ with each pregnancy. The court also found the phrase "may be viable" to be unconstitutionally vague.

In *Harms v McRae*\(^8\) the court upheld the Hyde Amendment, cutting off federal Medicaid funds for all abortions except those necessary to save the woman's life. Again, this case follows the line and reasoning of *Maher v Doe* and *Poelker v Rae*.

A municipal ordinance containing a variety of obstacles to abortion was struck down in *City of Akron v Akron Center for Reproductive Health*\(^9\). One such obstacle was a hospitalization requirement for abortions during the

\(^6\) (US 519 1977)  
\(^7\) (439 US 379)  
\(^8\) (448 US 297) (1980)  
\(^9\) 462 US 416 (1983)
second teamster. The court found that the requirement imposed obstacles of increased cost and travel, which were not justified by the stage's interest in maternal health, and that there was not reasonable medical basis for the regulation.

The 1984 case of Thornburgh v American College of Obstetricians and Gynecologists is another decision which reaffirmed Roe v Wade. A statute which required the attending physician to recite creation information in all circumstance was struck down, because it came "close to being state medicine imposed upon the woman... and it officially structures the dialogue between the woman and her physician.”.

Trend of Restriction

From this brief of some of the major abortion decisions since Roe v Wade, it is apparent that the Supreme Court has constricted the availability of abortions, especially to poor women, by allowing the government to withhold public funds for abortions not medically necessary. Nevertheless, until Webster, court had upheld the principle of the trimester analysis outlined in Roe, reaffirming a woman's constitutional right to an abortion in the first trimester of pregnancy, a conditional right in the second trimester, restricted only by the state's interest in the maternal health of the pregnant woman, and no clear right in the last trimester because of the state's interest in the potential life of the foetus. Government regulation of abortion was allowed only so far as it was narrowly drawn to effect the state's "compelling interests.

Delivered on 3 July 1989, the Webster decision allows states to impose greater restrictions on the availability of abortion, although the opinion does not say precisely what regulations would be permissible. The decision abandons the trimester analysis, of Roe, referring to it as "unsound in

\[10 \text{(476 US 7477) (1984)}\]
principle and unworkable in practice.” The decision also allows state regulation of doctor-patient communication regarding abortion.

What Webster Upheld

Specifically, the court in Webster upheld a Missouri Statute which:

1. declares that “the life of each human being begin at conception”, prosecutable interest in life, health and well-being’.

2. required a physician to perform “such medical examinations and tests as are necessary to make a finding of the gestational age, weight and lung maturity of the unborn child, in determining viability of the foetus for woman who appear to be twenty weeks pregnant or more; and

3. prohibits public employees form “encouraging or counseling a woman to have an abortion not necessary to save her life”, and also bans the use of public funds and facilities for such “encouraging or counseling”,

In upholding the legislative declaration of when life begins, the court has given states the power to enact in law what is essentially a religious belief. There percussions of such legislation certainly affect a woman’s right to abortion, but may also affect the law of torts in relation to unborn children. Prior to Webster, the foetus had no “protectable interest” until it had reached viability. The future impact of this “preamble” to the Missouri statute is uncertain.

Repression of Webster

The medical testing requirement imposed on physicians before performing abortions on woman twenty weeks pregnant, is a significant deviation form the rights of woman during the second trimester is focused on the foetus, not the maternal health of the pregnant woman. This regulation places significant obstacles in the path of a woman desiring an abortion, including increased costs and forcing her to submit to additional medical examination. The regulation also intrudes into the physician-patient
relationship by controlling the manner by which the physician may determine viability.

Perhaps what is most astounding about the *Webster* decision is the prohibition on public employees from counseling or encouraging abortions not medically necessary. To not allow physicians to fully inform their patients of all the medical options available to them, not only appears to infringe upon the first Amendment right to free speech, but also compromises the physician's professional obligations to his patients. Furthermore, because of the life-defining preamble to this statute, physicians would also be prohibited from prescribing, counseling or encouraging the use of contraception such as IUDs and certain low dose birth control pills which act as abortifacients. The decision allows states to regulate what physicians and other health care providers, who are public employees, can actually say to their patient, and forces them to withhold complete medical advice.

Having found the Missouri statute to be constitutionally sound, the court has opened its doors to "many future challenges to a woman's right to abortion". Thirty one states have already declared their intentions to restrict abortions. At least fifteen states are ready to outlaw abortion if the court so allows. At this point in time a woman's right to abortion still exists, although it is obvious that states will be allowed to significantly restrict that right. How far state regulations will be allowed to interfere is uncertain, but clarification should be announced shortly, as the Supreme Court has already agreed to hear three more abortion cases this fall.

_Ayotte v. Planned Parenthood of Northern New England*¹¹, was a decision by the Supreme Court of the United States involving a facial challenge to New Hampshire's parental notification abortion law. The First

Circuit had ruled that the law was unconstitutional and an injunction against its enforcement was proper.

The Supreme Court vacated this judgment and remanded the case, but avoided a substantive ruling on the challenged law or a reconsideration of prior Supreme Court abortion precedent. Instead, the Court only addressed the issue of remedy, holding that invalidating a statute in its entirety "is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief."

The opinion was delivered by Justice Sandra Day O'Connor, who had been significantly responsible for developing the Court's recent abortion jurisprudence. This decision was O'Connor's last opinion on the Court before her retirement on January 31, 2006.

In its ruling the Court found that the following three propositions were established:

1. "States have the right to require parental involvement when a minor considers terminating her pregnancy."

2. "A State may not restrict access to abortions that are 'necessary, in appropriate medical judgment for preservation of the life or health of the mother.' Planned Parenthood of Southeastern Pa. v. Casey. (plurality opinion)."

3. "New Hampshire has not taken issue with the case's factual basis: In a very small percentage of cases, pregnant minors need immediate abortions to avert serious and often irreversible damage to their health. New Hampshire has conceded that, under this Court's cases, it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks."

The Court considered under what circumstances federal courts can enjoin enforcement of abortion laws if in some cases such laws would have

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12 O'Connor was one of the three attributed authors of the plurality opinion in Planned Parenthood v. Casey, 505 U.S. 833 (1992), that adopted the "undue burden" standard for reviewing whether abortion regulations were too stringent, a standard she herself had previously formulated in her concurring opinion in Webster v. Reproductive Health Services, 492 U.S. 490 (1989).
the effect of regulating abortion more strictly than is consistent with Supreme Court precedent, as the New Hampshire law did in some circumstances.

The Court ruled that in such circumstances facial invalidation of a statute would be inappropriate if the statute could be narrowed sufficiently by judicial interpretation. It raised the question of what the appropriate judicial remedy would be if a statute's enforcement would be unconstitutional in medical emergencies. The court ruled that "invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief."

_Gonzales v. Carhart_, 13 is a United States Supreme Court case which upheld the Partial-Birth Abortion Ban Act of 2003. The case reached the high court after U.S. Attorney General Alberto Gonzales appealed a ruling of the United States Court of Appeals for the Eighth Circuit in favor of LeRoy Carhart that struck down the Partial-Birth Abortion Ban Act. Also before the Supreme Court was the consolidated appeal of _Gonzales v. Planned Parenthood_ from the United States Court of Appeals for the Ninth Circuit, which had struck down the Partial-Birth Abortion Ban Act.

The Supreme Court's decision, handed down on April 18, 2007, upheld the federal ban and held that it did not impose an undue burden on the due process right of women to obtain an abortion, "under precedents we here assume to be controlling," such as the Court's prior decisions in _Roe v. Wade_ and _Planned Parenthood v. Casey_. This case distinguished but did not reverse _Stenberg v. Carhart_ (2000), in which the Court dealt with similar issues.

Justice Anthony Kennedy wrote for the Court that the respondents had failed to show that Congress lacked power to ban this abortion procedure.

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Chief Justice John Roberts along with Justices Samuel Alito, Clarence Thomas, and Antonin Scalia agreed with the Court's judgment, and they also joined Kennedy's opinion.

The Court left the door open for as-applied challenges, citing its recent precedent in Ayotte v. Planned Parenthood of New England. According to Washington Post reporter Benjamin Wittes, "The Court majority, following the path it sketched out last year in the New Hampshire case, decided to let the law stand as a facial matter and let the parties fight later about what, if any, applications need to be blocked."

The Court decided to "assume ... for the purposes of this opinion" the principles of Roe v. Wade and Planned Parenthood v. Casey. The Court then proceeded to apply those "principles accepted as controlling here."

The Court said that the lower courts had repudiated a central premise of Casey — that the state has an interest in preserving fetal life — and the Court held that the ban was narrowly tailored to address this interest. Relying deferentially on Congress's findings that this intact dilation and extraction procedure is never needed to protect the health of a pregnant woman. Kennedy wrote that a health exception was therefore unnecessary. And, where medical testimony disputed Congress's findings, Congress is still entitled to regulate in an area where the medical community has not reached a "consensus."

The majority opinion held that "ethical and moral concerns", including an interest in fetal life, represented "substantial" state interests which (assuming they do not impose an "undue" burden) could be a basis for legislation at all times during pregnancy, not just after viability.

The majority opinion in Gonzales v. Carhart did not discuss the constitutional rationale of the Court's prior abortion cases (i.e. "due process"). However, the majority opinion disagreed with the Eighth Circuit that the
federal statute conflicted with "the Due Process Clause of the Fifth Amendment [which] is textually identical to the Due Process Clause of the Fourteenth Amendment."

_McCorvey v. Hill_" was a case in which the principal original litigant in _Roe v. Wade_, Norma McCorvey, also known as 'Jane Roe', requested the overturning of Roe. The U.S. Court of Appeals for the Fifth Circuit ruled that McCorvey could not do this; the United States Supreme Court denied certiorari on February 22, 2005, rendering the opinion of the Fifth Circuit final. The opinion for the Fifth Circuit was written by Judge Edith Jones, who also filed a concurrence to her opinion for the court. _McCorvey_'s case

_McCorvey_ - who, since _Roe_, had become pro-life - sought to have _Roe_ overturned based on her rights as an original litigant. Federal Rules of Civil Procedure permit a litigant to file for "relief from judgment", under defined circumstances. However, the same rule requires that "[t]he motion shall be made within a reasonable time"; the U.S. District Court for the Northern District of Texas ruled that the time elapsed since _Roe_ (in excess of thirty years) was too great for _McCorvey_ to now file.

The Court of Appeals for the Fifth Circuit upheld the ruling of the district court. Judge Jones, writing for a three judge panel, noted that, of the objections brought by _McCorvey_ on appeal, none held up; the district court acted properly.

Judge Jones concluded:

"The perverse result of the Court's having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, is that the facts no longer matter...That the Court's constitutional decision making [sic] leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer not only about the

14 385 F.3d 846 (5th Cir. 2004)[1]
abortion decisions, but about a number of other areas in which the Court unhesitatingly steps into the realm of social policy under the guise of constitutional adjudication."15

American Trends of Sex-Selections

The practice of sex-selective abortion to permit parents to destroy unwanted female fetuses has become so wide-spread in the modern world that it is disfiguring the profile of entire countries--transforming (and indeed deforming) the whole human species.

Even in the United States, the boy-girl sex ratio at birth for Asian-Americans is now several unnatural percentage points above the national average. So sex-selective abortion is taking place under America's nose.

According to a recent study published by the National Academies of Science, is already has. Looking at data from the 2000 U.S Census. researchers noticed a strange phenomenon. The U.S.-born children of Chinese, Korean, and Asian Indian parents tended to be male. The researchers, Douglas Almond and Lena Edlund, called this "son-biased sex ratios."16

Taking their study a step further, they considered the effect of birth order. First-born children of Asians showed normal sex ratios at birth. roughly 106 girls for every 100 boys. If the first child was a son. the sex ratio of the second-born children was also normal.

But what happened if the first child was a girl? The second child tended to be a boy. Almond and Edlund found that "This male bias is particularly evident for third children: If there was no previous son, sons

15 Ibid
16 http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/04/06/choosing_to_eliminate_unwanted_daughters/
outnumbered daughters by 50%." That means that, for every 150 boys, there were only 100 hundred surviving girls. The rest had been eliminated.17

The authors quite rightly interpret this "deviation in favor of sons" the only way they possibly could, namely, as "evidence of sex selection, most likely at the prenatal stage." In other words, as early as a decade ago, Asian-American communities in the U.S. were already practicing sex-selective abortion.

In the United States and a few other prosperous, technologically advanced nations, methods of sex selection that are less intrusive or more reliable than older practices are now coming into use. Unlike prenatal testing, these procedures generally are applied either before an embryo is implanted in a woman’s body, or before an egg is fertilized. They do not require aborting a fetus of the “wrong” sex.

These pre-pregnancy sex selection methods are being rapidly commercialized — not, as before, with medical claims, but as a means of satisfying parental desires. For the assisted reproduction industry, social sex selection may be a business path toward a vastly expanded market. People who have no infertility or medical problems, but who can afford expensive out-of-pocket procedures, are an enticing new target.

For the first time, some fertility clinics are openly advertising sex selection for social reasons. Several times each month, for example, the New York Times’ Sunday Styles section carries an ad from the Virginia-based Genetics & IVF (in-vitro fertilization) Institute, touting its patented sperm sorting method. Beside a smiling baby, its boldface headline asks, “Do You Want To Choose the Gender Of Your Next Baby?”

Recent trends in consumer culture may warm prospective parents to such offers. We have become increasingly accepting of — if not enthusiastic

17 Ibid
about — “enhancements” of appearance (think face-lifts, collagen and Botox injections, and surgery to reshape women’s feet for stiletto heels) and adjustments of behavior (anti-depressants, Viagra, and the like). These drugs and procedures were initially developed for therapeutic uses, but are now being marketed and normalized in disturbing ways. When considering questions of right and wrong, of liberty and justice, it is well to remember that the state is not the only coercive force we encounter.

This constellation of technological, economic, cultural, and ideological developments has revived the issue of sex selection, relatively dormant for more than a decade. The concerns that have always accompanied sex selection debates are being reassessed and updated. These include the prospect that selection could reinforce misogyny, sexism, and gender stereotypes; undermine the well-being of children by treating them as commodities and subjecting them to excessive parental expectations or disappointment; skew sex ratios in local populations; further the commercialization of reproduction; and open the door to high-tech consumer eugenics.

**Sex Selection Debates in the United States**

Sex selection is not a new issue for U.S. feminists. In the 1980s and early 1990s, it was widely discussed and debated, especially by feminist bioethicists. This was the period when choosing a boy or girl was accomplished by undergoing prenatal diagnostic tests to determine the sex of a fetus, and then terminating the pregnancy if the fetus was of the undesired sex.

Ultrasound scanning and amniocentesis, which had been developed during the 1970s to detect, and usually to abort, fetuses with Down’s syndrome and other conditions, were on their way to becoming routine in wealthier parts of the world. Soon they were also being openly promoted as
tools for enabling sex-selective abortions in South and East Asian countries where the cultural preference for sons is pervasive. Opposition in these countries, especially strong in India, mounted in the early 1980s and remains vibrant today.

Throughout the 1980s and early 1990s, feminists and others in the U.S. who addressed the issue of sex selection were — almost universally — deeply uneasy about it. Not all opposed it equally, but none were enthusiastic or even supportive.

Some, like Helen Bequaert Holmes, pointed out that the deliberate selection of the traits of future generations is a form of eugenics. Many deplored the practice as a symptom of a sexist society, in effect if not always in intent. In a book-length treatment of these concerns, published in 1985, philosopher Mary Anne Warren asked whether the practice should be considered an aspect of what she dubbed ‘gendercide’ — “no less a moral atrocity than genocide” — and published an entire book on the topic in 1985.

But there was also broad consensus among feminists that any effort to limit sex-selective abortions, especially in the U.S., would threaten reproductive rights. Warren, despite her misgivings, argued that choosing the sex of one’s child was sexist only if its intent or consequence was discrimination against women. She concluded that “there is great danger that the legal prohibition of sex selection would endanger other aspects of women’s reproductive freedom,” and considered even moral suasion against the practice to be unwarranted and counterproductive.

By the mid-1990s, the discussion had reached an impasse. No one liked sex selection, but few were willing to actively oppose it. Sex selection

18 Humber and Almeder, eds. “Sex Preselection: Eugenics for Everyone?” Biomedical Ethics Reviews, 1985
largely faded as an issue of concern for U.S. feminists, especially outside the circles of an increasingly professionalized bioethics discourse.

Favouring Sex Selection

The unfettered “right to choose” is a progressive value, we are instructed by the abortion lobby—one indispensable to the empowerment of women. But a new study in the Proceedings to the National Academy of Sciences (PNAS) prompts an awkward question—how exactly are American women empowered when abortion is deployed to prevent the existence of American girls? Population experts have documented for years the use of abortion for sex selection in regions of the world where sons are more highly prized than daughters.

The new technologies of sex selection (and, perhaps, their potential profits) have prompted some bioethicists to argue in favor of allowing parents to choose their offspring’s sex. As in past debates on other assisted reproductive procedures, they frame their advocacy in terms of “choice,” “liberty,” and “rights.” John Robertson, a lawyer and bioethicist close to the fertility industry, is one of the leading proponents of this approach. In a lead article of the winter 2001 issue of American Journal of Bioethics, Robertson wrote, “The risk that exercising rights of procreative liberty would hurt offspring or women — or contribute to sexism generally — is too speculative and uncertain to justify infringement of those rights.”

Robertson’s claims are based on a world view that gives great weight to individual preferences and liberties, and little to social justice and the common good. As political scientist Diane Paul writes in a commentary on Robertson’s recent defense of “preconception gender selection.” “If you

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20 Jeff Jacoby, “Choosing to eliminate unwanted daughters”, Global Columnist, April 6, 2008.
begin with libertarian premises, you will inevitably end up having to accept uses of reprogenetic technology that are even more worrisome" than sex selection.22

Definitions of procreative liberty like Robertson’s are expansive — indeed, they often seem limitless. They are incapable, for example, of making a distinction between terminating an unwanted pregnancy — that is, deciding whether and when to bear children — and selecting the qualities and traits of a future child. However, sex selection and abortion are different matters, especially when a pregnancy is not involved.

Since new sex selection technologies are used before pregnancy, political discussions and policy initiatives which address them need not directly affect women’s rights or access to abortion. In fact, many countries already prohibit “non-medical” sex selection, with no adverse impact on the availability or legality of abortion. One such nation is the United Kingdom, where, in November, 2003, after a comprehensive reconsideration of the issue, their Human Fertilization and Embryology Authority recommended that sex selection for social reasons continue to be prohibited, and that the Authority’s purview be expanded to include regulation of sperm sorting technologies as well as other sex selection procedures. Even in the United States, where abortion rights are imminently threatened, the emergence of pre-pregnancy technologies should make it far easier than before, when sex determination meant selective abortion, to consider sex selection apart from abortion politics.

When Mary Anne Warren considered sex selection in 1985, she summarily dismissed concerns of its contribution to a new eugenics as

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“implausible” on the grounds that “there is at present no highly powerful interest group which is committed to the development and use of immoral forms of human genetic engineering.”

However, less than two decades later, a disturbing number of highly powerful figures are in fact committed to the development and use of a form of human genetic engineering that huge majorities here and abroad consider immoral — inheritable genetic modification, or manipulating the genes passed on to our children. These scientists, bioethicists, biotech entrepreneurs, and libertarians are actively advocating a new market-based, high-tech eugenics.

Princeton University molecular biologist Lee Silver, for example, positively anticipates the emergence of genetic castes and human sub-species. “The GenRich class and the Natural class will become . . . entirely separate species,” he writes, “with no ability to cross-breed, and with as much romantic interest in each other as a current human would have for a chimpanzee.” Nobel laureate James Watson promotes redesigning the genes of our children with statements such as, “People say it would be terrible if we made all girls pretty. I think it would be great.”

Silver’s and Watson’s remarks (and all too many similar ones) refer to technologies that are being used routinely in lab animals, but have not been applied to human beings. However, pre-implantation genetic diagnosis (PGD), the most common new sex selection method, is very much related to these technologies. It was introduced in 1990 as a way to identify and discard embryos affected by serious genetic conditions, and thus prevent the birth of children with particular traits. Though PGD is touted as a medical tool,

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disability advocates have pointed out that many people who have the conditions it targets live full and satisfying lives. PGD, they say, is already a eugenic technology.

In recent years, PGD has begun to be used to screen for more and more genetic attributes — late-onset conditions, tissue types suitable for matching those of a future child’s sick sibling, and sex. Advocacy of even greater permissiveness in the use of PGD is beginning to pepper the professional literature. Bioethicist Edgar Dahl recently published an essay arguing that if a “safe and reliable genetic test” for sexual orientation were to become available, “parents should clearly be allowed” to use it, as long as they are permitted to select for homosexual as well as heterosexual children. Bioethicist Julian Savulescu even baits disability advocates with the argument that we “should allow people deliberately to create disabled children.”

Concern about consumer eugenics and the commodification of children looms large for critics of social sex selection. As part of a recent campaign aimed at the Human Fertilization and Embryology Authority, the UK-based bioethics group Human Genetics Alert writes, “If we allow sex selection it will be impossible to oppose ‘choice’ of any other characteristics. such as appearance, height, intelligence, et cetera. The door to ‘designer babies’ will not have been opened a crack — it will have been thrown wide open.”

Another British NGO, Gene Watch UK puts it this way: Allowing sex selection “would represent a significant shift towards treating children as commodities and [subjecting] the selection of a child’s genetic make-up . . .

27 Julian Savunescu, from the title of a November 25, 2003 presentation in London. See http://www.progress.org.uk/events/ChosenChildren.html
to parental choice, exercised through paying a commercial company to provide this ‘service’.\textsuperscript{29}

Some researchers, bioethicists, and fertility practitioners have publicly opposed such uses of PGD, and expressed alarm at what the new push for social sex selection seems to portend. In September, 2001, Robertson, then acting chair of the Ethics Committee of the American Society for Reproductive Medicine (ASRM), issued an opinion that overturned the organization’s opposition to PGD for social sex selection. The \textit{New York Times} reported that this “stunned many leading fertility specialists.” One fertility doctor asked, “What’s the next step? . . . As we learn more about genetics, do we reject kids who do not have superior intelligence or who don’t have the right color hair or eyes?”\textsuperscript{30}

In the US, several women’s organizations and other NGOs drafted a letter, signed by nearly a hundred groups and individuals, urging the ASRM not to loosen its recommendations on sex selection. Several months later, the ASRM affirmed its opposition to the use of PGD for “non-medical” sex selection. (The organization does not oppose sperm selection to select the sex of a child for “family balancing.”) The spread of social sex selection and the ASRM episode were described in an \textit{Atlantic Monthly} article titled “Jack or Jill? The era of consumer-driven eugenics has begun.” Author Margaret Talbot concluded,

If we allow people to select a child’s sex, then there really is no barrier to picking embryos — or, ultimately, genetically programming children — based on any whim, any faddish notion of what constitutes superior stock. . . A world in which people (wealthy people, anyway) can custom-design human beings unhampered by law or social sanction is not a dystopian sci-fi fantasy

\textsuperscript{29} “GeneWatch UK Submission to the HFEA Consultation on Sex Selection,” January 2003
any longer but a realistic scenario. It is not a world most of us would want to live in.\textsuperscript{31}

Voicing a Preference for Girls

In 1992, Nobel Prize-winning economist Amartya Sen estimated the number of “missing women” worldwide, lost to neglect, infanticide, and sex-specific abortions, at one hundred million. Similarly shocking figures were confirmed by others.

Many in the global North are distressed by the pervasiveness and persistence of sex-selective abortions in South and East Asia, and believe bans on sex selection procedures may be warranted there. At the same time, some of these people believe sex selection in countries without strong traditions of son preference may not be so bad.

This double standard rests on shaky grounds. The increased use and acceptance of sex selection in the U.S. would legitimize its practice in other countries, while undermining opposition by human rights and women’s rights groups there. Even \textit{Fortune} recognized this dynamic. “It is hard to overstate the outrage and indignation that MicroSort [a sperm sorting method] prompts in people who spend their lives trying to improve women’s lot overseas,” it noted in 2001.\textsuperscript{32}

In addition, there are also large numbers of South Asians living in European and North American countries, and sex selection ads in \textit{India Abroad} and the North American edition of \textit{Indian Express} have specifically targeted them.\textsuperscript{33} South Asian feminists in these communities fear that sex selection could take new hold among immigrants who retain a preference for sons. They decry the numerous ways it reinforces and exacerbates misogyny, including violence against women who fail to give birth to boys. If these

\textsuperscript{31} Margaret Talbot. “Jack or Jill? The era of consumer-driven eugenics has begun,” \textit{The Atlantic Monthly}, March 2002
\textsuperscript{32} Meredith Wadman. “So You Want A Girl?,” \textit{Fortune}, February 2001
Foeticide Disaster: American Response

practices are unacceptable — indeed, often illegal — in South Asia (and elsewhere), should they be allowed among Asian communities in the West?

An immigrant couple, recently arrived from India, requests an ultrasound procedure for their expected third child (they have two daughters). They tell the physician that they are concerned about the health of the fetus. The ultrasound detects no problems. "And is it a boy or a girl?" the parents ask. "An alert physician might wonder how best to respond to the couple's question. Requests for prenatal sex determination as a potential prelude to sex-selective abortion have surfaced among Indian immigrants in the United States and Canada. The root of the problem is ancient and economic. Male children are favored since they carry the family name and frequently get the family inheritance. Girls are viewed as liabilities, who will cost their parents a dowry when they marry and move into their husband's homes [sic]..."

While no U.S. law prohibits prenatal sex-determination procedures, discussions about ethical aspects of preconception sex selection for nonmedical reasons provide an apt analogy. The ethics committee of the American Society for Reproductive Medicine advises that, if preconception sex selection methods such as X- and Y-sperm cell separation are established as safe and effective, physicians may perform these procedures "for gender variety in a family" when couples "are fully informed of the risks of failure" and "affirm that they will fully accept children of the opposite sex if the preconception gender selection fails." This second condition precludes aborting fetuses solely because of their sex.

The AMA's Council on Ethical and Judicial Affairs has taken a different track. Its policy statements on artificial insemination advise physicians against participating in sex selection of sperm "for reasons of

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36 "Preconception Gender Selection for Nonmedical Reasons," Fertility and Sterility (May 2001), 863.
gender preference. Physicians should encourage a prospective parent or parents to consider the value of both sexes."37 A related statement on genetic counseling holds, "It would not be ethical to engage in selection on the basis of non-disease related characteristics or traits." Physicians who are morally distressed by the possibility that parents may request abortions on the basis of genetic information may "choose to limit their services to preconception diagnosis and advice or not [to] provide any genetic services." including ultrasonography. 38 (The physician in our opening scenario might opt for this approach.)

These considerations would suggest that healthcare professionals are obligated to disclose only the medically relevant information that results from prenatal tests and procedures. If, however, they disclose to some patients "nonmedical" information—such as the sex of a fetus when no related medical concern is present—and withhold similar information from other patients, they run the risk of acting in an arbitrary and unjustifiably discriminatory way. It is better to establish a consistent stance concerning such disclosure, and stick to it.

Further, although Hinduism is the majority religion of India. Hindu teaching does not support sex-selective abortion but condemns it. The cumulative weight of Hindu tradition rejects abortion for any reason other than jeopardy to the mother: "From earliest times, ... abortion (viz., deliberately caused miscarriage as opposed to involuntary miscarriage) at any stage of pregnancy has been morally condemned as violating the personal integrity of the unborn, save when it was a question of preserving the

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37 Current Opinions of the Council on Ethical and Judicial Affairs, E-2.04 Artificial Insemination by Known Donor, E-2.05 Artificial Insemination by Anonymous Donor.
38 Current Opinions of the Council on Ethical and Judicial Affairs, E-2.12 Genetic Counseling.
mother's life.\textsuperscript{39} No other consideration, social or otherwise, seems to have been allowed to override this viewpoint." \textsuperscript{40}

Avoiding unwarranted generalizations about peoples, their culture, and their religious traditions is important because such generalizations can become stereotypes that are applied unjustly to persons from that cultural or religious group. Not every couple of Indian descent will ask about the sex of their child-to-be; not every couple who ask will be considering abortion. (Conversely, some couples from non-Indian backgrounds will seek the same information precisely because they have sex selection and possible abortion in mind.) Moreover, unexamined cultural generalizations can lead us to overlook the differences within cultures and religious traditions—especially when, as in India, authoritative voices within the culture and its traditions are seeking to reverse a widespread, long-established practice.

In contrast to sex selection in India, however, a preference for girls may be emerging in America. Anecdotal evidence — based on reports from companies offering various methods for sex control and on perusal of the "Gender Determination" message board at www.parentsoup.com, which has over a quarter million postings — tends to confirm that of Americans trying to determine the sex of their next child, many are women who want daughters.

That Americans may not use new technologies to produce huge numbers of "extra" boys does not, however, mean that sex selection and sexism are unrelated. One study, by Roberta Steinbacher at Cleveland State University, found that 81\% of women and 94\% of men who say they would use sex selection would want their firstborn to be a boy. Steinbacher notes


that the research literature on birth order is clear: firstborns are more aggressive and higher-achieving than their siblings. "We'll be creating a nation of little sisters," she says.41

Observers of sex selection point to another discriminatory impact: its potential for reinforcing gender stereotyping. Parents who invest large amounts of money and effort in order to "get a girl" are likely to have a particular kind of girl in mind. As a mother of one of the first MicroSort babies recalled, "I wanted to have someone to play Barbies with and to go shopping with; I wanted the little girl with long hair and pink fingernails."42

There are many reasons people may wish for a daughter instead of a son, or a boy rather than a girl. In a sympathetic account, New York Times reporter and feminist Lisa Belkin described some of the motivations of U.S. women who are "going for the girl."

"They speak of Barbies and ballet and butterfly barrettes," she writes. but "they also describe the desire to rear strong young women. Some want to recreate their relationships with their own mothers; a few want to do better by their daughters than their mothers did by them. They want their sons to have sisters, so that they learn to respect women. They want their husbands to have little girls. But many of them want a daughter simply because they always thought they would have one."

Wishes and Consequences

Compelling though some of these longings may be, sex selection cannot be completely understood or appropriately confronted by evaluating the rightness or wrongness of parental desires. The preferences of prospective parents are obviously relevant in child-bearing matters, but so are the well-

being of future children, and the social consequences of technologies—especially those that are already being aggressively marketed.

Wishing for a girl, or for a boy, is cause for neither shame nor condemnation. But as legal scholar Dorothy Roberts points out, it is important to “scrutinize the legal and political context which helps to both create and give meaning to individuals’ motivations.”

If wishes, choices, and preferences are to be appropriately balanced with social justice and the common good, they cannot be unthinkingly transformed into protected liberties, much less codified rights. Isolated from social consequences, both wishes and liberties are at best naïve.

A 2006 study published in the British medical journal, the Lancet, estimated that up to half a million female fetuses are aborted every year in India. Joseph D'Agostino, vice president for communications with the Virginia-based Population Research Institute (PRI), calls it "a massive violation of human rights" which affects both women and men. "When it comes to sex selective abortion, it's something that's leading to grave social problems—the extermination of tens of millions of girls," says D'Agostino. "And of course it's bad for the boys too because they're going to grow up and not be able to get married. It seems to be against everyone's interests.

In 2005, a U.N. report stated that the number of "missing" girls resulting from abortion and female infanticide is now at an estimated 200 million worldwide. In an effort to combat the problem, the U.S. sponsored a resolution at the U.N.'s Commission on the Status of Women calling on states to eliminate infanticide and gender selection. But the resolution was withdrawn, thanks to opposition from China, India, Mexico and other countries—one of which apparently was Canada.

One of the latest high-tech sex selection methods to appear in the U.S. is a sperm sorting technique which is marketed as a way to achieve "family balancing" or "family completion." Demographers and women's rights groups are concerned that an increased acceptance of gender selection in the U.S. will serve to exacerbate the problem in countries where "son preference" prevails.

D'Agostino, who believes the gender imbalance "is turning into a huge global problem that's getting worse every year," says his organization would like to see sex selective abortion outlawed in the U.S. He says it should be more prominent on the U.N.'s agenda, and that countries need to work to "change the culture around this and hopefully change the laws." "There needs to be some sort of global approach to this because it's fast becoming a social problem," says D'Agostino. "It's not only immoral, it's impractical, and people need to have a different mentality."

How can we rid the world of this barbaric form of sexism? Simply outlawing sex-selective abortions will be little more than a symbolic gesture. As long as abortion is basically available on demand, any legislation to abolish sex-selective abortion will have no impact.

What about more general restrictions on abortion, then? Poll data consistently demonstrate that most Americans do not favor the post-\textit{Roe} regimen of unconditional abortion. But a return to the pre-\textit{Roe} status quo, where each state made its own abortion laws, would probably have very little effect on sex-selective abortion in our country. After all, the ethnic communities most tempted by it are concentrated in states where abortion rights would likely be strongest, such as California and New York.

In the final analysis, the extirpation of this scourge will require nothing less than a struggle for the conscience of nations. Here again, South Korea may be illustrative: Its gender imbalances began to decline when the public
was shocked into facing this stain on their society by a spontaneous, home-grown civil rights movement.

To eradicate sex-selective abortion, we must convince the world that destroying female fetuses is horribly wrong. We need something akin to the abolitionist movement: a moral campaign waged globally, with the victories declared one conscience at a time.