

ABORTION RIGHTS
in the UNITED STATES and TAIWAN

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INTRODUCTION

The number of illegal abortions has been a brewing crisis in Taiwan in recent years. The Taipei Times has reported that approximately 200,000 illegal abortions are performed in Taiwan every year, citing a study conducted by the Garden of Hope Foundation.¹ Experts even think that number of illegal abortions is low.² For every three births, there are two illegal abortions.³ The high rate of illegal abortions in Taiwan may be attributable to several factors. An increasing adoption of western lifestyles has led to more acceptance of pre-marital sex among the youth.⁴ Restrictive abortion laws may also have contributed significantly to the prevalence of illegal abortions as married women cannot obtain an abortion without their spouse's consent and minor girls cannot undergo a procedure without their parents' approval. Though, no formal study has been conducted regarding the correlation of Taiwan's abortion laws to the number of illegal abortions sought. The last official abortion statistics compiled by Taiwan's Department of Health was in 1996 wherein 300,000 legal abortions were recorded.⁵ Nonetheless, it is likely that the restrictiveness of its laws have impacted a number of Taiwanese women to seek out the procedure, legal or otherwise.

Unlike married women and under-aged girls in Taiwan, women in the United States (U.S.) do have a constitutional right to choose an abortion on their own. Abortion clearly has been a controversial issue that has divided the American public in half for the past thirty years. On one end of the spectrum, hard line pro-life activists argue that life begins at conception and that all abortions are illegal even in cases of rape or incest. On the other end are far left pro-choice groups that state a woman has a right to terminate the pregnancy at any time even in the ninth month. So contentious is this issue that anti-abortion groups have picketed and even blocked access for women patients to enter abortion clinics. Radical pro-life zealots even have bombed some clinics. Most moderate pro-life and pro-choice groups, though, settle on a middle ground in the abortion battle. Accordingly, since the early 1970s, the U.S. Supreme Court (Court) has rendered a number of important decisions that have profoundly affected a woman's choice. This paper will compare the abortion laws in the U.S. and Taiwan. Part I of this paper reviews the major cases that have shaped U.S. abortion law, and Part II is a comparison of the abortions laws between the U.S. and Taiwan.

I. THE STATE of ABORTION LAW in the U.S.

A cursory overview of the mechanics of U.S. Constitutional law is in order before reviewing the Court's abortion decisions. U.S. law is made up of the

Constitution, federal and state statutes and decisions, agency regulations and cases, and municipal ordinances. The Constitution is the supreme law of the land in the states. Any federal, state, agency or municipal law that goes against the Constitution is invalid. The Court has the primary duty of interpreting the Constitution and determining whether any law goes against it or a fundamental right. A fundamental right includes personal liberties such as freedom of speech, religion, association, but also a *right to privacy*. Constitutional rights apply to everyone within the territorial jurisdiction of the U.S. even to non-citizens.

A federal or state law that infringes upon a fundamental right is justified only by a compelling state interest and the means to achieve that purpose must be narrowly tailored. A law also cannot *unduly burden* an individual's constitutional right or it will be held invalid.

The History of Abortion Decisions in the U.S.

When the U.S. Constitution was adopted in the late eighteenth (18th) century, there was no federal or state law regarding abortion. Early American states still followed the English common law of permitting abortions before “quickening,” the first instance when a fetus moves in the mother’s womb, usually between the sixteenth (16th) and 18th week of gestation.⁶ Most states adhered to the “quickening” distinction up until the first half of the nineteenth (19th) Century.⁷ Connecticut and

New York, though, became the first states to enact anti-abortion statutes in the 1800s criminalizing the procedure.⁸ Then, beginning in the 1850s, the American Medical Association (AMA) led a movement to ban abortions.⁹ As medical advances made childbirth safer, physicians wanted to take control of pregnancies from midwives, who did a fair share of abortions during this period. In 1859, the AMA issued a report deploring most abortions as criminal recognizing that that fetus may be alive before quickening.¹⁰ More states then began to pass laws prohibiting abortions, and up until the 1950s, abortion was forbidden in most states except to save the life of the mother.¹¹

However, during the late 1960s, there was a movement to liberalize abortion in the states. By the early 1970s, almost a third of the states permitted abortion in early stages of pregnancy.¹² The movement stemmed from the alarming number of illegal abortions being performed. During this period, experts estimated that between a million and a million half illegal abortions were done.¹³ Only about ten thousand abortions were performed legally.¹⁴ Those who had money and influence could obtain safe, discreet abortions in hospitals or clinics performed by competent, licensed physicians.¹⁵ Those who could not had to obtain illegal ones in “back alley clinics.” Many women risk their lives and health in these abortion mills. They were in the hands of non-licensed and non-caring abortionists.¹⁶ There were horrendous stories

of abortions being done on kitchen tables with unclean instruments where many women risked death or permanent injury.¹⁷

Although a third of the states permitted abortion in the early stages, the remaining two-thirds forbade the procedure. States like Texas made abortion a crime for the practitioner and only allowed abortion if it would save the mother's life.¹⁸

Thus, a woman's options in a state like Texas were to get an illegal one or travel to a legalized state. Traveling would not be feasible as the majority who sought abortions came from poor socio-economic backgrounds. The costs of traveling and paying for a legalized abortion in another state would be difficult to meet.¹⁹ Legalized states also required residency requirements before permitting an abortion.²⁰ Even if a woman could afford and stay long enough to meet residency requirements, it would be too late to get an abortion.

Then, in 1973, the landmark case of *Roe v. Wade*²¹ was decided that legalized abortion throughout the states. Jane Roe, a pseudonym for the real plaintiff and a Texas resident, was a single pregnant woman that challenged the constitutionality of Texas' criminal abortion laws.²² Roe alleged that the Texas statutes were unconstitutionally vague and that the laws abridged her right to privacy as protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendment.²³ Roe brought a class action suit on behalf of herself and other similarly situated plaintiffs.²⁴

There, the Court held that the Texas statute at issue violated the Due Process Clause of the Fourteenth Amendment²⁵ by infringing upon a woman's right to privacy. A woman's right to choose in *Roe* was an extension of existing privacy rights at the time.

Pre-Roe Cases

Before *Roe*, there were a long line of cases that developed an individual's privacy or liberty interest with respect to reproduction and family planning. In *Loving v. Virginia*, the case involved an interracial married couple challenging a Virginia law that barred interracial marriages.²⁶ Richard Loving, a white male, had married a black female by the name of Mildred Jeter in 1958.²⁷ Both of them were Virginia residents prior to their marriage.²⁸ Virginia subsequently outlawed the marriage and convicted them of violating the law banning interracial marriages.²⁹ However, the Court struck down the Virginia miscegenation law as unconstitutional because it violated an individual's freedom to choose their mate.³⁰

Another case significant to privacy interests was *Griswold v. Connecticut*. At issue in *Griswold* was the constitutionality of a Connecticut law that banned the use of contraceptives in the bedroom.³¹ One of the appellants, Estelle T. Griswold, an executive director of Planned Parenthood League of Connecticut, was convicted as an accessory of violating the Connecticut statute.³² There, the Court reversed

Griswold's conviction and invalidated the Connecticut law banning the use of contraceptives in the bedroom because it infringed upon the right of marital privacy.

³³ *Griswold* was the first case that the Court recognized "zones of privacy" under the Constitution even though the right to privacy is not explicitly listed in the Bill of Rights or in the Constitution.³⁴ Specifically, Justice Douglas wrote that the right of marital privacy and procreation were "older than the "Bill of Rights"-older than our political parties, older than our school systems."³⁵

In a related case, the Court in *Eisenstadt v. Baird*,³⁶ held a Massachusetts statute that permitted contraceptives to married couples but prohibited distribution to single persons as violating the Equal Protection Clause of the Fourteenth Amendment. Appellee William Baird was convicted by a Massachusetts Superior Court for distributing a contraceptive to a single person after a lecture on contraception.³⁷ His conviction was later dismissed by the U.S. Court of Appeals for the First Circuit and then affirmed by the Court.³⁸ Justice Brennan wrote for the majority that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."³⁹ The *Griswold* and *Eisenstadt* decisions laid the groundwork for the *Roe* decision.

Roe v. Wade

Specifically, the Court held the Texas statute unconstitutional as it infringed upon a woman's right to privacy.⁴⁰ A summary of the *Roe* holding is as follows:

The Texas Style Statue and similar statues violate the Due Process Clause of the Fourteenth Amendment, and thus is deemed invalid.

(a) Prior to the end of the first trimester, the abortion decision is left to the woman and the medical judgment of the pregnant women's attending physician.

(b) Subsequent to the end of the first trimester, the State may regulate an abortion procedure if it reasonably relates to the health of the mother.

(c) Subsequent to viability, the State in promoting its interest in the potentiality of human life may choose, regulate, or even proscribe abortion except for the preservation of life or health of the mother.⁴¹

The Court's reasoning was that a woman's right to choose was intimate.⁴² A pregnant woman has the difficult choice of whether to hold off her own future to bear and raise a child. There are psychological, physical, and economic challenges in dealing with an unwanted pregnancy.⁴³ A woman's bodily integrity also must be recognized. For a single woman, she has the added stigma of being unwed.⁴⁴ Even today, unwed pregnant woman are still frowned upon. Therefore, permanent mental and physical harm may result if a state denied a woman a right to choose.

In weighing the two competing interests, the Court also wanted to protect the state's interest in potential life and settled on a viability point for a woman to choose. In reaching the decision, the Court wrestled with the age-old question on when life begins but found no consensus among the philosophical, religious, and medical

communities.⁴⁵ If experts from those fields could not agree, the Court would not speculate on this vital question.⁴⁶ The Court, however, referred to new embryological data, which indicated that conception was a “process” over time instead of an event.⁴⁷ Thus, in light of differing viewpoints on the beginning of life, the Court ruled that Texas’ theory of life beginning at conception did not override a woman’s right to privacy.⁴⁸

However, the Court did not grant a woman an unfettered right to an abortion throughout the pregnancy. Her right would last only until the baby was deemed viable, which would be best determined by a medical practitioner. Viability was defined at a point when the fetus can survive outside a mother’s womb with or without artificial assistance and live a meaningful life.⁴⁹ Thus, the Court determined that the states’ interest in saving the health of the mother becomes compelling at the end of the first trimester and the state’s interest in preserving potential life becomes compelling at viability.⁵⁰

The *Roe* decision, though, was not unanimous. Justice Rehnquist in his dissent argued that no such privacy right exists in the Constitution for a woman to choose to have an abortion.⁵¹ Justice Rehnquist criticized the Court’s trimester framework decision as partaking in judicial legislation rather than interpreting the intent of the drafters of the Fourteenth Amendment.⁵² According to Justice Rehnquist, the issue

of abortion should be left for the states to regulate. The intent of the drafters of the Fourteenth Amendment was not to withdraw this power from the state.⁵³

Post Roe Decisions

The practical effect of *Roe* was that it made abortions more available and safer for women in the U.S. After *Roe*, more states began to loosen their abortion laws. Today, abortion law in the U.S. provides that a woman still has a right to terminate her pregnancy up to the point of viability, and a state may proscribe abortion when the fetus becomes viable.

However, since *Roe*, the make-up of the Court has been more conservative in nature. As a result, a number of post *Roe* cases have eroded *Roe*'s effect.

The first case that seriously challenged *Roe* was *Webster v. Reproductive Health Services*.⁵⁴ In *Webster*, Reproductive Health Services, a non-profit abortion service provider, and other plaintiffs challenged a Missouri statute that banned the use of state public hospitals and public funds for non-therapeutic abortions.⁵⁵ The Court upheld the Missouri statute in a 5-4 decision.

An underlying issue in *Webster* was the Court's implicit acceptance of Missouri's statement that "life begins at inception" in the preamble of its abortion statute. The Court did not directly rule on the constitutionality of the preamble citing it had no effect on abortion regulations but was merely an expression.⁵⁶

The *Webster* case is significant because it was the first time that the plurality of the Court gave indications of overturning *Roe*. Justice Scalia strenuously argued that *Roe* be abolished, as it was not the Court's duty to decide on the constitutionality of abortion.⁵⁷ The Court, though, did not explicitly overturn *Roe* but left the state of abortion law in question.

Later in *Planned Parenthood v. Casey*, the Court cleared up the confusion by retaining the central holding in *Roe*.⁵⁸ *Casey* involved a case brought by a number of number abortion clinics challenging the constitutionality of a Pennsylvania abortion act that required a number of provisions be met before a woman could undergo a procedure.⁵⁹ Specifically, the statute required (i) a woman to sign an informed consent form, (ii) the physician to disclose truthful, non-misleading information about the abortion procedure, (iii) its attendant risks and alternatives, and (iv) the availability of paternal child support and state funded alternatives, and a mandatory 24 hour waiting period before an abortion can be performed.⁶⁰ The Court held that none of the foregoing provisions posed an undue burden on a woman's choice.⁶¹

The real importance of *Casey* was that a woman still maintained a constitutional right to an abortion but *Roe*'s trimester framework and "strict scrutiny standard" was rejected for an "undue burden" standard wherein a law cannot substantially obstruct or infringe upon an individual's fundamental rights.⁶² For instance, if a statute

required a 30-day waiting period, medical approval from three doctors, board approval from the hospital, and approval from a state medical officer before an abortion could be performed, the statute will likely impose an “undue burden.”

Also, *Roe*’s central holding was not overturned in *Casey* because of the principle of Stare Decisis, which means to stand by a previous decision based on facts substantially similar to the case before a court.⁶³ Stare Decisis preserves credibility in judicial rulings by not having a significant number of previous decisions overturned. Thus, the *Casey* decision preserved a woman’s right to choose an abortion up to the point of viability.

Spousal Consent and Notification

The statute at issue in *Casey* also required the woman to notify their husbands upon seeking an abortion, a provision the Court invalidated.⁶⁴ The Court reasoned that a significant number of women would forgo an abortion if they were required to notify their husbands.⁶⁵ By issuing the decision, the Court’s intention was to not disregard the husband’s rights or input in family planning but to protect rights of millions of women in abusive marriages.⁶⁶ The Court noted that many abused women do not report that they have been sexually assaulted or battered by their husbands. Even if women could fall under Pennsylvania’s husband notice exception for fear of bodily harm, the husband could still apply psychological abuse and

economic pressure on his wife.⁶⁷ For example, he could tell family and friends that his wife wanted to have an abortion, threaten her and the children with future violence, or withhold support for the family.⁶⁸

Striking down the husband notification requirement was a reaffirmation of a previous ruling issued by the Court in *Planned Parenthood of Central Mo. v. Danforth*⁶⁹ wherein the Court struck down a provision of a Missouri statute requiring husband consent. The plaintiffs in *Danforth* were Planned Parenthood of Central Missouri, a not-for-profit Missouri corporation that maintained an abortion facility, and several licensed physicians.⁷⁰ There, the Court struck down the husband consent requirement because it would effectively give husbands veto power over the women's choice, a power even the State did not have.⁷¹ The Court asserted that the final choice should be the woman's since she was more psychologically and physically impacted by the pregnancy than the husband.⁷²

Parental Consent for Teen Abortions

In *Danforth*, the Court also struck down provisions of the Missouri statute requiring parental consent for teen abortions.⁷³ Minors like adults are entitled to rights under the constitution, including the right to privacy. According to the justices, Constitutional rights do not just appear when a person reaches the age of majority. Also, mandatory parental consent would give veto power to the parents that the state

did not even have.⁷⁴

In a later case, *Belotti v. Baird*, the Court stated that a statute requiring parental consent would be permissible but must also provide an opportunity for the minor to seek an independent judicial bypass.⁷⁵ In a judicial bypass, a minor would be granted an abortion if (1) she is mature and well enough to make an informed decision about the abortion in consultation with her physician or (2) even if she is not able to make the decision independently, the abortion would be in her best interests.⁷⁶ The *Belotti* requirement of a judicial bypass was later applied and followed in *Ohio v. Akron Center for Reproductive Health*,⁷⁷ *Hodgson v. Minnesota*,⁷⁸ and *Casey*.

Partial Birth Abortions

A heated debate today in the U.S. is whether statutes forbidding partial birth abortions will be held unconstitutional. A partial birth abortion has been defined as a procedure in which a doctor delivers a living fetus into the vagina or a substantial portion thereof before killing it.⁷⁹ Partial birth abortions have been called “dilation and evacuation” (D&E) procedures.⁸⁰ If the fetus is pulled feet first, the procedure is commonly known as “dilation and extraction” (D&X).⁸¹ In *Stenberg v. Carhart*, the Court held a Nebraska Statute banning partial birth abortions as unconstitutional.⁸² The “D&E” procedure was the most popular procedure performed in the second trimester and was considered safe.⁸³ By banning the procedure, the Court held the

Nebraska statute would pose an undue burden to a woman's right to choose.⁸⁴

The U.S. Senate, though, recently passed a bill banning partial birth abortions. If the bill is passed into law, a case challenging it will likely be before the Court in a few years. To be upheld, the language would have to be substantially different from that in the Nebraska statute. One of the reasons the Nebraska statute was struck down was because its language was too broad and could not differentiate between various partial birth procedures.⁸⁵

To summarize, a woman in the U.S. has a right to choose up to the point of viability. A woman deciding upon an abortion need not obtain the husband's consent. She does even have to notify him. A statute can require parental consent for the minor but also must contain a judicial bypass alternative. After viability, the state can prohibit abortions. A state does not have to publicly fund or provide public facilities for an elective abortion. In cases of rape or incest, Medicaid funding is available for abortion. A mandatory 24-hour period before an abortion does not pose an undue burden.

II. THE STATE of ABORTION LAW in TAIWAN

There are several substantial differences between the abortion law of Taiwan and the U.S. Unlike a woman in the states, a Taiwanese woman does not have a constitutional right to an abortion. A woman, however, can undergo an induced

abortion in any one of the six following cases.

- (i) *If the woman or her husband has a genetic disease, infectious disease, or mental illness that may adversely affect eugenics;*
- (ii) *If the woman or her husband's relatives within the fourth degree has a genetic disease that may adversely affect eugenics;*
- (iii) *If the pregnancy or parturition would cause a fatal risk to the woman or cause mental or physical harm to the woman as determined by medical reason.*
- (iv) *If the unborn baby will be born with a deformity as determined by medical reason.*
- (v) *If the woman was impregnated by rape or seduction⁸⁶ or through a relative of which relationship the law would forbid as a marital one.*
- (vi) *If the pregnancy adversely affects the psychological or physical health of the woman or her family life;*

In any of the foregoing six provisions, a minor or a mentally handicapped person must obtain the consent of her parents or legal guardian to obtain an abortion. In paragraph six, a woman who wants to obtain an abortion must obtain the consent of her husband or sponsor, unless the husband or sponsor is dead, missing, unconscious, or mentally incapacitated.

An abortion should be performed within 24 weeks except for medical treatment to preserve the health and life of the woman. ⁸⁷

Under the Criminal Code in Taiwan, if a woman obtains an illicit abortion, she is subject to a six-month imprisonment.⁸⁸ Further, a person who causes an unlawful abortion at the request or consent of the woman is subject to a two-year imprisonment.⁸⁹ And a person who assists a woman in an illegal abortion for gain is subject to imprisonment for one to five years.⁹⁰

In comparison to the Texas Law in *Roe*, Taiwan's present abortion law is far more liberal. However, prior to 1984, Taiwan's abortion law was extremely restrictive, as a woman could not even get a legal abortion even in the case of rape.⁹¹

Differences between United States and Taiwan Abortion Law

The main difference between U.S. and Taiwan law is that a Taiwanese woman must obtain the consent of her husband. In Taiwanese society, family harmony is paramount. A decision as important as abortion requires the agreement of both the husband and wife. Taiwanese culture also emphasizes that the husband primarily make important family decisions. Accordingly, the law's purpose is aimed more to preserve family peace than to recognize a privacy interest.

In addition, according to women's rights groups, the spousal consent requirement is a remnant of Taiwan's patriarchal society. Yenlin Ku, a noted Taiwan woman right's activist, states that the husband consent was a compromise for women to obtain access to better, safer clinics, in particular for women who were impregnated through sexual violence or incest.⁹² It was also a measure to control Taiwan's rapid increase in population.

When the abortion laws were changed in 1984, Taiwan was still under martial law, and its culture was much more paternalistic than it is today. Pushing for a woman's right to have an abortion at that time may have been too much for a male

dominated legislature and society to accept.⁹³ The legislature may also not have wanted to appear to be yielding to “feminist” groups.⁹⁴

Although the husband consent requirement strives to preserve family harmony, the effect of the law is that it gives the husband control over his wife’s body in a pregnancy. It places a man’s decision over a woman’s. It gives the husband priority in important family decisions. By requiring consent, it effectively takes away a woman’s choice. If the husband’s consent requirement were to remain, then the lawmakers should justify that a husband’s right is paramount over a woman’s right to her body.

Taiwan’s spousal consent requirement is not entirely shocking considering its laws and customs have favored men. For instance, when the ROC Civil Code was enacted in 1931, Article 1002 required that the wife take the domicile of her husband.⁹⁵ As to marital property, Article 1017 provided that a husband had ownership of all property at the time of marriage as well as property acquired during the marriage except for the wife’s contributed or separate property.⁹⁶ Contributed property is property received by inheritance or gift and separate property is property exclusively for personal use and the spouse’s occupation. Also, Article 1089 originally granted the husband the final say over his wife with respect to major decisions over the care of minor children.⁹⁷ Article 1051 of the old Civil Code also

automatically awarded custody of the children to the father in divorce cases.⁹⁸ Even today, the husband still controls the joint property of the marriage unless there is an agreement otherwise.⁹⁹

However, in recent years, progress is being made regarding woman's rights at home. Article 1002 has been ruled unconstitutional in violation of Article 7 of the ROC Constitution.¹⁰⁰ Article 1017 has since been revised to allow women to maintain ownership of property which they acquired on their own before or during the marriage.¹⁰¹ The Council of Grand Justices also ruled that Article 1089 is unconstitutional.¹⁰² Article 1051 has since been abandoned and the courts now employ the best interests of the child standard.¹⁰³ Accordingly, a proposal has already been presented to the legislature to eliminate the husband consent requirement.¹⁰⁴

Women's rights groups also have vehemently opposed a proposed amendment to the law requiring women to undergo psychological counseling and a six day waiting period.¹⁰⁵ In response, Huang Sue-ying, head of Taiwan Women's Link, has stated, "The draft bill deems women not wise enough to make their own choices and discriminates against women by treating those who intend to get an abortion as mental patients."¹⁰⁶ The six-day waiting period may pose a burden if a woman's pregnancy is near 24 weeks. Pro-choice advocates fear that six days is too long a wait and a

woman would decide against an abortion during this period.

Another key factor why Taiwanese women lack a right to choose is the non-recognition of a general privacy right under Taiwan's constitution. The Taiwan Constitution under Article 12 recognizes a privacy right but this right only applies to letters and correspondences. Article 12 does not even mention a privacy right with respect to an individual's body. Article 22 of the R.O.C. Constitution can be broadly interpreted to include a general privacy right for all persons in Taiwan as it is a "catchall" phrase that provides, "All other freedom and rights of the people that are not detrimental to social or public welfare shall be guaranteed under the Constitution." Theoretically, Article 22 could include a woman's privacy right to control her body in pregnancy, but its language seems far too general to recognize a woman's right to choose without spousal interference. Alternatively, Taiwan's Supreme Court could rule on a number of cases laying out the rights of privacy for an individual including the right of privacy. In either scenario, it would likely be years before a constitutional right of privacy for a woman to choose is recognized.

Eliminating the husband consent requirement is not to advocate that a husband should never be consulted in such a critical decision. Some argue that a husband should participate in the family planning process and has as much a right to be involved in the decision making of the unborn baby. Both the man and woman

would be economically affected by the pregnancy. These are valid points and in a majority of cases normal couples do discuss important family planning decisions together. Nonetheless, the present law in Taiwan gives the husband final authority over his spouse who will be more physically and psychologically impacted by a pregnancy. If the choice was left to the wife, she still has the option of telling her husband.

The Taiwan law also provides no alternative if the husbands are abusive. Even if the law provided an exception, notification enough may deter some women from making a choice, as was the concern in the U.S. Some husbands may use physical and psychological abuse to prevent a woman's choice. In a survey conducted by Women's Development Committee of the DPP (Democratic Progressive Party), a report showed that up to 35% of married women were subject to spousal abuse.¹⁰⁷ In 2002, from January through September, over 14,000 domestic abuse cases were set up as follow-up files and 2,429 orders of protection were granted.¹⁰⁸

Some husbands may be so abusive that they may control a woman's choice in cases where the unborn will be a girl. Statistically, the ratio of male to female children in Taiwan was 107:100 for the first born, 108:100 for the second child, 119:00 for the third, and 135:100 for the fourth.¹⁰⁹ The law does not permit husbands to force an abortion upon their wives, but based on these ratios, there is

evidence that illegal abortions are being committed for sex selection purposes.

Other abusive husbands could also withhold or reduce financial support, as male spouses are typically the breadwinners in a Taiwan family.

Another major difference between American and Taiwanese abortion rights is parental consent for a minor girl in Taiwan. The same is required for mentally handicapped persons. Similar to the husband having control over his wife's body, the parents have control over their daughter's body. This law is partly due to the Chinese tradition of overprotecting their children in making important family decisions for them.

Some argue, though, that parents should be involved in such a critical decision as abortion. Further, eliminating the parental consent requirement may cause a breakdown in the trust relationship between a parent and a child. These points are sensible, and in most families parents are involved in the decision-making.

However, the law also does not recognize any inherent privacy right for the teenaged girl. The present law does not provide a legal alternative for teenagers if they have abusive parents. Some teenage girls in abusive families may be beaten, disowned, or humiliated if forced to tell about an unwanted pregnancy. Some may be forced to marry the father, quit school, and start working. To many teenagers, an unwanted pregnancy is such a private, shameful event that they have "lost face" for

the family. Instead of facing their parents, they would rather risk their health and lives in makeshift, seedy clinics at the hands of illegal abortionists who are insensitive to the women's health afterwards.¹¹⁰

Equally alarming, a number of under-aged women were illicitly taking the French drug RU-486 or knockoffs of the drug in the late 1990s. The Taiwanese government legalized RU-486 in the year 2000 partly because teenagers were buying the drug on the black market and taking it without medical supervision.¹¹¹ According to a Taiwanese health official, the drug must be taken in the presence of the doctor and can only be taken for pregnancies less than seven weeks.¹¹² A follow up to the doctor's office is usually required 36-48 hours later and another drug is taken to induce the abortion.¹¹³ The side effect of the drug is that it can cause excessive bleeding.¹¹⁴ Allegedly, two women died from the drug and approximately 1,000 were treated for side effects in Taiwan.¹¹⁵ The drug maker has issued a warning letter that six women have developed serious illnesses and two women died after taking the drug.¹¹⁶ Currently, there is still a danger that a significant number of under-aged girls are still buying the drugs illegally to end their unwanted pregnancies without receiving the proper medical supervision or knowing all the side effects.¹¹⁷

If abortions are inevitable for under-aged girls, a judicial option should be considered to at least give them a choice and access to a procedure that will be safer

than the illegal ones offered on “Neichiang Street.”¹¹⁸ Also, some form of counseling also should be provided to teenagers in dealing with the psychological difficulties of an unwanted pregnancy. In particular, there is a widespread belief among Taiwanese that the fetus will haunt the family after it has been killed.¹¹⁹ This supernatural belief could produce long-term psychological damage for a young woman.

Derek Lee, Assistant Editor-In-Chief of the Taipei times, advocates implementing a German form of counseling for Taiwan’s desperate youth. A young woman with an unwanted pregnancy would receive counseling from a government-funded organization about abortion and any alternatives without having to reveal her identity.¹²⁰ If she decides to keep the baby, the counseling office would seek financial assistance for her and the newborn.¹²¹ The German model is similar to many programs already being implemented in the U.S.

As for single woman, getting a legal abortion is less difficult as she only needs to show that the pregnancy will affect her psychology or family life. Theoretically, the psychological requirement is likely not a great barrier for a woman seeking an abortion. She may only need to tell her physician that the unwanted pregnancy is having a psychological impact on her life including future economic difficulties. For the seduction requirement, a single woman could always state that she was “seduced” by the father if she wanted an abortion. The “seduction” requirement, though, was

primarily intended for the protection of under-aged girls than for single adult women as its Chinese meaning is similar to statutory rape.

As for paying for the procedure, national health insurance in Taiwan does not cover abortions even in the cases of rape or incest for any women, single or married.¹²² At one point in the United States, Medicaid¹²³ also did not fund abortions caused by rape or incest, but that law was relaxed in 1993.

Viability

As to viability, the U.S. law is slightly different from that of Taiwan. As mentioned earlier, a woman under Taiwan law has until the 24th week to get an abortion. After the 24th week, the woman cannot get an abortion unless continuance of the pregnancy would cause a serious risk to her physical or mental health or life. The 24th week is an indication under Taiwan law that the fetus may be viable and that the fetus' rights supersede any woman's or family right to an abortion. By setting a 24th week deadline, the Taiwan law protects the rights of the unborn baby.

The danger imposed by a 24-week deadline is that a fetus may be viable before the 24th week. As medical science advances, the point of viability could be pushed even earlier in the pregnancy. There have been several cases where fetuses have survived before the 24th week.¹²⁴

CONCLUSION

In summary, U.S. and Taiwan abortion laws differ markedly. In Taiwan, a woman does not have a constitutional right and must receive the consent of husband. A minor must obtain parental consent. Whereas, in the U.S., a woman need not obtain the consent of her spouse or even notify him. A state also must have a judicial bypass if an under-aged girl in the U.S. chooses not to notify her parents.

In both countries, there is protection for the fetus after viability as the woman in Taiwan cannot get an abortion after 24 weeks except to save the health or life of the mother or if the fetus has a congenital defect. Also, there are a number of laws in Taiwan that punish an attacker that cause a termination of the pregnancy but the penalties are not as severe as in some states.

Abortion in general has been much more controversial in the U.S. based on several factors. Religious groups in the U.S. have been major proponents against abortion. The predominant religions in the U.S. are Catholicism, Protestant, and various denominations of the Christian faith. These western-based religions generally abhor the concept of abortion and view that all life should be preserved. Religious faiths have argued that a woman does not have a bodily integrity issue with respect to abortion. Their argument is that a woman has constitutional right to

control her body before pregnancy but not afterwards. A woman can choose not to get pregnant with the wide availability of contraceptives on the market. Once she is pregnant, she no longer has that right, as there is a separate human life involved.¹²⁵ Since Roe, the religious community has led an ongoing campaign against abortion and promoted pro-life through its message and the media.

However, Catholicism and Christianity are minority religions in Taiwan. These groups have been outspoken against abortion but their message have not received as much media attention or focus like they would in the states.

Another factor is the progress of the women's movement between the two countries. Taiwan is an infant democracy compared to the U.S. Accordingly, the women's movement in Taiwan has only gained real momentum in the last decade with favorable revisions in the family law and passages of the 1997 Sexual Violence Prevention Act and the 1999 Domestic Violence and Protection Control Act. Whereas in the United States, the women's rights movement had been ongoing for well over a century before *Roe* was decided.

Also, Taiwanese have not been so preoccupied with the issue of abortion. For over fifty years, survival, industrialization, and protection from the mainland have been more pressing issues. Accordingly, Taiwanese have been more focused on improving their living standards and developing the country's economy and national

security rather than focusing on individual rights.

Even a woman's a right to choose in the U.S. is tenuous given the makeup of a conservative court, a Republican president, and Republican congress. There are four justices on the Court who wished to overturn the *Roe* decision based on their past opinions. All four justices have stated that *Roe* was wrongly decided and no constitutional right exists for a woman to choose an abortion. If one of the justices like O'Connor retires from the bench, *Roe* may very well be overturned.¹²⁶ It was O'Connor who was instrumental in preserving the central holding in *Roe* for a woman's right to choose.

The pro-life movement as a whole will continue to fight for *Roe* to be overturned. As medical science further pushes back the viability line, the rights of the fetus will grow more in importance. Someday, medical science may advance to a point where the embryo may develop and survive outside the mother's womb from the moment of conception. This was such a scenario as described in the famous novel, Brave New World, but this reality is still decades away. When medical science reaches this point, a woman's right to choose may no longer be overriding.

Generally, U.S. has been a cradle for individual and human rights since its birth over two centuries ago. This has led to an expansion of privacy rights for its citizenry, equality in its laws between men and women, and recognition of rights for

the unborn. Though, the U.S. has been far from perfect in the equal application of its laws for all its citizenry. In comparison, Taiwan has made enormous strides in promoting individual rights in the last decade for such a young democracy, but individual rights for women are still developing.

In the next few years, the abortion debate will continue to grow in controversy as women's rights in Taiwan keep making progress. A man's decision whether a woman can get an abortion should not be the controlling factor. In most cases, husbands will be involved in family planning, but the law should consider giving the final decision to the woman based on bodily integrity issues. The problem of stemming the number of illegal teenage abortions also needs to be addressed. Ultimately, if abortions are inevitable, it's better for under-aged girls, to have access to safe legal clinics than to put them at risk in a dark corner clinic. The rights of the fetus also should not be overlooked in light of today's medical technology. In short, the focus of the debate should be between a women's right to choose versus the rights of the fetus.

ENDNOTES

¹ Derek Lee, *Abortion Statistics Must Be Taken*, Taipei Times, October 15, 2002, at 8 (citing Garden of Hope Foundation's estimate), *available at* <http://www.taipeitimes.com/News/edit/archives/2002/10/15/0000175785>

² *Id.*

³ Government Information Office, The Republic of China (Taiwan) Statistical Data On The Republic of China (May 2003) (hereinafter Statistical Data), *available at* <http://www.gio.gov.tw/taiwan-website/5-gp/stats/>

The Statistical Data reports 9.12 births per 1000 and a population of 22,549,000 for Taiwan.

⁴ See Pai-shu Huang, *Premarital Sex for Women in Taiwan*, The Human Sexuality Web, *available at* <http://www.umkc.edu/sites/hsw/Taiwan/>

⁵ See Lee, *supra* n.1.

⁶ *Roe v. Wade*, 410 U.S. 113, 138 (1979) (citing Conn. Pub. Acts, c. 71, sec. 1 (1860)).

⁷ See *Roe* at 138.

⁸ *Id.* at 138.

⁹ *Id.* at 141-42.

¹⁰ *Id.* at 141.

¹¹ *Id.* at 139 (citing Quay, *Justifiable Abortion-Medical and Legal Foundations* (pt. 2), 49 Geo. L.J. 395, 447-520 n.34.

¹² *Roe* at 140.

¹³ Marian Faux, *Roe v. Wade The Untold Story of the Landmark Supreme Court Decision That Made Abortion Legal* (1988) at 11.

¹⁴ *Id.* at 11.

¹⁵ *Id.*

¹⁶ *Id.* at 35.

¹⁷ *Id.*

¹⁸ Relevant articles of the Texas statute at issue in *Roe* (*id.* at 117 n.1.):

Article 1191. Abortion

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By ‘abortion’ is meant that the life of the fetus or embryo shall be destroyed in the woman’s womb or that a premature birth thereof be caused.

Article 1194. Murder in producing abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Article 1196. By medical advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

¹⁹ Faux, *supra* n.13 at 10.

²⁰ *Id.*

²¹ *Roe*, *supra* n.6 at 167.

²² *Id.* at 120.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 167. The Due Process Clause is contained in the Fifth and Fourteenth Amendments of the Constitution and ensures that the fundamental rights of the individual are not unduly infringed upon by the government. The Due Process Clause contained in the Fifth Amendment protects fundamental rights against any adverse federal law. The Due Process Clause under the Fourteenth Amendment serves the same against any state law.

²⁶ 388 U.S. 1, 3 (1967).

²⁷ *Id.* at 2.

²⁸ *Id.* at 3.

²⁹ *Id.*

³⁰ *Id.* at 12.

³¹ 381 U.S. 479 (1965).

³² *Id.* at 480.

³³ *Id.* at 479, 484-486.

³⁴ *Id.* at 486.

³⁵ *Id.*

³⁶ 405 U.S. 438, 452 (1972).

³⁷ *Id.* at 440.

³⁸ *Id.* at 440, 455.

³⁹ *Id.* at 452.

⁴⁰ *Roe* at 163.

⁴¹ See *Id.* at 164-65.

⁴² *Id.*

⁴³ *Id.* at 153.

⁴⁴ *Id.*

⁴⁵ *Id.* at 159.

⁴⁶ *Id.*

⁴⁷ *Id.* at 161.

⁴⁸ *Id.* at 162.

⁴⁹ *Id.* at 163.

⁵⁰ *Id.* at 163-64.

⁵¹ *Id.* at 172 (Rehnquist, J. dissenting).

⁵² *Id.* at 174.

⁵³ *Id.*

⁵⁴ 492 U.S. 490, 511 (1989).

⁵⁵ *Id.* at 501.

⁵⁶ *Id.* at 507.

⁵⁷ 492 U.S. 490, 532 (1989) (J. Scalia dissenting).

⁵⁸ 505 U.S. 833, 878 (1992).

⁵⁹ *Id.* at 844.

⁶⁰ *Id.*

⁶¹ *Id.* at 885-887.

⁶² *Id.*

⁶³ *Id.* at 867-870.

⁶⁴ *Id.* at 893.

⁶⁵ *Id.* at 893-894.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ 428 U.S. 52, 69 (1976).

⁷⁰ *Id.* at 56.

⁷¹ *Id.* at 70.

⁷² *Id.*

⁷³ *Id.* at 74.

⁷⁴ *Id.*

⁷⁵ 443 U.S. 622, 643 (1979).

⁷⁶ *Id.* at 643.

⁷⁷ 497 U.S. 502, 519 (1990).

⁷⁸ 497 U.S. 417, 461 (1990).

⁷⁹ 530 U.S. 914, 922 (2000).

⁸⁰ *Id.* at 925.

⁸¹ *Id.* at 927.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 938.

⁸⁶ The seduction requirement in Chinese law is similar to statutory rape.

⁸⁷ Republic of China (R.O.C.) Eugenic and Health Care Law.

⁸⁸ Article 288 of the R.O.C. Criminal Code.

⁸⁹ Article 289 of the R.O.C. Criminal Code.

⁹⁰ Article 290 of the R.O.C. Criminal Code.

⁹¹ Yenlin Ku, *Selling A Feminist Agenda On A Conservative Market--The Awakening Experience In Taiwan*, Taiwan Women Web, A History Of Taiwan's Women Movement., November 12, 1998, available at <http://taiwan.yam.org.tw/womenweb/sell.htm>

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Article 1002 of Book IV Family of the R.O.C. Civil Code; Linda Chang, *Ruling enhances women's rights*, Free China Journal, April 24, 1998, available at

http://www.gio.gov.tw/taiwan-website/5-gp/rights/society_06.htm

⁹⁶ Article 1017 of Book IV Family of the R.O.C. Civil Code; Christie Su, *Lawmakers approve removal of biases against women*, Free China Journal, September 26, 1996, available at http://www.gio.gov.tw/taiwan-website/5-gp/rights/society_05.htm

⁹⁷ Article 1089 of Book IV Family of the R.O.C. Civil Code; See Su, *supra* (note 96)

⁹⁸ Article 1051 of Book IV Family of the R.O.C. Civil Code; See Su, *supra* (note 96)

⁹⁹ Article 1018 of Book IV Family of the R.O.C. Civil Code; See Su, *supra* (note 96)

¹⁰⁰ Article 1002 of Book IV Family of the R.O.C. Civil Code; See Chang, *supra* (note 95)

¹⁰¹ Article 1017 of Book IV Family of the R.O.C. Civil Code; See Su, *supra* (note 96)

¹⁰² Article 1089 of Book IV Family of the R.O.C. Civil Code; See Su, *supra* (note 96)

¹⁰³ Article 1051 of Book IV Family of the R.O.C. Civil Code; See Su, *supra* (note 96)

¹⁰⁴ *Women's groups protest proposed abortion restrictions*, Taiwan News, December 23, 2002, available at <http://www.taiwanheadlines.gov.tw/20021223/20021223s1.html>

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Sunny Hwang, Kay Lin, Yvonne Lin, Amy Chen, Billie Karel, Symphen Wu, *Women Rights Issues In Taiwan*, Womenweb Issue, Health Section, November 15, 2000, available at http://www.womenweb.org.tw/English/Issue_Show.asp?Issue_ID=14

¹⁰⁸ U.S. Department of State, *Country Reports On Human Rights Practices-2000* China (Taiwan only), Released by the Bureau of Democracy, Human Rights, and Labor, March 31, 2003, available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18240.htm>

¹⁰⁹ R.O.C. Yearbook 2000 Taiwan, Population Policy, available at <http://www.roc-taiwan.org/taiwan/5-gp/yearbook/chpt02-1.htm>

¹¹⁰ *Id.*

¹¹¹ *RU-486 approved for controlled sales*, Taipei Times, Dec. 29, 2000, available at <http://www.taiwanheadlines.gov.tw/20001229/20001229s1.html>

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ A Drug Recall.com, Ru-486, *available at*
<http://www.adrugrecall.com/ru486/ru486.html>

¹¹⁷ See *Women's groups protest proposed restrictions*, *supra* (note 104).; Taiwan Gynecologist specialist notes that many under-aged girls take abortion pills because they are afraid to go their parents.

¹¹⁸ See Lee, *supra* (note 1).

¹¹⁹ See Marc L. Moskowitz, *The Haunting Fetus: Abortion, Sexuality, and the Spirit World in Taiwan*, Honolulu, University of Hawaii Press (2001).

¹²⁰ See Lee, *supra* (note 1).

¹²¹ *Id.*

¹²² See Hwang et. al., *supra* (note 107)

¹²³ Medicaid is the national health insurance in the United States for low-income families who otherwise could not afford health insurance. The Hyde Amendment in 1975 prevented Medicaid funding for abortions. In 1993, the Hyde Amendment was changed to allow Medicaid funding for abortion in cases of rape and incest.

¹²⁴ Some documented cases have reported that fetuses have survived as early as 20 weeks. See Abortioninfo.net, *Viability*, *available at*
<http://www.abortioninfo.net/facts/development4.shtml>

¹²⁵ Valerie Protopapas, *Articles for Family Life Common Pro-Abortion Clichés and The Pro-Life Response*, Resource Handbook for Lay Ministries, Volume II (1991), *available at*
http://www.oca.org/pages/min_orgs/Resource-Handbook/Family-Life/comproab.html

¹²⁶ Sandra O'Connor was the lead justice that retained the central holding of *Roe* in *Casey*.