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SEX SELECTION IN THE UNITED STATES AND INDIA: A CONTEXTUALIST FEMINIST APPROACH

*Sital Kalantry**

ABSTRACT

Seven states in the United States have passed sex selection abortion bans, bills are pending in several other states, and a bill has been reintroduced in the U.S. Congress. In analyzing state legislative hearings, this article documents how the wide-spread practice of sex selection in other countries, particularly India and China, is being used by anti-abortion groups as a way to restrict women's right to autonomy in the United States. The dominant feminist paradigm in the United States takes a universal position on sex selection bans – these bans contravene women's right to autonomy and should not be permitted in any country. But engaging with the true realities of the situation in India, it is clear that sex selection in favor of boys does raise concerns for women's equality. This article develops a feminist framework to understand sex selection from a global perspective. This approach prioritizes individual women's autonomy, but suggests that the context in which sex selection occurs should be taken into account and the impact of sex selection on women as a group must be considered.

Statutes in the United States that ban sex selection abortion are framed as protecting the fetus from sex discrimination. The contextualist feminist approach, on the other hand, focuses the conversation on the equality of women and girls who are already born. The intent of the individual woman

who sex selects is no longer the focus, but the impact (if any) that it has on the equality of girls and women as a group should be the relevant criterion for determining whether or not sex selection should be limited.

INTRODUCTION 62

I. CONTEXTUALIZING SEX SELECTION IN INDIA 65

II. USING (MIS)INFORMATION ABOUT INDIA TO PUSH FOR SEX SELECTION BANS IN THE UNITED STATES 68

III. INFORMATION (AND MISINFORMATION) ABOUT INDIA IS IMPACTING POLICY CHANGE IN THE UNITED STATES 71

IV. OVERVIEW OF FEMINIST VIEWPOINTS ON SEX SELECTION 75

V. A CONTEXTUALIZED FEMINIST APPROACH TO SEX SELECTION..... 78

 a. Context-Specific..... 78

 b. A Woman’s Right to Autonomy 79

 c. The Equality of Women as a Class 80

 1. Does sex selection reflect inequality in society? 80

 2. Does sex selection perpetuate inequality? 83

CONCLUSION 84

INTRODUCTION

Several studies have shown that the ratio of girls to boys has drastically decreased in some countries in the last few decades. China and India are usually cited as countries where the starkest disparities exist. The normal at-birth ratio for boys to girls is 1000 boys to 952 girls.¹ Yet the overall ratio

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¹ See Natalie Wolchover, *Why Are More Boys Born than Girls?*, LIVESCIENCE (Sept. 9, 2011, 5:13 PM), <http://www.livescience.com/33491-male-female-sex-ratio.html>. This number is usually expressed as 105 boys to 100 girls. However, I modified this ratio so that it correlates with the way the Indian government expresses the at-birth ratio.

across India is 1000 boys to 943 girls, according to the 2011 census.² Many assume that this greater sex ratio gap in India (as well as other countries) is due to sex selection.

Sex selection is often associated with a certain level of economic development in many countries, including India. As economic growth and massive urbanization have occurred in the last few decades in India, families have tended to have fewer children.³ The Indian government also launched campaigns to encourage families to have fewer children to control the skyrocketing population.⁴ At the same time, ultrasound machines, which are used to identify the sex of the fetus, became widely available in India.⁵ With economic growth leading to a larger middle class, more people have obtained access to this technology.⁶ A strong “son preference”⁷ has led to a widespread practice of sex selection abortion.

Anti-abortion legislators and groups in the United States have pointed to the widespread practice of sex selection in India and have begun to import (often inaccurate) information about India to lobby for, and in many cases successfully enact, state-wide sex selection bans in the United States. Seven states have passed sex selection bans;⁸ bills are pending to ban sex selection

² *Sex Ratio of India*, CENSUS ORG. INDIA, <http://www.census2011.co.in/sexratio.php> (last visited Oct. 4, 2013).

³ MARA HVIStENDAHl, UNNATURAL SELECTION 39–40 (2011). Fertility rates are lower in urban locations because people desire to have fewer children than in rural areas where farming is a source of sustenance (farming requires a lot of labor).

⁴ Mallika Kaur Sarkaria, Comment, *Lessons from Punjab’s “Missing Girls”: Toward a Global Feminist Perspective on “Choice” in Abortion*, 97 CALIF. L. REV. 905, 913 (2009).

⁵ See Ashley Bumgarner, Note, *A Right to Choose?: Sex Selection in the International Context*, 14 DUKE J. GENDER L. & POL’Y 1289, 1292 (2007).

⁶ Some have pointed out that the sex ratios are more skewed in middle-class families and urban areas in India. See CHRISTOPHE Z. GUILMOTO, CHARACTERISTICS OF SEX-RATIO IMBALANCE IN INDIA, AND FUTURE SCENARIOS 4–8 (2007), available at <http://www.unfpa.org/gender/docs/studies/india.pdf>.

⁷ INT’L INST. FOR POPULATION SCIENCES, NATIONAL FAMILY HEALTH SURVEY (NFHS-3) 103-05 (2007), available at <http://www.measuredhs.com/pubs/pdf/FRIND3/FRIND3-Vol1AndVol2.pdf>. In 2005–06, 25.5 percent of married Indian women age 15 to 49 and 23.5 percent of married Indian men age 15 to 49 expressed a preference to have more sons than daughters. *Id.* at 104-05 tbls.4.17.1 & 4.17.2.

⁸ Illinois (720 ILL. COMP. STAT. ANN. 510/6 (West 2013)), Pennsylvania (18 PA. CONS. STAT. ANN. § 3204 (West 2013)), Oklahoma (OKLA. STAT. ANN. tit. 63, § 1-731.2 (West 2013)), Arizona (ARIZ. REV. STAT. ANN. § 13-3603.02 (2013)), Kansas (S.B. 141 and H.B. 2253, 2013–2014 Leg., Reg. Sess. (enacted)), North Carolina (Act of July 26, 2013, ch. 90,

abortion in ten states,⁹ and a federal bill has been reintroduced in Congress.

Sex selection can be achieved by means other than an abortion, including sperm sorting (which sorts sperm carrying the X and Y chromosomes before artificial insemination is used to implant the sperm of the desired sex)¹⁰ and pre-implantation genetic diagnosis (PGD) (whereby embryos are fertilized in vitro, tested for sex, and then implanted into the uterus).¹¹ Nevertheless, the statutes that have been enacted and the bills that have been proposed in the United States do not limit pre-implantation sex selection but only sex selection if it involves aborting a fetus.

An analysis of the recent legislative hearings in Arizona and in Congress reveals extensive references to sex selection in India and other countries to support enacting laws in the United States. On the other hand, Illinois (in 1984) and Pennsylvania (in 1989) adopted sex selection bans before this recent legislative push by anti-abortion groups. In analyzing the legislative hearings from those states, I found that supporters of bans in those two states did not use global sex ratio trends or depictions of sex selection abortion in other countries in lobbying to enact those laws.

The issue of sex selection is dividing people who consider themselves pro-choice in the United States because equality for women appears on both sides of the argument. On the one hand, one could argue that sex selection should not be permitted because some people may be aborting female fetuses because of a culture of “son preference” that values boys more than girls. On the other hand, prohibiting sex selection constrains women’s autonomy over their bodies. The issue of sex selection places women who typically value autonomy rights in a dilemma, causing many people to support sex selection bans in the United States or to be agnostic about the issue.

Pro-choice groups have typically taken universal positions on sex

2013 N.C. Laws 366 (Westlaw 2013)), and North Dakota (N.D. CENT. CODE ANN. § 14-02.1-04.1 (West 2013)).

⁹ Colorado (H.B. 1131, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); S.B. 56, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013)), Florida (H.B. 845, 115th Reg. Sess. (Fla. 2013); S.B. 1072, 115th Reg. Sess. (Fla. 2013)), Indiana (H.B. 1430, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013)), Missouri (H.B. 386, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013)), New Jersey (Assemb. B. 2157, 215th Leg., 1st Ann. Sess. (N.J. 2012)), New York (S.B. 2286, 236th Legis. Sess. (N.Y. 2013)), North Carolina (H.B. 716, 2013 Gen. Assemb. (N.C. 2013)), Texas (H.B. 309, 83d Leg. (Tex. 2013)), Wisconsin (Assemb. B. 217, 101st Leg., Reg. Sess. (Wis. 2013)), and Virginia (H.B. 1316, 2013 Reg. Sess. (Va. 2013)).

¹⁰ Bumgarner, *supra* note 5, at 1293.

¹¹ *Id.* at 1294.

selection bans, arguing that bans on sex selection should not be put into place in the United States, India, or elsewhere.¹² In line with liberal feminist thought, this position gives primary weight to the right to autonomy of the woman without any limitations. Feminists who take this universal position (i.e., that sex selection abortion should not be banned in any country) may not have engaged with the true reality of the situation in other countries. As a result, they are not able to effectively counter the inaccurate framing and importation of information on sex selection abortion from India.

By engaging with the reality and complexities of the situation in India, women's rights organizations in the United States will be better able to paint a more accurate narrative of sex selection in India. This understanding will also help distinguish the situation in the United States from India more appropriately. I therefore propose a contextualist feminist approach that prioritizes women's equality but recognizes that if the practice of sex selection is widespread, it likely reflects and perpetuates inequality of women and girls in society.

Part I of this article provides an overview of the development and use of sex selection in India. Part II describes the use of sex selection as part of a legislative strategy to restrict abortion rights by anti-abortion groups in the United States. Part III describes how information about what is happening globally is in fact influencing policy-making in the United States. Part IV provides an overview of some of the main feminist approaches to sex selection. Part V develops a framework that uses the lens of women's equality to understand sex selection.

I. CONTEXTUALIZING SEX SELECTION IN INDIA

To begin with, it is important to point out that India is a diverse country with multiple viewpoints. "Son preference" is often used to explain the occurrence of sex selection and the imbalanced sex ratio in many parts of India.¹³ This ratio is more imbalanced in some states in India than others.

¹² See, e.g., CTR. FOR REPROD. RIGHTS, STATEMENT OF POLICIES AND PRINCIPLES ON DISCRIMINATION AGAINST WOMEN AND SEX-SELECTIVE ABORTION BANS (2009), available at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Statement%20on%20Sex%20Selective%20Abortion%20Bans%20FIN_1.pdf.

¹³ ROHINI PANDE & ANJU MALHOTRA, SON PREFERENCE AND DAUGHTER NEGLECT IN INDIA: WHAT HAPPENS TO LIVING GIRLS I (2006), available at <http://www.icrw.org/files/publications/Son-Preference-and-Daughter-Neglect-in-India.pdf> ("Son preference in India is a well-documented phenomenon, and its implications for skewed

For example, in the state of Kerala, the sex ratio is 1084 women per 1000 men.¹⁴ In the state of Haryana, on the other hand, the sex ratio is 879 women per 1000 men.¹⁵ In places where “son preference” is more engrained, the perception of daughters as economic burdens may be the cause. For poor parents, having to provide a dowry when a daughter marries is often economically challenging. Providing a dowry persists as a practice despite its outlaw in 1961.¹⁶

Women face inequality in many spheres of life in parts of India. In many places, women do not have economic opportunities or are not permitted to work outside of the home. Although inheritance laws have been reformed, a daughter is often expected to give up her rights to her parents’ property in favor of her brothers.¹⁷ Although in urban areas there are more opportunities for educated women to obtain jobs, and dowries can be less burdensome for middle-class parents, it still appears that sex selection abortion is widespread in these areas.¹⁸ This could be for a host of reasons, including the fact that in many homes, a woman gains her status only after she has a son. Parents and grandparents desire to continue the family name, and in Hinduism, only sons can perform certain rites of passage for their parents when they die.¹⁹

The right to an abortion was never at the center of women’s equality movements in India as it is in the United States. In 1971, the central government enacted the Medical Termination of Pregnancy Act (MTPA), a law permitting abortion, as a way to control exponential population growth.²⁰ In the mid-1970s, government hospitals in India offered

sex ratios, female feticide, and higher child mortality rates for girls have drawn research and policy attention.”).

¹⁴ *Sex Ratio of India*, *supra* note 2.

¹⁵ *Id.*

¹⁶ Sarkaria, *supra* note 4, at 910–11.

¹⁷ See, e.g., Ashok Sircar, *Emerging Voices: Ashok Sircar on Women’s Right to Inherit Land in India*, LANDESA (June 12, 2013), <http://www.landes.org/emerging-voices-ashok-sircar-womens-right-inherit-land-india-blog/>.

¹⁸ Sarkaria, *supra* note 4, at 914.

¹⁹ Sujatha Jesudason accurately describes and categorizes the root causes of sex selection abortion as social, political and economic. See SUJATHA JESUDASON, ATTITUDES TOWARDS AND PREVALENCE OF SON PREFERENCE AND SEX SELECTION IN SOUTH ASIAN AMERICAN COMMUNITIES IN THE UNITED STATES 5, available at [http://www.generations-ahead.org/files-for-download/articles/GenerationsAhead_SonPreferenceAndSexSelection_\(1\).pdf](http://www.generations-ahead.org/files-for-download/articles/GenerationsAhead_SonPreferenceAndSexSelection_(1).pdf).

²⁰ See The Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971

amniocentesis tests, which involve the withdrawal of a small amount of amniotic fluid²¹ as a way to determine the sex of the fetus.²² They also offered sex selection abortions.²³ In the past, American foundations also actively supported population control efforts in India, including sex selection abortions.²⁴ Even in the 1980s, voices in Indian society advocated for sex selection abortion as a means to control the rising population.²⁵

By the mid-1980s, many clinics in the capital city of Delhi offered prenatal ultrasound exams.²⁶ With increasing access to ultrasound machines produced by companies such as General Electric to detect the gender of the fetus, and the growing middle class, more abortions occurred, and the ratio was further skewed.²⁷ In response, feminists and other organizations pushed for adopting a ban on sex determination tests.²⁸

The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act (PNDT) was adopted in India in 1994.²⁹ This Act prohibits the use of prenatal tests (such as ultrasounds and amniocentesis) for sex determination. Medical personnel and women who violate the PNDT are subject to criminal penalties and fines.³⁰ However, there is a rebuttable presumption in the law that a “pregnant woman has been compelled by her husband or relative to undergo pre-natal diagnostic technique.”³¹ This Act does not explicitly ban abortions of female fetuses, but, by limiting information about the sex of the fetus, its objective is to prevent sex selection abortions.

In response to public interest litigation arguing that the government was

(India).

²¹ Bumgarner, *supra* note 5, at 1292.

²² HVISTENDAHL, *supra* note 3, at 80.

²³ *Id.* at 81.

²⁴ *Id.* at 82-89.

²⁵ Nivedita Menon, *Abortion and the Law: Questions for Feminism*, 6 CAN. J. WOMEN & L. 103, 109 (1993).

²⁶ HVISTENDAHL, *supra* note 3, at 49.

²⁷ See GUILMOTO, *supra* note 6.

²⁸ Menon, *supra* note 25, at 108.

²⁹ The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, No. 57 of 1994, INDIA CODE (1994); Sarkaria, *supra* note 4, at 917-18.

³⁰ The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, No. 57 of 1994, ch. VII, INDIA CODE (1994).

³¹ *Id.* art. 24.

not doing enough to curb it, the Indian Supreme Court in 2003 declared sex selection abortion “immoral” and “unethical” and ordered the government to implement the Act.³² The Indian Parliament subsequently amended the Act, changing its title to “Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection)” (Amended PNDT) and increasing penalties and other regulations targeted at clinics.³³ Despite the Amended PNDT, the practice of sex selection abortion continues, as shown by the at-birth sex ratios. Laws against sex selection are not enforced and corruption is not uncommon in India.³⁴ There have not been many convictions against medical professionals for violations of the Act.³⁵

II. USING (MIS)INFORMATION ABOUT INDIA TO PUSH FOR SEX SELECTION BANS IN THE UNITED STATES

Anti-abortion groups in the United States have pushed for federal and state bans on sex selection abortions. In her book *Unnatural Selection*, Mara Hvistendahl describes the evolution of a strategy by the pro-life movement to use bans on sex selection abortion to chip away at the right to an abortion in the United States. Steven Mosher, head of Population Research Institute, a leading anti-abortion group, wrote in 2008:

I propose that we—the pro-life movement—adopt as our next goal the banning of sex-selective abortion. . . . By formally protecting all female fetuses from abortion on ground of their sex, we would plant in the law the proposition that the developing child is a being whose claims on us should not depend on their sex.³⁶

In furtherance of this strategy, the pro-life movement has been increasingly using information, often framed in a distorted way, about the practice and reasons for sex selection abortion in foreign countries. The

³² Centre for Enquiry Into Health and Allied Themes (CEHAT) v. Union of India, (2003) 8 S.C.C. 398 (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=19363>.

³³ The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, No. 57 of 1994, INDIA CODE (1994).

³⁴ Sarkaria, *supra* note 4, at 922–23.

³⁵ D. Y. Chandrachud, *Foreword* to SHALINI PHANSALKER JOSHI, COMPILATION AND ANALYSIS OF CASE-LAWS ON PRE-CONCEPTION AND PRE-NATAL DIAGNOSTICS TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994, at iv (2011) (“There are few convictions under the Act.”).

³⁶ HVISTENDAHL, *supra* note 3, at 240.

legislative toolkit developed by Americans United for Life to help promote state-wide legislative bans on sex selection abortion starts with a discussion of the global sex ratios³⁷ and secondarily mentions that sex selection is occurring among immigrant communities in the United States.³⁸ Additionally, a new movie, *It's a Girl: The Three Deadliest Words*,³⁹ associated with anti-abortion views, is an example of how misinformation from the situation in India is being used to garner support for sex selection bans in the United States.

The tactics employed by the movie and its makers are even more pernicious because the marketing around the movie and language in the movie is dressed in the clothes of women's equality movements (which view abortion as a right to autonomy issue), but the underlying theme of the movie subtly conveys a broad anti-abortion message.⁴⁰ The makers of the film also intentionally failed to reveal their funding sources and associations with anti-abortion groups.⁴¹

While it is important to present information about the practice of aborting female fetuses in other countries, anti-abortion groups do not present an accurate picture of the situation. The only scenario on abortion presented in the movie, for example, is where a woman is coerced through violence to have an ultrasound and/or an abortion. This is a situation where people who believe in autonomy rights of women and people who believe in the right of the fetus agree—a woman should not be forced to have an abortion because her fetus is female. To this end, the movie extensively covers Mitu Khurana, a woman who left her husband because he physically abused her after she refused to abort her female fetuses.⁴²

³⁷ AMERICANS UNITED FOR LIFE, BAN ON ABORTIONS FOR SEX SELECTION AND GENETIC ABNORMALITIES 1 (2012), available at <http://www.aul.org/wp-content/uploads/2012/01/Sex-Selective-and-Genetic-Abnormality-Ban-2012-LG.pdf>, (“In 2011, author Mara Hvistendahl reported in her book, *Unnatural Selection*, that 163 million girls are missing in the world because of sex-selection abortions.”).

³⁸ *Id.* (“While the practice of sex-selection abortions is common in some Asian countries, such as China and India, it is also being practiced in the United States, often by people who trace their ancestry to countries that commonly practice sex-selection abortions.”).

³⁹ IT'S A GIRL (Shadowline Films 2011), available at <http://www.itsagirlmovie.com/>.

⁴⁰ Sital Kalantry, *It's a Trick*, SLATE (May 6, 2013, 5:55 AM), http://www.slate.com/articles/double_x/doublex/2013/05/it_s_a_girl_a_pro_life_movie_embraced_by_pro_choice_groups.html.

⁴¹ *Id.*

⁴² IT'S A GIRL, *supra* note 39.

The film, however, fails to depict the most common cases in India—women who make the choice to abort a female fetus without physical violence or overt coercion. Poor women in villages have told me that they do not want to bring girls into the world and do not want them to go through what they have faced.⁴³

Another common situation that the film fails to depict is the situation in which a woman faces violence from her husband and in-laws if she does not abort the fetus and give birth to a girl. Mitu Khurana's family is depicted as middle-class, and she escaped from her husband with the financial support of her parents. Countless poor women do not have that luxury. Indeed, they are in a double bind—they face violence at home if they do not have an abortion and face the threat of jail if they do.

People who give primary importance to the rights of the unborn child can only advocate one type of solution to the problem. They view abortion as the problem that needs stopping. Charities that take the perspective of the unborn child spend resources on preventing such abortions even if it means pursuing criminal sanctions against women. On the other hand, solutions that prioritize women's equality would focus on curing larger issues of inequality systemically and individually. One such campaign is being undertaken by ActionIndia, a non-governmental organization that sends people to specific villages with bands and sweets to celebrate the arrival of a baby girl, which is often what families do only when a son is born.⁴⁴

As Maneesha Deckha has pointed out about sex selection in Canada (which has adopted only a ban on pre-implantation methods of sex selection), discussions involve an "othering" of minority communities in Canada and depictions of South Asian communities as misogynist and savage.⁴⁵ Similarly, Indians are depicted in the film *It's a Girl* as savages (the film opens with a woman smiling as she describes how she killed several of her female babies) and Americans as saviors (the film closes with an American woman claiming it is our responsibility to help women who

⁴³ During the course of teaching the Cross-National Human Rights Clinic at Jindal Global Law School during the Spring 2011 in India, I worked with several women in villages in Haryana, and this information is from those village visits.

⁴⁴ *Save the Girl Child Campaign*, ACTION-INDIA.ORG, http://www.action-india.org/child_rights.html (last visited Sept. 27, 2013).

⁴⁵ Maneesha Deckha, *(Not) Reproducing the Cultural, Racial and Embodied Other: A Feminist Response to Canada's Partial Ban on Sex Selection*, 16 UCLA WOMEN'S L.J. 1, 10-11 (2007).

cannot help themselves). It should be noted that even though sex ratios have become imbalanced in Eastern European countries such as Azerbaijan, legislative hearings in the United States never point to these countries.⁴⁶

If anti-abortion groups that present information about India were truly concerned with women's equality, then they would also focus on pre-implantation methods of sex selection that are increasingly used in India, such as sperm-sorting and pre-implantation genetic diagnosis.⁴⁷ Anti-abortion groups do not draw attention to this problem in India and are not making any efforts on adopting bans on pre-implantation sex selection in the United States.

Additionally, unlike the Indian law, none of the sex selection statutes in the United States prevents women from learning about the sex of the fetus. Thus, it is virtually impossible to even monitor the implementation of the sex selection bans in the United States because there is no way for an abortion provider to determine the true reason for why a woman is having the abortion. Banning sex determination tests would never be politically viable in the United States where many parents relish learning the sex of the fetus so they can plan for post-birth, including the choice of colors for their babies' rooms.

III. INFORMATION (AND MISINFORMATION) ABOUT INDIA IS IMPACTING POLICY CHANGE IN THE UNITED STATES

The sex ratio disparities in other countries are being used in the United States to successfully push for legislation in Congress and several states. One example is a bill that was introduced in Congress in 2008 called the "Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act." It was defeated in 2012 but reintroduced in 2013.⁴⁸ Adding to the two states that passed sex selection bans in the 1980s,⁴⁹ in the recent wave of legislation, five states have passed sex selection bans,⁵⁰ and bills are pending

⁴⁶ HVIStENDAHL, *supra* note 3, at 13.

⁴⁷ See Bumgarner, *supra* note 5, at 1293-94.

⁴⁸ In addition to prohibiting sex selection abortions, it prohibits race selective abortions. This article does not address the later prohibition.

⁴⁹ Illinois (720 ILL. COMP. STAT. ANN. 510/6 (West 2013)) and Pennsylvania (18 PA. CONS. STAT. ANN. § 3204 (West 2013)) passed laws in the mid-1980s.

⁵⁰ Oklahoma (OKLA. STAT. ANN. tit. 63, § 1-731.2 (West 2013)), Arizona (ARIZ. REV. STAT. ANN. § 13-3603.02 (2013)), North Dakota (N.D. CENT. CODE ANN. § 14-02.1-04.1 (West 2013)), Kansas (S.B. 141 and H.B. 2253, 2013-2014 Leg., Reg. Sess. (enacted)), and

in ten states.⁵¹ An analysis of deliberations in Congress and several of these states demonstrates how concerns about India and the global sex ratio are being used to influence legislative change in the United States.

A recent spate of legislative bills that have been passed and proposed prominently feature discussions of the global sex ratios and lengthy discussions of practices occurring in other countries. For example, a report by the Judiciary Committee of the House of Representatives, undertaken in connection with the federal legislative ban on sex selection abortion, extensively discusses practices occurring in India. It states that “the selective abortion of females is female infanticide, the intentional killing of unborn females, due to the preference for male offspring or ‘son preference.’”⁵² Although the report does not mention India at this point, it is obvious that it is describing practices in India when the report explains why “son preference” exists: girls are a financial burden and do not carry the family name.⁵³

The report then explains the problem of sex selection abortion with reference to the global sex ratio, rather than the country-specific sex ratio.⁵⁴ The report states that “[e]xperts worldwide document that a significant sex-ratio imbalance in which males numerically predominate can be a cause of increased violence and militancy within a society.”⁵⁵ By describing a global sex ratio imbalance, the report fails to disaggregate and address whether there is actually a sex ratio imbalance in the United States.

The report does, however, turn to sex selection abortion in the United States. It states that “the evidence strongly suggests that some Americans

North Carolina (Act of July 26, 2013, ch. 90, 2013 N.C. Laws 366 (Westlaw 2013)).

⁵¹ Colorado (H.B. 1131, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); S.B. 56, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013)), Florida (H.B. 845, 115th Reg. Sess. (Fla. 2013); S.B. 1072, 115th Reg. Sess. (Fla. 2013)), Indiana (H.B. 1430, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013)), Missouri (H.B. 386, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013)), New Jersey (Assemb. B. 2157, 215th Leg., 1st Ann. Sess. (N.J. 2012)), New York (S.B. 2286, 236th Legis. Sess. (N.Y. 2013)), North Carolina (H.B. 716, 2013 Gen. Assemb. (N.C. 2013)), Texas (H.B. 309, 83d Leg. (Tex. 2013)), Wisconsin (Assemb. B. 217, 101st Leg., Reg. Sess. (Wis. 2013)), and Virginia (H.B. 1316, 2013 Reg. Sess. (Va. 2013)).

⁵² *Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011: Hearing on H.R. 3541 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 7 (2011).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 11.

are exercising sex selection abortion practices within the United States consistent with discriminatory practices common to their country of origin, or the country to which they trace their ancestry. While sex selection abortions are common outside of the United States, the evidence reveals that female feticide is also occurring in the United States.”⁵⁶

Additionally, in committee meetings considering the Arizona bill in February 2011, there were abundant references to the global sex ratio concerns.⁵⁷ For example, Representative Steve Montenegro pointed out that “a report by a Harvard University economist estimated that more than 100 million women were demographically missing from the world as early as the 1990s due to certain practices, including sex selection abortion.”⁵⁸ Sydney Hay from Defending America’s Future testified at the meeting and cited an *Economist* article stating that sex selection abortion is the primary cause for these missing baby girls. The only piece of evidence cited for sex selection abortion in the United States was a 2008 study published in the National Academy of Sciences.⁵⁹ This study found that some people from India, China, and Korea may be sex selecting in favor of boys only when they have two girls.⁶⁰

In stark contrast to the recent legislative proposals, discussions of the situation in foreign countries was absent in sex selection bans adopted by two US states in the 1980s—Illinois and Pennsylvania. This is likely because these two states enacted prohibitions on sex selection abortion before anti-abortion groups launched state-wide strategies to push for the adoption of sex selection bans.

The first state in the United States to ban sex selection abortion was Illinois. The Illinois state legislature amended the abortion laws in 1985 to add this ban.⁶¹ In 1985, the Illinois legislature adopted a bill that modified

⁵⁶ *Id.* at 8, 12 (“Sex-selection abortions have the effect of diminishing the representation of women in the American population, and therefore, the American electorate.”).

⁵⁷ *Minutes of Meeting, Wednesday, Feb. 16, 2011: Before the H. Comm. on Health and Human Serv.*, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

⁵⁸ *Id.*

⁵⁹ Douglas Almond & Lena Edlund, *Son-biased Sex Ratios in the 2000 United States Census*, 105 PROC. NAT’L ACAD. SCI. 5681, 5681-82 (2008).

⁶⁰ *Id.*

⁶¹ See, e.g., Dayna Lovelady, *At Least 9 States Considering Bills to Ban Sex-Selective Abortions*, CHRISTIAN POST (Mar. 6, 2013, 1:27 PM), <http://www.christianpost.com/news/at-least-9-states-considering-bills-to-ban-sex-selective-abortions-91318/>. Many sources

its abortion law in light of certain rulings by courts but then also added a provision relating to sex selection abortion.⁶² The specific provision states: “[N]o person shall intentionally perform an abortion with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus.”⁶³ In reviewing the transcripts of the Illinois Senate and House of Representatives discussions of the bill, there was no mention of any discussion or trends of the global sex ratio or practices of female infanticide or feticide.⁶⁴

The second state to ban sex selection was Pennsylvania in 1989. The ban was added without much discussion to a bill that was introduced to amend Pennsylvania’s existing abortion laws in light of the Supreme Court’s decision in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).⁶⁵ During the deliberations on this bill, no supporters of the bill mentioned the situation in other countries or the global sex ratio. The focus of the discussion was the United States. For example, the main sponsor of the bill, Representative Stephen Friend, cited a *New York Times* poll that indicated that twenty percent of the medical geneticists interviewed for the poll counseled for sex selection abortions. He further admitted that even if no sex selection abortions “are performed [in the United States] and that poll is wrong, then this legislation prohibiting it does no harm whatsoever.”⁶⁶

Additionally, in testimony submitted by the Pennsylvania Pro-Life

incorrectly assume that the ban dates back to 1975, the date that the legislature adopted the law permitting abortion.

⁶² Phillip Lentz & Michael Lang, *Abortion Foes Push Bill Through House*, CHI. TRIB., Apr. 27, 1984, at A1.

⁶³ S.B. 890, 84th Gen. Assemb. (Ill. 1985); H.B. 1399, 84th Gen. Assemb. (Ill. 1985).

⁶⁴ STATE OF ILL. GEN. ASSEMB., S. TRANSCRIPTS DISCUSSING H.B. 1399, 83d Gen. Assemb., at 36-38 (June 25, 1983); STATE OF ILL. GEN. ASSEMB., S. TRANSCRIPTS DISCUSSING H.B. 1399, 83d Gen. Assemb., at 222-23 (June 29, 1983); STATE OF ILL. GEN. ASSEMB., S. TRANSCRIPTS DISCUSSING H.B. 1399, 83d Gen. Assemb., at 17-33 (Apr. 30, 1984); STATE OF ILL. GEN. ASSEMB., S. TRANSCRIPTS DISCUSSING H.B. 1399, 83d Gen. Assemb., at 142-51 (June 30, 1984); STATE OF ILL. GEN. ASSEMB., H. TRANSCRIPTS DISCUSSING H.B. 1399, 83d Gen. Assemb., at 175-79 (May 27, 1983); STATE OF ILL. GEN. ASSEMB., H. TRANSCRIPTS DISCUSSING H.B. 1399, 83d Gen. Assemb., at 81-86 (Apr. 26, 1984); STATE OF ILL. GEN. ASSEMB., H. TRANSCRIPTS DISCUSSING H.B. 1399, 83d Gen. Assemb., at 50-64 (June 29, 1984).

⁶⁵ H.R. 173-65, 1989 Sess., at 1743-44 (Pa. 1989), available at <http://www.legis.state.pa.us/WU01/LI/HJ/1989/0/19891024.pdf>.

⁶⁶ *Id.*

Federation in support of the sex selection ban, several anecdotes from newspapers were cited to show that some women in the United States obtained sex selection abortions. The group admitted that “[a]lthough no one knows exactly how many sex selection abortions have been performed in the U.S., there are indications that the demand for sex testing are on the increase.”⁶⁷ The testimony, however, made no reference to the situation in any other country.⁶⁸ The only mention of sex selection in other countries was made by Senator Karen Ritter, an opponent of the bill, who said, “This is a terrible practice in other countries like India and China, but we do not do it here.”⁶⁹

The absence of a discussion about sex selection abortion in other countries in the legislative histories of the Pennsylvania and Illinois acts was not because this practice was not occurring abroad. Indeed, Nicholas Kristof reported in the *New York Times* in 1993 that “China manufactured its first ultrasound machine in 1979 and by the end of the 1980s it was making 10,000 annually and importing more than 2,000 each year. One Chinese demographer estimates that 100,000 ultrasound scanners were in place around the country by 1990.”⁷⁰ According to Kristof’s article, sex selection abortion had become common in China by 1993 and presumably the ultrasounds machines were being used to detect the sex of the fetus.⁷¹ Thus, although the legislative history of the Arizona sex selection ban and the bill currently pending in Congress extensively refers to the widespread practice of sex selection abroad, the laws enacted decades ago do not mention the situation in other countries. In a form of reverse law reform, practices from other countries are being used to push forward legislation in the United States by anti-abortion groups.

IV. OVERVIEW OF FEMINIST VIEWPOINTS ON SEX SELECTION

The right to autonomy over one’s body has been the driving force in the

⁶⁷ *In Support of H.B. 1979: “1989 Abortion Control Act”*: Hearing on H.B. 1979 Before the H. Comm. on the Judiciary, H.R. 173-65, 1989 Sess. 5 (Pa. 1989) (testimony of Pennsylvania Pro-Life Federation).

⁶⁸ *Id.*

⁶⁹ H.R. 173-65, 1989 Sess., at 1749 (Pa. 1989), available at <http://www.legis.state.pa.us/WU01/LI/HJ/1989/0/19891024.pdf>.

⁷⁰ Nicholas D. Kristof, *The Chosen Sex—A special report; Chinese Turn to Ultrasound, Scorning Baby Girls for Boys*, N.Y. TIMES, July 21, 1993, at A1.

⁷¹ *Id.*

mainstream liberal feminist movement in the United States. Some feminists have opposed a prohibition on sex selection abortion on this ground. For example, Tabitha Powledge has stated, “To make it illegal to use prenatal diagnostic techniques for sex choice is to nibble away at our hard-won reproductive control, control that I think most of us believe is the absolute rock-bottom minimum goal we have got to keep achieved before we can achieve anything else.”⁷²

In line with this view, pro-choice groups take a universal position on sex selection bans—they oppose such bans in all countries, including India.⁷³ It is likely that the liberal feminist viewpoint would also oppose pre-implantation means of sex selection as well as limitations on sex determination tests because such procedures impinge a woman’s right to do whatever she chooses with her body.

On the other hand, some feminists in the global North have recognized that the widespread practice of sex selection in countries where it occurs is problematic. These feminists support limiting a women’s right to autonomy in India and imposing bans in that country on sex selection. Yet, they remain staunchly opposed to any limitation on sex selection in the United States. They justify this seemingly conflicting position by arguing that in places like India, women operate within social constraints that do not permit them to choose “freely.”⁷⁴ Thus, having a right to autonomy would be meaningless if they can never exercise that right.⁷⁵

Uma Narayan has labeled this general view the “Dupe of Patriarchy.” According to her, a woman makes a decision, “but makes the wrong one according to pre-set feminist standards, in that she believes she is exercising choice in, say, choosing to have a boy and not a girl, but is really ‘duped’ by

⁷² Tabitha M. Powledge, *Unnatural Selection: On Choosing Children’s Sex*, in *THE CUSTOM-MADE CHILD?: WOMEN-CENTERED PERSPECTIVES* 193, 197 (Helen B. Holmes et al. eds., 1981).

⁷³ See, e.g., *CTR. FOR REPROD. RIGHTS*, *supra* note 12.

⁷⁴ MARY ANN WARREN, *GENDERCIDE: THE IMPLICATIONS OF SEX SELECTION* 197 (1985).

⁷⁵ Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *Yale L.J.* 1281, 1317 n.157 (1991) (“[I]n a context of mass abortions of female fetuses, the pressures on women to destroy potential female offspring are tremendous and oppressive unless restrictions exist. While under conditions of sex inequality monitoring women’s reasons for deciding to abort is worrying, the decision is not a free one, even absent governmental intervention, where a male life is valued and a female life is not.”).

others and society into perpetuating the devaluation of women.”⁷⁶

In considering sex selection abortions and taking into account the context of India in particular, other authors have also expressed concern about the limitations of the Western individual rights approach to abortion. In critiquing the Western feminist approach, Nivedita Menon has pointed out that abortion rights are justified in the language of liberal rights. She concludes that:

[I]t may be the case that feminists do not have to reject altogether the possibility of using the language of rights. However, we must learn to talk of rights in a manner which is highly self-conscious and very cautious. We must understand that no rights can be said to exist as simple and self-evident facts.⁷⁷

She points out the contradiction inherent in demanding access to abortion on the basis of choice but then also demanding that women be prevented from aborting female fetuses. Maliki Kaur Sarkaria also examines sex selection abortions from a feminist perspective.⁷⁸ She agrees that the concept of “choice” is Western and must be re-evaluated from a global feminist perspective.⁷⁹

The discourse on abortion in the United States prioritizes the rights of the individual to choose without any exception. This framework, however, does not consider the impact on women as a group. It may not be that the principle of the right to autonomy is itself problematic but that it should be limited in certain exceptional circumstances (where in practice it reflects and perpetuates inequality). April Cherry, in grappling with sex selection from a feminist perspective, understood that sex selection could harm women as a group.⁸⁰ She states that “[m]y construction of a radical feminist analysis moves away from a view of the procedure as one of individual choice, and acknowledges sex selection as an issue affecting women as a class.”⁸¹ To be clear, it seems that Cherry does not propose that sex selection abortion should be banned but only that it is permissible to deny women information

⁷⁶ Deckha, *supra* note 45, at 25-26.

⁷⁷ See Menon, *supra* note 25, at 117.

⁷⁸ See generally Sarkaria, *supra* note 4.

⁷⁹ *Id.* at 908.

⁸⁰ April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?*, 10 WIS. WOMEN'S L.J. 161 (1995).

⁸¹ *Id.* at 167.

about the sex of the fetus.⁸²

V. A CONTEXTUALIZED FEMINIST APPROACH TO SEX SELECTION

I propose an approach to sex selection that prioritizes the individual right of each woman to autonomy, yet suggests that it could be limited in countries where the practice of sex selection reflects and perpetuates women's inequality. Below I explain why sex selection must be examined in the context in which it occurs, why limitations on autonomy may be acceptable (in some narrow cases), and how to assess whether sex selection reflects and perpetuates women's inequality in any given context.

a. Context-Specific

In contrast to the liberal feminist universal position that opposes sex selection bans in all countries, I believe that that this question should be examined on a country-by-country basis. Indeed, a body of literature emerging in the 1980s pointed out that feminism itself must be contextual. An advocacy goal or feminist solution for one group of people (such as white middle-class women) cannot simply be assumed appropriate for another class of women.⁸³ Similar critiques have been made of "Western feminism" from the perspective of the global South.⁸⁴ These critics point out that advocating for a universal opposition to prohibitions on sex selection is another form of imperialist feminism—exporting mainstream American feminism to other parts of the world.⁸⁵

Anti-subordination feminist theory (albeit in a different context) points out that in determining whether or not a law promotes or contravenes women's equality, we must look not only at the language of the law but also

⁸² *Id.* at 222. It should be noted that other feminists have called for bans on sex selection abortion, but for different reasons. Some have argued that aborting a fetus because of its sex suggests that gender identities are not constructed. A child's sex is not dispositive of that child's gender identity. Thus, opposing sex selection is to also oppose the essentialist notions that are embedded in the practice of sex selection. Deckha, *supra* note 46, at 15-16.

⁸³ See, e.g., Floya Anthias & Nira Yuval-Davis, *Contextualizing Feminism: Gender, Ethnic and Class Divisions*, 15 FEMINIST REV. 62 (1983), available at <http://www.jstor.org/stable/1394792>.

⁸⁴ See, e.g., THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM (Chandra Talpade Mohanty et al. eds., 1991).

⁸⁵ E.g., Cyra Akila Choudhury, *Exporting Subjects: Globalizing Family Law Progress Through International Human Rights*, 32 MICH. J. INT'L L. 259 (2011).

at the actual impact of the law.⁸⁶ Under this view, laws that are equal on their face can have an unequal impact on women or further subordinate women.⁸⁷ Similarly, a contextualized approach to sex selection places focus on the context within which laws are implemented and examines their actual impact.

b. A Woman's Right to Autonomy

A woman's right to autonomy and control over her body is crucial to promoting equality for women. This vision of a woman's right to autonomy is reflected in *Roe v. Wade*⁸⁸ as the "right to privacy." But even in *Roe*, the Supreme Court placed limits on the right to privacy. Most importantly, it was limited by viability of the fetus.⁸⁹ Some commentators have argued that sex selection abortion bans violate the U.S. Constitution as understood in *Roe* and amended in *Planned Parenthood v. Casey*.⁹⁰ This question may very well reach an appellate court in a recent case filed by the Center for Reproductive Rights against North Dakota's sex selection abortion ban.⁹¹ My point here is not to determine whether a prohibition on sex selection abortion contravenes the U.S. Constitution but to develop a feminist framework to understand sex selection from a global perspective.

I propose an approach that allows for restrictions on sex selection (which means limiting individual women's right to autonomy) only if that autonomy is being exercised in a way that threatens the equality of women and girls as a group. This framework can be used as a lens to understand sex selection in the United States and in other countries. An analogy to vaccinations could help clarify this position. In the United States, individuals are required to vaccinate their children even if they do not want

⁸⁶ Ruth Colker, *The Anti-Subordination Principle: Applications*, in *FEMINIST LEGAL THEORY: FOUNDATIONS* 288, 290-91 (D. Kelly Weisberg ed., 1993).

⁸⁷ *Id.*

⁸⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

⁸⁹ *Id.*

⁹⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). See, e.g., Annie Moskovian, *Bans on Sex-Selective Abortions: How Far is Too Far?*, 40 *HASTINGS CONST. L.Q.* 423 (2013).

⁹¹ See Press Release, Ctr. for Reprod. Rights, Ctr. for Reprod. Rights Files Lawsuit in N.D. to Block Nation's Earliest and Most Extreme Abortion Ban (June 15, 2013), available at <http://reproductiverights.org/en/press-room/center-for-reproductive-rights-files-lawsuit-in-north-dakota-to-block-nations-earliest-an>.

to because vaccinations prevent the spread of disease. Some parents think that there are risks associated with vaccines, such as autism, and, as a result, do not want to vaccinate their children.⁹² Because other parents still vaccinate their children, many childhood diseases occur very rarely in the United States. Thus, the decision by parents who do not vaccinate their children relies on the fact that most other parents do vaccinate their children.

If one or two parents decided to opt out, it would not likely impact the occurrences of diseases that are prevented by vaccines. If many parents decided not to get their children vaccinated, however, then those childhood diseases that are rare now would become more widespread. This would harm the greater good of society. Therefore, for the larger social good, state laws typically require children to be vaccinated to enter school. Similarly, in the context of sex selection abortion, it can be appropriate to place limitations on the individual's right to autonomy if—and only if—sex selection is being practiced in a way that reflects and perpetuates inequality against women as discussed below.

c. The Equality of Women as a Class

In line with Cherry, I argue that the operative concern that can outweigh an individual's privacy or autonomy rights is women's equality as a group.⁹³ It is therefore important to examine whether sex selection in practice reflects and perpetuates women's inequality in any given context. I develop the framework below and provide a preliminary analysis of the situation in India and the United States.

1. Does sex selection reflect inequality in society?

If the practice of sex selecting against girls is widespread, it could be a reflection of inequality in a country. Widespread sex selection suggests that beliefs persist about the relative inequality of girls as compared to boys. The

⁹² Some parents might refuse to vaccinate their children for religious reasons as well.

⁹³ There may be other reasons that various commentators have put forth for limiting the right of a woman to autonomy, and they may be equally valid. Some argue that fetuses with Down syndrome should not be aborted because it devalues people with the syndrome and reduces the potential population that would have otherwise added a sense of community to the existing population. Others argue generally against controlling the traits of the future child such as eye color, and they see sex selection abortion as another form of this. Those may all be valid reasons to limit sex selection abortion, but they do not necessarily impact the larger concern of women's equality and so I do not address them here.

only tool we have to determine whether or not sex selection is occurring on a widespread basis is the at-birth sex ratio. A sex ratio that reveals that far fewer girls are born than we would otherwise expect suggests that sex selection is widespread. But if only a small segment of the population in the country is selecting for boys or selecting for girls, their behavior is not likely to have an impact on the overall at-birth sex ratio.⁹⁴

As noted above, the sex ratio in India is highly skewed in favor of boys (although it varies by region). Some predict that there will be a surplus of fifteen to twenty percent more men in northwestern India by 2020.⁹⁵ Clearly, this disparity suggests that sex selection against girls is occurring on a widespread basis in India. In examining the context of India, it is likely that sex selection occurs because of a preference for sons,⁹⁶ which suggests that girls are less valued in society.⁹⁷

In the United States, however, the sex ratio is not imbalanced. The ratios are what they should be (1000 boys to 952 girls or 105 boys to 100 girls).⁹⁸ This means that the practice of sex selection against girls is not widespread in the United States. Indeed, to the extent most people sex select in the United States, they do so for family balancing purposes. In other words, if a family has a boy, they may sex select for a girl later. In fact, the majority of the parents who use PGD select in favor of girls (not boys).⁹⁹ Of course, just because there is no widespread practice of sex selection against girls does not mean that there are not other forms of inequality against

⁹⁴ To the extent that sex ratios are imbalanced, it is hard to know how sex selection is being achieved, but it is likely that sex determination and abortion are likely the methods employed for sex selection, particularly in poorer countries since pre-implantation methods of sex selection are generally more expensive.

⁹⁵ GUILMOTO, *supra* note 6, at 11–12.

⁹⁶ In a survey of 168 women in Delhi, an NGO in India found that 89 percent said there is an intense preference for sons in the culture. INDIRA JAISING ET AL., *FROM THE ABNORMAL TO THE NORMAL: PREVENTING SEX SELECTIVE ABORTIONS THROUGH THE LAW 142* (2007), *available at* <http://www.lawyerscollective.org/files/From%20the%20Abnormal%20to%20the%20Normal-%20Preventing%20Sex%20Selective%20Abortions%20through%20the%20Law%20copy.pdf>.

⁹⁷ *See supra* Part 1.

⁹⁸ *The World Factbook: Field Listing: Sex Ratio*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2018.html> (last visited Sept. 27, 2013).

⁹⁹ HVISTENDAHL, *supra* note 3, at 256.

women in the country. It just means that the inequality does not manifest itself in this way.

A few studies have found that sex selection abortions are occurring among certain immigrant communities in the United States. In one study, using data from the 2000 US Census, Douglas Almond and Lena Edlund looked at sex ratios in Chinese, Korean, and Indian American families. They found that while the sex ratio for first-born children was normal (1.05 males: 1 female), for subsequent children the ratio appeared to favor boys. When the first child was a girl, the sex ratio for the second child was 1.17 males: 1 female. If the first two children were girls, the sex ratio disparity was 1.51 males: 1 female.¹⁰⁰ This study included only families where both parents were born in China, India, and Korea.¹⁰¹

Another study that is often cited to show that sex selection is occurring in the United States includes women who said they had used sex selection.¹⁰² The sample size in the study was 65 women born in India who moved to the US after they were eighteen. The women were chosen for the study because they had approached or received services from sex selection clinics. The study does not suggest and does not intend to suggest that the practice is widespread among Indians in the United States.¹⁰³ And it certainly does not give us any information on whether or not immigrant women who are not born in India are using sex selection technologies.¹⁰⁴

Immigrants from Asia constitute a small proportion of the American population. In the 2001 census, only 3.6 percent of the population identified itself as Asian. This category includes Chinese, Koreans, Indians, and people from other Asian countries. To the extent that some immigrants practice sex selection in favor of boys, it has not influenced the overall sex ratio in the United States. Thus, sex selection against girls is not a widespread practice in the United States.

¹⁰⁰ Almond & Edlund, *supra* note 59.

¹⁰¹ *Id.*

¹⁰² Sunita Puri et al., "There Is Such a Thing as Too Many Daughters, but Not Too Many Sons": A Qualitative Study of Son Preference and Fetal Sex Selection Among Indian Immigrants in the United States, 72 SOC. SCI. & MED. 1169 (2011).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

2. Does sex selection perpetuate inequality?

In a context where the practice of sex selection is widespread, it is likely that allowing sex selection to continue will perpetuate inequality. Sex selection against girls suggests that men are valued more than women in the society. Allowing people to sex select does nothing to change that valuation. If bans on sex selection could successfully prevent people from sex selecting for boys, that may eventually change people's views about the relative worth of girls to boys.¹⁰⁵

On the other hand, the economic analysis of sex selection proposed by Gary Becker, a Nobel Prize-winning economist, suggests that the practice of sex selection does not perpetuate inequality in the long-term. He argues that the market will eventually eliminate sex selection. If women are scarcer, their value will increase; perhaps parents will receive a higher bride price and parents who have girls will value and educate them better.¹⁰⁶ Feminist scholar Mary Ann Warren, however, argued that a shortage of women caused by sex selection will lead to negative impacts on women when they do not have economic control but may empower women in societies where there is more equality.¹⁰⁷

A few studies have shown that a shortage of women in India has increased trafficking, violence, and bride purchase. Unmarried men with no prospects of being married can destabilize societies.¹⁰⁸ One study by the same economist who published the study on sex selection in immigrant communities in the United States finds that some increased violence can be accounted for by the imbalanced sex ratios.¹⁰⁹ In some cases, a woman is

¹⁰⁵ Pro-choice groups have long argued that prohibitions on reproductive rights rarely work because they can never be implemented. But even assuming a prohibition on sex selection could be implemented in a country, people's views about the relative worth of girls as compared to boys still might not change if they were prohibited from using sex selection technology. It might just mean that the fertility rates would increase as parents continued to have children until they had at least one boy.

¹⁰⁶ Gary Becker, *Is Sex Selection of Births Undesirable?*, BECKER-POSNER BLOG (Feb. 12, 2007), <http://www.becker-posner-blog.com/2007/02/is-sex-selection-of-births-undesirable-becker.html>.

¹⁰⁷ WARREN, *supra* note 74, at 134.

¹⁰⁸ HVISTENDAHL, *supra* note 3, at 15, 204.

¹⁰⁹ See Douglas Almond et al., *Son Preference and the Persistence of Culture: Evidence from South and East Asian Immigrants to Canada*, 39 *Population & Dev. Rev.* 75, 75 (2013).

forced to marry multiple men (typically brothers).¹¹⁰ Thus, the skewed sex ratio in India may be negatively impacting women as a class.

CONCLUSION

Sex selection is a fraught issue because it is the collision point of three strong viewpoints. Those who oppose eugenics fear that sex selection is just one inappropriate way to manipulate human offspring. This group of people likely opposes both pre-implantation and post-implantation methods of sex selection. People who oppose abortion generally also oppose sex selection to the extent abortion is used to achieve it. There is no consensus among people who strongly believe in women's equality and bodily autonomy on how to approach sex selection.

In a form of reverse law reform, anti-abortion groups are increasingly using information from abroad, often portrayed in a distorted way, to garner support for sex selection abortion bans in the United States. Much of the information is about India and China. This information appears prominently in legislative hearings and reports. Fear of what is happening in other countries is successfully convincing legislators and voters in the United States to pass bans. Some argue that we must adopt the law here to be in solidarity with other nations to show our disapproval of this practice.¹¹¹ But if solidarity with other countries is a reason to enact legislation, then we would have many unnecessary laws. Caste discrimination occurs in India and may even occur among some people in the United States, but there is no legislative agenda to ban caste discrimination in the United States since its occurrence is likely negligible.

I propose an approach that places primary value on women's autonomy over their bodies but limits this in only narrow cases where sex selection is widely practiced in favor of boys. In countries where it is widely practiced against girls, there is an imbalance in the sex ratio. A widespread practice of sex selection against girls is likely a reflection and perpetuation of inequality against women in those countries. In determining whether or not a country should adopt a ban, policymakers and advocates should focus on the practice in their own country. Any potential restriction on women's autonomy should be as least restrictive as possible—the least intrusive ban would be to ban sex determination tests or pre-implantation bans, while limiting abortion

¹¹⁰ HVISTENDAHL, *supra* note 3, at 190.

¹¹¹ *Id.* at 244.

is most intrusive on women's autonomy.

The contextualist feminist framework I propose focuses the conversation on the equality of women and girls who are already born rather than on discrimination against the fetus. The statutes in the United States that ban sex selection are framed as protecting the fetus from sex and race discrimination.¹¹² The discrimination that is occurring is not necessarily against the fetus but against women and girls who are already alive. The intent of the individual woman who sex selects is no longer the focus, but the impact (if any) that it has on the equality of girls and women as a group is the relevant criterion for determining whether or not sex selection should be banned.

Pro-choice groups have typically taken a universal approach opposing bans on sex selection in all countries. As such, they have not engaged with the true reality of the situation in other countries like India. By understanding the challenges that women in India face and the dominant culture under which they operate, feminists will be able to resist the importation of (mis)information about India and other countries as a means to influence policy decisions in the United States.

¹¹² See, e.g., Videotape: HB2443 – Abortion; Sex; Race Selection; Prohibition (Ariz. State Legislature 2011), http://azleg.granicus.com/MediaPlayer.php?view_id=19&clip_id=8286 (click on “HB 2443 – abortion; sex; race selection; prohibition” under the video in the left column).