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Author
Deckha, Maneesha

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ARTICLES

(NOT) REPRODUCING THE CULTURAL, RACIAL AND EMBODIED OTHER: A FEMINIST RESPONSE TO CANADA'S PARTIAL BAN ON SEX SELECTION

Maneesha Deckha[1]

I. INTRODUCTION

Western feminist attention to reproductive rights and their repercussions for female bodies has primarily concentrated on gender issues shaped by sexism.[2] Other equality dimensions of reproductive issues have been less quick to appear within feminist discussions and thus within larger debates about the ethics of a particular reproductive practice. When we think of what "reproductive rights" signifies, many of us think of the right to "choose" abortion, which has been a priority for white, middle-class women, rather than forced sterilization or treatment or the right to access to abortion services, which disproportionately affect low-income and racialized women as well as women with dis-

1. Assistant Professor, Faculty of Law, University of Victoria. This Article has benefited from its presentation at the Feminist Legal Theory Workshop on Genetic Manipulation and Enhancement Technologies, Emory Law School, January 27-28, 2006, the Feminism & Law, Diversity & Law, and Health Law & Policy Workshop Series, University of Toronto Faculty of Law, February 25, 2005, and the Canadian Journal of Women and the Law Junior Scholars Feminist Workshop, May 3, 2005. I wish to thank the organizers and participants at these workshops for their comments as well as Shannon Elliott and Layli Antinuk for research assistance.

2. An important element of postcolonial analysis is to interrogate liberal legalism's adoption of the West/non-West binary and the corresponding assumptions of superiority and inferiority that attach to it. *See, e.g.,* RATNA KAPUR, EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM 23 (2005). In using the terms "West" and "non-West," "Western" and "non-Western," I do not mean to entrench this dichotomy, but rather to locate sex selection as an issue influenced adversely by this paradigm.

abilities.[3] Even with respect to analyses of the abortion debate in the West, feminists have focused on ensuring legal access to abortion as a fundamental right for women and precondition for their personhood, by highlighting the perils of criminalizing it. They have not, despite the sullied roots of the pro-choice movement in race-based and eugenics campaigns,[4] also included as central a story about racism or classism, for example, in structuring that access.[5] Feminists need to provide more responses to reproductive rights and regulation that examine the intersectional aspects of various reproductive issues. This Article attempts to provide such an analysis by applying an intersectional feminist perspective to pre-implantation sex selection. By "intersectional feminist perspective," I mean a feminist perspective that does not prioritize gender over other socially constructed differences such as disability, culture, race, age, class, etc., but instead understands all these social constructs as interactively constitutive of women's experiences of autonomy, agency and injustice.[6]

Pre-implantation sex selection is a category that refers to several procedures. It can refer to various techniques used to manipulate the sex chromosomes to increase the chance that an egg, once fertilized, will be a zygote of a certain sex. It can also refer to selecting embryos created *in vitro* for implantation into a woman's womb on the basis of the embryo's sex. The issue of pre-implantation sex selection is a current one because of the Ca-

3. *See generally* Angela Davis, *Racism, Birth Control and Reproductive Rights*, *in* FEMINIST POSTCOLONIAL THEORY: A READER 353 (Reina Lewis & Sara Mills eds., 2003); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Sunera Thobani, *From Reproduction to Mal(e) Production: Women and Sex Selection Technology*, *in* MISCONCEPTIONS: THE SOCIAL CONSTRUCTION OF CHOICE AND THE NEW REPRODUCTIVE AND GENETIC TECHNOLOGY 138, 149 (Gwynne Basen, Margrit Eichler & Abby Lippman eds., 1994) (analyzing the colonial assumptions about cultural differences that informed gendered debates about reproductive technologies in Canada).

4. Margaret Sanger, widely viewed as the founder of the pro-choice movement in the United States, distanced herself from her Marxist roots and adopted race-based arguments supporting the role of abortion in quelling non-white reproduction and maintaining white superiority. *See, e.g.*, Davis, *supra* note 3, at 358-61.

5. For an influential example of feminist analysis that does attend to race and class, see DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997).

6. *See generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; *see* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991).

nadian federal government's recent initiative on this bioethical issue. In March 2004, Canada finally legislated in the realm of assisted reproduction after a decade or more of public inquiries, consultations, and attempted legislation, enacting the *Assisted Human Reproduction Act* ("the Act").[7] Section 5 of the Act prohibits reproductive-related technologies, including pre-implantation sex diagnosis for sex selection and pre-conception sex selective techniques.

In this Article, I undertake a feminist critique of this provision from an intersectional point of departure. While I do not endorse sex selection, I argue that the current partial prohibition is problematic from an intersectional feminist perspective and that feminist support for the provision must therefore be tentative at best. In Part II of this Article, I explain the scope of the Act's prohibition and the types of procedures it targets. In Part III, I map the intersectional dimensions of pre-implantation sex selection. Building from this discussion, Part IV then provides a critique of the provision as a compromised route to a feminist vision of women's equality. The aim of this section is to caution against an embrace of this provision as a "victory for women" for feminists who are against sex selection. Lastly, Part V offers a brief comparison of the Canadian provision with the current regulatory scheme (or absence thereof) in the United States. The paper does not engage the debate of whether a total ban on sex selection would be ethically problematic from a feminist or gender equality perspective and, if so, whether the general right to reproductive freedom should be curtailed on this one dimension.[8]

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7. Assisted Human Reproduction Act, R.S.C., ch. 2 (2004) (Can.).

8. Some argue that it is impossible for feminists to be both pro-choice and anti-sex-selective abortion. One could argue that the same feminist principles could underlie both positions. A feminist sensibility entails a commitment to ending the subordination, exploitation, and oppression of women. Many feminists believe that the denial of abortion rights is a glaring manifestation of the oppression of women, thus motivating them to adopt a pro-choice stance. Feminists also view the preference for males over females as sexist, whether that preference takes place in decisions regarding admission to universities, hiring for particular jobs, or, as is the case here, what children to bring into this world. *See, e.g.*, Lynne Marie Kohm, *Sex Selection Abortion and the Boomerang Effect of a Woman's Right to Choose: A Paradox of the Skeptics*, 4 WM. & MARY J. WOMEN & L. 91, 115-17 (1997) (discussing the responses of various feminist organizations); April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?*, 10 WIS. WOMEN'S L.J. 161, 212-222 (1995) (arguing that liberal feminist understandings of a woman's right to choose in all situations do not lead to feminist results when that choice expresses a desire for males over females in reproduction).

A skeptic might assert that opposition to sex-selective abortion is fundamentally condescending to women and therefore cannot be reconciled with a feminist pro-choice position. Just as feminists criticize governments for not trusting women to make the decision to abort by regulating these decisions, the skeptic might claim that a ban on sex-selective abortion holds women's decision-making capacities in the same poor regard. Moreover, the ban condescendingly tells women what values they should hold with respect to having children, and it uses the coercive power of the law to ensure that they do not fall victim to their false consciousnesses by aborting female fetuses they may not wish to have. It is true that preventing sex-selective abortion constrains the reproductive choice of women, but to the extent that the choice to abort female fetuses violates the ethic of equality, it may be reasonably curtailed under feminist logic. Hence, feminist opposition to sex selective abortion does not necessarily contradict feminist arguments supporting the right to abortion. Rather, it explicitly recognizes the same principles that these pro-choice arguments typically underscore – the devaluation of female personhood and the oppression of females. Although the logic can be consistent, the agency/cnoice concern is one of the problematic aspects of the provision, which I explore later in this paper. For gender equality arguments against sex selection, see DRUCILLA CORNELL, THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY & SEXUAL HARASSMENT 86-88 (1995); Dorothy C. Wertz & John C. Fletcher, *Sex Selection Through Prenatal Diagnosis: A Feminist Critique*, *in* FEMINIST PERSPECTIVES IN MEDICAL ETHICS 240 (Helen Bequaert Holmes & Laura M. Purdy eds., 1992); Elisabeth Boetzkes, *Sex Selection and the Charter*, 7 CAN. J.L. & JURIS. 173 (1994); Cherry, *supra* note 8; Jodi Danis, *Sexism and the "Superfluous Female": Arguments for Regulating Pre-Implantation Sex Selection*, 18 HARV. WOMEN'S L.J. 219, 245-252 (1995); Dena Davis et al., *1999 Symposium Remarks: Panel on Pre-Pregnancy Gender Selection*, 8 TEX. J. WOMEN & L. 267 (1999); Renu Dube et al., *Women Without Choice: Female Infanticide and the Rhetoric of Overpopulation in Postcolonial India*, WOMEN'S STUD. Q., Spring/Summer 1999, at 73; Naryung Kim, *Breaking Free From Patriarchy: A Comparative Study of Sex Selection Abortions in Korea and the United States*, 17 UCLA PAC. BASIN L.J. 301, 317 (1999/2000); Kohm, *supra* note 8; Abby Lippman, *Prenatal Genetic Testing and Screening: Constructing Needs and Reinforcing Inequities*, 17 AM. J.L. & MED. 15, 39-40 (1991); Farhat Moazam, *Feminist Discourse on Sex Screening and Selective Abortion of Female Foetuses*, 18 BIOETHICS 205 (2004); Kelly M. Plummer, Comment, *Ending Parents' Unlimited Power to Choose: Legislation is Necessary to Prohibit Parents' Selection of Their Children's Sex and Characteristics*, 47 ST. LOUIS U. L.J. 517, 552 (2003); Rachel E. Remaley, *"The Original Sexist Sin": Regulating Preconception Sex Selection Technology*, 10 HEALTH MATRIX: J.L. MED. 249 (2000); Thobani, *supra* note 3; Dorothy C. Wertz, *International Perspectives on Ethics and Human Genetics*, 27 SUFFOLK U. L. REV. 1411, 1434 (1993).

Some feminists who oppose sex selection would allow sex-selective abortion so as not to undermine a woman's right to choose what goes on in her body. *See, e.g.*, Danis, *supra* note 8, at 262; *but see* Renée C. Esfandiary, *The Changing World of Genetics and Abortion: Why the Women's Movement Should Advocate for Limitations on the Right to Choose in the Area of Genetic Technology*, 4 WM. & MARY J. WOMEN & L. 499 (1998).

Still others have noted that sex selection, although regrettable, may be preferable to having an unwanted and thus neglected daughter. *See, e.g.*, Sonia M. Suter, *Sex Selection, Nondirectiveness, and Equality*, 3 J. INTERDISC. LEGAL STUD. 473, 485-89 (1996). For feminist arguments questioning the moral blameworthiness of the practice, see CHRISTINE OVERALL, ETHICS AND HUMAN REPRODUCTION: A FEMINIST ANALYSIS 30 (1987); MARY ANNE WARREN, GENDERCIDE: THE IMPLICATIONS OF SEX SELECTION 21-22 (1985); Boetzkes, *supra* note 8, at 174.

II. PROHIBITED SEX SELECTIVE PROCEDURES

A. *What does the Act Prohibit?*

The Act targets genetic technologies that relate, either primarily or in an ancillary fashion, to assisted reproduction. It prohibits reproductive cloning (creating a full "cloned" person) and therapeutic cloning (creating "cloned" body parts, but not a full person) alike.[9] The Act also bans certain economic transactions relating to reproductive material. For example, it is now an offense to pay donors for sperm or ova[10] or to pay a woman to act as a surrogate mother.[11] The sanctions are significant. A person who engages in a prohibited activity could face a fine of up to $500,000 and/or imprisonment of ten years if proceeded against through an indictment; if the charge is a summary one, the figures reduce to $250,000 and/or four years respectively.[12] The Act is permissive of other types of technologies such as *in vitro* fertilization, embryonic research and transgenics (combining certain human and nonhuman genetic material), and establishes the Assisted Human Reproductive Agency to license clinics, monitor reproductive material users, and otherwise enforce the provisions of the Act.[13]

Sex selection is a topic infrequently associated with the Act despite the prohibition in subsection 5(1)(e), which states that:

> No person shall knowingly . . . for the purpose of creating a human being, perform any procedure or provide, prescribe or administer any thing that would ensure or increase the probability that an embryo will be of a particular sex, or that would identify the sex of an *in vitro* embryo, except to prevent, diagnose or treat a sex-linked disorder or disease.[14]

The first part of subsection 5(1)(e) thus prohibits a doctor, specialist or other professional from using a technique or drug that purports to increase the chance of creating a zygote of a specific sex. Sperm sorting through a technology known as "flow cytometry," the technique that is most commonly used to bolster one's chances of ensuring that the embryo will be of a certain sex, would be caught under the purview of this part of the sub-

9. Assisted Human Reproduction Act, R.S.C., ch. 2, § 5(1)(a) (2004) (Can.).
10. *Id.* § 7(1).
11. *Id.* § 6(1).
12. *Id.* § 60-61. The punishment for violating any other provision of the Act is $250,000 and/or 5 years imprisonment if indicted and $100,000 and/or 2 years if summarily convicted.
13. *Id.* § 21.
14. *Id.* § 5(1)(e).

section. This method either "mechanically separate[s] x-bearing sperm from y-bearing sperm" or attempts "to produce an increasing proportion of either type of sperm."[15] Y-bearing sperm are distinguished from x-bearing sperm since the former have slightly less DNA than the latter.[16]

The second half of subsection 5(1)(e) is directed at pre-implantation technologies. Recall that it makes it an offense for anyone to "identify the sex of an *in vitro* embryo, except to prevent, diagnose or treat a sex-linked disorder or disease." This provision will affect those availing themselves of *in vitro* fertilization, or a process in which fertilization of the egg occurs in a clinic environment outside a woman's uterus. *In vitro* fertilization involves the extraction of ova from a woman's body and fertilization of those ova by sperm in a laboratory petri dish.[17] Typically, multiple zygotes are created that develop into very young embryos (a few days old) before one or more are selected to implant into the uterus of the intended mother-to-be. The embryos that are not selected for implantation are either discarded or cryopreserved for future possible use if the first implantation does not succeed.[18] By ruling out sex as a criterion for selection, subsection 5(1)(e) tries to ensure that the decision of which embryo to implant is sex "neutral."

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15. Policy Statement, *Ethical Issues in Assisted Reproduction: Sperm Sorting for Medical and Non-Medical Reasons*, 21 J. SOC'Y OBSTETRICIANS & GYNECOLOGISTS CAN. 67, 68 (1999) [hereinafter Joint Policy Statement].

16. *See* Plummer, *supra* note 8, at 521. The prevalence of sperm sorting in Canada is very low. Canadians are free, if they can afford it, to travel to other jurisdictions where sperm sorting may be more accessible. Julie Zilberberg draws attention to the services offered by MicroSort, an American company with offices in Virginia and California, whose sperm sorting technique involving flow cytometry is in clinical trials. *See, e.g.*, Julie M. Zilberberg, *A Boy or a Girl: Is Any Choice Moral? The Ethics of Sex Selection and Sex Preselection in Context*, *in* LINKING VISIONS: FEMINIST BIOETHICS, HUMAN RIGHTS, AND THE DEVELOPING WORLD 147, 149 (Rosemarie Tong, Anne Donchin & Susan Dodds eds., 2004). For more information about the company and the flow cytometry practice, see generally E.F. Fugger et al., BIRTHS OF NORMAL DAUGHTERS AFTER MICROSORT SPERM SEPARATION AND INTRAUTERINE INSEMINATION, IN-VITRO FERTILIZATION, OR INTRACYTOPLASMIC SPERM INJECTION, 13 HUM. REPROD. 2367 (1998); MicroSort Corporate Website, http://www.microsort.net/ (last visited October 31, 2006).

17. *See* SCOTT F. GILBERT, ANNA L. TYLER & EMILY J. ZACKIN, BIOETHICS AND THE NEW EMBRYOLOGY: SPRINGBOARDS FOR DEBATE 64-65 (2005).

18. *See id.* at 64-69.

B. *The Partiality of the Provision*

The provision is a partial prohibition of sex selection in Canada in at least two respects. First, the Act does not apply to any tests that prospective parents may wish to conduct once the embryo is *inside* a woman's uterus. So, for example, a woman who becomes pregnant either "naturally" or through assisted fertilization is free to use technology (amniocentesis, ultrasounds, etc.) to find out the sex of her embryo or fetus and to decide to terminate the pregnancy because of the sex trait. In other words, the Act does not ban the practice of sex selective abortion, or the technologies that deliver information about the sex of the fetus once a woman becomes pregnant. This exclusion appears intentional. A background paper created before the Act was passed identifies the three primary objectives the Act is meant to secure as ensuring the "health and safety" of Canadians using assisted reproductive technologies, preventing "unacceptable practices" such as cloning and regulating permitted research.[19] The same backgrounder brings up the issues of the ethical treatment of embryos in the *in vitro* context only, taking care to state that the Act "would ensure that [*in vitro*] embryos are treated with respect,"[20] yet remaining silent on the question of abortion or fetuses *in utero*.

This type of line-drawing between the *in vitro* and *in utero* contexts makes sense if one considers other purposes behind the partial ban. Section 2 of the Act lists several values and purposes. A central one is to affirm human dignity and respect for all humans. Another is to recognize that while reproductive technologies have social implications for all of us, it is women more than men that are affected by them.[21] Indeed, another backgrounder strengthens this emphasis by declaring that "[b]ased on informed consent, the health and safety of women and children will come first. The legislation reflects the Government of Canada's commitment to helping Canadians make healthy and informed choices throughout their lives."[22]

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19. Health Canada, Proposed Act Respecting Assisted Human Reproduction – Frequently Asked Questions (May 2002), http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/2002/2002_34bk2_e.html.

20. *Id.* at 2.

21. Assisted Human Reproduction Act, R.S.C., ch. 2, § 2 (2004) (Can.).

22. Health Canada, Proposed Act Respecting Assisted Human Reproduction – Proposed Procedures Covered (May 2002), http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/2002/2002_34bk4_e.html. These purposive statements signaling an affirmation of women's reproductive freedom with respect to their bodies are important to clarify

A prohibition on sex selection that would have prevented pregnant women from terminating their pregnancies on the basis of the sex of the fetus would have imposed a significant impairment on the availability of abortion in Canada and thus women's rights to liberty and security of their person. Despite the feminist purpose (opposition to sex selection), it is arguable that many feminists would be reluctant to re-introduce a regulatory scheme that would monitor and approve of the reasons women sought out abortions.[23] At least, then, feminists need not be troubled by the provision's impact on abortion rights.

The second indication of the provision's partial nature is the exception to the ban. Recall the last clause. Sex diagnosis *in vitro* that is done to detect or treat an inheritable sex-linked disease or disorder is permissible. The purpose behind this restriction of the ban is plainer – it is to prevent diseases or disorders and facilitate the "normal" functioning of the future child. Whereas the first exclusion – the *in utero* context – matches feminist priorities, this second exclusion invites more reflection. It is to this discussion that I now turn.

III. INTERSECTIONAL DIMENSIONS

In this Part, I analyze the practice of pre-implantation sex selection through an intersectional lens. My aim is to give a com-

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the government's intention. Without them, the restrictions in the Act against robust embryonic stem cell research might raise some doubts as to the precise scope and reason for the partial sex selection ban. The stem cell debate is closely tied to abortion because embryos, whether existing or created specifically for research purposes, are destroyed in the process of harvesting stem cells. Canada has waded into this debate by way of the Act's prohibition on creating embryos for any non-reproductive related research (such as stem cell research) and using existing embryos for research past the 14th day of development. It is arguable that the presumption for these restrictions invokes the position that the embryo is human life and as such is entitled to a measure of respect. That respect is materialized through provisions that ensure than any instrumental research on embryos only uses surplus (typically left over from *in vitro* fertilization procedures) embryos when they are extremely young; researchers cannot create any embryos specifically for stem cell or other research purposes not related to reproduction. *See* Assisted Human Reproduction Act. R.S.C., ch. 2 §§ 5(1)(b), (d) (2005) (Can.).

The repercussion of expressing this respect in the *in vitro* context is the ambiguous implication it raises for women's reproductive rights in the *in utero* context. For a discussion of the discursive connection between the embryonic stem cell research debate and the abortion debate, see Janet L. Dolgin, *Embryonic Discourse: Abortion, Stem Cells and Cloning,* 19 ISSUES L. & MED. 203 (2004).

23. *Cf.* R. v. Morgentaler, [1988] 1 S.C.R. 30 (where the Supreme Court of Canada struck down the problematic regulatory scheme involving therapeutic abortion committees, contained in § 251 of the Criminal Code, as unconstitutional).

prehensive sense of the issue before proceeding to examine, in Part IV, the implication of subsection 5(1)(e) for feminists.

A. *Sex Selection and the Cultural and Racial Other*

Critical to the intersectional framing of sex selection in the Canadian context are the colonial narratives in which the practice is situated in the West. Postcolonial feminist scholarship has unpacked the continued force of imperial systems of knowledge, instanced in law, education, popular culture and otherwise, in representing the non-Western Other.[24] The debate, including legal campaigns against sex selection, needs to be situated in this discursive context. As postcolonial feminists have shown, sex selection appears in the parade of (bodily) horrors relating to non-Western women that Westerners, including Western feminists, have historically used to demonstrate the supposed inherent misogyny and gender backwardness of non-Western cultures.[25] It is not difficult to imagine what this list, which still resonates today, looks like. Just think of the media reports we hear about non-Western women — veiling, female genital mutilation, dowry deaths, honor killings, *sati*, foot binding, and arranged marriages all figure prominently on the list along with sex selection.[26] It is a steady and overwhelming discourse of tragedy and victimization.[27]

What is problematic about this assemblage is its reproduction of a colonial discourse of "othering" that, by definition, constitutes Western subjectivity in contrast to a homogenous and essentialized "Third World."[28] As postcolonial feminists have noted, integral to the process and success of British empire-building was the rationale of the "civilizing mission." "Saving brown women from brown men" captures a substantial part of this colo-

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24. *See* KAPUR, *supra* note 2, at 23-28.

25. For a general critique of mainstream Western feminism by women of color and third world women, see THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM (Chandra Talpade Mohanty, Ann Russo & Lourdes Torres, eds., 1991); FEMINIST POSTCOLONIAL THEORY: A READER (Reina Lewis & Sara Mills eds., 2003).

26. *See, e.g.,* Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, *in* FEMINIST POSTCOLONIAL THEORY: A READER 49 (Reina Lewis & Sara Mills eds., 2003); Aihwa Ong, *Colonialism and Modernity: Feminist Re-presentations of Women in Non-Western Societies,* 3/4 INSCRIPTIONS 79 (1988).

27. *See generally* KAPUR, *supra* note 2, at 95.

28. *See* Mohanty, *supra* note 26, at 67-68.

nial justificatory strategy.[29] Despite critical differences of language, culture, religion, class, age, etc., colonial discourses elevated particular, and sometimes isolated, non-Western practices into signifiers of the downtrodden status of non-Western women.[30] The way that the colonizing gaze imagined the "status" of non-Western women became a critical factor in the social Darwinism that justified imperial designs, whereby cultures were placed on a spectrum of "civilization" or "progress," with non-Western ones forever trailing their Western counterparts. Postcolonial and third wave feminists have revealed this to be a trend in feminist theorizing as well, where, as Uma Narayan calls it, "cultural essentialism," or gross generalizations of entire nations and peoples, are liberally harnessed to support commentary evaluating the lives of non-Western women.[31]

This discourse of Othering has the monolithically oppressed "Third World Woman" at its core. News items about third world women or the cultures of racialized women in the West make references to gender "traditions" in a manner that implies or even directs the reader to conclude that the "culture" of the non-Western woman is to blame for her suffering, injury, or death. Such "death by culture" explanations do not typically figure, in contrast, when practices or "traditions" affecting Western women are reported or investigated.[32] And when these reports invoke "cultural" traditions, depending on the country, it is often one or more of the practices in the parade above that appear.[33] The "oppressed" non-Western woman continues to be a formidable cultural icon for international and domestic relations. Most re-

29. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg eds., 1988).

30. *See* Mohanty, *supra* note 26, at 53-54.

31. Uma Narayan, *Essence of Culture and a Sense of History — A Feminist Critique of Cultural Essentialism*, 13 HYPATIA 86, 87-88 (1998); UMA NARAYAN, DISLOCATING CULTURES: IDENTITIES, TRADITIONS AND THIRD-WORLD FEMINISM 81 (1997) (discussing the problems with "cultural explanations" of violence against "Third World women" in general) [hereinafter DISLOCATING CULTURES]. *See generally* AUDRE LORDE, SISTER OUTSIDER (1984); Adrian Howe, *White Western Feminism Meets International Law: Challenges/Complicity, Erasures/Encounters*, 4 AUSTL. FEMINIST L.J. 63 (1995); Mohanty, *supra* note 26; Ong, *supra* note 26; Leti Volpp, *Feminism versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001).

32. *See, e.g.*, DISLOCATING CULTURES, *supra* note 31 (discussing, for example, the different explanations given for deaths resulting from domestic violence in the U.S. and dowry deaths in India; while the latter are quickly marked by the media as *cultural* phenomenon, the former is not).

33. *See* KAPUR, *supra* note 2, at 107-08.

cently, she was the body upon which the Bush Administration justified its invasion of Afghanistan.[34] She is the woman at the center of negative intuitive reactions to the possibility of *Sharia* law governing family law arbitrations in Ontario as well as the linchpin for the banning of overt religious symbols in French public schools.[35]

Within this discursive framework, talking about sex selection is tricky, as it can so easily slip into a discourse punctuated by cultural imperialism. Consider the discussion of the "international experience" of sex selection by the Canadian Fertility and Andrology Society ("CFAS") in its 1999 Joint Policy Statement on Ethical Issues in Assisted Reproduction:

> In many countries, traditional cultural values and norms judge a male to be of greater socio-economic worth than a female. China and India are two countries long recognized for obvious male bias and privilege and, consequently, widespread female abuse and infanticide. These values and actions have been reinforced, respectively, by China's one-child family planning programme, and India's continued custom of marriage dowries. In western industrialized nations, there appears to be no consistent public response to the morality of non-therapeutic preselection or selection methods. Most researchers and many physicians approve of these techniques because of their potential to meet various personal desires of couples or individuals. Other practitioners and feminists disapprove of these methods because of their potential to reinforce sexist preferences, or to objectify both a prospective child and the special relationship between a parent and child. A review of attitudinal surveys since the 1930s reveals a general, sustained and marked preference for male children over female children, for male firstborns, and for more males if there is an unequal number of children in a family. The prevalence of sexist attitudes correlates with the world-wide prevalence of patriarchal societies.

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34. *See generally* Elisabeth Bumiller, *White House Letter; The Politics of Plight and the Gender Gap*, N.Y. TIMES, Nov. 19, 2001, at B2; Mary O. Donohue, Opinion, *War on Terror Is as Much a War to Liberate Afghanistan Women*, POUGHKEEPSIE J., Dec. 5, 2001, at 8A; Melinda Henneberger, *A Nation Challenged: The Allies; European Critics of U.S. Find That the War Gives Them Little Ammunition*, N.Y. TIMES, Dec. 8, 2001, at B5; Nicholas D. Kristof, *The Veiled Resource*, N.Y. TIMES, Dec. 11, 2001, at A27; Jane Smiley, *The Way We Live Now: Women's Crusade*, N.Y. TIMES, Dec. 2, 2001, § 6 (Magazine), at 58; David Stout, *A Nation Challenged: The First Lady; Mrs. Bush Cites Women's Plight Under Taliban*, N.Y. TIMES, Nov. 18, 2001, at B4.

35. NATASHA BAKHT, NAT'L ASS'N OF WOMEN & THE LAW, ARBITRATION, RELIGION AND FAMILY LAW: PRIVATE JUSTICE ON THE BACKS OF WOMEN (2005); Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L. J. 49 (2005).

> The structure of patriarchy relies on the predominantly male-oriented distribution of power and, consequently, the distribution of liberties and opportunities.[36]

Although, at one level, the CFAS appears to adopt a nuanced approach to the phenomenon of sex selection and recognizes the global preference for males, its analysis does participate in forms of cultural Othering. First, it reproduces the colonial discursive dynamic of explaining the choices of non-Western societies (here, India and China) as "traditional" and "cultural" and homogenous while describing the choices of those in Western industrialized societies as "preferences." This dynamic reinforces the tradition/modernity dichotomy that structures colonial representations of the non-Western Other in which non-Westerners are viewed as pre-modern, influenced primarily by custom, and incapable of expressing the agency and consent that are the foundation of liberal societies.[37] As Sunera Thobani has identified, a double standard structures the discourse. The practice is innocuously termed "family completion" or "family balancing" when white mainstream Canadians engage in it. The practice loses its benign status and transforms into "sex selection" and gets explained as a "cultural" problem when the participants are marked as non-Western individuals because of their race and/or culture.[38]

Critical to this marking of Canadians with non-Westerner identities as passive repositories of harmful cultures and Canadians without such backgrounds (read: white) as rational actors, is the culturally essentialist erasure of internal contestation and movement within non-Western cultures.[39] The CFAS position is complicit in this erasure when it describes "the situation" in India and China, the two most populous nations on the planet, as uni-

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36. Joint Policy Statement, *supra* note 15, at 68-69.

37. *See* KAPUR, *supra* note 2, at 25-26.

38. Thobani, *supra* note 3, at 146-47. Even feminist accounts use this dichotomy to discuss the different meanings of sex selection in Western as opposed to non-Western contexts, invoking the discourse of cultural essentialism (that Narayan decries) with its simplistic level of analysis and generalizations about how non-Western people behave. *See, e.g.,* Zilberberg, *supra* note 16, at 150-52, for an analysis of sex selection in the US and India. Narayan, through a comparison of American explanations for domestic violence in India and the United States, shows how this selective "cultural" framing and its attendant negative associations attaches to the actions of racialized non-Western peoples, but is not used as an explanatory factor to indict "American" culture. *See generally* DISLOCATING CULTURES, *supra* note 31.

39. *See* DISLOCATING CULTURES, *supra* note 31, at 15-16 (discussing the discursive challenges that feminists in non-Western countries face from male elites when they apply a feminist critique to the non-Western cultures they inhabit).

form while taking care to highlight the diversity in opinion in Western societies (despite its own admission that there has been a steady preference for males at least since the 1930s).[40] It does this by referring to the "long recognized" and "obvious" male bias and privilege in these societies. This begs the question of who has "long recognized" these societies this way and whether we should deconstruct the frames by which the West has imagined the Other. It also raises the question of why male bias and privilege in Western societies is not also seen as "obvious."

The CFAS report, despite its slippage into the colonial binary explained above, appears to be an improvement from the collapse in analysis proffered by the Royal Commission on Reproductive Technologies ("the Commission") in its landmark report in 1993.[41] Thobani details how the Commission heard submissions from the Immigrant and Visible Minority Women (B.C.) that took care to present a nuanced analysis of sex selection in terms of opposing the practice and any cultural articulations given for it as a gross stereotype of "Indo-Canadian" culture. The group insisted its presence at the hearings was evidence of, to the contrary, the firm cultural traditions of resistance and opposition to "the devaluation of women for centuries."[42] In short, the Immigrant and Visible Minority Women (B.C.) invoked cultural forwardness on issues of gender to counter the racist representations seeking to blame sex selection as a product of a backward "Indo-Canadian" culture. As Thobani goes on to describe, the depth of the contestations around culture was lost to the Commission who instead reverted to the dichotomy of "ethnocultural" communities who had "cultural" preferences for sex and thus were in need of "culturally appropriate" services in contrast to "Canadian" couples who would use sex selection only for "family completion."[43]

My point is not to deny female exploitation in non-Western societies, but to trouble the ease by which we harness traditions and a monolithic sense of culture as the explanation when it comes to the postcolonial Other and focus on internal contestation and more complicated analyses when thinking about our

40. Joint Policy Statement, *supra* note 15.

41. ROYAL COMMISSION ON REPRODUCTIVE TECHNOLOGIES, PROCEED WITH CARE: FINAL REPORT OF THE ROYAL COMMISSION ON REPRODUCTIVE TECHNOLOGIES (1993).

42. Thobani, *supra* note 3, at 146.

43. *Id.*

own Western societies. Now that Canada has legislated in this area, feminists need to be especially wary of conceptualizing sex selection as a cultural practice of "ethnic" minorities in the West; rather, they should emphasize the preference for males at *every* stage and in many facets of life (work, family, play) as the global phenomenon that it is.[44] This is especially so given the colonial framing of this issue in the recent past. We should not mistake the skewed sex ratios in favor of males in countries like India, China and South Korea as evidence of cultural values that are more gender-hostile than our own. Instead, these sex ratios and their links to sex selection are more productively understood as a complicated phenomenon occasioned by gendered economic, educational, *and* cultural norms, the last of which manifest themselves just as pervasively in Western societies, albeit in different forms.[45] Colonial representations of the Other obscure the fact that males are preferred in Western nations as well.[46] The possibility that Canadians on the whole (and not just its "ethnic" Chinese and South Asian pockets), would prefer sons to daughters if given the choice,[47] is not explained by an unchanging, monolithic culture to which we are all mindless adherents. Of course, this is not to deny the cultural contours of such preferences. Rather, it is to underline the complicated construction of rationales for social practices, a complication that is assumed when we analyze our own society, but that is negated when we analyze the habits of racialized Others.[48] Any feminist position on sex selection must be sensitive to these nuances and avoid replicating a marginalizing discourse.

B. *Sex Selection and Selective Equality*

Another eclipsed dimension of the sex selection debate is its impact on people with disabilities. Recall that the line the Act

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44. *Id.* at 143.

45. *Id.*; Amartya Sen, *More Than 100 Million Women are Missing*, N.Y. REVIEW, Dec. 20, 1990, at 61.

46. *See* Joint Policy Statement, *supra* note 15, at 68-69.

47. *See* Plummer, *supra* note 8, at 551 ("Studies suggest that if women in America were allowed to select the sex of their children, they would choose 161 boys for every 100 girls."). There are other studies which suggest only marginal preference for boys. *See, e.g.*, Martin Thomas, *Preference for the Sex of One's Children and the Prospective Use of Sex Selection*, *in* TECHNOLOGIES OF SEX SELECTION AND PRENATAL DIAGNOSIS, VOLUME 14 OF THE RESEARCH STUDIES 71 (Royal Comm'n on New Reprod. Tech. ed., 1993) (reporting that a majority of Canadians would not use sex-selective technology).

48. *See* DISLOCATING CULTURES, *supra* note 31.

draws between non-implanted embryos on the one hand, and implanted ones on the other, appears to rest on dignity and equality reasons relating to women's personhood. This rationale for the distinction makes the Act's built-in exception, and second indicator of partiality, all the more striking. With respect to the pre-conception and pre-implantation context the Act does address, section 5 includes an explicit exception to the ban on sex selection where it is used to avoid, identify or treat an inheritable sex-linked disease or disorder. On its face, the provision might appear innocuous. What could be wrong with eliminating diseases and disorders? Quite a bit, if we take the arguments of certain disability rights theorists seriously who argue that the social construction of disability as an intensely negative experience exaggerates the biological realities of certain human disorders.[49] From this perspective, a provision such as subsection 5(1)(e) of the Act, which bans the use of technology to design children of a certain sex, but is entirely permissive of using that same technology to weed out embryos considered "abnormal" with respect to "normal" species functioning, seems hypocritical, not socially progressive. The provision appears to sustain one type of discrimination while trying to end another.

Due to this disconnect, feminist disability scholars extend feminist arguments against sex selection into the disability arena. Most feminists contend that rigid gender identities are undesirable social constructions that impoverish the autonomy of individuals, particularly women.[50] Arguably, the desire for a fetus of a certain sex – whether for patriarchal or "family balancing" preferences – stems from such a gendered understanding that the resulting child will "be" a certain way either naturally, for those who believe in biological determinism, or because of gender socialization. Both the theory of biological determinism and the practices by which individuals learn to perform their gender are

49. *See* discussion *infra* notes 51-56 and 66-71.

50. *See, e.g.*, Carol A. Stabile, *Shooting the Mother: Fetal Photography and the Politics of Disappearance*, 28 CAMERA OBSCURA J. FEMINISM & FILM THEORY 179 (1992) (arguing that cultural visual representations of the fetus help to render the bodies of women in which fetal tissue resides invisible). Some feminists are, of course, "cultural feminists" in that they do not wish to deconstruct differences, but rather to affirm what they see as female values and ways of being. *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). However, even if most feminists believed in the desirability of distinct (but equal) gender identities, it is not clear that they would favor "family balancing" sex selection because of the assumption that feminine values that females are socialized to express are preferable to masculine value that boys would learn.

concepts that feminists contest.[51] Opposing sex selection, then, is one measure to resist such rigid and essentialist notions of sex or gender differentiation.

Why it is wrong to test for sex according to this reasoning, but not for ability, is one of the main questions posed by the "disability critique" of designing children. Adrienne Asch, one of the leading scholars in this area, eloquently articulates the critique in her contributions to her co-edited collection with Erik Parens, *Prenatal Testing and Disability Rights*.[52] Her primary point is to underscore the essentialism we engage in when we decide whether or not to continue a pregnancy based on a single characteristic of a fetus. Despite any other trait or talent that future child might bring, it is the disability trait that assumes paramount status to define the meaning of that future individual's life.[53] This essentialism, Asch argues, becomes even more distressing when one considers the message it sends to society in general, and the disabled members of our community in particular. This latter "expressivist" argument maintains that by counseling and otherwise encouraging the testing and subsequent termination of prenatal life on the discovery of an "abnormal" fetus, and thus "letting the part stand in for the whole,"[54] that prenatal professionals send a discriminatory and demoralizing message to persons already living with disabilities that it would have been better for all concerned had they not been born.[55]

Thus, the argument posits, just as feminists are concerned with the complicity of sex selection in gendered ideologies that devalue females, disability critics worry that disability selection will reinforce categories of normalcy that construct a life with disabilities as inferior to the extent that it is not worth living.[56] Some wonder how the liberal and unthinking use of prenatal genetic testing or any other technology to purge disability from hu-

51. *See* Peter Osborne & Lynne Segal, *Gender as Performance: An Interview with Judith Butler*, 67 RADICAL PHIL. 32, 33 (1994).

52. Erik Parens & Adrienne Asch, *The Disability Rights Critique of Prenatal Genetic Testing: Reflections and Recommendations*, *in* PRENATAL TESTING AND DISABILITY RIGHTS 3 (Parens & Asch eds., 2000); *see also* Adrienne Asch, *Why I Haven't Changed My Mind About Prenatal Diagnosis: Reflections and Refinements*, *in* PRENATAL TESTING AND DISABILITY RIGHTS 234 (Parens & Asch eds., 2000).

53. Parens & Asch, *supra* note 52, at 14.

54. *Id.*

55. *Id.* at 13.

56. *Id.*; *see also* Marsha Saxton, *Why Members of the Disability Community Oppose Prenatal Diagnosis and Selective Abortion*, *in* PRENATAL TESTING AND DISABILITY RIGHTS 147, 147-157 (Parens & Asch eds., 2000).

manity differs from other historic and now discredited ideas about difference.[57]

A second significant argument against disability selection, which resonates with feminist arguments regarding sex selection, concerns parental attitudes toward children and child-raising. Adrienne Asch and Erik Parens call this argument, appropriately enough, the "parental attitude argument."[58] Asch, Parens, and others are concerned that individuals want to be parents for the wrong reasons if they are anxious about the presence or absence of any given trait in their child. This focus on a singular trait reflects an essentialist and thus problematic understanding of children that makes parental love and acceptance conditional and partial rather than responsive to the whole child and person.[59] Instead, parents-to-be should anticipate the challenges and talents that all children bring and love them for all their uniqueness. To obsess about a disability-carrying gene is to erroneously imagine biology as destiny and to make nurturance conditional on biology.[60] Although the disability critique recognizes that parents-to-be may legitimately desire and plan to increase their chances of children who fit into their family projections[61] – plans that may relate to having a certain ability – more often than not the good parent "will care about raising whatever child they receive and about the relationship they will develop, not about the traits the child bears."[62] The parental attitude argument raises the specter of the commodification of children.[63]

It is important to note that many of the prominent disability scholars writing in this area are pro-choice women.[64] This is a

57. *See generally* Parens & Asch, *supra* note 52, at 29. *See also* Amy Harmon, *The Problem with an Almost-Perfect Genetic World*, N.Y. TIMES, Nov. 20, 2005, § 4 at 41.

58. Parens & Asch, *supra* note 52, at 17.

59. *See id.*

60. *See id.*

61. *See id.* at 18-19 (discussing William Ruddick's defense of individuals who wish their children-to-be to have a certain talent or capacity because that particular talent or capacity, and not the state of being "normal" or "able-bodied," is of fundamental importance to the individuals' concepts of family and parenthood). *See also* William Ruddick, *Ways to Limit Prenatal Testing*, *in* PRENATAL TESTING AND DISABILITY RIGHTS 95, 95-105 (Parens & Asch eds., 2000) (discussing concerns with the parental attitude argument).

62. Parens & Asch, *supra* note 52, at 18.

63. *See id.; see also* MARGARET JANE RADIN, CONTESTED COMMODITIES (1996), for a general critique of concerns regarding the commodification of children.

64. *See, e.g.*, Parens & Asch, *supra* note 52, at 12.

point that those who analogize sex and disability selection themselves emphasize.[65] As feminists, they believe in reproductive choice for women and endorse the choices women make when they decide that they cannot continue with a pregnancy at a given time, not because of a trait or characteristic of a *particular* fetus, but because they do not want to have *any* fetus as part of them right now. Adrienne Asch calls this the "any/particular" distinction: aborting *any* and all fetuses is fine, but selectively aborting *particular* fetuses because they are female or marked by disability is ethically problematic because of the aforementioned two main arguments.[66]

As alluded to above, underlying both the expressivist and parental attitudes argument, and a main component of the critique in itself, is an emphasis on the social construction of disability. The "social construction of disability" refers to the practices and discourses by which the presence of disability is overwhelmingly represented as a negative and undesirable feature of life, and a difference that needs to be eliminated from the human mainstream.[67] As Rachel Ariss argues, in a society where the able-bodied white male body rests at the pinnacle and as the norm of human form, and the modernist belief in rational science to deliver freedom and happiness through "perfect health," "beauty" and "youthful vigor" to individuals, the disabled body is rendered abject, and a potent reminder to able-bodied persons of the "failure of heroic Western medicine" and everything they do not wish their bodies to become.[68] Disability scholars, drawing from and informing disability activism,[69] resist this rendering to argue that, with the proper supports, the biological reality of

65. *Id.*

66. *See* Asch, *supra* note 52, at 236-39.

67. *See id.* at 243-47. Some have split the social model into two separate models, with the focus on the materialist aspect of prejudice as grounding the new "social model," and the focus on the discursive construction of disability and multiplicity of meanings of abilities as animating the "discursive model." *See, e.g.*, Jackie Leach Scully, *Admitting All Variations? Postmodernism and Genetic Normality*, *in* ETHICS OF THE BODY: POSTCONVENTIONAL CHALLENGES 49, 58-59 (Margrit Shildrick & Roxanne Mykitiuk eds., 2005).

68. Rachel Ariss, *The Form and Substance of Ethics: Prenatal Diagnosis in the Baird Report*, 21 DALHOUSIE L.J. 370, 401-03 (1998).

69. Scully, *supra* note 67, at 53.

disability is not generally a cause for concern for the person with the disability or the family that raises and supports her or him.[70]

Writing against the medical model that imagines disability as an inferior state and deviation, disability scholars highlight recent studies that show the high proportion of families that include a person with a disability that do not report notable periods of dysfunction or elevated levels of stress or unhappiness.[71] They argue that the problems many families and persons with disabilities experience arise not from the disability itself, but from the poor social arrangements and underlying norms that privilege persons with full abilities and are thus unable to accommodate different capacities and levels of functioning.[72] Further, this standpoint (mis)informs the views of professionals – doctors, genetic counselors, religious advisors – who, in turn, provide (mis)information to individuals contemplating filtering out a particular human variation.[73]

Disability scholars do not deny the "biological realities of less energy, shortened life span, difficulty in breathing, need for mechanical devices and human assistance" or otherwise reduced functioning "that might accompany impairments like cystic fibrosis, muscular dystrophy, or sickle cell anemia."[74] Their point is simply that many able-bodied lives have systemic barriers and oppressive regimes to negotiate (e.g., racism, sexism, poverty) yet thoughtful people do not generally condone race selection, sex selection or the sterilization of poor people as acceptable options to address these challenges in the present day.[75] They query why

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70. *See* Philip M. Ferguson, Alan Gartner & Dorothy K. Lipsky, *The Experience of Disability in Families: A Synthesis of Research and Parent Narratives*, *in* PRENATAL TESTING AND DISABILITY RIGHTS 72, 73 (Parens & Asch eds., 2000).

71. *See id.* at 72-88.

72. *See* Ashe, *supra* note 52, at 234, 249; Scully, *supra* note 67, at 53.

73. Samuel R. Bagenstos, *Disability, Life, Death, and Choice,* 29 HARV. J.L. & GENDER 425, 435-36 (2006).

74. Asch, *supra* note 52, at 244.

75. This is not to deny, of course, the problematic dimensions along race and class lines of reproductive policies in the domestic context and with respect to "overpopulation" campaigns targeted for the global South. *See generally Abortion and Sterilization in the Third World*, *in* FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 63 (Marlene Gerber Fried ed. 1990) (providing statistics on the worldwide prevalence of female sterilization as a form of birth control and the coercion that often underlies the procedure); BETSY HARTMANN, REPRODUCTIVE RIGHTS AND WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL (1987) (discussing the classed, racialized, and gendered myths and practices promoted by Western-designed population "control" policies against non-Western countries).

terminating life seems more sensible when those challenges take a certain bodily form.[76] They stress that lives with disabilities are just as fulfilling and enriching as lives without disabilities given the proper supports. Parents and society should not assume otherwise.[77] As Marsha Saxton notes, "[w]hile the limitations of a disability can be difficult, it is the oppression that is most disabling about disability."[78] It is the stereotypes, norms, and assumptions about what constitutes normal or typical species functioning and the practices that cater to this type of functioning[79] that are oppressive and preclude contemplating, for example, whether reading a text through viewing printed letters is superior to touching raised letters or hearing a recitation of it from a tape or compact disc.[80]

This social constructivist argument, then, like the cultural Othering concern discussed above, is one that highlights a crisis in (mis)information. It suggests that those of us who are considering prenatal testing, but who have not experienced a disability on a routine basis, such that the bulk of our information about disability comes from its hegemonic social construction, should receive balanced information about what raising a child with disability really entails. Ideally, our choices to test in the *in vitro* or *in utero* context should be based on current actualities and future possibilities of a more disability-responsive society rather than outdated information inflected with anti-disability bias. With this enlargement of our minds,[81] it would be possible to regard disabilities as relatively neutral characteristics the way we do, for ex-

76. The corollary of this argument is the assisted suicide debate. Here, again, disability scholars note that suicide is largely only viewed as reasonable response to a life of hardships when those hardships are experienced by a person with a disability. A recent example of this problem in representing disability is the Oscar-winning film, MILLION DOLLAR BABY (Warner Brothers Pictures 2004). In it, the female boxing protagonist (played by Hilary Swank) suffers a complete paralyzing blow on her rise to boxing stardom. The film depicts her suffering in the hospital, including the loss of one of her legs to gangrene brought on by bed sores. In the end and at her request, her male coach (played by Clint Eastwood), with whom she has developed a close familial bond, unplugs her respirator and administers a lethal dose of adrenaline.

77. *See* Parens & Asch, *supra* note 52, at 26.

78. Saxton, *supra* note 56, at 153.

79. *See* Scully, *supra* note 67, at 53.

80. *See, e.g., id.* at 54.

81. *See generally* Jennifer Nedelsky, *Embodied Diversity and the Challenges to Law*, 42 MCGILL L.J. 91 (1997). The author, writing in the context of objectivity in legal judgments, uses this term to refer to the broadening of thought through an education of affect by way of listening and learning from the Other that must occur before we are truly able to render impartial judgments.

ample, the difference between five-feet-seven and five-feet-nine or persons with their tonsils intact versus those who have them excised.[82] Instead of lamenting the limits in options that, for example, conditions such as blindness and deafness bring, society and individuals would design ways that people with blindness could have aesthetic experiences and people with deafness could enjoy musical talent.[83] Attention would also be better spent "on the nearly infinite range of remaining opportunities."[84]

C. *Parallels (and Disconnects) between Sex Selection and Ability Selection*

Recalling the reasons many feminists oppose sex selection, it is simple to draw a close parallel between the arguments against disability selection and those against sex selection. Those against testing for both traits stress the negative social message the practice cultivates and conveys against those who possess the selected traits (females and persons with disabilities) and the inherent discriminatory basis for the selection whereby majoritarian norms shape preferences and distract parents-to-be from ideal parenting considerations. The difficulty with the parallel for feminists for whom the disability critique is a newer perspective will likely materialize at the point of distilling just how much our attitudes toward selecting for disability are discriminatory. Most feminists view sex selection as a choice that communicates sexism pure and simple; it is not in any way health-related or socially ameliorative as selecting for ability is categorized and legitimated.[85] To the extent that feminists query how much preferences for testing against diseases and disorders are shaped by misinformation and the social construction of disability and how much they develop from legitimate concerns about the responsibilities and limitations disability can bring to parenting and otherwise, the corresponding parallel is at risk of collapse.

The disability critique of prenatal testing and other forms of selection is relatively emergent. Certainly, there are counterarguments to pose to all of the above arguments about expressiv-

82. *See, e.g.*, Parens & Asch, *supra* note 52, at 23.

83. *See id.* at 24-25 (discussing Philip M. Ferguson's personal communication to them).

84. *Id.* at 26.

85. *See, e.g.*, Zilberberg, *supra* note 16, at 147-48 (drawing this moral distinction in discussing the practice of sex selection to avoid a sex-linked disease or disorder in the United States).

ity, parental attitudes, and the characterization of disabling traits as "neutral."[86] And, to stress a point made earlier, there is divergence among viewpoints within the disability communities resulting in a critique of prenatal testing,[87] but unlike the related issue of assisted suicide, no widespread calls for bans on prenatal testing targeting disabilities.[88] For feminists especially, the residual concern about women assuming the bulk of primary caregiving assumes heightened proportions in the context of care-giving for children whose periods of dependence can be intense, costly and life-long.[89] Further, it might be that the interest in connecting forms of genetic selection together eclipses important points of difference between the two practices and their cultural trajectories.[90]

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86. *See, e.g.*, Mary Ann Bailey, *Why I Had Amniocentesis*, *in* PRENATAL TESTING AND DISABILITY RIGHTS 64 (Parens & Asch eds., 2000) (defending the ethics of prenatal diagnosis based upon a woman's right to choose); James Lindemann Nelson, *The Meaning of the Act: Reflections on the Expressive Force of Reproductive Decision Making and Policies*, *in* PRENATAL TESTING AND DISABILITY RIGHTS 196 (Parens & Asch eds., 2000) (discussing the merits and ultimate weakness of the expressivist argument within a disability rights critique); Bonnie Steinbock, *Disability, Prenatal Testing, and Selective Abortion*, *in* PRENATAL TESTING AND DISABILITY RIGHTS 108 (Parens & Asch eds., 2000) (responding to Adrienne Asch's articulation of the disability rights critique to argue in favor of the ethics of parents choosing against a disability).

87. Assisted suicide and prenatal testing are related insofar as they have been the subject of a critique by disability rights scholars. *See* Bagenstos, *supra* note 71, at 443-51.

88. *See id.*

89. *See* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2-3, 13-20 (2000) (detailing how the economy relies on an ideal worker model for American workplaces, which assumes that the ideal worker has an unremunerated caregiver at home and how systemic norms still converge to encourage women to perform this devalued caregiving work for others). In Canadian families where an individual has a disability, it is primarily women who assume the caregiving responsibilities and the corresponding detriment to careers and paid market work that accompanies that role. *See Participation and Activity Limitation Survey, 2001,* CHILDREN WITH DISABILITIES AND THEIR FAMILIES, (Statistics Canada: Housing, Family and Social Statistics Division) July 2003, Catalogue No. 89-585-XIE, at 7 ("In 62% of cases where the child required help with personal care, it was the mother who provided most of the help . . . ").

90. For example, Jackie Leach Scully notes that although disability can share similar features with other locators/constructs of identity such as sex, race, sexuality, etc., for some elements of critique, it is also conceptually different. Primarily, "[u]nlike the others, it is possible to be outside the category of disability. It is possible not to be disabled in a way in which it is not possible not to be gendered, for example. . . [W]hat term is available to signify the same sort of thing for being disabled that 'gender' signifies in relation to being a woman? It is revealing that our language lacks a word . . . 'Ability' is not a satisfactory alternative, partly because it is uselessly broad, and also because it negates, rather than includes, disability." Scully, *supra* note 67, at 56-57.

But even if we accept the parallel drawn between sex selection and ability selection, a consensus need not exist on how to resolve the disability critique with current habits of pre- or post-implantation testing that are increasingly sought out by women in order to inform a feminist analysis of testing for disability. It is enough to affirm the tenor of the critique, if not all its arguments, by adverting to the perils of disability selection and the slippery slope toward designer babies when contemplating the merits of a sex selection prohibition that exempts testing for sex when sex is linked to a disease or disorder. The objective of many feminist disability scholars is to inspire parents-to-be to reflect and deliberate rather than automatically test for disabilities when they are planning a birth and to consider questions of trait selection in a larger discursive framework.[91]

Having articulated the gendered dimensions of the sex selection debate, as well as the lesser known racialized, cultural and disability ones, the next Part attempts to bring all these insights to bear in formulating a normative feminist position on subsection 5(1)(e) of the Act and its analogs in other industrialized contexts.

IV. SUBSECTION 5(1)(E) – A FEMINIST (PRO)VISION?

In this Part, I set out my argument as to why the provision in the Act is problematic from an intersectional feminist perspective. To recall, I have argued that regardless of whether feminists should oppose sex selection in general, the potential for marginalization along the grounds of culture and ability should subdue feminist support for the provision.

A. *Should the potential for cultural Othering deter feminists from supporting the Act's sex selection provision?*

As discussed above, one of the reasons subsection 5(1)(e) requires close feminist scrutiny is the problematic manner in which sex selection is cast as a "Third World" practice, and thus becomes a signifier of the "inherent misogyny" of "Third World cultures."[92] This "truth" then translates reductively into the backwardness of the non-West compared to the West, which is a staple in colonial discourses. Recognizing this intersectional aspect of the sex selection debate, however, should not immedi-

91. *See, e.g.*, Parens & Asch, *supra* note 52, at 28-29.
92. *See supra* text accompanying notes 25-36.

ately deter feminists from supporting subsection 5(1)(e) of the Act since the statute does not make any explicit reference to this colonial argument as its animus. In other words, supporting the Act's provision does not require feminists to advance explicitly a racist colonial discourse.

What this postcolonial insight should accomplish, however, is a caution in how we articulate our reasons for opposing sex selection. Specifically, we need to ensure that the source of support for the provision is not a distorted view of the communities who wish to avail themselves of pre-implantation sex selection in Canada and the agency of the women in these groups. Due to the probability that many Canadians will associate sex selection with non-Western countries, primarily, India and China, it is not fanciful to conclude that there is a perception among Canadians that it is South Asian and Chinese Canadians, and possibly other Asian cultural groups, who are seeking out this service.[93] The media reports on the users of sex selection typically discuss these communities.[94] In this culturally and racially fraught context, a prohibition on sex selection then sends a message to remind these cultural Others, in a discourse reminiscent of colonial dynamics, of Western liberal commitments to gender equality.

The issue raises the specter of colonial representations, and the likely possibility that the provision is aimed, whether erroneously or not, at marginalized cultural and racialized groups. As a result, feminists need to be careful how they defend or support a provision that curtails the choices of women and how they conceptualize the agency of the women they imagine would wish to engage in sex selection. In this regard, sex selection acutely engages the ongoing debate about women's agency within feminism and what conditions or restrictions in any given situation best respect it.[95] The influence of postmodernism in feminist theory

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93. I am reminded here of a conversation I had with one of my students who recently gave birth. By her own identification, she is a very light-skinned Asian-Canadian woman who most people assume is white. She told me that when she asked to know the sex of her fetus after the ultrasound, that her doctor readily provided that information. An Asian-Canadian friend of hers, who does not "pass" as white, was denied this same information by another doctor although she specifically asked to know the sex.

94. *See, e.g.,* Robin Harvey, *Boy or Girl? Clinics Are Cashing in on the Growing Number of Parents-to-Be Who Want to Choose the Sex of Their Offspring*, TORONTO STAR, Jan. 6, 1995, at D1.

95. *See* WILLIAMS, *supra* note 89, at 260-70 (discussing, through the examples of veiling and female genital cutting, how feminists can move forward with critiques targeting practices that many women still wish to engage in while respecting the

caused many feminists to criticize the trend in earlier waves of feminist theorizing to cast women primarily as victims with little or no scope for embodying social locations involving complex negotiations.[96] Instead, postmodernist feminism encourages us to conceptualize social reality as a text that invites us all to play with, and thus undo, our scripted gender and other identities.[97] As discussed above,[98] postcolonial feminist critiques of Western, feminist and otherwise, representations of "tradition-bound" Third World women share the postmodernist insistence on anti-essentialism and the need to recognize *all* women as agents capable of resistance.[99]

Uma Narayan, a prominent postcolonial feminist, has recently taken up the agency debate with respect to sex selection.[100] She questions, and eventually argues against, the feminist push to criminalize sex selection because of its flawed characterization of women's agency. (Presumably, she would not be in favor of subsection 5(1)(e) of the Act.) Narayan argues that feminist analyses of "women's issues," especially those associated with non-Western women, are still dominated by two problematic constructions of women. These are the Prisoner of Patriarchy and the Dupe of Patriarchy. The Prisoner of Patriarchy is that figure who is so oppressed by threats and violence that that she has no scope for action or decision-making; she would like to resist sexism but is prevented from doing so. The Dupe of Patriarchy is the female actor who does make decisions, but makes the wrong ones according to pre-set feminist stan-

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agency of those women); KAPUR, *supra* note 2, at 96-100 (discussing how Western feminist campaigns regarding violence in non-Western countries rely on a view of non-Western women as "victim subjects" rather than agents leading their own complicated lives).

96. *See, e.g.*, Annie Bunting, *Feminism, Foucault, and Law as Power/Knowledge*, 30 ALTA. L. REV. 829, 829-42 (1992).

97. *See id.* Some feminists have worried that the postmodern trend within feminism is politically futile because it abjures discussion of women as victims and views power as an unpredictable and dispersed phenomenon rather than something that men use against women. *See, e.g.*, Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687 (2000).

98. *See supra* text accompanying notes 25-35.

99. *See* KAPUR, *supra* note 2, at 128-34.

100. *See* Uma Narayan, *Coercing Women For Their Own Good?: Women's Choices, Criminal Sanctions and the State* (November 2003) [unpublished draft, on file with author] [hereinafter *Coercing Women For Their Own Good?*]. For an earlier version of this work, see Uma Narayan, *Minds of Their Own: Choices, Autonomy, Cultural Practices, and Other Women*, *in* A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 418 (Louise M. Antony & Charlotte E. Witt eds., 2d ed. 2002) [hereinafter *Minds of Their Own*].

dards, in that she believes she is exercising choice in, say, choosing to have a boy and not a girl, but is really "duped" by others and society into perpetuating the devaluation of women.[101]

Narayan wants feminists to suppress any quick recourse to these two archetypes and rethink their support for criminalization, and even education campaigns against, practices that many women may support such as sex selection. It is too simplistic to assume that women support sexist practices due to coercion or that their choices were not really freely made because they were made in the context of a few options. Narayan challenges us to think of choices in our own lives that would meet the standards for decisions made in the absence of constraints. The standard of "no constraints" cannot be the standard for recognizing women's autonomy because it distorts the reality that we all make complicated choices every day under certain sexist limitations, but nonetheless want these choices respected. More often than not, drawing from Deniz Kandiyoti, Narayan notes that we "bargain with patriarchy";[102] she views this metaphor as productively turning our minds to both agency and constraint simultaneously.[103] It may be that a woman chooses to implant an *in vitro* embryo that is male with a heavy heart, but does so because it will maintain smoother relations with her relatives, which translates into less anxiety for her in her present context.

Narayan is not claiming that feminism should be a subjective free-for-all and accept all choices that a woman makes or that no lines can be drawn as to what a just society should support or denounce.[104] Indeed, she is critical of the rhetoric of choice which claims that any practice is defensible as long as a woman chooses it.[105] She wants to unearth context and cultural pressures, but cautions us against a reductive conceptualization of non-Western women's agency[106] and the criminalization of contested practices.[107] Given that we, as feminists, are concerned with women's agency, Narayan wonders how removing yet another choice through criminalization can be said to empower wo-

101. *Coercing Women For Their Own Good?, supra* note 100, at 3, 12.

102. *Minds of Their Own, supra* note 100, at 421, (drawing from Deniz Kandiyoti, *Bargaining with Patriarchy*, 2 GENDER & SOC'Y 274 (1988)).

103. *Coercing Women For Their Own Good?, supra* note 100, at 3, 12.

104. *Minds of Their Own, supra* note 100, at 422-24.

105. *Id.* at 424.

106. *Id.* at 422-24.

107. *Id.* at 425-28; *see generally Coercing Women For Their Own Good?, supra* note 100, at 17-23.

men.[108] While it is possible to impugn Narayan's premise that more choice is always a good thing,[109] the delicate matter of conceptualizing agency as well as the troubling question of using criminal powers to target women's choices remain.

Returning to the parallel between sex and ability selection helps to elicit the strength of Narayan's point that it would be better to let women manage through their own pressures and values to make a decision about sex selection rather than criminalize the practice altogether. Imagine that subsection 5(1)(e) did not contain the exception for disability selection such that it was now impermissible for individuals using assistive reproductive procedures to screen for a disease or disorder. I suspect that the support for such a provision among feminists and the public at large would be far less than it is for the provision in its current state even though similar concerns about dignity and equality would animate the ban of both types of selection. While sexism is far from being a distant memory in Canada, the feminist and public consciousness about disability rights is much newer. Many individuals who cannot understand why anyone would today prefer to have a boy over a girl might have a more difficult time following the reasoning of disability rights critics who state that disability, like gender, is a social construction and not a relevant biological distinction that should structure reproductive prefer-

108. *Coercing Women For Their Own Good?, supra* note 100, at 18.

109. Farhat Moazam does precisely this in the context of sex selection in India. Moazam draws from research that shows that having too many choices does not necessarily contribute to an individual's well-being and can, in fact, impair it. Moazam would also appear to characterize Narayan's emphasis on agency as misplaced in the first place. In Moazam's view, a position such as Narayan's rests on the uncritical embrace of autonomy, seen to be a "cornerstorne" of Western liberal ways of reasoning in the realm of bioethics, wherein "[a]ny action . . . that may have any possible negative implications for . . . one's autonomy is viewed with considerable concern." Contrary to postcolonial critics, Moazam sees Western feminists, while against sex selection, as reluctant to agitate for its criminalization in non-Western societies for fear of being labeled cultural imperialists. She argues that as a cultural value, autonomy is variably suited for different cultural contexts and, is, in fact, rather ill-suited to theorize sex selection in developing countries where she views the prerequisites for autonomy – freely informed consent – to be lacking. In her view, many developing countries are gender-coercive societies for women where women face intense social pressures to adopt gendered roles and rear male children. Moazam's account of the (monolithic) "patriarchal culture of India" is replete with the essentialism and homogenization of experience that postcolonial feminists contest. *See* Moazam, *supra* note 8. Narayan would certainly reply to Moazam that she is relying on the fallible images of the Prisoner and Dupe of Patriarchy in her reductive analysis of Indian society. *See generally Coercing Women For Their Own Good?, supra* note 100; *Minds of Their Own, supra* note 100.

ences. It is far from "common sense" to the mainstream as it is to many disability theorists that the main disadvantages that people with disabilities experience is not from their physical "limitations," but from the social constructions generated as to what constitutes "normal" in society in terms of mode and level of functioning.[110]

Reflecting upon current mainstream ability preferences elucidates the complicated nature of agency around sex selection in yet another way. It recognizes that individuals who accept the parallel between the indefensibility of sex and ability selection on equality and dignity grounds, may nonetheless choose to select against disability when faced with that circumstance in their own lives. Some individuals may be unconvinced by the full thrust of the social constructivist account of disability, but nonetheless concede some of the argument. Some may even fully agree with the social construction critique of the medical model of disability. Such individuals might then see themselves as harboring problematic hegemonic views about disability that must be undone. The question for these individuals then becomes whether they want the state to undo these views for them to the extent that they are expected to raise a child that they did not want upon discovering a variation from normal species functioning. Despite desires to value all future children equally and not select embryos based on ability, these individuals might still screen for ability because they do not want to or cannot assume the extra care-giving and financial responsibilities or concerns that they forecast will be involved, and the pressures they anticipate these responsibilities will place on their existing relationships.

This, then, is a reasoning process that surveys the conditions of peoples' current lives to reflect on the type of pressures they are willing to assume while acknowledging that these choices, while fraught, permit choosing a less egalitarian route, e.g. disability selection. Taking the time to consider this context of disability selection might more readily illuminate the reality that many of us accept these pressures and feel their weight in a way many of us do not for gender preference. What Narayan wants us to do is to try to imagine female actors placed in an as fraught a choice matrix when they decide on sex selection as those of us who view the ability to select for sex as low on the priority list

110. *See generally* Anita Silvers, *A Fatal Attraction to Normalizing: Treating Disabilities as Deviations from "Species-Typical" Functioning, in* ENHANCING HUMAN TRAITS: ETHICAL AND SOCIAL IMPLICATIONS 95, 101-04 (Eric Parens ed. 1998).

when it comes to prenatal testing or pre-implantation may view ourselves when we think about disability selection. If we do not want our decisions about ability selection deemed criminal or immoral because they are complicated ones to make in a less than egalitarian social order, then we should extend this reasoning to sex selection as well.[111]

Narayan's discussion of agency in the context of sex selection shows that the potential exists for feminist support of subsection 5(1)(e) to promote colonial discourses. And although there is nothing explicit in the wording of the provision that triggers the cultural Othering concern, the backdrop to sex selection as an issue indicates a need for feminists committed to intersectionality to proceed cautiously with their support and monitor how the legal discourse the provision generates is framed.

B. *Should the disability exemption deter feminists from supporting the Act's sex selection provision?*

The theory of intersectionality, with its insistence on inclusion and attention to multiple points of difference and experiences of marginalization, poses considerable challenges to feminist praxis. It is difficult to organize an intervention, campaign or other form of advocacy that attends to *all* dimensions of difference that may be implicated in a given social issue equally or even proportionately. The question then looms as to when it is ethical to support reform measures that are partial or selective in the inequalities or injustices they address. Should we attend a December 6 memorial of the Montreal Massacre that talks about violence against women, for example, but says nothing about the continued colonization of First Nations women and their commu-

111. Narayan's critique of the criminalization of sex selection extends to educational programs that the state may launch as well. *See Coercing Women For Their Own Good*, *supra* note 100, at 28-29. If we concede that sex selection might be a well thought-out response by a woman who, although she views the practice as sexist, nevertheless anticipates that opting for a boy will lead to a better quality of life for her given her particular social location and circumstances, then the need to "educate women" about the practice seems unnecessary. This might be too much of a non-interventionist argument though. The reason the woman may have judged it better to select for sex is because of the social and cultural expectations surrounding her. To the extent the state can support educational efforts deconstructing gender to reduce or shift these expectations, state action can serve an ameliorative function while not approximating the repressive stature of a criminal prohibition. It is preferable to support educational campaigns against sex and ability selection as well as those that explain sex and disability as social constructions.

nities?[112] Should more women's groups have supported Beth Symes, a professional white woman, in her constitutional equality challenge to Canada's tax laws, when she, in focusing on professional women like herself rather than nannies or domestic workers, deliberately chose to foreground the gender dimensions of child care at the expense of the class and race ones?[113]

Subsection 5(1)(e) presents a similar dilemma. If we accept that one of the functions law performs is to send a social message about the values of a society, then it is reasonable to interpret subsection 5(1)(e) as communicating a message that sex selection is wrong for gender equality reasons, but that disability selection, euphemistically or legitimately understood as selecting for health, is acceptable. If we further accept the gist of disability critiques, then what we have is a law reform measure that targets sexism, but not able-ism. For feminists and others committed to the tenets of intersectionality, the question of "when is it legitimate to support non-inclusive but nonetheless ameliorative social justice measures" returns full force.

Elsewhere I have argued that feminist ethics need not demand a purist approach to activism.[114] Put differently, because of the difficulty in attending to all axes of difference, we need not insist that all law reform advance all affected marginalized individuals equally. It would be legitimate for a measure to advance one equality (say, gender equality) but not another (say, disability equality) as long as the measure did not actually or foreseeably subordinate one group of marginalized individuals while trying to help another. Addressing one type of injustice against women while not addressing another would be acceptable absent such subordination and provided that the measure or representation was particularized and not overly essentialist. Thus, to return to a previous example, under this model it would have been legitimate for Beth Symes to make the partial gender equality claim she did, and for feminists to have supported it, had she been candid about the type of women who would have benefited

112. For a general critique of the troubling ways in which the issue of "violence against women" does not direct our attention to larger structural violence issues such as racism and colonialism, see Mary Ellen Turpel, *Home/Land,* 10 CAN. J. FAM. L. 17, 32-34 (1991).

113. For an excellent intersectional analysis of this issue, see REBECCA JOHNSON, TAXING CHOICES: THE INTERSECTION OF CLASS, GENDER, PARENTHOOD, AND THE LAW 142-73 (2002).

114. *See generally* Maneesha Deckha, *Is Culture Taboo? Feminism, Intersectionality, and Culture Talk in the Law*, 16 CAN. J. WOMEN & LAW 14, 39-53 (2004).

from the measure (the particularization element) instead of casting her case as one of women vis-à-vis men. This is because her claim that child care expenses should constitute a "business expense" for the purpose of tax deduction for gender equality reasons did not include a claim that made women who could not afford child care, but cared for their own children and perhaps those of others, "worse off" than they already were.[115]

Applying this "anti-subordination" test to subsection 5(1)(e), it would be difficult for feminists to support the partial sex selection ban while abiding by an intersectional ethic. It is possible to argue that the provision tolerates the status quo for testing for diseases or disorders and thus does not make individuals with disabilities "worse off" since this testing already occurs. But the state has explicitly sent a message that selecting children on the basis of ability is different from sex selection and thus, arguably, absent acknowledgement and response to the social constructivist account of disability, sends the additional message that disability selection is not worthy of legal sanction. In this symbolic sense, it has made the situation of people with disabilities "worse off." And although it does not *advocate* disability selection, it has sent an explicit message through the built-in exception, that disability selection is acceptable. By supporting such a provision, feminists should be concerned that they are supporting a provision that actively marginalizes the concerns of the disability community by including the exception.

The provision in this regard very much reminds me of the structure of Persons Day Breakfasts celebrated by the Women's Legal Education and Action Fund (LEAF) throughout the country. The October date that a few LEAF chapters typically pick is meant to coincide with the historic *Persons* case in Canada, where the Privy Council decided that "women" are persons under the law.[116] Of course, the decision at that time only ap-

115. *Id.* at 52.

116. Edwards v. Canada, [1930] A.C. 124. I asked the Director of West Coast LEAF whether its organizers had ever considered having the breakfast on the date when all women received the vote in Canada. She informed me that there is at least one LEAF chapter she knew of which did mark Persons Day on International Women's Day rather than associate it so closely with the *Persons* case. Telephone interview with Alison Brewin, Director of West Coast LEAF (Oct. 2005). According to LEAF's website, there are fourteen chapters who have Persons Day Breakfasts, with most of them occurring in October/November. The Women's Legal Education & Action Fund, News/Events, http://www.leaf.ca/events-pdb.html#schedule (last visited October 25, 2006).

plied legally to those who were propertied[117] and, effectively, could vote in 1929[118] – by most accounts, an elite group of women. It is difficult to celebrate this decision as a "victory for women" when one is aware of the explicit exclusionary and racist laws that permeated the legal and cultural context. Sitting at these breakfasts, I often wonder whether I can justify my attendance given the exclusiveness of this victory, landmark though it may be. While the holding of Equality Breakfasts in April to coincide with the more inclusive symbol of the equality guarantee of the *Canadian Charter of Rights and Freedoms*[119] dilutes

117. Constitution Act, 1867, 30 & 31 Vict., Ch. 3 (U.K.), § 23(3)-(4).

118. In 1900, under the Dominion Elections Act, S.C., ch. 12 (1900) (Can.), the only people who could vote in federal elections were people who had the legal right to vote in a provincial election. Minorities, including women, who were excluded from voting in provincial elections, were therefore automatically excluded from voting in federal elections. In 1902, Cunningham and Attorney Gen. for B.C. v. Tomey Homma and Attorney Gen. for Can. [1903] A.C. 151 (P.C. 1903) (appeal taken from B.C.) unsuccessfully challenged the lack of suffrage for Chinese, Japanese, and Indian citizens in British Columbia. This was affirmed in 1907 when the right to vote in provincial elections was denied to Hindus under S.B.C., ch. 16 (1907). In 1908, the Municipal Elections Act, S.B.C., ch. 14 § 13(1) (1908) (Can.), stated that no Chinese, Japanese, or other "Asiatic" or Indian person was entitled to vote in any municipal election in British Columbia. Saskatchewan followed suit in 1909 and denied the right to vote in provincial elections to Chinese people under R.S.S., ch.3 § 11 (1909) (Can.). It was not until 1916 that women obtained the right to vote in provincial elections in Manitoba, Saskatchewan and Alberta. In 1917, an act to amend the Provincial Election Act of 1917, S.B.C., ch. 23 (1917) (Can.), granted women the right to vote in provincial elections in British Columbia, and the Ontario Franchise Act, S.O., ch. 5 (1917), granted women the right to vote in provincial elections in Ontario. The War-Time Elections Act, S.C., ch. 39 (1917) (Can.), amended the Elections Act but kept a clause denying people the right to vote in a federal election if they were not allowed to vote in their own provincial elections. Again, minorities who were excluded from voting in provincial elections were therefore automatically excluded from voting in federal elections. Nova Scotia granted women the right to vote in 1918 through an amendment to the Nova Scotia Franchise Act, S.N.S., ch. 2 (1918). Also in 1918, an Act to Confer Electoral Franchise Upon Women, S.C., ch. 20 (1918) (Can.), granted women the right to vote in federal elections. It was not until 1919 that New Brunswick extend the electoral franchise to women through an amendment to the New Brunswick Electors Act, S.N.B., ch. 63 (1919). Finally, in 1920, the federal government made the franchise universal for many, but did not include racialized peoples and Aboriginal persons. Prince Edward Island gave women the right to vote in 1922 through an amendment to the Election Act, R.S.P.E.I., ch. 48 (1951) (Can.) (effective 1922). Yet in 1938, the Dominion Elections Act, S.C., ch. 46 § 14(2)(i) (1938) (Can.), still retained race as a grounds for exclusion from the federal franchise.

119. *See* Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.); Donna Dasko, Senior Vice President, Environics Research Group Limited, Speech at the LEAF National Equality Day Dinner (Apr. 19, 2006) (transcript available at http://www.leaf.ca/events-equality.html, date accessed: July 25, 2006).

this dilemma for me to some extent, it is still difficult not to perceive the Persons Day breakfasts as an affirmation of racism and colonialism. On one level, I recognize the need for organizations such as LEAF to support that case and the reading of it that casts it as a step toward justice for women. Yet, I cannot help but be tempered in my enthusiasm and qualified in my support because of the highly particularized group of women that did benefit from the case. Where we have current legislative measures that prohibit a certain action in the name of women's equality, but then proceed to include an exception that tolerates that same action against another vulnerable group, it is difficult to celebrate the provision or present it as an ideal feminist vision. This is so even where we can recognize the benevolent intentions of prospective parents who may access testing to avoid having their future children struggle with poor social resources for and attitudes toward disability.[120] For this reason, any embrace of subsection 5(1)(e) as a feminist provision should be fragile.

C. *Other reasons why subsection 5(1)(e) is troubling*

Even if there were no potential for cultural Othering and no explicit exception for sex-linked disorders and diseases, several other reasons exist to cast the partial sex selection ban as undesirable. The first reason takes us back to abortion and the *in utero* context. By preventing women from trying to conceive a child of a certain sex or finding out information before they conceive, the Act forecloses all options but abortion if the resulting fetus is not of the desired sex. As much as we may contest the desire for a child of a certain sex, especially a preference for boys, the legislative ban will not automatically reduce the existence of these desires or preferences. A woman who cannot, for example, identify the sex of an *in vitro* embryo, but nonetheless proceeds with implantation to discover later a female embryo when she wanted a male one, is now faced with two choices: carrying the embryo to term or aborting it. As much as it is neces-

120. *See* Michael M. Burgess & Bryn Williams-Jones, Law in Tension with Evolving Ethical Perception: Prenatal Genetic Testing for Sex and Disability, 12 (Cardiff Inst. of Soc'y, Health & Ethics, Cardiff Sch. of Soc. Sci., Cardiff Univ., Working Paper No. 71, 2006), *available at* http://www.cardiff.ac.uk/socsi/cishe/pages/Publications/wrkgpaper-71%5B1%5D.pdf. The authors argue that, unlike sex selection in Western societies, disability selection should not be seen as discriminatory because we can interpret the choice to use prenatal testing as reflecting the desire of prospective parents to give their children the best lives possible.

sary to write against the backlash discourse against abortion,[121] where even feminists represent the right to abortion as a "necessary evil,"[122] it is important to acknowledge the unpleasantness, discomfort and pain the procedure holds for many women. To effectively force women who wish their resulting children to be of a particular sex only to undergo an abortion when prenatal testing or sperm sorting could have engendered the result she desired is more than an unfortunate result of the provision.

The second reason to disfavor subsection 5(1)(e) arises from the danger that normally attends to procedures when they are not regulated, but criminalized. And this is a concern that stands apart from the general drawbacks of using criminal laws to navigate "controversial reproductive practices" since such laws are "blunt, inflexible, and require a good deal of time and political energy to change."[123] There is a good chance that the business of sex selection, to the extent it exists or develops, will enter the dangerous underground market below the radar of state surveillance. This is an important reason that feminists have underscored in arguing for the decriminalization of abortion.[124] Of course, the argument is a speculative one in the context of sex selection in Canada, but what it forecasts is not a remote possibility. Moreover, when goods or services are criminalized, the individuals seeking them have little recourse against botched procedures or defective goods because of their complicity in illegality. In the assisted reproductive context where human, and mostly women's, bodies are at stake, the prospect of an underground market is worrying.

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121. *See* Elizabeth Reilly, *The "Jurisprudence of Doubt": How the Premises of the Supreme Court's Abortion Jurisprudence Undermine Procreative Liberty*, 14 J.L. & POL. 757, 761 (1998); *see generally* Joan C. Williams & Shauna L. Shames, *Mothers' Dreams: Abortion and the High Price of Motherhood*, 6 U. PA. J. CONST. L. 818 (2003) (arguing that the right to abortion, while a right, is not typically framed as other rights are – as something to be celebrated; arguing that while feminists should not accept the terms of the debate as set by pro-life argumentation, that highlighting how a pro-choice position actually promotes the pro-life purported value about good mothering is a useful argument in the feminist repertoire defending abortion).

122. *See, e.g.*, Naomi Wolf, *Our Bodies, Our Souls: Rethinking Pro-Choice Rhetoric*, NEW REPUBLIC, Oct. 16, 1995, at 8.

123. Timothy Caulfield, *Clones, Controversy, and Criminal Law: A Comment on the Proposal for Legislation Governing Assisted Human Reproduction*, 39 ALTA. L. REV. 335, 337 (2001).

124. *See, e.g.*, K. Shanthi, *Feminist Bioethics and Reproductive Rights of Women in India: Myth and Reality*, *in* LINKING VISIONS: FEMINIST BIOETHICS, HUMAN RIGHTS, AND THE DEVELOPING WORLD 119, 124-25 (Rosemarie Tong et al. eds., 2004).

V. THE AMERICAN SITUATION

It is worth briefly noting whether the concerns elucidated above inhere in the United States. When compared with the specificity of Canadian legislation surrounding genetic testing, the United States appears much more permissive. In fact, the U.S. currently has no laws – on either a federal or state level – that directly regulate the use of pre-implantation genetic diagnosis ("PGD"), including that conducted to determine sex.[125] Although both federal and state governments have the potential to legislate in this area, each level of government has yet to commit one way or another to the issue of sex selection and genetic testing.[126] Although three different federal agencies (the Center for Medicare and Medicaid Services; the Center for Disease Control and Prevention; and the Food and Drug Administration) regulate areas tangentially related to PGD, none of these agencies has yet made explicit reference to sex selection or the technologies related to PGD.[127] In this regard, the U.S. is similar to most countries since only a handful of countries have regulated in this

125. Kathy L. Hudson, *Preimplantation Genetic Diagnosis: Public Policy and Public Attitudes*, 85 FERTILITY & STERILITY 1638, 1638 (2006).

126. On a state level, each state has the power and ability to enact legislation for the direct regulation of the medical practice, yet not one of the fifty states has enacted any legislation explicitly addressing PGD, although some states do have laws related to assisted reproductive technology. At this stage, New York appears as one of the only states that has gone so far as to enact laws surrounding the simple oversight of laboratories that engage in genetic testing (which by extension includes laboratories that perform PGD). *Id.* at 1639. Contained within New York Public Health Law, these regulations require that clinical laboratories engaging in genetic testing obtain state-issued permits to operate legally. To qualify for such a permit, clinical laboratories must be competently staffed and properly equipped. Under the statute, the New York Department of Health has the power to conduct periodic inspections of clinical laboratories to ensure compliance with the regulations contained within the statute. The department also can demand the submission of regular reports and tests from laboratories and can terminate permits if laboratories fail to comply with such demands. The New York statute also requires that directors of such clinical laboratories receive state-certification. This requires that potential directors have both: (a) a minimum set of qualifications in areas of testing, including genetic testing, and (b) the "character, competence, training and ability to administer properly the technical and scientific operation" of the type of clinical laboratory in question. Under the statute, owners and/or operators of laboratories who fail to comply with the statute's requirements will have to pay fines of up to two thousand dollars per day of infractions, serve a year or less of jail time, or comply with a combination of fines and imprisonment. As this overview of the New York law in this area shows, even a state that has undertaken the oversight of laboratories engaging in genetic testing has not explicitly mentioned PGD or made reference to sex selection or its regulation. N.Y. PUB. HEALTH LAW §§ 570-581 (2002).

127. Hudson, *supra* note 125, at 1638-39.

area; however, several countries have, like Canada, explicitly prohibited the use of PGD for non-medical sex selection.[128] This has created a new "medical tourism" phenomenon, with couples from countries with PGD bans traveling to the States for the procedure.[129] As Kathy Hudson notes, the reasons given for the lack of regulation in the U.S. range from the fact that explosive abortion debates overly polarize the well-reasoned discussion of genetic testing, to the confusing regulatory status of PGD, which involves two different technologies – genetic testing and assisted reproduction – each of which has its own complex web of regula-

128. Several governments have banned sex selection using PGD either explicitly through legislation or explicitly through the ratification of trans-national treaties. For example, the government in Victoria has enacted prohibitions very similar to those contained in Canada's Assisted Human Reproduction Act in its Infertility Treatment Act. *See* Infertility Treatment Act, 1995, § 50 (Vict. Consol. Leg.), *available at* http://www.austlii.edu.au/au/legis/vic/consol_act/ita1995264/s50.html. The section reads: "If a person is carrying out artificial insemination or a treatment procedure, that person must not (a) use a gamete or embryo; or (b) perform the procedure in a particular manner – with the purpose of . . . producing or attempting to produce a child of a particular sex." However, as in Canada, this restriction does not apply if the purpose of the sex selection is to "avoid the risk of transmission of a genetic abnormality or a disease to the child." *Id.* § 50(2). Similarly, the UK's Human Fertilisation and Embryology Authority has banned PGD when used for sex selection without a medical purpose. *See* Marcy Darnovsky, *Sex Selection Moves to Consumer Culture – Ads for "Family Balancing" in the New York Times*, 33 GENETIC CROSSROADS (Ctr. for Genetics & Soc'y, Oakland, Cal.), Aug. 20, 2003, *available at* http://genetics-and-society.org/newsletter/archive/33.html#II. Twenty other European nations agreed to enact similar prohibitions by ratifying the Council of Europe's *Convention on Human Rights and Biomedicine*. This trans-national treaty contains an Article explicitly prohibiting the use of any techniques in medically assisted procreation to choose the sex of a future child, unless the purpose of such use is the avoidance of a serious sex-linked disease. *See* Eur. Consult. Ass., *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, art. 14, (E.T.S. No 164, Apr. 4, 1997), *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/164.htm. To date Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Georgia, Greece, Hungary, Iceland, Lithuania, Moldova, Norway, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, and Turkey have ratified the Treaty. A few countries and regions have prohibited the use of PGD entirely, including Germany, Austria, Switzerland, and the State of Western Australia. The majority of countries with legislation regarding PGD have, like Canada, allowed its use for disease testing, but prohibited it for sex selection. This is the case in France, India, The Netherlands, South Australia, Victoria (Australia), and the UK. *See* Bartha M. Knoppers & Rosario M. Isasi, *Regulatory Approaches to Reproductive Testing*, 19 HUM. REPROD. 2695, 2695-2697 (2004).

129. Joanne Laucius, *Canadians Go South to Choose Baby's Sex: US Fertility Practice is Illegal Here*, NAT'L POST (Can.), July 4, 2006, *available at* http://72.14.253.104/search?q=cache:fHKN-7z_WiUJ:www.usask.ca/research/files/download.php/National%2BPost-RogerPierson.pdf%3Fid%3D245%26view%3D1+medical+tourism+PGD&hl=en&gl=ca&ct=clnk&cd=4.

tions.[130] Given the geographic proximity of the U.S. and Canada, it is not surprising that Canadians seeking to avoid the Canadian restrictions are traveling to American clinics for sex diagnosis.[131]

Of course, a more permissive regime does not eliminate the concerns highlighted in this Article from an intersectional reading of sex selection. Problematic knowledges about gender, race, culture, and disability can still circulate in such technological regimes and likely do. One of the aims of exploring the Canadian law so closely is to identify the issues that countries who have not yet legislated in this area should consider if committed to an expansive vision of equality and dignity.

VI. CONCLUSION

Feminist analyses of reproductive issues have often focused on the gendered nature of reproductive rights rather than the influence of other social constructs related to race, class, ability, etc. In this newer wave of bioethics and assisted reproduction, it is important not to replicate the singular or overwhelming emphasis on gender as we think about how to craft an ethical response to these newer procedures and technologies. Preimplantation sex selection is one such procedure that it would be misguided to categorize as a simple issue of sexism. It is better to view it as a practice that is implicated in gender, culture, race, and ability hierarchies. From this intersectional departure point, several concerns about subsection 5(1)(e) of the Act emerge, most notably its distinction between sex and ability selection and possible reliance on cultural stereotypes in regard to women's agency. In addition, the criminalization of a complicated area of decision-making for women may give rise to further complications that outweigh the provision's ameliorative effects. Although an underlying purpose of gender equality animating the provision is laudable, the disability exception troubles the provision's claim to equality enhancement and justice while the criminal sanctions subject women's choices to a stigma they do not deserve. This is not an argument that the state should not act with respect to sex selection. Indeed, it should educate its citi-

130. Hudson, *supra* note 125, at 1638.

131. *See* Laucius, *supra* note 129.

zenry through a sophisticated analysis that attends to the intersectional aspects of the issue, including the gendering, racializing and normalizing practices that affect sex selection.