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Annual Review of Law and Ethics

Band 15 (2007)

Herausgegeben von

B. Sharon Byrd
Joachim Hruschka
Jan C. Joerden



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Vorwort

Der vorliegende Band des *Jahrbuchs für Recht und Ethik / Annual Review of Law and Ethics* ist dem Themenschwerpunkt Medizinethik und -recht gewidmet. Er versucht einen Überblick zu geben über die gegenwärtige Diskussion medizinethischer und medizinrechtlicher Fragen. Dafür konnte erfreulicherweise eine Reihe namhafter Autorinnen und Autoren gewonnen werden. Die Beiträge befassen sich sowohl mit schon seit längerer Zeit diskutierten, aber keineswegs abgeschlossenen Problemstellungen als auch mit durch die medizintechnische Entwicklung ganz neu entstandenen Fragen.

Frau Dr. *Daniela Lieschke*, LL.M. (Wellington), Frankfurt (Oder) gebührt Dank für die Erstellung der Register zum vorliegenden Band. Für ihre vielfältige Unterstützung bei der technischen Herstellung der Druckvorlagen danken die Herausgeber den Mitarbeiterinnen des Lehrstuhls für Strafrecht und Rechtsphilosophie an der Europa-Universität Viadrina Frankfurt (Oder) *Camilla Klich*, *Manuela Klose*, *Susen Pönitzsch* und *Judith Weisgerber*. Herrn *Lars Hartmann* (Berlin) ist für die Betreuung der Drucklegung im Verlag zu danken.

Der kommende Band 16 (2008) des *Jahrbuchs für Recht und Ethik* wird das Schwerpunktthema „Kants *Metaphysik der Sitten* im Kontext der Naturrechtslehre des 18. Jahrhunderts“ haben. Hingewiesen sei weiterhin auf die Internet-Seiten des *Jahrbuchs für Recht und Ethik*:

<http://www.uni-erlangen.de/JRE>,

wo weitere Informationen, insbesondere die englische und deutsche Zusammenfassung der Artikel und Bestellinformationen, erhältlich sind.

Die Herausgeber

Preface

This volume of the *Jahrbuch für Recht und Ethik/Annual Review of Law and Ethics* is devoted to the topic of medical law and ethics. A number of authors provide an overview of current discussions on medical issues from legal and ethical perspectives. The papers consider both issues that have been discussed for some time and are still quite current today. They also discuss new problems raised through modern medical development in technologies.

The editors would like to extend special thanks to Dr. *Daniela Lieschke*, LL.M. (Wellington), Frankfurt (Oder) for preparing the index for this volume of the *Jahrbuch*. We would also like to thank the assistants at the Chair for Criminal Law and Legal Philosophy at the Europa University Viadrina, Frankfurt (Oder), *Camilla Klich*, *Manuela Klose*, *Susen Pönitzsch* and *Judith Weisgerber*, for their support and technical preparation of the manuscript for publication. We also owe our gratitude to Mr. *Lars Hartmann* (Berlin) at Duncker & Humblot for his assistance with the publication work.

Volume 16 (2008) of the *Jahrbuch für Recht und Ethik/Annual Review of Law and Ethics* will be primarily devoted to “Kant’s *Metaphysics of Morals* in the Context of Natural Law Theory of the Eighteenth Century”. We would also like to direct readers’ attention to our website:

<http://www.uni-erlangen.de/JRE>,

where further information can be obtained on this and other volumes of the *JRE*, particularly English and German abstracts of the articles and information for ordering the *JRE*.

The Editors

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**Lebensanfang, Gentechnik –
Beginning of Life, Genetic Technology**

Sex Selection, Social Policy and Ethics: Another look

Eike-Henner W. Kluge

I. Introduction

“Sex selection” refers to the attempt to choose or control the sex of a child prior to its birth. (Presidents’ Council on Bioethics, 2003) It is not a new phenomenon, nor is it confined to any particular society. If anthropological and historical reports are correct, it is a cultural universal of great antiquity. (Gledhill, 1988)

Traditional methods of sex selection involve the management of diet, the timing and manner of intercourse, and even magic. (Gledhill, 1988; Royal Commission on New Reproductive Technologies, 1993) Traditional methods of sex selection continue to enjoy varying degrees of popularity. By contrast, modern methods of sex selection are more scientific and involve such techniques as assisted insemination with sperm treated to concentrate sex-specific sperm; or *in vitro* fertilization, pre-implantation diagnosis of the resulting zygote and disposal if it does not have the desired sex; etc. (Royal Commission, 1993) Traditional techniques of sex-selection have no proven effectiveness; by contrast, modern scientific methods do provide a statistically significant chance of success. (Royal Commission, 1993)

II. The Issues

Over the past few years sex selection in general, and scientific sex selection in particular, has come under concerted ethical scrutiny. Some jurisdictions have even banned it outright. (*Assisted Human Reproduction Act*, 2004; *Convention for the Protection of Human Rights*, 1997; *Law No. 35/1988 on Assisted Reproduction Procedures*; *Human Fertilisation and Embryology Act*, 1990) The core of the issue can be stated very simply: *Is it ethically defensible to attempt to select the sex of a child?* Argumentation then centres in the reasons for attempting the sex selection and on the various ways in which this might be effected and concludes that sex selection in general should be prohibited.

However, approaching the issue in this way discloses only part of the problematic. Sex selection is more than a purely ethical issue: It also engages questions of public policy – and more enters into considerations of public policy than theoretical ethics. From a policy perspective, the ability to enforce relevant standards, the

impact that such enforcement might have on the social fabric, and the material costs that might be associated with their implementation are also relevant. (*Cooper v. Hobart*, 2001; *Congenital Disabilities (Civil Liability) Act 1976* (U.K.); *Dobson v. Dobson*, 1999; Kent, 2005; Law Commission, 1979) Therefore to rely on traditional ethical analysis is to ignore a series of important questions that really must be addressed if the debate is to have more than merely theoretical significance. These other questions include the following: *Should sex selection be allowed, encouraged or forbidden as a matter of public policy? If it should be allowed, should the practice be subject to legal conditions? If it should be encouraged, under what circumstances should it be encouraged and with what conditions? If it should be forbidden, under what circumstances should it be forbidden and how should such a prohibition be enforced?*

Furthermore, scientific techniques of sex selection differ from traditional methods not only in that they are vastly more effective, they also differ in that they involve the active participation of health care professionals. By involving health care professionals, what traditionally was a private matter confined to the sphere of personal decision-making has become an issue that engages professional ethics. This adds a further strand to the problematic that is inadequately addressed by the current debate: *Should health care professionals participate in sex selection?*

Finally, the involvement of health care professionals itself adds another element that deserves consideration from the perspective of public policy. It centres not in the ethics of the health care professions but in the fact that the health care professions provide *health care*. In countries where healthcare is a socially guaranteed service, the delivery of this service is usually grounded in considerations of equality and justice. Specifically, it is assumed that access to health care should be on an equitable basis for all qualified members of society. Does this mean that if sex selection services are provided by health care professionals to some members of society, equality and justice require that they should be available to all?

III. Sex selection as unethical

As has already been noted, most ethically oriented discussions of sex selection have come out squarely against it. Argumentation here ranges from purely theoretically grounded analyses to arguments with a pragmatic orientation. The former type of argument usually begins with the principle of equality and justice and then claims that sex selection violates this principle by ranking the moral worth of individuals solely on the basis of their sex. It also tends to emphasize the potential that permitting sex selection has for reinforcing or increasing sex-based discrimination, and the dangers of gender-role stratification. (Glover, 1989; Ethics Committee of the ASRM, 2001) Pragmatically oriented arguments generally begin with the claim that the survival of the species requires a healthy balance between the sexes. They then go on to say that sex selection would threaten this balance and consequently

would imperil the evolutionary fitness of the human race. (President's Council, 2003)

Pragmatically based arguments

However, pragmatic arguments are only as good as the facts to which they appeal and on which they are based. It is therefore important to note that the notion of a "healthy balance" does not, as might appear at first glance, mean that the proportion of male to female must be 50–50. Not all animals that reproduce sexually require an equal number of males and females for a "healthy balance between the sexes" to achieve evolutionary fitness. It varies from species to species. (Hardy, 2002) This makes it appropriate to ask whether – and indeed why – an equal number of males and females should be necessary in the case of *homo sapiens*. There are insufficient scientific data to answer this question – which makes assessment of this type of reasoning very difficult.

Moreover, pragmatically based arguments that focus on species survival make certain assumptions about the ethics of species survival, and integrally involve the concept of species *telos*. Specifically, they assume that it is ethically obligatory to try and assure species survival, and that interference with natural processes of species reproduction violates species *telos*. Both of these are important subjects in their own right and have received detailed and extensive discussion in the context of evolution and of animal research. (Holland, 1995; Kelch, 1998; Ortiz, 2004; Rollin, 1981, 1998; Verhoog, 1992) This paper will not examine these issues nor address the question of how they might be relevant for humanity as a species. However, it should be noted that the concept of species *telos* is not universally accepted (Kontopoulos, 1995) and that the ethics of species survival has been addressed only in the context of partisan environmental debates.

IV. Sex selection on medical grounds

As to theoretically based arguments against sex selection, it may be appropriate to begin the discussion with an analysis of medically based sex selection in order to avoid any possible confusion as to what this paper will ultimately recommend – and why.

Medically grounded arguments in favour of sex selection usually find their ethical root in the principle of non-maleficence – which is to say, in the principle that there lies a general duty to prevent harm. (Beauchamp and Childress, 2001; Garrett, Baillie and Garrett, 2002; Murray, 1987) They begin with the fact that some seriously debilitating health conditions are, or tend to be, sex-specific. Haemophilia, Lesch-Nyhan syndrome, Grave's Disease, Hunter syndrome and Alport's syndrome all constitute illustrative examples. (Levitan, 1988; Strachan and Read, 2004) They then argue that persons who are born with these conditions either die very young under agonizing circumstances or live a life of suffering. Available