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NON-MEDICAL SEX SELECTION BY PREIMPLANTATION GENETIC DIAGNOSIS: REFLECTIONS ON ISRAELI LAW AND PRACTICE

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While technology enabling sex selection by Preimplantation Genetic Diagnosis ("PGD") is not new, the debate surrounding it has not abated. A wide variety of models exist. Some countries leave the decision to the parents, while others strictly prohibit sex selection for non-medical purposes. The Israeli system uses a unique model whereby a professional committee is authorized to approve non-medical PGD sex selection when the birth of a child of a certain sex is shown to cause severe mental distress to the parents or to the child, and the parents already have at least four children of the same sex. This Article critically examines the Israeli approach and how the model has been implemented since 2005. Beyond the Israeli system, this Article engages in non-jurisdiction-specific theoretical and normative analysis. It suggests that the potential harm embedded in non-medical sex selection and its profound consequences on family relationships are fundamental and they must be taken into account when policy on the matter is set.

I. INTRODUCTION

Sex selection by means of Preimplantation Genetic Diagnosis ("PGD") for non-medical reasons raises a host of weighty ethical, legal, and social questions. The relatively widespread availability of the technology that allows the selection of the sex of the embryo

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prior to implementation in the womb requires the resolution of a basic question: whether, and under what conditions, prospective parents should be allowed to use this technology to select the sex of their child. The answer to this question has been much debated by commentators.[2] In principle, the positions vary from little or no legal interference with parental choice[3] all the way to a strict prohibition on genetic selection.[4] In that context, the Israeli response to the challenge is unique and merits consideration.

Israeli health authorities addressed the issue of non-medical sex selection by means of PGD in 2005 with the issuance of *The Procedure for Selecting the Embryo's Sex Through*

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[2] *See, e.g.*, Owen D. Jones, *Sex Selection: Regulating Technology Enabling The Predetermination of a Child's Gender*, 6 HARV. J.L. & TECH. 1 (1992); Rachel E. Remaley, *"The Original Sexist Sin": Regulating Preconception Sex Selection Technology*, 10 HEALTH MATRIX 249 (2000); Françoise Shenfield et al., *Taskforce 5: Preimplantation Genetic Diagnosis*, 18 HUM. REPROD. 649, 651 (2003); Jodi Danis, Recent Development, *Sexism and "The Superfluous Female": Arguments for Regulating Pre-implantation Sex Selection*, 18 HARV. WOMEN'S L.J. 219 (1995); Rebecca Knox, *Preimplantation Genetic Diagnosis: Disease Control or Child Objectification?*, 22 ST. LOUIS U. PUB. L. REV. 435 (2003).

[3] This position predominates in the United States. *See* Margaret Foster Riley & Richard A. Merrill, *Regulating Reproductive Genetics: A Review of American Bioethics Commissions and Comparison to the British Human Fertilisation and Embryology Authority*, 6 COLUM. SCI. & TECH. L. REV. 1, 4–6 (2005).

[4] This position predominates in the U.K., Germany, and Italy. *See* Ulrike Meister et al., *Knowledge and Attitudes Towards Preimplantation Genetic Diagnosis in Germany*, 20 HUM. REPROD. 231, 231–38 (2005); Erin L. Nelson, *Comparative Perspectives on the Regulation of Assisted Reproductive Technologies in the United Kingdom and Canada*, 43 ALBERTA L. REV. 1023, 1023–25 (2006); Riley & Merrill, *supra* note 3, at 38–40, 58; John A. Robertson, *Protecting Embryos and Burdening Women: Assisted Reproduction in Italy*, 19 HUM. REPROD. 1693, 1693–96 (2004); John A. Robertson, *Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics*, 43 COLUM. J. TRANSNAT'L L. 189, 205–06, 223–24 (2004) [hereinafter Robertson, *Reproductive Technology*]; Aaron R. Fahrenkrog, Note, *A Comparison of International Regulation of Preimplantation Genetic Diagnosis and a Regulatory Suggestion for the United States*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 757, 763–67 (2006).

Preimplantation Genetic Diagnosis[5] ("the 2005 Circular" or "the Circular"). The Circular, issued by the Director General of the Ministry of Health to all fertility clinics in Israel,[6] sets up the procedures and the substantive conditions for the use of PGD for non-medical sex selection. Under the Circular, such selection is generally prohibited, but certain "exceptional, unusual and rare"[7] cases may justify allowing parents to select the sex of their embryo. Approval may be granted pursuant to an application to a review committee of professional experts, established by the Ministry of Health. In a nutshell, the committee may approve an application if it is convinced that the prospective parents harbor a deep emotional need to bear a child of a specific sex after already having given birth to at least four previous children, all of the opposite sex. Approval may also be granted in certain other circumstances, as described below.

In this Article, I discuss this regulatory arrangement, with reference to the values it represents and the practical experience that has been gained since its implementation in 2005. I begin with arguments for and against allowing parents to select an embryo's sex in the absence of medical need. These arguments are presented below in Parts II and III, respectively. After offering my

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[5] MINISTRY OF HEALTH, DIRECTOR GENERAL CIRCULAR: NOHAL LEBREIRAT MIN HAYILOD BE-IVHUN GENETI TROM HASHRASHATI, HOZER MANKAL MISRAD HABRIUT MISPAR 21/05 [THE PROCEDURE FOR SELECTING THE EMBRYO'S SEX THROUGH PREIMPLANTATION GENETIC DIAGNOSIS], Sept. 5, 2005 [hereinafter 2005 CIRCULAR], *available at* http://abush.health.gov.il/download/forms/a2692_mk21_05.pdf.

[6] The actual legal force of the 2005 Circular vis-à-vis non-public institutions is unclear. In one sense, the Circular can be seen as a binding regulation, but it also can be viewed as merely an administrative guideline that limits only the discretion of government officials. Practically, however, since most of the hospitals and clinics in Israel are public or receive public funds, and since the practice of medicine is highly regulated in Israel through licensing, the instructions issued by the Director General of the Ministry of Health in such circulars are treated by the profession as binding. They may, of course, be challenged as ultra vires, as violating due process, or as violating a basic human right, but I will proceed on the accepted assumption that the Circular is valid law. *See generally* HCJ 5413/07 Anonymous v. Health Minister [2007] 12–13 (unpublished) (opinion of Rubinstein, J.).

[7] 2005 CIRCULAR, *supra* note 5, § 2.

assessment of each position, I turn to the details of the Israeli regulatory regime, describing it in Part IV and evaluating it in Part V. I conclude with some comments regarding the relevance of the Israeli experience—and the critique thereof—to other systems facing similar dilemmas.

II. FREEDOM OF CHOICE AND PRIVACY AS THE BASIS FOR ALLOWING NON-MEDICAL SEX SELECTION

The desire to choose an embryo's sex has been a human concern for many generations, as shown by the wide range of "domestic methods" thought to achieve the desired result. These include the timing of the sexual act, unique diets, positions assumed by the couple during sexual intercourse, and various other creative ideas.[8] In contrast to these unproven techniques, there are now at least two scientifically grounded methods for accomplishing sex selection. The first relies on the identification and separation of sperm cells (sperm sorting).[9] The second involves Preimplantation Genetic Diagnosis (PGD), a technique used primarily for detecting genetic disorders in eggs fertilized in vitro.[10] In the course of PGD, it is possible to ascertain the sex

[8] MICHAEL J. SANDEL, THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING 19 (2007); Jones, *supra* note 2, at 4–6.

[9] On the general technical aspects of sperm sorting, see Jerome H. Check & Diane Katsoff, *A Prospective Study to Evaluate the Efficacy of Modified Swim-Up Preparation for Male Sex Selection*, 8 HUM. REPROD. 211 (1993); Ethics Comm. of the Am. Soc'y for Reprod. Med., *Preconception Gender Selection for Nonmedical Reasons*, 75 FERTILITY & STERILITY 861 (2001); G. Alan Rose & Anthony Wong, *Experiences in Hong Kong with the Theory and Practice of the Albumin Column Method of Sperm Separation for Sex Selection*, 13 HUM. REPROD. 146, 146–47 (1998); Joe L. Simpson & Sandra A. Carson, *The Reproductive Option of Sex Selection*, 14 HUM. REPROD. 870 (1999); and Francesca Vidal et al., *Preliminary Study of the Incidence of Disomy in Sperm Fractions After MicroSort Flow Cytometry*, 14 HUM. REPROD. 2987, 2987–88 (1999).

[10] PGD can be regarded most simply as a biopsy and genetic testing of one of the cells of the fertilized egg, a procedure that can reveal the genetic profile of the fertilized egg and, in principle, of the resulting child. For the general technical aspects of the procedure, see Sozos J. Fasouliotis & Joseph G. Schenker, *Preimplantation Genetic Diagnosis Principles and Ethics*, 13 HUM. REPROD. 2238 (1998); and Willy Lissens & Karen Sermon, *Preimplantation*

chromosomes of the fertilized egg prior to its implantation in the gestational mother's body.[11] This latter method has proven to be highly successful, and its recent regulation is the focus of this Article.

The yearning for a child of a particular sex is, at its core, a subjective matter. On the premise that our culture views such a choice as bearing not only on the newborn's life but also on the parents' sense of self-fulfillment, it has been argued that permitting sex selection promotes the parents' liberty to shape their lives as they see fit.[12] No matter how subjective, if they perceive their newborn's sex to be critical in shaping the dimensions of their family life, the parents should have, in principle, the choice to make such a meaningful decision with autonomy.

The desire for a child of a particular sex may stem from personal preference or be rooted in a socio-cultural context. Some parents may express this preference by an explicit wish or desire to beget a child of a particular sex.[13] Others, having already parented children of one sex, may want a child of the opposite sex for

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Genetic Diagnosis: Current Status and New Developments, 12 HUM. REPROD. 1756 (1997).

[11] John A. Robertson, *Extending Preimplantation Genetic Diagnosis: The Ethical Debate*, 18 HUM. REPROD. 465, 468–70 (2003) [hereinafter Robertson, *Ethical Debate*]; *see also* John A. Robertson, *Extending Preimplantation Genetic Diagnosis: Medical and Non-Medical Uses*, 29 J. MED. ETHICS 213, 213–14 (2003) [hereinafter Robertson, *Extending PGD*].

[12] *See* Jason C. Roberts, *Customizing Conception: A Survey of Preimplantation Genetic Diagnosis and the Resulting Social, Ethical, and Legal Dilemmas*, 2002 DUKE L. & TECH. REV. 12, 37–39, *available at* http://www.law.duke.edu/journals/dltr/articles/2002dltr0012.html; Robertson, *Extending PGD*, *supra* note 11, at 470; John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J.L. & MED. 439, 462 (2003).

[13] For a variety of research that examines what motivates parents to choose their children's sex and the attitudes of parents and doctors towards sex selection by PGD, see LORI B. ANDREWS, THE CLONE AGE: ADVENTURES IN THE NEW WORLD OF REPRODUCTIVE TECHNOLOGY 142–43 (1999); Edgar Dahl et al., *Preconception Sex Selection for Non-Medical Reasons: A Representative Survey from Germany*, 18 HUM. REPROD. 2231 (2003); Edgar Dahl et al., *Preconception Sex Selection for Non-Medical Reasons: A Representative Survey from the U.K.*, 18 HUM. REPROD. 2238 (2003); and Robertson, *Extending PGD*, *supra* note 11, at 468–70.

purposes of family balance or, at least, for allowing representation of both sexes within the family[14] and the different experiences that might come with rearing both boys and girls.[15] Socio-cultural motivations are particularly prominent in Asia,[16] where the preference for male children results from the inferior status of women, economic considerations (including inheritance and dowry rules), and the desire to perpetuate the family name.[17]

Alongside the argument of parental choice, there is the prevailing view that individual decisions in the area of reproduction and fertility merit the protection of the right to privacy.[18] As the United States Supreme Court has plainly said, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[19] Similarly, in the United States a woman's right to control her body

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[14] Shenfield et al., *supra* note 2; *see also* Guido Pennings, *Ethics of Sex Selection for Family Balancing: Family Balancing as a Morally Acceptable Application of Sex Selection*, 11 HUM. REPROD. 2339 (1996); Julian Savulescu & Edgar Dahl, *Sex Selection and Preimplantation Diagnosis: A Response to the Ethics Committee of the American Society of Reproductive Medicine*, 15 HUM. REPROD. 1879, 1880 (2000).

[15] Pennings, *supra* note 14; *see also* Robertson, *Ethical Debate*, *supra* note 11.

[16] *See, e.g.*, Peter Liu & G. Alan Rose, *Ethics of Sex Selection for Family Balancing: Sex Selection: The Right Way Forward*, 11 HUM. REPROD. 2343, 2343–44 (1996); A. Malpani et al., *Preimplantation Sex Selection for Family Balancing in India*, 17 HUM. REPROD. 11 (2002); Dorothy C. Wertz, *International Perspectives on Ethics and Human Genetics*, 27 SUFFOLK U. L. REV. 1411, 1432–33 (1993); Kenan Farrell, Note, *Where Have All the Young Girls Gone? Preconception Gender Selection in India and the United States*, 13 IND. INT'L & COMP. L. REV. 253, 259–63 (2002).

[17] In India and China, for example, sex preference frequently results in the termination of a pregnancy when the embryo is identified by ultrasound diagnosis as female. *See infra* notes 23–27 and accompanying text. Notably, the preference for males is bound up with an economic preference. Whereas males are expected to work and contribute to the family's sustenance, females will become an economic burden due to the expectation of a dowry payment when they get married.

[18] *See* Roe v. Wade, 410 U.S. 113, 153 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[19] *Eisenstadt*, 405 U.S. at 453 (emphasis in original).

has been conceptualized as stemming from the right to be let alone.[20] Consequently, parents who claim that they should be allowed to plan their family free from state intervention argue in favor of allowing sex selection. In the case of a woman's right to privacy, the claim is even stronger because the embryo's sex may well have a direct bearing on the number of pregnancies and births that a woman might have to undergo before realizing her desire (and that of her spouse) for a child of a particular sex. Put differently, to the extent that privacy creates a sphere in which intimate decisions can be made without interference from the state, the decision whether to have a boy or a girl surely belongs within such a sphere.[21]

III. PROTECTING WOMEN AND CHILDREN AND SECURING FAMILIES AS THE BASIS FOR RESTRICTING NON-MEDICAL SEX SELECTION

In principle, access to the means of improving one's quality of life or for expanding the scope of one's choice should be denied by society only where such a denial is shown to be justified. That is certainly the case when that which is being infringed upon is a recognized liberty such as procreation or the right to privacy. With respect to preimplantation sex selection, the legal literature indeed puts forward a plethora of justifications for denying such means.[22]

One of the more frequently raised claims alleges a potential disruption of the demographic balance between the sexes.[23] It is claimed that freedom to choose the embryo's sex will allow implementation of a preference for male offspring, culminating in

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[20] *See* L. v. Matheson, 450 U.S. 398, 434–35 n.18 (1981) (Marshall, J., dissenting).

[21] On the constitutional aspect of whether the desire to choose an embryo's sex should be seen as invoking substantive due process protection associated with fundamental reproductive rights, see Remaley, *supra* note 2, at 255–59.

[22] *See, e.g.*, Jeffrey R. Botkin, *Ethical Issues and Practical Problems in Preimplantation Genetic Diagnosis*, 26 J.L. MED. & ETHICS 17, 20–25 (1998); Remaley, *supra* note 2, at 266–81; Roberts, *supra* note 12, at 23–24 & n.32.

[23] Remaley, *supra* note 2, at 277–78; Ashley Bumgarner, Note, *A Right to Choose?: Sex Selection in the International Context*, 14 DUKE J. GENDER L. & POL'Y 1289, 1294–98 (2007).

an overall distortion of the ratio of males to females in the population and an insufficient number of women. Proponents of this view point to the accumulated experience of countries such as Azerbaijan,[24] India,[25] and China,[26] where the demographic balance has indeed been disrupted as a result of the abortion of female embryos identified in ultrasound examinations.[27]

This argument, however, is rooted in the particular experience of Asia, and its relevance for the West is doubtful. Research conducted in Western societies fails to bear out the initial concern that enabling sex selection inevitably leads to an overall preponderance of male births. Although there is some indication of a preference that a first child be male,[28] this trend changes with respect to subsequent children, where the dominant motivation seems to be a desire for family balancing.[29] Furthermore, despite the widespread *a priori* preference for a particular sex, most people are apparently reluctant to take steps to realize that preference, at least by means of existing techniques.[30]

The fear of disrupting the demographic balance would seem to be similarly inapplicable in the Israeli context. A pilot study conducted in Israel a few years ago by the Gertner Institute for Health Policy and Epidemiology (coordinated with the Ministry of Health) found that the majority of those surveyed were opposed to

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[24] PRESIDENT'S COUNCIL ON BIOETHICS, BEYOND THERAPY: BIOTECHNOLOGY AND THE PURSUIT OF HAPPINESS 61 (2003), *available at* http://www.bioethics.gov/reports/beyondtherapy/beyond_therapy_final_webcorrected.pdf.

[25] Mehroo D. Hansotia, *Family Balancing by Preimplantation Genetic Diagnosis in India*, 17 HUM. REPROD. 2778, 2778–79 (2002); Farrell, *supra* note 16, at 256–59.

[26] *See, e.g.*, Baochang Gu & Krishna Roy, *Sex Ratio at Birth in China, with Reference to Other Areas in East Asia: What We Know*, 10 ASIA-PAC. POPULATION J. 17 (1995), *available at* http://www.unescap.org/esid/psis/population/journal/Articles/1995/V10N3A2.htm; Zeng Yi et al., *Causes and Implications of the Recent Increase in the Reported Sex Ratio at Birth in China*, 19 POPULATION & DEV. REV. 283 (1993).

[27] *See supra* notes 23–26; *see also* Dahl et al., *supra* note 13.

[28] *See* Dahl et al., *supra* note 13; *see also* Robertson, *Extending PGD*, *supra* note 11, at 214 ("[I]t could lead to great disparities in the sex ratio of the population, as has occurred in China and India.").

[29] *See* sources cited *supra* note 13.

[30] *See* Dahl et al., *supra* note 13, at 2233.

allowing sex selection.[31] Even among those who had an *a priori* desire for bearing males, the overwhelming majority were unwilling to choose the embryo's sex themselves.[32] The reluctance to embrace non-medical sex selection is corroborated by the relatively low number of applications based on the recent regulation in Israel.[33] It should be noted, however, that despite the low number of applicants, a clear majority applied for a permit to conceive a male child.[34]

As a practical matter, the data collected from Germany, the United Kingdom, the United States, and Israel suggests that, at least in these Western societies, the concern about disrupting the demographic balance loses its urgency, either because it is unclear that males are preferred over females or because only a marginal percentage of the population has expressed willingness to deploy technology in order to select the sex of the embryo.

An interrelated argument against allowing the selection of an embryo's sex is raised in the name of feminism. It maintains that allowing for sex selection would be harmful to women when the expected outcome, as aforesaid, might favor male fetuses.[35] The argument is that granting social legitimacy to choosing male embryos would compound discrimination against women. In my

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[31] Yael Hashiloni-Dolev, The Gertner Inst. for Health Policy & Epidemiology—Sheba Med. Ctr., Presentation at a Conference Organized by the International Center for Health, Law, and Ethics: What Kind of Selection?: Medical, Legal, Ethical, and Social Aspects of Sex Selection (Feb. 7, 2006). In addition, the findings of a 2007 study conducted in Israel showed that parents had a certain preference for bearing girls. Market Watch—Market Research Public Opinion Polls, Poll Conducted in Advance of the Publication of the Guidebook SODOT HA-HOROTE [THE SECRETS OF PARENTHOOD] (2007) (unpublished study, details on file with author). Nevertheless, it should be noted that the study was limited to the Israeli Jewish population.

[32] Hashiloni-Dolev, *supra* note 31.

[33] In more than two years (from its inception until September 2007) less than 200 applications were submitted for review by the professional committee in charge of the implementation of the Circular. Interview with Tova Bareket, Sec'y, Labor, Welfare & Health Prof'l Comm. (Jan. 8, 2008); *see infra* notes 92–93 and accompanying text.

[34] Interview with Tova Bareket, *supra* note 33. More than 75% of the applications sought a permit to choose a male embryo. *Id.*

[35] Remaley, *supra* note 2, at 274.

view, however, the conceptual force of this argument applies only when there exists a clear preference within a given system for the selection of male embryos. Against the background I presented above, which suggests that allowing for choice would have no significant effect on the relative numbers of boys and girls that are born, this argument loses its practical force.

Some arguments for precluding sex selection are grounded in moral or religious principles. There are two types, and their persuasiveness will depend on the reader's faith and worldview. First, there are arguments that reason from the metaphysical meaning of the birth process which view selection of an embryo's sex as an artificial, illegitimate intervention in Nature's, or God's, act of creation.[36] Arguments of this sort lead to reservations about sex selection in and of itself, without regard to how it is performed.[37] And while the metaphysical issue of intervention in the act of the creation of life entails a certain religious perspective, it is not devoid of more general ethical components related to the proper bounds of medical interventions. According to this position, there is good reason to curb medical interventions that do not promote individual or public health.[38] This perspective would limit the physician's role to treatments required by actual medical needs.

The second line of arguments looks to the procedure employed in selecting the embryo's sex and the consequences associated with it. These arguments may vary with the specific procedure that is used—sperm sorting or PGD[39]—and with the use made of the sperm cells or ova left after the procedure has been completed.[40] When PGD is involved, the opposition focuses its arguments on

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[36] Elliot N. Dorff, *Jewish Theological and Moral Reflections on Genetic Screening: The Case of BRCA1*, 7 HEALTH MATRIX 65, 71–72 (1997); Jones, *supra* note 2, at 22; Danis, *supra* note 2, at 234, 240–41; Eric Lode, Comment, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469, 1538 (1999).

[37] David Heyd, *Male or Female, We Will Create Them: The Ethics of Sex Selection for Non-Medical Reasons*, 10 ETHICAL PERSP. 204, 205 (2003).

[38] *Id.* at 208.

[39] On the various means available for selection and the differences among them, see *supra* notes 9–10 and accompanying text.

[40] Heyd, *supra* note 37, at 206–07.

the harm done to fertilized eggs (called "embryos" by those seeking to accord them greater protection).[41] The selection process sometimes entails the destruction of "leftover" fertilized eggs that do not meet the selection criteria and therefore are not returned to the mother's body. Of the fertilized eggs of the "wrong" sex that are left over, some are actively destroyed, while others are dedicated to research or simply kept frozen and unused. Unless this "surplus" of pre-embryos is donated to others for use in assisted reproduction, strong objections to sex selection can be anticipated from those who view fertilized eggs as the beginning of life and therefore regard them as no less sacred than human life in any other form.[42]

Various religions have different views on the point at which life begins and the degree of sanctity to be attributed to the materials that mark that point. The Roman Catholic Church would be opposed to any process that determines sex by means of in vitro fertilization ("IVF"). Believing, as it does, that the fertilized egg is a pre-embryo entitled to have its life protected, the Catholic Church would object in all respects to any sex selection process that entails the preimplantation determination of the fertilized egg's sex; the foreseeable result of any such process is the destruction of eggs that are not of the desired gender.[43] Even

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[41] Judith F. Daar, *ART and the Search for Perfectionism: On Selecting Gender, Genes, and Gametes*, 9 J. GENDER RACE & JUS. 241, 252 (2005); David M. Smolin, *Does Bioethics Provide Answers?: Secular and Religious Bioethics and Our Procreative Future*, 35 CUMB. L. REV. 473, 508–13 (2004–2005); Sherylynn Fiandaca, Comment, *In Vitro Fertilization and Embryos: The Need for International Guidelines*, 8 ALB. L.J. SCI. & TECH. 337, 358–65 (1998).

[42] *See generally* Katheryn D. Katz, *The Legal Status of the Ex Utero Embryo: Implications for Adoption Law*, 35 CAP. U.L. REV. 303, 318–20 (2006) ("Roman Catholic church teachings also condemned IVF for separating procreation from marital unity, for threatening the stability of marriage and family life, and causing the discard and destruction of embryos." (citations omitted)); Elizabeth Spahn & Barbara Andrade, *Mis-Conceptions: The Moment of Conception in Religion, Science, and Law*, 32 U.S.F. L. REV. 261, 272–73 (1998) ("The mainstream position of the Catholic Church has now become instant animation, the human soul infusing at the moment of conception." (citation omitted)).

[43] *See* Daar, *supra* note 41, at 252; S. Matthew Liao, *The Ethics of Using Genetic Engineering for Sex Selection*, 31 J. MED. ETHICS 116 (2005);

Judaism, which is somewhat less protective of sperm and egg cells, opposes a process that leads to the destruction of fertilized eggs for the sole purpose of socially motivated sex selection.[44]

Another argument widespread in the literature cites the "slippery slope" as a reason for limiting the permitted uses of science and technology.[45] Advocates of this position maintain that allowing for the selection of an embryo's sex would only be the first step toward permitting other, less legitimate measures. If sex selection is a legitimate reason for selection among embryos, why not a whole range of other grounds, including future physical appearance, expected intellect, sexual orientation, temperament, musical talent, or mathematical aptitude?

The objection to allowing selection for these other choices seems to be grounded in their eugenic implications. Socially motivated sex selection, to be sure, does not give rise to such concerns about efforts to "improve" the race, but such concerns are sure to arise in the future, when perfected diagnostic tools and increased knowledge of genetics may enable parents to strive to ensure the birth of "improved" or at least "the best possible" offspring. Even if the choices mentioned above lack the capacity to serve as positive intervention in the human genome—involving, as they do, only a choice among embryos produced through a fertilization process and entailing no use of genetic manipulation to shape the fetus's genetic profile—they can still lead indirectly to other methods directed at improving the race, for only the "best"

Robertson, *Ethical Debate*, *supra* note 11; Smolin, *supra* note 41, at 508–13; Fiandaca, *supra* note 41, at 358–65.

[44] On the stance taken by *halakhah* (Jewish law) with regard to gametes and fertilized eggs, see Yehoshua Ben-Meir, *Legal Parenthood and Genetic Parenthood in Jewish Law*, 12 JEWISH L. ANN. 153, 165 (1993); and Miryam Z. Wahrman, *Fruit of the Womb: Artificial Reproductive Technologies & Jewish Law*, 9 J. GENDER RACE & JUST. 109, 114–15 (2005).

[45] For the "slippery slope" argument in general and as it relates to this Article, see Heyd, *supra* note 37; Savulescu & Dahl, *supra* note 14; Wibren van der Burg, *The Slippery Slope Argument*, 102 ETHICS 42 (1991); Danis, *supra* note 2, at 241–42; Susan M. Faust, Comment, *Baby Girl or Baby Boy? Now You Can Choose: A Look at New Biology and No Law,* 10 ALB. L.J. SCI. & TECH. 281, 292–94 (2000); and Lode, *supra* note 36, at 1537–38.

fetuses will have the privilege of being allowed to come into the world.

Despite its initial allure, I find the slippery-slope argument unpersuasive.[46] Fear that a technological innovation will be put to some harmful use—however severe the outcome for the individual or however adverse its consequences for society—does not by itself warrant forbidding the innovation outright. Even if there is reason to rank the various uses on a continuum of harm or potential harm, I see no persuasive reason to forbid a benign practice simply because it may exist on a continuum with practices that ought to be banned. Banning the harmful practices themselves provides all the needed protection. It follows that preimplantation sex selection should be barred only if it is itself improper.

Yet another argument against allowing preimplantation sex selection focuses on the issue of funding and is grounded in the principle of equality and the desire to ensure social justice. To the extent that preimplantation sex selection is permitted, the question of funding necessarily arises. In jurisdictions that publicly fund fertility treatments (and that recognize the right to be a parent as a fundamental right) it can be argued that sex selection should be publicly funded too. However, the national healthcare budget, by its very nature, is limited, and the inclusion of funding for preimplantation sex selection will clearly diminish the resources available for other, seemingly more important, health services.[47] While the allocation of scarce resources is always a complex matter, we can assume a broad consensus that socially motivated sex selection should not be budgeted for at the expense of such health services as immunization, medicines, and a range of medical treatments; to do so would be to contravene fundamental concepts of social justice.[48] I would venture to guess that a majority of the

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[46] Heyd, *supra* note 37; Savulescu & Dahl, *supra* note 14, at 1879.

[47] Einer Elhauge, *Allocating Health Care Morally*, 82 CAL. L. REV. 1449 (1994).

[48] Jennifer Prah Ruger, *Health, Capability, and Justice: Toward a New Paradigm of Health Ethics, Policy and Law*, 15 CORNELL J.L. & PUB. POL'Y 403, 460–71 (2006) (arguing that "health resource allocation models are unworkable unless they consider the necessity and appropriateness of medical care").

public will likely assign a higher priority to the prevention of illness and the provision of effective medical treatment than to enabling parents to ensure that their child will be of a particular sex.

But is it essential that preimplantation sex selection be funded from the public purse? Those who support allowing it can argue that permitting the procedure does not dictate public funding and that the costs should be borne by those using it.[49] At this point, however, an argument based on the principle of equality might be raised: the cost of PGD is not trivial, and without public funding the procedure would be unavailable to people who are unable to pay for it.[50] Arguably, the principle of equality calls for forbidding the procedure outright; if it cannot be afforded by all, it should be allowed to none. But this argument, too, is unpersuasive.

Even if socially motivated preimplantation sex selection is permitted in general, it need not be open, as a practical matter, to all. Failing to provide access to one group—namely, those unable to pay—would not differentiate between groups in a way that increases unjust discrimination. As in the case of cosmetic plastic surgery, which is not publicly funded and therefore available only to those with private resources, the sex selection procedure does not implicate serious health-related issues, and therefore the moral imperative to ensure equal access loses its force.[51] This is to be distinguished from selecting among embryos on the basis of health-related indicia or even on the basis of personal qualities. In such cases, use of the procedure might lead to furthering existing gaps between different social groups, as the economically advantaged could be transformed into the genetically advantaged

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[49] Savulescu & Dahl, *supra* note 14.

[50] In Israel, the procedure is estimated to cost about 20,000 NIS; in the United States, the cost ranges between $10,000 and $17,500. DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 213 (2006).

[51] Roxanne Mykitiuk & Steven Penney, *Screening for "Deficits": The Legal and Ethical Implications of Genetic Screening and Testing To Reduce Health Care Budgets*, 3 HEALTH L.J. 235, 256–60 (1995); Michael H. Shapiro, *Does Technological Enhancement of Human Traits Threaten Human Equality and Democracy?*, 39 SAN DIEGO L. REV. 769, 778 (2002).

as well.[52] It follows that as long as we are speaking only of sex selection, a matter of little import to the shape of the community as a whole, it is hard to argue persuasively against allowing it to be conducted on a privately funded basis.

One of the more persuasive arguments against sex selection is based on the health of the woman. As noted, PGD entails IVF, and IVF is not free of medical risk. A woman undergoing IVF must receive hormone therapy, the long-term effects of which are unclear.[53] She must then undergo an invasive procedure, under anesthesia, for the harvesting of her ova. It is already known that hormone therapy can entail immediate health risks, sometimes (albeit very rarely) fatal ones.[54] The success rate for the procedure is not high, and several rounds of treatment often are needed before a pregnancy finally results.[55] Although the woman has the right to decide for herself whether to assume the risks to her health (on the premise that she receives all the information needed for informed consent), those risks are still worthy of being taken into account in devising the applicable legal regime.

The most persuasive argument against allowing preimplantation sex selection pertains to the effects on children in general, and on parent-child relationships in particular. The concern raised by this argument is that allowing parents to determine a child's genetic profile may impair inter-family relations, not necessarily immediately or even directly, but nonetheless in a fundamental way and with far-reaching implications for generations to come.

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[52] For an argument against preimplantation and embryo selection based in part on concern about a social-genetic hierarchy, see FRANCIS FUKUYAMA, OUR POSTHUMAN FUTURE: CONSEQUENCES OF THE BIOTECHNOLOGY REVOLUTION 218 (2002).

[53] *See* Helen Klip et al., *Cancer Risk Associated with Subfertility and Ovulation Induction: A Review*, 11 CANCER CAUSES & CONTROL 319 (2000).

[54] *See* J.G. Schenker & Y. Ezra, *Complications of Assisted Reproductive Techniques*, 61 FERTILITY & STERILITY 411 (1994).

[55] On the general health risks, see Reija Klemetti et al., *Complications of IVF and Ovulation Induction*, 20 HUM. REPROD. 3293 (2005); and Helen Klip et al., *Risk of Benign Gynaecological Diseases and Hormonal Disorders According to Responsiveness to Ovarian Stimulation in IVF: A Follow-up Study of 8714 Women*, 18 HUM. REPROD. 1951 (2003).

Normatively, the unique foundation upon which parent-child relations are premised is unqualified and unconditional acceptance.[56] Parents are expected to care for their child without reservation, under any circumstance. A child whose birth is undesired, who is sick or "defective," or who fails to meet parentally set standards, is nonetheless entitled to devoted and equal care and treatment from her parents. To be clear, I am not arguing that parent-child relationships invariably have these qualities under all circumstances. Sadly, the real world is more complicated, and the expectation that parents will do well by their children, accept them as they are, and treat them with unconditional love is not always borne out. The argument here is grounded on ideal parental relations; it is this ideal, I believe, that the legal system must take as its guide and goal in devising regulatory regimes. If a certain legal regulation acts to undermine this ideal type, this, in my mind, is a good reason to amend the legal regulation. In our context, the ideal scenario is well stated by Michael Sandel:

> To appreciate children as gifts is to accept them as they come, not as objects of our design, or products of our will, or instruments of our ambition. Parental love is not contingent on the talents and attributes the child happens to have. We choose our friends and spouses at least partly on the basis of qualities we find attractive. We do not choose our children.[57]

Needless to say, the law is powerless to guarantee ideal family relations. It can neither enforce affection and love nor guarantee human warmth or care. But the law can make a modest contribution by creating the conditions that promote such relations and by structuring the background and atmosphere in which warm family relationships are forged—or, at least, by ensuring that legal provisions do not damage the fabric of these relations.[58] Some would also say that the law sends a constitutive message regarding

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[56] Rosalind McDougal, *Acting Parentally: An Argument Against Sex Selection*, 31 J. MED. ETHICS 601, 603–04 (2005); Guido Pennings, *The Right To Choose Your Donor: A Step Towards Commercialization or a Step Towards Empowering the Patient?*, 15 HUM. REPROD. 508, 509–10 (2000).

[57] SANDEL, *supra* note 8, at 45.

[58] Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9, 30 (1986).

the ideal type of such relationships.[59] As Bartlett and Stack say in a different context, the law has an "expressive or symbolic power to alter social expectations and norms."[60]

As in the case of other aspects of family law, here too, the law plays a role in structuring the anticipated contours of parent-child relations.[61] Authorizing the use of preimplantation sex selection would almost inevitably foster the perception that a parent is "entitled" to a selected child, one having a personally chosen genetic trait, namely his or her sex. This concern exists even though the selection in our case is made only with respect to gender and only from among the limited variety of fertilized eggs the parents can naturally provide. Even with these limitations, we are still dealing with the selection of an embryo not merely to maintain a basic state of good health,[62] but rather on the basis of external parameters or personal preferences of the parents. Doing so entrenches a conceptual linkage between the right to parenthood and the right to a particular type of parenthood. People are free to choose whether or not to become a parent, but broadening that choice to encompass whether or not to become a parent to a child of a particular sex fundamentally transforms the nature of parenthood.

The concern is that under such circumstances, parental feelings of love, satisfaction, and personal reward would emerge as a result of the parent's specifications being met, both in the child's genetic profile (his or her sex) and in its expression in the reality of the child's life. If, however, those parental expectations for some reason were not met—for example, if a medical error occurs—the

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[59] For an example, see Beverly Horsburgh, *Redefining the Family: Recognizing the Altruistic Caretaker and the Importance of Relational Needs*, 25 U. MICH. J.L. REFORM 423, 503 (1992).

[60] Bartlett & Stack, *supra* note 58, at 28.

[61] *Cf.* Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 141–43 (2004) (advocating for a "rewriting of our [legal] definition of family").

[62] Even selection on the basis of health-related criteria is somewhat controversial. *See* Knox, *supra* note 2, at 140–44; Lindsey A. Vacco, Comment, *Preimplantation Genetic Diagnosis: From Preventing Genetic Disease to Customizing Children. Can the Technology Be Regulated Based on the Parents' Intent?*, 49 ST. LOUIS U. L.J. 1181, 1186–89 (2005).

parents might feel deceived and might even direct their feelings of disappointment and frustration toward the child who had failed to turn out as expected.

The effect, moreover, would likely flow both ways and also alter the child's relation to her parents. A child chosen by virtue of a specific genetic characteristic (in contrast to one whose genetic fate was determined by the usual "natural selection") may well decide to challenge her parents regarding the nature of their choice—what they opted for and what they avoided. Sex selection, like some other genetic determinations, is irreversible (or reversible only at great personal cost) and inescapable (in the sense that a person does not have the option to ignore it). A person chosen for her sex might therefore be anxious about the yoke of anticipation cast upon her by the choice her parents made. This line of argument is often heard with respect to "designer babies" (babies "manufactured" via parental interference with the embryo genotype to produce specific characteristics),[63] but it is true as well for "selected babies," as in our case when the child could not have been born at all unless she had been selected on the basis of the genotype of the fertilized egg from which she developed.

The danger is clear: the more the parents' preferences for a child's genetic makeup are met through active, external, and calculated intervention, the greater their expectation will be for that child to fulfill the "genetic promise," namely to lead a life consistent with what the genes are supposedly intended to achieve.[64] This may cover both physical characteristics and personality traits. Such a design is detrimental to the child even if she lives up to expectations, given the emotional stress involved, and it is *a fortiori* detrimental if she fails to live up to them. Moreover, allowing parents to choose the newborn's sex might further entrench the already existing tendencies among parents, offspring, and society to overemphasize the role genes play in

[63] *See* Vacco, *supra* note 62, at 1193–96.
[64] *See* Faust, *supra* note 45, at 292–94.

individual self-development and in the formulation of relationships with others.[65]

If a statute allowing genetic selection were to receive public attention and visibility, it might serve to undermine the existing social consensus regarding parenthood, according to which parental care and responsibility do not depend on the child's specific traits but are embedded in the relationship itself. As Sandel argues, "parents bent on enhancing their children are more likely to overreach, to express and entrench attitudes at odds with the norm of unconditional love."[66]

The change in attitude might take place even without widespread use of preimplantation sex selection procedures; it is enough that the procedures have high public visibility. It is fair to assume that the availability of the procedure and its use in selected instances would gain broad media attention—it is, after all, an attractive subject for journalists—and would resonate within the public consciousness. And that, in turn, would promote the worrisome change in attitude, even if the procedure itself did not become routine.

There is a related, rather narrower, argument pertaining to the effect of preimplantation sex selection on the child herself or on

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[65] As Dreyfuss & Nelkin illustrate:

> Society appropriates science to support prevailing values, sometimes extending it beyond the limits of well-accepted knowledge. Thus, the enthusiasm of some members of the scientific community draws public attention to genetic relationships. Media articles on reproductive technologies imply that women should reproduce at all costs for they will be emotionally "desperate" without their own children. Those unable to conceive seek out surrogate mothers in order to have genetically related children. Films and articles on parent-child relationships suggest the importance of genetic integrity, of "flesh and blood."

Rochelle Cooper Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 319 (1992) (citing John McCormick & Pat Wingert, *Whose Child Am I Anyway?*, NEWSWEEK, Summer 1991, at 58). *See generally* DOROTHY NELKIN & M. SUSAN LINDEE, THE DNA MYSTIQUE: THE GENE AS A CULTURAL ICON (1995).

[66] SANDEL, *supra* note 8, at 49. Sandel is speaking here of non-medical sex selection as well.

her social status (as distinct from its effect on parent-child relations in general). At the very least, concern for the well-being of a specific child warrants restricting the parents' freedom to intervene, for such intervention may transform the child, to her detriment, into a "commodity"—something evaluated exclusively in terms of its genetic features, seen as a means instead of an end, and considered to be an acquirable object rather than a person in her own right.[67] In that sense, selection of the child's sex is just one of a variety of options available to parents when filling out their child's genetic "specification."

Bearing these concerns in mind, I believe that it is preferable to disallow the use of procedures for choosing the embryo's sex. I recognize that the arguments regarding the child and her relationship with her parents are premised on assumptions about the consequences that I foresee. Although speculative in character, the consequences that follow are not the kind that a society that values its children can afford to disregard.

The same conclusion is suggested even where a mother is already using IVF (and even PGD for medical reasons) to conceive. In such cases, allowing for sex selection would not increase the risk to the mother's health (since IVF is being used anyway), but it would still pose the foregoing risks to the overall well-being and welfare of the child. A general prohibition is preferable because of the clear message it broadcasts and because it avoids establishing two classes of parents: those permitted to use preimplantation sex selection procedures (because they are already undergoing PGD for medical reasons or already using IVF to conceive), and those barred from using them.

There is a counterargument that might be raised against the view that sex selection by means of PGD should be banned to protect the interests of the child and the parent-child relationship.

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[67] Vicki G. Norton, Comment, *Unnatural Selection: Nontherapeutic Preimplantation Genetic Screening and Proposed Regulation*, 41 UCLA L. REV. 1581, 1608–09 (1994); *see also* Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 LAW & SOC'Y REV. 257, 271–72 (2002).

One might maintain that sex is not so substantial a factor in shaping the child's identity (at least in Western societies), and that allowing parents to make so relatively insignificant a choice—more a matter of "taste" than of substance—would not harm the overall parent-child relationship or the status of children in general. This argument is grounded in the premise that belonging to one sex or the other has no significant effect on shaping the person, that it is a neutral characteristic incapable of substantively influencing the course of a person's life—except, perhaps, with respect to biological matters.

This premise, however, does not describe real life, and even in Western societies, selecting a child's sex is not a marginal or insignificant choice. Even today, one's sex (or, using the more accurate term in this context, one's gender) plays a significant part in shaping an individual's life, exerting substantive, sometimes even determinative, influence on its course. As a practical matter, this is part of what motivates parents to want to choose their child's sex. In this sense, preimplantation sex selection is not an exceptional case, for one can think of other choices having significant influence on the course of a person's life—for example, choices related to sexual orientation, intellectual capacity, or personal temperament (insofar as they are formed genetically). Even minor choices related to external appearance—height or hair color—can regrettably play a real part, even if only indirectly, in forming a person's life.[68] Even a choice where consequences for the individual are minor (for example, the form taken by the fingers or the structure of the eyebrow) should not be provided for, given the conceptual harm to parent-child relationships that might arise from it. By its nature, however, this line of thinking is theoretical—as it seems unlikely that anyone would take on the burden of undergoing PGD in order to ensure development of an unimportant characteristic—so it could be left open for now. Against this background, I turn to consider Israeli law and practice.

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[68] *See, e.g.*, STEPHEN S. HALL, SIZE MATTERS: HOW HEIGHT AFFECTS THE HEALTH, HAPPINESS, AND SUCCESS OF BOYS—AND THE MEN THEY BECOME (2006) (detailing a study of how height affects a person's life on a variety of aspects).

IV. ISRAELI LAW AND PRACTICE: INTRODUCTION

The Israeli approach to sex selection underwent a change three years ago, when the 2005 Circular[69] replaced the previous Circular of September 2003.[70] The earlier regulation had prohibited, in all IVF procedures, the selection of the embryo's sex (except for medical reasons), including by means of PGD.

Section 2 of the 2005 Circular maintains the general prohibition of the selection of the embryo's sex for non-medical purposes,[71] but allows for permits to be issued for such a procedure in "rare and exceptional" cases.[72] According to the Circular, several cumulative conditions must be met before such a permit is granted. First, there must be a real and substantial danger that the child's welfare, or the emotional health of at least one parent, would be injured if the requested selection procedure is not performed.[73] Second, the applicants must already have at least four joint children (that is, children born to the two applicants, not stepchildren of either) of the same sex.[74] Deviation from this condition is possible, but only in particularly rare and exceptional cases. Third, the prospective parents must have received genetic counseling. The details of the procedure—including risks and likelihood of success—must be explained to them, they must give their informed consent to the selection procedure, and each individually must agree to the IVF procedure.[75] Fourth, the parents must have been informed that if the embryos produced are not of the desired sex, no additional approval will be given for another IVF procedure until all of the functional embryos from the previous round have been used for reproductive purposes.[76]

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[69] 2005 CIRCULAR, *supra* note 5.

[70] MINISTRY OF HEALTH, DIRECTOR GENERAL CIRCULAR: NOHAL BHIRAT MIN HAYILOD BETAHALICHEY I.V.F, HOZER MANKAL MISRAD HABRIUT MISPAR 17/03 [PROCEDURE FOR SEX SELECTION IN IVF PROCEDURES], Sep. 14, 2003, *available at* http://www.abush.health.gov.il/download/forms/a1265_mk17_03.pdf.

[71] 2005 CIRCULAR, *supra* note 5, § 2.1.

[72] *Id.*

[73] *Id.* § 2.2.1.

[74] *Id.* § 2.2.2.

[75] *Id.* § 2.2.3.

[76] *Id.* § 2.2.4.

In order to implement the regulatory scheme, a professional committee was established,[77] comprised of a psychologist, a bio-ethicist, a social worker, a lawyer, a physician with expertise in genetics, an obstetrician-gynecologist, and a religious official.[78] The professional committee is authorized to deliberate and rule on an application for sex selection, based on the conditions enumerated in the Circular.[79] While the Circular does not address the matter, under Israeli law such a decision may be reviewable in court, but the grounds for review are usually limited to violations of due process and gross unreasonableness.[80]

In addition to determining whether the preconditions have been met, the committee must also consider, before granting a permit, several additional factors. First, it must inquire whether the parents are employing IVF for medical reasons, independent of the sex selection.[81] If parents seek to use IVF only for non-medical reasons, the committee is required to examine the risk to the woman posed by the procedure,[82] taking into account her general

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[77] *Id.* § 3.

[78] It is noteworthy that this is not the first time in Israel where a matter of public controversy has been regulated by the establishment of a public-professional committee authorized to grant individual permits. Under the Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law, 5756-1996, 1996, S.H. 1577, 176, for example, every surrogacy agreement must be approved in advance by a public-professional committee. More recently, the law regulating the rights of the terminally ill, enacted in 2005, authorized two similar types of committees to determine the medical treatment of terminally ill patients. Terminally Ill Law, 5776-2005, S.H. 2039. The composition of the various committees is similar: they include a varying number of people from the fields of medicine, psychology, ethics, law, and religion. The use of these public-professional committees appears to be a common method in Israel for reaching decisions on matters of public controversy that raise weighty ethical and religious questions.

[79] 2005 CIRCULAR, *supra* note 5, §§ 2–3.

[80] Basic Law: The Judiciary, 1984, S.H. 158, § 15(c)–(d), *available at* http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm; HCJ 3511/02 Negev Coexistence Forum v. Ministry of Infrastructure [2003] IsrSC 57(2) 102, *available at* http://elyon1.court.gov.il/eng/verdict/search_eng/verdict_by_case_rslt.aspx?case_nbr=3511&case_year=02; BARUCH BRACHA, ADMINISTRATIVE LAW 13 (vol. 1, 1997).

[81] 2005 CIRCULAR, *supra* note 5, § 2.3.1.

[82] *Id.* § 2.3.2.

state of health. Second, the committee must inquire whether the embryos would have been subject to preimplantation diagnosis for medical reasons.[83] Presumably, if the embryos already needed to be subjected to PGD for medical reasons, the decision to approve sex selection would be made easier. Finally, the committee must examine the familial and social situation of the applicants, including their ages.[84] Applications may be filed by married and unmarried couples (as long as neither partner is married to someone else).[85] In principle, the possibility is available to single mothers as well.[86]

Even if all the preconditions are met, the committee must be persuaded, after taking account of the pertinent professional and ethical considerations, "that there exists compelling justification for selecting the sex of the child to be born in the case at issue."[87] Only then may it grant the requested permit.

V. ISRAELI LAW AND PRACTICE: DISCUSSION

The 2005 Circular paves the way for selecting a newborn's sex for non-medical reasons, but the underlying policy it evidences is far from unequivocal. On the one hand, its scope is limited *a priori*: it addresses sex selection by means of PGD only, and it therefore does not even consider the legitimacy of sperm sorting. On the other hand, the Circular's regulatory regime is certainly not rigid, nor even entirely clear. Despite its cautious point of departure, which attempts to substantially restrict attempts to choose an embryo's sex for non-medical purposes, it leaves the committee a degree of leeway and discretion to grant permits even for cases that do not strictly meet the stated preconditions.

The regulatory scheme is grounded in the recognition of the couple's powerful desire to produce a child of a particular sex, and of the threat to the mental health of all concerned if they fail to do

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[83] *Id.* § 2.3.3.
[84] *Id.* § 2.3.4.
[85] *Id.* § 3.2.
[86] *Id.* § 3.2.3. As a practical matter, however, it seems unlikely that a single mother who has four previous children would want to bear and raise a fifth on her own.
[87] *Id.* § 2.2.5.

so. This proviso is nondirigible, despite its essentially subjective nature and the correspondingly broad discretion it confers on the professional committee.[88] The Circular further allows for authorization only where the couple already has four children of the same sex. This condition may be waived under exceptional circumstances.

Although the Circular revokes the outright ban on sex selection, its extremely cautious guidelines ensure that it is permitted only in exceptional cases, limited to situations of extreme sex imbalance within a family, and other unique cases. The risk to the woman's health is minimized by the requirement that the committee factor in considerations pertaining to her medical condition. Still, the criteria leave the committee a broad discretionary margin. Even the one objective condition—"that there already be four children of the same sex, with none of the other sex"—is not absolute, and deviations from it are allowed under "exceptional and very rare circumstances."[89] While the committee must specify in writing what these circumstances are, there is no legislative guidance as to their nature. Accordingly, the Circular does not establish a strict regulatory framework; rather, it leaves the decision, in essence, to the professional committee's discretion. The committee therefore has the power to design policy for both the short and long term.

Before briefly addressing the committee's actual approach to date, another important aspect of the regime established by the Circular deserves attention. The primary criterion for allowing sex selection is not maintaining gender balance, but avoiding an acute risk. According to its rule, a permit may be granted only in cases where "there is a significant and manifest danger of serious, major harm to the mental welfare of both or one of the parents, or of the welfare of the child to be born, unless the requested procedure is performed."[90] This condition reflects—or, perhaps, gives rise to—

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[88] The professional committee relies on a psychological evaluation conducted by a research center chosen via a public tender. Any and all applicants are required to undergo an evaluation by an agent of the center. Interview with Tova Bareket, *supra* note 33.

[89] 2005 CIRCULAR, *supra* note 5, § 2.2.2.

[90] *Id.* § 2.2.1.

the notion that the birth of a particular child may herald major emotional damage. But is it conceivable that the birth of a child, whose only flaw is being of the "wrong" sex, could really cause such severe harm? The mere specification of such grounds requires the prospective parents to prove the harm and the probability of its eventuation within the context of their request for a permit.

This requirement is highly problematic. First, it is demeaning to all children whose birth is considered to be potentially so damaging. Second, it is offensive to the applicants' existing and future children, for the application must be supported by the expert opinion of a psychologist who has found that the parent(s) will be severely harmed by the birth of a fifth child of the same sex. The unavoidable implication is that the parents are already substantially distressed by having four children of the same sex. At the very least, the parents must have been thoroughly disappointed when they discovered the sex of their last born; otherwise, their claim that another child of the same sex would cause them "serious harm" seems unlikely.

But let us assume, contrary to common sense, that this is not the case, and the family was happy with the four children of the same sex. For argument's sake, let us also assume that an application was filed but found unpersuasive and denied by the professional committee. Assume further that a fifth child is born and has the "misfortune" of being of the same sex as his or her older siblings. This child might well conclude ex post facto that his or her birth was seen by the parents as a cause of severe harm. Viewed from the parents' perspective, it is not far fetched to imagine that their frustration resulting from begetting a child of the same sex yet again would be amplified by knowing that the authorities were prepared in principle to grant permission—as evidenced by the promulgation of the Circular—but were unpersuaded of the need to grant it in the case at hand.

The Circular also assumes that the welfare of the unborn child may seriously be affected if sex selection is not performed. It is not clear how such an assessment is made, for it is difficult to discuss the welfare of an entity that has not yet come into being.

Beyond that, it is logically difficult (if not impossible) to conclude that an entity would be better off not being born at all than being born as a member of one sex rather than the other.[91] But to the extent such projections are possible, the Circular tacitly acknowledges the possibility of a child suffering serious harm by being born of the "wrong" sex. In addition to the derogatory message conveyed regarding gender attribution, this might have some ill effects as a practical matter. Assuming, again, that some applications will be rejected, and assuming that a child of the "wrong" sex is then born, would that child not be injured simply by learning that the parents had foreseen that his or her birth would be a source of serious mental harm to them and to him/her alike?

Before concluding, let me briefly recount the performance of the professional committee to date. In October 2006, the committee reported to the pertinent Knesset committees.[92] Two points from this report are worth mentioning: the number of granted applications and the perception of the professional committee members regarding the scope of their discretion under the Circular. As for the first issue, the professional committee put the number of applications filed over the year and a half since it

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[91] Even if it were demonstrated that by being born a certain sex, the child would be harmed emotionally, this harm is a far cry from the harm needed to support a morally defensible claim to non-existence. Moreover, the harm discussed here is speculative, and it is therefore difficult to argue on behalf of a particular child before she is born that she would have been better off not being born at all. Lastly, as a matter of logic, the "welfare of the child" is relevant only when there is a child; but here the thrust of the claim is that there should not be a child at all. This ethical conundrum is called "the non-identity problem." DEREK PARFIT, REASONS AND PERSONS 351 (1984); *see also* John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7, 13–14 (2004).

[92] The Knesset is the Israeli Parliament. The deliberations took place in a joint meeting of the Science and Technology Committee and the Labor, Welfare, and Health Committee. *Protocol me-yeshiva meshutefet shel va'adat ha'avoda, harevacha ve-habriut, mispar 85 ve-va'adat hamada ve-hatechnologia, mispar 29* [*Protocol from J. Meeting of the Labor, Welfare, and Health Comm., No. 85, with the Science and Technology Comm., No. 29*], Oct. 30, 2006, *available at* http://www.knesset.gov.il/protocols/data/rtf/avoda/2006-10-30.rtf.

first convened at 124.[93] Of these, three were granted, thirty-nine were rejected, and the rest remained pending. This would appear to be a rather low number of applications.[94] As for the issue of discretion, some members of the professional committee[95] complained that the discretion granted them was not broad enough, and they expressed support for the adoption of a more flexible arrangement that would make it easier for them to grant applications for sex selection.

The Circular has not been in force long enough to allow unequivocal conclusions regarding its policy, but I believe the concerns raised before the Knesset committee about the limitations on the professional committee's discretion and the small number of permits it has granted are not an accurate reflection of reality. Updated data, not formally published, shows that of 197 applications filed since the Circulation came into force in 2005, thirteen were granted, seventy-five were rejected, and the rest remain pending either because not all documents were filed or because the committee is still considering the case.[96] As of today, then, the approval rate is above 17%—by no means a negligible figure.

It is noteworthy that in at least two of the thirteen cases in which the committee granted permits, the applicant couple did not already have four children of the same sex; in fact, they had no

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[93] *Id.*

[94] The number of births in Israel was approximately 148,000 during 2006, and the overall number of births during the relevant period of time—eighteen months since the Circular was adopted and the date of the report—stood at 210,000. *See* Press Notice, Central Bureau for Family and Domestic Establishment Statistics, Dfusey Piryon Be—Israel 2006 [Patterns of Fertility in Israel] (2006), *available at* http://www.cbs.gov.il/reader/newhodaot/hodaa_template.html?hodaa=200701215. It appears that the number of applications for sex selections is low not only relative to the number of births, but also given that the adoption of the Circular opened the gates by providing, for the first time in Israel, parents the opportunity to apply for the procedure, and thus one could expect that the numbers of applications would be higher than in an ordinary year, because it would reflect "suppressed demand."

[95] Two out of three members of the professional committee that came to the deliberation at the Knesset reflected this stand.

[96] Interview with Tova Bareket, *supra* note 33.

previous children at all. The permits were justified in these cases on the basis of unique cultural considerations. Under Jewish law, some religious rituals are performed only by a *kohen* (literally, a "priest"—a male descendant of the ancient hereditary Temple priesthood associated with a particular clan within the biblical tribe of Levi).[97] A *kohen* by definition is the male biological offspring of a *kohen*. Thus a child conceived via anonymous sperm donation[98] will not be considered a *kohen* for the purposes of performing these rituals. Two couples in which the husband was a *kohen* sought to use PGD to ensure that the child conceived through sperm donation (and therefore not the father's biological offspring) would be a female. Giving birth to a girl avoids any issue of *kohen* status, thereby allowing the parents to conceal their having resorted to sperm donation and to decide only later whether to disclose that fact to the child. This example shows the breadth of the professional committee's discretion and its ability to grant permits in unusual cases.

VI. CONCLUSION

The Israeli regulatory treatment of these matters is exceptional when compared to that in other jurisdictions around the world. In the United States, for example, there is no legal restriction on utilizing these procedures. The matter is therefore left to the profession[99] and the market, until litigation arises. In European

[97] Although the Temple rituals have not been practiced since the Temple was destroyed in the first century of the Common Era, a *kohen* retains certain roles in Jewish ritual. He is the first of those called to read from the Torah; he recites the "priestly blessing" for the congregation; and he officiates at the ceremony of the redemption of a first-born male. A *kohen* is also subject to certain restrictions, including avoidance of contact with a corpse. *See generally High Priest, or Kohen Gadol (Judaism)*, ENCYCLOPAEDIA BRITANNICA ONLINE, http://www.britannica.com/eb/topic-265328/high-priest (last visited Apr. 6, 2008).

[98] Non-anonymous donations raise a host of religious difficulties, and are not performed by medical institutions in Israel. *See* Ruth Landau, *The Management of Genetic Origins in Donor-Assisted Conception in Israel and Elsewhere*, 13 HUM. REPROD. 3268, 3270–71 (1998).

[99] *See* Remaley, *supra* note 2.

countries, including England,[100] Italy,[101] and Germany,[102] sex selection is proscribed, at least to the extent that it is based on non-medical reasons.

By contrast, Israel chose to permit the procedure on a qualified basis, declaring its commitment to procreation and the right to become a parent.[103] But the basic authorization is circumscribed by a number of conditions that must be satisfied before the professional committee can grant a permit for socially based sex selection. The governing Circular is cautiously worded, indicating that a permit will be granted only rarely, in extraordinary cases. Ultimately, however, the committee's members have discretion, which enables them in principle to grant a permit even when the preconditions (including the existence of a specified number of previous children of the same sex) are not satisfied.

Given the decisional framework I suggested earlier in this Article, which calls for an absolute ban on socially motivated preimplantation sex selection, the Israeli regulatory scheme is flawed, not only in its authorizing such selection as a matter of principle, but also in the conditions it sets for granting such authorization in practice. As explained earlier, the most persuasive rationale for banning the practice is based on the interests and welfare of the children it affects, on the importance of parent-child relationships, and on the risk of impairing those relationships over the long run. Against that background, I find the Circular's precondition to granting a permit for sex selection—the probable risk of "substantive injury to the parent's emotional health" if a child of the undesired sex is born—troublesome. The condition is harmful to children in general and, in particular, to the applicants' children. It embodies the premise that children are meant to fulfill their parents' desires, and that a child who fails to meet the parents' desiderata somehow injures the parents.

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[100] Vacco, *supra* note 62, at 1201–04.

[101] *See* Robertson, *Reproductive Technology*, *supra* note 4, at 192.

[102] Meister, *supra* note 4; Robertson, *Reproductive Technology*, *supra* note 4, at 192; Fahrenkrog, *supra* note 4, at 763.

[103] *See* 2005 CIRCULAR, *supra* note 5.

My objection to sex selection by means of Preimplantation Genetic Diagnosis, based on my concern about impairing family relations, has implications that go beyond the specific issue considered in this Article and also apply to other Western jurisdictions that have yet to ban the procedure. It can be argued that the broad array of genetic manipulations that will become possible in the future have implicit within them the potential to impair parent-child relationships.[104] As explained, the anticipated impairment results from a change in consciousness produced by the practice taking root or becoming something bruited about in public discourse. Even though these fears are not grounded in direct proof or empirical research, I believe the potential harm implicit in sex selection by means of PGD and its profound consequences for the involved individuals and the community as a whole are so fundamental that they must be taken into account at the outset, when policy on the matter is set. Freedom of choice regarding the sex or other genetic characteristics of an embryo cannot be introduced gradually or on a trial basis. The results of any such "trial" would not become evident quickly, and once they became evident—following a substantial change in the concept of family relations—it would be too late to force the genie back into the bottle. Therefore, in view of the foregoing risks, this Article argues that Israel has taken a wrong turn. It is possible, of course, that experience in other jurisdictions, which may adopt a more permissive view of these practices than Israel, will show that I have overstated those risks and that they are, in fact, acceptable. Should that be the case, the option to reconsider the matter would remain open.

[104] I am not speaking here of manipulations whose purpose is to avoid serious illness, as it could be argued that the very nature of the parent-child relationship obligates such procedures.