

Lessons from Punjab’s “Missing Girls”: Toward a Global Feminist Perspective on “Choice” in Abortion

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INTRODUCTION

In the United States, abortion rights are synonymous with feminism and women’s rights, but halfway across the world in Punjab, India,¹ abortion has become an unlikely but fierce agent of a patriarchy that oppressed women. Punjab today epitomizes the growing phenomenon of feticide,² or sex-selective abortion of girls. Such abortions have resulted in increasingly warped sex ratios—the sex ratio in Punjab has now fallen below 880 girls to 1000 boys (with some districts³ as low as 754 girls to 1000 boys), as compared to the natural Indian sex ratio of about 950 girls to 1000 boys.⁴ Research indicates that women abort girls due to societal pressures and deeply ingrained prejudices against the female child.⁵ Girls—whose vulnerable modesties must

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1. This Comment’s discussion is limited to the Indian-controlled part of Punjab. Punjab was partitioned between India and Pakistan in 1947, after Britain relinquished its colonial control.

2. This Comment uses the American spelling ‘feticide,’ except when referring to a source that employs the Anglo-Indian spelling ‘foeticide.’

3. Punjab’s 50,362 square kilometers and 24,359,000 strong population are divided into twenty administrative districts. *See* Government of Punjab Website, Punjab at a Glance, <http://punjabgovt.nic.in/punjabataglance/SomeFacts.htm> (last visited Dec. 20, 2008).

4. Census of India Website, http://www.censusindia.gov.in/Census_And_You/gender_composition.aspx (last visited Apr. 15, 2008) (natural sex ratio slightly favors boys at birth).

5. *See, e.g.,* ASHISH BOSE & MIRA SHIVA, DARKNESS AT NOON: FEMALE FOETICIDE IN INDIA (2003); PUNJAB HUMAN DEVELOPMENT REPORT 2004, ch. 6, 111-42 (2004), *available at* <http://data.undp.org.in/shdr/punjab/06-gender.pdf>; Madhu Gurung, *Demographic Danger Signals*, FRONTLINE (India), Jan. 22–Feb. 4, 2000, *available at* <http://www.flonnet.com/fl1702/17020710.htm>.

be protected, wedding dowries must be paid, and socio-economic positions are insufficient to ensure parents' economic stability or security—are seen as burdens and liabilities for their families. The selective abortion of females both represents and reinforces this devaluation of girls and further entrenches gender prejudices.

Abortions are legal both in the United States and India. In India, the abortion issue neither decides presidential elections nor triggers even a fraction of the spirited or spiritual debates that exist in the United States. Rather, the trend of “missing baby girls” has brought abortion under scrutiny in India. Over the last decade, this has led to the criminalization of sex-selective abortions under Indian law. However, the practice continues unabated, the law largely disregarded.⁶ The responses to this problem vary. One approach is to enforce the law more strictly by implementing harsher penalties and anti-corruption measures. Many remain skeptical, however, that law alone can solve social problems. For instance, the failure of regulations outlawing dowries to achieve meaningful change in India suggests that law alone cannot solve social problems.⁷ Nevertheless, as Punjabi feminists employ various tools to counter sex-selective abortions, they continue to look to legal avenues for potential solutions.

This Comment adopts a feminist lens to analyze laws and policies surrounding sex-selective abortions. I define the feminist legal approach as one that not only studies how regulations affect women, but also aims at improving women's status in society. In other words, the very process of feminist theorizing is goal-oriented in that it seeks to highlight the interaction between women and regulations in order to prompt changes that make this interaction more equitable for all. This Comment studies whether anti-sex-selection laws—created as a reaction to government embarrassment over census figures, feminist advocacy, and some moral outrage—help or detract from the struggle against Punjabi patriarchal norms. Next, this Comment explores non-legal responses to sex-selection, including education campaigns, vigils, teach-ins, religious edicts, and even social policing. Notably, the increased attention to the issue—a Google search of “sex-selection, Punjab” reveals 33,100 results—has not meant an increased birth rate of girls.⁸ Research demonstrates that

6. See BOSE & SHIVA, *supra* note 5.

7. See, e.g., Amanda Hitchcock, *Rising Number of Dowry Deaths in India*, World Socialist Website, July 4, 2001, <http://www.wsws.org/articles/2001/jul2001/ind-j04.shtml> (giving several accounts of dowry murders, discussing various statistics offered by both the Indian government and NGOs in recent years, and maintaining that while exact statistics are difficult to obtain, the National Crimes Bureau of the Government of India reported a 170% increase in dowry deaths in the decade 1987-97); Sahil Makkar, *Every Four Hours, One Indian Woman Ends Life Over Dowry*, INDO-ASIAN NEWS SERV., Dec. 24, 2007, available at <http://www.hindustantimes.com/storypage/storypage.aspx?id=1777b6e8-95c8-48c4-85f9-4feda2a6fd53&&Headline=Every+four+hrs%2C+1+woman+ends+life+over+dowry>.

8. BOSE & SHIVA, *supra* note 5.

educational campaigns are not a solution in and of themselves.

Punjabi feminists face many challenges in working to combat sex-selective abortion. Unlike dowry or child marriage, abortion—the new agent of patriarchy—is not itself an anti-feminist activity. This Comment proposes that in order to combat this practice, Punjabi feminists must attack all forms of patriarchy instead of simply locking horns with sex selection. To this end, Punjabi feminists need increased support from other feminists and Punjabi society alike. It is generally accepted that Punjab, like the majority of India, has always been patriarchal—structured around men as heads of households, in economically, culturally, and socially superior positions to women. Punjabi historical narratives are replete with child marriage, bigamy, dowry, and infanticide.⁹ Though Punjab has seen crucial advances in women's rights over the last few decades, combating patriarchy is no easy task for Punjabi feminists. The solution lies in fighting against deeply ingrained societal prejudices to achieve true reproductive "choice." *That* is the fight that law and society should be supporting at each level. *That* is the harder fight. *That* is the fight that will help us find our "missing" girls, our missing balance and equality.

I have chosen to focus on the state of Punjab for several reasons. First, India is a unique conglomeration of diverse cultures and peoples. While the state of Punjab is not homogenous, this Comment's analysis can be more thorough by concentrating on one state alone. Second, the political climate in Punjab is ripe for presenting suggestions for positive change. The problem of feticide in Punjab has received much negative press in recent years, and in response, the state has implemented many initiatives that are now underway. Third, Punjab has historically been seen as one of India's more prosperous and developed states,¹⁰ and its warped sex ratios raise a contradictory flag of failure in the midst of success. Finally, I am most familiar with this state and culture, having grown up in Punjab myself.

Part I defines the binary notion of choice prevalent in U.S. feminist thought and the multiple notions of choice advanced by this Comment. Part II describes the ways in which gender stereotypes intersect with political and economic factors to fuel the problem of sex-selective abortion in Punjab. Through this description, Part II provides an international case study that challenges the binary notion of "choice" in U.S. feminist discourse on abortion. Part III provides an overview of the law prohibiting female feticide and its apparent weaknesses. Drawing an analogy between legal responses to sex selection and legal efforts to combat prostitution, this Comment argues that there is no true feminist legal solution to this phenomenon. Part IV discusses non-legal responses to sex selection and questions the desirability of these responses from a feminist perspective. Part V synthesizes the legal and non-

9. See BOSE & SHIVA, *supra* note 5; Gurung, *supra* note 5.

10. PUNJAB HUMAN DEVELOPMENT REPORT 2004, *supra* note 5.

legal aspects of the case study to explore how “choice” factors in sex-selective abortions. In doing so, I explore whether there is a way to be pro-choice and anti-sex-selective abortions, and conclude that the answer is an expanded concept of choice. This expanded concept of choice creates a global feminist approach to abortion that transcends the borders of this country and applies to women in Punjab. This re-imagined global feminist perspective also challenges American feminists to think of abortion rights in this country in a manner that is more inclusive and compatible with the reality of many women’s lives.

I

UNDERSTANDING CHOICE

This Comment concludes that the Western binary concept of “choice” must be re-evaluated with a global feminist perspective to encompass the case of Punjab’s “missing girls.” The binary notion sees “choice” as the decision between having and not having an abortion. A multiple notion of “choice” acknowledges a more complicated mental calculus rather than an individualistic decision on abortion alone. As such, “choice” accounts for and reflects a range of social and cultural variables.

Viewed within the binary framework of “choice” in Western feminist abortion discourse, women aborting female fetuses in Punjab are “pro-choice.” However, this label does not have the same implications in the Punjabi context of sex-selective abortion as it does in American society. This case study of sex selection in Punjab seeks to effectively problematize “choice,” not to weaken the abortion rights movement, but rather to strengthen it by making it more nuanced and globally applicable.

Given today’s societal norms and pressures, a contemporary Punjabi woman will choose abortion if the choice is between abortion and no abortion. When multiple choices are placed on the table—the choice to raise a daughter without dowry; the choice to have a daughter support her in old age without ridicule; the choice to have a daughter carry forth the family name without shame; the choice to raise a daughter without fear that violence will be inflicted on her—the same Punjabi woman might not choose to abort her female fetus. Or she might. There might still be women who, even in a gender-balanced world, only wish to raise sons. But using Joan Williams’s effective analogy, a true choice exists only when a woman picks one thing over the other in the same spirit as “some people choose Mars Bars over Baby Ruths.”¹¹

When the choice is between abuse and honor; ridicule and prestige; vulnerability and security; women will choose honor, prestige, and security—

11. JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 15 (2000). Williams employs this analogy—of preferences between Mars Bars and Baby Ruth Bars, both chocolate candies—when discussing women’s “marginalization” in the workplace.

and Punjabi women will have sons. This Comment embraces this reality. Punjabi women must be supported in bringing about societal change, rather than punished for finding a survival mechanism for themselves and not wishing their predicament on their daughters. Without assuring women security, honor, and prestige regardless of the choice (son or daughter) they make, any law or campaign attacking sex selection will not only be unsuccessful, but also unfair.

II

SEX-SELECTIVE ABORTIONS IN PUNJAB:

CHANN CHARIYAA BAAP DE VEHRE, VIR GHAR PUTT JAMIYAA!

*(The moon has risen over my father's courtyard, My brother's house
has been blessed with a son!)*

The seemingly innocuous congratulatory couplet from a Punjabi folk song reproduced above is extremely troubling in the present day context of Punjab. The couplet recognizes three generations of men in a family while celebrating the birth of another male heir. Here, congratulations are in order not only because a boy is born, but also because a girl is not. Was the boy's birth the happy result of probability? Or did the proud parents take steps to ensure a zero probability of having a female child?

According to the 2001 Census of India,¹² seven of the ten districts with the worst sex ratios in India are in Punjab.¹³ The sex ratio in India as a whole is 933 females per 1,000 males.¹⁴ However, the sex ratios of four Indian states, including Punjab, have fallen below 880 girls per 1,000 boys.¹⁵ The population of Punjab in 2001 was 24,289,296: 11,325,934 females and 12,963,362 males.¹⁶ The sex ratio was 874 females per 1,000 males.¹⁷

Like most Indian women, Punjabi women have lower social standing than men.¹⁸ Despite this, Punjab is one of the most prosperous states in India.¹⁹ The high rate of feticide in a relatively prosperous state may seem counterintuitive. To shed light on this phenomenon, this Part of the Comment first examines the patriarchal system that characterizes much of India. It then explores two Punjab-specific phenomena which, when coupled with prevalent gender stereotyping, may help explain why people in this rather "prosperous" state are desperate to have sons.

12. The Indian Government publishes a census report once every decade. The most recent census was taken in 2001.

13. PUNJAB HUMAN DEVELOPMENT REPORT, *supra* note 5, at 121, tbl. 6.8.

14. *Id.* at 118.

15. *Id.*

16. INDER JIT SINGH, INDIAN ADMIN. SERV., CENSUS OF INDIA 2001: PROVISIONAL POPULATION TOTALS, SERIES-4, PUNJAB (2001).

17. *Id.*

18. Madhu Gurung, *Punjab: A Village Panchayat Fights Foeticide*, DAILY EXCELSIOR (Jammu, India), Jan. 12, 2000, available at <http://www.dailyexcelsior.com/00jan12/edit.htm#5>.

19. PUNJAB HUMAN DEVELOPMENT REPORT 2004, *supra* note 5.

A. Son Preference in Traditional Indian Culture and in Punjab

Punjabi social scientists documenting sex-selective abortion trends in Punjab report deeply ingrained prejudice against girls.²⁰ Dominant Indian culture that favors male children exists in Punjabi society as well, and some commentators suggest that patriarchic trends are stronger in Punjab than in other Indian states.²¹ There are, of course, many exceptions to these trends in present-day Punjab, but the following analysis aims to discuss the reported general trends.

Punjabis see daughters as social and economic burdens.²² Parents must worry about the chastity of their daughters and about arranging suitable marriages for them.²³ Weddings impose serious economic strain on a bride's parents, who traditionally have to pay for the wedding and arrange for a hefty dowry.²⁴ Also, traditionally, daughters do not contribute economically to the household or to their parents' care in old age.²⁵ On the other hand, people equate sons with security. In the patriarchic system, only sons are rightful heirs and inherit the family name and property.²⁶ Further, parents see sons as sources of support in their old age, since culture dictates that parents live in a joint family with their sons and daughters-in-law, not with their married daughters.²⁷ The high premium on sons and low demand for daughters explains the high demand for sex-selective abortions.

Daughters' weddings impose a heavy financial burden on families because of the practice of dowry. Dowry constitutes the giving of money and other goods by a bride's family to a groom's family. The practice is socially justified as the "last expense" a girl's parents must bear—after her marriage the girl becomes the "responsibility" of her husband's family. A bride's parents traditionally have little bargaining power, and typically arrange the wedding in accordance with all of the groom's family's demands. This places them under extreme emotional, economic and social pressure.²⁸

Often cloaked as "gift-giving," dowry demands have only grown greater in recent years.²⁹ Dowry is not a fixed, flat rate for all. It varies and increases

20. See BOSE & SHIVA, *supra* note 5; Gurung, *supra* note 5.

21. See, e.g., Monica Das Gupta, *Selective Discrimination Against Female Children in Rural Punjab, India*, 13 POPULATION & DEV. REV. 77, 96 (1987); Gurung, *supra* note 18.

22. In some cases, the perceived "burden" of having daughters drives parents to take extremely troubling steps, such as suicide and even murder. See, e.g., *Mother Kills 2 Girls, Ends Life*, H.T. CHANDIGARH LIVE, May 3, 2007 (depression from having three girls believed to be the reason behind this 32-year-old mother's actions).

23. See BOSE & SHIVA, *supra* note 5; Gurung, *supra* note 5.

24. PUNJAB HUMAN DEVELOPMENT REPORT 2004, *supra* note 5, at 114.

25. VEENA TALWAR OLDENBURG, *DOWRY MURDER: THE IMPERIAL ORIGINS OF A CULTURAL CRIME* 24-25 (2002).

26. BOSE & SHIVA, *supra* note 5.

27. *Id.*

28. OLDENBURG, *supra* note 25.

29. PUNJAB HUMAN DEVELOPMENT REPORT 2004, *supra* note 5, at 114.

depending on a family's economic status. The practice thus successfully places a substantial burden on most girls' families, whether rich or poor.³⁰ Poor, rural Punjabi farmers unable to re-pay large loans taken for their daughters' weddings have committed suicide.³¹ Urban families do not fare much better; many are forced into large debts.³²

The Dowry Prohibition Act of 1961, strengthened through amendments in 1984 and 1986, legally eliminated dowry.³³ Yet numerous media reports and studies indicate that both the practice of dowry and dowry-related crimes continue to thrive across India, including Punjab.³⁴ Dowry crimes include threats to the bride's family and post-nuptial harassment of the bride to extract more money from her family.³⁵ However, prosecutions for these crimes are rare, even when the harassment results in the tragic deaths of young brides.³⁶ The law has failed to provide an appropriate solution in the face of general societal sanction of the practice of dowry.³⁷

Dowry persists unabated for the large part, contributing to the persistent belief that girls are a burden.³⁸ This explains a popular advertisement for clinics that offer sex-determinative tests: "Spend Rs. 500 now, save Rs. 50,000 later."³⁹ Since daughters continue to be viewed as a financial burden, dowry is reportedly one of the leading reasons for son preference by women who undergo sex-selective abortions.⁴⁰

Women are generally not seen as financially independent actors, a consideration that promotes sex-selective abortions in a time of rising costs of

30. See, e.g., Gurung, *supra* note 5.

31. *Id.*

32. *Id.*

33. "[T]wo other amendments to the Dowry Prohibition Act of 1961, enacted in 1984 and 1986, made dowry giving and receiving a cognizable offense." Mandhu Kishwar, *India's New Abuse Laws Still Miss the Mark*, MANUSHI: A JOURNAL ABOUT WOMEN & SOCIETY (New Delhi), as reprinted in HINDUISM TODAY MAG., Sept.–Oct. 2001, available at http://www.hinduismtoday.com/archives/2001/9-10/44-47_dowry.shtml. See also BOSE & SHIVA, *supra* note 5.

34. BOSE & SHIVA, *supra* note 5. See also, e.g., Hitchcock, *supra* note 7 and accompanying text; Kanchan Vasdev, *Poisoned for Dowry, Woman Battles for Life*, TRIBUNE (Chandigarh, India), Sept. 10, 2003, available at <http://www.tribuneindia.com/2003/20030910/ldh1.htm>; *Husband Gets 7-Year Term in Dowry Death Case*, TRIBUNE (Chandigarh, India), Sept. 10, 2003, available at <http://www.tribuneindia.com/2000/20001226/ldh1.htm>.

35. BOSE & SHIVA, *supra* note 5.

36. BOSE & SHIVA, *supra* note 5; see also Laurel Remers Pardee, *The Dilemma of Dowry Deaths: Domestic Disgrace or International Human Rights Catastrophe?*, 13 ARIZ. J. INT'L & COMP. L. 491, 493-96 (1996) (discussing forms of dowry violence including bride-burning, sati, female-child murders, etc.).

37. See, e.g., BOSE & SHIVA, *supra* note 5.

38. See, e.g., OLDENBURG, *supra* note 25; Tim Sullivan, *The World: Mothers of India Cry for Joy to Learn It's a Boy*, L.A. TIMES, Nov. 17, 2002, at 3.

39. Ravindra Rukmini Pandharinath, *Fighting Female Foeticide – A Long Way To Go*, LAWYERS COLLECTIVE, Aug. 1991, at 5.

40. BOSE & SHIVA, *supra* note 5; Manmeet Kaur, *Female Foeticide – A Sociological Perspective*, 39 J. FAM. WELFARE 1, 40-43 (1993); Gurung, *supra* note 5.

living.⁴¹ Though many women in Punjabi cities and towns are leaving the domestic realm and contributing economically to their families, the domestic sphere continues to be considered a woman's rightful place.⁴² In wealthier families, women often stay at home because not working outside the home is seen as a symbol of social status and economic prosperity.⁴³ Of the total male population in Punjab, 54.1% were recorded as part of the workforce, while of the total female population only 18.7% participated.⁴⁴ The women who do enter the workforce generally earn much less than their male counterparts.⁴⁵ Further, workplace harassment serves as a barrier to women entering the professional realm.⁴⁶

Women are not seen as qualified workers. The huge literacy gap between men and women, which results from a lack of emphasis on girls' education, serves as a disadvantage in the job market.⁴⁷ As of the last census, the female literacy rate in rural Punjabi populations was 57.91%, compared to male literacy rate of 71.70%.⁴⁸ In urban sections of Punjab the female and male literacy rates were 74.63% and 82.97% respectively.⁴⁹

In Punjabi families, women traditionally do not inherit property.⁵⁰ Though the law now allows daughters to receive their share, it is uncommon and frowned upon for daughters to inherit property.⁵¹ Some argue that legal developments designed to ensure a girl's share in family property have backfired.⁵² Parents now fear that the daughter's husband will try to gain control of their property unless he is paid a hefty dowry as a substitute for the daughter's share of inheritance.⁵³ This fear of ancestral property being usurped by another family (the daughter's in-laws) further increases prejudice against

41. BOSE & SHIVA, *supra* note 5.

42. PUNJAB HUMAN DEVELOPMENT REPORT 2004, *supra* note 5, at 130-31.

43. *Id.* at 113.

44. SINGH, *supra* note 16.

45. PUNJAB HUMAN DEVELOPMENT REPORT 2004, *supra* note 5.

46. On prevalence of sexual harassment in India, see generally KERRY SEGRAVE, *THE SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE, 1600 TO 1993* (1994) (detailing the history of sexual harassment in the workplace and reporting the great degree of sexual harassment suffered by professional Indian women); Shobha A. Menon & Suresh Kanekar, *Attitudes Toward Sexual Harassment of Women in India*, 22 J. APPLIED SOC. PSYCHOL. 1940 (1992); Namita Bhandare et al., *Gender Law: Workplace Victory*, INDIA TODAY MAG., Sept. 1, 1997, at 66 (quoting survey concerning sexual harassment in Indian workplace); Martha Nussbaum, *Women and Work – The Capabilities Approach*, THE LITTLE MAG. (ONLINE ED.), May 2000, <http://www.littlemag.com/martha.htm> (explaining the cultural forces contributing to sexual harassment of Indian women).

47. SINGH, *supra* note 16; PUNJAB HUMAN DEVELOPMENT REPORT 2004, *supra* note 5, at 129-30.

48. *Id.*

49. *Id.*

50. *Id.* at 113-14.

51. Gurung, *supra* note 5.

52. *Id.*

53. *Id.*

daughters and drives the desire for sons.⁵⁴

Domestic violence is yet another reason why people perceive having a daughter as a liability and source of angst. Domestic violence is a common phenomenon in Indian and Punjabi marriages.⁵⁵ As discussed above, often-deadly violence against women is perpetrated in dowry-related conflicts.⁵⁶ Similar to other societies, domestic violence is believed to be under-reported in India and Punjab. When it is reported, police often ignore the issue and rarely enforce the laws against domestic violence.⁵⁷ This, coupled with concerns about family harmony and social status, results in "family, in-laws, friends, and even neighbors" being reluctant to come to the aid of a woman who is suffering domestic violence.⁵⁸ Girls' parents consider this very real threat of violence in their daughters' marriages not only with natural parental concern for a child's welfare but also as a potential source of dishonor and burden.

The Indian government's population-control campaigns over the last fifty years have further exacerbated son preference by preaching the merits of a small family.⁵⁹ The merits of planning for small families and a two-child family norm are instilled into the public's psyche through the popular government slogans like "Hum Do, Humare Do" (We are Two, and We will have Two).⁶⁰ The Government is now attempting to promote the idea of a one-child family through messages such as "Have fun with One, Control Population," highlighted on the website for the Department of Family Welfare.⁶¹ Families generally want at least one male child, if not two.⁶² Since they aim for a two-child family, women only have two chances at producing a male child. As a result, the sex-determinative tests and sex-selective abortions become all the more important. Studies show that women whose first child is a girl display higher son preference than women who have had one boy.⁶³

Finally, son preference and sex-selective abortions are not limited to the

54. *Id.*

55. *See, e.g., Woman Commits Suicide*, TRIBUNE (ONLINE ED.) (Chandigarh, India), Mar. 11, 2006, <http://www.tribuneindia.com/2006/20060312/punjab1.htm#27>. ("A case of suicide by a housewife on account of her alleged regular beating by her drunkard husband was reported in the city police station here yesterday.")

56. *See, e.g., Makkar, supra* note 7.

57. Martha Nussbaum, *India: Implementing Sex Equality Through Law*, 2 CHI. J. INT'L L. 35, 35 (2001).

58. Judith G. Greenberg, *Criminalizing Dowry Deaths: The Indian Experience*, 11 AM. U. J. GENDER SOC. POL'Y & L. 801, 811-12 (2003).

59. BOSE & SHIVA, *supra* note 5.

60. *Id.*

61. Department of Family Welfare Website, Government of India, <http://mohfw.nic.in/dofw%20website/national%20population%20policy/npp.htm> (last visited Apr. 15, 2008) [hereinafter Family Welfare Website].

62. *See* BOSE & SHIVA, *supra* note 5; ANURAG AGARWAL, *FEMALE FOETICIDE: MYTH AND REALITY* (2003).

63. S. Puri et al., *Gender Preference and Awareness Regarding Sex Determination Among Married Women in Slums of Chandigarh*, 32 INDIAN J. COMMUNITY MED. 60, 62 (2007).

illiterate, rural, and poor populations. Some Punjabi districts with the highest female literacy rates, such as Ludhiana and Fatehgarh Sahib, also have the worst sex ratios in the country.⁶⁴ While Ludhiana is the industrial center of the state, Fatehgarh Sahib is semi-rural.⁶⁵ The son preference cuts across class lines and plagues various strata of society. Though more educated, the urban elite also have easier access and greater financial resources for sex-determinative tests and abortions.⁶⁶ In fact, sex ratios are the worst in urban areas. While rural areas recorded 887 females per 1000 males in 2001, urban areas recorded 848 females per 1000 males.⁶⁷

B. Punjab's Relative Prosperity and the Green Revolution

Punjab is generally seen as a prosperous Indian state that has experienced high levels of economic development. In 2001, the Human Development Index (HDI) for India was 0.472, compared to Punjab's HDI of 0.537.⁶⁸ Unfortunately, this development does not alleviate son preference, as discussed above. The relative economic prosperity does, however, raise some questions about the financial motivations associated with the practice of sex-selective abortions in Punjab. Shouldn't the relatively wealthy Punjabis be better able to support the economic burden of having daughters?

Part of the answer is that over time son preference has become entrenched as an accepted and rationalized part of Punjabi culture. Daughters are more than an economic burden—people see them as a social liability, their chastity and honor a matter of family concern. Further, it has been argued that despite its economic prosperity, Punjab's recent history has caused more feelings of discontent and instability in this state than in many others in India. Shiva, writing an acerbic review of the Green Revolution in Punjab, explains that this discontent results from “a sense of having been exploited and treated with discrimination.”⁶⁹

Many consider the advent of Punjab's relative economic prosperity synonymous with the “Green Revolution.” The Green Revolution refers to the development initiatives undertaken in the late 1960s and 1970s by developed countries to aid developing countries in increasing their crop yield.⁷⁰ During this period, foreign developed seeds and equipment were introduced to Punjab's

64. PUNJAB HUMAN DEVELOPMENT REPORT 2004, *supra* note 5, at 121.

65. *Id.*

66. See Scott Baldauf, *India's 'Girl Deficit' Deepest Among Educated*, CHRISTIAN SCI. MONITOR, Jan. 13, 2006, available at <http://www.csmonitor.com/2006/0113/p01s04-wosc.htm>.

67. SINGH, *supra* note 16.

68. The Human Development Index (HDI) is a comparative measure of standard of living. BOSE & SHIVA, *supra* note 5.

69. VANDANA SHIVA, *THE VIOLENCE OF THE GREEN REVOLUTION: THIRD WORLD AGRICULTURE, ECOLOGY AND POLITICS* 13 (1991).

70. PUNJAB HUMAN DEVELOPMENT REPORT 2004, *supra* note 5, at 114.

agriculture.⁷¹ Foreign agencies, such as the International Monetary Fund and the World Bank, and the Indian Government considered these new initiatives a miracle.⁷² The Green Revolution brought quick results and agricultural prosperity, but critics allege that return on crops began to decline quickly thereafter: "[a]fter an early experience of prosperity, Punjab farmers were rapidly disillusioned. In 1971-72, the returns on wheat cultivation were 27% on investment. By 1977-78 cultivators complained that their returns had fallen to less than two percent of their investment."⁷³ There is general agreement that this "Revolution" deeply affected the Punjabi agrarian society just as it did agrarian societies in other developing countries.⁷⁴

The social impact of the Green Revolution affected Punjabi women intimately. Small landholdings became inefficient and poorer farmers could no longer sustain themselves off their land.⁷⁵ New technologies generally replaced unskilled labor, which many women had contributed to the agrarian system.⁷⁶ With the increased economic prosperity, larger land-owners quickly pulled women back into the domestic realm as a sign of increased social standing.⁷⁷ The Green Revolution also heralded the advent of consumerism and dowry demands increased.⁷⁸ Thus, the source of prosperity for the state also caused discontent for the poor, heightened the demand on natural resources, and most relevant for the purposes of this Comment, decreased the "economic worth" of women in agrarian families while increasing their "economic liability."

C. Militancy and Counter-Insurgency in Punjab

Some commentators posit that the decade of militancy in Punjab beginning in the late 1980s further fueled son preference. The Punjab insurgency stemmed from economic frustrations, demands for greater

71. See generally CARY FOWLER & PAT MOONEY, SHATTERING: FOOD, POLITICS AND THE LOSS OF GENETIC DIVERSITY 56-60, 63-81 (1990) (describing the Green Revolution's promotion of uniform high-yielding seeds in order to increase food production and the subsequent world-wide loss of crop diversity).

72. See, e.g., Prime Minister Manmohan Singh, Remarks at the Foundation Stone Laying Ceremony of IISER (Sept. 27, 2006), available at <http://pmindia.nic.in/speech/content.asp?id=399>.

73. SHIVA, *supra* note 69, at 174.

74. One review of over 300 published reports on the Green Revolution concluded that 80% of these reports found that the Green Revolution aggravated rural poverty and inequality in developing countries. See, e.g., Donald K. Freebairn, *Did the Green Revolution Concentrate Incomes?: A Quantitative Study of Research Reports*, 23 WORLD DEV. 265 (1995). A minority of studies concluded that the Revolution's overall social impact was positive. See, e.g., RITA SHARMA & THOMAS T. POLEMAN, THE NEW ECONOMICS OF INDIA'S GREEN REVOLUTION 16-18, 239-44 (1994); MURRAY J. LEAF, SONG OF HOPE: THE GREEN REVOLUTION IN A PANJAB VILLAGE 46-58, 64, 94-95, 104-05, 131-33, 140-41 (1984).

75. SHIVA, *supra* note 69.

76. PUNJAB HUMAN DEVELOPMENT REPORT 2004, *supra* note 5, at 131.

77. *Id.*

78. *Id.*

autonomy from the Central government, and human rights grievances.⁷⁹ Economic discontent in Punjab grew when the Center decreased its investment in Punjab, instituted what some considered unfair economic policies, and imposed a limit on the percentage of Sikhs who could serve in the military.⁸⁰ In the mid-1980s, farmers organized several protests in Chandigarh, the capital of Punjab.⁸¹ In May of 1984, under the organization of the Akali Dal, the Sikh political party, farmers agitated and tried to use their strongest bargaining chips—they blocked transportation of Punjabi wheat and withheld taxes from the Indian government.⁸² The government, under the orders of then Prime Minister Indira Gandhi, responded by deploying 100,000 troops in Punjab.⁸³

On June 3, 1984, the Indian army attacked the Darbar Sahib, which is the most significant religious site for the Sikh community. The attack took place on a religious holiday that drew large quantities of pilgrims.⁸⁴ The army simultaneously attacked forty-one Sikh gurdwaras (religious and communal centers).⁸⁵ According to eyewitnesses, anywhere from 4,000 to 8,000 people, mostly pilgrims, died in this attack in the Darbar Sahib alone.⁸⁶ However, official government figures cited the deaths of 493 “terrorists” and eighty-three “army personnel.”⁸⁷ What followed in Punjab was a long period of militancy that was met with a fierce counter-insurgency campaign by the Indian state.⁸⁸ As a result, thousands of Sikhs, mostly young men, were killed in this decade, though official numbers are still being investigated.⁸⁹

Women were often the direct and indirect targets of abuse during this period of turmoil.⁹⁰ As a result of the state’s counter-measures, several women were left without husbands or sons, and became destitute.⁹¹ It is reasonable to infer that this amplified ideas of women’s inherent “weakness.” This period of militancy thus might have further increased the desire for the coveted son. One further suggestion is that militancy heightened desire for sons since it promoted

79. Jaskaran Kaur, *A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India*, 15 HARV. HUM. RTS. J. 269, 270 (2002).

80. *Id.*; SHIVA, *supra* note 69, at 14 (documenting farmers’ frustrations, Vandana Shiva asserts that the Green Revolution was a “techno-political strategy” that in fact caused the violent tension between the people of Punjab and the Central Government). Historically, since the colonial British Indian army, military service had been the source of livelihood for a significant number of Sikhs, second only to agriculture.

81. SHIVA, *supra* note 69, at 14.

82. Kaur, *supra* note 79, at 270-71.

83. *Id.* at 271.

84. SHIVA, *supra* note 69, at 14.

85. Kaur, *supra* note 79, at 271.

86. *Id.*

87. *Id.*

88. *See generally*, RAM NARAYAN KUMAR, AMRIK SINGH AND JASKARN KAUR, REDUCED TO ASHES—THE INSURGENCY AND HUMAN RIGHTS IN PUNJAB (2003).

89. *Id.*

90. PUNJAB HUMAN DEVELOPMENT REPORT 2004, *supra* note 5, at 135.

91. *Id.*

casting men in the "traditional military mould."⁹² Another commentator goes on to generalize that the Sikhs have always preferred sons since they are a "martial race."⁹³ Though this latter generalization is inaccurate in light of Sikh history and religious tenets,⁹⁴ the former raises a plausible argument—that militancy promoted hyper-masculinity, strengthening traditional gender roles.⁹⁵ Further, it is worth noting that Punjabi militancy was male dominated and as a result of state counter-insurgency, many Punjabi men from rural families lost their lives. A missing generation of men was created in several villages, as young men "disappeared" in large numbers.⁹⁶ We might thus be witnessing one effect of the strife of the late 1980s and early 1990s in the form of an increased desire for males in the next generation. It is reasonable to suggest that the gendered economic, social, and cultural effects of Green Revolution and militancy in Punjab at best left unaffected, but more likely somewhat strengthened, the deeply ingrained son preference in Punjab.

III

LEGAL RESPONSES TO SEX-SELECTIVE ABORTIONS

In general, the law responds to undesirable social practices in one of three ways: criminalization, decriminalization, or regulation. This Part first describes the Indian laws criminalizing sex selection. It then discusses the relative advantages and pitfalls of each of the three options when viewed from a feminist perspective.⁹⁷ I analogize sex selection in Punjab to prostitution in the United States, because the latter has evoked extensive discussion about how the law can best address a gendered social phenomenon. Beginning with the assumption that the law is not the only solution to such practices, I ultimately conclude that the law might not, in fact, be a solution at all.

A. Laws Criminalizing Sex Selection in India

Although India legalized abortion in 1972, the legislature took up the issue once again when sex-selective abortions began to receive attention. In 1994, the Indian government passed the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act (hereinafter "PNDT Act").⁹⁸ For the

92. Gurung, *supra* note 5.

93. AGARWAL, *supra* note 62, at 6.

94. PUNJAB HUMAN DEVELOPMENT REPORT 2004, *supra* note 5, at 122.

95. However, commentaries on the nature of militants and the effects of militancy in Punjab should also be read in light of the political sensitivity of the topic and the fact that the Indian state quelled the militancy and the militants are now cast as 'terrorists.' See generally Kaur, *supra* note 79.

96. *Id.*

97. A feminist legal perspective is one that studies how a chosen regulation affects women, with ultimate goal of improving women's status in society.

98. Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, No. 57 of 1994; INDIA CODE (1994), available at <http://mohfw.nic.in/dofw%20website/acts%20&%20rules/>

next decade, as sex-selective abortions increased rather than decreased, observers criticized the PNDT Act for lack of enforcement mechanisms and other loopholes. The Act was amended in 2003, and its title was accordingly changed to “Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection).”⁹⁹ As the following historical discussion reveals, the legacy of abortion law in India would have been rather bare and unchallenged were it not for the issue of sex-selection.

1. The Medical Termination of Pregnancy Act

In India, abortion is not a constitutional right, but is legalized by a statute, the Medical Termination of Pregnancy Act (hereinafter “MTP Act”).¹⁰⁰ However, this right to abortion is limited, and the MTP Act only guarantees the right when the pregnancy is less than twenty weeks.¹⁰¹ Further, a doctor’s assent is required for every abortion.¹⁰² If the pregnancy is between twelve and twenty weeks, two medical practitioners must assent to the abortion.¹⁰³ The medical practitioner(s) must conclude that “(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or (ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities to be seriously handicapped.”¹⁰⁴ The Act provides two examples of “grave injury” to mental health: pregnancy as the result of rape and pregnancy that “occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children.”¹⁰⁵ Abortion on any grounds other than those specified in the MTP Act is an offense punishable under the Indian Penal Code.

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

The PNDT Act, passed by the Indian Parliament in 1994, was the first national law prohibiting sex determination. It limits the use of prenatal tests for diagnosing possible genetic conditions in fetuses and bans employing these tests for sex determination. The Act requires that all genetic counseling centers

PNDT-1994.htm [hereinafter PNDT Act].

99. Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, No. 14 of 2003; INDIA CODE (2003), available at [http://mohfw.nic.in/The%20PNDT%20\(AMENDMENT%20RULES\)%202003.htm](http://mohfw.nic.in/The%20PNDT%20(AMENDMENT%20RULES)%202003.htm) [hereinafter PNDT Amendment Act].

100. Medical Termination of Pregnancy Act, No. 34 of 1971, INDIA CODE (1971), available at <http://mohfw.nic.in/MTP%20Act%201971.htm> [hereinafter Termination of Pregnancy Act].

101. *Id.* at 3(2).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 3(2), explanations 1-2.

register with the government¹⁰⁶ and that no center “be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purposes specified in clause (2) and after satisfying any of the conditions specified in clause (3).”¹⁰⁷ Clause two lists five “abnormalities” and leaves it to the discretion of the “Central Supervisory Board,” which is described in detail below, to further add other genetic conditions to this list.¹⁰⁸ Clause Three requires that a woman who is to be tested for genetic disorders be over the age of thirty-five, have had two or more miscarriages, have been exposed to radiation or drugs, or have a family history of “mental retardation” or “physical deformities.”¹⁰⁹ This clause also allows the Central Supervisory Board to add conditions under which tests for genetic disorders may be conducted. In addition to regulating genetic counseling centers, the PNDT Act also prohibits advertisements promoting sex determination.¹¹⁰

The PNDT Act creates a Central Supervisory Board to oversee and report on the implementation and progress of the Act. The Central Advisory Board consists of ministers of various government departments, including health and women’s welfare, and ten members appointed by the central government, including medical doctors, social scientists, and representatives from women’s organizations.¹¹¹ The Act thoroughly details the qualifications, tenure, and administrative procedures for Board members. The expectation is that the Board will consist of mostly high-ranking government officials and some non-governmental members elected by the central government.

The Act also lays out penalties and fines for violators.¹¹² It details the maximum sentence and fines for first time offenders and suggests harsher penalties for subsequent offenders. It indicates that medical personnel who act in contravention of the Act should be reported to their respective State Medical Council for further action. This penalties section of the Act also reflects the reality of gender relations in Indian society by delineating a rebuttable presumption that a “pregnant woman has been compelled by her husband or relative to undergo pre-natal diagnostic technique.”¹¹³ However, this presumption does not preclude the pregnant woman herself from liability for fines and imprisonment. Instead, it only means that when a woman is charged under the Act, some ‘accomplice’ to the woman must also be charged.

Though the PNDT Act clearly criminalizes sex-determinative tests, critics contend that the Act is ineffective because its criminalization does not extend

106. Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, No. 57 of 1994, INDIA CODE (1994), ch. II(1).

107. *Id.* at ch. III(1).

108. *Id.* at ch. III(2).

109. *Id.* at ch. III(3).

110. *Id.* at ch. VII(1-2).

111. *Id.* at ch. IV.

112. *Id.* at ch. VII.

113. *Id.* at ch. VIII, 24.

far enough.¹¹⁴ Though the Act regulates prenatal diagnostic procedures, it does not ban these procedures altogether. Critics believe this makes implementation of the Act nearly impossible.¹¹⁵ The Act also fails to cover newly developed sex-determinative technology and does not criminalize pre-conception techniques such as sperm sorting that separates the X- from the Y-chromosome.¹¹⁶

The Act has other enforcement problems. Doctors often choose to ignore the mandate of the law in exchange for hefty fees.¹¹⁷ Results of sex-determinative tests are given orally, making such communications difficult to prove. Further, ultrasound machines, which are regularly used by physicians for legitimate purposes during the second and third trimesters of pregnancy, also divulge the sex of the child. Regulation of private communications between physicians and patients during ultrasounds is extremely difficult.¹¹⁸ It is estimated that fewer than one percent of the ultrasound machines in India are registered in the first place, and in Punjab alone, there are anywhere from 1,000-1,500 ultrasound centers.¹¹⁹ Finally, some critics also contend that the Act does not sufficiently detail penalties because it specifies maximum, but not minimum, fines and prison sentences. The Act also fails to specify procedures for reporting doctors to their medical council.¹²⁰ For all of these reasons, the PNDT Act may be incapable of bringing about measurable change.¹²¹

3. *Pre-Conception & Pre-Natal Diagnostic Techniques Amendment Act of 2003*

In February 2000, advocacy groups approached the Indian Supreme Court and urged stricter implementation and enforcement of the PNDT Act. The Indian Supreme Court agreed with these advocates and ordered stricter enforcement of the PNDT Act.¹²² The Act was most recently amended in 2003, as described below.¹²³

Two Indian advocacy groups, Center for Enquiry into Health and Allied Themes (CEHAT)¹²⁴ and Manabadhikar Suraksha Mancha (MASUM),¹²⁵

114. See Vineet Chander, "*It's (Still) a Boy . . .*": Making the Pre-natal Diagnostic Techniques Act an Effective Weapon in India's Struggle to Stamp Out Female Feticide, 36 GEO. WASH. INT'L L. REV. 453, 463 (2004).

115. *Id.*

116. *Id.*

117. *Id.*

118. BOSE & SHIVA, *supra* note 5.

119. Gurung, *supra* note 5; Gurung, *supra* note 18.

120. Chander, *supra* note 114, at 464.

121. BOSE & SHIVA, *supra* note 5.

122. *Id.*

123. PNDT Amendment Act, *supra* note 99.

124. Centre for Enquiry into Health and Allied Themes (CEHAT) Homepage, <http://www.cehat.org/go> (last visited Apr. 15, 2008).

125. Manabadhikar Suraksha Mancha (MASUM), <http://www.geocities.com/geesen/masum.htm#m> (last visited Apr. 15, 2008).

together with activist Sabu George, filed a Public Interest Litigation (PIL) petition in the Indian Supreme Court. The PIL sought "To activate the central and state governments for rigorous implementation of the central legislation, and (t)o interpret the legislation and/or to demand amendments to ensure that the techniques that use pre-conception or during-conception sex selection are also brought under the purview of the Act."¹²⁶ In response, the Court ordered more vigorous implementation of the Act in opinions issued in 2001 and 2003.¹²⁷ The Court denounced the practice of sex-selective abortions as "immoral" and "unethical."¹²⁸ After the 2001 decision declared that "[it] is apparent that to a large extent, the PNDDT Act is not implemented by the Central Government or by the State Governments,"¹²⁹ the Court ordered the central and state governments to report regularly on the implementation of the Act and to educate the public against sex-selective abortions through media and other campaigns.¹³⁰ In its 2003 decision, the Court again addressed the lack of implementation of the Act by noting that "it is unfortunate that [the] law . . . is not implemented and, therefore, Non-Governmental Organisations [*sic*] are required to approach this Court for implementation . . . which is the normal function of the Executive."¹³¹ The Court recognized the "prevailing uncontrolled dowry system despite the Dowry Prohibition Act," the Indian "mind-set" of son preference, "insufficient education," and the "tradition of women being confined to household activities" as some of the root causes of the practice of sex selection.¹³² The Court then reiterated the necessity of education campaigns, and declared that "this process should be continued till [*sic*] there is awareness in public that there should not be any discrimination between male and female child [*sic*]."¹³³ The Opinion also reiterated the requirement on states to report bodies that perform illegal sex-determinative tests and specifically identified those states that had to yet develop reporting and implementing procedures as per the PNDDT Act.¹³⁴

In 2003, the PNDDT Act was amended in direct response to the Indian Supreme Court's rulings.¹³⁵ The amendment imposed a limitation on the use of the newest pre-conception diagnostic procedures to those situations in which

126. CEHAT, Call for a Ban on Sex Selection, <http://www.cehat.org/pndt.html> (last visited Apr. 15, 2008).

127. CEHAT v. Union of India, A.I.R. 2003 S.C. 3309; CEHAT v. Union of India, (2001) 3 S.C.R. 534.

128. CEHAT (2001) 3 S.C.R. 534.

129. *Id.* at 536.

130. *Id.*

131. CEHAT, A.I.R. 2003 S.C. at 3310.

132. *Id.*

133. *Id.* at 3314.

134. *Id.*

135. Kristi Lemoine & John Tanagho, *Gender Discrimination Fuels Sex-Selective Abortion: The Impact of the Indian Supreme Court on the Implementation and Enforcement of the PNDDT Act*, 15 U. MIAMI INT'L & COMP. L. REV. 203 (2007).

their use is medically necessary. The Act's title was revised accordingly to reflect this change: "Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection)."¹³⁶ The amended Act also mandated the imposition of stricter registration requirements for ultrasound providers. Additionally, the amendment addressed the criticism levied at the 1994 Act that it targeted traditional clinics but failed to sufficiently take into account the portable "clinics," or battery powered ultrasound machines set up in the back of vans.¹³⁷

Although the 2003 Act has increased penalties and further delineated the cases in which ultrasounds are permissible, sex determination and sex-selective abortions continue unabated.¹³⁸ An organized and protected "supply" of sex-selective abortions is met with high "demand" as women continue to be pressured to produce male heirs.¹³⁹ Meanwhile, in the few instances where offenders are apprehended, an already over-burdened Punjab judiciary is painfully slow to respond.

a. Enforcement Problems

The complicity of the medical community and government officials contributes to the persistence of sex-selective abortions. Some government officials report experiencing significant "pressure and lobbying" from the medical community, urging them to refrain from prosecuting doctors who have been caught revealing the sex of the fetus.¹⁴⁰ Not surprisingly, this pressure often leads to cooperation between the medical community and government officials.

For example, in 2006, skeletons of fifty aborted fetuses were found in a well outside a private clinic in the town of Patran, Patiala district, Punjab.¹⁴¹ News reports disclosed allegations of corruption and complicity of government officials, doctors, and police, all of whom allowed the practice to continue

136. PNMT Act, *supra* note 98.

137. See, e.g., John F. Burns, *India Fights Abortion of Female Fetuses*, N.Y. TIMES, Aug. 27, 1994, at 5, available at <http://query.nytimes.com/gst/fullpage.html?res=9E07E3D91139F934A1575BC0A962958260&sec=&spon=&pagewanted=2> ("One criticism of the new law is that it focuses on clinics but makes no provision for registration of the ultrasound machines themselves. This means, in effect, that thousands of entrepreneurs who have set themselves up with what amount to portable clinics—ultrasound machines powered by generators or batteries, and installed in the back of vans—are outside the new law.").

138. BOSE & SHIVA, *supra* note 5.

139. *Id.*

140. Ganapati Mudar, *Doctors in India Prosecuted for Sex Determination, But Few Convicted*, BRITISH MED. J., Feb. 4, 2006, available at <http://bmj.bmjournals.com/cgi/content/full/332/7536/257-c> ("'There is confidence, almost arrogance, among some doctors that they can get away with this,' said Arvind Kumar, the senior administrative officer in the southern city of Hyderabad who has prosecuted 18 doctors, the largest number of cases in a single city.").

141. Asit Jolly, *Gory Tale of Punjab's Lost Girls*, BBC NEWS, Aug. 18, 2006, available at http://news.bbc.co.uk/2/hi/south_asia/5264174.stm.

unchecked.¹⁴² The government health official who conducted the raid on the clinic reported that he received threatening phone calls warning him to discontinue such raids in the future, because there were "vested interests" behind the sex-determinative tests and sex-selective abortions.¹⁴³ Such complicity makes enforcement of the amended act especially challenging.

b. Judicial Problems

Even when arrests are made, cases stagnate in courts for years due to the generally sluggish nature of the Punjab judiciary. Last year, the Chief Justice of the Punjab and Haryana High Court, the two states share a common high court, reported that judges typically maintain around 9,000 open cases, even though no judge should have more than 500 cases open at a time.¹⁴⁴ Unsurprisingly, the first conviction for sex-selective abortions in India was handed down in August 2006, when a doctor from Punjab's neighboring state of Harayana was sentenced to two years in jail.¹⁴⁵ Officials estimate that over 300 doctors throughout India have been prosecuted for violating the law, but only a handful of them have actually been convicted.¹⁴⁶

Doctors have not been the only targets of prosecution. In other cases, clinics have been charged with failing to comply with the PNDT Act's guidelines regarding clinics, rather than for complicity in sex-selective abortions.¹⁴⁷ Finally, efforts have been made to prosecute manufacturers of ultrasound machines. In April 2007, Indian prosecutors brought charges against General Electric (GE), the largest manufacturer of ultrasound machines, alleging that GE knowingly supplied ultrasound machines to unregistered clinics that were performing illegal sex-selection tests.¹⁴⁸

c. Effects on Women

While the PNDT Act's lack of enforcement is a serious problem in the campaign against sex-selective abortions,¹⁴⁹ the successful implementation of the PNDT Act also poses troubling issues for the women involved. Despite their weaker position and lower influence in society, women who undergo sex-selective abortions face penalization under the Act. The Act acknowledges this reality by providing that: "the court shall presume, unless the contrary is

142. *Id.*

143. *Id.*

144. *Foundation Stone for Judicial Complex Laid*, TRIBUNE (ONLINE ED.) (Chandigarh, India), Mar. 24, 2007, <http://www.tribuneindia.com/2007/20070325/punjab1.htm>.

145. *India Sex Selection Doctor Jailed*, BBC NEWS, Mar. 29, 2006, available at http://news.bbc.co.uk/2/hi/south_asia/4855682.stm.

146. Mudar, *supra* note 140.

147. Lemoine & Tanagho, *supra* note 135.

148. Peter Wonacott, *India's Skewed Sex Ratio Puts GE Sales in Spotlight*, WALL ST. J., Apr. 18, 2007, at A1.

149. *See, e.g.*, BOSE & SHIVA, *supra* note 5; Chander, *supra* note 114.

proved, that the pregnant woman has been compelled by her husband or relative” to have the sex-selective abortion.¹⁵⁰ This provision holds the husband or relative in question guilty of abetment.¹⁵¹ However, in light of the factors discussed in Part I, son preference is ingrained in and expected of women living in a society that considers girls a burden. While the Act makes an exception for cases of ‘compulsion,’ this might be hard to prove in all but the obvious of cases.

Women are thus in a double bind—on one hand, their families pressure them to produce sons; on the other hand, the law threatens them if they undergo sex-determinative tests or sex-selective abortions. This punitive feature of the Act is very troubling. Indeed, the first arrest for female feticide in Punjab in 2002 was of a woman who had had a sex-selective abortion.¹⁵² Given that women are pressured not to birth girls, punishing women who undergo sex-selective abortions is punishing the very victims of the double bind.

B. Legal Alternatives Compared

A feminist legal perspective calls for an evaluation of the law from the perspective of the women involved. As explained in the preceding Part, the Indian legislature, supported and prodded by the Indian Supreme Court, has clearly criminalized sex selection. Even though enforcement of the law criminalizing the practice is currently weak, criminalization threatens the victims of a sex-selective culture. In search for different legal alternatives, this Part explores legal responses to the practice of prostitution in the United States and analogizes these to possible alternative legal responses to sex selection in India. Since different legal responses—criminalization and regulation—to prostitution are already in force in the United States, these responses allow us to study specific tactics instead of theorizing about them.

Although the prostitution analogy might not seem like an obvious choice the analogy is apt for several reasons.¹⁵³ First, both involve activities in which women, rather than men, primarily engage due to factors beyond their control. Prostitution may involve a “choice” to engage in an undesirable calling due to financial concerns, while sex-selective abortion is often undertaken due to family pressures. Second, both involve activities that perpetuate certain cultural norms—prostitution subjects women to male domination while sex-selective

150. PNDT Act, *supra* note 98, ch. VII (23).

151. *Id.* ch. VII (24).

152. *War Against Female Foeticide Begins with Two Arrests: First Case Registered in Punjab; Foetus Dug Out*, TRIBUNE (ONLINE ED.) (Chandigarh, India), Mar. 9, 2002, <http://72.14.235.104/search?q=cache:3WpBCd-4D58J:www.tribuneindia.com/2002/2>.

153. While the actual practice of sex-selective abortions includes discrimination and injustice toward unborn females, this Comment has approached the issue from the perspective that the fate of unborn females is but a symptom of the social status of Punjabi women, and that addressing sex selection will address gender discrimination—including the bias reflected in reproductive choices—in Punjabi society.

abortion reinforces preference for males in Punjabi society. Third, the assumption in both cases is that the law can and must provide an answer. Thus, both activities have been subjected to official regulation, while facing judgment from society.

1. Criminalization

Criminalization of prostitution is in effect in most of the United States, and involves outlawing the exchange of sex for money and other related acts such as solicitation and the transportation of women. Feminist commentators, however, critique such criminalization as a "prop to patriarchy."¹⁵⁴ Because the overwhelming majority of prostitutes are women,¹⁵⁵ criminalizing the practice largely affects women. It "removes prostitutes from the protection of wage and hour laws, social security, insurance and pension laws, safety and health protections and collective bargaining rights."¹⁵⁶ Further, because of their "criminal status," prostitutes are susceptible to victimization by corrupt police and other people in positions of power.¹⁵⁷ The criminalization of prostitution has also led to an increased number of female prisoners.¹⁵⁸

While it is difficult to argue that criminalization is positive for individual women, criminalization may be desirable on a macro level because it deters women from entering prostitution in the first place. However, the statistical proof of the effectiveness of criminalization is debated. Though scholars note certain downward statistical trends—for example, from 1987 to 1996, the numbers of arrests for prostitution and related crimes fell from 85,588 to 76,754¹⁵⁹—these numbers only account for street prostitution and do not reflect the prevalence of the practice in general, which includes massage parlors, escort or call services, and hotel workers.¹⁶⁰ While 85-90% of those arrested for prostitution work on the street, street work accounts for approximately 20% of prostitution.¹⁶¹ Experts also estimate that for every prostitute, there are ten

154. Carlin Meyer, *Decriminalizing Prostitution: Liberation or Dehumanization?*, 1 CARDOZO WOMEN'S L.J. 105, 105 (1993).

155. JOHN F. DECKER, PROSTITUTION: REGULATION AND CONTROL 16-17 (1979).

156. Meyer, *supra* note 154, at 106.

157. Susan E. Thompson, *Prostitution – A Choice Ignored*, 21 WOMEN'S RTS. L. REP. 217, 231 (2000).

158. Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 244 (2000).

159. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1997 324, tbl. 4.1 (Kathleen Maguire & Ann L. Pastore eds., 1998).

160. See Priscilla Alexander, *Prostitution: Still a Difficult Issue for Feminists*, in SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 184, 189 (Frédérique Delacoste & Priscilla Alexander eds., 2d ed. 1998).

161. Prostitutes' Education Network, Prostitution in the United States – The Statistics, <http://www.bayswan.org/stats>.

times as many customers.¹⁶² State governments, for their part, spend millions of dollars and thousands of hours attempting to enforce the prohibition of prostitution.¹⁶³ Thus, although quantifying prostitution and the deterrence effect of criminalization is difficult, it is safe to say that the “world’s oldest profession” persists in the United States today.

Despite criminalization’s adverse effects on prostitutes, this approach remains the predominant legal response to prostitution for several reasons. First, criminalization placates conservative moralists; commercialization of sex has long been viewed as a danger to the social fabric, particularly by American Christians.¹⁶⁴ Second, criminalization is thought to protect the public health and thwart the increase of sexually transmitted diseases (STDs), despite the lack of empirical data suggesting the relationship between prostitution and STDs.¹⁶⁵ Third, criminalization of prostitution is presented as a means to eliminate other related crimes.¹⁶⁶ Finally, criminalization allows local officials to “assure their constituency that they are ‘tough on crime.’”¹⁶⁷

Some contend that criminalization of prostitution supports the feminist agenda by sending a clear message that women cannot and should not be commodified.¹⁶⁸ But the threats that criminalization poses to women’s health, safety, and well-being decrease the desirability of employing the criminal justice system to send such a message. And, of course, there are other means to send this message, including positive imagery of women in media, gender education, and campaigns that attack the “demand” side of prostitution. More importantly, the survival of the “world’s oldest profession” in the face of anti-prostitution laws and enforcement perhaps sends the contrary message—that the commodification of women is, in fact, unstoppable.

Criminalization of sex-selective abortions poses similar problems. While criminalization seeks to discourage the practice and raise public awareness, the rampant disregard of the law actually sends the opposite message by illustrating that nothing can stop society’s deeply entrenched desire for sons. Furthermore, the threat of criminal liability might push the practice of sex-selective abortions “underground” and away from licensed health care providers and sanitary

162. See KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 107 (1979).

163. Jessica N. Drexler, *Governments’ Role in Turning Tricks: The World’s Oldest Profession in the Netherlands and the United States*, 15 *DICK. J. INT’L L.* 201 (1996).

164. Thompson, *supra* note 157, at 229.

165. *Id.*

166. *Id.* at 230.

167. Whitebread, *supra* note 158, at 245.

168. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 61 (1987) (providing a feminist perspective of prostitution as the ultimate form of female subordination). See also MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (1996); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 *S. CALIF. L. REV.* 777, 828 (1988) (concluding that sexual conduct is and should be acceptable only when induced by mutual desire for intimacy and pleasure and not for economic benefit).

facilities, which endangers the health of the women involved.

There is also evidence that the age-old practice of infanticide is resurfacing in parts of Punjab. Doctors in the Punjabi city of Patiala have reported seeing as many as three male infants to every one female infant for general check-ups and medical care. This has raised concerns that the heightened government attention to sex-determinative tests has resulted in a resurgence of infanticide.¹⁶⁹ Doctors suspect that in order to avoid criminal penalties, women are avoiding pre-natal care and deliveries in government hospitals, choosing to deliver their children at home, where they may take it upon themselves to eliminate the baby if she is a girl.¹⁷⁰ Thus, PNDT Act's provision of criminal liability may actually encourage women to resort to murder in order to escape the criminal liability threatened by the PNDT Act. The above discussion highlights that criminalization of prostitution and sex-selective abortions only attacks the symptoms of the problem rather than the problem itself.

2. Regulation

Regulation of prostitution involves imposing time, place, and manner restrictions on the practice of prostitution.¹⁷¹ Legalized but regulated prostitution exists in some countries, as well as in the U.S. state of Nevada. In regulated areas, government officials closely watch and police the daily life activities of prostitutes. For example, prostitutes are often confined to their "brothels" during work hours, prohibited from living in the neighborhoods in which they work, and restricted in their movement while on the job.¹⁷² Further, mandatory health check-ups are imposed to screen for STDs, and brothels face losing their licenses for lack of compliance with these regulations.¹⁷³

Regulation arguably has both pros and cons. These regulatory provisions do allow women to continue working in the prostitution industry with the benefit of protection from disease and abuse.¹⁷⁴ Further, the zoning of brothels removes the "nuisance" of prostitution from many neighborhoods by confining the practice to specific neighborhoods. At the same time, confining prostitutes' movement, policing their activity, and making their health records public should they contract a disease prompts the critique that regulation is in fact "oppressive confinement" of the women involved.¹⁷⁵ Critics claim that legalized but regulated prostitution is akin to "modern day slavery—created,

169. G.S. Nibber, *Sex Ratio Fails Hospital Maths*, HINDUSTAN TIMES (New Delhi, India), 2007, at 1.

170. *Id.*

171. Meyer, *supra* note 154, at 107.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

operated, and condoned by the government, in order to control women's sexuality."¹⁷⁶ Policing and confining prostitutes in this way perpetuates the same stigma against prostitutes as criminalization—"those" kind of women are not equal citizens and thus their rights merit restriction.

While policy makers have not yet entertained regulation as a legal response to sex selection in Punjab, potential regulatory measures are easily imaginable. Sex-selective abortions have become an industry in Punjab, and regulations could aim at curbing this industry by checking providers and better informing the clients. For example, regulations could ban public advertisements promoting sex selection, impose mandatory medical evaluations of women seeking sex-selective tests and abortions, and require counseling for couples considering abortion. As elaborated below, however, such well-meaning regulations could also label and punish women.

Like the prohibition on advertising prostitution, the elimination of advertisements blatantly asking people to abort girls (such as, "Spend 500 Rupees now, save 50,000 Rupees later") could serve the goals of moral conservatives and those who believe that the advertisements themselves promote corrupt behavior. Also, one can imagine that young children viewing sex-selection advertisements will be socialized in the existing gender biases from a very early age. The removal of sex-selection advertisements could also serve to protect children's innocence regarding sex and abortions for a little longer. Additionally, politicians could use the elimination of advertisements from the public eye as evidence of their own positive impact on society. But, like in prostitution, the women who receive abortions are potentially hurt, rather than helped by such regulations that push the practice under the radar. Prohibiting advertisements does not remove the societal prejudice against daughters, but it could prevent women from learning about licensed abortion clinics.

Imposing mandatory medical evaluations or requiring the reporting of women who seek sex-selective tests and abortions could endanger doctor-patient confidentiality and women's privacy rights. Critics of regulation cite these same concerns.¹⁷⁷ Abortions in India already require the assent of medical professionals,¹⁷⁸ and increasing the power of doctors could snowball into harassment and the increased likelihood of doctors demanding bribes. In any event, in India, regulation could be tantamount to decriminalization, since laws are not uniformly enforced and corruption is rampant.

The above discussion suggests that the regulation of both prostitution and sex selection is undesirable because it opens doors to gratuitous labeling and punishment of women.

176. Thompson, *supra* note 157, at 244.

177. Meyer, *supra* note 154, at 107.

178. See *supra* Part III.A.

3. Decriminalization

Decriminalization of prostitution would involve the elimination of all existing criminal laws and regulations regarding prostitution. In a decriminalized system, prostitution would be subject to the same laws as all other businesses.¹⁷⁹ Advocates for decriminalization believe that it would allow women to directly control their lives and work conditions.¹⁸⁰ They believe it would allow women to organize and not be left at the mercy of brothels and "johns," the middlemen.

Carlin Meyer argues that prostitution does not create, reinforce, or perpetuate gender oppression, though it does perhaps epitomize it.¹⁸¹ Decriminalization of prostitution, then, does not risk increased violence against women, but rather is the best option for women who are already part of the practice.¹⁸² Meyer acknowledges the danger of viewing prostitution as any other job, because, in doing so, we ignore something unique about sexuality and about women's bodies being sold for money. Although Meyer recognizes this weakness, she believes it should not stand as an impediment to decriminalization, which protects the interests of prostitutes otherwise left vulnerable to abuse under a criminalized or regulated system.¹⁸³

Decriminalization of sex selection would validate social biases against the girl child and would perhaps encourage more sex-selective abortions. With respect to the women themselves, decriminalization would have mixed results. Women who oppose sex-selective abortion, despite familial and societal pressure to the contrary, currently have the law on their side. Decriminalization would eliminate this source of support. On the other hand, decriminalization would address the punitive nature of the current PNDT Act by eliminating criminal penalties for women who seek sex-selective abortions.

In sum, decriminalization might hurt women who are currently protected by the law, while simultaneously protecting those who are criminalized by the current law, even though data suggests that more women are breaking the current law than seeking protection under it. Decriminalization neither punishes women nor protects them. Coupled with the danger of validating social prejudices, decriminalization appears to be an undesirable option.

Criminalization, regulation, and decriminalization are all inadequate feminist legal responses to sex selection. Criminalization punishes women, the very victims of the double bind; threatens women's health by pushing them to illegal providers; and harbors the danger of encouraging practices like infanticide. Regulation could also endanger women's health by limiting access

179. Thompson, *supra* note 157, at 244.

180. *Id.* at 245.

181. Meyer, *supra* note 154, at 112-13.

182. *Id.*

183. *Id.* at 120.

to important information, threatening doctor-patient confidentiality, and opening women to harassment. Decriminalization of sex-selective abortions validates society's prejudice against the girl child and fails to provide legal protection to those women who might be coerced into sex-selective abortions by their families. Given the inadequacies of all the legal alternatives, it is wise to consider non-legal avenues that address sex-selection.

IV

NON-LEGAL APPROACHES TO COMBATING SEX-SELECTIVE ABORTIONS

Punjabi activists have also employed non-legal approaches to address female feticide. The most prevalent response implemented is awareness campaigns regarding the societal worth of the female child. Other approaches have employed social embarrassment to combat sex-selective abortions with some success. This Part briefly discusses both responses, evaluating their short and long-term effectiveness from a feminist perspective.

A. Awareness Campaigns

Non-legal action in response to feticide has largely taken the form of awareness campaigns.¹⁸⁴ In a more unconventional effort against sex-selection, the International Charity Plan, a nonprofit organization, collaborated with the Indian Government to create a soap opera to disseminate a strong message against feticide.¹⁸⁵ The show, called *Atmajaa* ("Born from the soul"), portrays a pregnant woman whose husband forces her to have sex-determinative tests and then encourages women to resist such pressures. In fact, the protagonist in the show eventually leaves her husband.¹⁸⁶

More conventional awareness campaigns include protests and rallies. The United Nations Children's Fund (UNICEF) and the United Nations Population Fund (UNFPA) have supported rallies by various religious groups, which march from town to town and condemn sex-selective abortion.¹⁸⁷ Additionally, New Delhi's Centre for Social Research has organized prominent protests in conjunction with a campaign known as *Meri Shakti, Meri Beti* (My daughter, my strength). Activity at the grassroots level is also prevalent. In one case, female college students created human chains at India Gate in New Delhi.¹⁸⁸ In a more dramatic protest, schoolgirls gagged themselves and sat in protest outside hospitals, urging doctors to turn away patients hoping to rid themselves

184. See UNICEF India: Media Centre, *UNICEF Endorses Multi-Faith Campaign Against Female Foeticide*, Nov. 15, 2005, http://www.unicef.org/india/media_1030.htm.

185. Jane Elliott, *Soap Opera Fighting to Save Baby Girls*, BBC NEWS, Jan. 22, 2005, available at <http://news.bbc.co.uk/2/hi/health/4173597.stm>.

186. *Id.*

187. See UNICEF India: Media Centre, *supra* note 184.

188. *Campaign Launched Against Female Foeticide*, HINDU (ONLINE ED.) (New Delhi, India), Dec. 3, 2006, <http://www.hindu.com/2006/12/03/stories/2006120310400300.htm>.

of their female fetuses.¹⁸⁹

The highest chair of Sikh religious and temporal authority, the Akal Takht, has repeatedly condemned feticide and ordered Punjabi districts to improve their gender ratios. The Sikh community responded by organizing candlelight vigils and *nagar kirtans* (Sikh community processions which include singing of religious hymns) to educate people about the equality of the sexes.¹⁹⁰

While such campaigns are laudable in that they involve the community in the fight against feticide, their effectiveness is debatable.¹⁹¹ The campaigns empower those who participate in their rallies, protests, and vigils. However, as discussed in Part II, Punjabis' preference for sons is deeply entrenched in the society.¹⁹² Religious condemnations and moral guilt aside, people make economic calculations and decide that daughters are burdens they cannot afford in the long run.¹⁹³ Punjab demographers Ashish Bose and Mira Shiva point out that in spite of numerous national and international conferences and seminar(s) on the girl child, as well as numerous projects and programmes [*sic*] funded by the government and donor agencies . . . there is very little evidence to suggest that the status of the girl child has improved substantially. . . . [I]n fact it has worsened. . . . [P]lanners and policy-makers have not understood the grip of the son complex.¹⁹⁴

It is thus questionable whether soap operas, posters, and songs will change deeply ingrained attitudes and make husbands realize that forcing their wives into sex selection is mentally, physically, and emotionally oppressive and unacceptable. However, the value of these awareness efforts should not be altogether lost in cynicism. These campaigns encourage dialogue and have successfully brought sex selection into the public realm, as is evidenced by numerous media reports on such campaigns.¹⁹⁵

Given the sensitivity and complexity of the issue, excessive negative pressure and attention to sex selection by media and NGOs is potentially dangerous. The dismal 2001 census figures have attracted much negative international press. For example, a recent U.N. report that analyzed the financial detriment of gender discrimination in India. As a result of mounting pressures engendered by the 2001 census, the Indian government passed legislation like the PNDDT Act and Amendment.¹⁹⁶

189. Shailaja Chandra, *Branches Sprout New Leaves*, PIONEER (New Delhi, India), Mar. 26, 2007, available at <http://www.dailypioneer.com/84688/Branches-sprout-new-leaves.html>.

190. *Campaign Against Female Foeticide*, TRIBUNE (ONLINE ED.) (Chandigarh, India), Dec. 26, 2006, <http://www.tribuneindia.com/2006/20061227/punjab1.htm>.

191. See, e.g., BOSE & SHIVA, *supra* note 5.

192. See *supra* Part II.

193. See sources cited *supra* notes 22, 23, 24, 25.

194. BOSE & SHIVA, *supra* note 5.

195. See, e.g., sources cited *supra* notes 184, 185, 188-191.

196. AFP, *Discrimination Costs Asia-Pacific 80 bln: UN*, April 2007, <http://business>.

Increased action involves stricter enforcement of the law, which carries with it the danger of forcing the practice underground.¹⁹⁷ In many villages 'ultrasound' is synonymous with 'feticide,' and there is a general conspiracy of silence around pregnancies.¹⁹⁸ As women and families begin to feel the pressure of these external campaigns, they might begin to resort to unlicensed providers and resist medical care, endangering the health of the women and their babies. Worse yet, as discussed earlier, in some areas women are returning to the age-old practice of infanticide.¹⁹⁹ Thus, awareness campaigns focusing on the skewed sex ratios do not solve the problem, and in some cases they promote reactions that might hurt the women involved.

B. Naming, Blaming, and Shaming

Nawanshehar, a district in Punjab, is repeatedly cited as a success story in the campaign against sex selection. Local authorities there claim that their efforts raised the sex ratio above 900 girls to 1000 boys in 77 villages.²⁰⁰ The district's leaders used many tactics to combat sex selection, but they attribute their success to embarrassment techniques implemented by Deputy Commissioner Krishan Kumar, who launched a drive against feticide in his district in 2005.²⁰¹

The Nawanshehar approach included public awareness campaigns by NGOs, students, and volunteers. Kumar worked closely with NGOs, uniting various groups under one banner and helping them organize rallies and increase outreach. NGOs were allotted vehicles to drive through villages, playing popular songs on loudspeakers and disseminating information about the value and worth of the female child. They denounced sex selection and warned people that engaging in sex-selective abortions has dire implications for women. Press releases and advertisements were used to encourage cooperation among doctors, journalists, politicians, and common citizens.²⁰² Also, pictures of Indian female role models, such as the young tennis player Sania Mirza, were posted in some villages in this district to serve as inspiration.²⁰³

Though the public awareness campaigns in Nawanshehar made headlines, Kumar attributes the district's success to his shaming tactics.²⁰⁴ Kumar

maktoob.com/News-20070218035750-Discrimination_costs_Asia_Pacific_80_bln_UN.aspx.

197. See text, *supra* accompanying note 169.

198. Manraj Grewal, *Skewed Sex Ratios in Punjab: A Case Study*, THE INDIAN EXPRESS, Feb., 2004, http://www.sikhtimes.com/news_021504c.html.

199. See Nibber, *supra* note 169.

200. Amrit Dhillon, 'Name and Shame' Tactic Stops Indians Aborting Baby Girls, TELEGRAPH (U.K.), Feb. 25, 2006, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/02/26/wabort26.xml>.

201. *Id.*

202. Chandra, *supra* note 189.

203. *Id.*

204. *Id.*

galvanized a team of informants that included his staff, NGO workers, village officials, health care workers, and various volunteers, including students. This group tracked pregnancies to ensure that no female feticide occurred in the district.²⁰⁵ Kumar's staff maintained a database of pregnant women which they used to call families and indirectly 'alert' them that the Deputy Commissioner was aware of the impending pregnancy.²⁰⁶

Kumar's office also took steps to ensure that ultrasound clinics complied with the recordkeeping and reporting provisions of the PNDT Act.²⁰⁷ By keeping an eye on pregnancies and ultrasounds, the office was able to detect when a sex-selective abortion took place. Kumar also set up a 'hotline' telephone number so that villagers could call when they believed a woman was considering an ultrasound or an abortion.²⁰⁸ Citizens were paid Rs. 5000 (\$100) for providing such information.²⁰⁹ Kumar's office also employed college students to provide information in return for a monetary reward.²¹⁰ Upon receiving information from any of the aforementioned sources, Kumar's staff paid a visit to the woman to verify the information received. In one reported case, officials arranged a "mock funeral" outside the home of a woman who had had a sex-selective abortion, and volunteers chanted prayers for the fetus and shouted "girl-killers."²¹¹ A local child development worker admired this tactic and observed that the offending family, "almost died of shame . . . [a]nd it scared everyone else too."²¹²

Government officials have applauded the improvement in sex ratios in Nawanshehar, and other districts have been admonished for not following suit. Almost 250 Nawanshehar ultrasound centers have been investigated and either had their operations suspended or their registration cancelled.²¹³ Impressed by Nawanshehar's success, the Punjab government awarded the district Rs. 300,000 (\$6,000).²¹⁴

Although the strategy employed in Nawanshehar has produced statistically favorable results, a critical evaluation of this strategy is still missing. Because the Nawanshehar strategy does not threaten women's general right to abortion, it seems within the legal bounds of the Medical Termination of Pregnancy Act (1971). Under the Act, abortions are legal up to the twentieth week of pregnancy.²¹⁵ Ultrasounds, which are policed in Nawanshehar, do not

205. Dhillon, *supra* note 200.

206. *Id.*

207. *Id.*

208. Chandra, *supra* note 189.

209. *Id.*

210. Dhillon, *supra* note 200.

211. *Id.*

212. *Id.*

213. *Id.*

214. Chandra, *supra* note 189.

215. Termination of Pregnancy Act, *supra* note 100, at 3(2).

determine the sex of the child before at least the twenty-sixth week of pregnancy. This means sex-selective abortions of female children based on ultrasound results would otherwise be illegal because of the timing of the abortion. Despite its legality, the Nawanshehar strategy is potentially harmful to women. As discussed in Part II, women who undergo sex-selective abortions do so under familial and societal pressures.²¹⁶ The shaming techniques used in Nawanshehar penalize the woman, who might be simply acting on her family's behest. They ostracize the woman, adding to her emotional turmoil. The system also involves the invasion of a pregnant woman's privacy for at least a few months. Villagers, including young children, are provided monetary incentives to "report" pregnant women. Further, monetary incentives raise the concern about false reporting and undue harassment. These programs realize success at the expense of women's rights and autonomy. One could question whether the situation in Punjab calls for such desperate measures that completely disregard women's privacy.

Further, the Nawanshehar model is a reactionary flurry of activity promoted by financial incentives. Despite its negative consequences for women's privacy, the model is also likely unsustainable. Preventing sex-selective abortions through policing and shaming women and families may be a short-term solution, but it hardly changes the social and political forces in which women are devalued—the very forces that caused sex selection in the first place.

The Nawanshehar efforts exemplify how the PNDA Act can be put into practice with vigor and provide immediate tangible results. However, from a feminist perspective, the efforts also exemplify why the PNDA Act and its enforcement may not be the best route for sustainable change.

V

REFRAMING LEGAL POLICY: SEX-SELECTIVE ABORTIONS AND "CHOICE"

This Comment suggests ways to reconcile Western feminist abortion rhetoric with the reality of how abortion is used in Punjab. To this end, this Part first distinguishes this Comment's concept of "global feminism" from the flawed traditional notions of the global feminism. It then proceeds to explain the U.S. feminist approach to abortion and why it is insufficient to address the concerns in the Punjabi context. In doing so, I hope to demonstrate how the feminist approach to abortion as a "choice" can be maintained in the context of sex selection, but only when a global feminist approach is applied.

A. Traditional Notions of Global Feminism

Global feminism in the 1960s and 1970s reflected an idea that women

216. See sources cited *supra* notes 22, 23, 24, 25.

around the world share the exact same problems simply by virtue of being women. For example, "[o]ne of the basic tenets of radical feminism²¹⁷ is that any woman in the world has more in common with any other woman—regardless of class, race, age, ethnic group, nationality—than any woman has with any man."²¹⁸ This language assumed women share a "common oppression."²¹⁹ Writing in the late 1980s on the rhetoric of global feminism employed by white bourgeois feminists, Bell Hooks remarked, "Women are enriched when we bond with one another but we cannot develop sustaining ties or political solidarity using the model of Sisterhood created by bourgeois women's liberationists."²²⁰ Similarly, in their book on Transnational Feminism, Inderpal Grewal and Caren Kaplan remarked: "[global feminism] may simply repeat the condescension and paternalism inherited from the past The internationalizing of women's and gender studies can lead to new forms of cultural imperialism."²²¹ Traditional notions of global feminism applied one single mould to all women, a Western feminist mold, which simplified and diminished the experiences of other women. As explained below, this Comment does not employ the same notions of "global feminism."

B. Anti-Essentialist Global Feminism

Unlike feminism's early missteps, a truly global feminist approach is one that remains sensitive to the contexts in which different women live their lives, yet is still applicable to women living in a range of cultures. It is not essentialist, that is, it resists labeling all women's experiences as essentially similar based solely on the shared experience of being women. It is thus more complicated than the traditional notions of global feminism, as well as more restricted by virtue of having to consider diverse constituencies of women all over the world. As a result, a functioning global feminist approach cannot encompass too many specific details. Rather, it should paint a broad strategy that can apply to women across the world.

This Comment joins other commentators who have re-claimed the terms

217. Generally defined as a more militant form of feminism that grew out of the civil rights movement in 1967. Radical feminism opposes the traditional gender roles that allow men to dominate women and believes that women's oppression cuts across boundaries of race, economic class, and culture. See generally ALICE ECHOLS & ELLEN WILLIS, *DARING TO BE BAD: RADICAL FEMINISM IN AMERICA, 1967-1975* (1990).

218. Sonia Johnson, *Telling the Truth*, 9 TRIVIA 9, 14 (1986).

219. Bell Hooks, *Sisterhood: Political Solidarity Between Women*, 23 FEMINIST REV. 125, 127 (1986).

220. *Id.* at 128.

221. Inderpal GREWAL & CAREN KAPLAN, *AN INTRODUCTION TO WOMEN'S STUDIES: GENDER IN A TRANSNATIONAL WORLD* xvii (2d ed. 2005). Grewal and Kaplan argue that global feminism represents a belief that women are similar everywhere due to their subordinate position to men, and thus have a natural alliance. The authors believe that "[u]nder the current circumstances, such an alliance would not only be impossible, it would have to operate under false pretenses."

“global feminism” and “global sisterhood,” insisting that they do not have to stand for essentialist approaches by default.²²² A recent book defines global/transnational feminism “as the broad goal of challenging and changing gender relations that subordinate women to men and that thereby also differentially advantage some women and men relative to others.”²²³ My choice to employ the term “global feminism” is based on the belief that a broader and more holistic approach to “choice” and abortion is one that applies both to women in the global North and South.

C. Global Feminism and “Choice”

A global feminist approach to abortion is one that promotes a variety of choices for all women. These choices will become possible only after feminist theory embraces various aspects of different women’s lives. Such theory will then prompt activities—challenging social norms, influencing public policy, and formulating laws—that empower women. Creating choices for women involves feminist activity in many different spheres of women’s lives, depending on the particular communities’ situation and needs. In Punjab, it is imperative to address dowry, employment discrimination, and domestic violence in order to make the appropriate choices available to women who are carrying female fetuses. Thus, the global feminist approach calls for a new, revised reality with a menu of options that apply to all women—albeit in different countries and with different restrictions.

Joan Williams has written a compelling and lucid argument for a broader notion of “choice.” In her book about the family-versus-professional-life conflict faced by many women, Williams discusses the need to break the constraints of the binary notion of “choice.”²²⁴ She describes the two alternatives presented to women as a result of “[d]omesticity’s organization of market and family work”: women can either (1) perform as ideal workers without family and domestic support that male counterparts with families enjoy, or (2) take “dead-end ‘mommy’ jobs” or “women’s work.” Neither alternative permits women to achieve gender equality.²²⁵ Williams explores the

222. See, e.g., PEGGY ANTROBUS, *THE GLOBAL WOMEN’S MOVEMENT: ORIGINS, ISSUES AND STRATEGIES* 1 (2004). Peggy Antrobus begins her book by acknowledging that “a book about a global woman’s movement is, inevitably, controversial. The adjective ‘global’ itself appears to minimize cultural and contextual differences . . . and indeed to disregard profound differences among women even within national boundaries.” She however goes on to say that she is “amazed to find that its image remains one of a movement associated with white, middle-class women from North America and Europe.” She describes how the movement has evolved over the last forty years “from a rich diversity of local movements into an international women’s movement and finally into a trans-national or global movement.”

223. See, e.g., *GLOBAL FEMINISM: TRANSNATIONAL WOMEN’S ACTIVISM, ORGANIZING AND HUMAN RIGHTS* vii (Myra Marx Ferree & Aili Mari Tripp eds., 2006).

224. WILLIAMS, *supra* note 11.

225. *Id.* at 39.

possibility of restructuring both "market work and family entitlements" (that is, employment requirements and divisions of labor within the family) to create more options for women.²²⁶ She suggests that more professional fulfillment and enjoyment of family life would be possible for men and women if the market and family structure was questioned, challenged, and reorganized.²²⁷ Only when women have more options can they truly choose family or work or both, depending on their personal preferences.

Williams's approach does not define the list of all practical choices because the essence of global feminism is to leave the construction of choices to individual women rather than lawmakers, policymakers, or larger society. This theory of global feminism calls for structural change—whether it is redefining the work week and hours requirements or redistributing the division of household tasks—for its practical realization.

In the context of sex selection, this means restructuring gender roles. Only when a baby girl and boy have equal worth in Punjabi society, can Punjabi women take in account other factors such as religion, health, family situation, and "choose" whether to have an abortion or not. Then, for some women, aborting the female fetus girls might be the first choice; for others it might be the fifth. But, as explained below, without expanding the array of choices available to the Punjabi woman, a feminist approach that is pro-choice and anti-sex-selective abortions is not possible.

D. U.S. Feminist Approach to Abortion: Limited Global Applicability

The U.S. feminist approach to abortion has focused on "choice" and the "right to choose" ever since the U.S. Supreme Court recognized women's right to abortion in *Roe v. Wade*.²²⁸ The *Roe* Court defined the first two trimesters of a woman's pregnancy as the time when she is free to consider various factors and decide "whether or not to terminate her pregnancy."²²⁹ The Court's decision provided women the right to be free from government interference during her first two trimesters. Following *Roe*, U.S. feminists have cited it as establishing the positive "right to choose."²³⁰ Pro-choice advocacy organizations have likewise adopted "choice" in their organizational language and mission. For example, NARAL Pro-Choice America, an abortion advocacy group, publicizes itself as "the nation's leading advocate for privacy and a woman's right to choose."²³¹

226. *Id.* at 41.

227. *Id.*

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

229. *Id.* at 153.

230. *See, e.g.*, SIMONE PAYMENT, *ROE V. WADE: THE RIGHT TO CHOOSE* (2004).

231. NARAL Pro-Choice America, Learn About NARAL Pro-Choice America, <http://www.naral.org/about-us/learn-about-us> (last visited Apr. 2, 2009).

The “choice” rhetoric reflects a liberal rights approach.²³² Choice is a quintessential liberal value, representing respect for individual autonomy.²³³ U.S. Supreme Court decisions on procreation,²³⁴ contraception,²³⁵ and abortion,²³⁶ all assume that citizens “have a zone of liberty in which to make intimate decisions.”²³⁷ The “choice” approach to abortion aims to empower the individual woman by protecting her decisions.

While the “choice” approach has proven powerful and effective for many women in the United States, it does not fit well with the experiences of women around the world. In one sense, Punjabi women are choosing to give birth only to sons—many studies show women themselves endorse son preference and therefore approve of sex-selective abortions.²³⁸ However, Punjabi women are often harassed by their husbands and in-laws if they do not produce the family’s male heir, the sign of security and prosperity.²³⁹ Further, Punjabi women generally have low decision-making capacity in their families²⁴⁰ and therefore have little autonomy over their bodies.²⁴¹ Even without explicit threats or pressures, women toe the line of societal expectations by categorizing their actions as efforts to prevent their daughters from suffering the brunt of gender discrimination.²⁴² Studies indicate that many Punjabi women consider abortion against their religious beliefs, while others fear the negative effects of multiple abortions on their bodies.²⁴³ Despite these weighty concerns, some women still undergo several abortions at their family’s behest.²⁴⁴ Meanwhile, the Indian government continues with its vigorous family planning campaigns, emphasizing the need for smaller families.²⁴⁵ Punjabi women thus make their “choice” of whether to selectively abort in the shadow of the societal preference for at least one son coupled with the government’s campaigns,

232. Nivedita Menon, *Abortion and the Law: Questions for Feminism*, 6 CANADIAN J. WOMEN & L. 103, 105 (1993).

233. April L. Cherry, *Choosing Substantive Justice: A Discussion of “Choice,” “Rights” and the New Reproductive Technologies*, 11 WIS. WOMEN’S L.J. 431 (1997).

234. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

235. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

236. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe*, 410 U.S. 113.

237. Cherry, *supra* note 233, at 433.

238. *See, e.g.*, Nandini Oomann & Bela R. Ganatra, *Sex Selection: The Systematic Elimination of Girls*, 10 REPRODUCTIVE HEALTH MATTERS 184, 185 (2002) (questioning whether a choice can be free if it is in response to a society ridden with gender discrimination).

239. AGARWAL, *supra* note 62.

240. *Id.*

241. Oomann & Ganatra, *supra* note 238.

242. Manmeet Kaur, *Female Foeticide – A Sociological Perspective*, 39 J. FAM. WELFARE 1, 40-43 (1993).

243. *See, e.g., id.*

244. Note that the predominant religion in Punjab, Sikhism, forbids feticide, considers it as an affront to gender equality, and instructs Sikhs to excommunicate those who abort girls. *See* Shiromani Gurdwara Parbandhak Comm., *Sikh Reht Maryada (Code of Conduct)*, <http://www.sgpc.net/sikhism/sikh-dharma-manual.html> (last visited Apr. 2, 2009).

245. Family Welfare Website, *supra* note 61.

which preach the value of a one- or two-child family.

The U.S. "choice" approach affords two possible reactions to the situation in Punjab: (1) support women who choose sex-selective abortion, even if it is motivated by patriarchy, or (2) suggest patronizingly that cultural considerations prevent "third world" women from ever exercising meaningful individual choice. The first is because some feminists are wary of any challenges to the right to an abortion and believe that "society should seek no legal restrictions on reproductive freedom, even on a technology that will be used selectively against females,"²⁴⁶ they are likely to denounce abortion restrictions in Punjab. Feminists' reluctance to engage with issues such as sex selection—exhibited by the lack of research and activism on this issue by otherwise active feminist organizations—is a result of the fear that the hard-won "right to choose" has enough detractors without feminists themselves questioning its appropriateness.²⁴⁷

The second is to insist that the Punjabi women's "choice" to selective abort females is not a real, legitimate "choice." A would-be mother's silence and complicity in the practice of sex-selective abortions should not, it has been argued, be equated with true "choice." However as one Indian feminist, Nivedita Menon, notes, the above position assumes "that in the case of abortion of female foetuses, and only in that case, women function on the incorrect understanding that their bodies have legitimacy only as the bearers of patriarchal values."²⁴⁸ In other words, the statement that sex-selective abortion is not true "choice" assumes that abortion in other circumstances reflects true "choice." This approach assumes that women who undergo abortions in the United States do not function within the social constraints that "to a greater or lesser extent, create all of us."²⁴⁹ This is not only judgmental, but also misleading.

The difficulty of applying "choice" to sex-selective abortions provides ammunition to anti-abortion activists in the United States. Anti-abortion activists argue that sex selection is yet another ugly aspect of abortion. For example, one anti-abortion commentator has argued that "sex selection abortion is illustrative of the fact that abortion in general is destructive to women. What was once hailed as the choice that would free all women has come to shackle the future of women as a gender."²⁵⁰ These commentators focus on the individualist nature of the "choice" rhetoric and blame it for sex selection—if there were no abortion, there would be no sex-selective abortion.

246. See, e.g., *Tabitha M. Powledge, Toward a Moral Policy for Sex Choice*, SEX SELECTION OF CHILDREN 201, 207 (Neil G. Bennett ed., 1983).

247. See Cherry, *supra* note 233, at 435-36.

248. Menon, *supra* note 232, at 114.

249. WILLIAMS, *supra* note 11, at 38.

250. Lynne Marie Kohm, *Sex Selection Abortion and the Boomerang Effect of a Woman's Right to Choose: A Paradox of the Sceptics*, 4 WM. & MARY J. WOMEN & L. 91, 96 (1997).

This simplistic argument—presuming that people indulge in the practice only because abortions are accessible and legal—is easily dismantled in the context of sex-selective abortions in Punjab. For example, as discussed previously, the unavailability or unlawfulness of abortions in Punjab has not curbed people’s desire for and success in aborting female fetuses.²⁵¹ However, anti-abortion arguments are briefly acknowledged here to help the reader understand why some U.S. feminists might not wish to delve into the issue of sex selection. If they support the choice to abort a fetus, but oppose the choice to abort based on sex of the fetus, they run the risk of being accused of perpetuating double standards. Moreover, they subject their deeply held notion of “choice” to further damning critique.

However, critiques of the “choice” approach to feminism are not limited to anti-abortion groups in the United States—they are also voiced by pro-abortion feminists. Pro-abortion feminists in the “reproductive justice” movement in the United States perceive the narrow notion of individual “choice” as exclusionary and even incompatible with the reality of many women’s lives. This movement seeks to expand the concept of “choice” for women, especially women of color. Reproductive justice advocates describe this concept as “the complete physical, mental, spiritual, political, social, and economic well-being of women and girls, based on the full achievement and protection of women’s human rights.”²⁵² This movement addresses the reproductive issues faced by women who are likely not a part of the mainstream, including poor women, women of color, lesbians, incarcerated women, immigrant women, and women with disabilities. It critiques the individual reproductive “choice” approach for its underlying assumptions of “the individual woman’s economic suitability and even to her eugenic suitability as a mother of future citizens.”²⁵³ Similarly, Professor April Cherry states that “the ‘right to choose’ means very little when women are powerless.”²⁵⁴ The reproductive justice movement makes the point that this right fails to make abortion a real “choice” for many women who face racial, economic, physical, and social constraints on their everyday lives. This movement and the important questions it raises within the U.S. suggest that broadening the question of “choice” would be helpful for United States as well as global feminism.

The global feminist approach suggested in this Comment stems from the belief that the practical and philosophical difficulties that result from viewing

251. See *supra* Part III.

252. Loretta Ross, SisterSong Women of Color Reproductive Health Collective, *What is Reproductive Justice?*, in REPRODUCTIVE JUSTICE BRIEFING BOOK 4 (n.d.), available at <http://www.protectchoice.org/downloads/Reproductive%20Justice%20Briefing%20Book.pdf>.

253. Rickie Solinger, *The Incompatibility of Neo-Liberal “Choice” and Reproductive Justice*, in REPRODUCTIVE JUSTICE BRIEFING BOOK, *supra* note 252, at 78.

254. Cherry, *supra* note 233, at 440.

abortion within a rights-based frame of reference can be overcome only by accepting that rights are discursively constituted.²⁵⁵ Menon explains that “rights alter significantly if they are displaced from one discourse to another.”²⁵⁶ This discursive approach forces the realization that the right to abortion in India, backed by family planning efforts, is very different from the roots of the right to abortion in the United States. Further, the exercise of this right in sex-selective abortions is less an expression of a woman’s individual “choice” for what is best for herself and more her response to the pressures created by son preference. Thus, when studied in the context of Punjabi society and governmental agendas, the idea of a woman’s “choice” is no longer clear-cut or obvious. But does this mean that the “choice” rhetoric and rationale simply fail to apply to Punjabi women? If so, it would be hard to frame a feminist argument for abortion in India. The “choice” paradigm can be maintained—provided we move beyond binary notions of “choice.”

CONCLUSION

This Comment has suggested that the law by itself is not the solution to sex-selective abortions, if indeed it is a solution at all. Additional feminist activity needs to be encouraged alongside the current activism against sex selection—activism that displays several limitations. Punjab’s warped sex ratios are a symptom of gender inequality. Improving these numbers cannot be the end goal, at least not from a global feminist perspective. Nor is it likely possible or desirable to improve these numbers without examining their underlying causes. A solution is to reconceptualize “choice” and create a space for people in civil society, where multiple “choices” can be created, discussed, and evaluated. This requires gradual change rather than top-heavy legislation or advocacy.

Acts of resistance by Punjabi women themselves provide the seeds for such change. For example, recently a Punjabi woman refused, on her wedding day, to marry a man whose family demanded Rs. 5,000,000 (approximately \$125,000) as dowry. The bride, Amitoz Kaur, was a doctor from Punjab who had met Gurpreet Singh, from Philadelphia, Pennsylvania, on the Internet. The wedding was to take place in Patiala, Punjab, in October 2007. The day before the ceremony, the groom’s parents called Amitoz’s father and asked for dowry money. They told Amitoz’s father that the groom was highly qualified, earned a hefty salary in the United States, and that a demand of Rs. 5,000,000 before the marriage ceremony was reasonable. Amitoz’s father said he was unable to arrange this amount, but the groom’s parents insisted. Amitoz’s father, mother, and brother then arranged for Rs. 525,000 (approximately \$13,000) to be paid to the groom’s family. The next day, the marriage parties reached the venue.

255. Menon, *supra* note 232, at 117.

256. *Id.* at 115.

Again, the groom's parents demanded Rs. 5,000,000. This is when Amitoz learned about the dowry demand and insisted on calling off the wedding. Tensions escalated, and a scuffle broke out between the two wedding parties. The police were called and the groom and his parents were arrested under the anti-dowry Act.²⁵⁷

Local press hailed Amitoz's actions as unique and unusual.²⁵⁸ Other than this case, little else has been reported on anti-dowry activism by women in Punjab. Amitoz's case reflects what women in Punjab know—that they need not pay someone to marry them. They are not chattel. But Amitoz's case also reflects that most women in Punjab do not act on this knowledge. Women like Amitoz thus need support from people like the journalists who lauded Amitoz for her actions.²⁵⁹ Civil society in general can encourage and then recognize such acts of defiance. Amitoz should not be penalized by hurtful social gossip, barriers to finding another match, and family dishonor. Instead, women and their families should look to her as inspiration.

Recognizing and supporting everyday Punjabi women like Amitoz is more likely to bring about change than campaigns solely focused on sex selection. The former is likely more effective than the latter because of differences in the way the problem is framed. Rather than focusing on forcing women to make the “right” choice, cultural change campaigns should focus on expanding choices. Rather than punishing women for making the “wrong” choice of sex selection, they should ensure that it is not the only choice for women. Rather than speaking of choice in the binary—to have or not to have a sex-selective abortion—the campaigns should help create many choices for women. Only then can women decide what is right for their individual lives.

257. See Editorial, *Amitoz Says 'No': Girls Must Stand Up Against Dowry*, TRIBUNE (ONLINE ED.) (Chandigarh, India), Oct. 29, 2007, <http://www.tribuneindia.com/2007/20071029/edit.htm> [hereinafter *Amitoz Says 'No'*]; Gur Kirpal Singh Ashk, *NRI Arrested for Demanding Dowry*, TIMES OF INDIA, Oct. 27, 2007, available at http://timesofindia.indiatimes.com/Chandigarh/NRI_arrested_for_demanding_dowry/articleshow/2493749.cms; *NRI Groom, Parents Held for Demanding Dowry*, TRIBUNE (ONLINE ED.) (Chandigarh, India), Oct. 26, 2007, <http://www.tribuneindia.com/2007/20071027/main8.htm>.

258. *Id.*

259. See, e.g., *Amitoz Says 'No,' supra* note 257.