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NORTH CAROLINA LAW REVIEW

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Volume 99 | Number 1

Article 3

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12-1-2020

## Reverse Legal Transplants

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### Recommended Citation

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## REVERSE LEGAL TRANSPLANTS\*

SITAL KALANTRY\*\*

*In early modern history, laws often moved in one direction—from imperial nations to their colonies. In the contemporary era, we would expect legal solutions to move in many directions, including from economically weaker countries (“Global South” countries) to economically more developed ones (“Global North” countries). The legal transplant literature, however, documents relatively few transplants from Global South countries to Global North countries. There is also little critical analysis in the literature about why there is a paucity of “reverse legal transplants”—transplants from Global South countries to Global North countries.*

*This Article presents a case study of a reverse legal transplant—the movement of restrictions on abortion from India to the United States. U.S. statutes restricting women from terminating their pregnancies on the basis of the predicted sex of the fetus have been enacted in nine states and introduced in over half of all state legislatures and the U.S. Congress. The U.S. Court of Appeals for the Seventh Circuit found those prohibitions to be unconstitutional. The U.S. Supreme Court suggested that it would consider adjudicating the constitutionality of the statutes after more appeals courts ruled on them. Many lawyers, advocates, and others who oppose restrictions on abortion have failed to analyze sex-selective abortion statutes correctly. Instead of a human rights approach that proposes universal legal solutions, a comparative methodology is more appropriate because it leaves room for distinct legal solutions across jurisdictions.*

*This Article fills several gaps in the transplant literature. First, through an analysis of the literature, it finds that scholars have documented few reverse legal transplants. Second, it exposes the lack of rigor around the concept of transplants and attempts to create relevant definitional boundaries for it. This analysis informs the methodology of the literature review and allows us to identify the*

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case study as a reverse legal transplant. Third, this Article contributes to the refinement of comparative methodologies to evaluate legal transplants. Articles evaluating transplants have measured success after the transplantation has already occurred. By limiting their analysis to whether a transplant was properly implemented in the reception country, authors have neglected to examine whether the law was appropriate to transplant in the first place. This Article proposes a multidirectional and contextual approach that can be useful in identifying whether a specific law should a priori be transplanted or not.

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## INTRODUCTION

Laws have migrated from one country to another since early recorded history. Powerful and rich imperial nations imposed their laws on weaker colonies: the Code of Hammurabi was spread to Mesopotamia,<sup>1</sup> German laws

1. See Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples To Explain the Transplant Process*, 51 AM. J. COMPAR. L. 839, 839 (2003) (“Examples of the transplant of private law go back at least to the Code of Hammurabi.”).

were adopted in parts of South-West Africa,<sup>2</sup> and the British imposed a codified version of their common law system in their Indian colony.<sup>3</sup> Comparative legal studies is replete with case studies of these “legal transplants.”<sup>4</sup>

In the modern era, laws are not spread by colonizers but are often the work of multilateral institutions, foundations, lawyers, and individuals.<sup>5</sup> In some cases, people might borrow a law from another country for efficiency purposes—it saves time to use existing models.<sup>6</sup>

Despite the vast scope of the transplant literature, authors have not focused on identifying whether the directional flow of the law and legal institutions in the modern era differs from the colonial era. Do laws flow in multiple directions now, or is the traffic still one way? People who borrow foreign laws for efficiency purposes should be interested in the laws of any nation where similar problems have arisen, not just those nations that are more or equally economically developed as them. However, a review of over 300 articles reveals that the literature has only documented laws moving from economically powerful to economically weaker nations, rather than in the opposite direction, even in the contemporary era.<sup>7</sup>

Several reasons have been offered for why laws migrate from countries with greater economic power, which I call “Global North countries,” to countries with less such power, referred to here as “Global South countries.”<sup>8</sup> “North” and “South” were first used to refer to cardinal directions, distinguishing countries with greater economic power in the geographic north

2. Martin Cai Lockert, *Transplanting and Customizing Legal Systems: Lessons from Namibian Legal History*, 13 RICH. J. GLOB. L. & BUS. 173, 207–08 (2014).

3. See Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 16 (1974).

4. Miller, *supra* note 1, at 839.

5. See Anne-Marie Slaughter, *Breaking Out: The Proliferation of Actors in the International System*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 12, 19–26 (Yves Dezalay & Bryant G. Garth eds., 2002); see also Toby S. Goldbach, *Why Legal Transplants*, 15 ANN. REV. L. & SOC. SCI. 583, 590 (2019) [hereinafter Goldbach, *Why Legal Transplants*] (pointing out that laws migrate as a result of transnational expert networks, international organizations, and private contracting parties); Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT’L L. REV. 1335, 1340 (2011) (focusing on the importance of transnational civil society in norm creation).

6. Miller describes this as a “cost-saving transplant.” See Miller, *supra* note 1, at 845–46.

7. See *infra* Part II.

8. I prefer the labels Global North and Global South over “developing” and “developed” countries, as the latter terms assume that all countries follow one trajectory and that moving toward being a “developed” country is the appropriate trajectory. Cf. Tariq Khokhar & Umar Serajuddin, *Should We Continue To Use the Term ‘Developing World?’*, WORLD BANK BLOGS (Nov. 16, 2015), <https://blogs.worldbank.org/opendata/should-we-continue-use-term-developing-world> [<https://perma.cc/NP4E-VS83>] (arguing that the terms “developed” and “developing” should be phased out). Legal transplant scholars have also used other demarcations such as Western/Eastern or Center/Periphery. See Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMPAR. L. 617, 621–26 (2007) [hereinafter Langer, *Revolution*].

from countries with less such economic power in the geographic south. In today's world, a demarcation based on cardinal directions is no longer accurate since many countries in the geographic global south (on a traditional map) have sustained high levels of economic growth. In this Article, I use the terms "Global South" and "Global North" in two ways. Primarily, I use them as metaphors to categorize countries based on economic strength, regardless of geography. A country is either in the Global North or Global South—it cannot be in both. For purposes of the literature review in Part II, though, I use the terms Global North and Global South to describe the relative economic strength of a particular country in relation to the other based on their relative GDP per capita. This distinction is made clearer in Section II.A below.

Some scholars have argued that laws are imposed by Global North countries to force Global South countries to reform their economic systems for the purpose of foreign economic exploitation.<sup>9</sup> Exploitation is not a motive behind every transplant from a Global North country to a Global South country. People in Global North countries who work on "rule of law projects" that export laws to the Global South have more benign motives. However, they too often problematically assume that laws connected to economic systems with high levels of growth deserve to be spread around the world. Laws of more economically powerful nations are thought to be more legally mature and reflect "best practices" for others to emulate.

The North-South traffic in laws is not just attributed to Global North actors. Global South actors often independently adopt laws from Global North countries without obvious external pressure. For example, authors have suggested that Global South policymakers sometimes adopt laws from Global North countries to gain legitimacy in order to attract foreign capital (among other things).<sup>10</sup> Global South policymakers, lawyers, and other experts who have been educated in Global North countries are often at the forefront of importing laws.<sup>11</sup>

The reasons for the movement of laws from the Global North to the Global South have been thoroughly examined and theorized. However, there is little discussion in the literature about whether or not laws move from the Global South to the Global North. I call laws, institutions, and norms that

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9. See UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* 35–38 (2008).

10. Miller calls these "legitimacy-generating" transplants. See Miller, *supra* note 1, at 854–55.

11. Miller calls these "entrepreneurial" transplants. *Id.* at 850 ("One example of a pure type of entrepreneurial transplant would be the individual or individuals who travel abroad to study a particular area of law, come home with foreign degrees in the area, establish a law firm or an NGO in the relevant field, and then work with legislators to get a law passed modeled on the statute that was the subject of the study abroad."); see also Langer, *Revolution*, *supra* note 8, at 619 (describing Latin American "entrepreneurs" introducing criminal procedure reforms to domestic institutions).

migrate from Global South countries to Global North countries “reverse legal transplants.”

Filling a gap in the literature, this Article presents a case study of a reverse legal transplant—sex-selective abortion statutes. Those laws prohibit a person from terminating her pregnancy if she is doing so because of the predicted sex of the fetus. Limitations on sex selection are regularly introduced in state legislatures and the U.S. Congress.<sup>12</sup> The question of the constitutionality of one state statute reached the U.S. Supreme Court last Term.<sup>13</sup> The bills and legislative debates surrounding them often make reference to India’s restrictions on sex selection and use them as a reason to push for restrictions in the United States. Some pro-choice legislators have voted in favor of those abortion restrictions even though the laws have a broader restrictive impact on abortion.

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12. Restrictions on sex-selective abortion have been introduced in nearly half of all state legislatures in the United States. *See, e.g.*, Prenatal Nondiscrimination Act of 2015, S. 48, 114th Cong. (2015); Assemb. B. 2336, 2013–14 Leg., Reg. Sess. (Cal. 2014); H.B. 15-1162, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015); S.B. 13-056, 69th Gen. Assemb., Reg. Sess. (Colo. 2013); H.B. 13-1131, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); S.B. 1072, 115th Leg., Reg. Sess. (Fla. 2013); Comm. Substitute/H.B. 845, 115th Leg., Reg. Sess. (Fla. 2013); S.B. 529, 150th Gen. Assemb., Reg. Sess. (Ga. 2010); H.B. 1155, 150th Gen. Assemb., Reg. Sess. (Ga. 2010); H.B. 693, 60th Leg., Reg. Sess. (Idaho 2010); H.B. 3850, 101st Gen. Assemb., Reg. Sess. (Ill. 2019); H.B. 2281, 101st Gen. Assemb., Reg. Sess. (Ill. 2019); S.B. 334, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015); S.B. 183, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013); H.B. 1430, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013); S. File 44, 86th Gen. Assemb. (Iowa 2015); S. File 13, 85th Gen. Assemb. (Iowa 2013); H.B. 5, 2019 Gen. Assemb., Reg. Sess., 2019 Ky. Acts 156; H.B. 701, 2015 Leg., Reg. Sess. (La. 2015); H. 3434, 191st Gen. Ct., Reg. Sess. (Mass. 2019); H. 1567, 188th Gen. Ct., Reg. Sess. (Mass. 2013); H.B. 5731, 96th Leg., Reg. Sess. (Mich. 2012); S. File 1073, 86th Leg., Reg. Sess. (Minn. 2010); H. File 1196, 86th Leg., Reg. Sess. (Minn. 2010); S.B. 2767, 2015 Leg., Reg. Sess. (Miss. 2015); S.B. 2790, 129th Leg., Reg. Sess. (Miss. 2014); H.B. 771, 100th Gen. Assemb., Reg. Sess. (Mo. 2019); H.B. 439, 98th Gen. Assemb., Reg. Sess. (Mo. 2015); H.B. 1585, 97th Gen. Assemb., Reg. Sess. (Mo. 2014); Assemb. 2157, 215th Leg., Reg. Sess. (N.J. 2013); Assemb. 6816, 242d Leg., Reg. Sess. (N.Y. 2019); Assemb. 6545, 238th Leg., Reg. Sess. (N.Y. 2015); S. 2286, 237th Leg., Reg. Sess. (N.Y. 2014); Assemb. 2533, 237th Leg., Reg. Sess. (N.Y. 2014); H.B. 90, 133d Gen. Assemb., Reg. Sess. (Ohio 2019); H.B. 570, 129th Gen. Assemb., Reg. Sess. (Ohio 2012); H.B. 1396, 57th Leg., 1st Sess. (Okla. 2019); S.B. 329, 80th Leg. Assemb., Reg. Sess. (Or. 2019); H.B. 3048, 80th Leg. Assemb., Reg. Sess. (Or. 2019); H.B. 3458, 78th Leg. Assemb., Reg. Sess. (Or. 2015); H.B. 4034, 78th Leg. Assemb., Reg. Sess. (Or. 2014); S.B. 21, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019); S. 2376, 2014 Gen. Assemb., Reg. Sess. (R.I. 2014); H. 7383, 2014 Gen. Assemb., Reg. Sess. (R.I. 2014); S.B. 1033, 86th Leg. Sess. (Tex. 2019); H.B. 2434, 86th Leg., Reg. Sess. (Tex. 2019); H.B. 113, 84th Leg., Reg. Sess. (Tex. 2015); H.B. 309, 83d Leg., Reg. Sess. (Tex. 2013); H.B. 98, 2014 Gen. Assemb., Reg. Sess. (Va. 2014); H.B. 2031, 82d Leg., Reg. Sess. (W. Va. 2015); H.B. 2371, 81st Leg., Reg. Sess. (W. Va. 2014); S.B. 173, 104th Leg., Reg. Sess. (Wis. 2019); Assemb. B. 182, 104th Leg., Reg. Sess. (Wis. 2019); S.B. 201, 101st Leg., Reg. Sess. (Wis. 2014); Assemb. B. 217, 101st Leg., Reg. Sess. (Wis. 2014).

13. While the U.S. Supreme Court refused to review the constitutionality of a sex-selective abortion statute last year, the Court suggests that it will conduct a review once more lower courts have addressed the issue. *See* *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1782 (2019).

Universalist human rights approaches often inform advocacy on reproductive rights.<sup>14</sup> An extreme version of that position calls for universal legal solutions to similar human rights problems that arise around the world. The alternative to universalism—cultural relativism—suggests that it is not possible nor normatively desirable for legal solutions to be uniform across jurisdictions.<sup>15</sup> Countries have used this viewpoint to permit obvious human rights abuses. Comparative law methods provide an exit to this intractable debate in international law. Context-sensitive comparative law methods do not assume that legal solutions are applicable across borders (unlike universalism), yet they do not reject that possibility (unlike cultural relativism).<sup>16</sup> The comparative analysis presented here of sex-selective abortion laws in the United States and India could inform the way in which U.S. legislators and judges approach those laws.

Scholarship on the movement of laws has not articulated robust methods to examine when, a priori, it is appropriate for one country to borrow laws or legal institutions from another country. Under the banner of the “law and development” movement, American scholars transplanted U.S. law in the 1960s and 1970s until the legal academy began to reject such transfers.<sup>17</sup> The scholarship critiquing the law and development movement called for the abandonment of the project of transplantation. As a result, the critics did not develop a methodology to determine when it would be appropriate to transplant a law in practice.<sup>18</sup>

A more recent strand of the transplant literature geared toward determining what makes a transplant successful has also neglected to present a framework to determine whether it is appropriate to transplant the law in the first place.<sup>19</sup> In those studies, success is defined as whether people and institutions in the reception country implement laws or, to put it another way, whether the laws have “adapted . . . to local conditions.”<sup>20</sup> There should be a broader definition of success. The question should not be whether the laws will “take hold” but whether they will serve the same purposes and have the same impact in the reception country as they did in the country where they were developed.

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14. See *infra* notes 167–84 and accompanying text.

15. See *infra* notes 185–89 and accompanying text.

16. See *infra* Section V.A.

17. See, e.g., David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1064, 1080 (describing “malaise” brought on by doubts about the social utility of law and development within the legal academic field).

18. See *id.*

19. Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMPAR. L. 163, 167 (2003).

20. *Id.*

The comparative approach presented here helps to develop a robust methodology for studying any type of transplant regardless of the economic strength of the country in which it originated or the economic development of the receiving country. Studies aimed at identifying what makes transplants successful have tended to focus only on factors in the receiving country.<sup>21</sup> The comparative analysis of sex-selective abortion laws reveals that the purpose, scope, consequences, and other factors in the country of origin of a transplant matter a great deal to determining whether a transplant is appropriate in the receiving country.

One challenge to defining a reverse legal transplant is that there is no consensus or attempt made in the literature to identify what constitutes a legal transplant. Is something considered a transplant only if it moves between nations, or do intra-nation borrowings count as legal transplants? Is the use of foreign precedent by judges a transplant? This Article outlines a set of characteristics of modern legal transplants to guide the literature review and identify the features of the case study that qualify it as a transplant.

This Article proceeds in five parts. Part I provides an overview of the evolution of the term “legal transplant” in the scholarship and a historical overview of transplants in practice. Section I.B fills a gap in the literature by identifying a set of characteristics of legal transplants and explaining where there are points of consensus and grey areas in the definition.

Part II examines whether, in the modern era, the movement of laws is connected to the relative economic power of nations. Through a study of the transplant literature (Section II.A), this Article finds that most transplants documented in the literature observe movements from economically powerful countries to countries with lower levels of economic development (Section II.B).

This Article argues that limitations on sex-selective abortion are an example of a reverse legal transplant. Section III.A documents the proliferation of sex-selective abortion statutes in the United States. Section III.B explains why those laws are reverse legal transplants by demonstrating that they satisfy the characteristics of transplants.

Indian feminists pushed for restrictions on a woman’s ability to abort a fetus on the basis of its sex, and similar restrictions are being advocated by pro-life groups in the United States. Initially, when they were introduced, pro-choice representatives were unsure about how to react to the laws. Section IV.A demonstrates that some pro-choice legislative representatives even voted in favor of sex-selective abortion restrictions. Section IV.B explains that this lack of clarity on the part of pro-choice people stems from using a universalist human rights lens to understand the prohibitions. A comparative approach presents a

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21. See *infra* Section V.A.



path forward out of the universalist/cultural relativist debate in international law.

In evaluating sex-selective abortion laws in the United States and India, Section V.A exposes certain limitations of traditional comparative approaches. Authors who have studied what makes transplants succeed and fail often neglect to consider why the laws were enacted in the origin country and what behaviors they sought to address. This might be because they take for granted that laws of Global North countries are legally mature or reflect best practices. Section V.B applies a multidirectional and contextual comparative methodology to sex-selective abortion law in India and the United States.

### I. LEGAL TRANSPLANTS

Legal transplants have been the subject of significant scholarship within comparative law.<sup>22</sup> Section I.A. below explains the genesis of the term and the evolution of the modes of migration of transplants over time. Despite the enormous scope of the legal transplant literature, authors have not agreed on a definition of legal transplant. In Section I.B below, I identify key traits of transplants. This framework then provides appropriate parameters to guide the literature review in Part II and identify sex selective abortion statutes as reverse legal transplants in Part III.

#### A. *Legal Transplants: Theory and Practice*

Legal transplants generally refer to legal regimes, laws, legal policies, or legal rules that travel from one jurisdiction or legal system to another.<sup>23</sup> In early history, transplants were imposed by imperial rulers in their conquered territory. For example, French and Spanish laws were transported to what is now Louisiana, and British laws were spread to its colonies.<sup>24</sup> A wave of legal transplants started after World War II when the victorious countries rewrote

22. A search of the online database HeinOnline for the phrase “legal transplants” results in 3,790 articles. HEINONLINE, <https://home.heinonline.org> [<https://perma.cc/3VZY-JKFW>] (search in search bar for “legal transplants”) (search conducted Aug. 10, 2020).

23. See Goldbach, *Why Legal Transplants*, *supra* note 5, at 584. The term “legal transplants” is often attributed to a debate between Alan Watson and Otto Kahn-Freund. See Alan Watson, *Legal Transplants and Law Reform*, 92 L.Q. REV. 79, 81 (1976); *infra* notes 205–13 and accompanying text.

24. See Goldbach, *Why Legal Transplants*, *supra* note 5, at 586. Valerie Hans observes that:

The classic common law jury that was borrowed, transplanted, and translated in its new Argentine context was itself the product of a long line of successive transplantations across legal systems. Developing as a dispute resolution mechanism in medieval England, the English jury came to be considered as, in Blackstone’s words, “the glory of the English law.”

Valerie Hans, *Trial by Jury: Story of a Legal Transplant*, 51 L. & SOC’Y REV. 471, 479 (2017).

the constitutions of the defeated.<sup>25</sup> The popularity of transferring legal systems from powerful countries to less powerful countries again saw a resurgence in the 1960s and 1970s when legal academics, development agencies, and lawyers transplanted laws and legal concepts from “developed countries” to “developing countries.”<sup>26</sup>

That project, known as the law and development movement, was eventually abandoned by the legal academy. Scholars came to question the view that exporting liberal legalist models of law based on the U.S. legal system would improve economic development in other countries.<sup>27</sup> First, scholars who engaged in this work had little empirical knowledge about the countries whose legal systems they were designing.<sup>28</sup> But as they began their work in those countries, they soon realized the mismatch between their models and the empirical reality in the developing country.<sup>29</sup> Second, the lawyer-scholars realized that the liberal legalist model might not even accurately describe the legal system in the United States.<sup>30</sup> Third, there were doubts that the U.S. model was in fact appropriate to claim as the ideal.<sup>31</sup> Finally, the liberal legalist model developed in the United States was not suitable for countries around the world that did not have formal court systems or where pluralist notions of law prevailed.<sup>32</sup> The critics of the law and development movement were resigned to abandoning the law reform project. Consequently, they did not build a methodology to provide guidance to lawyers and other advocates interested in exporting or importing laws.

Ignoring earlier warnings,<sup>33</sup> a new resurgence of legal transplants began in the 1990s, but with less involvement from legal academia.<sup>34</sup> Laws were transplanted, for example, by lawyers drafting constitutions for newly democratic countries and by nongovernmental organizations working to

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25. See Mertus, *supra* note 5, at 1378; see also Louis F. Del Duca & Alain A. Levasseur, *Impact of Legal Cultural and Legal Transplants on the Evolution of the U.S. Legal System*, 58 AM. J. COMPAR. L. 1, 29 (2010) (tracing the history of transplantation from British and French law to the United States).

26. See JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 6–8, 12 (1980).

27. See Trubek & Galanter, *supra* note 17, at 1080.

28. *Id.* at 1090.

29. *Id.*

30. See *id.* at 1081, 1090–91.

31. See *id.* at 1091–92.

32. See *id.* at 1071.

33. William Twining, *Diffusion of Law: A Global Perspective*, 49 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 32 (2004) [hereinafter Twining, *Diffusion of Law*]; see also Mertus, *supra* note 5, at 1380 (“Whether the lessons of the law and development movement were heard is questionable.”).

34. Goldbach notes that legal reforms in the 1990s included strengthening court administration, drafting alternative dispute resolution mechanisms, and establishing bankruptcy and other court systems. See Goldbach, *Why Legal Transplants*, *supra* note 5, at 586.

promote legal reform.<sup>35</sup> In this era, not only were legal rules transplanted, but legal institutions, such as courts, were also strengthened.<sup>36</sup> Those activities were largely driven by economists and other nonlawyers working with practicing (rather than academic) lawyers.<sup>37</sup>

The legal transplants observed during the modern waves were driven not solely by governments but also by multilateral institutions (such as the World Bank) and foundations hoping that legal systems tied to economically powerful countries would lay the foundation for economic growth when exported to less developed countries.<sup>38</sup>

Comparative law scholars point out that, even today, economically powerful countries use law as a way to plunder less powerful countries. Under the guise of “rule of law,” powerful countries and the institutions they control force Global South countries to adopt laws that allow for Global North countries to devastate them economically.<sup>39</sup> While this critique is valid, not all transplants manifest this kind of ulterior motive. Some Global North actors transplant laws because they genuinely believe they will benefit Global South economies. Furthermore, Global South actors sometimes voluntarily borrow laws as a ruse to gain legitimacy among multinational organizations.<sup>40</sup>

Scholars have presented numerous theories about why laws flow from Global North nations to Global South nations, but there is little discussion in the literature about the reverse movement. In the contemporary era, actors in all countries have access to the laws of other countries through the internet. This access allows individuals, governments, and groups to evaluate laws from other countries as potential models for their own countries.<sup>41</sup> Yet, as demonstrated in Part II below, the literature does not appear to document movements from Global South countries to Global North countries.

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35. See Lis Wiehl, *Constitution, Anyone? A New Cottage Industry*, N.Y. TIMES (Feb. 2, 1990), <https://timesmachine.nytimes.com/timesmachine/1990/02/02/issue.html> [https://perma.cc/WU6U-ZYV7 (dark archive)].

36. See Goldbach, *Why Legal Transplants*, *supra* note 5, at 586.

37. See Wiehl, *supra* note 35. But see the well-known example of Noah Feldman, now law professor at Harvard Law School, who assisted in drafting the Iraqi constitution. Madeleine Brand, *Next Steps for Iraq's Constitution Authors*, NPR (Aug. 23, 2005, 12:00 AM), <https://www.npr.org/templates/story/story.php?storyId=4811914> [https://perma.cc/L4GC-YZXE].

38. Under Miller's typology, these would be “externally dictated” transplants. Miller, *supra* note 1, at 847.

39. MATTEI & NADER, *supra* note 9, at 35–38.

40. Miller, *supra* note 1, at 840.

41. See generally STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 223–24 (1999) (discussing how Global South countries have adopted political practices of the Global North for recognition of international legal sovereignty); see also GARDNER, *supra* note 26, at 12 (describing how the American legal assistance began to change as its perspective shifted beyond state instrumentalism and into the study of foreign legal and social institutions).

The transplant literature continues to grow to reflect the new actors involved in transplantation and the new modes of migration of laws. As the literature organically expands, it is time to take stock and build parameters around the term “legal transplant.” In the section below, I articulate an understanding of legal transplants that guides the research described in Part II and use this framework to determine that sex-selective abortion statutes in the United States qualify as transplants.

B. *Legal Transplants: A Category in Need of Clarity*

The phrase “legal transplants” appears in thousands of articles.<sup>42</sup> However, authors imbue it with different meanings. To further confound the situation, the category has broadened over time to reflect the new ways in which laws migrate in the modern world. For example, whereas governments in the past were (often coercive) spreaders of law,<sup>43</sup> today, activists, lawyers, and transnational networks assist in the process of legal transplantation. Although authors have undertaken empirical and theoretical studies on transplants, much of the literature is in the form of case studies of transplants.<sup>44</sup>

The intersection between the “diffusion of law” literature and the legal transplant literature is another area that lacks clear boundaries. The term “diffusion” brings to mind the way in which gas spreads. As such, the diffusion literature is not very concerned with the actors involved in the movement of laws or the source and destination of the law.<sup>45</sup> On the other hand, legal transplant scholars sometimes present law as an organ that is transplanted from one patient to another.<sup>46</sup> Like the organ, the law must be the right fit for the recipient, and specialists may need to modify it so that it is successfully

42. *Supra* note 22 and accompanying text.

43. Twining describes the traditional legal transplant as follows:

[A] bipolar relationship between two countries involving a direct one-way transfer of legal rules or institutions through the agency of governments involving formal enactment or adoption at a particular moment of time (a reception date) without major change. Although not explicitly stated in this example, it is commonly assumed that the standard case involves transfer from an advanced (parent) civil or common law system to a less developed one, in order to bring about technological change (‘to modernize’) by filling in gaps or replacing prior local law. There is also considerable vagueness about the criteria for ‘success’ of a reception—one common assumption seems to be that if it has survived for a significant period ‘it works’.

Twining, *Diffusion of Law*, *supra* note 33, at 15–16 (emphasis omitted).

44. Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 AM. J. COMPAR. L. 583, 588 (2010) (criticizing the proliferation of “countless case studies”).

45. See William Twining, *Social Science and Diffusion of Law*, 32 J.L. & SOC’Y 203, 237 (2005) [hereinafter Twining, *Social Science*] (“Legal scholarship [of diffusion of laws] has tended to neglect such ‘bottom-up’ perspectives.”).

46. Goldbach, *Why Legal Transplants*, *supra* note 5, at 584.

incorporated by the recipient.<sup>47</sup> Scholars often discuss legal transplants and diffusion of law interchangeably.<sup>48</sup> However, the concept of diffusion is much broader.<sup>49</sup>

Although there is no accepted set of characteristics of legal transplants,<sup>50</sup> authors have created typologies of them. Those typologies sort transplants into categories based, for example, on motivations of transplanters.<sup>51</sup> However, those typologies do not identify what is considered a legal transplant in the first place.

Below, I articulate the features of modern legal transplants as they have been discussed in the literature. Some characteristics are universally agreed upon, but the category continues to expand as authors use the term to describe new methods and paths of migration. There are, however, limits to how far the term can be expanded without becoming meaningless.

### 1. Laws, Legal Institutions, and Legal Procedures Are the Subject of the Migration

The transplant literature initially included only the movement of laws, legal institutions, and legal procedures.<sup>52</sup> Broadening the category even further, authors have used the term legal transplants in association with the migration of policies between private entities.<sup>53</sup> In addition, others have suggested that

47. See *id.* (citing Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998)).

48. See, e.g., CHRISTA RAUTENBACH, JAMES GALLEN & SUE FARREN, *DIFFUSION OF LAWS: MOVEMENT OF LAWS AROUND THE WORLD 1* (Sue Farran, James Gallen, Jennifer Hendry & Christa Rautenbach eds., 2015) (“[D]iffusion of laws has been an important topic . . . at least since the publication of Alan Watson’s inspiring book *Legal Transplants*.”).

49. See Jeremy Forman, *A Tale of Two Regions: Diffusion of the Israeli “50 Percent Rule” from the Galilee to the Occupied West Bank*, 34 L. & SOC. INQUIRY 671, 675 (2009) (“Overall, social science diffusion literature focuses on developing theories and models to explain when and why people adopt new inventions, ideas, and practices, and the spatial form assumed by their spread. Here, it is especially important to note that social science diffusion literature has said little about law.”).

50. David Nelken suggests that there is a need to consider new developments and identify unifying characteristics, plus also identify differences among transplants. David Nelken, *Comparativists and Transferability*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 437, 459 (Pierre Legrand & Roderick Munday eds., 2003).

51. See Miller, *supra* note 1, at 843 (“[I]t is now comparatively easy to use the literature to develop a typology of transplants based on the factors that motivate them.”); see also Cohn, *supra* note 44, at 591–96 (identifying a number of typologies of legal transplants in the literature, including whether transplants are forced or voluntary on the part of the receiving countries, the level of success or failure of a transplant, the motivations of exporters or importers, and the identity of the exporter).

52. The early transplants were often entire civil or criminal codes exported from colonizers to the colonized that displaced existing codes or “filled gaps” where specific laws did not previously exist. The modern transplants are more likely to be discrete laws, rules, legal norms, procedures, or provisions in constitutions. Cohn, *supra* note 44, at 585 (stating that transplants today are not large-scale movements of law but rather concern a specific field of law).

53. See *infra* note 94 and accompanying text.

the use of foreign norms or rules in trials of indigenous people in Canada<sup>54</sup> or immigrants in the United Kingdom<sup>55</sup> are legal transplants. The diffusion of law literature includes within its ambit the migration of foreign precedent in case law,<sup>56</sup> as well as the movement of symbols, rituals, and legal phenomena. For purposes of the literature review in Part II below, only migrations of law, legal institutions, or legal procedures are considered transplants.

## 2. The Migration Is Between Nation-States

Likely because the study of legal transplants emerged in the comparative law literature, the term was initially used to describe migrations between nation-states. Many of the documented early transplants were indeed from colonial nations to colonized entities.<sup>57</sup> Arguably, the migration of laws within different political units in one country could be considered a transplant. However, I limit my examination of the literature in Part II below to nation-to-nation transplants.

## 3. There Are a Variety of Actors Involved in the Exporting/Importing

Modern legal transplants have been driven by actors in both countries exporting the laws and countries where the law is received. In the exporting countries, foreign aid, donors who support law reform projects, or intergovernmental agencies might push for legal change in foreign countries.<sup>58</sup> Similarly, a host of actors can play a role in the process of importation in the receiving country. They include nongovernmental organizations, transnational networks of experts, and transnational civil society.<sup>59</sup> Legal norms are also spread and exchanged through a network of scholars.<sup>60</sup> People who were

54. See Toby S. Goldbach, *Instrumentalizing the Expressive: Transplanting Sentencing Circles into the Canadian Criminal Trial*, 25 *TRANSNAT'L L. & CONTEMP. PROBS.* 61, 82 (2015) [hereinafter Goldbach, *Instrumentalizing the Expressive*].

55. See Prakash Shah, *Globalisation and the Challenge of Asian Legal Transplants in Europe*, 2005 *SING. J. LEGAL STUD.* 348, 348.

56. See, e.g., ANDREW NOVAK, *Transnational Legal Citation as Method of Norm Diffusion*, in *TRANSNATIONAL HUMAN RIGHTS LITIGATION: CHALLENGING THE DEATH PENALTY AND CRIMINALIZATION OF HOMOSEXUALITY IN THE COMMONWEALTH* 37, 37–61 (2020) (discussing the way foreign courts cite one another's decisions as a method of norm diffusion).

57. Early literature primarily reveals the examination of nation-to-nation transfers. See, e.g., Watson, *supra* note 23, at 82–83 (examining the transfer of law between France, Germany, and Japan).

58. MATTEI & NADER, *supra* note 9, at 35–38.

59. See Slaughter, *supra* note 5, at 12, 19–26; see also Goldbach, *Why Legal Transplants*, *supra* note 5, at 590 (pointing out that laws migrate as a result of transnational expert networks, international organizations, and private contracting parties); Mertus, *supra* note 5, at 1340 (focusing on the importance of transnational civil society in norm creation).

60. See Hans, *supra* note 24, at 473 (“My specific interest is to assess the role of collaborative working groups of scholars, including the Law and Society Association’s (LSA) inventions of Collaborative Research Networks (CRNs) and International Research Collaboratives (IRCs). I discuss how these groups allow us to compare, contrast, and study legal institutions and their international movements.”).

educated abroad, particularly in the United States, have also borrowed from U.S. law to reform legal institutions in their home countries.<sup>61</sup>

#### 4. Transplants Have Multiple Origins

When a country seeks to design a new law, it will likely look for models from multiple countries or jurisdictions.<sup>62</sup> In addition, it is possible for one country to influence the laws of multiple countries.<sup>63</sup> There might also be intermediaries in the transplant process. Maximo Langer, for example, describes how Latin American experts pushed for criminal procedure norms and involved the United States Agency for International Development (“USAID”) in their work, and then those norms later migrated to other Latin American countries.<sup>64</sup>

#### 5. Laws Often Transform When They Migrate

To count as a legal transplant, the law or legal rule does not need to remain exactly the same when it migrates across borders. One scholar has famously argued that because laws are transformed when they migrate, legal transplants are impossible.<sup>65</sup> A less extreme view would dictate that it is not that transplants are impossible, but that when a law moves from one context to another it changes significantly—perhaps so much so that it is no longer comparable to the law in its original setting. Furthermore, when a country adopts a law from another country, the law may have a different impact in the receiving country.<sup>66</sup> For example, U.S. civil and criminal procedures have been implemented disparately across a range of countries where they were transplanted (including Germany, Italy, Argentina, and France).<sup>67</sup> As a normative matter, foreign laws

61. See Toby S. Goldbach, Benjamin Brake & Peter J. Katzenstein, *The Movement of U.S. Criminal and Administrative Law: Processes of Transplanting and Translating*, 20 IND. J. GLOB. LEGAL STUD., 141, 163–67 (2013) (demonstrating how students from China who studied in the United States influenced China to adopt U.S.-style criminal procedures).

62. Margit Cohn demonstrates how concepts of proportionality and unreasonableness have evolved in the United Kingdom and traces their source to multiple jurisdictions. See Cohn, *supra* note 44, at 607–08, 620–21 (“In this series of transplants, no single source was solely decisive, and different degrees of translation or distortion are apparent.”).

63. See Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L.J. 1, 3 (2004) [hereinafter Langer, *From Legal Transplants*].

64. See Langer, *Revolution*, *supra* note 8, at 619.

65. See Pierre Legrand, *The Impossibility of ‘Legal Transplants’*, 4 MAASTRICHT J. EUR. & COMPAR. L. 111, 123–24 (1997); see also Julio Carvalho, *Law, Language, and Knowledge: Legal Transplants from a Cultural Perspective*, 20 GER. L.J. 21, 24 (2019) (arguing that the concept of legal transplants assumes that different legal cultures share the same epistemological accounts of what is meant by law).

66. Langer, *From Legal Transplants*, *supra* note 63, at 32–35 (proposing the metaphor of “legal translation” rather than “legal transplant” to capture how laws are integrated into a reception country).

67. *Id.* at 3.

should be adapted to local environments to better ensure successful implementation.<sup>68</sup>

#### 6. Actors Doing the Exporting/Importing May Have Multiple Motives

People borrow laws from other countries to save time, and sometimes foreign-trained lawyers adopt foreign laws from countries where they were trained to enhance their own practice.<sup>69</sup> Laws are also externally dictated by foreign donors or governments.<sup>70</sup> Further, exporters or importers might have other motives for referring to the law of another country. Colonial transplanters, for example, wanted to facilitate administration of their colonies through legal transplantation.<sup>71</sup> In the modern era, laws are sometimes transplanted with the goal of promoting a neoliberal vision of economic development and growth. Certain legal rules are advanced because they will decrease barriers to foreign investment and ownership in Global South countries.<sup>72</sup> Less economically developed countries borrow the laws from economically powerful countries as a way to gain legitimacy.<sup>73</sup> Some, for example, have pointed out that Singapore adopted the U.S. model for independent directors on boards of directors only as a way to enhance sources of foreign investment, since U.S.-style corporate law would have appealed to potential investors.<sup>74</sup> Thus, the legal transplant literature does not exclude categorizing something as a transplant just because there are multiple or hidden motives behind the importation of the law.

#### 7. Multiple Sources of Evidence Can Be Used To Conclude That the Exporting/Importing Has Happened

There are several ways to trace transplantations. Actors involved in the transplantation might make public statements about the use of foreign laws. The statements might appear in the media or be written in the legislation or policy itself. Another way to trace the transplantation is to examine the text of law to see if it resembles laws, procedures, or norms in other countries.<sup>75</sup>

68. Berkowitz et al., *supra* note 19, at 189–90.

69. Miller, *supra* note 1, at 845–46, 850–52.

70. *Id.* at 847–49.

71. MATTEI & NADER, *supra* note 9, at 26–28.

72. *See id.* at 22.

73. *See* John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT'L L. 357, 388 (1981); Miller, *supra* note 1, at 839–40.

74. Dan W. Puchniak & Luh Luh Lan, *Independent Directors in Singapore: Puzzling Compliance Requiring Explanation*, 65 AM. J. COMPAR. L. 265, 293 (2017).

75. In an empirical study, the author “looks for foreign influences in the legislative history as documented in official reports, treatises on the subject, or law journals” in statutes and also points to verbatim copying of statutes. Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 BYU L. REV. 1813, 1825.



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Section I.B above articulates the general characteristics of modern legal transplants as used by legal transplant scholars. Using the traits of legal transplants identified above, I conducted a literature review, which I describe in the next part.

## II. THE DEARTH OF REVERSE LEGAL TRANSPLANTS

This Article focuses on an aspect of legal transplants that has not received much attention in the literature—transplants from the Global South to the Global North. Scholars have explained why there are legal transplants from the Global North to the Global South. Some have observed, for example, that law continues to be used by powerful nation-states and international institutions to plunder economically weaker nations.<sup>76</sup> Others have found that legal transplants occur to stimulate foreign investments by pursuing a veneer of legitimacy.<sup>77</sup> Still others have noted that Global South actors facilitate the transplant of laws from the Global North.<sup>78</sup> The transplant literature, however, has not attempted to ascertain whether or not laws flow in the opposite direction. The paucity of attention on this subject is what this Article aims to rectify.

During colonial times, transplants were unidirectional because they were used mainly by imperial nations to control their colonies.<sup>79</sup> Today's transplants, on the other hand, are not always the work of coercive government entities but involve individuals, lawyers, organizations, and other groups in both the origin and reception countries.<sup>80</sup> As such, one would expect people to seek out laws in other countries that address similar concerns that they are attempting to address at home. People borrow to save time. A country that is less economically developed than another country may have designed innovative solutions to problems that are worth examining.

In this part, I analyze the literature to determine the types of transplants scholars have documented. Section II.A explains the methodology used for the literature review, and Section II.B reports the findings of the review.

### A. *Literature Review: Methodology*

I designed a study of the legal transplant literature to ascertain the directions of observed transplants. The goal of this review was to determine

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76. See MATTEI & NADER, *supra* note 9, at 35–38.

77. See Miller, *supra* note 1, at 854–55.

78. See Langer, *Revolution*, *supra* note 8, at 618, 622.

79. See MATTEI & NADER, *supra* note 9, at 21–22.

80. See *supra* Section I.B.3.

which of the following pathways laws, legal procedures, and legal institutions have been observed to take: (1) from a Global North country to a Global South country (referred to as a “traditional legal transplant”), (2) from a Global North country to a Global North country or a Global South country to a Global South country (referred to as a “horizontal legal transplant”), or (3) from a Global South country to a Global North country (which I call a “reverse legal transplant”). “Vertical transplants,” which describe migrations from the international level to nation-states,<sup>81</sup> are not included in this study.

In conducting this research, I defined legal transplants using the characteristics developed in Part I above. Sticking closer to a more traditional definition of a transplant, I excluded any observations in the articles that involved (1) legal migrations other than between nation-states; and (2) movement of anything other than laws, institutions, or legal procedures (for example, migration of human rights policies between businesses would be excluded).

In determining whether a country that is involved in a transplant is a “Global South” country or a “Global North” country in relation to the other, I used the gross domestic product per capita (“GDP per capita”) as reported in a UN database as a proxy for the country’s level of economic development.<sup>82</sup> Specifically, I used the GDP per capita of the country in the year that the transplant was documented.

I limited the search to articles published from January 1, 1980, to January 1, 2020, in the JSTOR database<sup>83</sup> that contained the phrase “legal transplants.” This search resulted in 614 articles and the results appeared in the order of relevance. Working with a research assistant, I reviewed all 614 of those articles in the order they appeared.

81. Anna Dolidze, *Bridging Comparative and International Law: Amicus Curiae Participation as a Vertical Legal Transplant*, 26 EUR. J. INT’L L. 851, 853 (2015).

82. *Per Capita GDP at Current Prices – US Dollars*, UNDATA (Feb. 10, 2020), <http://data.un.org/Data.aspx?q=GDP+per+capita&d=SNAAMA&f=grID%3a101%3bcurrID%3aUSD%3bpcFlag%3a1> [https://perma.cc/D5YC-5563]. There are other measures for development. For example, the human development index ranks countries not only on economic growth but also on literacy, health, and other indicators. *Human Development Index (HDI)*, UNITED NATIONS DEV. PROGRAMME: HUM. DEV. REPS., <http://hdr.undp.org/en/content/human-development-index-hdi> [https://perma.cc/2V4H-AFSB]. Political scientists have developed their own methodologies for measuring the relative political power of nations in the world. See, e.g., Michael Beckley, *The Power of Nations: Measuring What Matters*, 43 INT’L SEC. 7, 9 (2018) (developing a “net indicator” framework that “does a better job . . . at tracking the rise and fall of great powers, . . . predicting war and dispute outcomes, and serving as a control variable in statistical models of various aspects of international relations”). While some combination of political power and economic power likely impact the direction of legal transplants, in this Article I use a pure economic measure for simplicity’s sake—GDP per capita—to determine whether a country is more economically powerful than another country.

83. Search conducted on September 5, 2020. I chose JSTOR over Westlaw or LexisNexis because it contains a wider array of sources both beyond the United States and outside of the legal discipline.

I excluded certain articles and transplants from the literature review. Namely, I intentionally excluded the following types of transplants and articles from the study: (1) transplants that relate to the movement of laws from imperial nations to their colonies (because this Article aims to understand movements in the modern era); (2) articles that discussed legal transplants generally but did not provide any examples of them; (3) transplants from any origin and destination other than nation-states (for example, transplants between private entities were excluded); and (4) transplants involving anything other than laws, legal procedures, or institutions. Thus, only seventy articles had examples of transplants. In some of the articles that I did use, on the other hand, I found more than one observation of a transplant.

Laws that migrated from a country with a higher GDP per capita to a lower GDP per capita were defined as traditional legal transplants. Laws that migrated from a country with a lower GDP per capita to a country with a higher GDP per capita were considered reverse legal transplants. Legal movements between countries with *relatively* the same GDP per capita were considered to be “horizontal legal transplants.”<sup>84</sup> This study intentionally defined horizontal legal transplants narrowly in order to capture as many reverse legal transplants as possible.

A transplant was identified as a horizontal transplant using the following methodology. First, we determined the amount equal to thirty percent of the GDP per capita of the country with the higher GDP per capita (the “Range”). Second, we subtracted the GDP per capita of the country with the lower GDP per capita from the GDP per capita of the country with the higher GDP per capita (the “Difference”). Third, the transplant was considered a horizontal legal transplant only if the Range was greater than the Difference. Otherwise, it was categorized as a reverse legal transplant or traditional legal transplant.

I present an example to demonstrate that the formula for determining a horizontal legal transplant is relatively conservative. For example, under this formula, even a transplant from Spain to Germany in 2018 would be considered a reverse legal transplant. Germany’s GDP per capita in 2018 was \$47,514 and Spain’s was \$30,406.<sup>85</sup> Arguably, the GDP per capita of the two countries and their status as nations that are part of the European Union might suggest that any legal movement between them should be considered a horizontal legal transplant.

Creating a narrow range for what qualified as a horizontal legal transplant increased the number of observations that were considered reverse legal

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84. When I refer to horizontal legal transplants, I focus on the economic power of the nations involved in the transplantation. The term has also been used to refer to the collaboration between law deans and law professors in the United States and China. Matthew S. Erie, *Legal Education Reform in China through U.S.-Inspired Legal Transplants*, 59 J. LEGAL EDUC. 60, 86–87 (2009).

85. *Per Capita GDP at Current Prices – US Dollars*, *supra* note 82.

transplants (as well as traditional legal transplants). One hypothesis of this Article is that scholars have not written significantly about reverse legal transplants. By creating a broader category for what qualified as a reverse legal transplant, I averted objections that the methodology unduly tilted the equation in favor of proving my hypothesis.

It might seem that the methodology has some limitations. First, the search of a database of articles excludes a wealth of transplants documented in academic books.<sup>86</sup> Second, even within a database of articles, by using the search term “legal transplants,” the literature review would not capture articles that do not use that term but do discuss the migration of laws, institutions, and procedures across borders.<sup>87</sup>

While this is a valid critique, there is no reason to believe that certain types of transplants were disproportionately excluded over others. The total number of observations might have been greater if the study included books and articles that discuss migrations of law without using the phrase “legal transplants.” However, the proportion of the observations of transplants in relation to each other (for example, traditional legal transplants, horizontal legal transplants, and reverse legal transplants) might not have been very different than reported in Table 1 below even if more observations of transplants were included in the study.

B. *Literature Review: Findings*

Table 1: Direction of Movement of Transplants

Type of Transplant	Direction of Movement	Number of Observations
Traditional Legal Transplant	Global North to Global South	199
Horizontal Legal Transplant	Global North to Global North or Global South to Global South	24
Reverse Legal Transplant	Global South to Global North	5

86. See, e.g., MITCHEL DE S.-O.-L'É. LASSER, *JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE 206–07* (2009) (discussing how fundamental rights have spread across European courts).

87. See, e.g., Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMPAR. L. 103, 105 (2009) (observing that judicial councils for the appointment of judges have spread across the world but never using the term “legal transplants”).

The findings of this review of articles on legal transplants demonstrates that the great majority of transplants (namely one hundred and ninety-nine) observed in the literature are traditional legal transplants—for example, transplants from Global North countries to Global South countries. Twenty-four horizontal legal transplants have also been observed, which are transplants between countries of relatively similar GDPs per capita.<sup>88</sup> Many transplants considered traditional legal transplants might also be appropriately considered horizontal legal transplants, but the category of horizontal legal transplants was designed to be very narrow for the reasons discussed above.

In only five cases did the literature document legal borrowings by a country with a higher GDP per capita from a country with a lower GDP per capita. In particular, Turkey borrowed laws from India,<sup>89</sup> Swaziland used legal norms from Uganda,<sup>90</sup> Japan borrowed from Germany,<sup>91</sup> South Africa from India,<sup>92</sup> and Bhutan used laws from India.<sup>93</sup>

The disparity between the GDP per capita between countries where reverse legal transplants have been observed is not very stark because (as discussed above) what qualifies as a horizontal legal transplant was narrowly tailored. As mentioned above, I used a relatively conservative range to determine whether or not a transplant was horizontal so that we could identify as many reverse legal transplants as possible.

Although this study can only definitively comment on what types of transplants are written about in the legal transplant literature, the results likely also reflect the directionality of transplants in practice. In other words, there are few reverse legal transplants in practice. As noted above, it is not likely that

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88. Legal migrations between regional institutions could also be considered a type of horizontal legal transplant. It is interesting to note that in the literature review, in all the examples of migration of laws between regional institutions, the sending institution was located in the Global North and the receiving institution in the Global South. *See, e.g.*, Karen J. Alter, Laurence R. Helfer & Osvaldo Saldías, *Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice*, 60 AM. J. COMPAR. L. 629, 632 n.14 (2012) (finding that the European Court of Justice inspired the creation of a number of similar bodies around the world and eight of those bodies were in Global South countries and the other two were in countries located in the Global North).

89. *See* Twining, *Social Science*, *supra* note 45, at 224 (“In preparation of [the Turkish] Constitution, wide use was made of the West German and Italian models, the provisions on economic development being insured by the Indian model of 1949.”).

90. Doron Shultziner & Guy E. Carmi, *Human Dignity in National Constitutions: Functions, Promises and Dangers*, 62 AM. J. COMPAR. L. 461, 479 (2014).

91. Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West, *Evolution of Corporate Law and the Transplant Effect: Lessons from Six Countries*, 18 WORLD BANK RSCH. OBSERVER 89, 101 (2003).

92. Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMPAR. L. 657, 705 (2013).

93. Alessandro Simoni & Richard Whitecross, *Gross National Happiness and the Heavenly Stream of Justice: Modernization and Dispute Resolution in the Kingdom of Bhutan*, 55 AM. J. COMPAR. L. 165, 174 (2007).

this literature review of articles using the phrase “legal transplants” would disproportionately exclude one type of transplant over another. Thus, even if books and articles that describe legal transplants without using that term were included, it would not likely change the proportion as between the three categories of transplants discussed here.

Reverse migrations of norms (rather than laws) outside of the context of transfers between nation-states are worth noting. Multinational companies spread human rights as well as other norms around the world by forcing vendors in their supply chain to adopt certain policies.<sup>94</sup> Such transplants also mark a one-way stream from corporations based in the Global North to vendors and suppliers in the Global South.<sup>95</sup>

Other reverse migrations involve judges who utilize certain norms for specific cases. First, Toby Goldbach observes that some Canadian judges use traditional indigenous methods, such as sentencing circles, when sentencing indigenous peoples.<sup>96</sup> Second, Prakash Shah has proposed that judges in the United Kingdom use certain norms (such as Sharia law) when adjudicating cases involving immigrants.<sup>97</sup> In both of those cases, legal rules are not being adopted to inform general policy or govern the mainstream group but only to resolve how to treat minority communities in specific trials. While sex-selective abortion statutes, the reverse legal transplant discussed in Part III, were adopted to purportedly address the behavior of Asian immigration, they apply more broadly to every pregnant person in the United States.

In sum, the transplant literature largely documents the migration of laws, legal institutions, and legal procedures from Global North to Global South countries. A modest number of transplants between nation-states with relatively similar levels of growth have also been observed. However, very few transplants from countries with lower levels of economic growth to countries

94. See Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMPAR. L. 711, 741 (2009) (arguing that private contracts with vendors in China have resulted in “bottom-up” legal transplants with eventual impact on nationwide policy shifts); see also Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J.L. & SOC’Y 20, 43–45 (2011) (discussing the rulemaking and regulation-making power of private industry); Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 147, 156–61 (2013) (describing the expansion of the private governance of environmental law through bilateral agreements created for supply chains, mergers and acquisitions, and commercial loans, and noting that “bilateral standard-setting need not be motivated by altruism to be characterized as private environmental governance so long as it induces a private entity to achieve a traditionally governmental objective”).

95. See Lin, *supra* note 94, at 741.

96. See Goldbach, *Instrumentalizing the Expressive*, *supra* note 54, at 64–66.

97. See Shah, *supra* note 55, at 356–58. Although they have not used the lens of legal transplants, other authors have also discussed the migration of evidence of foreign cultures or customs in trials of immigrants. See Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals’ Dilemma*, 96 COLUM. L. REV. 1093, 1093–94 (1996); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the Cultural Defense*, 17 HARV. WOMEN’S L.J. 57, 57–58 (1994).

with higher levels of growth appear in the articles studied. In the next part, I present a case study of a reverse legal transplant.

### III. A REVERSE LEGAL TRANSPLANT: SEX-SELECTIVE ABORTION STATUTES

Laws that are aimed at preventing a person from aborting a fetus on the basis of its predicted sex have been proliferating in the United States in the last several years, as described in Section III.A. The initial bills referred to India's prohibitions on sex determination. Using the traits of legal transplants elaborated in Part I, I explain why the U.S. state statutes are reverse legal transplants in Section III.B below.

#### A. *The Proliferation of Sex-Selective Abortion Statutes*

Since 2009, nearly half of all state legislatures have considered bills to prohibit sex-selective abortion.<sup>98</sup> Today, laws prohibiting women from terminating their pregnancies because of the sex of the fetus are effective in nine states.<sup>99</sup> These statutes forbid a medical professional from performing an abortion if they know that the patient's motive for the abortion is the predicted biological sex of the fetus.<sup>100</sup>

The majority of the U.S. House of Representatives voted in favor of a similar ban in 2012.<sup>101</sup> That same year, anti-sex-selective abortion legislation

98. See *supra* note 12 and accompanying text.

99. The nine states that prohibit women from terminating their pregnancies because of the sex of a fetus are Arizona, Arkansas, Kansas, Mississippi, North Carolina, North Dakota, Oklahoma, Pennsylvania, and South Dakota. See ARIZ. REV. STAT. ANN. § 13-3603.02(A)(1) (Westlaw through the 2d Reg. Sess. of the 54th Leg.); ARK. CODE ANN. § 20-16-1904(a) (LEXIS through all legislation of the 2020 1st Extraordinary Sess. and the 2020 Fiscal Sess.); KAN. STAT. ANN. § 65-6726(a) (Westlaw through laws enacted during the 2020 Reg. and Spec. Sess. of the Kansas Leg. effective on or before July 1, 2020); Life Equality Act of 2020, § 2(2), 2020 Miss. Laws Adv. Sh. H.B. 1295 (LEXIS through 2020 Legis. Sess.) (to be codified); N.C. GEN. STAT. ANN. § 90-21.121(a) (LEXIS through Sess. Laws 2020-94 of the 2020 Reg. Sess.); N.D. CENT. CODE ANN. § 14-02.1-04.1(1)(a) (LEXIS through all acts approved by the governor through the end of the 2019 Reg. Leg. Sess.); OKLA. STAT. ANN. tit. 63, § 1-731.2(B) (Westlaw through enacted legislation of the 2d Reg. Sess. of the 57th Leg.); 18 PA. STAT. AND CONS. STAT. ANN. § 3204(c) (Westlaw through 2020 Reg. Sess. Act 78); S.D. CODIFIED LAWS § 34-23A-64 (Westlaw through 2020 Sess. Laws, Exec. Order 20-31 and Supreme Court Rule 20-06). Illinois adopted a ban in 1975 but repealed the law in 2019. See Illinois Abortion Law of 1975, Pub. Act No. 79-1126, 1975 Ill. Laws 3462, *repealed by* Reproductive Health Act, Pub. Act No. 101-0013 (codified at 755 ILL. COMP. STAT. ANN. 55/1-1 to 55/999-999 (Westlaw through Pub. Act 101-651)).

100. See ARIZ. REV. STAT. ANN. § 13-3603.02(A)(1) (Westlaw); ARK. CODE ANN. § 20-16-1904(a) (LEXIS); KAN. STAT. ANN. § 65-6726(a) (Westlaw); Life Equality Act of 2020, § 2(2); N.C. GEN. STAT. ANN. § 90-21.121(a) (LEXIS); N.D. CENT. CODE ANN. § 14-02.1-04.1(2) (LEXIS); OKLA. STAT. Ann. tit. 63, § 1-731.2(C)-(D) (Westlaw); 18 PA. STAT. AND CONS. STAT. ANN. § 3204(d) (Westlaw); S.D. CODIFIED LAWS § 34-23A-64 (Westlaw).

101. See Ed O'Keefe, *Bill Banning 'Sex-Selective Abortions' Fails in the House*, WASH. POST (May 31, 2012), <https://www.washingtonpost.com/blogs/2chambers/post/bill-banning-sex-selective-abortions->

was the second most proposed anti-abortion legislation in the United States.<sup>102</sup> A case involving the constitutionality of sex-selective abortion bans has even reached the U.S. Supreme Court.<sup>103</sup> Although the Court refused to review the Seventh Circuit's finding that the statute in question was unconstitutional, the Court, in an unusual move, gave a reason for why it denied certiorari.<sup>104</sup> The Court indicated that it wanted to give more appeals courts the opportunity to review similar statutes.<sup>105</sup> In his concurring opinion, Justice Thomas made it clear that he did not agree with the lower court's opinion.<sup>106</sup>

A doctor who performs an abortion and has knowledge that a woman is seeking an abortion due to the sex of the fetus faces criminal liability in many states that ban sex-selective abortion.<sup>107</sup> But if an abortion seeker does not volunteer her motive, how will a medical professional determine if sex plays a role? To get at this issue, some states require medical professionals to inquire about the reasons why a woman is seeking to terminate her pregnancy. For example, South Dakota's law banning sex-selective abortion requires medical professionals to "[i]nquire into whether the pregnant mother knows the sex of her unborn child and, if so, whether the mother is seeking an abortion due to the sex of the unborn child."<sup>108</sup> Oklahoma requires medical professionals to complete a form for each abortion they perform, which includes a section on the reasons the woman obtained the abortion.<sup>109</sup> In Arizona, while the law does not directly require any kind of inquiry, each medical professional must sign an affidavit certifying that he or she "is not aborting the child because of the child's sex or race and has no knowledge that the child to be aborted is being aborted because of the child's sex or race."<sup>110</sup> Arizona also requires health care

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fails-in-the-house/2012/05/31/gJQAgCYn4U\_blog.html [https://perma.cc/NDN4-88MV (dark archive)].

102. See Lydia O'Connor, *San Francisco May Be First City To Oppose Sex-Selective Abortion Bans*, HUFFPOST, [https://www.huffingtonpost.com/2014/09/10/san-francisco-sex-selective-abortion\\_n\\_5800840.html](https://www.huffingtonpost.com/2014/09/10/san-francisco-sex-selective-abortion_n_5800840.html) [https://perma.cc/79UU-2KG4] (Sept. 17, 2014).

103. *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1780 (2019).

104. *Id.* at 1782.

105. *Id.* ("Only the Seventh Circuit has thus far addressed this kind of law. We follow our ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals.")

106. *Id.* at 1792 (Thomas, J., concurring) ("The Court's decision to allow further percolation should not be interpreted as agreement with the decisions below.")

107. See, e.g., ARIZ. REV. STAT. ANN. § 13-3603.02(A)(1) (Westlaw through the 2d Reg. Sess. of the 54th Leg.) (mandating that a person who "[p]erforms an abortion knowing that the abortion is sought based on the sex or race of the child" is guilty of a felony).

108. S.D. CODIFIED LAWS § 34-23A-56(4A) (Westlaw through 2020 Sess. Laws, Exec. Order 20-31 and Supreme Court Rule 20-06).

109. OKLA. STAT. ANN. tit. 63, § 1-738k (Westlaw current with legislation effective through September 1, 2020 of the Second Regular Session of the 57th Legislature (2020)).

110. ARIZ. REV. STAT. ANN. § 36-2157 (Westlaw).



professionals to report “known violations . . . to appropriate law enforcement authorities.”<sup>111</sup>

Arkansas goes further than any other state. It requires medical professionals to ask each patient if she knows the predicted future sex of the fetus. If the patient answers in the affirmative, then the professional must spend “time and effort” seeking out the patient’s entire pregnancy-related history (including prior pregnancies).<sup>112</sup> This means that any woman who is aware of the predicted biological sex of the fetus may suffer delays in receiving reproductive care as she waits for physicians to seek out her pregnancy history. Sex-selective abortion bans may lead doctors to deny care even to women who are not engaging in the practice of sex-selective abortion and also subjects all women to invasive and humiliating questions about their motives for seeking an abortion. In the following section, this Article explains why sex-selective abortion bills are reverse legal transplants.

#### B. *Sex-Selective Abortion Statutes as Reverse Legal Transplants*

One of the reasons sex-selective abortion laws are being proposed in the United States is because it is perceived that immigrants from countries like India are terminating pregnancies when they learn that the fetus is female.<sup>113</sup> As discussed below, sex-selective abortion statutes satisfy the characteristics of transplants that were developed in Section I.B.

##### 1. What Is Being Imported/Exported?

A piece of legislation from one nation, namely India,<sup>114</sup> is being used to influence law in another country, the United States. Legislative representatives and pro-life advocates in the United States are referencing a discrete portion of India’s laws on abortion. Abortion is legal in India through legislation.<sup>115</sup>

##### 2. What Is the Origin and Destination of the Law?

As noted above, laws adopted to curb sex selection in India are being advanced in the United States as appropriate responses to sex-selective abortion in this country. However, this migration of laws moves in the opposite direction from a traditional legal transplant. India’s GDP per capita of \$2,055 is significantly lower than the GDP per capita of the United States, which is

111. *Id.* § 13-3603.02(D).

112. ARK. CODE ANN. § 20-16-1904(a)–(b) (LEXIS through all legislation of the 2020 1st Extraordinary Sess. and the 2020 Fiscal Sess.).

113. *See infra* note 128 and accompanying text.

114. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (India); The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 (India).

115. The Medical Termination of Pregnancy Act, 1971, § 3(1)–(2) (India).

\$62,918.<sup>116</sup> Thus, the law migrates from a Global South country to a Global North country.

### 3. Who Is Doing the Importing/Exporting?

Modern legal transplants are the work of a wide range of actors and are not limited to governments.<sup>117</sup> Anti-abortion groups and legislators are responsible for importing the abortion restrictions into the United States. As we would expect with laws that flow from Global South countries, there are no actors or groups in India that are attempting to push the United States to adopt the bans.

### 4. Does the Law Have Multiple Origins?

The sex-selective abortion bills in the United States have referred to the laws of both India and China. Arguably, then, the sex-selective abortion statutes are laws that have multiple origins. Future researchers should conduct a comparative analysis of China's laws and context. That discussion is outside of the scope of this Article.

### 5. Does the Law Transform When It Migrates?

Modern laws that migrate to another country are often modified—text might be removed, added, or changed in certain sections.<sup>118</sup> Sex-selective abortion laws are no different. The laws that are being proposed in the United States restrict abortion, but the regulations in India only prevent physicians from revealing to the parents the predicted sex of the fetus.<sup>119</sup> The rationale for India's law is that, if parents do not know the predicted sex of the fetus, they will not be able to terminate pregnancies of female fetuses simply because of their sex.<sup>120</sup>

### 6. Do Actors Doing the Exporting/Importing Have Multiple Motives?

Advocates for sex-selective abortion prohibitions in the United States are not pushing for the laws *only* because India has them—their use in India is just one justification.<sup>121</sup> Notwithstanding this, it is still appropriate to view those

116. *Per Capita GDP at Current Prices – US Dollars*, *supra* note 82.

117. *Supra* Section I.B.3 and accompanying text.

118. *See supra* Section I.B.5 and accompanying text.

119. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002, ch. III, § 5(1) (India).

120. *See* KIRTI SINGH, LAWS AND SON PREFERENCE IN INDIA: A REALITY CHECK 58 (2013), <https://www.unfpa.org/sites/default/files/jahia-news/documents/publications/2013/LawsandSonPreferenceinIndia.pdf> [<https://perma.cc/HV5C-GHMN>].

121. *See, e.g.*, Mary Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232, 267 (2013) (“As the sex-selection . . . campaign[]

laws as reverse legal transplants even if there are other motives at play in advancing the laws, including the goal of pro-life groups to chip away at reproductive rights. As discussed above, there are a host of motives involved when governments, institutions, and people borrow laws from other nations or push for legal change in other countries.

#### 7. What Evidence Demonstrates That Exporting/Importing Has Happened?

There are several ways to trace transplantations. In this Article, I undertake a discursive analysis<sup>122</sup> of the text of the bills and their proponents' statements. For example, one version of the Prenatal Nondiscrimination Act ("PRENDA")<sup>123</sup> introduced in the U.S. House of Representatives states:

Countries with longstanding experience with sex-selection abortion—such as the Republic of India, the United Kingdom, and the People's Republic of China—have enacted restrictions on sex selection and have steadily continued to strengthen prohibitions and penalties. The United States, by contrast, has no law in place to restrict sex-selection abortion, establishing the United States as affording less protection from sex-based feticide than the Republic of India or the People's Republic of China, whose recent practices of sex-selection abortion were vehemently and repeatedly condemned by United States congressional resolution and by the United States Ambassador to the Commission on the Status of Women.<sup>124</sup>

Thus, PRENDA points to those laws of India and China that are aimed at prohibiting sex-selective abortions of fetuses predicted to be girls.<sup>125</sup> The bill also suggests that the United States lagged behind India and China, who have done more to protect women in this regard.<sup>126</sup>

That same bill further asserts that Asian Americans practice sex-selective abortions in the United States in the same way that people in Asia do:

Evidence strongly suggests that some Americans are exercising sex-selection abortion practices within the United States *consistent with*

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illustrate[s], pro-lifers have tried to appropriate claims about sex discrimination, and use them to deny women reproductive choice.”).

122. Annelise Riles posits three types of comparative law methods—categories, discursive, and contextual. See Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L. L.J. 221, 231–50 (1999).

123. PRENDA has been introduced in the U.S. Congress every term since 2011. See Prenatal Nondiscrimination Act of 2019, H.R. 2373, 116th Cong. (2019); Prenatal Nondiscrimination Act of 2017, H.R. 147, 115th Cong. (2017); Prenatal Nondiscrimination Act of 2016, H.R. 4924, 114th Cong. (2016); Prenatal Nondiscrimination Act of 2015, S. 48, 114th Cong. (2015); Prenatal Nondiscrimination Act of 2013, S. 138, 113th Cong. (2013); Prenatal Nondiscrimination Act of 2012, H.R. 3541, 112th Cong. (2011).

124. H.R. 4924 § 2(a)(1)(J) (emphasis added).

125. *Id.*

126. *Id.*

discriminatory practices common to their country of origin, or the country to which they trace their ancestry.<sup>127</sup>

The political rhetoric of politicians in state legislatures that support these bills also refer to Asian immigration as a justification for the bans. For example, Don Hagger, a state representative in South Dakota, stated:

Let me tell you, our population in South Dakota is a lot more diverse than it ever was . . . . There are cultures that look at a sex-selection abortion as being culturally okay. And I will suggest to you that we are embracing individuals from some of those cultures in this country, or in this state. And I think that's a good thing that we invite them to come, but I think it's also important that we send a message that this is a state that values life, regardless of its sex.<sup>128</sup>

Finally, another version of PRENDA in the House of Representatives refers to the problem of “missing women”<sup>129</sup> around the world to justify a U.S. ban.<sup>130</sup>

Interestingly, the use of foreign references in the context of sex-selective abortion laws has even seeped into Supreme Court jurisprudence. The U.S. Supreme Court's order denying certification on the constitutionality of Indiana's anti-sex-selection statute refers to the practices in India to justify the importance of the issue.<sup>131</sup> Justice Thomas notes that “[i]n Asia, widespread sex-selective abortions have led to as many as 160 million ‘missing’ women—more

127. *Id.* § 2(a)(1)(F) (emphasis added). The most recent federal bill that has been proposed has removed references to other countries, likely as a result of advocacy by the National Asian and Pacific American Women's Forum (“NAPAWF”) and other organizations. See H.R. 2373 § 2(a)(2).

128. Molly Redden, *GOP Lawmaker: We Need To Ban Sex-Selective Abortions Because of Asian Immigrants*, MOTHER JONES (Feb. 25, 2014), <https://www.motherjones.com/politics/2014/02/south-dakota-stace-nelson-ban-sex-based-abortions-because-asian-immigrants/> [https://perma.cc/B8XG-4ZYT].

129. Amartya Sen drew attention to the maltreatment of women by coining the phrase “missing women.” Amartya Sen, *More Than 100 Million Women Are Missing*, N.Y. REV. BOOKS, Dec. 20, 1990, <https://www.nybooks.com/articles/1990/12/20/more-than-100-million-women-are-missing/> [https://perma.cc/K43S-T9G5]. In 1990, Sen postulated that more than 100 million women were missing in the world because of the disparate treatment of girls and other social inequalities. *Id.* Sen's work created a genre of studies that use sex ratios to calculate the number of missing women. Debraj Ray, *Where Are All the Women?*, WORLD ECON. F. (Oct. 19, 2015), <https://www.weforum.org/agenda/2015/10/where-are-all-the-women/> [https://perma.cc/5Z8L-W5AN]. Economists have debated the appropriate formula for calculating the number of missing women. See Stephan Klasen & Claudia Wink, “Missing Women”: *Revisiting the Debate*, 9 FEMINIST ECON. 263, 263 (2003). Despite Sen's best intentions, the concept of missing women has evolved from one that captures multiple forms of women's inequality to one that only measures the number of female fetuses that have been aborted. See Jason Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data*, 1 AM. ECON. J.: APPLIED ECON. 1, 23 (2009).

130. Prenatal Nondiscrimination Act of 2012, H.R. 3541 § 2(I), 112th Cong. (2011).

131. *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1791 (2019) (Thomas, J., concurring).

than the entire female population of the United States.”<sup>132</sup> By citing my work on India (and not on the United States), Justice Thomas reinforces the argument that anti-sex-selective laws in the United States are being influenced by practices in other countries.<sup>133</sup> Only after referring to Asia does he move to the United States to incorrectly<sup>134</sup> argue that “sex-selective abortions of girls are *common* among certain populations in the United States as well.”<sup>135</sup>

In sum, bills and laws to prohibit sex-selective abortion in the United States are proliferating around the country and can be characterized as reverse legal transplants. In the next part, I explain why people who would normally be opposed to restrictions on abortion found it hard to resist these reverse legal transplants, at least initially.

#### IV. BEYOND UNIVERSALISM AND HUMAN RIGHTS APPROACHES

India enacted restrictions on sex-selective abortion to enhance gender equality. Particularly when they were first introduced, pro-choice legislators and other pro-choice people were conflicted about the laws. Surprisingly, many supported them even though the prohibitions seem more like targeted restrictions on abortion providers, also known as TRAP laws,<sup>136</sup> than laws that will promote gender equality. I argue in Section IV.B that the inability of pro-choice people to approach sex-selective abortion prohibitions with the same clarity as other abortion restrictions proposed by pro-life groups relates, in part, to the human rights framework that guides the work of many pro-choice organizations, individuals and, representatives.

##### A. *Pro-Choice Support for Sex-Selective Abortion Laws*

Indian feminist organizations pushed for restrictions on sex-determination in India.<sup>137</sup> In the United States, pro-life groups frame the restrictions as pro-women’s rights laws.<sup>138</sup> This section raises a few puzzling questions: Why did

132. *Id.* (citing Sital Kalantry, *How To Fix India’s Sex-Selection Problem*, N.Y. TIMES, INT’L ED., July 28, 2017, at 9).

133. See Sital Kalantry, *By Misciting My Work, Justice Thomas Proves My Point*, U. PENN. PRESS (June 12, 2019), <https://pennpress.typepad.com/pennpresslog/2019/06/by-misciting-my-work-justice-thomas-proves-my-point.html> [<https://perma.cc/36UQ-NK5V>].

134. SITAL KALANTRY, *WOMEN’S HUMAN RIGHTS AND MIGRATION: SEX-SELECTIVE ABORTION LAWS IN THE UNITED STATES AND INDIA* 112 (2017) [hereinafter KALANTRY, *WOMEN’S HUMAN RIGHTS AND MIGRATION*].

135. *Box*, 139 S. Ct. at 1791 (Thomas, J., concurring) (emphasis added).

136. TRAP laws place unneeded requirements on abortion providers—such as requiring them to have admitting privileges in local hospitals—in order to make the burdens of operating clinics so great that they will eventually need to shut down. See *What Are TRAP Laws?*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/abortion/trap-laws> [<https://perma.cc/U7KA-6BSY>].

137. See *infra* notes 143–47 and accompanying text.

138. Seema Mohapatra, *False Framings: The Co-Opting of Sex-Selection by the Anti-Abortion Movement*, 43 J.L. MED. & ETHICS 270, 270–73 (2015).

many pro-choice legislators support prohibitions on sex-selective abortion, and why are mainstream pro-choice groups not vigorously advocating against them? I suggest answers to these questions in Section IV.B below.

### 1. Feminist Organizations Lobby for Restrictions on Sex Determination in India

As a result of feminist activism, no pregnant woman in India can legally find out whether her child will be a boy or a girl. This was India's legal response to a growing crisis in which parents would discover the sex of the fetus using ultrasounds<sup>139</sup> and abort the fetus if it were predicted to be a girl.

By the mid-1980s, many clinics in the capital city of New Delhi offered prenatal ultrasound exams.<sup>140</sup> With a growing middle class and increased access to ultrasound machines, more abortions occurred, and the ratio of men to women in the country started to become skewed toward males.<sup>141</sup> As a result of the factors discussed below, by some estimates, today there are 300,000 to 500,000 sex-selective abortions per year and 50 million missing women.<sup>142</sup>

Witnessing sexist advertisements<sup>143</sup> by ultrasound providers and the widespread use of this technology to detect sex and abort female fetuses, Indian feminist organizations pushed to restrict sex selection. In 1982, a group of women's organizations planned a protest meeting to demand a complete ban on sex determination tests.<sup>144</sup> In Mumbai, a group called the Forum Against Sex Determination and Sex Pre-Selection was created in 1985.<sup>145</sup> These groups did not want to place restrictions on abortion access, but instead demanded that

139. In an ultrasound test, a medical professional uses a machine that can observe the anatomy of the fetus and detect its sex at around eighteen weeks of gestation. Medical professionals are not always able to identify the body parts accurately, particularly if the fetus is not in an appropriate physical position to allow for such a determination. See Ceara O'Brien, *Social Implications of Non-Invasive Blood Tests To Determine the Sex of Fetuses*, EMBRYO PROJECT ENCYCLOPEDIA (Mar. 24, 2014), <http://embryo.asu.edu/handle/10776/7648> [<https://perma.cc/3KTD-PU82>].

140. MARA HVISTENDAHL, UNNATURAL SELECTION: CHOOSING BOYS OVER GIRLS, AND THE CONSEQUENCES OF A WORLD FULL OF MEN 49 (2011).

141. See CHRISTOPHE Z. GUILMOTO, CHARACTERISTICS OF SEX-RATIO IMBALANCE IN INDIA, AND FUTURE SCENARIOS 4–6, 20 (2007), <http://www.unfpa.org/gender/docs/studies/india.pdf> [<https://perma.cc/L45K-MNTW>].

142. Sunny Hundal, *India's 60 Million Women That Never Were*, AL JAZEERA (Aug. 8, 2013), <https://www.aljazeera.com/indepth/opinion/2013/07/201372814110570679.html> [<https://perma.cc/9GPS-UZ3F>].

143. Referring to dowry, advertisements would say, "[p]ay 500 rupees now and save 50,000 later." *Missing Sisters*, ECONOMIST (Apr. 17, 2003), <http://www.economist.com/node/1715401> [<https://perma.cc/YYX4-EDUZ> (dark archive)].

144. See MARY JOHN, SEX RATIOS AND GENDER BIASED SEX SELECTION: HISTORY, DEBATES AND FUTURE DIRECTIONS 8 (2014), <https://asiapacific.unfpa.org/sites/default/files/pub-pdf/Sex-Ratios-and-Gender-Biased-Sex-Selection.pdf> [<https://perma.cc/78NY-5YLU>].

145. *Id.*

medical professionals be prohibited from telling patients the sex of a fetus.<sup>146</sup> The state government of Maharashtra, where Mumbai is located, passed legislation to ban sex determination tests in 1988 before any national legislation was adopted.<sup>147</sup>

Six years later in 1994, the Government of India enacted the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act (“PNDT”).<sup>148</sup> This Act, which went into effect in 1996, prohibited the use of techniques (such as ultrasounds and amniocentesis) to determine the sex of the fetus after conception.<sup>149</sup> The law only addressed postconception methods of sex selection, but with technology rapidly evolving in India, methods of preconception sex selection became available on the market, namely in vitro fertilization (“IVF”).<sup>150</sup>

In 2002, recognizing this gap and responding to the Indian Supreme Court orders,<sup>151</sup> the Indian Parliament amended the PNDT, changing its title to “The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act” (“PCPNDT”).<sup>152</sup> The PCPNDT (among other things) increases the penalties and other regulations targeted at clinics.<sup>153</sup> The PCPNDT does not ban the abortion of female fetuses, but by limiting information about the sex of the fetus, its objective is to prevent sex-selective abortions.<sup>154</sup>

The law banning sex determination is often flouted. Ultrasound technology, the desire to have fewer children, and a preference to have at least one son lead many women each year to illegally learn the sex of their fetuses and to abort female fetuses. According to the Indian census, the ratio of boys to girls became more skewed toward males even after the prohibition on sex determination was enacted.<sup>155</sup> There is less agreement today among feminist

146. See Bijayalaxmi Nanda, *Campaign Against Female Foeticide: Perspectives, Strategies and Experiences*, in *SEX-SELECTIVE ABORTION IN INDIA: GENDER, SOCIETY AND NEW REPRODUCTIVE TECHNOLOGIES* 357, 361 (Tulsi Patel ed., 2007).

147. See *id.*

148. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, (India).

149. *Id.*

150. See generally KPMG & FED’N INDIAN CHAMBERS COM. & INDUS., *MEDICAL VALUE TRAVEL IN INDIA* (2014), [http://www.travelbizmonitor.com/images/kpmg\\_ficci\\_heal\\_sep\\_2014\\_271014.pdf](http://www.travelbizmonitor.com/images/kpmg_ficci_heal_sep_2014_271014.pdf) [<https://perma.cc/W6D4-N4NM>] (“Many Indian hospitals now have modern technologies/treatments available with . . . in vitro fertilization options.”).

151. See *Ctr. for Enquiry into Health and Allied Themes (CEHAT) v. Union of India*, (2003) 8 SCC 412 (India).

152. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2003, (India).

153. *Id.*

154. See SINGH, *supra* note 119, at 58.

155. See The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, (India); *Gender Composition*, OFF. REGISTRAR GEN. & CENSUS COMM’R, INDIA, [http://censusindia.gov.in/Census\\_And\\_You/gender\\_composition.aspx](http://censusindia.gov.in/Census_And_You/gender_composition.aspx) [<https://perma.cc/CT64->

groups about whether these restrictions should remain in effect than there was decades ago.<sup>156</sup>

## 2. Pro-Choice Support for Abortion Prohibitions in the United States

Although pro-choice people, lawyers, and organizations rarely support restrictions on abortion, the situation is different with sex-selective abortion bans. Legislative representatives who are typically opposed to restrictions on abortion appear to have accepted the narrative on sex selection in the United States.

In 2012, when the majority of the U.S. House of Representatives voted in favor of a federal law prohibiting sex-selective abortion, twenty Democrats voted with the majority.<sup>157</sup> One of those Democrats who voted to prohibit sex-selective abortion, Representative John Garamendi from California, stated that “[he is] a strong pro-choice feminist and a proud father of 5 daughters and 3 granddaughters!”<sup>158</sup> His official position further stated that “[his] daughters and wife are [his] closest advisors and confidants and all of [his] decisions are heavily weighed by their influence.”<sup>159</sup> In addition, twenty-five pro-choice Democrats and on-the-fence Democrats voted in favor of adopting restrictions on sex-selective abortion in Oklahoma.<sup>160</sup>

Major legal and other advocacy groups that work on the national stage to support abortion rights have not spoken out against the laws. In challenging Pennsylvania’s abortion statutes, Planned Parenthood failed to bring to the Supreme Court’s attention the prohibition on sex selection adopted by Pennsylvania<sup>161</sup> in what later was to become an important abortion decision:

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MDRZ] (“At the Census 2001, sex ratio of the population in the age group 0-6 years has been registered as 927, in India, declining from 945 in 1991 and 962 in 1981.”).

156. Compare 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, 25–26 (2007) (describing Uma Narayan’s conception of the criminalization of sex-selection abortion as a “Dupe of Patriarchy”), with Anita Jain, *Sex Selection and Abortion in India: Efforts To Curb Sex Selection Must Not Retard Progressive Safe Abortion Policies*, 346 *BRIT. MED. J.* 8, 8 (2013) (arguing that restrictions on sex selective abortions do not curb the problem of sex selection), and Sital Kalantry, *Sex Selection in the United States and India: A Contextualist Feminist Approach*, 18 *UCLA J. INT’L L. & FOREIGN AFF.* 61, 84–85 (2013) (arguing that restrictions on sex selective abortion may be permissible if an imbalanced sex ratio impacts women as a group).

157. Kate Sheppard, *House GOP’s ‘Prenatal Nondiscrimination’ Bill Fails*, *MOTHER JONES* (May 31, 2012), <https://www.motherjones.com/politics/2012/05/house-gop-abortion-sex-selection> [<https://perma.cc/4JY3-TBWB>].

158. John Garamendi, *John Garamendi on Abortion*, *ON THE ISSUES*, [https://www.ontheissues.org/CA/John\\_Garamendi\\_Abortion.htm](https://www.ontheissues.org/CA/John_Garamendi_Abortion.htm) [<https://perma.cc/KTU6-Y36Z>] (last updated May 30, 2020).

159. *Id.*

160. See KALANTRY, *WOMEN’S HUMAN RIGHTS AND MIGRATION supra* note 134, at 85–87.

161. *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S. Ct. 1780, 1792 (Thomas, J., concurring) (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992)).



*Planned Parenthood v. Casey*.<sup>162</sup> Even though these prohibitions were the second most introduced anti-abortion legislation in 2012, no prominent<sup>163</sup> pro-choice organization is devoting significant attention to the issue.<sup>164</sup> The single organization that has included sex-selective abortion bans in their main advocacy is focused on the rights of Asian American and Pacific Islander women.<sup>165</sup> Until advocates, collaborating with the clinic I directed, brought a comparative approach into the conversation, pro-choice groups largely accepted the claim that sex selection is widespread among immigrants.<sup>166</sup>

#### B. *Limitations of Human Rights Frameworks*

Advocates, lawyers, and activists who are involved in issues concerning women's equality are often guided by international human rights frameworks.<sup>167</sup> Much of human rights law and theory advances the universal applicability of laws.<sup>168</sup> The universal lens tends to favor the free movement of laws across borders without critical evaluation. Under a universalist view, it would be appropriate for a law that was designed to prevent a human rights problem in one country to be adopted by another country without critical reflection. This section explains how and why this universalist approach has led to a misunderstanding of sex-selective abortion statutes by some people.<sup>169</sup> The alternative to universalism—cultural relativism—is also not suitable to evaluate the appropriateness of legal transplantations.

162. 505 U.S. 833, 844 (1992).

163. KALANTRY, WOMEN'S HUMAN RIGHTS AND MIGRATION, *supra* note 134, at 77.

164. For example, the Center for Reproductive Rights website does not mention any recent work on sex-selective abortion. A search through their website reveals a single statement on principles against sex-selective abortions from 2009. See *Statement of Policies and Principles on Discrimination Against Women and Sex-Selective Abortion Bans*, CTR. FOR REPROD. RTS. (Sept. 29, 2009), <https://reproductiverights.org/document/statement-of-policies-and-principles-on-discrimination-against-women-and-sex-selective-abor> [<https://perma.cc/S898-R2Y5>]. The latest legal action taken by the Center on the subject is from 2013. See *State Judge Blocks ND Law Designed to Close Only Abortion Clinic in the State*, CTR. FOR REPROD. RTS. (July 31, 2013), <https://reproductiverights.org/press-room/state-judge-blocks-nd-law-designed-to-close-only-abortion-clinic-in-the-state> [<https://perma.cc/2773-DE5R>] (mentioning as an aside that the Center for Reproductive Rights filed a lawsuit in response to North Dakota passing a law banning abortions for reasons of sex selection or genetic fetal anomaly).

165. *Sex-Selective Abortion Bans*, NAT'L ASIAN PAC. AM. WOMEN'S F., <https://www.napawf.org/reproductive-health-and-rights/sex-selective-abortion-bans> [<https://perma.cc/B84R-PVEY>].

166. RAJANI BHATIA, GENDER BEFORE BIRTH: SEX SELECTION IN A TRANSNATIONAL CONTEXT 162–64 (2018).

167. Scholarship relating to women's rights has a rich relationship to practice. See Cynthia Grant Bowman & Elizabeth Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249, 255–56 (1998).

168. *But see* Shannon Speed & María Teresa Sierra, *Critical Perspectives on Human Rights and Multiculturalism in Neoliberal Latin America: Introduction*, 28 POL. & LEGAL ANTHROPOLOGY REV. 1, 1–2 (2005) (critiquing the consequences of the spread of human rights and multicultural values).

169. See Rainer Arnold, *Reflections on the Universality of Human Rights*, in THE UNIVERSALISM OF HUMAN RIGHTS 1, 1 (Rainer Arnold ed., 2013).

United Nations (“UN”) treaties and documents are replete with an understanding that all human rights are universal. For example, the 1993 Vienna Declaration provides that “[a]ll human rights are universal, indivisible and interdependent and interrelated.”<sup>170</sup> This broad understanding of universalism manifests itself in modern practice. In an example of the stronghold of universalist ideas, the World Bank has created indicators to assess the status of women’s rights and gender equality around the world.<sup>171</sup> The indicators use one definition of domestic violence and valorize one set of solutions as appropriate.<sup>172</sup> Countries that deviate from this uniform solution are thought to be doing too little to eradicate violence against women.<sup>173</sup>

Nongovernmental organizations also apply universalist approaches to human rights issues across their different country areas. For example, “Amnesty International objected to the [European Court of Human Rights] failure to find that France’s full-face ban violated the European Convention of Human Rights and also objected when that same court failed to hold that Turkey’s ban on headscarves in universities violated that Convention.”<sup>174</sup> Amnesty International did not appear to consider it relevant that in Turkey—a Muslim-majority country—a prohibition on headscarves could potentially promote women’s equality.<sup>175</sup> In France, by comparison, the full-face veil prohibition targeted a minority group in the context of growing Islamophobia.<sup>176</sup> Thus, it could have been acceptable to ban headscarves in Turkey to promote women’s equality, but a restriction on full-face veils would not promote the same goal in France.<sup>177</sup>

International human rights organizations are reluctant to deviate from the principle of universality, in part because it gives their positions moral

170. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993), <https://www.refworld.org/docid/3ae6b39ec.html> [<https://perma.cc/D7CF-ME57>].

171. See THE WORLD BANK & INT’L FIN. CORP., WOMEN, BUSINESS AND THE LAW 2014: REMOVING RESTRICTIONS TO ENHANCE GENDER EQUALITY 3–5 (2013), <http://documents.worldbank.org/curated/en/893551468147874555/pdf/922710PUB0v20W00Box385355B00PUBLIC0.pdf> [<https://perma.cc/VWX3-HTTH>].

172. See *id.* at 24–26.

173. See *id.* at 27–28.

174. Sital Kalantry, *The French Veil Ban: A Transnational Legal Feminist Approach*, 46 U. BAL. L. REV. 201, 233 (2017) [hereinafter Kalantry, *The French Veil Ban*]; see *European Court Ruling on Full-Face Veils Punishes Women for Expressing Their Beliefs*, AMNESTY INT’L (July 1, 2014), <https://www.amnesty.org/en/latest/news/2014/07/european-court-ruling-full-face-veils-punishes-women-expressing-their-religion/> [<https://perma.cc/ZFZ4-62V6>]; *Turkey Violates Freedom of Religion with Headscarf Ban: Amnesty*, WORLD BULL. (Apr. 24, 2012), <https://www.worldbulletin.net/general/turkey-violates-freedom-of-religion-with-headscarf-ban-amnesty-h88969.html> [<https://perma.cc/DLL2-7MVT>].

175. Kalantry, *The French Veil Ban*, *supra* note 174, at 231.

176. *Id.* at 220–22.

177. *Id.* at 229–30.

authority.<sup>178</sup> “The supporters of universalism often draw upon natural law and reason and argue that there are objective standards by which to judge human conduct and to create law.”<sup>179</sup> For the universalist, everyone is protected by human rights, and the content of those rights is largely the same across the world.<sup>180</sup> When a practice is seen to be contrary to a right in one context, then a similar practice that emerges elsewhere is also seen to violate that universal right.<sup>181</sup> Thus, legal solutions designed to address human rights concerns in one country can be transferred across countries without critical evaluation.

Anti-abortion advocates capitalized on universal ideas that are prevalent in organizations such as the UN. An interagency statement signed by numerous agencies of the UN stated that “[i]mbalanced sex ratios are . . . unacceptable manifestation[s] of gender discrimination against girls and women and a violation of . . . human rights.”<sup>182</sup> The UN report, however, does not distinguish the impacts and harms of the practice of sex selection in a country where it is widespread from a country where it rarely occurs.<sup>183</sup> This lack of distinction allows statements by UN bodies to be co-opted by anti-abortion groups in the United States. For example, the prohibition on sex-selective abortion introduced in the U.S. Congress in 2015 states that “[t]he United Nations Commission on the Status of Women has urged governments of all nations ‘to take necessary measures to prevent . . . prenatal sex selection.’”<sup>184</sup> Because of the UN’s failure to clarify that sex-selective abortion could vary by jurisdiction, anti-abortion advocates are able to use the UN’s universalist position as a way to promote limitations on abortion in the United States.

Cultural relativism is often presented as an alternative approach to universalism in human rights.<sup>185</sup> A cultural relativist would “assert that culture

178. See Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 414 (1984); see also Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281, 289–291 (2007) (exploring “several different senses of ‘universal’ human rights”).

179. Kalantry, *The French Veil Ban*, *supra* note 174, at 208; see R. H. Helmholz, *Natural Law and Human Rights in English Law: From Bracton to Blackstone*, 3 AVE MARIA L. REV. 1, 1–2 (2005).

180. Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49, 63–64 (1993).

181. Kalantry, *The French Veil Ban*, *supra* note 174, at 207–08.

182. OFF. OF THE UNITED NATIONS HIGH COMM’R FOR HUM. RTS., UNITED NATION POPULATION FUND, THE UNITED NATIONS CHILD.’S FUND, UNITED NATIONS ENTITY FOR GENDER EQUAL. & THE EMPOWERMENT OF WOMEN, & WORLD HEALTH ORG., PREVENTING GENDER-BIASED SEX SELECTION 12 (2011), [https://www.unfpa.org/sites/default/files/resource-pdf/Preventing\\_gender-biased\\_sex\\_selection.pdf](https://www.unfpa.org/sites/default/files/resource-pdf/Preventing_gender-biased_sex_selection.pdf) [<https://perma.cc/G8BV-GUCM>].

183. See generally *id.* (failing to differentiate the impacts of sex selection in varying countries).

184. Prenatal Nondiscrimination Act of 2015, S. 48, 114th Cong. § 2(a)(8) (2015).

185. See Dianne Otto, *Rethinking the “Universality” of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1, 8 (1997) (“In contemporary debates, the ‘universalists,’ who are primarily Northern states, predict that even the slightest ‘dilution’ of universalism will give the green light to tyrannical governments, torturers, and mutilators of women.”). Cyra Akila Choudhury argues that the liberal feminists/universalists make the same arguments about culture as do the religious cultural relativists. See Cyra Akila Choudhury, *Beyond Culture: Human Rights Universalisms Versus Religious and Cultural*

is the sole or primary source of the validity of a practice or claim to a moral right.”<sup>186</sup> In an extreme form of cultural relativism, human rights are defined by religion and culture and, as a result, can vary across contexts.<sup>187</sup> For example, in Saudi Arabia, every woman must have a male guardian and needs that guardian’s consent to marry, travel, and engage in other activities.<sup>188</sup> While this kind of system would be rejected under mainstream human rights standards, Saudi Arabia might justify this law on the basis of their religion or culture. A cultural relativist position would allow them to claim that the guardian law is appropriate because it is consistent with their understanding of women’s rights. Some nation-states have actively used cultural relativism to justify unquestionably repressive practices.<sup>189</sup>

When the universalist/cultural relativist debate is applied to problematic practices that migrate around the globe, the theories offer two inadequate approaches. The universalist approach in its extreme form posits that legal responses to practices that violate human rights in one country can be uncritically transported to other countries. On the other hand, cultural relativist approaches leave little room for any universal standards at all and, as a result, have been used to deny basic human rights to women.

Modern comparative approaches, on the other hand, offer a way out of the debate. It does not have a dog in the fight on the question of whether or not laws should be universally transported across borders. Comparative approaches instead provide a methodology to determine when it is appropriate for laws to move from one jurisdiction to another.<sup>190</sup>

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*Relativism in the Activism for Gender Justice*, 30 BERKELEY J. GENDER L. & JUST. 226, 239–43 (2015) (“[B]oth assume that culture as a social construct is essential and immutable.”).

186. Kim, *supra* note 180, at 56.

187. *Id.* at 59; see Kalantry, *The French Veil Ban*, *supra* note 174, at 213.

188. *Boxed In: Women and Saudi Arabia’s Male Guardianship System*, HUM. RTS. WATCH (July 16, 2016), <https://www.hrw.org/report/2016/07/16/boxed/women-and-saudi-arabias-male-guardianship-system#> [<https://perma.cc/C8GK-9QQS>].

189. Eva Brems, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, 19 HUM. RTS. Q. 136, 149 (1997). It should be noted that at least one scholar has attempted to bridge the extremes of cultural relativism and universalism. One author proposed certain situations where cultural values could be prioritized over universal rights. Burns H. Weston, *The Universality of Human Rights in a Multicultural World*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 39, 44–45 (Richard Pierre Claude & Burns H. Weston eds., 2006).

190. See *infra* Section V.A and accompanying text.

Some post-colonial feminists<sup>191</sup> and feminist legal scholars have recognized the value of comparative approaches to gender rights across the globe.<sup>192</sup> Karmina Bennoune, for example, suggests that practices can have different implications for women's equality depending on the context of the country in which they arise.<sup>193</sup> She points to the error in assuming that banning Muslim women's veils<sup>194</sup> always promotes women's equality in every context.<sup>195</sup> Bennoune elaborates that, to really understand how a practice (in this case, veiling) impacts women's equality and, relatedly, whether bans on veiling promote women's equality or not, one must evaluate the practice in the historical, political, and other contexts in which it emerges.<sup>196</sup>

Bennoune's framework challenges the consensus in favor of universalism, suggesting that a law in one context may promote women's equality, but similar regulations on women's behavior in other contexts may undermine it.<sup>197</sup> This perspective is open to the idea that countries with seemingly similar practices can adopt differing legal solutions to them.

Some human rights and feminist scholars and activists may resist abandoning universality because they might view it as a wholesale rejection of any common vision of equality. Tracy Higgins warns that "the challenge is

191. Post-colonial and gender studies scholar Chandra Mohanty, in her seminal critique of Western feminism, elaborated upon the idea that a practice like veiling can signify different things in different moments of history, even within the same country. See Chandra Talpade Mohanty, *Under Western Eyes, Feminist Scholarship and Colonial Discourses*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* 67 (Chandra Talpade Mohanty, Ann Russo & Lourdes Torres eds., 1991). She points out that during the Iranian revolution in 1979, middle-class women veiled themselves in solidarity with their working-class sisters. *Id.* On the other hand, in contemporary Iran, there are mandatory veiling laws. She observes that "[t]o assume that the mere practice of veiling women in a number of Muslim countries indicates . . . universal oppression of women . . . is analytically reductive . . ." *Id.*

192. See Lama Abu-Odeh, *Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West"*, 1997 UTAH L. REV. 287, 290 (using a comparative analysis of violence against women in the Arab legal system and that of the American legal system to "reveal[] the fallacy of both the orientalist construction that the East is different from the West and the almost contradictory idea of international feminism that all violence against women all over the world is the same").

193. Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law*, 45 COLUM. J. TRANSNAT'L L. 367, 368 (2007).

194. "Veil" here is meant to encompass multiple different types of clothing. This includes a loose headscarf, a cloth that covers all the hair, or a full-face covering, and it could refer to a loose black cloth covering the entire body. See Russell Goldman, *What's That You're Wearing? A Guide to Muslim Veils*, N.Y. TIMES (May 3, 2016), <http://www.nytimes.com/2016/05/04/world/what-in-the-world/burqa-hijab-abaya-chador.html> [<https://perma.cc/XJ5Q-E8HZ> (dark archive)]; James Vyver, *Explainer: Why Do Muslim Women Wear a Burka, Niqab or Hijab?*, AUSTL. BROAD. CORP. (Aug. 17, 2017, 3:58 AM), <http://www.abc.net.au/news/2014-09-23/why-do-muslim-women-wear-a-burka-niqab-or-hijab/5761510> [<https://perma.cc/K5R9-GKNQ>].

195. Bennoune, *supra* note 193, at 368.

196. *Id.* at 396.

197. *Id.*

simultaneously to reject universalist human rights claims that fail to account for difference and to embrace a normative conception of gender justice that is critical of patriarchy across cultures.”<sup>198</sup> But I do not think that being attuned to the need for differing legal responses to similar practices when they emerge in different jurisdictions constitutes the wholesale acceptance of cultural relativism. In a similar vein, Cyra Akila Choudhury argues that liberal feminism needs a more nuanced lens in today’s global world.<sup>199</sup> She suggests that if liberal feminism “wants to be relevant to the lives of women beyond the Westernized elite, it will have to take difference seriously and translate its ideas into ones that appeal broadly.”<sup>200</sup>

It should be noted that universal approaches to legal solutions also appear beyond human rights law. For example, when it comes to corporate law or other law, the World Bank and International Monetary Fund (“IMF”) have also proposed nearly universal solutions across borders. In the next part, I articulate a multidirectional and contextual comparative approach to evaluate whether sex-selective abortion should be adopted in the United States.

#### V. COMPARATIVE APPROACH TO SEX-SELECTIVE ABORTION LAWS

Scholarship on legal transplants has largely been that of a distant observer of legal migration in practice. The scholarship has been either critical of laws migrating across borders<sup>201</sup> or not critical of it at all.<sup>202</sup> Legal scholars, however, have not paid significant attention to developing methods that can guide lawyers and practitioners who are considering transplanting laws.

In Section V.A below, I propose a contextual<sup>203</sup> and multidirectional approach to evaluate whether or not a law should be transplanted. Although the need for a multidirectional and contextual approach is easier to see when we examine a reverse legal transplant, this approach should be used when people are considering any kind of transplant—a reverse, horizontal, or traditional legal transplant.

In Section V.B, I apply the framework to a case study of sex-selective abortion laws. I hope the analysis will also assist lawmakers who are considering

198. Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN’S L.J. 89, 105 (1996).

199. Choudhury, *supra* note 185, at 266–67.

200. *Id.* at 266; *see also* Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1634–35 (1990) (“Relativism is the dreaded label so often foisted upon contextualism. The claim is that if we turn to context, not only do we lose our bearings, our principles, and our politics, but we also endanger our very ability to know right from wrong and to object to what is wrong.”).

201. *See, e.g.*, Trubek & Galanter, *supra* note 17, at 1080.

202. *See* Berkowitz et al., *supra* note 19, at 163–64.

203. Between the three approaches identified in comparative law scholarship by Riles, a contextual approach offers the best lens for this purpose. *See* Riles, *supra* note 122, at 241.

adopting sex-selective abortion statutes and judges who are considering their constitutionality.

A. *Toward a Multidirectional and Contextual Comparative Law Approach*

In most cases, scholars evaluating the success of transplants have only done so after the fact. In determining whether a transplant is successful, scholars have asked whether it has “taken hold” or been implemented in a society.<sup>204</sup> As a result, in evaluating the “success” of legal transplants, authors have tended to focus on factors in the reception country and have ignored important factors in the country of its origin that would help determine whether the law should be transplanted in the first place.

Berkowitz, Pistor, and Richard concluded that the success of a legal transplant depends on whether the transplant was voluntary or forcefully imposed and whether the transplant’s country of destination adapted the law to local conditions.<sup>205</sup> Along these same lines, other authors have also focused on the reception country, finding that the key determinants of the success of a legal transplant are the degree of engagement of indigenous populations in local rule and legislative bodies, and the extent to which indigenous rules are integrated into court systems.<sup>206</sup>

One reason for this lack of emphasis on the country of origin might relate to the fact that most transplants move from Global North countries to Global South countries.<sup>207</sup> Authors might assume that the country of origin of the law—typically, a Global North country—has a more developed legal regime than the country of destination of the law, typically a Global South country. They thus assume that the legal transplants represent “best practices.” Consequently, the only question they are then concerned with is whether the context of the developing country is ready for those laws.

204. For example, in their well-known empirical study, Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard noted that “for the law to be effective, it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop the law.” Berkowitz et al., *supra* note 19, at 167.

205. *Id.* at 189; see Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165, 180 (2003).

206. See Ronald J. Daniels, Michael J. Trebilcock & Lindsey D. Carson, *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, 59 AM. J. COMPAR. L. 111, 127 (2011).

207. *Supra* Section II.B. Note that articles in the transplant literature that place great emphasis on the country of origin are those that focus on legal migrations between civil law and common law jurisdictions. See Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113, 1115 (acknowledging that laws in different countries are transplanted from only a few “families”—specifically, common law and civil law systems); Merryman, *supra* note 73, at 367–68 (“Legal transplants across the Civil Law-Common Law boundary obviously lead in the direction of convergence of the two systems.”).

In addition, traditional comparative law approaches to transplants de-emphasize the role of context. Indeed, Watson argued that there is no need for laws in certain areas to be sensitive to society or context.<sup>208</sup> According to this view, laws easily move from one context to another without the need for critical evaluation.<sup>209</sup> His contemporary, Kahn-Freund, on the other hand, argued that laws should be transplanted only if certain conditions are met.<sup>210</sup> But he too only stressed that factors in the country of destination of the legal transplant mattered to evaluating its success or failure.<sup>211</sup> He specifically identified political institutions and the interests of the powerful as being relevant to determine whether or not it was appropriate to transplant a legal norm.<sup>212</sup> Although Watson's view has been universally rejected among scholars, Kahn-Freund's approach to evaluating legal transplants should also be broadened.<sup>213</sup>

Inga Markovits argues that the nature of the law being transplanted is important in determining its success or failure.<sup>214</sup> She argues that legal rules that do not require any citizen action, such as abolition of the death penalty, are more likely to be incorporated into foreign legal systems.<sup>215</sup> Laws that have more institutional support and personnel on the ground are more likely to be successful.<sup>216</sup> On the other hand, laws that require the cooperation of people will fail if they are out of sync with the deeply held moral views of the people. Law reform that corresponds to common habits and beliefs of the people are more likely to take hold.<sup>217</sup>

Markovits rightly turns her attention to a deep study of the culture, society, history, and politics of the reception country as an important variable in determining the success of a transplant. Her work adds an important layer of complexity to transplant analysis by exposing the correlation between the success of a transplant and the type of legal rule or institution being transplanted.

She moves us in the direction of examining the goals, history, and context of the country of origin of a law in determining if a transplant of that law will be successful. In discussing the failure of Germany's use of U.S.-style bankruptcy laws, she points us to the rationale and goals of the law in the United

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208. See Watson, *supra* note 23, at 81.

209. *Id.*

210. Kahn-Freund, *supra* note 3, at 12–13.

211. *See id.*

212. *See id.*

213. See Twining, *Social Science*, *supra* note 45, at 212 (arguing that Watson's arguments are devoid of empirical evidence).

214. See Inga Markovits, *Exporting Law Reform—But Will It Travel?*, 37 CORNELL INT'L L.J. 95, 110 (2004).

215. *Id.* at 98–99.

216. *Id.* at 100–01.

217. *Id.* at 99 (“Most law reform . . . requires the cooperation of its citizenry to be effective.”).



States—it is meant to give control and power to debtors. The law in question did not succeed in Germany because it was inconsistent with German culture that frowns upon relieving debtors of their obligations.<sup>218</sup>

All of the studies about the success or failure of transplants described above have aimed to examine laws after they have already been transplanted. Their goal has not been to develop methods for determining *when* it is appropriate to transplant laws in the first place. In other words, they have not attempted to articulate methods that will assist lawyers, lawmakers, and other potential transplanters in evaluating when they should borrow laws or impose their laws on others. Success of a law should not just be defined by whether or not it is implemented. In many countries, most legislation that is adopted will be implemented, and mere implementation does not mean that the transplant was appropriate. Sex-selective abortion statutes are examples of such legislation.

In examining whether or not sex-selective abortion statutes will meet the goals in the United States for which they were designed in India, we must broaden the analysis to include the context of the originating country. At first glance, it might seem that because the restrictions on sex selection in India were meant to promote gender equality, they would have the same impact in the United States. However, without more than a surface-level understanding of the goals of the law and the practice the laws in India seek to address, we are not able to determine whether they will address the same problems and achieve the same goals when adopted in the United States.

In addition to shining a light on factors in the country of origin, comparative approaches to legal transplants should be expanded by examining a broader array of factors both in the country of origin and destination of the transplant. Even those authors who have emphasized context looked only at a narrow set of factors. Kahn-Freund, for example, placed great emphasis on political factors, such as political institutions and the interests of the powerful, as the relevant unit to determine whether it was appropriate to transplant a legal norm.<sup>219</sup>

Thus, in evaluating whether a law should be transplanted at all, it is necessary to identify and compare (1) the structural social, cultural, economic, and other background factors in the country of origin that gave rise to the law and their existence or absence in the country of destination; and (2) the prevalence, intent, and consequences of the harm that the transplant proposes to address in both the country of origin and country of destination.

This multidirectional and contextual comparative approach to evaluating reverse legal transplants should be employed when determining whether any transplant is appropriate, including traditional, reverse, and horizontal legal

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218. *Id.* at 101–02.

219. *See* Kahn-Freund, *supra* note 3, at 12–13.

transplants. The legal transplant of French company takeover law to Egypt is an example of how a multidirectional and more contextual approach would have better assisted in evaluating whether or not the company takeover law should have been transplanted.<sup>220</sup> In France, takeover law is protective of businesses and was designed to protect its nation's investments from foreign takeovers.<sup>221</sup> On the other hand, Egypt was not seeking to protect investors but to promote investments. A takeover law that made it easier (rather than harder) for investors to gain control of corporations was more likely to promote economic development.<sup>222</sup>

Thus, although the French version of the law was consistent with the economic priorities of France, the law failed when it was transplanted to Egypt because it was inconsistent with Egypt's priority to grow its economy.<sup>223</sup> Instead of adopting the law just because it was from a Global North country, Egypt's goals would have been better served by trying to understand the reasons behind French company takeover law. Transplanting French company takeover law to Egypt failed because the goals for which French takeover law was designed did not match Egypt's goals.<sup>224</sup> Had actors in Egypt examined the reasons for why the law developed in France, they may never have transplanted it to Egypt.

The comparative law approach identified here might also benefit judges in determining when, which, and for what purpose foreign cases should be used in their decisions. Liberals have strongly embraced the use of foreign precedent by judges,<sup>225</sup> but the use of foreign precedent can also undercut their commitments.<sup>226</sup> When the debates on foreign precedent heated up in the

220. See generally Ahmad A. Alshorbagy, *On the Failure of a Legal Transplant: The Case of Egyptian Takeover Law*, 22 IND. INT'L & COMPAR. L. REV. 237 (2012) (examining a case study of Egyptian takeover law that was transplanted from France).

221. *Id.* at 238, 246.

222. See *id.* at 266.

223. *Id.*

224. See *id.*

225. Harold Hongju Koh pointed out that the submission of amicus briefs by the Mexican Foreign Ministry and former U.S. diplomats was a strategy used by law professors and death penalty abolitionists to introduce international materials into U.S. death penalty jurisprudence, which expanded protections for criminal defendants. See Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1116–17, 1119–20, 1124–25 (2002). Conservative scholars, on the other hand, opposed the use of foreign precedent by the U.S. Supreme Court. John Yoo, for example, argued that using foreign precedents to determine outcomes transfers federal authority to bodies outside of the United States and is against the limited role of judicial review. John Yoo, *Peeking Abroad: The Supreme Court's Use of Foreign Precedents in Constitutional Cases*, 26 UNIV. HAW. L. REV. 385, 387–400 (2004).

226. Michael D. Ramsey points out that using foreign precedent can cut both ways: it can be used to justify expanding rights as well as to limit rights. For this and other reasons, he argues that American courts need principled guidance on which foreign and international courts they should draw from, under what circumstances, and to what ends. Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 71–72 (2004); see also Roger P. Alford,

international law scholarship, the U.S. Supreme Court had referred to foreign cases for the purpose of advancing gay rights and protections for criminal defendants.<sup>227</sup> The case study on sex-selective abortion demonstrates the need for consistent principles in analyzing whether transplanting foreign law is necessary, rather than blindly accepting transplants.

In the following section, I evaluate whether the restrictions on sex-selective abortion being introduced and adopted in many U.S. states will achieve the same goals that the restrictions on sex selection in India were designed to achieve and whether the laws being proposed in the United States even address a similar problem.

### B. *Evaluating Sex-Selective Abortion Laws*

In evaluating legal transplants, Section V.A above shows that it is important to identify and compare both (1) the social, cultural, economic, and other background factors of the country of origin and country of destination; and (2) the prevalence, intent, consequences, and other salient factors in regard to the practice that the reverse legal transplant proposes to address in both the country of origin and country of destination. This section provides background on sex-selective abortion regulations in India and evaluates sex-selective abortion laws in the United States using this perspective to determine whether they will enhance gender equality as they were designed to do in India.

#### 1. Examining and Comparing Structural Factors Giving Rise to the Practice in India

There are many cultural reasons advanced for why some Indian women abort female fetuses. First, patrilocal marriages, where a couple settles into the husband's family's home, are the norm in India.<sup>228</sup> As a result of this custom, a daughter is thought to be *paraya dhan* (someone else's wealth).<sup>229</sup> Sons are the ones who are assumed to be breadwinners for the families.<sup>230</sup> The lack of a pension system in India leads parents to rely on the son to provide financial

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*Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 58, 61, 64, 67 (2004) (outlining potential misuses of international and foreign materials). See generally Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1313, 1326 (2004) (identifying weakness in scholarly justifications for the use of foreign law).

227. See Alford, *supra* note 226, at 65.

228. See Geentanjali Misra, Veronica Magar & Susan Legro, *Poor Reproductive Health and Environmental Degradation: Outcomes of Women's Low Status in India*, 6 COLO. J. INT'L ENV'T L. & POL'Y 273, 280 (1995).

229. See *id.*

230. See *id.*

support during old age.<sup>231</sup> On the other hand, there are strong norms in some communities against families taking money or any support from a married daughter.<sup>232</sup> To the extent a woman earns an income outside of her household, she will often be expected to keep her earnings within the husband's family.

Second, the tradition that a bride's family must give large gifts to a groom's family is another reason for sex selection. Although dowry is prohibited under the Dowry Prohibition Act of 1961, the practice continues today.<sup>233</sup> As a result, when a woman gets married, her parents often have to pay money (sometimes large sums in relation to their income) to the groom's family.<sup>234</sup> For poor parents, having to provide a dowry when a daughter marries is often economically challenging.<sup>235</sup>

Third, while dowry may not be as much of a financial burden for wealthier families, parents may desire sons to perpetuate their family name and to inherit their parents' money. Parents are sometimes reluctant to leave money to their daughters because it will potentially be controlled by their daughters' husbands.<sup>236</sup>

Fourth, the desire to have a son instead of a daughter is often attributed to Hindu religious traditions. Many Hindus believe that only sons should light the funeral pyre of their parents and that *moksha* (liberation from the cycle of rebirth and reincarnation) is only possible through their sons.<sup>237</sup>

There are also structural factors that have contributed to the high rates of sex-selective abortion. There has been a decrease in overall fertility in India.<sup>238</sup> The UN Population Division estimated that the fertility rate in the 1950s was 5.9 children per woman in India.<sup>239</sup> By 2009, fertility in India had declined to 2.6 children per woman, less than half the rate of the early 1950s.<sup>240</sup> There are a host of reasons for the desire for smaller family sizes. Some argue that as agrarian modes of production become less prevalent (where the labor of children

231. Nirjhar Majumdar, *Retirement Planning: Do Not Ignore Individual Pension Plans*, FIN. EXPRESS (Mar. 13, 2020, 4:30 AM), <https://www.financialexpress.com/money/retirement-planning-do-not-ignore-individual-pension-plans/1896295/> [<https://perma.cc/TE54-HTJQ>].

232. *See id.*

233. Mallika Kaur Sarkaria, *Lessons from Punjab's "Missing Girls": Toward a Global Feminist Perspective on "Choice" in Abortion*, 97 CAL. L. REV. 905, 911 (2009).

234. *See id.* at 910–11.

235. *See* Wanda Teays, *The Burning Bride: The Dowry Problem in India*, 7 J. FEMINIST STUD. RELIGION 29, 32 (1991).

236. *See id.* at 33.

237. *See* RITA PATEL, *MAY YOU BE THE MOTHER OF A HUNDRED SONS: THE PRACTICE OF SEX SELECTIVE ABORTION IN INDIA* 7 (1996).

238. *See* CHRISTOPHE Z. GUILMOTO, *SEX IMBALANCES AT BIRTH: CURRENT TRENDS, CONSEQUENCES AND POLICY IMPLICATIONS* 10 (2012), <http://www.unfpa.org/publications/sex-imbalance-birth> [<https://perma.cc/6Y6S-2PFE> (staff-uploaded archive)].

239. *See* Carl Haub & James Gribble, *The World at 7 Billion*, POPULATION BULL., July 2011, at 9, <http://www.prb.org/pdf11/world-at-7-billion.pdf> [<https://perma.cc/GDG5-HZ6U>].

240. *Id.*

might have been important), people have fewer children.<sup>241</sup> In urban areas, increasing prices and cost of living encourages people to have smaller families.<sup>242</sup>

Governmental policies provide another reason for the changing family size norms. While most people know about China's prior one-child policy,<sup>243</sup> few are aware of the coercive policies adopted by Indian state governments to enforce a two-child norm model. In pursuit of the goal of smaller families, certain states have adopted laws barring people with more than two children from holding posts in local governing bodies.<sup>244</sup>

The social, cultural, economic, and other factors that give rise to sex selection in India do not exist in the United States. Some argue that the practice of dowry causes people to prefer sons,<sup>245</sup> but this practice is not common in the United States, even among immigrants. Families in the United States often share the costs of marriage. Others argue that in India, parents want to have at least one son because they rely on their sons for support in old age, given the lack of a national healthcare system for retirees.<sup>246</sup>

Another argument advanced to explain the preference for sons in India is the patrilocal system, where the daughter leaves her parents' family and moves in with her husband's family after marriage.<sup>247</sup> In the United States, in contrast, only 0.7% of households include a parent-in-law, son-in-law, or daughter-in-law.<sup>248</sup>

Finally, in India, although property laws allow for inheritance by daughters, in practice that does not occur.<sup>249</sup> Daughters are often pressured by their fathers, mothers, and brothers to relinquish any claims to their share of

241. JOHN, *supra* note 144, at 42.

242. Ravinder Kaur, *Dispensable Daughters and Bachelor Sons: Sex Discrimination in North India*, 43 *ECON. & POL. WKLY.* 109, 114 (2008).

243. See Lily Kuo & Xueying Wang, *Can China Recover from Its Disastrous One-Child Policy?*, *GUARDIAN* (Mar. 2, 2019, 10:00 AM), <https://www.theguardian.com/world/2019/mar/02/china-population-control-two-child-policy> [<https://perma.cc/HQN9-YGG8>].

244. See SINGH, *supra* note 120, at 83.

245. See Teays, *supra* note 235, at 47.

246. See *India's Preference for Sons Mostly Due to Need for Elderly Care: Study*, *ASIAN SCIENTIST* (July 14, 2016), <https://www.asianscientist.com/2016/07/health/india-cultural-preference-sons-elderly-care/> [<https://perma.cc/FFP4-ECYX>].

247. See Misra et al., *supra* note 228, at 280.

248. See UNIV. CHI. L. SCH. GLOB. HUM. RTS. CLINIC, NAT'L ASIAN PAC. AM. WOMEN'S F., & ADVANCING NEW STANDARDS IN REPROD. HEALTH, *REPLACING MYTHS WITH FACTS: SEX-SELECTIVE ABORTION LAWS IN THE UNITED STATES* 25 (2014) [hereinafter *REPLACING MYTHS*], <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1004&context=ihr> [<https://perma.cc/XM5L-WV3U>].

249. See Indu Bhan, *Property Rights in India: Women Are Not Getting Their Due; Here Is How*, *FIN. EXPRESS* (Oct. 26, 2017, 3:34 AM), <https://www.financialexpress.com/opinion/property-rights-in-india-women-are-not-getting-their-due-here-is-how/906827/> [<https://perma.cc/DAR4-6MP2>].

paternal and maternal wealth.<sup>250</sup> In the United States, daughters are not generally disinherited just because they are female.<sup>251</sup>

Thus, most of the societal factors that encourage sex selection in India relate to sexist norms and institutions that do not, for the most part, exist in the United States.<sup>252</sup> To the extent the practice occurs in the United States, it is not a result of larger societal norms and institutions that discriminate against women.<sup>253</sup>

## 2. Examining and Comparing the Prevalence, Intent, and Consequences of the Behavior

In examining the prevalence, intent, and consequences of the practice in both the country of origin and country of destination of the reverse legal transplant, it becomes obvious that the practice of sex-selective abortion does not carry the same connotation in the United States for gender equality.<sup>254</sup> It is estimated that over fifty million women and girls are missing in India as a result of sex-selective abortion, as well as other causes, such as malnutrition and neglect.<sup>255</sup> On the other hand, in the United States, the largest estimates suggest that there are approximately one thousand to two thousand missing women and girls.<sup>256</sup> The widespread nature of the practice in India makes it more problematic for women's equality.

To understand the harm caused by a practice, it is sometimes helpful to ascertain the motive for the practice. In India, based on an analysis of sex ratios, it is safe to assume that people select for sex because they want to have a son

250. See KALANTRY, WOMEN'S HUMAN RIGHTS AND MIGRATION, *supra* note 134, at 168.

251. *Id.*

252. *Id.*

253. *Id.*

254. Some authors oppose sex selection regardless of whether it is for family balancing purposes or is widespread because they believe that sex selection assumes that parents can somehow select the gender of a child, challenging the view that gender is societally determined. See Deckha, *supra* note 156, at 15–16; Arianne Shahvisi, *Engendering Harm: A Critique of Sex Selection for "Family Balancing"*, 15 BIOETHICAL INQUIRY 123, 128–29 (2018).

255. Hundal, *supra* note 142; see Ira Trivedi, *A Generation of Girls Is Missing in India*, FOREIGN POL'Y (Aug. 15, 2019, 12:32 PM), <https://foreignpolicy.com/2019/08/15/a-generation-of-girls-is-missing-in-india/> [<https://perma.cc/S2AM-8M2E> (dark archive)].

256. Calculating the actual numbers from the sex ratios based on the decennial 2010 U.S. Census, there are likely no more than 1,000 missing girls among Chinese and Indian Americans. See Douglas Almond & Yixin Sun, *Son-Biased Sex Ratios in 2010 US Census and 2011–2013 US Natality Data*, 176 SOC. SCI. & MED. 21, 23 (2017). Similarly, another author reports that he thinks there were “2,000 ‘missing girls’ in the United States between 1991 and 2004.” Abrevaya, *supra* note 129, at 23. In 2011, another study estimated that there were 1,000 missing girls per year across the entire United States from 1983 to 2002. See James F. X. Egan, Winston A. Campbell, Audrey Chapman, Alireza A. Shamshirsaz, Padmalatha Gurrum & Peter A. Benn, *Distortions of Sex Ratios at Birth in the United States: Evidence for Prenatal Gender Selection*, 31 PRENATAL DIAGNOSIS 560, 565 (2011); REPLACING MYTHS, *supra* note 248, at 18.

and also have fewer children.<sup>257</sup> As noted above, societal factors that drive sex selection in India are largely absent in the United States. Thus, when Indian families do use sex selection to have a boy, they could be doing it because of their cultural desires. An analysis of U.S. census birth data of Asian Americans paints a more complicated picture. Working with economists, we found that when certain groups of Asian Americans have two sons, their third child is more likely to be a girl as compared to White Americans.<sup>258</sup> This suggests that, to the extent a small number of people in the United States are using some method of sex selection, they are doing so to have girls in some cases and boys in other cases. While many object to sex selection for any reason,<sup>259</sup> it carries a different implication when targeting females than when it is being used for purposes of family balancing. Further, any sex selection targeted at reducing the births of girls for sexist reasons could have symbolic harms for girls and women.

In addition, in a random national survey of one thousand people in the United States on their preferences with regard to the gender of their children, I found that Asian Americans—more than any other racial or ethnic group in the United States—were more likely to want to have one boy and one girl if they could have children. Sixty percent of Asian Americans desired one boy and one girl, while less than fifty percent of White Americans desired one boy and one girl.<sup>260</sup> This suggests that, to the extent people do sex select, they might be doing it to serve different goals than to obtain only sons.

The consequences of a practice are also relevant to determining its harm. The consequences of sex-selective abortion in India are very different than in the United States. Part of the reason Indian feminists object to sex selection against girls is that they believe it occurs as a result of unequal societal institutions and that the practice perpetuates those institutions.<sup>261</sup> The widespread practice makes girls in society feel less valuable.

Moreover, emerging empirical studies have found that the male surplus is harming women in other ways. Recent studies suggest that there are higher levels of sexual harassment, rape, and early child marriage in districts where

257. See Prabhat Jha, Rajesh Kumar, Priya Vasa, Neeraj Dhingra, Deva Thiruchelvam & Rahim Moineddin, *Low Male-to-Female Sex Ratio of Children Born in India: National Survey of 1.1 Million Households*, 367 LANCET 211, 214 (2006).

258. REPLACING MYTHS, *supra* note 248, at 16–17.

259. Rosalind Petchesky, for example, has argued that it is blatantly sexist for a woman to get an abortion on the grounds that she prefers a child of a different gender. See ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMEN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM* 7 (1984). Feminists informed by queer theories oppose sex selection because it suggests that gender is a binary category—male or female. See *Generations Ahead, Sex Selection Can Lead to Gender Discrimination*, in *SHOULD PARENTS BE ALLOWED TO CHOOSE THE SEX OF THEIR CHILDREN?* 28, 29 (Tamara Thompson ed., 2012).

260. KALANTRY, *WOMEN'S HUMAN RIGHTS AND MIGRATION*, *supra* note 133, at 122–23.

261. See *supra* notes 228–42 and accompanying text.

there is greater sex selection.<sup>262</sup> One study found some correlation between domestic violence and the shortage of women. Using survey data from the National Family and Health Survey, the study found that a low community sex ratio is associated with a higher likelihood of wives being punched by their husbands.<sup>263</sup> Furthermore, wives in communities with a sex ratio imbalance in favor of men are more likely to be slapped, pushed, or shaken.<sup>264</sup> The authors conclude that “in a patriarchal society such as India a relative shortage of women will encourage men to resort to violence and control to constrain women’s interactions with other nonrelated men and to confine women to traditional roles as wives and mothers.”<sup>265</sup> In contrast, we do not observe the same consequences of sex selection in the United States.

Thus, when seen through a multidirectional and contextual comparative lens, it becomes clear that the practice of sex-selective abortion is carried out in a way that is problematic from a perspective of women’s equality in India but not similarly so—and probably much less so—in the United States. In India, sex selection occurs because of certain social, economic, and historical factors and further perpetuates unequal social institutions. The practice harms girls and women both in terms of the implication it carries that girls and women are less valued and because of the actual harms that some empirical studies have documented in India as a result of a shortage of women.

To further illustrate my points, it is useful to consider two examples of sex selection undertaken in different contexts. Take the case of an Indian woman living in India who takes steps to have a boy after having a girl, and the case of a woman of Indian descent in the United States who takes steps to have a boy after having a girl. The first scenario raises different concerns than the second one. Social institutions such as dowry, patrilocal forms of marriage, and fewer economic opportunities for girls are some reasons why families may want to have at least one son in India. When families play into this tradition, they further perpetuate and reinforce those customs. In addition, because so many people have aborted girl fetuses, the shortage of women has been shown by empirical studies to cause actual harm to women.<sup>266</sup>

262. See RAVINDER KAUR, TOO MANY MEN, TOO FEW WOMEN: SOCIAL CONSEQUENCES OF GENDER IMBALANCE IN INDIA AND CHINA 40 (2016); Ravinder Kaur, *Mapping the Adverse Consequences of Sex Selection and Gender Imbalance in India and China*, 48 ECON. & POL. WKLY. 1, 37 (2013); Scott J. South, Katherine Trent & Sunita Bose, *Skewed Sex Ratios and Criminal Victimization in India*, 51 DEMOGRAPHY 1019, 1035 (2014); Sofia Amaral & Sonia Bhalotra, *Population Sex Ratios and Violence Against Women: The Long-Run Consequences of Sex Selection in India* 22–23 (Inst. for Soc. & Econ. Rsch. Working Paper Series, Working Paper No. 2017-12, 2017), <https://www.iser.essex.ac.uk/research/publications/working-papers/iser/2017-12.pdf> [<https://perma.cc/6CBL-6EWK>].

263. See Sunita Bose, Katherine Trent & Scott J. South, *The Effect of a Male Surplus on Intimate Partner Violence in India*, 48 ECON. & POL. WKLY. 53, 57 (2013).

264. See *id.* at 58.

265. *Id.* at 59.

266. See *id.* at 57–58.



In the case of an immigrant woman in the United States, the context in which her act occurs is different. She will not likely be required to pay money to a groom to marry her daughter, and she can rely on social security and other state support rather than relying solely on her son for economic support in old age. Further, there is no prevailing custom against daughters providing economic support, though perhaps certain Indian American parents might resist taking any financial support from their daughter. A daughter born in the United States may have more economic opportunities for self-sufficiency than one born in India.

Thus, societal institutions and norms do not encourage sex-selective abortion nor does the practice perpetuate sexist institutions and norms. Large numbers of people in the United States are not systematically selecting in favor of boys. Though the knowledge that sex-selective abortions of female fetuses occur even in the United States may cause symbolic harms within a family and community, given that there is no surplus of males in the United States, there are no consequences that relate to imbalanced sex ratios (such as increased sexual harassment and rape). Even though violence against women is prevalent in the United States, there is no correlation between that violence and sex selection in the same way as has been identified in India. Moreover, the few Asian American people who are using IVF or other means of sex selection may be doing so to ensure they have at least one boy *and* at least one girl.

In sum, a multidirectional and contextual comparative examination suggests that importing a law from India to the United States will not meet the goal for which the law was designed in India: to promote women's equality. While the nature of the practice and societal context in which it occurs in India is problematic from the perspective of equality for women, it does not have the same impact in the United States. Indeed, migrating such a law would harm women's rights to access reproductive care by imposing hurdles on women seeking to terminate their pregnancy for nonselective reasons.<sup>267</sup> Thus, a comparative approach makes it obvious that restrictions on sex-selective abortion were adopted for entirely different reasons in India, and the practice in the United States is vastly different. As a result, the limitations will not serve the purposes of enhancing gender equality as they were initially believed to do by some legislators.

#### CONCLUSION

During early modern history, colonial powers forced their colonies to adopt legal regimes based on their own legal systems. This was part of the larger project of dominating and controlling their weaker colonies. In the contemporary era, however, one might expect laws, institutions, and legal

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267. See *supra* Section III.A.

procedures to flow more organically. Governmental entities and individuals drafting laws or creating new policies might research and adopt laws from a host of other countries. However, a review of the legal transplant literature demonstrates that authors have tended to only document transplants from Global North countries to Global South countries and horizontally from countries with similar levels of economic growth. But they have not observed many migrations from a Global South country to a Global North country. This is likely because many reverse legal transplants do not occur in practice. Alternatively, it could be that there is a plethora of reverse legal transplants in practice, but scholars have chosen not to write about them. In that unlikely case, transplant scholarship should begin to expand to document the multiple ways in which law travels.

One likely explanation for the lack of Global South to Global North transplants is that, while Global North countries have institutions, donors, and governmental entities that fund the work of exporting laws, similar organizations are rare in Global South countries. Another possible explanation for the dearth of reverse legal transplants is the assumption that laws from countries that have economies with higher per-capita production are legally mature and ought to be exported to economically weaker countries. Alternatively, the laws of countries with lower per-capita production are not viewed as worth borrowing. These assumptions place too great of an emphasis on law as a vehicle of economic growth and too little emphasis on other goals of law, including promoting social justice and environmental protection. When norms do migrate in the reverse, they typically relate to the regulation of immigrants' or other minority groups' behavior.

Prior studies consider a legal transplant to be successful if it has been implemented by the reception country. The case study on sex-selective abortion statutes makes it clear that this inquiry is too narrow. If implementation of the law were the only measure of success, then there would be no need to resist transplantation of prohibitions on sex selection. It is only by placing the law in a comparative perspective that we determine whether or not it is appropriate for the United States to adopt a similar legislative response to sex selection as India. Examining the law in the Indian context lays bare why adopting the bans in the United States will not serve the same purposes for which they were designed in India. This analysis should be of interest to legislators who are faced with voting on the bills and judges who adjudicate their constitutionality.

Beyond the case study of the reverse legal transplant, this Article makes several important contributions to the transplant literature. First, this Article finds from a study of the transplant literature that scholars who write in the legal transplant tradition only document transplants that move from Global North to Global South. This is likely because there are so few moving the other way. While unlikely, it is possible that there are many reverse legal transplants

in practice, but scholars have failed to document them. In either case, this Article contributes to the literature by presenting a robust case study of a reverse legal transplant.

Second, there is little rigor or consistent usage of the term “legal transplant.” This Article attempts to draw boundaries around the concept. It uses that definition to guide a review of the transplant literature and to identify sex-selective abortions statutes as reverse legal transplants.

Third, this Article develops a multidirectional and contextual comparative methodology that should be employed when policymakers, lawyers, and advocates are determining whether or not to transplant a law, legal institution, or legal procedure. Learning from the case study of the reverse legal transplant of sex-selective abortion bans, it becomes apparent that comparative approaches to all transplants (even ones from the Global North to Global South) should be broadened.

Egypt’s use of French company takeover law is an example of where a multidirectional and contextual comparative methodology employed prior to adoption of the law would have revealed that the law should never have been transplanted.<sup>268</sup> If the policymakers had examined the rationale and goals of the takeover law in France, they might have concluded that it was not appropriate for Egypt.<sup>269</sup> French takeover law is designed to discourage shareholders from taking over companies, but that goal might not serve a less developed country like Egypt.<sup>270</sup>

Universalist approaches often guide international legal reform efforts, particularly in the field of human rights. An extreme version of universalism calls for universal legal solutions to similar legal problems that arise across the world. Cultural relativism alternatively suggests that it is not possible nor normatively desirable for legal solutions to be uniform across jurisdictions. Comparative law methods provide a way out of this intractable debate in international law. Context-sensitive comparative law methods do not assume that legal solutions are applicable across borders (unlike universalism), yet they do not reject that possibility (unlike cultural relativism).

Future research on the directionality of vertical transplants (transplants between the international level and domestic law) could be fruitful.<sup>271</sup> For example, it would be interesting to ascertain whether laws that travel from the international level to nation-states migrate equally to Global North and Global South countries or disproportionately only to Global South nations. In

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268. See *supra* notes 220–24 and accompanying text.

269. Alshorbagy, *supra* note 220, at 266.

270. *Id.* at 245–46.

271. See, e.g., Dolidze, *supra* note 81, at 853 (“[T]hree core conditions must be present for internationalization: an opportunity for law-making related to structural transformation, norm entrepreneurs and norm entrepreneurs’ access to the decision-making body.”).

addition, it would be interesting to learn which countries' laws influence the development of international law—Global South countries, Global North countries, or both? Another area of research that moves beyond transplants would examine the use of foreign precedent. Do judges in Global North countries rely on case law from other Global North countries or cite to cases from Global South countries at the same rates when they use foreign precedent?

Some might argue that there is a dearth of reverse legal transplants because Global North countries do not have the same problems as Global South countries. This is a false assumption. A country like India, for example, has encountered many similar challenges as the United States, including free speech concerns, data privacy issues, affirmative action, and regulation of corporations. For example, one author has suggested that the United States and the United Kingdom consider allowing corporations to adopt the trusteeship model used by large conglomerates in India.<sup>272</sup>

Even the highest levels of the U.S. judiciary have acknowledged the importance of looking to legal models of Global South countries. In particular, the late Justice Ginsburg argued that countries writing modern constitutions should look not to the U.S. Constitution but instead to the South African Constitution for guidance.<sup>273</sup> Global South countries have developed innovative solutions to numerous contemporary problems that are, at least, worth examining by Global North policymakers and legal reformers.

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272. See COLIN MAYER, FIRM COMMITMENT 231–32 (2013). Another innovation in India is quotas for women on boards of directors. Darren Rosenblum describes how California has also adopted this requirement in the wake of the #MeToo movement, which he notes “echoes” the Indian quotas. Darren Rosenblum, *California Dreaming?*, 99 B.U. L. REV. 1435, 1439–40 (2019).

273. See Joshua Keating, *Why Does Ruth Bader Ginsburg Like the South African Constitution So Much?*, FOREIGN POL’Y (Feb. 6, 2012, 6:07 PM), <https://foreignpolicy.com/2012/02/06/why-does-ruth-bader-ginsburg-like-the-south-african-constitution-so-much/> [<https://perma.cc/8MFC-YWR7>].

