



# **WOMEN'S HUMAN RIGHTS AND MIGRATION**

Sex-Selective Abortion Laws in the  
United States and India



**Sital Kalantry**

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PENN

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# Women's Human Rights and Migration

PENNSYLVANIA STUDIES IN HUMAN RIGHTS

Bert B. Lockwood, Series Editor

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*To my boys (Eduardo, Sidhartha, and Jai Julio)*

## PREFACE

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A few years ago an Indian American undergraduate student at the University of Chicago asked me to moderate a film discussion about a documentary on sex-selective abortion in India and China. The screening of the film, *It's a Girl: The Three Deadliest Words*, was sponsored by a well-regarded human rights center on campus. Before I agreed to host the film discussion, I wanted to know a little bit about the movie. Through an online search I learned that many women's groups, including the National Organization for Women, were screening the film across the country. The film was also an official selection for the Amnesty International Film Festival, and it appeared in *Ms.* review of feminist movies. Given the support it had from feminist organizations, I agreed to moderate the discussion even though my initial Google search did not reveal any background about the people and organizations that made the movie.

However, when I watched the movie, I was troubled by the narrow story it told about sex selection in India. The movie began with a poor Indian woman from a village pointing to where she buried the infant girls she had killed; it depicted the violent removal of a fetus from the womb as part of a cycle of violence against Indian women; and it ended with an interview with a Caucasian American woman activist who said that she helps women in other countries because they cannot help themselves.

The characters in this film were exactly the offensive caricatures identified by human rights scholar Makau Mutua nearly two decades ago in his critique of human rights work.<sup>1</sup> In this movie, Indians were savages, female fetuses were victims, and Caucasian American women were saviors. Nonetheless, much like the feminists who lauded the movie across the United States, the largely pro-choice audience for whom I moderated the film discussion did not challenge the film or its message.

Through a series of interviews with policymakers, advocates, and women who sex-select, the film framed sex-selective abortion as a cycle of violence

against girls and women in India. Having spent many summers in India with my grandparents, through the academic and activist work I have done in India over the last decade, and having lived there as a Fulbright scholar, I know firsthand that many women obtain sex-selective abortions because of societal norms that demand a male heir, and not as a result of overt physical or emotional coercion. There is no doubt that some of these women also face domestic violence for their failure to produce a male heir. The film, however, depicted no possibility other than violence.

Upset by the disconnect between my discomfort with the film and the general acceptance of its message by the people with whom I watched it, that very evening I stayed up late into the night trying to find out information about the filmmakers and the film's funding sources. The film was expensive to make as it was shot on location in India and China. But unlike other films with such generous funding, the film credits did not list any funding sources. I thought I was at a dead end when I made it to the final page of the Google search results and uncovered nothing.

As a last resort I traced the ownership of the domain name of the website for the movie. By doing this, I found that the director of the film worked for an organization that makes gruesome anti-abortion videos. On the website that promotes the film, he is described only as a filmmaker who makes movies on human rights issues—there is no mention of any of his prior works. The director later admitted to me in an interview that some of his funding came from people whom he had met through that anti-abortion organization.<sup>2</sup> Had the director's background and funding sources not been so cleverly hidden, then perhaps the American feminist community would have been more skeptical of the story he was telling about India and China.

In May 2013, I published an article in *Slate* about my discovery.<sup>3</sup> Shivana Jorawar, Reproductive Justice Director at the National Asian Pacific American Women's Forum (NAPAWF) at the time, read my article and told me that the promoters of *It's a Girl* asked her organization to co-sponsor a screening of the film on Capitol Hill for congressional representatives in Washington, D.C. This was all happening at the same time that a bill was pending in the U.S. House of Representatives to ban sex-selective abortion in the United States.<sup>4</sup> The bill's preamble states that its purpose is to stop the widespread practice of abortions of female fetuses by Indian and Chinese people living in the United States. Bills like this were also sweeping across state legislatures. By 2016, half of all state legislatures in the United States had voted on bans on sex-selective abortions, purportedly to address the behavior of Asian Americans. Seven



states enacted the bans during this wave of legislative activity. Two states had adopted them decades ago.

Americans went to India and China, made a film depicting the “culture” of “son preference” and violence against women, and brought it back to the United States to support claims that Asian Americans sex-select and to lobby for laws that burden the reproductive rights of all American women. The rub of it is that they are convincing pro-choice feminists that the ban promotes women’s equality.

Moreover, anti-abortion legislators and movement actors deceptively used advocates concerned about women’s equality in other countries to further restrictions on reproductive rights. For example, Sabu George, a well-known activist against sex selection in India, was invited to testify and did testify at a hearing organized by Representative Chris Smith, a staunch opponent of legal abortion rights, for the U.S. House Foreign Affairs Committee. The purpose of the hearing was to push the U.S. government to stop funding family planning services in India because of sex selection.<sup>5</sup>

The legislative discussions about sex-selective abortion uniformly contend that the bans address a widespread practice among Asian Americans.<sup>6</sup> As someone whose scholarship and clinical work involve India and who has a personal connection to both the United States and India, I was skeptical of both the film and the empirical claims made by the proponents of the sex-selective abortion bills. Many of the factors that motivated my aunt who lives in India to abort a female fetus after she had already given birth to two girls did not exist for my other aunt who lived in the United States. As someone who was raised by Indian immigrants in the United States, I was aware that the “culture” of immigrant communities evolves from the “culture” in the places from which they migrated.

I teamed up with movement leaders to study the issue further. An important voice for Asian American and Pacific Islander women, the National Asian Pacific Women’s Forum (NAPAWF), under Miriam Yeung’s direction was working to defeat the bans. I also worked with Sujatha Jesudason who is an expert in the field. Under the auspices of the International Human Rights Clinic at the University of Chicago Law School, which I directed at the time, we investigated the issue from empirical, comparative, legal, and medical perspectives. As part of our team were economists Arindam Nandi and Alexander Persaud; law students Kelsey Stricker and Jeff Gilson; and Brian Citro, a fellow in the clinic; as well as health experts at ANSIRH (Advancing New Standards in Reproductive Health), a reproductive health organization based

at the University of California–San Francisco. Economists on our team analyzed U.S. demographic data from 2008 to 2012 from the American Community Survey and found that in some cases, Asian Americans had a girl preference. When some Asian Americans had two prior boys, they were more likely to have girls than were Caucasian Americans. These findings, together with the contextualized and comparative perspective presented in this book, suggest that a few Asian Americans may use some method of sex selection (not necessarily abortion) to obtain a family with gender balance. That is a family that has at least one boy and at least one girl.

We released a report in June 2014 documenting the empirical findings and disproving other misrepresentations made by supporters of sex-selective abortion bans in the United States.<sup>7</sup> Since the report was released, no bill banning sex-selective abortion has been adopted by any state except Indiana. However, a federal judge in Indiana has blocked the enforcement of the Indiana law.<sup>8</sup> This book builds on my collaborative as well as my own individual work on sex selection.<sup>9</sup>

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## Introduction

Some of the most hotly debated issues about women's human rights today relate to practices undertaken by immigrants in their country of destination. When someone migrates to another country, she may replicate some of the cultural traditions and customs prevalent in the country of her origin. If she decides to settle permanently in the country of her destination, her children also may decide to continue those traditions. These customs can include celebrating certain holidays, eating distinctive food, and speaking a language other than the one spoken in the mainstream society. While most of these practices are unobjectionable, some practices of immigrants seem to be contrary to women's equality and rights. In some cases, feminists, human rights advocates, and other stakeholders push for legal prohibitions on this behavior with the goal of advancing women's rights. But these legal prohibitions themselves raise human rights concerns.

This book uses sex-selective abortion laws in the United States as a site to develop a transnational feminist approach to sort through questions about women's human rights. Laws prohibiting sex-selective abortion, which are spreading like wildfire in the United States, are an example of laws designed to prevent a practice that is (erroneously) thought to be prevalent among people of Asian descent living in the United States. Since 2009, nearly half of the state legislative bodies in fifty states have considered laws to stop women from terminating their pregnancies if they are doing so because of the sex of the fetus. Nine states have passed sex-selective abortion bans. In May 2016, Vice President Mike Pence signed the most recent sex-selective abortion ban while he was governor of Indiana.

In regulating practices of immigrants, advocates, legislators, and even some pro-choice feminists (erroneously) draw conclusions about the scope, motives, and impact of a practice based on their (mis)understanding of how the practice is undertaken in the country of origin of certain immigrants. In some cases, if a practice is thought to be discriminatory against women and girls in the country of origin of the migrant, it is assumed that the practice

will have the same impact on women in migrant-receiving countries. Policy-makers, feminists, and other stakeholders often draw conclusions about the magnitude of the practice based on their understanding of its scope in the country of origin of the immigrant. Additionally, some people in the migrant-receiving countries assume that immigrants who undertake the practice do so for the same reasons as people in the country of origin of the migrant.

This phenomenon, which I refer to as decontextualization, can be observed in the discourse around bans on sex-selective abortion in the United States. The dominant narrative used to justify these laws is that: (1) people in Asia prefer sons and that is why they abort female fetuses, (2) Asians have emigrated to the United States and many of them obtain sex-selective abortions, (3) Asian Americans obtain these abortions because (like Asians) they have a sexist preference for sons and an aversion to daughters, and (4) sex selection in both the United States and Asia is discriminatory and harms women.

In the increasingly global world of communication, news and knowledge travel quickly and at a massive scale across borders. Sometimes the knowledge about people in the migrant-receiving country may itself be distorted and lack nuance. This knowledge is filtered through media sound bites and dominant stereotypes about foreign peoples. The popular perception in the United States is that women in India who sex-select are largely physically or mentally coerced to do so. A story about one woman who was coerced by her in-laws to abort her twin fetuses, which she refused to do, circulates around the media and the legislative discussions about the bans. On the other hand, an in-depth study of India presented in this book suggests that women sex-select for many reasons other than direct coercion.

Sex-selective abortion bans are part of a larger strategy by anti-abortion groups to pass a variety of state-level bills restricting abortion. Anti-abortion groups frame sex-selective abortion bans in women's equality terms. This puts some pro-choice feminists between a rock and a hard place. They oppose the bans because the laws burden the right to choose, but they also believe that it is sexist for a woman to terminate her pregnancy just because she does not want to give birth to a girl. As a result of this tension, it appears that some pro-choice feminists support the legislation while others express no view about it. With some notable exceptions, pro-choice organizations have not devoted significant resources to opposing the bans even though the sex-selective abortion bills were the second most often introduced anti-abortion legislation in 2012.

There appears to be a Rawlsian "overlapping consensus among some pro-choice and pro-life people in the United States in regard to" sex-selective

abortion bans. Pro-life people oppose sex-selective abortion because they oppose abortion for any reason. Pro-choice people in the United States oppose sex-selective abortion because they are concerned about equality for women and girls. The title of an article by Noah Berlatsky, a writer for *The Atlantic*, observes this consensus. In his article, “Neither Pro-Life Nor Pro-Choice Can Solve the Selective Abortion Crisis,” he suggests that sex-selective abortion in the United States is an issue that both proponents and opponents of legal abortion rights should work together on.<sup>1</sup> An analysis of legislative voting records presented in Chapter 3 suggests that pro-choice legislators in a few states voted in favor of prohibitions on sex-selective abortion. Another indicator of the overlap in positions between the two factions is the fact that the term “gendercide,” coined decades ago by a staunch feminist supporter of abortion rights,<sup>2</sup> is now the rallying cry for anti-abortion movement actors.

I argue that scholarship that informs these questions—feminist legal theory and international human rights theory—has not considered questions of this nature and thus does not provide adequate tools in sorting through the competing rights. Both of these theoretical perspectives support a universal view of practices and rights. None of the many variants of American feminist legal theory have conceived of practices that so radically change meaning that they may be oppressive to women in one country, but not repressive when undertaken by women in another country. Though it should be noted that recent scholarship has been attuned to the view that different regulatory approaches may be necessary in regard to a practice based on the context in which the practice emerges.

The lines in the sand are even more firmly drawn in international human rights theory and practice on these questions. Modern international human rights theory is built on the premise that all rights are “universal”—everyone everywhere has the same substantive human rights. If a practice violates human rights in one country, it is also thought to violate human rights in another country. On the opposite pole of universality is cultural relativism. The extreme form of cultural relativism is problematic because it uses culture and religion to shield practices that are oppressive to women. The strong force of universalism of human rights is necessary to counteract the extreme forms of cultural relativism.

I endeavor to create a conceptual space between these two poles. In contrast to this universalizing messages in both feminist legal theory and international human rights law, I argue that whether or not bans on certain practices of immigrant women promote women’s rights should be ascertained using

an evidence-based understanding of the practice in the context in which it occurs. I develop the framework of a new approach to evaluating regulations on the practices of migrants. This transnational feminist legal approach is a methodology that emphasizes both the context of the immigrant-sending and migrant-receiving country in evaluating bans on women's behavior.

I argue that in evaluating whether or not a practice is oppressive to women, we should be open to the possibility that when the practice emerges in a new context, it has a different human rights impact. The universal approach to human rights is not adequately skeptical of claims that practices have the same negative human rights impact across multiple country contexts. Once a practice is thought to be contrary to human rights in one country context, it is assumed to also be discriminatory in another country context. In contrast, I suggest that policymakers in migrant-receiving countries should not leap to this conclusion.

In examining the behavior of people who trace their origin to another country, some people in migrant-receiving countries also assume that immigrants will undertake similar practices as people from their country of origin because they overemphasize the role of "culture" in shaping behavior and underestimate the role of the larger societal structures and context in influencing behavior. In contrast, I call for a careful empirical analysis that ascertains the scope of the practice in question in immigrant communities, the motives for the practice, and the impact the practice is likely to have in the migrant-receiving country.

The politics and discourse surrounding sex-selective abortion bans in the United States provide a rich case study for critiquing shortcomings in existing feminist legal theories as well as in developing a new methodology, the transnational feminist legal approach. Using the general principles of the transnational feminist legal approach that I develop in Chapter 1, I propose a specific framework in Chapter 2 that can be used to evaluate and resolve the competing rights in question when bans on sex-selective abortion are considered.

In proposing bans on sex-selective abortion, anti-abortion advocates have successfully argued that the bans are necessary to protect fetuses from sex discrimination. Pro-choice feminists and scholars have not successfully rejected this framing. Indeed, some advocates have tacitly accepted it. The context-based legal approach I propose frames the competing rights in question as women's reproductive rights, on one hand, and the harm that sex selection may cause to girls and women living in a society, on the other. I start from the proposition that reason-based restrictions on the right to

choose during the pre-viability period—including sex-selective abortion bans—do burden women's reproductive rights, but they may be justifiable if women in any given society are exercising their rights in a way that harms women as a group.

In India, for example, many women want to have at least one male child, but they also want to have fewer children. This has led to fewer girls and women in society than there would be had women not aborted female fetuses. There is a consequent male surplus. Emerging empirical studies in India suggest that violence against women is associated with a male surplus.

On the other hand, there is no evidence in the United States that sex selection is widespread. However, the national discourse in the United States on sex-selective abortion has been driven by misinterpretations and misrepresentations of empirical studies of (now) old data on the children born to Asian American women. Indeed, the anti-sex-selective abortion bans in the United States were fueled by an article by economics professors Douglas Almond and Lena Edlund published in an influential multidisciplinary science journal in 2008. They found that when Chinese, Indian, and Korean families in the United States have one or two girl children, they are more likely than Caucasian Americans to have a boy as their next child. Their study was based on a 5% representative sample of the U.S. Census of 2000, which contained only 324 Asian American families with three children. They found that a small subset of these Asian American families select for boys. Yet, proponents of sex-selective abortion bans in state legislatures misrepresented these findings (and subsequent studies) as proof that “[s]ex-selection abortions have the effect of diminishing the representation of women in the American population.”<sup>3</sup>

It is no surprise that the anti-abortion movement was successful in exaggerating the findings of this technical article—even the media blew it out of proportion and claimed that it proved “son preference” among all Asian Americans. The article lent itself to these types of misrepresentations because the authors suggested that the magnitude of sex selection among Asian Americans was the same as among people who live in Asia.<sup>4</sup> The authors attempted to contain the can of worms they unleashed by clarifying to media sources that they did not mean to suggest that sex selection occurs among “all” or even “most” Asians.<sup>5</sup> But the damage was already done.

I present a new empirical analysis of sex ratios of Asian Americans, but also critique existing quantitative empirical studies using a critical race theory lens in Chapter 4. I argue that these studies rely too heavily on the



ratio of girls to boys born to Caucasian American parents as a baseline to measure whether or not Asian Americans are sex-selecting. Some researchers also make unjustified comparisons to the behavior of Asian Americans and the behavior of people living in Asia. Finally, stereotypes that Asian Americans have a “son preference” foreclose interpretations of the data in ways that challenge that narrative.

I present an analysis of new demographic data about the sex of children born to Asian Americans from 2008 to 2012, which was developed in collaboration with economists Alexander Persaud and Arindam Nandi. Our analysis of this data suggests that a very small number of Asian Americans may be using some method of sex selection to ensure that they conceive a fetus of the opposite sex to the two prior children they already have. Survey data of attitudes of Asian Americans suggests that more than any other racial or ethnic group, Asian Americans desire to have gender-balanced families—families with at least one boy and one girl.

The national rhetoric on sex-selective abortion bans, including the draft federal legislation, consistently makes reference to the practice in foreign countries as a way to advance a domestic agenda. Although in understanding the significance of sex-selective abortion practices among immigrant communities, the country context of their country of origin should not be overemphasized, it is still relevant. I undertake a comparative analysis with the situation in India in Chapter 5.<sup>6</sup> I examine how the practice became widespread in certain parts of India, the societal and personal factors that contribute to women’s desires to have at least one son and at the same time have fewer children, and the efforts made by the Indian government to curb the practice. Through this in-depth comparative study, it becomes clear that many of the societal institutions that contribute to sex selection such as dowry, reliance on sons for support during old age, significantly fewer economic opportunities for women as compared to men, as well as other factors are not present in the United States.

I use empirical and comparative methodologies to shed light on the practice of sex-selective abortion in the United States. From the information developed through this analysis in Chapter 6, I consider the practice of sex-selective abortion in the United States through the lens of the legal framework I articulated. Are women practicing it in society in great numbers? What are the consequences of the practice? Bans on sex-selective abortion in the United States will lead to racial profiling of Asian American women, place access restrictions on women seeking nonselective abortions, and potentially open the door to many other pre-viability restrictions. Few women abort