

# *Is Sex-Selective Abortion Against the Law?*

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**Abstract**—The paper addresses the legal status of ‘sex-selective’ abortion in British law. It argues, firstly, that abortions for which knowledge of fetal sex is a ‘but for’ cause *can* be lawful under the terms of the Abortion Act 1967, so long as one of the physical or mental health grounds in section 1 of the Act is attested to in good faith by two medical professionals. The failure of governmental and health bodies to correctly state the law pertaining to sex-selective abortion in recent years owes in part to the failure to distinguish the legal *grounds* for abortion from the factual *explanations* for abortion, a distinction which, I argue, is essential for understanding the structure of Britain’s abortion law. The paper also considers the claim that abortions carried out partly for reasons of fetal sex are unlawful, or if not, ought to be legally prohibited, because of reasonable doubts about patient consent. It points out some key ways in which this consent-based objection is difficult to square with our general abortion permissions.

**Keywords:** abortion, sex-selection, consent, Abortion Act 1967

## 1. *Introduction*

In February 2012, the Daily Telegraph newspaper published the details of a scandal it had claimed to unearth by conducting sting operations in a number of British abortion clinics.<sup>1</sup> Equipped with secret cameras, reporters from the newspaper visited the clinics accompanied by actors who posed as women desiring terminations. In the process of the consultation, the female actors revealed to the abortion providers that they had decided on an abortion after discovering the sex of the fetus.

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<sup>1</sup>Holly Watt, Claire Newell, Zahra Khimji, ‘Available on demand – an abortion if it’s a boy you wanted; Special Investigation on The Consultations. Sex-selection terminations are illegal, but clinics show willingness to carry them out’, *Daily Telegraph* 23 February p4–5 at <http://www.telegraph.co.uk/news/health/news/9099925/Abortioninvestigation-Available-on-demand-an-abortion-if-its-a-boy-you-wanted.html>.

Although most of the clinics subsequently refused the termination, some private providers agreed to perform them notwithstanding the admitted relevance of fetal sex in the woman's decision-making. Upon publication of the story, government officials rushed to denounce sex-selective abortion as immoral and to affirm the illegality of the practice. Andrew Lansley, the then Secretary of State for Health, responded to the Telegraph's investigation with the following comments:

Carrying out an abortion on the grounds of gender alone is in my view morally repugnant. It is also illegal. Whatever an individual's opinion on abortion,...abortion laws are decided by Parliament, not by individual doctors. If some professionals disagree with the law as it stands they should argue their case for change. Simply flouting them in a belief that they know better is unacceptable.<sup>2</sup>

Lansley subsequently announced that the health watchdog Care Quality Commission would be carrying out a series of unannounced inspections on abortion clinics across the country, to ensure compliance with the 'spirit and letter of the law' of abortion. In addition, two abortion clinic workers named in the Telegraph piece were referred to the police for possible criminal investigation.<sup>3</sup> Despite the fact that the CQC returned no evidence about the practice of abortion for reasons of fetal sex,<sup>4</sup> the matter of sex-selective termination continued to attract political interest in the following years, culminating, in November 2014, with the introduction of a Private Member's Bill intended to expressly ban abortions motivated by fetal sex.<sup>5</sup> The

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<sup>2</sup> Andrew Lansley, 'Health professionals must not think they know better than the law', Daily Telegraph 24 February 2012.

<sup>3</sup> After a lengthy investigation of the two doctors, the Crown Prosecution Service decided, in September 2013, not to advance the prosecution. A subsequent attempt made by an anti-abortion activist to bring a private prosecution under the 1861 Offences Against the Person Act was also halted, although a General Medical Council 'fitness to practice' investigation is ongoing for one of the doctors, Palanaippan Rajmohan. See, 'CPS Statement on Abortion Related Case', 5 September, 2013 at [http://www.cps.gov.uk/news/latest\\_news/cps\\_statement\\_abortion\\_related\\_case/](http://www.cps.gov.uk/news/latest_news/cps_statement_abortion_related_case/). See also, Bingham, J. and Newell, C. 2013. 'No action on illegal abortion doctors; CPS says there is evidence to prosecute but it would not be in the public interest'. Daily Telegraph, 5 September, and Bingham, J. and Newell, C. 2013. 'Prosecute abortion doctors, MPs urge; MPs unite over illegal abortion doctors'. Daily Telegraph 14 September.

<sup>4</sup> 'Findings of termination of pregnancy inspections published', Care Quality Commission, 12 July 2012 at <http://www.cqc.org.uk/content/findings-termination-pregnancy-inspections-published>. The CQC had also been asked to investigate the alleged pre-signing of HSA1 forms, the forms which two qualified doctors must sign in order to attest that the requirements of the Abortion Act 1967 are met and, hence, that the abortion is lawful. CQC did identify evidence of the pre-signing practice at fourteen NHS Trusts, although it also reported that it 'did not find any evidence that any women had poor outcomes of care at any of these locations'.

<sup>5</sup> Abortion (Sex Selection) Bill (2014-15), HC Deb vol 587 col 677-679 4 November 2014.

original bill, introduced by Conservative MP Fiona Bruce, was withdrawn after its second reading, but a revised version was tabled for debate as a possible amendment to the Serious Crime Bill (2014–2015). The amendment read that: ‘nothing in section 1 of the Abortion Act 1967 is to be interpreted as allowing a pregnancy to be terminated on the grounds of the sex of the unborn child’.<sup>6</sup> After debate in Parliament on 23<sup>rd</sup> February 2015, the proposed amendment was rejected, although an alternative amendment (New Clause 25 of the Serious Crimes Bill) which committed the government to assessing the evidence for the practice of sex-selective termination and, if necessary, to take action to change ‘prejudices, customs and traditions’ which constitute pressure to seek a sex-selective abortion was passed with an overwhelming majority.<sup>7</sup>

Of course, if sex-selective abortion were indeed contrary to existing law, as was so confidently confirmed in 2012 by government representatives and healthcare bodies, the point of the original amendment would have been hard to discern. Why would Parliament prohibit a procedure that is already prohibited? Even if evidence had been discovered to suggest that an existing prohibition on sex-selective abortion was being routinely flouted (evidence which, ultimately, did not materialise), the apposite remedial measure would surely have been to improve law enforcement, not re-ban the practice.

The proposing MP’s explanation came down to the matter of clarity. In support of the provision, Bruce claimed that its purpose was not to change the law on abortion, but to ‘clarify beyond doubt, in statute, that sex-selective abortion is illegal in UK law’.<sup>8</sup> Bruce’s explanation, in other words, was that although sex-selective abortion is indeed prohibited by British law<sup>9</sup>, there is widespread misapprehension that it is not. In fact, as I set out to argue here, the inverse is far closer to the truth. The legal status of sex-selective abortion in Britain is (as I intend to demonstrate) a far more complex matter than Lansley’s statement presented it to be.

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<sup>6</sup> See: <http://www.publications.parliament.uk/pa/bills/cbill/2014-2015/0160/amend/seriouscrimeaddednames.pdf>

<sup>7</sup> The original amendment was rejected by 292 votes to 201. Serious Crime Bill (2014–2015), HC Deb vol 593 col 113–130 23 February 2015, at <http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm150223/debtext/150223-0004.htm>. New Clause 25 passed with 491 votes in favour and 2 against. See, Hansard (Daily Hansard). 23<sup>rd</sup> February 2015 (starting Column 113) <http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm150223/debtext/150223-0003.htm>

<sup>8</sup> *ibid* col 114.

<sup>9</sup> Bruce’s statement contained the misleading suggestion that the same law of abortion applies to the whole of the United Kingdom; the Abortion Act 1967 governs only England, Wales, and Scotland.

I will proceed by laying out an initial argument to the effect that abortions which would not have been requested but for knowledge of fetal sex *can* be lawful under the terms of the Abortion Act 1967 where certain conditions are met, and that the route to demonstrating the legality of those abortions is exactly the same as is followed in far less controversial abortion scenarios. I will also advance the subsidiary argument that in almost any instance where a pregnant woman requests a ‘sex-selective’ abortion, there is good reason to suppose that the legalising requirements of the Abortion Act are in fact met. Hence, while sex-selective abortions are not automatically lawful, it is reasonable to presume that they most often will be, under the law as it stands.

I will subsequently consider two objections to the initial claim that sex-selection can be lawful in the right conditions. The first challenges that claim on the ground that the interpretive argument it relies upon is far too permissive, bringing almost any abortion, including for the most trivial reasons, within the authorising scope of the Abortion Act. The second objection centres on the necessity of consent for lawful medical treatment, and questions whether valid patient consent can be reliably obtained for sex-selective abortion procedures.

I set out to show that neither objection succeeds. That is to say, neither manages to show that sex-selective abortion is always illegal according to the terms of the Abortion Act. It goes without saying that, far from any question of its legality, the ethical significance of sex-based termination is a complex and contentious topic in its own right. Even in the heated arena of abortion discourse, sex-selection has proved a subject of acute moral controversy, not the least because of concerns that, where practiced, it is overwhelmingly used to select against females – the so-called ‘gendercide’ issue.<sup>10</sup> Whilst acknowledging the depth and breadth of the ethical debate about sex-selection, I will mostly restrict my comments here to an analysis of the relevant legal permissions, which turn chiefly on the provisions of the Abortion Act.<sup>11</sup> This said, my discussion will not exclusively trace questions of legal doctrine

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<sup>10</sup> See, for example, M A Warren, *Gendercide: The Implications of Sex Selection* (Rowman and Allanheld 1985). Some commentators have eschewed the term ‘gendercide’ in favour of the alternative descriptors ‘femicide’ or ‘gynocide’ which better reflect the fact that sex selection, either through prenatal selection techniques, infanticide, or selective child neglect, almost invariably deselected females (see: H B Holmes and B Hoskins, ‘Preconception and Prenatal Sex Choice Technologies: A Path to Femicide?’ in Corea et al eds., *Man-Made Women: How Reproductive Technologies Affect Women* (Hutchinson 1984) 15-26; C Overall, ‘The Implications of Sex Selection by Mary Anne Warren’ (review article), *Canadian Journal of Philosophy* (1987) 17 683, and H B Holmes, ‘Review of *Gendercide* by Mary Anne Warren’, *Bioethics* (1987) 1 100.

<sup>11</sup> I put even further aside the far grander question whether sex-selective abortion is morally impermissible in virtue of the fact that *all* abortion is the impermissible destruction of human life.

and interpretation. With regard to the consent objection in particular, I will consider some normative claims that British law ought to adopt a prohibitive stance on sex-selective abortion for paternalistic reasons.

## *2. Sex-Selection and the Abortion Act 1967*

Lawful abortion in England, Wales and Scotland is governed by the Abortion Act 1967. The Abortion Act stipulates the grounds on which medical professionals must act when performing lawful abortions, as well as setting down the procedural requirements for termination of pregnancy. These procedural regulations govern the facilities where abortions must be performed<sup>12</sup>; the need for the authorisation of two registered doctors<sup>13</sup>, and the recording of abortions carried out.<sup>14</sup> To this day, the default rule for termination of pregnancy in British law is that it is a criminal offence, pursuant to provisions under the Offences Against the Person Act 1861 and, if the fetus is capable of being born alive, under the Infant Life Preservation Act 1929.<sup>15</sup> The Abortion Act therefore provides defences to what would otherwise be criminal offences of procuring miscarriage or child destruction. The statutory grounds for abortion are laid out in section 1 of the Act, which states that no criminal liability shall attach to someone performing an abortion where two doctors form an opinion in good faith that:

- a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
  
- b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or

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<sup>12</sup> Abortion Act 1967 s1(3) and 1(3A).

<sup>13</sup> Abortion Act 1967 s1.

<sup>14</sup> Abortion Act 1967 s2.

<sup>15</sup> Offences Against the Person Act 1861, ss58-59; Infant Life Preservation Act 1929 s1. S1(2) of the 1929 Act stipulates a rebuttable presumption that a fetus of 28 weeks or more is 'capable of being born alive', although the threshold of viability is now generally taken to be lower, at around 24 weeks.

- c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
- d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Pursuant to section 1(2) of the Act, in determining whether or not continued pregnancy would pose risks of injury to health referenced under ground a) or ground b), the doctors may take account of the woman's 'actual or reasonably foreseeable environment'.

Whether or not the two doctors have formed their opinion that one or more of the section 1 grounds is made out in 'good faith' is a question of fact for the jury. The good faith requirement is an essential but easily overlooked provision of the Abortion Act. It is not correct to say that the Act provides an exception to criminal liability for abortion if and only if one of the contraindications in section 1 is present. Rather, the exception applies wherever two doctors *are of the opinion, formed in good faith* that one of the grounds is met. Consequently, showing that an abortion was performed unlawfully is not a matter of disproving the ground relied upon, but of demonstrating that a doctor's acceptance of that ground was not in good faith, a court verdict which has proved extremely rare.<sup>16</sup>

The first thing to note about the status of sex-selective abortion under the Abortion Act is that the statute makes no mention whatsoever of termination for reasons of fetal sex. There is no specified 'sex' or 'gender' ground in section 1, and the legislation is otherwise silent on the matter. The absence of a specific provision for sex-selective abortion has given rise to the widespread assumption that abortion for reasons of fetal sex is not covered by the Act, and is consequently always criminal. This is a false equivalence, however. The mistake is best brought out by means of examples. In her commentary on the sex-selective abortion controversy, Sally Sheldon provides the following two:

Imagine a woman with two female children who comes from an ethnic group which places a very high value on sons. She and her husband live with her in-laws, who threaten to throw them out if she gives birth to another daughter. Imagine another whose husband beats her and tells her that she will be subject to far worse violence if she gives birth to a daughter. In each of these situations, we would wish for the woman to be able to leave an abusive

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<sup>16</sup> *R v Smith* [1974] 1 All ER 376 is one of the only known examples of such a finding by an English court. After hearing evidence that the doctor in question had failed to perform any medical examination of the pregnant woman concerned, enquire about her medical history, or seek a second opinion, and moreover had made efforts to conceal the fact that the termination had taken place, the Court of Appeal held that the doctor's conviction for an unlawfully performed abortion was safe.

situation or, better, to live in a world where such things do not happen. But while we wait for that world, a doctor who authorises a termination in such circumstances could make a strong legal case that she had acted in good faith to preserve the mental health of her patient.<sup>17</sup>

As Sheldon's examples demonstrate, the absence of a specific ground for sex-selective abortion does not, in and of itself, preclude lawful terminations in which fetal sex is a *sine qua non* of the termination being requested. As Sheldon also notes, there is, likewise, no designated ground for abortion under the Act for the standardly accepted reason that pregnancy is the result of rape. Yet the legality of abortion in such circumstances has never been thought to depend on the existence of a "rape ground" in s1 of the Abortion Act. Rather, it is readily presumed that where pregnancy is brought about by rape, either ground a) or ground b) will be applicable, usually in the form of risk to mental health. The fact that the pregnancy is the result of rape is simply the background circumstance that gives rise to a specified ground for abortion, making that ground explicable and, hence, believable.

Just as the fact that pregnancy was brought about by rape can form the background circumstances that establish a statutory ground for abortion, so it is possible to imagine cases in which the revealed sex of the fetus can create equivalent circumstances. As we saw from Sheldon's examples, the factual matrix of those situations may take different forms. Suppose, as per one of the examples, a woman reasonably fears that if she gives birth to a baby girl, rather than a boy, her husband will subject her to violence, or more violence. Or suppose instead that because the child is not a boy, she will be compelled to have yet more children in circumstances where a greater number of children to care for will have a seriously detrimental effect on her physical or mental health, and, or, on the wellbeing of her existing children. If her doctors are satisfied that either of these scenarios were realistic, then they will have formed an opinion that ground (a), (b) or even (c) is met. Outside of the procedural requirements, the legality of the abortion will be subject only to the condition that the doctors did indeed form their opinion in good faith – in other words, that they genuinely believed one of the grounds applied and performed the abortion on the basis of that belief, and in order to secure the wellbeing of the woman.

Following this thinking, we can see that those who infer the illegality of sex-selection from the Abortion Act's silence about it have conflated two distinct things: the statutory grounds for abortion, and the background circumstances giving rise to those grounds – what we might term the 'explanations' for abortion. The Abortion Act makes demands only about the grounds, not about the explanations behind them. Every lawful abortion must be supported by good faith medical belief in a specified *ground*, but there are no specifications as to *explanations*, either in terms of

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<sup>17</sup> S Sheldon, 'Abortion for Reason of Sex: Correcting Some Basic Misunderstandings of the Law', *bpas Reproductive Review*, 1 March 2012.

those which are required or those which are excluded. All that is required of the explanation, legally speaking, is that the explanatory circumstances could plausibly place a woman within one of the section 1 grounds, usually by way of threatening her mental health, and, hence, that two doctors could plausibly form the good faith opinion that one of the grounds was met, this being (along with practice regulations) the consummate test for lawful abortion.

So far, I have not offered a definition of abortions that merit the description ‘sex-selective’. Some may think that definition obvious. However, on a closer look, it becomes clear that even attempting to define precisely what amounts to aborting *because of* fetal sex forces one to attend to the distinction between grounds and explanations. Few, I think, take ‘sex-selective abortion’ to denote only those terminations that are requested out of sheer prejudice toward or distaste for a particular sex, unconnected to any further threat of harm to the pregnant woman concerned. Indeed, as we shall see shortly, there is good reason to regard terminations motivated solely by personal sexism as a fairly fanciful scenario. Presumably, those who contend that sex-selective abortion is illegal mean to suggest that any abortion in which the fetus’s sex was a ‘but-for’ cause of the woman’s request for termination is illegal, even if it is indeed the case that carrying the pregnancy to term will endanger the woman’s mental or physical health to a degree otherwise sufficient for one of the section 1 grounds. On this view, all abortions in which fetal sex is part of the explanation are unlawful, whether or not a legitimate ground (a threat of harm supervening on the fetus’s sex) is also made out.

On the contrary, however, the structure of the Abortion Act and the distinction between grounds and explanations yields the provisional conclusion that only an express declaration to the effect that fetal sex must not form any part of the background explanation for abortion would render all such abortions illegal. Apart from an explicit exclusion of this kind, the standard legal test, which looks only to whether good faith medical opinion was satisfied of one of the grounds, could be satisfied in the case of a ‘sex-selective’ abortion in precisely the same way that it often is when fetal sex is not part of the picture.

A further comparison with a pregnant woman who requests an abortion because of financial constraints elaborates this point. In this fairly mundane sort of case, the woman desires an abortion because she does not possess the financial resources to care adequately for a child. Her financial circumstances do not in and of themselves constitute a ground for lawful abortion under the Abortion Act; there is no “impecuniousness ground” in section 1. Still, it is entirely possible that one or more of the contraindications for abortion in section 1 will supervene on the woman’s financial situation. The pressure of caring for a child without adequate financial resources—or even the mere prospect of such a burden—might threaten damage to her mental or physical health in any number of ways: by rendering her depressed, acutely anxious, chronically fatigued, or, in the extreme case, suicidal. To be sure, a contraindication does not automatically follow from the circumstance. Perhaps, notwithstanding the prospect of childrearing she cannot afford, the woman in question does not face any risk to her physical or mental wellbeing ‘greater than if the pregnancy were terminated’. Nevertheless, her impecuniousness could surely form the basis of a good faith judgment that the risk obtains, were she to attest as much.

Likewise, it may be argued, the only question for doctors when assessing the merits of a 'sex-selective' abortion is whether, in all of the circumstances, the possible implications of continued pregnancy for the woman concerned trigger one of the statutory grounds. And the only question for a jury, should the legality of such an abortion come under scrutiny, is whether those doctors formed that belief in good faith. Neither the actual existence of the grounds nor a medical professional's good faith belief in them depends on the particular causal nexus underlying them, except insofar as credibility is at issue. And inkeeping with the structure of the Act, this includes where fetal sex is part of the wider explanation.

### *3. Selective Abortion and Selective Implantation*

The foregoing argument aims to show that abortions with fetal-sex-explanations may or may not be lawful according to the terms of the Abortion Act, depending on whether the overall factual matrix gives rise to a good faith belief that one of the grounds in section 1 is made out. This is because the legality of abortion under the statute depends only on adducing the right grounds and not the 'right' explanations, an implicit distinction which is fundamental to understanding the authorising conditions of the Act.

The upshot is that those who take the statute's silence on sex-selection as indicative of the unlawfulness of any abortion in which fetal sex is part of the explanation are wrong to draw that inference. This false equation has been a wellspring of misstatement and misunderstanding about the legal status of sex-selective abortion in recent years. There is, however, a second notable source of misunderstanding about the legality of abortion for reasons of fetal sex. As sociologist Ellie Lee has pointed out, some attempted clarifications of the law have suggested a degree of confusion between the provisions of the Abortion Act and the regulation of embryo selection for *in vitro fertilization* under the Human Fertilisation and Embryology Act 2008.<sup>18</sup> Indeed, spokespeople from medical regulation bodies appeared to conflate the legal rules of abortion and those of assisted reproduction in their account of the legal status of sex-selective abortion following the 2012 Telegraph story. Issuing a statement on behalf of the General Medical Council, its chief executive Niall Dickson stated the law thus:

Sex selection through abortion is illegal in this country and is a clear breach of our guidance for doctors. Doctors involved in such activity are putting their registration and careers at risk. The law in the UK is clear: terminating a

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<sup>18</sup> See: E Lee, 'Recent Myths and Misunderstandings about Abortion Law', in British Pregnancy Advisory Service document, *Britain's Abortion Law: What it Says and Why* (2012), 10-13; see also E Jackson, 'The Legality of Abortion for Fetal Sex', in the same volume, 19-21. [http://www.reproductivereview.org/images/uploads/Britains\\_abortion\\_law.pdf](http://www.reproductivereview.org/images/uploads/Britains_abortion_law.pdf) (accessed June 2015).

pregnancy on the grounds of a foetus's sex is illegal under the 1967 Abortion Act unless specific hereditary diseases are involved. (This is set out in the Human Fertilisation and Embryology Act 2001[sic]).<sup>19</sup>

Dickson's reference to the 2001 Human Fertilisation and Embryology Act (HFEA) was meant to refer to the more recent HFEA 2008, which updated the 1990 HFE Act, an error which was quickly rectified. However, his reliance on the HFEA as authority for the proposition that abortion for reasons of fetal sex is unlawful except where the sex of the fetus can be linked to a hereditary disease is unfounded. The HFE legislation was passed to regulate (among other things) the use of pre-implantation genetic diagnosis (PGD) in assisted reproduction techniques. In other words, it set out the permissions for screening embryos prior to implantation in the womb in the process of IVF. Under that legislation, genetic testing on embryos in the process of fertility treatment is restricted to very particular uses. Testing embryos to determine their sex prior to implantation is prohibited by the Act except in circumstances where there is a risk that the embryo carries a genetic disease, and the disease itself is sex-linked.<sup>20</sup> Consequently, it is against the law for individuals using IVF techniques to test the sex of embryos prior to implantation simply because of a social preference for a boy or a girl.

The qualified prohibition on sex-selection in the HFE legislation has no application to abortion, however. Its provisions are concerned exclusively with the permissibility of PGD for the purposes of embryo selection in IVF, and not at all with the legal grounds *or* the explanations for abortion. Nothing about the legality of sex-selection in abortion therefore follows from the provisions of the HFEA. In a later clarification, the General Medical Council added the statement that 'terminating a pregnancy on grounds of the fetus's sex is not covered in the [Abortion] Act, and therefore remains illegal'.<sup>21</sup> This, of course, is merely another iteration of the false inference considered above: that the absence of a specified ground for sex-selection in the Abortion Act entails the illegality of all abortion in which fetal sex forms part of the explanation.

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<sup>19</sup> On 22 August 2012 the GMC updated its official guidance to read that 'Abortions provided solely on grounds of the sex of the foetus are not legal in the UK. We have launched investigations into the fitness to practice of the doctors involved. We also want to remind all doctors that they must work within the law', at <http://www.gmc-uk.org/publications/12225.asp>. An abridged version of the original statement can be found at <http://www.gmc-uk.org/news/12102.asp>. The full excerpt is reproduced in in the British Pregnancy Advisory Service document (ibid) 11 and 55.

<sup>20</sup> Human Fertilisation and Embryology Act 2008, Schedule 2.

<sup>21</sup> As was the case with its earlier statement, the GMC's revision was eventually removed in favour of the statement detailed in note 20, above, and is hence no longer available, but referenced in the British Pregnancy Advisory Service document (n 19) page 11.

It is not only the GMC that erroneously believed the legality of sex-selective abortion is constrained by the law on assisted reproduction. A statement released around the same time by the Royal College of Obstetricians and Gynaecologists (RCOG) made the following claims:

Sex selection is illegal in this country and abortion based on the baby's gender for non-medical purposes is unlawful. Abortion is already heavily regulated in the UK and sex selection is only allowed in very specific conditions such as in the case of hereditary disease as stated in the HFEA Act [sic] 2008.<sup>22</sup>

As is apparent, the RCOG's initial statement simply repeated the mistake made by the GMC, failing to separate the law of assisted reproduction with the law of abortion. In May 2014, the Department of Health attempted itself to formally and accurately state the law pertaining to abortion for reasons of fetal sex, but with no greater success. In a policy document entitled 'Guidance in Relation to the Requirements of the Abortion Act 1967', it described the state of the law in these terms:

Abortion on the grounds of gender alone is illegal. Gender is not itself a lawful ground under the Abortion Act. However, it is lawful to abort a fetus where two RMPs [registered medical practitioners] are of the opinion, formed in good faith, that "there is a substantial risk that if the child were born it would suffer from serious physical or mental abnormalities as to be seriously handicapped", and some serious conditions are known to be gender-related.<sup>23</sup>

The Department of Health's statement is an intriguing blend of misunderstandings about abortion law. First, it embraces the familiar mistake that the absence of a specified ground for sex-selective abortion entails the blanket illegality of all abortions in which fetal sex is a but-for cause. Second, and relatedly, it fails to distinguish between grounds for abortion and the explanations that give rise to those grounds, and hence fails to account for the legality of abortions wherein

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<sup>22</sup> Dr Tony Facloner, President (in 2012) RCOG. Like the GMC, the RCOG subsequently withdrew its original statement and replaced it with a statement which acknowledged that "[T]here are social and cultural reasons for preferring one gender over another and we need to know more about why these occur. The issues are complex. For instance, women may be coerced or threatened with violence into having an abortion. The priority would be to identify who these women are and to provide them with support.' The original statement and the revised version can be found in the *British Pregnancy Advisory Service* document (above n 19) at page 10.

<sup>23</sup> Department of Health, 'Guidance in Relation to the Requirements of the Abortion Act 1967', May 2014, 10, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/313459/20140509\\_-\\_Abortion\\_Guidance\\_Document.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/313459/20140509_-_Abortion_Guidance_Document.pdf).

at least one statutory ground is met notwithstanding the fact that fetal sex forms an integral part of the explanation as to why it is met (or, to be more accurate, why two doctors may form in good faith an opinion to that effect). Put differently, it ignores the possibility that an abortion in which fetal sex is a key factor may not be an abortion for reasons of ‘gender alone’.

Thirdly, the statement evinces yet another misunderstanding of the relationship between sex-selective abortion and abortion for fetal disability that seems, again, to stem from the mixing up of legal norms governing abortion and assisted reproduction. The statement accurately notes that substantial risk of a serious abnormality is a recognised contraindication in the Abortion Act (s1(1)(d)), and that some hereditary diseases can indeed be sex-related. As was noted, the HFEA 2008 prohibits sex-screening of embryos in pre-implantation genetic diagnosis except where a sex-linked hereditary disease is at issue. But the same protocol does not carry over to abortion. The disability ground for abortion will of course be met wherever two doctors are convinced that the would-be child has a substantial risk of developing a serious handicap, including where this judgment is formed in light of its sex. But ground (d) of section 1 is not the only ground for which fetal sex can form part of the background explanation. As any number of examples demonstrate, fetal sex, just like multitudinous other circumstances including financial pressure, relational instability, or pregnancy-through-rape, *could* form part of the explanation for any of the first three grounds specified in section 1 of the Abortion Act.

#### *4. Two Objections*

So far, then, I have argued that sex-selective abortion could be lawful under the terms of the Abortion Act, so long as one of the grounds in section 1 is credibly attested to. The reasons for widespread misapprehension of the legal situation are, I suggested, twofold. The first is the mistaken tendency to equate the absence of a specific ground for sex-selective abortion with the illegality of all abortions in which fetal sex forms part of the explanation. The second is the conflation of rules governing sex-selection in assisted reproduction with the rules pertaining to abortion. My argument on the first count may raise a question as to whether all abortion in which fetal sex is a but-for cause is even ‘sex-selective abortion’ properly so called. As we have seen, such abortions can often be re-described as abortion for other, legally adequate, grounds or reasons. Moreover, it merits pointing out that abortions are not conventionally described after their explanations, rather than their legal grounds, (we do not speak of “rape abortions” or “impecuniousness abortions” or “derailing-of-life-plans abortions”). To introduce the nomenclature of ‘sex-selective abortion’ is, therefore, a notable breach of the norm, although I will say no more about this here.

With the initial argument sketched out, I now want to examine two significant objections to the proposition that sex-selective abortion is potentially lawful according to the Abortion Act. The first objection pushes back against the distinction I drew between the grounds and explanations for abortion and doubts the reliability of that distinction as a tool for interpreting the Abortion Act. The

second objection surrounds the issue of consent to abortion, a particularly live question where sex selection is concerned.

It goes almost without saying that the spectrum of objections to sex-selective abortion is both extensive and varied. Those objections range from the familiar allegation of ‘gendercide’ or ‘femicide’, with its obvious allusions to genocidal atrocities,<sup>24</sup> to concerns about an altered sex ratio and its implications<sup>25</sup>; a possible slippery slope toward a eugenics-driven dystopia, where all unwanted characteristics are screened out prenatally and human beings are built to specification,<sup>26</sup> and to claims that sex selection contributes meaningfully to sex inequality and the subordination of existing women.<sup>27</sup>

My reason for focusing on these two particular objections attaches to my interest in expositing the law as it currently stands. The two objections to which I attend pertain to the current legal status of sex selective abortion and are thus distinguishable from the myriad normative arguments about which policy the law ought to adopt. To my mind, the only other objection which clearly challenges the extant legality of sex selection is the practice constitutes a form of unlawful sex discrimination against women. Speaking in support of the amendment to the Serious Crimes Bill, MP Fiona Bruce decried the use of abortion to prevent the birth of girls in particular as ‘a gross form of sex discrimination’ and ‘the first and most fundamental form of violence against women and girls’.<sup>28</sup> Some recent attempts in the US to combat the perceived problem of sex selection through legislative measures have invoked the anti-discrimination imperative, analogizing sex selection

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<sup>24</sup> See above n 10, and see also, J Hanmer and S Allen, ‘Reproductive Engineering: The Final Solution’ (1982) 2 *Gender Issues* 53-74; R Steinbacher, ‘Sex Preselection: From Here to Fraternity’ in C Gould eds. *Beyond Domination* (Rowman and Littlefield 1984) 274-282; G Corea, *The Mother Machine* (Women’s Press 1985) at 206, and ‘Gendercide: The Worldwide War on Baby Girls’, *The Economist* 4 March 2010.

<sup>25</sup> See: S Dubuc and D Coleman, ‘An Increase in the Sex Ratio of Births to India-born Mothers in England and Wales: Evidence for Sex-Selective Abortion’ (2007) 33 *Population and Development Review* 383-400; J Fletcher, ‘Ethics and Public Policy: Should Sex Choice be Discouraged?’ in Bennett et al ed. *Sex Selection of Children* (Academic Press 1983) 213 and B Hoskins and H Holmes, ‘Technology and Prenatal Femicide’ in R Arditti et al eds. *Test-Tube Women: What Future for Motherhood* (Routledge 1984) 237.

<sup>26</sup> See D Wertz and J Fletcher, ‘Sex Selection through Prenatal Diagnosis: a Feminist Critique’, in H Holmes and L Purdy eds., *Feminist Perspectives in Medical Ethics* (Indiana University Press 1992) 245.

<sup>27</sup> See, for example: C Chambers, ‘Autonomy and Equality in Cultural Perspective: Response to Sawitri Saharso’, (2004): 5 *Feminist Theory* 329; Overall (n 10) and J Raymond, *Women as Wombs* (Harper Collins 1993). This list of objections is by no means exhaustive. Further challenges have included the claim that controlling the sex of one’s future child fails to adopt the correct parental attitude of accepting one’s child as she is (see R McDougall, ‘Acting Parentally: An Argument Against Sex Selection’, (2005) 31 *Journal of Medical Ethics* 601) and that prenatal sex selection reinforces essentialist beliefs about gender identity (see V Seavilleklein and S Sherwin, ‘The Myth of the Gendered Chromosome: Sex Selection and the Social Interest’ (2007) 16 *Cambridge Quarterly of Healthcare Ethics* 7).

<sup>28</sup> Fiona Bruce, Hansard (Daily Hansard). 23rd February 2015 (starting Column 113)  
<http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm150223/debtext/150223-0003.htm>

to race and disability discrimination.<sup>29</sup>

As I see it, however, the position in British law that a human being lacks legally recognized personhood status until live birth presents a major obstacle for the discrimination argument.<sup>30</sup> Since laws against sex discrimination do not protect non-persons, there is a problem in selective abortion of locating the subject of the discriminatory practice – a possible future person who is prevented from existing cannot stand in the place of a victim of discrimination. For this reason, I am not offering any further analysis of the sex discrimination objection.

### *5. Grounds and Explanations*

In making the case that sex-selective abortion can be lawful under the terms of the Abortion Act, I relied on an important distinction between the legal grounds and what I termed the ‘explanations’ for abortion. I argued that since the Act only makes demands as to the grounds and not the explanations, and since knowledge of fetal sex can conceivably form part of a factual matrix which gives rise to one of the recognised grounds, it is possible to imagine lawful abortions which would not have been desired but for knowledge of fetal sex. If these are aptly called ‘sex-selective abortions’, then sex-selection can be lawful in certain conditions.

However, some doubts may be raised as to whether the grounds-explanations distinction can be relied upon when interpreting the permissions of the Abortion Act. After all, someone might say, it is *always* possible to segregate the statutory grounds for abortion from the further explanations underwriting them. Deploying this strategy, one could even make the case for legality of abortions which the Abortion Act clearly does not mean to decriminalise.

We might take the example, sometimes mentioned in ethical discussion about abortion, of a woman who wishes to abort a pregnancy merely because it interferes with a booked holiday.<sup>31</sup> In this example, let us say that the interference with the holiday is the sole reason the woman desires the abortion; she would simply rather go on the holiday than continue the pregnancy. It is generally supposed that this is

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<sup>29</sup> The Susan B. Anthony and Frederick Douglass Prenatal Non-Discrimination Act passed by Arizona in 2011 (HB 2443) makes it a felony for doctors to knowingly perform an abortion for race or sex selective reasons. The same legislation was introduced into US Congress in 2008. It was defeated in 2012, but reintroduced in 2013. See, generally, S Kalantry, ‘Sex Selection in the United States and India: A Contextualist Feminist Approach’ (2013) *UCLA Journal of International Law and Foreign Affairs* 61 and J Musial, ‘Fetal citizenship in the borderlands: Arizona’s house bill 2443 and state logics of racism and orientalism’ (2014) *20 Social Identities: Journal for the Study of Race, Nation and Culture* 262.

<sup>30</sup> See *Paton v British Pregnancy Advisory Service* [1979] QB 276; *Evans v Amicus Health Care* [2003] EWHC 2161 (Fam) and *A-G Ref No 3 of 1994* [1997] 3 All ER 936.

<sup>31</sup> See, for example, the use of the example in Judith Jarvis Thomson, ‘A Defense of Abortion’ [1971] 1 P&PA 47.

*not* an abortion decriminalised by the Abortion Act. If any abortion is outwith its scope, surely this is. However, deploying the grounds-explanations distinction, perhaps it is possible to make the same move as in the case of the ‘legal’ sex-selective termination. If two doctors can only be convinced that the woman’s desire to go on the holiday is fervent enough that, were the pregnancy to impede her, a risk of harm to her mental health would arise greater than if the pregnancy were terminated, the abortion is legal.

The objection is thus a *reductio ad absurdum* of the interpretive argument which led to my claim that sex-selective abortion can be lawful. The *reductio* argument can be made with various hypotheticals. Consider now another case, in which a woman desires an abortion because, having found out that the child born will have red hair, she no longer wants it (call this case ‘gingerphobia’). Following from the grounds-explanation distinction, it appears that in order to lawfully obtain an abortion she need only convince doctors that her abhorrence of red-headed children is such that giving birth to the child will risk sufficient harm to her mental health, it being of no consequence how that risk has materialised.

The problem, in both cases, is that the very same distinction relied upon to demonstrate the possible legality of sex-selective abortion can be deployed in exactly the same way to illustrate the possible legality of ‘holiday abortion’ and ‘gingerphobia’. Since, however, these cases seem to describe abortions that cannot possibly be within the authorising remit of the Abortion Act, the argument based on the grounds-explanations distinction looks faulty. It cannot be the meaning of the statute to turn every conceivable reason for having an abortion, including the most arbitrary or irrational, into a legally acceptable one, so long as the desire for abortion is sufficiently intense.

How might one answer this objection? To recapitulate, the apparent problem is that once the grounds for abortion are distinguished from the explanations thereof, there is no longer any theoretical limit on the sorts of reasons for having an abortion that may be legally valid, and that this cannot be a correct interpretation of the Abortion Act. Indeed, the suggestion that the Act could legitimate practically any reason for abortion might seem to be in tension with the entire structure of British abortion law, within which the Abortion Act fulfils the role of creating bounded exceptions to an otherwise criminal practice, but does not repeal its *de facto* criminal liability. In light of this, interpreting the statute in such a way that does not absolutely exclude *any* reason for an abortion is not inkeeping with the purpose and the spirit of the legislation – or so it might be claimed.

Yet it must be remembered that the ordinary protocol of the Abortion Act is to isolate the grounds for abortion from the explanations and only to make demands in respect of the former. Abortions in which pregnancy was brought about through rape, or where a woman faces severe financial hardship, are never, legally speaking, abortions on those grounds, but only ever on grounds of risk to physical or mental

health which those circumstances generate. Nor is it easy to imagine how the statute could impose any requirements as to explanations consistently with licensing abortion on one or more grounds – the main purpose of the Act. The combinations of facts on which any one ground might supervene are, naturally, limitless. But if it is the purpose of the Act to authorise abortion wherever one of the grounds is met (read: attested to in good faith by two medical professionals), then it may be argued that its main purpose would be frustrated by any conditions on the explanations which might give rise to them.

Still, for an abortion to be lawful a credible link must be forged between the circumstances in question and a physical or mental health risk of the kind described in section 1. This gives a clue as to how the ‘holiday abortion’ and ‘gingerphobia’ reductions might be answered. As in the case of lawful sex-selective abortions, the explanation—including what I have described as the ‘trivial’ reason for the abortion—must connect to a decidedly *non*-trivial justification for abortion permitted by the Act: the ground. This raises the question as to what circumstances could conceivably constitute that ground in ‘holiday abortion’ and ‘gingerphobia’. It would be a rare case indeed in which interference with a booked holiday or the future child’s hair colour makes the difference between a pregnancy which poses a meaningful risk to the physical or mental health of a woman and one which does not, (especially since it is a supposed feature of those hypotheticals that the woman would not wish to terminate her pregnancy otherwise). With some imagination, however, it is possible to construct fitting explanations. Perhaps, for instance, the holiday in question is one for which the pregnant woman had been saving money towards for years, and which cannot now possibly be postponed. Furthermore, we might suppose that her current mental state is sufficiently fragile (perhaps she is recovering from serious depression) that the elimination of her main source of hope and expectation at that time is likely to cause a significant deterioration in her mental health, far more so than if the pregnancy were terminated and she goes on the holiday.

Now imagine the situation of a different pregnant woman. In the past, she was the victim of a brutal assault, perpetrated by an assailant with red hair. However irrational the disposition, she has since never been able to completely disassociate red hair from her traumatic experience. Because of this, she suspects, with some basis, that were she to have a red-haired child, she would be constantly reminded of her assault. She moreover finds the idea of carrying a pregnancy to term thereafter to give up the baby for adoption extremely distressing. Consequently, upon finding out that the fetus is genetically determined to have red hair, she wishes to have an abortion.<sup>32</sup>

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<sup>32</sup> We can ignore for now the fact that in utero genetic screening for hair colour is neither legal nor, to my knowledge, a current capability of prenatal screening technology, since the question we are concerned with here is only whether the legal argument about sex-selective abortion that I have ventured can in principle be used to construe far wider permissions than the Abortion Act intends to grant.

With these background circumstances filled in, it is possible to see how the putatively ‘trivial’ reason for the abortion (the holiday or the hair colour) could form part of the wider explanation for an abortion ground. In such unusual cases, credibility is likely to be the biggest obstacle. The more outlandish the explanation for an abortion, the less believable the ground. Without knowing more, one might simply doubt that a compromised holiday generates a serious welfare concern for any pregnant woman – similarly so regarding the hair colour of the future child. Once the credibility obstacle is surmounted, however, ‘holiday abortion’ and ‘gingerphobia’ begin to look far less like reductions of the original argument. Rather, with all of the blanks filled in, they may simply look to be within the authorizing ambit of the Abortion Act, and firmly within its purpose if the abortions are carried out to spare the woman mental anguish.

It bears repeating that ‘holiday abortion’ and ‘gingerphobia’ are extraordinary cases. Indeed, any circumstances in which a holiday or the hair colour of the future child partly explains an abortion ground would have to be extremely unusual. The common conception that abortions for reasons such as these are abortions for ‘trivial’ reasons is not wrong, therefore, but only incomplete. It fails to account for the possibility that *any* fact or circumstance which, standing alone, is trivial in reproductive decision-making, may, if married with other very particular facts, constitute a set of conditions that are jointly sufficient to place a woman’s health in jeopardy if a pregnancy is continued. Still, as extraordinary as ‘holiday abortion’ and ‘gingerphobia’ undoubtedly are, most would consider it more extraordinary for a pregnant woman to desire an abortion *merely* to save from canceling a holiday, or out of blind prejudice against people with a particular hair colour, unaccompanied by any explanation of a wider threat of harm. Once appreciating this, one might even think there is good reason to even expect that wherever a woman requests abortion for a putatively trivial reason, some more serious interest is in fact at stake.

In a similar vein, the unavoidable costs of terminating pregnancy may give us cause to doubt that those who do seek out ‘sex selective’ abortions in Britain do so purely for family balancing purposes or out of personal sexism, where no threat to their personal wellbeing presents itself. This is not to call into question the prevalence of so-called ‘son preference’ which, as a wealth of research has shown, is a common attitude in the Western world, although the strength of that preference clearly pales in comparison with that of countries with the highest rates of sex selection, such as India and China.<sup>33</sup> Some such studies carried out in the US

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<sup>33</sup> Surveying the evidence in 1990, D Morgan claimed that ‘son-preference has roots implanted as firmly in Western as in other cultures’ (D Morgan, ‘Legal and Ethical Dilemmas of Fetal Sex Identification and Gender Selection’, in A Templeton and D Cusine eds., *Reproductive Medicine and the Law* (Churchill Livingstone 1990) 70). Surveys carried out in both the UK and the United States have revealed an appreciable amount of son preference, especially for firstborns (D Morgan at 71; N Williamson, *Sons or Daughters: A Cross Cultural Survey of Parental Preferences* (Sage 1976); R Steinbacher and F Gilroy, ‘Sex Selection Technology: A Prediction of its Use and Effect’, (1990) 124

revealed a strong preference for male first-born children and only children.<sup>34</sup> However, the sex preference surveys do not focus on whether prospective parents would be willing to make use of *abortion* in particular as a means of ensuring male offspring. Rather, they indicate only what those sex preferences are, and in some cases, whether the participants would avail themselves of preconception sex selection techniques.<sup>35</sup> Such techniques are accompanied by none of the typical costs of abortion: costs in time, inconvenience, (often) money, pain, and, for some, the emotional costs of ending a pregnancy already in progress. Using abortion as a method of sex-selection is far from a zero-sum decision.

Because of this consideration, it is difficult to extrapolate from the evidence of son preference in Western cultures a widespread willingness to secure those preferences through termination. Indeed, lack of evidence of a high sex ratio (meaning, a preponderance of males) in Britain indicates that the existing son preference is not, on the whole, strong enough to outweigh the costs of abortion, unlike in the Indian context, where the dowry system and family economic reliance on males makes termination, and even infanticide, a price worth paying to ensure male offspring.<sup>36</sup> For this reason, among others, Diemut Bubeck cautions against the tendency to project the 'femicide' problem of the most patriarchal countries onto the more 'gender-egalitarian' ones, and to imagine that a permissive stance on sex selection would yield similar results.<sup>37</sup> She concludes that sex selective abortion 'is not very likely on a grand scale in the latter due mainly to the cost of the currently

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Journal of Psychology 283). However, Morgan's suggestion that son preference is as strong in Western cultures as in others is clearly overstated. For commentary on son preference in India and a comparative overview see S Kalantry (n 30) and S Saharso, 'SSA: Gender, Culture and Dutch Public Policy', (2005) 5 *Ethnicities* 248 and 'Feminist Ethics, Autonomy and the Politics of Multiculturalism' (2003) 4 *Feminist Theory* 199.

<sup>34</sup> See N Williamson, 'Parental Preferences and Sex Selection', in N Bennett ed. *Sex Selection of Children* (Academic Press 1983).

<sup>35</sup> The study carried out by Steinbacher and Gilroy (n 34) posed the following question 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?"

<sup>36</sup> Despite evidence reported in 2007 by S. Dubuc and D. Coleman that the sex ratio indicated a small minority of Indian-born women in England and Wales making use of prenatal sex selection against females (above n 26), recent Department of Health investigations into 'gender ratio at birth' found that the sex ratio between 2007-2011 was 'well within the boundaries for normal populations' and that 'when broken down by mother's country of birth, no group is statistically different from the range that we would expect to see naturally occurring' (Department of Health, 2013. Birth Ratios in the UK – A report of gender ratios at birth in the UK.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/200527/Gender\\_birth\\_ratio\\_in\\_the\\_UK.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/200527/Gender_birth_ratio_in_the_UK.pdf). See also: Department of Health. 2014a. 'Birth Ratios in England and Wales – A report on gender ratios at birth in England and Wales'.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/313559/Sex\\_Selection\\_in\\_England\\_and\\_Wales\\_analysis\\_April\\_2014\\_NM\\_comments.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/313559/Sex_Selection_in_England_and_Wales_analysis_April_2014_NM_comments.pdf)

<sup>37</sup> D Bubeck, 'Sex Selection: The Feminist Response', in J Burley and J Harris eds., *A Companion to Genethics* (Blackwell 2002) 216.

required sex determination and subsequent abortion (although this prediction might change is cheap and reliable preconceptive sex selection became possible).<sup>38</sup>

Things would of course be very different if the usual costs of abortion could be entirely eliminated. We might imagine a counterfactual world in which abortion can be obtained up to a fairly late stage through the use of a painless and instantly effective injection, which causes the pregnancy simply to vanish (no need for surgery or for bodily contractions to expel the foetus), and in which advances in fertility treatment were such that becoming pregnant again instantly, if that were desired, is reliable, free, and easy. In circumstances like these, the prospect that many women might wish to avail themselves of the termination option for reasons of family balancing, or a greater preference for one or other sex, takes on greater plausibility. Needless to say, this is not what abortion is or could ever be like in the world as it is.<sup>39</sup>

These considerations might therefore support an important epistemic presumption about any abortion requested upon revelation of fetal sex, this being that where knowledge of fetal sex underwrites a woman's request for abortion, her surrounding circumstances will, in all likelihood, substantiate one of the physical or mental health grounds specified in the Abortion Act. That is, the very request for the abortion is a good reason in itself to believe that some further threat of harm supervening on the sex of the future child poses a risk to the physical or mental wellbeing of the woman greater than if the pregnancy were terminated, which is all that doctors must believe, in good faith, to lawfully perform the abortion before 24 weeks of pregnancy. (It is, of course, a silent stage of this calculation that the physical and mental health risks associated with a pre-24 week abortion are themselves fairly negligible. While there is no space to elaborate on these claims here, it has long been accepted by professional health bodies that the physical risks of pre-24 week abortion are extremely minimal, particularly when compared with the risks of continuing a pregnancy to term, which is the relevant counterfactual for the purposes of section 1(a).<sup>40</sup>)

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<sup>38</sup> *ibid* 221.

<sup>39</sup> On this point, there is an important comparison to be made between selecting for sex through pre-implantation genetic diagnosis (PGD) in assisted reproduction and sex selecting through abortion. A woman undergoing IVF treatment and who already has two male children might have the desire to select only female embryos for implantation for reasons of family balancing or simple sexism (although, as was seen, this would be legally prohibited except where sex-selection is disease related). Selecting for sex during this process would not otherwise affect the treatment or impact the woman detrimentally in any way.

<sup>40</sup> See RCOG policy document, 'The Care of Women Requesting Induced Abortion' (Evidence-Based Clinical Guideline No 7), at <https://www.rcog.org.uk/en/guidelines-research-services/guidelines/the-care-of-women-requesting-induced-abortion/>. Section 2.2 of the guidance states that 'Women should be advised that abortion is generally safer than continuing a pregnancy to term.' It also recommends patients be informed that most women who have abortions do not experience adverse psychological sequelae. For an extended comment about claims that abortion is

This may sound like a bold assertion. It might also be pointed out that the rationale for the epistemic presumption I defend could be extended to absolutely all requests for abortion up to 24 weeks, not only requests in which fetal sex is pertinent to the explanation.<sup>41</sup> It would seem to follow from that argument that the costliness of abortion *always* warrants the assumption that if a woman is motivated enough to request it, continued pregnancy does indeed pose a risk to her wellbeing greater than if the pregnancy were ended, whether the request stems from the bare desire to avoid motherhood (or adoption), or anything else that renders the pregnancy unwanted. If this is indeed the implication, then I am content to accept it. My claim, remember, is only that without yet knowing more about an abortion request, it is always more likely than not that a physical or mental health risk greater than the risks associated with termination are at issue, at least where the termination occurs early enough.

Still, the more extraordinary the constellation of facts, the more medical professionals may require by way of explanation to connect the dots. Hence there is no need for any further explanation in the pregnancy-through-rape case, where the resulting threat to wellbeing is entirely perspicuous, but a lot of explaining to do in my farfetched example of the lawful ‘holiday abortion’. The lawful ‘sex-selective’ abortion probably sits somewhere in the middle of these two extremes. The applicable ground, whichever it is, will probably require less explaining than is true of ‘holiday abortion’. The huge social and financial significance that can attach to the sex of one’s offspring in specific cultural or religious communities might even suffice to illuminate the relevant threat to the wellbeing of a woman within such a community, without the need for very much more information about her particular situation. But the inference from the sex of the fetus to a health risk will not be anywhere near as obvious or natural as it is in the rape scenario. Just how much by way of precise explanation medical professionals should require in order to form their good faith belief is certainly debatable, and will probably vary across individual cases. Even so, the presumption that any woman who wishes to end a pregnancy badly enough to have an abortion meets one of the section 1 grounds is, I think, a supportable one.

## 6. *The Consent Objection*

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commonly associated with negative emotional reactions, especially regret, see K Greasley, ‘Abortion and Regret’ (2012) *Journal of Medical Ethics* 705.

<sup>41</sup> I am leaving entirely out of this discussion the so-called ‘statistical argument’, which claims that because abortion before 24 weeks is statistically far less risky than childbirth, abortion up to that time-limit is in fact *always* lawful under ground (a). While the statistical argument has some academic support (see, e.g., Morgan (n 34) at 72), it still presents a reading of the Abortion Act that many interpreters of the legislation might be reluctant to accept, which is why I do not rely on it here.

So far, I have argued that abortions for which knowledge of fetal sex is a ‘but for’ cause *can* be lawful according to the terms of the Abortion Act and that there is good reason for presuming that one of the statutory grounds for abortion will be met wherever a woman requests an abortion with fetal-sex-explanations before 24 weeks of pregnancy. But an altogether different objection might be raised at this juncture. It may be true, as I have argued, that some or even most women requesting abortion partly for reasons of fetal sex do indeed face risks to their physical or mental health sufficient to raise a contraindication in the Act. If this is indeed so, however, the concern might be raised that pressure, duress or coercion will often be a feature of those abortion decisions. That is, it may be objected that sex-selective abortions are rarely likely to be consensual.

Recall the kinds of examples we considered at the beginning of the discussion. A woman requests an abortion because her family will shun her if she has another girl. A woman requests an abortion because her husband will abuse her if she does not produce a boy. A woman requests an abortion because, owing to the cultural repercussions of having a girl, it will financially ruin her family. Are these genuinely consensual abortions? If not, it may appear that the sex-selective abortions which most obviously fulfil the section 1 requirements of the Abortion Act are nonetheless unlawful for a different reason: that they are not consensually performed.

The consent issue is a notable ground of feminist disquiet about sex-selective abortion. Feminist thinking is, of course, a broad church, and feminist commentators have not been univocal in their treatment of the sex selection problem.<sup>42</sup> The disparate voices *are* unified in regarding it as hugely significant that fetuses terminated because of their sex are overwhelmingly likely to be female (as April Cherry puts it, ‘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’<sup>43</sup>). The ambivalence creeps in at the point of asking which policy best promotes the feminist’s interest in sex equality. Some of those who equate sex selection with ‘femicide’ and the future disempowerment of women have advocated an outright ban of the practice as the only tolerable solution.<sup>44</sup> Others, whilst acknowledging the moral dubiousness of sex selection, have argued that abrogating any of women’s reproductive freedoms ‘is to nibble away at our hard-won reproductive control’ and risks too much in the way of

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<sup>42</sup> For a useful overview of the competing analyses, see Bubeck (n 38).

<sup>43</sup> A Cherry, ‘A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?’ (1995) 10 *Wisconsin Women’s Law Journal* 161, 184.

<sup>44</sup> See Corea (n 25); Raymond (n 28) and R Rowland, *Living Laboratories: Women and Reproductive Technologies* (Lime Tree 1992).

constricting women's autonomy.<sup>45</sup> Still others focus their attention on the harm that choosing sex selection causes to existing women and girls, either by reducing their numbers (and hence, their power) relative to men, expressing misogyny (Tabitha Powledge writes that 'to prefer males is, unavoidably, to denigrate females'<sup>46</sup>), or helping to perpetuate the patriarchal values which make male babies more desirable in the first place.<sup>47</sup> Some such discussants frame the problem as, at bottom, a conflict between individual interests in procreative control and a class interest in overcoming disadvantage.<sup>48</sup>

But almost all feminist accounts, however they conclude, are alike in recognising how strained an example reproductive 'choice' sex selection will often be. Some such writers that have otherwise defended abortion access on sex equality grounds have questioned women's ability to freely choose sex-based abortions, especially against the background of pervasive sex inequality. In a footnote to her well-known article 'Sex Equality Under Law', Catharine MacKinnon highlights the tension between the freedom to abort which sex equality seems to demand and permissive policies regarding sex-selection:

On the one hand, it is difficult to say why the reason for the abortion decision should matter until those who prescribe what matters live with the consequences the way the mother does, or until women can make such decisions in a context of equality. At the same time, in 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>49</sup>

Doubting whether sex selection is always immoral or inherently sexist, Mary Anne Warren supported freedom of choice in the use of sex selection techniques as the best legal position, but nevertheless conceded that the question over how free a

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<sup>45</sup> T Powledge, 'Unnatural Selection: On Choosing Children's Sex', in H Holmes et al eds, *The Custom Made Child? Women-Centered Perspectives* (Humana Press, 1981) at 197. See also Warren (n 10) and Overall (n 10).

<sup>46</sup> T Powledge, 'Toward a Moral Policy for Sex Choice', in *Sex Selection of Children* (n 35) at 206.

<sup>47</sup> See Chambers (n 28); Overall (n 10) and Holmes 1987 (n 10).

<sup>48</sup> See Cherry (n 44) surmising that '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' (at 222).

<sup>49</sup> C. MacKinnon, 'Sex Equality Under Law', (1991) 100 *Yale Law Journal* 1281, 1317.

choice sex selection is will be pertinent for any assessment.<sup>50</sup> As she wrote, ‘the more powerful the social pressures upon women to have sons, the more room there is to doubt that they are really free to choose or reject SSA, and, perhaps, the stronger the argument for prohibition’.<sup>51</sup>

Few, I imagine, would doubt the probable influence of social pressure in sex-selective abortion decisions. Whether it emanates from individuals, a family unit, or an entire community that places a higher value on one sex, a decision to abort upon revelation of fetal sex is always likely to be partly or wholly informed by external persuasions. As I have already noted, the sex-selective abortion that is motivated only by personal sexism sounds considerably farfetched, especially given the typical costs of abortion.

Importantly, the influence of social encouragements does not, in and of itself, negate any of the section 1 grounds to which a woman might appeal when requesting an abortion with fetal-sex-explanations. Far from it: being able to point to serious pressure to abort exerted by individuals or groups may well be a crucial *part* of a woman’s explanation as to why her physical or mental health is put at risk by the pregnancy, given the sex of the would-be child. However, while social pressure to abort does not invalidate possible grounds for abortion, it can raise doubts about valid consent to abortion treatment.

The Abortion Act itself does not contain any explicit consent requirement. However, it is a general principle of medical law that all treatments performed on competent patients must be done so with that patient’s consent in order to be lawful, even where that treatment is indubitably in the best interests of the patient – indeed, even where it is life-saving.<sup>52</sup> In fact, the application of any force to a competent patient as part of a medical procedure to which she has not provided consent is, legally speaking, an assault.<sup>53</sup> As much would therefore be true of a surgically

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<sup>50</sup> MA Warren, ‘A Reply to Holmes on *Gendercide*’, (1987) 1 *Bioethics* 189.

<sup>51</sup> *ibid* 195.

<sup>52</sup> See *St George’s Healthcare NHS Trust v S* [1998] 3 All ER 673. The UK court addressed the question of consent to termination procedures in particular in *Re SB* [2013] All ER 278. There, the question was not whether the patient, who was a minor, failed to give valid consent because of any pressure placed on her by others, but whether paranoid thoughts attributable to her bipolar affective disorder meant that she lacked the requisite capacity to consent to the procedure. Even though the case concerned mental capacity to consent and not the consent-vitiating effect of pressure, *Re SB* nevertheless underscored the general need to obtain valid consent to a termination procedure, unless the patient is deemed incapacitous, in which case her judgment would be substituted for a decision in her best interests.

performed abortion for which valid consent was not obtained.<sup>54</sup> And one way a patient may fail to give valid consent is if she does not consent through free will.

In *Re T (adult)*, the Court of Appeal directly addressed the possible implications of social pressure for a patient's consent to a treatment procedure.<sup>55</sup> In that case, a 20 year-old pregnant woman had declined a medically necessary blood transfusion under the influence her mother, a practising Jehovah's Witness. The Court determined that the woman's ability to decide whether to accept the treatment had been impaired, partly due to her mother's pressure, and ordered the transfusion to take place. The case was, in a way, an inversion of the pressurised abortion scenario, since it concerned compulsion to withhold consent to treatment rather than to grant it. However, the Court endorsed the principle that a patient's consent to a particular treatment may not be valid if it is given under pressure or duress exerted by another person.

The first thing to say by way of reply to the consent objection is that it does not exclude the possibility of *some* lawful sex-selective abortions. The objection only claims that an abortion partly explained by fetal sex will not be lawful if and when valid consent is not given. It does not claim that sex-selective abortion is unlawful *per se*, and presumably it would not be so in the case of a pregnant woman who both presents a plausible contraindication under section 1 and who gives valid consent.

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<sup>53</sup> More precisely, the infliction of force in the process of non-consensual medical treatment fulfils the *actus reus*, (or, the "conduct") element of assault, whether or not the assailants possess the requisite guilty state of mind, or *mens rea*, to be guilty of the criminal offence. The absence of consent would render the treatment unlawful, however, whether or not it were criminal.

<sup>54</sup> Whether medical abortive procedures in which the woman eventually self-administers abortifacient pills handed over by medical professionals could also be considered an assault where requisite consent is lacking is less clear. (In a recent judgment, the High Court held that the Abortion Act's requirement that all abortion 'treatment' be carried out on registered premises precluded women from taking abortion pills from the clinic to self-administer at home in an early medical abortion. However, even when taking place in registered clinics, the final act of ingesting the pills, once handed over by healthcare professionals, is still carried out by the pregnant woman herself. See *BPAS v Secretary of State for Health* [2011] EWHC 235 and K Greasley, 'Medical Abortion and the 'Golden Rule' of Statutory Interpretation', (2011) 19 Med L R 314.) However, as long as the prescription and self-administration of the pills are regarded (as they have been by the courts) as abortive "treatment", the argument might still be made that the absence of consent renders that treatment unlawful.

<sup>55</sup> [1992] 4 All ER 649.

But there are also important questions to be asked about how forceful and direct pressure to undergo a medical procedure must be for it to vitiate a patient's consent to that procedure. In *Re T*, the source of the pressure was a close family member who directly exerted influence on her at a time when her ability to form an independent judgment was impaired for other reasons, leaving her particularly vulnerable to suggestion. Yet, as we know, the influences at issue in sex-selective abortion may be altogether more intangible and diffuse than this, and the women subjected to them will, for the most part, be entirely capable of weighing the considerations and forming a judgment for themselves. It is not clear that pressures of these kinds would be enough to invalidate consent to medical procedures other than abortion, although they might certainly be as powerful in inducing consent, oftentimes more so. Would the Court in *Re T* have reached the same judgment if the woman had refused the transfusion not under personal pressure from her mother, but under the weight of the norms and values of a community with which she herself identified?

Following MacKinnon's thinking, some may be inclined to take a more expansive view of the conditions of consent to sex-selective abortion, and even to raise doubts about the validity of all consent to such a procedure given in a context of sex inequality. There may be great difficulty, however, with the consent objection's basic contention that wherever a woman chooses sex-selective abortion under social pressure, her consent to the treatment procedure is compromised.

Abortion decisions are never made in a circumstantial void. The advocate of the consent objection will therefore need to show why factors that might influence or pressurise a woman to choose an abortion after revelation of fetal sex are more destructive of consent than a myriad of other uncontrollable circumstances that may have a hand in the abortion decision, but are not thought to invalidate consent to abortion. We can compare the situation of the pregnant woman under pressure to abort because of the fetus's sex with that of two different women: one who requests an abortion because she lacks the financial resources to raise a child, and another whose partner tells her that he will end their relationship unless the pregnancy is terminated.

In both cases, let us imagine that the woman would have desired to continue the pregnancy but for the unfortunate circumstance—the financial constraints, or the relationship threat—which motivated her to end it. I expect few people would regard these as non-consensual abortions. Valid consent to abortion does not demand ideal background circumstances and the absence of pressures of all kinds. Indeed, if that were so, we would be hard pushed to find any example of a consensual abortion, for reproductive decisions are always made in response to the circumstances as they are, often non-ideal. In this respect, abortion choices are like all of our choices. Perhaps I choose to become a lawyer because, as it turns out, I am better at that than, say, at ballet dancing, a fact that I bemoan. It does not follow from this that my lawyerly work is carried out non-consensually. This example might sound strange because paid legal work is not generally thought of as the sort

of activity one needs to consent to in any formal way – not like a treatment procedure. So we might take the more apt example of someone who agrees to undergo back surgery to fix a condition that is causing him great pain. It would be quite absurd to claim that his consent to the procedure is invalid because he would not have given it but for an unwanted circumstance (the back pain).

### 7. *Consent and Coercion*

This is only to state the obvious point that all of the choices we make are responsive to the situation in which we find ourselves, and are not necessarily less autonomous for that. The more pointed question regarding abortions requested upon revelation of fetal sex is whether they are *less* consensual than any number of abortion choices we readily accept as the free exercise of reproductive autonomy. The proponent of the consent objection may suggest that we are mistaken in assimilating the pressures motivating sex-selective abortions with those in play in other abortion decisions. No doubt, many freely chosen abortions are chosen in response to circumstances at least partly outside of the pregnant woman's control: her relationship status, her financial resources; her career development, to name but a few. It might be argued, however, that there is something special about the kinds of pressures typically at issue in sex-selection.

For one, where the influence comes in the way of pervasive cultural pressure to abort females exerted by the values of a pregnant woman's community, it may be thought of a wholly different order from financial dire straits, or plain bad timing. Moreover, where the pressure imposed by particular members of the woman's social world is direct and overwhelming enough, it can cross the threshold from mere pressure to *coercion*, and in this respect is set apart from other 'persuasions' to abortion. That would certainly be true of the extreme case where a woman faces domestic violence if she refuses to pursue termination, although coercion need not involve threats of physical violence.

In a lengthy analysis of the principal ethical objections to a permissive policy on sex-selective abortion, Jeremy Williams suggests that these sorts of attempts to distinguish pressure to abort on the basis of sex from other pressures informing abortion choices run up against problems.<sup>56</sup> The difficulties become apparent when comparing cultural imperatives to abort, say, female fetuses, with different social imperatives to detect and abort defective fetuses. Williams notes that cultural expectations in Western countries now weigh heavily in favour of terminating where fetal disability is detected. If cultural pressure of this kind precludes consent to a sex-selective abortion, he asks why the same would not be true of selective termination on the grounds of disability. It certainly appears that MacKinnon's worry about the freedom of the decision to abort a female fetus in conditions where 'a male life is valued and a female life is not' carries over to the disability context. In a social world where the lives of disabled people are not valued equally, are decisions

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<sup>56</sup> J Williams, 'Sex-Selective Abortion: A Matter of Choice', (2012) 31 *Law and Philosophy* 25.

to abort defective fetuses not also unfree? This is an implication which proponents of the consent objection of sex-selection might be reluctant to accept.

Sawitri Saharso has suggested that the common assumption that sex selection abortion is not a medical intervention that women would request voluntarily runs the risk of infantilising women whose reasons for abortion do not project prevailing cultural values, by denying their self-authorship of the decision, and betrays a double standard in our evaluation of free abortion choice.<sup>57</sup> Whereas the western woman who seeks an abortion because she is unemployed is realising all the value of reproductive autonomy, the immigrant woman who responds to her husband, her culture, or her religion is not an autonomous decision-maker. As Saharso responds, 'we could counter-argue that all of us are shaped by our cultures and furthermore that not all western women are as fully autonomous' as we might assume.<sup>58</sup> Consigning the pressures associated with sex selection to a category of their own might do much to encourage the 'othering' of ethnic minority cultures, along with the mistaken belief that only women from immigrant communities ever have reason to make use of sex selection.<sup>59</sup>

On the coercion question, Williams readily acknowledges a principled distinction between choices that are constrained by 'the application of threats of rights violations' and those in which options are limited through mere circumstance.<sup>60</sup> As he says: 'threats of serious wrongful harm are generally regarded as destructive of autonomous decision-making in a way that the prospect of being harmed more generally need not be'.<sup>61</sup> Thus, the woman who is forced to obtain a sex-selective abortion to avoid domestic abuse is not properly grouped with the woman who has no money to take care of a child. Personal threats of force diminish consent in a way that circumstantial pressure does not.<sup>62</sup>

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<sup>57</sup> Saharso 'Gender, Culture and Dutch Public Policy' and 'Feminist Ethics' (n 34).

<sup>58</sup> Saharso, 'Gender, Culture and Dutch Public Policy' (n 34) 257.

<sup>59</sup> For a discussion of the ways in which the sex selection debate in Canada has entailed the depiction of South Asian communities as primitive and misogynist, see M Deckha, '(Not) Reproducing the Cultural, Racial and Embodied Other: A Feminist Response to Canada's Partial Ban on Sex Selection', (2007) 16 *UCLA WOMEN'S LJ* 1, 10-11.

<sup>60</sup> Williams (n 57) 141.

<sup>61</sup> *ibid.*

<sup>62</sup> In this part of the paper, Williams relies on an account of coercion developed by Alan Wertheimer in his book, *Coercion* (Princeton University Press, 1988).

Of course, when defined this way, it is obvious that not all women requesting abortion after learning of the fetus's sex will be subject to coercive pressure. Williams therefore considers the prescriptive argument that the prospect of coerced abortions in some cases might yield paternalistic reasons for a blanket ban on sex-selective terminations.<sup>63</sup> In other words, he considers a possible prophylactic justification for prohibiting sex-selection, grounded in the need to safeguard women from terminations in which consent is unquestionably lacking.

A second prophylactic argument of a slightly different kind might also be presented in favour of prohibition. Perhaps, by permitting the sex-selection option, the state will in fact only place some women in a worse overall position than they would be in if the option did not exist at all. This is because coercive pressure to abort would be ineffectual, and therefore pointless, if women were not in any case able to accede to the coercers' insistence on an abortion. It may be that the very availability of sex-selective termination will compromise such women strategically by presenting them with an option others may then have reason to coerce them into choosing. Of course, this consideration applies to non-coercive pressure as well, hence Clare Chambers warns that the availability of sex selection for all will jeopardise the autonomy of some women by increasing the pressure on them to detect the fetus's sex and abort if female.<sup>64</sup> Conversely:

If sex selection is not permitted and is not generally available, a pregnant woman has an 'excuse' for failing to abort a girl – an excuse that is unavailable to her if the practice is lawful and relatively common.<sup>65</sup>

Williams attempts to counter the prophylactic argument by claiming that prohibiting sex-selection on such grounds would be *ad hoc*.<sup>66</sup> After all, women in abusive situations can be coerced into getting abortions for all sorts of reasons, not only having to do with the fetus's sex. If the mere potential for undetected coercion is sufficient reason to prohibit abortion wherever fetal sex is part of the explanation, it is equally good reason, Williams argues, to prohibit all abortion. In short, the prophylactic argument proves too much. Thus he concludes that while coercion in the abortion context is no doubt a serious concern, the problem is better addressed by adopting policies 'designed to effectively punish abusive spouses and family members, empower women within the home, and provide them with feasible exit

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<sup>63</sup> He says (*ibid*): '...standard liberal commitments to individual autonomy and anti-paternalism can be compatible with prohibiting certain practices on grounds of ineradicable concerns about people being coerced into participating in them, and the harm that would ensue'.

<sup>64</sup> Chambers (n 28).

<sup>65</sup> *ibid* 330.

<sup>66</sup> The term 'prophylactic argument' as applied to these particular claims is my own.

options', a strategy he believes also strikes a better balance between the interests of women exposed to coercion and those who choose abortion freely.<sup>67</sup>

Williams's dismissal of the prophylactic argument may be a little too hasty. Whilst it is true that domestic coercion can be a feature of abortion decisions in which fetal sex is *not* part of the picture, it does not follow that a legal policy of targeting coercion in sex-selection is *ad hoc*, so long as there is good reason to think that abortion as a response to knowledge of fetal sex is uniquely likely to involve coercion by some third party or group. If coercive sex-selection is a phenomenon of some note, the law may have a consent-based reason to prohibit all sex-selective terminations that does not extend to termination of pregnancy in general. Simply because the law cannot guard against all coercion in abortion without undue compromise to reproductive liberty is not to say it cannot address it in the worst places. Further to this, it might be argued that a selectively prohibitive policy targeting only those abortions where patient consent is the most precarious is a more proportionate protective policy than one which abrogates reproductive rights *en bloc*, just so as to pre-empt any possibility of coercion.

Still, the claim that outright coercion—as opposed to mere social pressure—is characteristic of sex-selective abortion strikes me as specious at best. There are all manner of reasons that individuals or groups may have for coercing a pregnant woman into requesting an abortion (concealment of the sexual intercourse that resulted in the pregnancy presumably being very high up on the list), and no reason I can think of for suspecting that resort to coercive threats is far *more* likely when the reason pertains to fetal sex. Coercion, remember, marks an extremely advanced threshold on the spectrum of influence, where the threat or the force applied is so severe that the coerced party is left with no reasonable choice but to comply. Unless there is sound reason for believing that such degrees of force are deployed with comparatively high incidence where the sex of the future child is the issue, the prohibition of sex-selective abortion would seem to come at too high a cost to the reproductive freedoms of those who would freely choose abortion for reasons partly informed by fetal sex.

A possible riposte here might point out that even where sex-selective abortions are not coercively induced, they are hardly likely to be consensual in the most meaningful sense. As MacKinnon reminds us, the decision to abort female fetuses in particular ought not to be regarded as entirely free against background conditions where 'male life is valued and female life is not', let alone where more direct forms of pressure and oppression—whether or not they amount to outright coercion—engender that decision. Since sex-selective abortion will hardly ever, if ever, take place in conditions of true *consensuality* (if one may put it that way), it might be argued that the right to choose terminating procedures which meet the

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<sup>67</sup> Williams (n 30) 142.

standard of free choice only by stopping short of full-fledged coercion is not worth protecting in the name of reproductive freedom.

Some would no doubt abjure the assumption that sex selection could never amount to genuine choice, even in conditions of patriarchy. As April Cherry argues, women are not ‘incapable of making positive choices within the contexts of powerlessness and vulnerability’, although these choices will often be “double bind” choices in which the chooser faces the dilemma of partaking in her own class subordination or being left even worse off.<sup>68</sup> In a different vein, Mary Anne Warren hypothesised a cluster of relatively harmless and unpressurised sex selection scenarios, including the case of prospective parents who may want a daughter after having a run of sons (or vice versa), who feel ‘that because of their own personal background or circumstances, they would be better parents to a child of one sex than the other’, or who might even attempt to ‘resist patriarchy’ by choosing daughters rather than sons, or sons, or choosing sons so as to rear them as non-sexist men.<sup>69</sup>

More to the point, however, reformulating the consent objection this way only resuscitates the earlier problem of distinguishing non-coercive sex-selective abortion from a range of other abortion scenarios in terms of consensuality. This, we saw, can be extremely difficult. Is the woman who decides on abortion as the best of a bad set of options amidst financial hardship exhibiting much greater consensuality in her abortion choice than the woman whose ability to cater financially or relationally for a new child depends on the sex of that child? Does an existing context which belittles the value of women and reduces the opportunities available to them diminish consensuality in sex-selective abortion far more so than social prejudice against the disabled calls into question the consensuality of abortion for fetal disability? If the relevant distinctions cannot be made, we may have to conclude that the consent objection is not an adequate justification for prohibiting all abortion for which fetal sex is part of the explanation.

## 8. Conclusion

There are a number of issues germane to sex-selective abortion which were not examined in any detail here. In particular, I have said nothing developed about the stark reality that sex selection, as it is practiced globally, is a tool for the extermination or prevention of female lives, and the ramifications this has for the legal acceptability of sex-selective abortion in any jurisdiction. If we are right to speculate that selective abortion is, and indeed, would be, used to select overwhelmingly against females, this cannot be inconsequential for the normative appraisal of the practice.

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<sup>68</sup> Cherry (n 44) 219.

<sup>69</sup> Warren (n 10) 84 and 128.

However, the pervasive worry that authorising sex-selective abortion will meaningfully exacerbate sex inequality must be contextualised to the prevailing social values and predicted uptake of the practice in the country in question. Thus some discussants have made a point of resisting the tendency to assimilate the sex selection issue in Britain and the US with that of India and China, where the implications of bearing female children are, on the whole, so drastically different.<sup>70</sup> As Bubeck concludes:

[I]f sex selection remains relatively little taken up and fails to reach a threshold of visibility, its counterproductive effects will be much reduced or even negligible, and it would thus be more neutral with respect to gender justice and equality.<sup>71</sup>

To the extent that abortion with fetal-sex-explanations in Britain does threaten to exacerbate the social disadvantage of women and, hence, reinvest in the conditions which make female children less desirable, the normative debate will, I expect, boil down to how far individual women can be obligated to sacrifice their prudential interests in aborting female fetuses for the sake of eliminating sex-selection as a source of sex inequality, as well as the degree to which a ban on sex selection might encroach on reproductive rights more broadly. April Cherry argues that the ultimate question for any discussion of sex selection is whether, notwithstanding its use to entrench male preference and female subordination, we should refrain from prohibiting the practice, in light of the precariousness of women's reproductive rights.

For the so-called 'liberal feminists' who conclude that 'the balancing of harms must sway in favour of its foundational principles of the protection of liberty and autonomy',<sup>72</sup> the pressing matter is what philosopher Margaret Radin might call the 'transitional problem' of what to do in the interim, non-ideal circumstances where refusing the sex selection option only places such women in a "double bind".<sup>73</sup> Some might well see the sex selection problem as of a piece with the kind of "double bind" problems Radin analyses, such as prostitution and commercial surrogacy, and which, she argues, call for tailored transitional policies which dodge the harsh effects of prohibition whilst working to reduce the social inequalities that create the conditions for exploitation. Those who regard prohibition of sex selection as too dangerous to women's precarious reproductive rights are especially likely to focus attention on the wider goal of counteracting the norms and attitudes largely responsible for placing some women in the situation whereby their wellbeing is

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<sup>70</sup> See Cherry (n 44), Kalantry (n 30) and Saharso (n 34).

<sup>71</sup> Bubeck (n 38) 226.

<sup>72</sup> Cherry (n 44) 209.

<sup>73</sup> MJ Radin, "Market Inalienability" (1987) 100 Harv. L. Rev. 1849.

threatened by the sex of the future child, including by means of “consciousness raising” about son preference.<sup>74</sup>

I neglected these matters not because they lack salience, but because I wished to focus on the preliminary question about the current legal status of ‘sex-selective abortion’ under British law. I have suggested that sex-selective abortion can be lawful under the terms of the Abortion Act, and that its lawfulness can be explained using the same authorising framework as applies to all legal abortion. This legal appraisal of abortion with fetal-sex-explanations is inkeeping with the general tenor of the Act which, as has been noted by some, defers heavily to medical authority for the authorisation of all abortion, making doctors, rather than pregnant women, the ultimate arbiters in termination decisions.<sup>75</sup>

I argued, moreover, that reservations about patient consent cannot, without more, justify the exclusion of fetal sex from the permissible explanations for abortion, and that an exceptional exclusion on grounds of lack of consent would be inconsistent with the general permissions of the Abortion Act. Whether an exclusion of this kind is still the most appropriate policy to follow when all things are considered—including the implications for sex equality—is a question that I do not attempt to answer here.

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<sup>74</sup> See AD Renteln, ‘Sex Selection and Reproductive Freedom’, (1992) 15 *Women’s Stud. Int’l F* 405.

<sup>75</sup> See S Sheldon, *Beyond Control: Medical Power and Abortion Law* (Pluto Press, 1997) and E Lee, *Abortion, Motherhood and Mental Health: The Medicalization of Reproduction in the U.S. and Britain* (Transaction Publishers, 2004).