

WILL PRESERVING AMERICAN WOMEN'S PROCREATIVE FREEDOM CONFLICT WITH ACHIEV- ING EQUALITY BETWEEN THE SEXES?

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Ln the essay, I explore a future conflict between what most American feminists hope to achieve and what they hope to preserve: full equality of opportunity in the long run between the sexes in America and freedom for American women to abort their fetuses in the early stages for any reason at all. The long-run equality I have in mind would afford equal chances for success to all American children regardless of sex. Some feminists will insist that American society must undergo a socialist transformation before such equality can be realized,¹ while others will concede that real equality is possible in capitalist society. The relevance of the dilemma I discuss, however, is unaffected by the resolution of this very large disagreement among feminists, since my point is of

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concern to all those who seek to remove the disadvantages women must bear due to disparate treatment they receive, especially the treatment accorded them prior to adulthood. One need not be a radical feminist to recognize that there cannot be sexual equality if girls are less likely than boys to develop the traits needed for rewarding careers² solely because of the position girls occupy in the family.

The Empirical Trends

I am not referring here to parental treatment of children after birth but to sex selection during gestation—a practice as I will show that affects not just the discarded fetuses but the laterborn children. Most if not all American feminists agree that a woman should be free to terminate her pregnancy (at least in the early stages) for any reason she chooses.³ In addition, feminists would agree that pregnant women have a right to know as much about their fetuses as can be disclosed to them—assuming the cost of acquiring such knowledge does not significantly burden society. My thesis is that the right to choose abortion for any reason (and acquire information about the fetus's sex) must be restricted if full equality of opportunity between the sexes in American society is to be achieved.

The most common technique for discovering the sex of the fetus, amniocentesis, is becoming more widely used and will become more affordable if this trend of widespread use continues. The available evidence indicates that, if American women and American couples could control the sex of their fetuses, there would at least be a preference for male firstborn child followed by a female second child, if not a preference for males regardless.⁴ The literature further suggests that firstborn children are more likely to be "achievers" than subsequently born siblings.⁵ Thus, if present trends continue, there will at least be wide fluctuations in the relative numbers of male to female births from one generation to the next. There is, alternatively, an appreciable risk that men will far outnumber women in every generation, with all the consequences that such an imbalance would entail, such as, more violent crime, more job discrimination, fewer career opportunities and diluted voting power for women.⁶ In any case, the continued availability of amniocentesis and abortion on demand certainly portends dimmer prospects for full equality of opportunity for American women in the subsequent generations.

The Question about Abortion for Sex Selection Which These Trends Raise

It is, of course, arguable whether the future will be as gloomy as I am predicting. But, even if some sociological studies suggest American couples would not now resort to abortion to preselect male firstborns, it is possible that, when the technology actually becomes widespread, attitudes will change. Nevertheless, for the sake of argument, at least, it is worthwhile for feminists to consider the following question: Would society be justified in depriving women of the knowledge of the sex of their fetuses, or, failing that, in prohibiting abortions sought solely for the purpose of controlling the sex of the subsequently born child?⁷ To be sure, taking this question seriously requires the reader to ignore the many objections one can pose to the dire predictions just discussed, but the question raises the fundamental problem that basic values—equality of opportunity and reproductive freedom—may collide. It is worth exploring this question, then, if only clarify our priority of basic social values. Some preliminary observations about this question are in order.

It should be noted, first, that there are two distinct issues that sex selection abortion raises: one is a question about a woman's right to information about the fetus's condition; the other concerns her right to act on the information. That is, the first question is whether women can be deprived of knowledge of the sex of the fetuses they carry (when that knowledge is unrelated to any sex-linked defect). I will focus on the second issue (of whether her freedom to act on her knowledge of fetal sex can be restricted), for a number of reasons, primary among which is the circumstance that without a justification for prohibiting sex selection abortion there can be no justification for denying the woman access to the information. Also, denial of access to information about her body raises other moral and constitutional questions I cannot fully explore here.

It should also be noted that there may be less draconian measures that would ensure equality of opportunity between the sexes, such as, public education campaigns along the lines of Roberta Steinbacher's suggestions that would make women more aware of the long-term consequences of aborting female fetuses.⁸ Although I do not deny the possibility that such campaigns will succeed, I nevertheless suppose it is not likely that they will. The sociological evidence shows that college women sympathetic with the "women's movement" would nevertheless prefer a firstborn son to a daughter by a two-to-one margin.⁹ My proposal might be viewed by those who believe such campaigns will succeed as a discussion about how American society

might justifiably interfere in women's abortion decisions if such public awareness campaigns do not succeed.

In this connection, the reader should note that banning sex selection abortion could take two forms: banning any abortion performed solely because the fetus is the "wrong" sex, or banning the abortion of any normal female fetus. The latter would be akin to a strict liability statute, because the motive a woman had would be irrelevant. The purpose of the statute would simply be the saving of as many female fetuses as possible. The statute would solve the narrow problem of an imbalance in male-to-female ratio and would be simpler to administer, since no examination of a woman's motives is needed. Nevertheless, because the first statute raises more interesting questions, I will address here the problems created by that solution. Admittedly, the statute is more sweeping than needed (since it would prevent imbalances of any kind in the population, not just imbalances of males), but it would also be equally as effective as the second statute in sparing future generations of women the suffering that preference for sons might otherwise cause. It also has the advantage of appealing to those feminists who believe sex selection abortion is grossly sexist, because it declares society's repugnance to the attitude that the value of potential human beings solely depends upon their sex.

A third preliminary question concerns the fairness of punishing only the women who choose to abort and not their male partners who may well have insisted on the abortion of the female fetuses. For the sake of simplicity I consider the cases of single women and married women who have come to the abortion decision on their own. This not only simplifies the discussion but it also is more firmly based in the available empirical data that consists largely of surveys of college women, most of whom are unmarried.¹⁰ Nevertheless, it is highly unlikely that sex selection abortions would occur without the approval of the husband or lover involved, if any. Therefore, any criminal punishment of women for seeking sex selection abortion should be coupled with criminal punishment of the husband or lover involved. This would accomplish several goals: it would punish men who insisted on or at least failed to object to the abortion; it would reveal society's strong disapproval of sex selection abortion; it would encourage men to take steps to prevent the abortion when they might otherwise not. The law could provide that a husband who has reason to know that his wife has decided to abort her female fetus and fails to object is equally as culpable as the wife. Procedurally, the law could provide that the fact that a wife has sought a sex selection abortion raises a rebuttable presumption that the husband did not object. The burden would then be on the husband to show that he had no reason

to know or that he did object or that his objection would have been futile. The reader should, therefore, bear in mind that I am really proposing punishment of couples, although I expressly discuss here only the special difficulties attendant to punishing women.

A fourth preliminary point is that the reader should not interpret my concern for women's equality as a concern for mere equality of numbers in future generations. My concern is equality of opportunity between the sexes—a state of affairs that American society has failed to achieve even when the numbers of the respective sexes are roughly equal. This goal will be even further out of reach, if not unattainable, should women be vastly outnumbered by men. Thus, the disproportionate numbers of women and men is merely symptomatic of the inequality of opportunity which is my real concern and which may well be incompatible with complete procreative freedom of couples and single women.

A fifth point here is that feminists must consider the consequences of restricting women's abortion rights, after the right to abortion has been so hard-won. Some feminists will refuse to restrict the freedom to avoid the slippery slope of the loss of the right in the long run. I do not resolve this difficult balancing problem. Instead, I say here only what can be said for restricting sex selection abortion.

A final preliminary point is that any prohibition on abortion for sex selection would not be based on any view that fetal life should take precedence over the woman's desire to terminate the pregnancy. Instead, the purpose of the prohibition would be the realization of sexual equality of opportunity in future generations. This does not imply that any fetuses saved by the prohibition were bearers of a serious right to life. Since society would restrict women's freedom for the sake of future equality, the crucial question is not whether the lives of individual fetuses are sacrosanct but whether such future equality is of sufficient social significance to justify interference with what are normally considered private decisions. It is instructive in this connection to reflect on the arguments presented by the participants in the Hart-Devlin debate of twenty-five years ago, since the issue there was the extent to which society can interfere with seemingly private decisions.

Three Morally Relevant Characteristics of Abortion for Sex Selection

One of the many arguments Devlin marshalled in his effort to convince his critics that private behavior is society's business concerned private drunkenness. He admits in his book that becoming drunk alone in one's own home seems to be a purely private matter,

but he proceeds to ask rhetorically what society would be like if half the population chose to do this every night.¹¹ Even Devlin's critics of a utilitarian persuasion would be forced to admit that society would be justified in prohibiting private drunkenness if large numbers of people were unable to resist the urge to drink alone to excess—with the resulting absenteeism from work and the decline in productivity that would inevitably result.

This hypothetical situation bears important similarities to abortion for sex selection: (1) both concern seemingly private decisions that in isolated cases have little impact on society but (2) have a seriously adverse impact if large numbers of people engage in the activity at issue, and (3) most importantly, the large numbers of prospective participants choose not to resist the temptation to engage in the activity at issue. A closer examination of each of these conditions shows how satisfying all of them provides a justification for society's interference in otherwise private decisions.

The first condition merely describes what Mill called self-regarding conduct: the individual decision to seek an abortion for sex selection or to become inebriated in solitude has little if any impact on society. The second condition is really the counterfactual claim about what would happen if large numbers of people became drunk alone or aborted fetuses of the "wrong" sex. Society is ultimately affected only when the third condition is satisfied. That is, if most people at home alone were simply unable to resist the temptation to drink to the extent that their performance at work the following day was adversely affected, the decision to become drunk alone would no longer be a merely private decision. Society would then be entitled on Millian grounds to intervene, because the decision is taken out of the purely private realm by the adverse effect on social productivity the decisions cause. To be sure, society could elect to bear the loss, but nondrinkers, who, unlike their drinking fellow workers, derive no benefit from the freedom to drink, would be under no obligation—of a Millian sort—to compensate for the poor performance of their fellow workers. Similarly, society could bear the enormous social cost of having wildly fluctuating proportions of the sexes in its population from one generation to the next or of a permanent imbalance in the proportion of males to females, but society is surely under no obligation to bear either burden.

Is Sexual Equality Similar to a Public Good?

In truth, society's attempt to prohibit abortion for sex selection is more aptly compared to the sacrifices society bears to enjoy a

public good than to the sacrifices it makes to eliminate social evils like excessive drinking. That is, women who seek abortions for sex selection are more appropriately viewed as free riders who prevent society from enjoying a public good than as individuals who cause social mischief. Whereas the drinking controversy pits the abstainers against the drinkers with each side disagreeing over the value of drinking and whether nondrinkers should compensate for the reduced productivity of drinkers, the controversy over abortion for sex selection might involve complete agreement on all sides over the value of equal opportunity between the sexes. In other words, childbearing couples would agree that women should not be disadvantaged in the competition for privileged positions and that women should not be free to have firstborn males exclusively. They would agree on the reasonableness of society's ban on abortion for sex selection, but, as with all public goods, each couple would secretly seek to make an exception for its own firstborn child. This is not to say the drinking controversy could not take the form of a free rider problem in which drinkers agreed with nondrinkers on a ban on private drunkenness but secretly sought exception in their own cases. However, the drinking controversy is more plausibly understood as arising from a fundamental disagreement between drinkers and nondrinkers over the respective values of worker productivity and the pleasure of drinking. Conversely, the sex selection controversy can be more plausibly depicted—to feminists at least—as a free rider problem in which all sides agree that long-run sexual equality takes precedence over short-run procreative freedom than as a fundamental disagreement among child-bearing couples over whether equality is more important than freedom.

One striking difference between the free rider problem and the sex selection abortion problem is that public goods are not designed to ease the burden of past discrimination. Justice might require some government provided programs, such as old age security or public health care, but they are not usually part of a program of compensatory justice, or, more exactly in the context of sex selection abortion, a way of reducing the pervasiveness of traditional forms of discrimination. Viewed this way a ban on sex selection abortion is unlike any other public good. In this respect, banning sex selection abortions is a variant of what constitutional scholars call "benign sex discrimination," i.e., legislation classifying people according to sex and restricting the opportunities of one sex to enlarge the opportunities for members of a traditionally discriminated

group. Usually, this entails reducing opportunities for males to benefit females; in this case we are restricting the reproductive freedom of the present generation of women to ease the burdens for future generations. Perhaps one last hypothetical scenario will more clearly show how banning sex selection abortions is a form of benign sex discrimination.

Suppose men could insure that all-or the vast majority of sperm they released during intercourse contained only Y chromosomes, thus guaranteeing—or greatly increasing the odds of—male offspring. We might imagine men could accomplish this by ingesting certain vitamins every few weeks. Few who profess concern for long-run equal opportunities for women would doubt the legitimacy of banning or at least restricting the sale of these vitamins. The reason would be clear: when men exercise their reproductive freedom this way, they create an atmosphere of greater oppression for women in subsequent generations. Moreover, banning the sale of the vitamins does not prevent men from reproducing entirely: instead, men can no longer control all aspects of their reproductive activity. Since men have no fundamental right to control this aspect of reproduction and since the effects of the attempts to control that aspect of reproduction impinges on women's fundamental rights to be free of discrimination, it is just to restrict men's freedom to control the sex of their offspring. If this justification will succeed in the case of men's attempts at sex selection, it will surely succeed in the case of women's attempts. Indeed, if future medical technology should develop a way for women to control the sex of their offspring using do, it-yourself devices at home prior to conception, the justification for banning the sale of such devices would take precisely this form.

Two Problems a Ban on Abortion for Sex Selection Raises

Whether prohibiting sex selection abortion is better viewed as benign sex discrimination or as an instance of society's pursuit of a public good, the long run goal of equality between the sexes requires that society restrict American women's procreative freedom. Because American women have enjoyed freedom to abort regardless of motive since *Roe v. Wade*,¹² certain practical and constitutional questions about banning abortions for sex selection arise. These are: (a) whether the courts can and should distinguish in specific cases between the women who abort for a permissible reason, such as, the financial burden, and those who abort to select the sex of

the firstborn; (b) whether *Roe v. Wade* allows the state to restrict a woman's choice to abort early in the pregnancy.

The Practical Difficulty

If a ban on abortion for sex selection were in effect, there would inevitably arise the case of the woman who knew her fetus was the "wrong" sex but chose to abort not to determine the child's sex but to avoid what she realized after conception was the onerous financial burden of childbirth and parenthood. It might seem irrational to excuse such a woman and to punish another woman who aborted under identical circumstances but honestly admitted that her motive was sex selection. Similarly, it might be said that it will be factually impossible to determine a woman's true motive whenever she claims her motive was permissible. Finally, it seems unprecedented for the state to punish people for conduct that is prohibited solely because it was actuated by a forbidden motive.

There are two responses to these questions. First, the courts could resolve close cases with a rule that the jury may infer an impermissible motive from an ambiguous situation alone. A permissive presumption like this can be justified on two grounds.

First, allowing the fact-finder this freedom would have the effect of encouraging women who know the sex of their fetuses to have "wrong" sex babies (rather than risk conviction of violation of the ban) thereby increasing the numbers of babies of the endangered sex, with the result, in turn, that imbalances in future generations become less likely to occur.

The second response to the objections above is that excusing women who abort a "wrong" sex fetus for permissible reasons is similar in relevant respects to the familiar good faith exemptions from liability in criminal law and the law of contracts. For example, a holder in due course, *H*, of a promissory note which, let us say, a purchaser, *P*, gave the seller, *S*, can recover what *P* owes on the note, even though *S* failed to perform—provided, among other things, that *H* acquired the note from *S* in good faith.¹³ In the criminal law, some courts will find an accused rapist innocent if he (or she) mistakenly believed the victim consented—even though the accused's belief was not reasonably held.¹⁴ Of course, the latter practice may have no justification, but the point is not that it is justified but that the courts have ordered fact-finders to make such subjective judgments. Admittedly, none of these determinations is easily made, but none is impossible.

Fundamental fairness requires that fact-finders make the distinctions between women who act from the right motives and those who do not, because we want to punish only those women with the

requisite mens rea and because, when the law denies an abortion to a woman with an unwanted pregnancy, the state imposes a far more oppressive burden on her than the burden it places on the woman who is willing to endure pregnancy, childbirth, and motherhood for the sake of a child with a certain sex. Moreover, the first woman has exercised the restraint the state demands, namely, refraining from abortion to determine the sex of the child, while the second woman has inexcusably contributed to sexual imbalance in the general population.

The Constitutional Problem

The constitutional difficulty is much more straightforward. A superficial reading of *Roe v. Wade* suggests that the Court insulated a woman's decision to abort during the early stages of pregnancy from all state interference.¹⁵ Some feminists, however, have concluded that *Roe* "may not provide a sturdy foundation upon which to erect a lattice of rules, regulations, and procedures sufficient to safeguard women in their desire to control fertility" in the face of the new reproductive technologies.¹⁶ Although the question of *Roe*'s application to the problem of banning sex selection abortion constitutes a topic of its own, a careful reading of the Court's opinion reveals that the state's interests in preserving fetal life and protecting maternal health were not deemed by the Court to be sufficiently compelling to warrant interference with the woman's decision to abort during early pregnancy.¹⁷ The Court did not consider how much more compelling (than the state's interest in protecting the fetus's life and the mother's health) is the state's interest in attaining sexual equality or preserving the present proportions of the sexes in the population. Moreover, the Court was presumably faced with the case of a woman who found the burden of pregnancy altogether unbearable. The Court noted that the woman and her physician would consider such factors as the stigma of unwed motherhood and the distress and psychological harm that the unwanted child would cause to the mother and the family.¹⁸ The Court was obviously not reaching any conclusions about the privacy right of a woman for whom the abortion decision involved the sole consideration of the sex of the offspring. As noted above, the burden of childbirth is far more onerous for a woman with an unwanted pregnancy than it is for a woman selecting the sex of her child. In constitutional terms, this means that forcing a woman to carry an unwanted fetus to term, as in *Roe*, is a far more intrusive invasion of her right to privacy than forcing a woman to carry to term a fetus of an undesired sex. It is at least plausible, then, to suppose that,

while the Court was not convinced that protection of fetal life and maternal health justified state interference with a woman's decision to avoid an unwanted pregnancy, the more important state interest in attaining women's equality might well provide a constitutional basis for restricting a woman's far less significant freedom to choose abortion solely to determine the child's sex.

It is even possible that a state could justifiably interfere in the early stages of pregnancy, for *Roe* did not entirely preclude a state from criminalizing abortion in the early stages. It said simply that Texas' statute violated the due process clause of the fourteenth amendment, because the statute proscribed abortion "without regard to pregnancy state and without recognition of the other interests involved."¹⁹ A statute that proscribed only sex selection abortion would take into account far weightier interests on the side of the state that were not present in the unwanted pregnancy case in *Roe*; nor would the woman's interests at stake be as serious as they were in *Roe*. It would, therefore, appear that a statute criminalizing only sex selection abortions would take into account the relevant interests involved in the way Texas's statute failed to do.²⁰

Thus, the constitutional difficulties *Roe v. Wade* may seem to have created for statutory bans on sex selection abortion are not as great as a casual reading of *Roe* would suggest. This does not show, however, that American women are likely in large numbers to seek sex selection abortions, since such a conclusion would presume that surveys showing couples prefer male children imply that women would ignore other factors, such as religious proscriptions or the probability (or improbability) of another pregnancy. The argument in this section merely shows that, should states choose to take preventative action (to avoid large numbers of sex selection abortions), the constitutional difficulties posed by *Roe* are not serious.

I owe the inspiration for the topic of this paper to Professor Richard Delgado of the University of California at Davis School of Law.

1. For a socialist view of women's liberation, see Reed, "Women: Caste, Class or Oppressed Sex?," in *Problems of Women's Liberation* (1970): 64-70.

2. Of course, socialist feminists could argue that there would be no careers that are inherently more rewarding than others in a truly liberated society, since work would be adjusted to needs. See V. Lenin, *The State and Revolution* (Foreign Languages Press, Peking ed., 1973), pp.109-22. This raises the difficult empirical question of the likelihood that such an

equalitarian society could ever come into existence. If it could, the question I raise would apply to the transitional society: between our present society and the truly liberated society, there must be a collective decision about the degree of procreative freedom society will permit women.

3. There is, of course, no universal agreement on this. Judith Thomson argued that resort to abortion can be "indecent," as when a woman in her seventh month aborts so as to avoid postponing a trip abroad. Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1 (1971): 47, 65-66. Undoubtedly, there are Roman Catholics who consider themselves feminists, but who are nevertheless morally opposed to abortion on demand. Feminists of this sort are not confronted with the dilemma I present here.

4. Westoff and Rindfuss, "Sex Preselection in the United States: Some Implications," 184 *Science* 633, 636 (1974). American wives are much more likely to prefer giving birth to a son than to a daughter. Coombs, "Preferences for the Sex of Children among U.S. Couples," *Family Planning Perspective* 9 (1977): 259. Holmes and Hoskins argued in their paper, "Prenatal and Preconception Sex Choice Technologies: A Path to Femicide?" (presented at the Second International Interdisciplinary Congress on Women in Gronigen, Netherlands, April, 17-21, 1984) that couples will be more willing to limit family size if they can first satisfy their desire to have a firstborn son. Allowing couples this option would therefore diminish the female population, since couples would need no longer continue "trying" to have a son after the births of several daughters as they now do.

One study found that only about one-fourth of college men and women would use sex preselection techniques, but, of those who would, 81% of women and 94% of men prefer firstborn sons. Gilroy and Steinbacher, "Preselection of Child's Sex: Technological Utilization and Feminism," *Psychological Report* 53 (1983): 671, 675. Even college women who moderately or strongly supported the women's movement expressed a two-to-one preference for firstborn sons. *Ibid.*, p.674. Other researchers posed to college students of both sexes the specific question of whether abortion was an acceptable means of sex selection and found that acceptance ranged between 4.2% and 40.3%. Feil, Largey, and Miller, "Attitudes Toward Abortion as a Means of Sex Selection," *Journal of Psychology* 116 (1984): 269.

If there were more laterborn daughters, the female infant mortality rate would increase because studies show high risk laterborn infants receive less maternal stimulation than the firstborns. Conversely, the male infant mortality rate is likely to increase because high-risk male infants will more often be firstborn. See Bendersky and Lewis, "The Impact of Birth Order on Mother Infant Interactions in Preterm and Sick Infants," *Journal of Development & Behavior Pediatrics* 7 (1986): 242.

5. Westoff and Rindfuss, *supra* note 4 at 636.

6. Researchers who studied female infanticide and neglect of female children in India conclude the "any further reduction in the sex ratio in Northern India... would be unlikely, to offer any benefits to the women who

survive." Jeffrey, Jeffrey, and Lyon, "Female Infanticide and Amniocentesis" *Social Science and Medicine* 1191 (1984): 1207, 1211. The authors do not believe a scarcity of women will raise their value, but would be "symptomatic of their low value." *Ibid.*

Of course, Northern India is different from the United States (with which I am exclusively concerned here) in a number of respects, but the point is that a scarcity of women in the United States would be symptomatic of chauvinism, not a cause for women to rejoice. Moreover, any "advantages" American women would enjoy if their numbers are reduced are likely to be the paternalistic and protective ones of which feminists have been suspicious or resentful, since those "advantages" often serve to insulate women from the risks of, for example, pursuing a career or owning a business. The disadvantages women would suffer if sex selection abortion were unrestricted lie, first, in the reduction of their numbers, as the Gilroy and Steinbacher study suggested. See *supra* note 4. The practice need not become rampant for the reduction to occur. Even skeptics must concede a modest reduction in the female population. This will result in diluted voting power for women (unless one supposes American voters would grant multiple votes to women and single votes to men).

Second, crime will increase because more men are involved in violent crime (defined as forcible rape, robbery, murder, and aggravated assault) than women. Indeed, arrests of males in this category exceeded arrests of females by a factor of eight to one in 1985. See Federal Bureau of Investigation, "Uniform Crime Reports for the United States" (1985), p.181. The reader should note that my prediction of an increase in crime is not based on any sociobiological theory nor on any correlation between male aggressiveness and crime or male hormones and crime. I simply predict that the incidence of crime will increase because there will be more males in society relative to the number of females. Thus, my argument is not subject to the attack Mary Anne Warren launches against the more males-more violence arguments based on sociobiology, male hormones, and sexual stereotypes. See M. Warren, "Gendercide" (1985): 108-29.

The predictions of increased job discrimination and reduced career opportunities are based largely on new evidence about the importance of birth order in career opportunities. The studies in note 4 *supra* indicate that unrestricted use of sex selection abortion will increase the number of firstborn males and decrease the number of firstborn females. Despite Mary Anne Warren's dismissal of the theory of birth order as "empirically unsubstantiated or devoid of predictive power," *ibid.*, p.142, those who have defended birth order theories have found flaws in studies yielding the conclusion that birth order is unimportant. See Zajonc, "Validity the Confluence Model," *Psychological Bulletin* 93 (1983): 457, 463-64. Moreover, one study has found that firstborn males have the least favorable attitude toward women as managers. Beutell, "Correlates of Attitudes toward American Women as Managers," *Journal of Social Psychology* 124 (1984): 57. Assuming firstborn men will serve as hiring officers, job discrimination at least in managerial position is likely to increase.

There are, for similar reasons, likely to be more limited career opportunities, since fewer women can be expected to pursue academic careers. Among honors undergraduates, one study found firstborn women over-represented (relative to laterborn women). Finlay, "Birth Order, Sex, and Honor Student's Status in a State University," *Psychological Report* 49 (1981):1000. Fewer firstborn women would likely mean fewer women excelling at academics and therefore fewer career options for the women who do not distinguish themselves academically.

Warren's dismissal of the birth-order theory is surprising in view of these studies—none of which she discusses. They reveal the empirical support for the theory and illustrate its predictive power, which she found lacking.

7. Illinois has a statute forbidding physicians from performing an abortion in a case in which the physician knows the woman seeks the abortion solely because the fetus is the "wrong" sex, apart from any sex-linked genetic defect. *Illinois Revised Statutes (1987): chap. 38, para. 81-26(8)*.

8. Steinbacher, "Sex Preselection: From Here to Fraternity," in *Beyond Domination*, C. Gould, ed. (1983), 274, 279-80.

9. Gilroy and Steinbacher *supra* note 4.

10. See *supra* note 8.

11. P. Devlin, *The Enforcement of Morals* (1965), p.14.

12. 410 U.S. 113 (1977).

13. See U.C.C. 3-302 (b).

14. The House of Lords held that an accused is innocent of rape if he believed the victim consented, even though a reasonable person in the place of the defendant would have realized that the victim did not consent. *Regina v. Morgan*, 1976 A.C. 182. Considerable discussion followed this decision in the editorial pages of the *Times*. See *The Times* [London], May 5-8 and 12, 1975. Of course, the latter practice may have no justification, but the point is not that it is justified but that the courts have ordered factfinders to make such subjective judgements

15. In the view of John Fletcher, for example, *Roe* made "the conscience of the individual woman the sole arbiter of the reasons" for choosing abortion. Fletcher, "Ethics and Amniocentesis for Fetal Sex Identification," *New England Journal of Medicine* 301 550, 551 (1979): 550, 551.

16. Wikler, "Society's Response to the New Reproductive Technologies: The Feminist Perspective," *Southern California Law Review* 59 (1986): 1043, 1055.

17. See *Roe*, *supra* note 12 at 163-64.

18. *Ibid.*, p.153.

19. *Ibid.*, p.164.

20. The Constitutional arguments in this section of the paper are expanded in Part III of my paper "Benign Sex Discrimination Revisited: Constitutional and Moral Issues in Banning Sex Selection Abortion," *Pepperdine Law Review* 15 (1988): 295.