

**Medical Law Review**

**Med Law Rev 2008 16 (369)**

**1 November 2008**

**Sexism, Sex Selection and 'Family Balancing'**

Stephen Wilkinson<sup>1</sup>

*Professor of Bioethics, Keele University, ST5 5BG, UK.*

© Oxford University Press 2008

**I. Introduction**

Traditionally, reproductive autonomy meant simply the freedom (assuming it was a real freedom) to decide whether to try and reproduce, with whom, when and where. However, now the issues include the questions of whether reproductive autonomy should extend to include, for example, social sex selection, buying and selling eggs, sperm and embryos, the selection of the characteristics of possible future children or to having one child to save another (the so-called saviour sibling). While we would strive to encourage autonomous decision making, we recognise that there may be problems with unfettered and unregulated choices.<sup>2</sup>

As well as its intrinsic interest, sex selection serves as an illuminating example from a much wider set of questions about the legitimacy of certain reproductive choices, and about the extent to which law should constrain procreative liberty.<sup>3</sup> For a number of reasons, sex selection is a particularly interesting case, especially in relation to both my academic aims and those of this volume. First, unlike some of the more fanciful bioethical examples of parental choice (selecting for intelligence and the like), sex selection is (or can be) technically uncomplicated and is already easy to deliver reliably. Thus, it is a pressing practical issue that has received considerable attention not just from academics, but from the policy community.<sup>4</sup> Secondly, sex selection (with the exception of selection to avoid sex-linked genetic disorders) is a reasonably clear case in which *parental desire or preference* is the immediate motivation, rather than considerations relating to the health or welfare of the future child. Thus, it is perhaps a clearer or purer case of the exercise of reproductive autonomy than (for example) using preimplantation genetic diagnosis to avoid disease. Thirdly, sex selection obviously raises in very direct ways issues of sex or gender discrimination; that is not to say that other forms of selection do not raise such issues, but sex selection is undoubtedly the clearest case. Finally, sex selection is a topic where bioethics, public policy and law are particularly closely related and where philosophical analyses of ethical arguments (such as, I hope, those contained in this paper) are particularly relevant to the formation and understanding of law and policy. This is because, more often than not, the reasoning offered by policy makers and lawmakers for allowing or prohibiting particular forms of sex selection is essentially ethical argument. Hence, ethical analysis can both *explain* (substantially though not completely) why we have the policies that we do and can *critique* these policies by discovering whether or not the moral reasoning behind the policies is sound. Ethical analysis alone, however, cannot provide *causal* explanations of how policy makers come to have the views that they do nor, more generally, of how certain values come to prevail; that is one of the roles of empirical social science and outside my remit here.

There are various possible views about prenatal and embryonic sex selection. At one extreme, some think that *all* sex selection is wrong and should be banned, although those who take this line are often driven mainly by quite general concerns about (for example) the destruction of embryos or the wrongness of 'playing god', rather than objections applying uniquely to *sex* selection. At the opposite end of the scale are libertarians who may favour either a 'free market' in sex selection, or perhaps a lightly regulated market: one controlled just enough to ensure technical competence and fair dealing. In-between are various intermediate positions. One of these is the present regulatory position in the UK (described in more detail below). According to this, embryonic sex selection is permissible only for one particular purpose: ensuring that the child created does not have a sex-linked genetic disorder.<sup>5</sup> A second, slightly more 'liberal', intermediate position is that sex selection is acceptable (and should be allowed) *both* for the purposes of disease-avoidance *and* in order to deliver 'family balancing'. This is the view that will be examined here: in particular, the argument that 'family balancing' is more acceptable than other (non-medical) forms of sex selection because it is less likely to be sexist.

The paper proceeds as follows. First, there are two contextualising sections: one bioethical, the other outlining the existing and anticipated UK regulation. Then, in the main substantive part of the paper, there is a critical assessment of (what I take to be) the two most important arguments for the view that 'family balancing' sex selection should be legally privileged: one concerning possible effects on population sex ratios, the other concerning sexism.

First of all though: what exactly is 'family balancing'? The broadest definition says that an instance of (non-medical) sex selection is 'family balancing' if the family in question (and I note in passing that there would be further definitional work to do on 'family') has more children of one sex than the other (say, four girls and three boys) and sex selects (in this case, a boy) with the aim of evening things up, of reducing or eliminating the sex differential. As the Human Fertilisation and Embryology Authority (HFEA) put it in its 2002 consultation document, 'family balancers':

... already have children predominantly of one sex and would like a child of the other sex to complement their existing family ...<sup>6</sup>

Later in the document, however, the HFEA does imply two possible ways of narrowing the definition of 'family balancing'. One is to make having *no existing children of the desired sex* a necessary condition; so selecting a girl would be 'family balancing' if the family started off with *no* girls and three boys, but not if it started off with *one* girl and three boys. The other possible narrowing is to require a sex differential of two or more in the existing family; thus, selecting a girl where boys outnumber girls four-to-two would be 'family balancing', but it would not be 'family balancing' if boys outnumbered girls by only four-to-three. These additional criteria were combined for HFEA's 2002 questionnaire, which asked whether:

... sex selection ... should be permitted for non-medical reasons when a family has at least two children of one sex and none of the other sex.<sup>7</sup>

On the basis of the reasoning contained elsewhere in the consultation document, it looks as if the thought was that this is the least contentious and most clear-cut version of 'family balancing'. Hence, if *any* form of non-medical sex selection is acceptable, *this* is.<sup>8</sup>

I should also mention at an early stage a concern about the expression 'family balancing'. The worry is that such language is pejorative and implies that families not containing boys and girls in roughly equal numbers are somehow defective. And while many parents (and prospective parents) do *desire* sex 'balance',<sup>9</sup> it is difficult to see how one could justify any suggestion that families with all girls or all boys are objectively inferior. Hence the expression 'family balancing' appears in quotation marks throughout to indicate that, although it is a standard and widely recognised term, it is problematic and not wholly accurate.<sup>10</sup> Thinking along similar lines, Holm writes:

Before I read the consultation document I had never come across the term 'family balancing,' but it is on reflection a brilliant term with wonderful rhetorical properties. It is a term that not only describes a particular situation, but also implies a potential problem ... Who would like to belong to an 'unbalanced family'?<sup>11</sup>

## II. Bioethical Context

In this section, I narrow the focus of the paper by introducing two bioethical distinctions. The first is between objections to sex selection *per se* and objections to *particular means* of sex selection. The second is between generic arguments that apply to all (or most) forms of selection (*i.e.* selection between different possible future children--*via*, for example, embryo selection) and arguments that apply uniquely (or at least principally) to *sex* selection.

Taking the first of these first, moral concerns about sex selection can usefully be divided into those about the *means* used to sex select and those about the *end* of sex selection itself--about the whole project of attempting to determine sex, regardless of the methods used. The extent to which objections of the first kind are applicable will depend on what sex selection techniques we are debating. All of the following are possible 'techniques':

- killing female (or male) babies;
- aborting female (or male) foetuses;
- sexing IVF embryos, implanting male (or female) ones and discarding those of the undesired sex;
- prior to insemination, using sperm sorting to increase greatly the probability of having a boy (or girl);
- having sexual intercourse only at certain points in the menstrual cycle in order to increase slightly the probability of having a boy (or girl).

I imagine that most of us would regard the practices near the top of the list as much more morally problematic than those at the bottom: believing that while (to understate it somewhat) there is something troubling about killing infants, choosing to deselect and discard a certain class of sperm is *relatively* innocuous. In the case of sex selection then, the now-real possibility of using sperm sorting greatly reduces ethical concerns about methods and means, since (unlike embryos or babies) hardly anyone wishes to attach moral status to sperm (plus sperm sorting is much less invasive than the main alternatives):

... preconception sperm sorting, although not currently as reliable as preimplantation testing, promises to combine the advantages of a comparatively un-invasive technique with the avoidance of unnecessary embryo creation...<sup>12</sup>

This technical advance was one of the reasons for the HFEA's 2002-03 review of sex selection:

Recent data have indicated that the flow cytometry method of sperm sorting ... has now reached a level of reliability that would make it an attractive option for those who want a child of a particular sex ...<sup>13</sup>

There may, however, be residual practical objections to sperm sorting relating to its reliability (*in what percentage of cases does it deliver the desired sex?*) and safety (*will it have an adverse impact on any resultant children's health?*).

In what follows, for the sake of argumentative clarity and simplicity, I am going to focus on sex selection *via* either sperm sorting or embryo selection, so as to be able to leave to one side any extra ethical or legal complications relating to selective abortion (or *a fortiori* to infanticide, which I take not to be an acceptable or realistic option).

I turn now to the second distinction: generic arguments applying to all (or most) types of selection v. arguments that apply uniquely or predominantly to *sex* selection. Those in the first category include the following.

- (1) Parents should love and accept their children (unconditionally perhaps); *prospective* parents should have the same attitude to their (possible, future) children and this attitude is not consistent with most forms of selective reproduction.<sup>14</sup>
- (2) Selection somehow violates the child's 'right to an open future'.<sup>15</sup>
- (3) Selection (or at least many forms of selection) would have an adverse effect on child welfare.
- (4) Selection constitutes, or may encourage, the wrongful 'commodification' of children and/or reproduction and/or women.
- (5) Selection constitutes, or may encourage, eugenics.<sup>16</sup>

The important feature of all these for our present purposes is that each attacks selection *generally* and therefore such arguments will not differentiate between sex selection for 'family balancing' and for other purposes. Hence, since the justifiability of privileging 'family balancing' is what concerns me here (and because providing an explanation and evaluation of such arguments would be an immense undertaking) I shall leave them to one side for the present.<sup>17</sup>

My concern in this paper rather will be arguments that attempt to show that *sex* selection is especially morally problematic. More specifically, I shall be looking for arguments that count against (non-medical) sex selection *and* do so less strongly in 'family balancing' cases than in other cases. More specifically still, I will examine two putative ethical bases for privileging 'family balancing' sex selection. First, there is the argument that 'family balancing' sex selection is less likely than other forms to cause population sex imbalance. Secondly, and perhaps more interestingly, there is the claim that 'family balancing' sex selection is less likely to be sexist. I do not suggest that these are the *only* possible grounds for privileging 'family balancing' sex selection (for example, someone might seek to show that 'balanced' families deliver higher levels of child welfare). Rather, I have chosen to concentrate on these for reasons of space and focus and because they seem to be the most prominent in academic and policy debates on this subject. After a brief outline of the legal and regulatory position in the UK, I shall proceed to a critical assessment of these arguments.

### III. Legal-regulatory context in the UK

The case which has perhaps done more than any other in recent times to put sex selection, and in particular 'family balancing', onto the policy agenda was that of Alan and Louise Masterton. In May 1999, their 3-year-old daughter Nicole suffered severe burns after a gas balloon fell onto a bonfire in their garden. Nicole was admitted to the Royal Hospital for Sick Children in Edinburgh but sadly died two months later.<sup>18</sup> Prior to her death, the Mastertons had had five children of which Nicole was the only daughter. They were left with four surviving sons then aged between 8 and 14.

By March 2000, it had emerged that the Mastertons were keen to have another daughter using embryonic sex selection and were lobbying the HFEA to allow them to do this. According to a *Times* report, they wrote to the HFEA enclosing a photograph of Nicole and a note which said:

This is our precious daughter Nicole. The joy and happiness she brought into our lives, her spirit and her place in our family and our hearts are the driving force behind his appeal.<sup>19</sup>

At that time (as now), embryonic sex selection for 'social' reasons (that is, for reasons other than disease-avoidance) was

not allowed in the UK. The basis for this was (and, at the time of writing, remains) as follows. The *Human Fertilisation and Embryology Act 1990* s.3 states that:

- (1) No person shall --
  - (a) bring about the creation of an embryo, or
  - (b) keep or use an embryo, except in pursuance of a licence

Thus, because embryonic sex selection requires the creation and use of embryos, it falls under the ambit of the HFEA, its Codes of Practice and standard licence conditions. The Code of Practice in force at that time (the fourth edition, revised in July 1998) stated that:

7.20 Centres should not select the sex of embryos for social reasons.

and that:

7.21 Centres should not use sperm sorting techniques in sex selection.<sup>20</sup>

Sex selection 'for social reasons' (which is banned by the HFEA) is contrasted with *medical sex selection* (which is permitted)--*i.e.* sex selection where the aim is to avoid creating a child with a serious sex-linked disorder. The HFEA informs us that:

There are approximately two hundred known sex-linked diseases, most of which only affect males. These diseases vary in severity from colour blindness to haemophilia and Duchenne's muscular dystrophy.<sup>21</sup>

'Family balancing' is not mentioned in the current Code of Practice (nor was it in the fourth edition) and is (therefore) not officially distinguished from other 'social' reasons to sex select.

One obstacle that the Mastertons faced was that the HFEA would not hear a direct appeal from prospective patients but required a clinic to apply for a license to treat them. However, none of the available clinics were willing to do this (presumably being aware of the ban on 'social' sex selection in the Code of Practice).<sup>22</sup> Thus, the Mastertons in effect had to ask the HFEA, not to consider *their case*, but rather to reassess the existing *policy* on sex selection. At the time, press reports claimed that the Mastertons planned to use the Human Rights Act 1998 to challenge HFEA's refusal to hear their case without the intercession of a clinic (specifically Articles 6 and 8 of the European Convention of Human Rights) although it does not appear that they ultimately pursued this.<sup>23</sup>

In October 2000, Ruth Deech (then HFEA chair) said publicly that there would be no change in policy on 'social' sex selection, citing the HFEA's 1993 consultation,<sup>24</sup> after which 'the policy of only permitting sex selection using licensed treatments for the avoidance of serious sex-linked genetic conditions was confirmed'.<sup>25</sup> At this point, the Mastertons (both already in their forties) reportedly travelled to Rome to receive treatment, although ultimately this was unsuccessful resulting only in a male embryo (which they decided to donate to an infertile couple).<sup>26</sup>

Later, in 2001, some procedural aspects of the HFEA's handling of the Mastertons' case were criticised by the Parliamentary Ombudsman and an apology was issued. In particular, when they initially provided the HFEA with a detailed (30-page) presentation of their case, the Mastertons were told (or at least it was implied) that this would be given full consideration by the HFEA membership at its meeting on 27 January 2000. Alan Masterton is reported to have said:

Right up until the day before the meeting at which our case was to be discussed we were told that a copy would be given to each member. It was not until the day after that we got information that the members of the authority had not actually

seen the document.<sup>27</sup>

What the HFEA was criticised for, however, was not requiring the Mastertons to present their case *via* a clinic and the licensing process, but rather giving them false expectations at the outset that they could present their case directly to the Authority.

Although the Masterton case did not directly affect policy, it was arguably one factor that led (in September 2001) to the Minister for Public Health asking the HFEA to carry out a further review of its sex selection policy.<sup>28</sup> As part of this review, the HFEA launched a public consultation in October 2002. Unlike the 1993 HFEA consultation document, the 2002 version (which was generally longer and much more detailed) mentioned and highlighted the idea that 'family balancing' might be a special ground for sex selection. Indeed, a noteworthy feature of the 2002 consultation document is the assumption (albeit qualified in some places) that 'family balancing' sex selection is less morally problematic than other forms of (non-medical) sex selection. For example, the Executive Summary says:

The arguments put forward against the permissive view may be tested against what is supposedly the least objectionable non-medical reason for sex selection, 'family balancing', to assess whether any form of sex selection, by any means, that is not carried out for serious medical reasons is morally acceptable.<sup>29</sup>

Underpinning this appears to be two thoughts, both of which are scrutinized later in this paper. The first is that (unlike unfettered social sex selection):

... if sex selection were restricted to family balancing it would not significantly alter the overall sex ratio.<sup>30</sup>

The second is that 'family balancing' sex selection is (or is less likely to be) objectionably sexist than other forms of (non-medical) sex selection:

For many people [sex discrimination] is an important consideration, especially for those proponents of the permissive argument whose liberal position includes a commitment to opposing discrimination on grounds of sex. They might respond that there are some non-medical reasons for sex selection which are not based on objectionable forms of sex discrimination. The standard case here is that in which prospective parents who have one or more children of one sex seek to ensure that a future child is of the other sex. This is sometimes known as 'family balancing' ...<sup>31</sup>

... an implication of these arguments against sex selection [is] that the best case for sex selection for non-medical reasons is where it rests on the wishes of prospective parents who already have one or two children of one sex, to have a child of the other sex. For where this is the rationale behind it, objectionable forms of sex discrimination are not involved.<sup>32</sup>

The main outcomes of the HFEA consultation process were fairly conservative, at least inasmuch as no liberalisation of sex selection (not even for 'family balancing') was proposed.<sup>33</sup> The *status quo* position of embryonic sex selection being available only for the purposes of disease-avoidance should (and would) be maintained. This position is instantiated in the HFEA Code of Practice currently in force, which states that:

G.8.7.1 The centre should not, for social reasons:

- (a) select embryos of a particular sex, or
- (b) separate sperm samples, or use sperm samples which have been separated, for the purpose of sex selection.<sup>34</sup>

In addition, HFEA's standard licence conditions state:

A.13.7(d) ... that Centres should not use any information derived from tests on an embryo, or any material removed from it or from the gametes that produced it, to select embryos of a particular sex for social reasons ...<sup>35</sup>

Finally, one other question dealt with by the HFEA's 2002-03 consultation was whether sex-selective sperm sorting using fresh sperm should be regulated by the HFEA (its being unregulated at the time of the consultation). The HFEA concluded that:

Because of the unknown risks to patients and offspring that could be associated with the use in treatment of gametes that have been subjected to sperm sorting in the laboratory, and the treatment context in which the gametes may be used, such uses should be subject to regulation ...<sup>36</sup>

Until as recently as 5 July 2007, sex-selective sperm sorting using fresh sperm could still be lawfully offered by unlicensed centres.<sup>37</sup> At that point however the Human Fertilisation and Embryology (Quality and Safety) Regulations 2007 came into force. These modified the legislation such that an HFEA licence would be required for all clinics carrying out 'the processing of sperm, including sperm sorting for sex selection for social reasons'.<sup>38</sup> And since, as we have just seen, the Code of Practice prohibits the use of sperm samples 'which have been separated, for the purpose of sex selection' the effect of the 2007 regulations was to widen the scope of the existing prohibition to cover sperm sorting as well as embryo selection. The Human Fertilisation and Embryology (Quality and Safety) Regulations 2007 were part of the UK implementation of the EU Tissues and Cells Directive.<sup>39</sup>

As regards future regulation, the most recent version of the Human Fertilisation and Embryology Bill 2007 (under debate in Parliament at the time of writing) also contains a prohibition of non-medical sex selection as follows:

#### **SCHEDULE 2 Section 11**

#### **ACTIVITIES THAT MAY BE LICENSED UNDER THE 1990 ACT [...]**

##### *Sex selection*

1ZB (1) A licence under paragraph 1 cannot authorise any practice designed to secure that any resulting child will be of one sex rather than the other.

[ ... ]

(3) Sub-paragraph (1) does not prevent the authorisation of any other practices designed to secure that any resulting child will be of one sex rather than the other in a case where there is a particular risk that a woman will give birth to a child who will have or develop--

- (a) a gender-related serious physical or mental disability,
- (b) a gender-related serious illness, or
- (c) any other gender-related serious medical condition.

(4) For the purposes of sub-paragraph (3), a physical or mental disability, illness or other medical condition is gender-related if the Authority is satisfied that--

- (a) it affects only one sex, or
- (b) it affects one sex significantly more than the other.<sup>40</sup>

Hence, unless there is an unanticipated reversal during the Parliamentary process, it looks as if the present prohibition on gametic and embryonic sex selection, except for disease-avoidance purposes, is set to remain in place.

## IV. Privileging family balancing

### A. Population Sex Differentials

... if you were concerned ... about the sex ratio, you would simply allow sex selection only for family balancing and there would be no effect on the sex ratio ...<sup>41</sup>

The first argument in favour of privileging 'family balancing' sex selection says that this form of sex selection is less likely to cause a population sex differential (an 'imbalance') than other kinds.<sup>42</sup> In order for this argument to work, three things would need to be established.

- (1) Population sex differentials (or differentials above a certain level) are a bad thing.
- (2) Unfettered 'social' sex selection would cause population sex differentials to rise significantly--beyond desirable levels.
- (3) 'Family balancing' alone would *not* cause population sex differentials to rise--or, at least, its effects on population sex differentials would be much less marked than those of unfettered 'social' sex selection.

I will grant (1), just for the sake of argument. It should, however, be noted that (as McCarthy, amongst others, has argued) its truth is by no means obvious.<sup>43</sup> For instance, perhaps a predominantly female human world would be preferable to the present one given that men are responsible for more than their fair share of crime and violence. Or perhaps women would be better off if there were fewer of them because 'they would be rarer and therefore more valued'.<sup>44</sup>

Turning to (2) and (3), would unfettered 'social' sex selection, specifically in the UK, cause population sex differentials to rise? Views vary on this, but the HFEA, in its post-consultation paper, told us that it had commissioned (from Catherine Waldby) a systematic literature review of material relating to the social and ethical issues raised by sex selection and this cites (amongst other things):

... recent studies in the UK [that] showed no significant overall preference for one sex over the other although a disproportionately high percentage of those actively seeking sex selection were from ethnic populations originating from outside Europe. Amongst these there was a marked preference for male children although this was from families who already had more than one female child and were nearing the end of their reproductive lives.<sup>45</sup>

The Authority concluded:

These findings did *not* demonstrate that permitting controlled sex selection for non-medical reasons would lead to a skewing of the sex ratio in the UK.<sup>46</sup>

As an ethicist, it is not for me to say whether or not 'social' sex selection would in fact cause population sex differentials to rise significantly. What is clear though is that this premise is at best contentious and that this is therefore a weak point in the argument. It should however be conceded that what the HFEA terms 'ethnic populations originating from outside

Europe' may raise special issues if their sex selection preferences differ substantially from those of the population overall. Quite how regulators should respond to such sub-populations would be the subject of another paper.

Let us turn now to (3), the claim that the effects of allowing only 'family balancing' sex selection (on population sex ratios) would be less severe than allowing sex selection more widely. As we have already seen, one possible objection to this is that the effects of allowing unfettered sex selection may not themselves be all that noticeable. Another is that, if there is a potential problem with population sex ratios, then either restricting sex selection to 'family balancing' would be ineffective, or this policy would be less effective than easily imaginable alternatives. Several different ways of preserving population sex balance have been suggested, including:

... setting up waiting lists for couples who wanted a child of the more frequently chosen sex, always pairing couples who wanted a boy with a couple who wanted a girl, and, as a last resort, even taxing parents of the preponderant sex more heavily.<sup>47</sup>

Alternatively, sex selectors could be encouraged or made to donate their viable spare embryos, thus almost completely eliminating any unbalancing effects (and doing some good besides).<sup>48</sup>

Some of these alternatives have apparent advantages over a system in which the only permitted form of (non-medical) sex selection was 'family balancing'. For instance, the pairing system, under which clinics must select roughly equal numbers of boys and girls, looks like a more robust way of ensuring that there are no detrimental effects on population sex ratios than simply privileging 'family balancing'. The pairing system would guarantee almost no effect. Whereas if there was (for example) a widespread preference for boys, then 'family balancing' sex selection would be used mainly by 'unbalanced' all-girl families seeking boys. The effects of this would be less dramatic than those of unfettered sex selection, but it could nonetheless lead to a preponderance of boys, and restricting sex selection in other ways could be more effective.

Therefore, if population sex imbalance is really the worry, restricting sex selection to 'family balancing' probably is not the best answer, and it may not be an answer at all. Even in countries with sex imbalance problems, restricting sex selection to 'family balancing' will probably be a less good option than either preventing sex selection from taking place altogether (if practicable) or using one of the alternatives mentioned above.

## ***B. Sexism***

... sex selection represents sexism in its purest most blatant form ...<sup>49</sup>

It might be said that the sex of one's child would matter only to someone who has objectionable sexist attitudes -- who thinks that little girls should be sweet and quiet, for example, or boys tough and brave -- and will try to impose these views on the child.<sup>50</sup>

The second argument in favour of a 'family balancing only' policy is that this is less likely to be sexist than other types of sex selection. Like many arguments of this kind, there is a causal or consequence-based version and a more straightforward direct version. The latter says that 'family balancing' sex selection is less likely to *be* sexist and to be motivated by sexist beliefs and attitudes. Whereas an example of the consequence-based version would be the claim that, if we permitted unfettered sex selection, this would change social attitudes and make sexism more widespread--while the same is not true of 'family balancing'.<sup>51</sup> For the present, I shall focus just on the direct version of the argument. This is partly because the consequence-based version is very hard to assess empirically. It is also partly because if the direct version fails then the causal/indirect version will most likely fail too. For if 'family balancing' *is not itself* less sexist (than other types of sex selection), it is hard to see why we should think it less likely to *cause* sexism. Of course, because this is a causal rather than a logical matter, this scenario is not *impossible*: that is, 'family balancing' *could* cause less sexism than other forms of sex selection, even if the alternatives were themselves no more sexist. However, we are entitled at least to make a (defeasible) presumption that if 'family balancing' is as sexist as other forms then the risks of its *causing* further sexism are the same as for the other forms (a presumption that could only be overturned if there was empirical evidence

specifically showing that the negative effects of allowing 'family balancing' sex selection would be less severe). Thus, even though ultimately this is purely an empirical matter, the causal argument is (in an albeit indirect way) dependent on the extent to which 'family balancing' is *intrinsically* more or less sexist than the other sex selection practices.

So, what is the sexism argument for privileging 'family balancing' sex selection? The main claim is that the motives of would-be sex selectors are suspect, except in cases of 'family balancing', because in 'non-family-balancing' cases, would-be sex selectors' preferences are frequently driven by sexist views. The most obvious of these is *sex-supremacism*, the belief that one sex is better than the other; another is *sex-stereotyping* which involves an exaggerated view of the difference that sex makes, or ought to make, to people's personal characteristics and behaviour. Both supremacism and stereotyping are often allied with other discriminatory (or otherwise problematic) views about the moral status and rights of women (and possibly men).

'Family balancing' sex selection, so the argument goes, is not (as) vulnerable to the charge of sexism because what 'family balancing' sex-selectors aim at is *balance*, rather than a *particular sex*. Other forms of sex selection however *do* aim at a particular sex and may therefore be based on supremacism, stereotyping or other sexist attitudes.

## 1. Supremacism

One problem with this argument is that 'regular' ('non-family-balancing') sex selection does not have to be underpinned by sex-supremacist beliefs. For there is an important distinction between *preferring to have* a child of a particular sex and *believing that sex to be superior*. As Steinbock suggests:

The desire for a son ... might be based on the recognition that the experience of parenting a boy is different from that of parenting a girl.<sup>52</sup>

Indeed, someone could prefer a female child because he thinks that females are *inferior*--and it is possible to prefer the company of one or other sex without believing that sex to be superior. Conversely, while 'regular' sex selection is not *necessarily* supremacist, 'family balancing' *can* be supremacist. For example, a father who believes females to be second-rate might suffer (what he sees as) the misfortune of numerous daughters and want to even things up, not because he desires balance, but because he believes that boys are better. So it looks, firstly, as if sex selection in general need not be supremacist and, secondly, as if the distinction between supremacist and non-supremacist sex selection has little or nothing to do with that between 'regular' and 'family balancing' sex selection.

## 2. Stereotyping

Perhaps, however, the concerns about sex-stereotyping are more sound than those about supremacism. Berkowitz and Snyder argue along these lines (although in the context of a more general attack on sex selection, not a defence of 'family balancing').<sup>53</sup> They tell us:

Sexism in pre-conceptive sex selection occurs when parents choose the sex of a child in anticipation of the social roles that child will perform in the future. For example, a man may desire a son with whom he may pursue such 'masculine' activities as fishing or baseball. This preference implies that boys, when compared to girls, are more desirable or capable companions for these activities. Conversely, a woman may desire a daughter because she would like a shopping companion. Such assumptions are sexist in that they presume one sex is superior to, or more appropriately suited for certain social tasks: presumptions which perpetuate and foster stereotypical social roles.<sup>54</sup>

There are two worries here. One is about how the child will be treated once it comes into existence--will it be forced into an unduly narrow or restrictive 'gender role' (boys made to fish and girls to shop, to use Berkowitz and Snyder's examples)? The other, which is perhaps more relevant to our immediate concerns, is that the sex selection is driven by sexist attitudes and beliefs.

In what way are they sexist? Well, for Berkowitz and Snyder, it appears largely to be a matter of 'essentialising' (to biological sex) characteristics that are not in fact essential--or at least a matter of *exaggerating* biological differences and their effects on personal and social traits. So, what would be wrong with selecting a girl because you want your child to enjoy flower arranging, housework and shopping is this: that these traits are not (or at least not directly) determined by or essential to biological femaleness. Hence, sex selectors of this kind are acting on a false view of biological sex difference *and* (both simply by making this choice and by the ways in which they plan to treat their children) doing something that will promulgate and perpetuate such false views of sex. As Berkowitz and Snyder put it:

Unlike the inability of men to become pregnant, there are no genetic barriers to girls fishing or boys shopping.<sup>55</sup>

So, as far as stereotyping is concerned, it may be permissible (if a little weird) for a woman to select a girl so that she can share with her experiences of childbirth and menstruation; and it may be similarly permissible for a man to select a boy so that they can share experiences of beard growing, erectile function (or dysfunction) and prostate enlargement. For these characteristics uncontroversially *are* determined by sex (or, at the very least, are heavily dependent on sex) regardless of social determinants. Of course, such cases of sex selection may still be morally problematic on other grounds. For example, one might question whether it is entirely appropriate or healthy to want to talk to one's (as yet non-existent) future children about such bodily matters, and might question why the prospective parents could not just talk to other existing relatives and friends about such things. But, since our present concern is specifically with sex-stereotyping, I shall leave such worries to one side.

If Berkowitz and Snyder are right about what it takes for a case of sex selection to involve sexist stereotyping then most cases of sex selection will turn out to be sexist:

... when carefully examined, many of the motivations for preferring a certain sex are probably rooted in sexist preconceptions.<sup>56</sup>

This is because relatively few prospective parents would want to sex select for the kinds of purely biological reason just mentioned. Rather, what interests them are behavioural and personality factors.

Before turning to see how this argument applies to 'family balancing', a further complication (or perhaps objection) should be mentioned. The difficulty is that the question of which personal characteristics are (wholly or partly) determined by *biology* (including sex) and which are (wholly or predominantly) *socially* determined--part of the 'nature-nurture' debate--is immensely complicated and controversial. Hence, in advance of settling the 'nature-nurture' question, it may be very difficult indeed to work out which views about sex difference are sexist stereotyping and which are simply reasonable views about the difference that biology makes to character. As Steinbock argues, it seems plausible that biology (including sex) has *some* role in shaping people's characters even if this is mediated by social determinants and even if its influence is only defeasible and probabilistic: that is, sex might make it *more likely* that one will have personality trait *x*, but having *x* is not an *inevitable* consequence of one's sex.<sup>57</sup> Anyway, for our purposes, the point is that insofar as it is hard to tell which aspects of a person's character are biologically determined, it is similarly hard to tell which claims about sex difference are factually correct and which are exaggeration or stereotyping.

A further complication is that prospective sex selectors must make their decisions in the real social world, an environment that may well be sexist and which will almost certainly impact on future children's characters whether the parents like it or not. Thus (to stick with the hackneyed examples for simplicity's sake), even if there is nothing in a girl's *biological* makeup that makes her more inclined to shop than to fish, in a sexist society, it may still be true that (albeit for social reasons) parents who choose a boy are more likely to end up with an angler than a shopper (and *vice versa*). So, what are we to say of parents who choose to have a boy because they want an angler rather than a shopper, and do this knowing that the mechanism linking maleness to fishing is social rather than biological? Are they stereotyping? Not necessarily, provided that their assessment of the situation is factually correct. It may, however, be that their behaviour should be criticised either because it is an instance of *collusion* with a sexist society, or because of the social consequences of 'going along with' and possibly reinforcing gender role stereotyping.

While not perhaps decisive objections, all of these complications do serve to weaken the stereotyping argument against sex selection because it is difficult to condemn (*a fortiori* ban) a practice when there is so much uncertainty about the fundamentals which supposedly underlie this condemnation.

Let us now turn to 'family balancing' and ask whether this fares any better than 'regular' sex selection when it comes to the stereotyping question. As with 'regular' sex selection, whether 'family balancing' involves stereotyping depends on what exactly it is that the parents are aiming at. If what they want is a 'balance' of plainly biological features (if they want half their children to be capable of beard growth and other half to develop breasts, for example), then (as explained previously) while we may think that this is weird or objectionable in other ways, it does not seem to involve sex-stereotyping, for the desired sex-linked characteristics really are biologically determined. If, on the other hand, the sort of 'balance' that they are after is less clearly related to biology and more to do with character traits that may or may not be determined by physical sex, then there is a significant risk that the parents are guilty of stereotyping. It seems then that such stereotyping is as likely in the case of 'family balancing' sex selection as it is in 'regular' sex selection. Consider these two cases. Family A want all of their children to have aggression and sporting prowess and so select all boys; Family B want half their children to have aggression and sporting prowess, and the other half to be caring and musical, and so use ('family balancing') selection to have half boys and half girls. Whatever the general merits of these choices, it seems clear that, as far as sex-stereotyping is concerned, the families are in the very same position; both are guilty of sex-stereotyping. A similar point can be found in a Human Genetics Alert campaign briefing from 2002:

Even in the case of 'family balancing' ... which the HFEA views as relatively acceptable, rigid gender expectations are clearly operating. In how many cases where parents are 'desperate for a girl' will they be hoping for a loud tomboy that grows up to be an engineer? Society must continue to fight sexist gender stereotypes, not allow them to dictate who is born.<sup>58</sup>

Thus, it seems that sex-stereotyping is just as likely to underpin 'family balancing' sex selection as it is any other type.

Given the above objections, only a very weak empirical version of the sexism argument could survive--the (as far as I know, unproven) empirical claim that 'regular' sex selectors are *more likely* to be motivated by sexism than 'family balancing' sex selectors. Even if there was some evidence to support this, it seems a fairly flimsy basis on which to base a regulatory distinction. And, as regards the *ethical* question, presumably we should just go straight for the sexist/non-sexist sex selection distinction, and not bother with the 'family balancing'/'non-family balancing' distinction at all. Sexists can use either and are to be equally condemned in both cases for their sexism.

## V. Conclusions

The main aim of this paper was to assess whether 'family balancing' is *ceteris paribus* morally better than other forms of (non-medical) sex selection, and whether it should receive preferential treatment in law. As we have seen, the two most significant arguments for privileging 'family balancing' are both weak and so I conclude that we do not have good reason to make a regulatory distinction between 'family balancing' and other forms, or to see 'family balancing' as less morally problematic.<sup>59</sup> This of course leaves open the much bigger question of whether 'social' sex selection *in general* should be permitted and this is not an issue that I can settle here. This is partly because there are other ethical arguments in play that there is no space to review in this piece. But it is also because (as I suggested earlier) whether 'social' sex selection is sexist--specifically, whether it involves sex-stereotyping-- will depend on some extraordinarily difficult empirical questions about the extent to which people's behavioural and character traits are determined by their biological makeup, and in particular by their being one sex rather than another.

<sup>1</sup> I am grateful to Ruth Fletcher, Marie Fox, and an anonymous reviewer for their helpful comments on earlier versions. An earlier version of

this paper was presented at the AHRC CentreLGS workshop 'Engendering Bioethics', an AHRC Centre for Law, Gender and Sexuality research workshop in healthcare and bioethics, Keele University, 17-18 November 2005.

<sup>2</sup> Human Genetics Commission (HGC), *Making Babies: Reproductive Decisions and Genetic Technologies* (2006) at 19.

<sup>3</sup> E. Jackson, 'Degendering Reproduction' (in press).

<sup>4</sup> See, for example, HFEA, *Sex Selection: Choice and Responsibility in Human Reproduction* (consultation document) (2002) at 5. HFEA, *Sex Selection: Options for Regulation (a Report on the HFEA's 2002-3 Review of Sex Selection Including a Discussion of Legislative and Regulatory Options)* (2003) at 25. House of Commons Select Committee on Science and Technology, *Inquiry into Human Reproductive Technologies and the Law, Eighth Special Report of Session 2004-05* (2005) at 179. HGC, *Making Babies* (2006) at 19.

<sup>5</sup> HFEA, *Code of Practice*, 7th edn. (2007) <http://cop.hfea.gov.uk/cop/>

<sup>6</sup> HFEA, *Sex Selection* (consultation document) (2002) at 5.

<sup>7</sup> HFEA, *Sex Selection: Options for Regulation* (2003) at 25.

<sup>8</sup> HFEA, *Sex Selection* (consultation document) (2002) at 3.

<sup>9</sup> T. Jain, 'Significant Proportion of Infertile Couples Requests Preimplantation Sex Selection' (March 2005) *Fertility Weekly*, at 9-10.

<sup>10</sup> Robertson suggests the alternative expression 'gender variety', with 'family balancing' sex selection being used to "to increase gender variety in a family". J. Robertson, 'Preconception Gender Selection' (2001) 1 *The American Journal of Bioethics* 2.

<sup>11</sup> S. Holm, 'Like a Frog in Boiling Water: the Public, the HFEA, and Sex Selection' (2004) 12 *Health Care Analysis* 27, at 31.

<sup>12</sup> HFEA, *Sex Selection* (consultation document) (2002) at 3.

<sup>13</sup> HFEA, *Sex Selection: Options for Regulation* (2003) at 8.

<sup>14</sup> R. McDougall 'Acting Parentally: an Argument Against Sex Selection' (2005) 31 *Journal of Medical Ethics* 601.

<sup>15</sup> J. Feinberg, *Freedom and Fulfilment: Philosophical Essays* (Princeton University Press 1980) at 76-97. S. Wilkinson, "'Designer Babies', Instrumentalisation and the Child's Right to an Open Future' in N. Athanassoulis (ed.), *Philosophical Reflections on Medical Ethics* (Palgrave-Macmillan 2005) at 44-69.

- <sup>16</sup> D. Paul, 'Is Human Genetics Disguised Eugenics?' in M. Ruse and D. Hull (eds), *Biology and Philosophy* (Oxford University Press 1998) at 536-549. A. Kerr and T. Shakespeare, *Genetic Politics: from Eugenics to Genome* (New Clarion Press 2002). S. Wilkinson, 'Eugenics, Embryo Selection, and the Equal Value Principle' (2006) 1 *Clinical Ethics* 26.
- <sup>17</sup> See S. Wilkinson, *Choosing Tomorrow's Children: the Ethics of Selective Reproduction* (Oxford University Press 2009) (forthcoming) for a discussion of these and similar arguments.
- <sup>18</sup> M. Mega, 'Couple Fight to Pick Sex of Baby', (2001) *Sunday Times*, 12 March, at 32.
- <sup>19</sup> G. Harris, 'Grieving Couple Fight to Choose Sex of Next Baby', (2000) *The Times*, 13 March, at 11.
- <sup>20</sup> HFEA, *Code of Practice*, 4th edn. (July 1998) at 45.
- <sup>21</sup> HFEA, *Sex Selection* (consultation document) (2002) at 7.
- <sup>22</sup> R. Young, 'Couple Seek Right to a Daughter', (2000) *The Times*, 4 October, at 4.
- <sup>23</sup> S. English, 'Parents Battle to Choose a Girl', (2000) *The Times*, 5 October, at 3.
- <sup>24</sup> K. Scott, 'IVF Selection Still Off Limits', (2000) *The Guardian*, 19 October, at 15. HFEA, *Sex Selection: Public Consultation Document* (1993), [http://www.hfea.gov.uk/en/1511.html#Published\\_responses](http://www.hfea.gov.uk/en/1511.html#Published_responses).
- <sup>25</sup> HFEA, *Sex Selection* (consultation document) (2002) at 3.
- <sup>26</sup> L. Duckworth, 'IVF Couple Give Away "Wrong Sex" Embryo', (2001) *The Independent*, 5 March.
- <sup>27</sup> S. Templeton, 'Couple in Battle to Choose the Sex of their Baby Win an Apology', (2001) *Sunday Herald*, 20 May, at 1. See also, House of Commons Select Committee on Science and Technology, *Human Reproductive Technologies and the Law* (Fifth Report of Session 2004-05), Volume II (Oral and Written Evidence), March 2005, Appendix 49, Ev336.
- <sup>28</sup> HFEA, *A Summary of the 111th Meeting of the Human Fertilisation and Embryology Authority*, 28 September 2001, <http://www.hfea.gov.uk/en/1256.html>.
- <sup>29</sup> HFEA, *Sex Selection* (consultation document) (2002) at 3.
- <sup>30</sup> HFEA, *Sex Selection* (consultation document) (2002) at 26.

31 *Ibid.*, at 25.

32 *Ibid.*, at 29.

33 HFEA, *Sex Selection: options for regulation* (2003) at 26.

34 HFEA, *Code of Practice*, 7th edn. (2007).

35 *Ibid.*

36 HFEA, *Sex Selection: options for regulation* (2003) at 26.

37 HFEA, *Sex Selection* (consultation document) (2002) at 5.

38 HFEA, *FAQs about Sex Selection*, <http://www.hfea.gov.uk/en/1563.html>

39 M. Latham, 'The Shape of Things to Come: Feminism, Regulation and Cosmetic Surgery' (in press).

40 Human Fertilisation and Embryology Bill [HL], Bill 70 07-08, 6 February 2008.

41 Professor Julian Savulescu, Oral Evidence, House of Commons Select Committee on Science and Technology, *Human Reproduction Technologies and the Law (5th report of session 2004-5)*, Ev103 (Q796).

42 HFEA, *Sex Selection* (consultation document) (2002) at 26.

43 David McCarthy, 'Why Sex Selection Should Be Legal' (2001) 27 *Journal of Medical Ethics* 302-307, at 305.

44 *Ibid.*

45 HFEA, *Sex Selection: Options for Regulation* (2003) at 10-11.

46 *Ibid.* at 11 (my italics).

See also Professor Martin Richards' written evidence to the HC Select Committee on Science and Technology, HC Select Committee on Science

and Technology, *Human Reproduction Technologies and the Law (5th report of session 2004-5)*, App66, Ev364. And N. Levy, 'Against Sex Selection' (2007) 100 *Southern Medical Journal* 107.

47 Dahl, 'Sex Selection: Laissez-faire or Family Balancing?' (2005) 13 *Health Care Analysis* (March 2005) 87, at 88.

48 This suggestion can be found in written evidence to the HC Select Committee on Science and Technology from Mr. Paul Rainsbury, Professor Geddis Grudzinskas and Professor Alan Handyside. HC Select Committee on Science and Technology, *Human Reproduction Technologies and the Law (5th report of session 2004-5)*, App43, Ev330.

49 J. Berkowitz and J. Snyder, 'Racism and Sexism in Medically Assisted Conception' (1998) 12 *Bioethics* 25, at 32.

50 B. Steinbock, 'Sex Selection: Not Obviously Wrong' (2002) 32 *Hastings Center Report* 23, at 25.

51 HFEA, *Sex Selection* (consultation document) (2002) at 29. The European Society of Human Reproduction and Embryology (ESHRE) Ethics Task Force, 'Preimplantation Genetic Diagnosis' (2003) 18.3 *Human Reproduction* 649-651, at 651.

52 Steinbock, *op. cit.*

53 Berkowitz and Snyder, *op. cit.*

54 *Ibid.*

55 *Ibid.*

56 *Ibid.*

57 Steinbock, *op. cit.*, at 25.

58 HGA, *The Case Against Sex Selection (Campaign Briefing)*, December 2002, <http://www.hgalert.org>.

59 For further discussion of how weak or untenable distinctions can become embedded in regulation, see Karpin and Mykitiuk, I. Karpin and R. Mykitiuk, 'Going Out on a Limb: Prosthetics, Normalcy and Disputing the therapy/Enhancement Distinction' (in press).