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### **Author**

Kim, Naryung

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# BREAKING FREE FROM PATRIARCHY: A COMPARATIVE STUDY OF SEX SELECTION ABORTIONS IN KOREA AND THE UNITED STATES

Naryung Kim\*

Since the landmark decision in *Roe v. Wade*, women in the United States have had a constitutional right to abortion that is unconditional during the first trimester of a pregnancy.<sup>1</sup> Although *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>2</sup>—decided almost two decades after *Roe*—granted state governments more leeway to encroach upon such rights, it nevertheless reaffirmed the constitutional protections in place for pregnant women seeking abortions. In the aftermath of *Roe*, some argued that sex-selection abortions (those performed solely for the purpose of eliminating fetuses of the undesired sex) would provide a common ground among anti-abortionists and some feminists who, despite their support of the rights established in *Roe*, opposed such procedures for their ultimate discriminatory effect on females.<sup>3</sup> These predictions were based on studies that showed that, given the choice, women would prefer sons as their first-borns or their only child.<sup>4</sup> Other feminists have held firmly to the view that since women are fully entitled to abortions within the *Roe* and *Casey* frameworks, any restriction on such rights is unconstitutional.

Interestingly, the social harms forecasted by those who sought to restrict the performance of sex selection abortions are

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\* Vassar College, B.A., Columbia University, M.A., University of Washington School of Law, J.D. The author would like to thank her mother, father, and brothers for their unending love, support, and encouragement. This paper is dedicated to her heart, Erin Alexa.

1. *Roe v. Wade*, 410 U.S. 113 (1973). See *infra* pp.5-8, for a discussion of legal precedent in U.S. abortion rights.

2. *Planned Parenthood of S.E. Pa. v. Casey*, 112 S.Ct. 2791 (1992). See *infra* pp. 5-8.

3. George Schedler, *Benign Sex Discrimination Revisited: Constitutional & Moral Issues in Banning Sex Selection Abortion*, 15 PEPP. L. REV. 295, 295 (1988).

4. See *infra* pp. 8-11.

at the very center of feminist debate in the country of South Korea,<sup>5</sup> where abortion is not a constitutional right, but rather a crime punishable by up to ten years in prison.<sup>6</sup> In a society still influenced by the deeply-rooted Confucian tradition of male dominance and female deference, sex selection abortions in favor of sons are escaping prosecution despite their illegality and causing serious social consequences. The majority of Korean feminists find themselves in the paradoxical position of supporting women's rights to reproductive freedom through safe, legal abortions, while simultaneously calling for a limitation of such rights through restrictions on sex selection abortions. This paper will examine the unique dilemma of feminist activists in Korea and distinguish how the interplay of sex selective technologies and constitutional reproductive rights in a patriarchal society differs from that in the United States. Although the constitutional bases of U.S. abortion rights appear to have influenced the initial development of Korean abortion laws, the resulting policies in the two countries differ drastically. As the current debate in the U.S. may provide some guidance in deciphering the problem areas of the Korean feminists' approach, the situation in both countries will be examined in turn.

## SEX SELECTION TECHNOLOGIES

Throughout history, there have been countless attempts to determine the sex of a child to be born. Some early methods were often derived from unfounded, "biologic"<sup>7</sup> reasoning, whereas others amounted to mere "old wives' tales" based on superstition.<sup>8</sup> The existence and function of sex chromosomes were not discovered until 1924. Since then, sex predetermination technologies have experienced a long and slow development.

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5. The countries of South and North Korea have diverged drastically in culture and thought during the half-century following political division. This paper discusses only the laws and conditions surrounding abortion issues in South Korea, and thus all references to "Korea" or "Korean" apply only to South Korea. Similarly, all uses of "American" in this paper refer only to the country of the United States of America.

6. See *infra* p.12.

7. This is the term used by Owen D. Jones in *Sex Selection: Regulating Technology Enabling the Predetermination of a Child's Gender* 6 HARV. J. L. & TECH. 1, 4 (Fall 1992). For more than two thousand years, the theory of "sidedness" led people to believe that methods such as lying on a particular side during intercourse or tying off one testicle guaranteed the birth of the desired sex. Other more plausible biological methods involved the timing of copulation, the timing of orgasm, and the diet and nutrition of the pregnant woman. See *id.* at 4-5 for more history.

8. See *id.* at 5-6 for what he terms "symbolic" methods such as hanging one's trousers on the appropriate bedpost; taking an axe to bed; biting the woman's right ear before orgasm; and keeping poppies or sugar on the windowsill for boys and girls, respectively.

Nevertheless, they have developed with definite and astounding results.

The sex selection technologies available today can be classified into pre-conception techniques and post-conception techniques. Both techniques can further be divided into *in vivo* and *in vitro* procedures.<sup>9</sup> Post-conception *in vivo* procedures amount to what we generally call sex selection abortions. After the sex of the embryo or fetus is determined by one of three techniques—amniocentesis, chorionic villi sampling (CVS), or ultrasound—the undesired sex is aborted. CVS must take place before the tenth week of pregnancy, and provides relatively immediate results. In contrast, amniocentesis cannot be performed until the fifteenth or sixteenth week of pregnancy, and another four weeks must pass before results are available. Finally, ultrasound is usually most effective in the last trimester of pregnancy where the fetus's genitalia have developed to a point that allows for visual recognition. These procedures preceding the abortion are significant in light of the viability timeline set forth in *Roe* as well as the popular debate surrounding the question of whether life truly begins at conception. The post-conception *in vitro* method takes place when several eggs are fertilized in a laboratory, and only those of the desired sex are implanted in the mother. Sex identification of a human embryo can take place as early as three days after conception.<sup>10</sup>

Pre-conception *in vivo* techniques are not too different from those biologic techniques practiced by our ancestors. Theories related to “special diets, coital timing, hormonal and immunologic manipulation, and manipulation of cervical mucus acidity” are prevalent but not necessarily accepted today.<sup>11</sup> On the other hand, pre-conception *in vitro* methods are highly sophisticated, elaborate means of more accurately achieving desired results. Most involve a process of distinguishing and separating X-bearing sperm and Y-bearing sperm, followed by artificial insemination using only the chosen sperm. The different properties of the two types of sperm (including weight, size, mobility, and reaction to ultraviolet light) made it possible for researchers to develop techniques that exploit such differences. Methods that rely upon

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9. See generally the literature cited in notes 10-14, *infra*, for more in-depth discussion.

10. See Jones, *supra* note 7, at 7; see also David Stoller, *Prenatal Genetic Screening: The Enigma of Selective Abortion*, 12 J. L. & HEALTH 121 (1998), and MARY A. WARREN, *GENDERCIDE: THE IMPLICATIONS OF SEX SELECTION* (1985) for criticism of the use of second or third trimester abortions for gender selection.

11. Jones, *supra* note 7, at 8; See also April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?* 10 WIS. WOMEN'S L. J. 161, 161 n.2 (1995).

the size or weight of sperm involve centrifugation (heavier sperm move away from the center toward the wall of a rotating cylinder), sedimentation (heavier sperm sink further through a thick liquid), and differential filtration (sperm is first passed through cervical mucous, and then through a millipore filter). Techniques that use mobility as the distinguishing factor focus on speed and swimming patterns. One particular technique reports 76-82% success rates for male births and 67-76% success rates for female births.<sup>12</sup> There is no doubt that each of these methods will be further developed to achieve higher rates of success in the future. Currently, due to the high costs and limited accessibility to both pre-conception and post-conception in vitro techniques,<sup>13</sup> sex selection abortion remains the method of choice worldwide for those seeking to control the sex of their children.<sup>14</sup> Despite the wide range of techniques and issues surrounding sex predetermination, this paper will focus specifically on sex selection abortions. An overview of the status of abortion in the United States and Korea will be followed by an analysis of the current debates surrounding sex selection abortion in particular. This comparative study will be an attempt to determine the implications and guidelines provided by American feminists for their Korean counterparts, and assess the applicability of their arguments to Korean society.

## ABORTION IN THE UNITED STATES

### THE *ROE* AND *CASEY* LEGACIES

It was a long and winding road that the United States Supreme Court took to reach its decision granting women the right to abortion in *Roe v. Wade*.<sup>15</sup> *Griswold v. Connecticut*<sup>16</sup> first invalidated a Connecticut statute that prohibited the sale and use of contraceptives by married couples by declaring that the right to privacy inherent in a marital relationship encompassed the decision to use contraceptives. This right to privacy was expanded seven years later to include the decisions of single

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12. Cherry, *supra* at n.2; Jones, *supra* note 7, at 9-10.

13. Amniocentesis ranges widely in cost from \$1,000 to \$12,000, and the average cost of in vitro fertilization procedures is \$7000 per ovulation. IVF must also be followed by pre-natal screening that can range from \$2,000 to \$3,000. Stoller, *supra* note 10, 131 n. 63; Vicki G. Norton, Comment, *Unnatural Selection: Nontherapeutic Preimplantation Genetic Screening and Proposed Regulation*, 41 UCLA L. REV. 1581, 1597 (1994).

14. The greater availability of pre-implantation sex selection techniques is also likely to decrease the prevalence of sex selection abortion. Lynn Smith, *For Many, Picking a Child's Gender Is a Fertile Field*, L. A. TIMES, Sept. 5, 1990, at E1.

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

16. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

people in *Eisenstadt v. Baird*.<sup>17</sup> In further recognizing a woman's right to privacy as "broad enough to encompass [her] decision whether or not to terminate her pregnancy,"<sup>18</sup> the *Roe* Court established a definite period of time (the first two trimesters of the pregnancy when the fetus is considered non-viable, or incapable of living outside its mother's body) in which she would be free to consider all physical, emotional, and other realistic consequences of pregnancy and delivery before deciding to abort the fetus.<sup>19</sup> The state's interests in protecting potential human life and maternal health were simply not compelling enough to justify the denial of abortion services to women who might be subject to "a distressful life and future" as the result of the pregnancy and subsequent birth of a child.<sup>20</sup> Only when the fetus reached the point of viability did the state's interests become sufficiently compelling to justify restrictions on the woman's fundamental right to privacy.

It is important to note here that the right to abortion arising out of the *Roe* decision was a negative right that only established the right to be free from government intervention for a specific period of time. It did not affirmatively ensure a constitutional right of access to abortion services.<sup>21</sup> The *Roe* Court thus prohibited direct interference with a woman's right to access but did not create an obligation for the government to guarantee that right to all women. Twenty years after the *Roe* decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>22</sup> created a wrinkle in the right to abortion established in *Roe*. Whereas the *Roe* decision created a presumption that declared any legislative interference (before viability) invalid, the *Casey* court abandoned this presumption in exchange for a substantial burden threshold. In other words, only regulations that pose a *substantial burden* on a woman's right to have an abortion would be declared unconstitutional. In the absence of such substantial burden, the court conducts a review to determine whether the regulation is rationally related to the state's legitimate interest in

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

18. *Roe*, 410 U.S. at 153.

19. "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. . . There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically, or otherwise, to care for it." *Id.*

20. *Id.*

21. Due to the federal government's refusal to fund abortions, poor women are denied the services available to their wealthier sisters. See Cherry, *supra* note 11, 189 n.129 discussing *Maher v. Roe*, 432 U.S. 464 (1977); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Harris v. McRae*, 448 U.S. 297 (1980).

22. *Planned Parenthood of S.E. Pa. v. Casey*, 112 S.Ct. 2791 (1992).

preserving potential life. Although the *Casey* Court did reaffirm the status of abortion as a fundamental right, it “departed significantly enough from *Roe* to lessen [the] legitimacy [of such a right].”<sup>23</sup>

Under the standards set forth in *Casey*, regulations designed to foster the health of the pregnant woman or to persuade her to choose childbirth over abortion are permissible unless they pose a substantial obstacle to the exercise of the woman’s right to choose abortion. As long as they do not pose an undue burden, regulations reasonably related to the promotion of childbirth rather than abortion services could still be valid *even if those measures are solely “persuasive” and in no way further a health interest.*<sup>24</sup> One of the provisions at issue in *Casey* found to be valid involved “informed consent.”<sup>25</sup> The Court found that the state could require the dissemination of certain information in order to persuade a woman to choose childbirth as long as such information was not misleading.<sup>26</sup> Along this line of reasoning—as long as encouraging childbirth is the ultimate purpose—it is possible to conceive of ways in which courts could similarly *restrict* the dissemination of information that might cause the patient to abort a fetus.<sup>27</sup> In effect, the *Casey* holding could allow legislatures to determine what a physician may tell his/her patients.

In the context of sex selection abortions, the *Casey* holding begs the question of whether the state may restrict a woman’s access to certain information that would influence her decision to request an abortion. The Court stressed the notion that information requirements lead to better decisions for all women, and thus seemed to imply the more information the better.<sup>28</sup> For a woman whose decision to abort is dependent upon the sex of the fetus, this denial of access to such information would undoubt-

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23. Cherry, *supra* note 11, 191.

24. *Casey*, 112 S.Ct. at 2825, emphasis added.

25. The particular provision in *Casey* required physicians to provide in great detail a litany of information regarding the availability of additional information on fetal development, the possibility of state-funded pre-natal care, and the child support liability of the father, if the child were to be born. 18 PA. CONS. STAT. ANN. 3205 (1998).

26. The Court found that the informed consent provision furthered a legitimate state goal “of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.” *Casey*, 112 S.Ct. at 2823.

27. *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). The “gag rule” prohibited doctors and other employees of federally funded health care clinics from providing information about abortion and abortion services to pregnant women. *See generally* Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587 (1993).

28. *Casey*, 112 S.Ct. at 2823, as cited in Cherry, *supra* note 11, 194.

edly be deemed an undue burden. However, it is unlikely to be seen as such under the *Casey* analysis. Since the woman would still be able to abort the fetus but just prohibited from using sex as a factor in her decision, it would be hard to claim there was an undue burden or substantial obstacle to her ability to access abortion services. In fact, the state could easily claim that such a restriction on the disclosure or consideration of fetal sex is just another means to encourage childbirth over abortion.<sup>29</sup>

#### ARGUMENTS SURROUNDING SEX SELECTION ABORTIONS IN THE UNITED STATES

Most proponents of statutory means to regulate the performance of sex selection abortions cite sociological studies which indicate a worldwide preference for male children. Indeed, the shortage of women in the world's population has been widely documented and recognized.<sup>30</sup> While many perceive this problem of "missing girls" to be a "third-world" phenomenon, a closer look at ratios of girls to boys up to nineteen years of age shows that developing and developed countries have similar figures of 954 and 952 girls, respectively, for every 1000 boys.<sup>31</sup> Researchers in the United States have also consistently found that, although most Americans strive for equal numbers of male and female children, sons are preferred as first-born children and as only children.<sup>32</sup> Studies also show that potential parents prefer sons because they believe boys will have greater opportunities than girls.<sup>33</sup> Although son preference or son fixation is not uniform across cultures, it cannot be denied that such phenomena exist in some form even among developed nations.

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29. The idea being that women who do not know the sex of the fetus will be discouraged from aborting by the fear that they might mistakenly abort a fetus of the "correct" sex. Cherry, *supra* note 11, 196.

30. Amartya Sen, *More than 100 Million Women Are Missing*, N.Y. REV. BOOKS 61 (December 20, 1990); Nicholas D. Kristof, *Stark Data on Women: 100 Million Are Missing*, N.Y. TIMES, Nov. 5, 1991, at C1. In 1990, the United Nations estimated 987 females for every 1000 males. Cherry, *supra* note 11, 168.

31. *Id.*

32. See generally Nancy E. Williamson, *Parental Sex Preferences and Sex Selection*, SEX SELECTION OF CHILDREN 129, 131 (Neil G. Bennett ed., 1983), cited in *id.* n.36. See also Dorothy C. Wertz, *International Perspectives on Ethics and Human Genetics*, 27 SUFFOLK U. L. REV. 1411, 1430 (1993), cited in Lynne Marie Kohm, *Sex Selection Abortion and the Boomerang Effect of a Woman's Right to Choose: A Paradox of the Skeptics*, 4 WM. & MARY J. OF WOMEN & L. 91 (1997). While one-third of the U.S. public favors use of pre-conception methods of sex selection, approval of prenatal testing and sex selection abortion is minimal. Nevertheless, thirty-eight percent "would approve the use of abortion for sex selection if a couple already had three children of the same sex, regardless of whether these were boys or girls." Wertz, *supra* p. 1430.

33. Cherry, *supra* note 11, n. 41.



Armed with such statistical data, those who advocate regulation of sex selection abortions argue that gender preferences inherent in all societies will inevitably cause gender imbalances that will lead to dire consequences. They worry that the overwhelming preference for males will be realized through unmonitored access to means of controlling the sex of offspring, and ultimately result in greater discrimination against women and girls.<sup>34</sup> Also, the unregulated use of sex-selective technologies cause "distributive concerns" related directly to the racist, heterosexist, and classist barriers that already affect access to technology. Procedures such as amniocentesis, CVS, and abortion are expensive. Under the assumption that women would choose to have sons rather than daughters, only those women who can afford these procedures will be able to actually effectuate that choice. Poor women who are denied access to the procedures will continue to have daughters regardless of their desire otherwise. As one scholar projected, class inequalities may eventually parallel gender and race lines "as the rich have privileged first-born sons, and the poor have both sexes," because the women in our society will eventually become poorer and darker.<sup>35</sup>

The type of "social consequence" analysis given above draws criticism from those who argue its inapplicability to the United States, where legal protection for women's rights are in place, and no real evidence shows that individuals indeed *act* upon their desire to predetermine the sex of their child (whether it be male or female) through sex selection abortion.<sup>36</sup> Nevertheless, even among those who recognize the potential gravity of conse-

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34. It has been predicted that as a result of an increase in first-born boys, men will benefit from the "over-achiever" status of first-born children and heighten discrimination against women most significantly in the areas of education and employment. It is further predicted that women in societies with unbalanced sex ratios will be subject to substantial constraints on their behavior, such as significant penalties for non-virginity before lawful marriage, extensive control by men over wives and daughters, and the marriage of girls and women at younger ages. These societies are also more likely to be plagued by female infanticide and neglect, and strong sex role ideologies that require women to behave according to models of submission and subordination. *Id.* at 173-174. See also Andrea Krugman, *Being Female Can Be Fatal: An Examination of India's Ban on Pre-Natal Gender Testing*, 6 *CARDOZO J. INT'L. & COMP. L.* 215, 222 (1998).

35. Cherry, *supra* note 11, 175, citing Laura R. Woliver, *The Deflective Power of Reproductive Technologies: The Impact on Women*, 9 *WOMEN & POLICY* 17, 19-20 (1989).

36. John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 *B. U. L. REV.* 421 (1996). Although sex selection abortions have become quite common in Eastern countries due to the development of inexpensive and easy means to identify fetal sex, such procedures are still relatively rare in the United States and the West. *Id.* n.101. However, see *supra* note 32 and accompanying text for studies noting a change reflected in attitudes (and thus perhaps actions) when additional circumstances are posed (e.g. the number of same sex siblings already born).

quences resulting from gender imbalances—and thus support government regulation of *other* sex selection technologies—sex selection abortion is distinguished and singled out for protection of “hard-won reproductive rights” for women. In fact, a 1985 survey among geneticists showed that many regarded sex selection as a logical extension of parents’ acknowledged rights to choose the number, timing, spacing, and genetic health of their children. They regarded withholding any service as “medical paternalism and an infringement on patient autonomy.”<sup>37</sup> Jodi Danis writes: “Attempts to criminalize sex selection abortion threaten women’s freedom to choose whether to bear children by authorizing easily abused inquiries into their motives for seeking an abortion and by assuming that there is a readily ascertainable, singular reason for seeking an abortion.”<sup>38</sup> She proposes that sex selection abortion be regulated through informal channels such as medical ethical guidelines rather than by legislation.

#### SOME ATTEMPTS TO REGULATE SEX SELECTION ABORTIONS IN THE UNITED STATES

Currently, sex selection abortions are prohibited by state law in Pennsylvania and Illinois. In Pennsylvania, an abortion can be performed only after a physician has determined it to be necessary.<sup>39</sup> The statute specifically states that “no abortion which is sought solely because of the sex of the unborn child shall be deemed a necessary abortion.”<sup>40</sup> However, it also provides that the physician may consider all factors (physical, emotional, psychological, familial and age-related) in determining whether the abortion is necessary.

The Illinois law, in contrast, pivots on the knowledge of the physician. Whereas the physician need not determine the necessity of the abortion, the law prohibits abortions of viable fetuses<sup>41</sup> and those performed “with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus.”<sup>42</sup> This statute again raises the question derived from

37. Kohm, *supra* note 32, p.111.

38. Jodi Danis, *Sexism and The Superfluous Female: Arguments for Regulating Pre-Implantation Sex Selection*, 18 HARV. WOMEN’S L. J. 219, 222. (1995).

39. 18 PA. CONS. STAT. ANN. 3204(a) (West 1998).

40. 18 PA. CONS. STAT. ANN. 3204(c) (West Supp. 1998). See Kohm, *supra* note 32, p.119

41. 720 ILL. ANN. STAT. 510/5 (West 1998).

42. 720 ILL. ANN. STAT. 510/8 (West 1998). It further elaborates that abortions sought for sex-linked diseases will not be proscribed under this law. The word “solely” renders the statute virtually useless since the statute does apply in cases where the mother’s decision to abort is for any other reason in addition to the sex of the fetus. Furthermore, the statute places an affirmative duty on physicians to ascertain the reasons behind their patients’ desire to know the sex of the fetus. This

*Casey*<sup>43</sup> whether a physician could refuse to reveal the sex of the fetus if s/he suspects it to be the motivating factor for an abortion. Such an active seeking of information by the physician seems peculiar and unrealistic. Indeed, the physician need not ask if the woman is not telling. Therefore, although such laws against sex selection abortion exist in the United States, it is difficult to gauge their effectiveness in deterring the procedure.<sup>44</sup>

### ABORTION IN KOREA

The Korean Criminal Code explicitly outlaws the actions of any individual who causes the miscarriage of pregnant woman through the use of drugs or other means. Depending on the circumstances, the penal sentences of imprisonment can range from one year (the pregnant woman herself and those who assist with her consent) up to ten years (those that act without the consent of the pregnant woman and ultimately cause her death).<sup>45</sup> Despite indications that abortions are performed throughout Korea with alarming frequency,<sup>46</sup> no individual has ever been charged or prosecuted under these explicit anti-abortion laws. In fact, it appears as though most people are not even aware of the anti-abortion provisions in the criminal code.<sup>47</sup>

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requirement does not exist in any other abortion circumstances. See Kohm, *supra* note 32, p.120.

43. See *Planned Parenthood of S.E. Pa. v. Casey*, 112 S.Ct. 2791 (1992).

44. It is impossible to estimate how many abortions are performed for the purposes of sex selection, since women never have to disclose their reason for obtaining an abortion. Kohm thus points out that regulation of *reasons* is absurd, and argues that women need "to be empowered within" to choose otherwise. See *supra* note 32 n.131.

45. Korean Criminal Code, art. 269(1), 270(1). See *infra* note 49 for a detailed description of the varying circumstances that warrant different penalties.

46. According to one study, 44.2% of married Korean women had experienced an abortion by the late 1980's. The actual numbers rose from 100,000 in the early 1960's; 320,000 in the early 1970's; 1 million in 1978, and 1.5 million in 1985. Hak-Tae Kim, *The Abortion Crime and Protection of Motherhood in the Criminal Code* 3 WEY BUP NOAN JIP [FOREIGN L. COMMENTARY] 384 (March 1996). An official survey by Seoul National University's School of Public Health also reported that 44 % of women between the ages of 15 and 49 had experienced at least one abortion as of 1996. Tom Welsh, *Why Feminists Object to Korea's High Abortion Rate*, KOREAN HERALD, Dec. 18, 1998. See also Sang-Guhl Oh, *The Maternal and Child Welfare Act and Fetal Right to Life*, 26 BYUN HO SA [LAWYER] 534, 534 (1996) for other studies that discuss a "social de-sensitization to abortion."

47. On a televised talk show, a prominent obstetrician openly disclosed that approximately 20 abortions took place daily at his hospital. All of the participants of the panel, including other physicians, and the broadcasters were either oblivious to the illegal status of abortions or in no fear of prosecution from such disclosure and discussion. Keum-Sook Choi, *Rise in the Legal Right of Korean Women*, 4(2) KOREANA 13-23 (1990), as published in KOREAN LAW IN THE GLOBAL ECONOMY 1431 (Sang-Hyun Song ed. Seoul: Bak Young Sa Publishers, 1996). See also Oh, *supra* note 46, p. 534, for an anecdote describing how, upon hearing her first baby's heartbeat for the first time, a pregnant woman was asked matter-of-factly by the attend-

The defunct status of such laws has allowed Korean legislators and the general public to basically ignore them. Although feminists in Korea have long been arguing for abortion to be declared a fundamental right, the government fears that repeal or modification of the current ban on abortions (and thus affirmative recognition of women's rights to self-determinism) will stir up opposition from religious groups such as the politically active Catholic contingency in Korea.<sup>48</sup> Furthermore, as those in need of the abortions are not actually hindered from obtaining such services, the philosophical and theoretical arguments of the feminists mostly fall on deaf ears.

#### THE KOREAN CRIMINAL CODE ARTICLES 269 AND 270

Ever since its inception in 1953, Article 269 of the Korean Criminal Code has outlawed abortion activity by the pregnant woman herself and by those from whom she seeks assistance. Its sister provision, Article 270, punishes abortion activity by medical practitioners more severely, especially if conducted without the consent of the pregnant woman.<sup>49</sup> In tracing the history and legislative purpose of these laws, the most common explanations refer to the conditions of the country immediately following the Korean War. The anti-abortion laws were designed as a "package deal" to address the problematic remnants of the war: the drastic decline in population and the social chaos created by sexual promiscuity.<sup>50</sup> By emphasizing the sanctity of any (including

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ing nurse, "Will you have it or abort it?" An estimated 4000-5000 abortions take place every day nationwide. *Id.*

48. DAE-KWON CHOI, RESEARCH ON THE INTERPRERATIONS OF THE CONSTITUTION (Choi, ed., Korean Constitutional Press, 1994).

49. Korean Criminal Code, art. 269(1) states: "A pregnant female who causes the destruction of her own fetus by abortion, by the use of drugs, or by any other means is punishable by imprisonment for not more than one year or by a fine of not more than 2 million won" (as amended Dec. 29, 1995). Article 269(2) punishes a person who causes the destruction of a fetus at the request, or with the consent of a pregnant woman with the same penalties; and (3) provides a sentence of three years and seven years for those who injure or cause the death of the woman, respectively in the process of performing the abortion. Article 270 provides special terms for "a physician, a doctor of Oriental medicine, a midwife, a pharmacist, or an apothecary" who causes the abortion of a fetus. If performed by request or consent, such medical professionals are subject to two years' imprisonment; without consent, the prison term is extended to three years; and those who injure or bring about the death of the woman in the process are subject to five and ten years' imprisonment, respectively. These professionals who injure or kill a patient while performing an abortion without request or consent will have their licenses suspended for seven years. See generally Pyong-Choon Hahm, *The Criminality of Abortion in Korea* in THE KOREAN POLITICAL TRADITION AND LAW (Hahm, ed. The Royal Asiatic Society) (1987).

50. Young-Hee Shim, *Proposed Amendments to Laws Related to Bodily Right and Sex: Focusing on the Relationship between Power and Sex*, 11 HAN KUK YEO SUNG HAK (KOREAN WOMEN'S STUDIES) 72, 94 (1995).

fetal) life, these laws sought to promote population growth and moral, wholesome sexual practices.<sup>51</sup>

For twenty years after Articles 269 and 270 were passed, there was much social commentary regarding the appropriateness of the criminalization of abortion in light of economic developments and more active, widespread family planning measures and education.<sup>52</sup> The country was experiencing exponential rates of population growth, and the Planned Parenthood Federation of Korea launched a campaign under the slogan "Don't distinguish between a girl or a boy. Have just two children and raise them well."<sup>53</sup> Various amendments to Articles 269 and 270, as well as the complete legalization of abortion were much debated.<sup>54</sup> However, these debates never focused on the *woman's role and rights* in pregnancy, delivery, and family planning;<sup>55</sup> instead, they centered mostly around the relationship between abortion and the national population. In 1965, the Supreme Court of Korea affirmed the illegal status of abortion simply by noting it was an inappropriate, unacceptable form of family planning<sup>56</sup>

#### THE MATERNAL AND CHILD WELFARE ACT

Ironically, in the matter of a decade following the war, abortion soon became a vehicle of modernization. Faced with the task of transforming Korea from a third world country to an "advanced society" in the 1960's, the government fully supported any means to drive down the local fertility rate to levels more close to those of developed countries.<sup>57</sup> Without addressing the constitutionality of the anti-abortion laws or attempting to amend the criminal code, the Korean legislature passed the Maternal and Child Welfare Act in 1973. It provided specific circumstances in which "artificial pregnancy termination procedures"<sup>58</sup> would be permitted. The five situations that allowed for abortions were: 1) when the continuation of the pregnancy is harmful to the health of the mother; 2) when the parents of the fetus have an infectious disease or illness; 3) when a genetic disorder is suspected of the fetus; 4) when the pregnancy

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51. *Id.*

52. *Id.*

53. Choi, *supra* note 47.

54. Shim, *supra* note 50. There were two attempts to legalize abortion, in 1966 and in 1970. See Welsh, *supra* note 46.

55. Shim, *supra* note 50, p. 94.

56. Eun-Soon Choi, *Women and Criminal Law*, 8 BUP KWA SA HOE [L. & SOCIETY] 95, 112 (1993). See *infra* note 80 for a description of the Korean court system.

57. See Welsh, *supra* note 46.

58. It is significant that the legislators chose to use this term rather than "abortion," which appears in the criminal code. It implies an effort to distinguish, even in script, the acts according to their purpose.

resulted from rape; and 5) when the pregnancy resulted from sexual relations between two individuals who are barred by law to marry (such as close cousins or those in incestuous relationships).<sup>59</sup>

As assessed by sociologist Shim Young-Hee, the above provisions make room for medical and moral reasons, but do not recognize the validity of any socio-economic reasons a woman might have for wanting an abortion.<sup>60</sup> Furthermore, the Act requires that the woman seeking an abortion also obtain the consent of her spouse or guardian. Therefore, a young, single woman to whom pregnancy poses a great financial and social burden is not only precluded from arguing the validity of her cause, she is restricted from exercising true autonomy in realizing her right to self-determinism. The structure and substance of this act clearly reveals the bias in favor of paternalistic, patronizing views of women that have existed throughout Korea's history.

Unfortunately, the issue of abortion in Korea is one where the law neither affects nor reflects reality. Despite the detailed provisions presented above, abortion is widely practiced. Newspaper commentaries suggest that the true effect of the Maternal and Child Welfare Act was to allow physicians to perform abortions under any pretext while remaining shielded from prosecution.<sup>61</sup> When one considers the estimated number of abortions each year,<sup>62</sup> it is evident that physicians do not adhere to the restrictions in the Maternal and Child Welfare Act in offering their abortion services. In fact, some argue that abortion was clearly and intentionally "at the core of a government-imposed social planning program that in the space of three decades, reduced the local fertility rate from six children per family to just 1.6."<sup>63</sup>

Abortion in Korea continued to remain legally banned but widely practiced until the 1980's when concerns about skewed sex ratios brought abortion issues back into the center of public debate. As a result of increased development and access to medical technologies, many parents who became capable of identifying the sex of their future child chose to do so as early as possible. It became apparent that abortions were being performed in order to prevent the birth of a daughter when the natural ratio of 100 girls to 103-105 boys began to tilt in favor of

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59. Public Welfare Law, ch. 2, art. 14 (Limited Permission of Induced Abortion Operations)

60. Shim, *supra* note 50, p. 95.

61. Welsh, *supra* note 46.

62. See *supra* notes 46-47.

63. Welsh, *supra* note 46.

more and more boys.<sup>64</sup> As abortion was already “legally” recognized as a crime, the legislature turned to public welfare law in its attempt to regulate the specific practice of sex selection abortions and passed the Medical Practices Act in 1994.

### THE MEDICAL PRACTICES ACT

Chapter 2 of the Medical Practices Act governs medical providers' authority and responsibilities. Article 19.2 states that a medical provider 1) must not personally examine, or assist another in examining, a pregnant woman for the purpose of determining the sex of the fetus; and 2) upon determining the sex of the fetus through examination, must not reveal such information to the pregnant woman, her family members, or any other persons.<sup>65</sup> Although the statute does not mention abortion, it resembles the Illinois statute mentioned above in that the physician's knowledge can determine whether or not an abortion will take place. Upon violation of this law, a physician could face up to three years imprisonment and a fine of up to US\$25,000.<sup>66</sup>

Unsurprisingly, this attempt to prevent sex selection abortions by silencing the physicians failed miserably. People turned to their friends and relatives in the medical profession to “ask a favor,” and many private physicians simply ignored the law and continued to conduct amniocentesis or ultrasound at the request of their patients.<sup>67</sup> In March of 1996, the first administrative punishment for violation of the Medical Practices Act took place when a doctor received one month's suspension for conducting ultrasound tests.<sup>68</sup> It was not until October of 1996—almost three years after the Medical Practices Act was enacted—that a doctor was first arrested and charged with “informing pregnant women of the sex of their unborn children.”<sup>69</sup>

The problem of sex selection abortions has consistently been an issue of concern among Korean medical and civic groups, but

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64. The birth rate is always higher for boys than girls in nature. However, boys suffer a higher infant mortality rate so that the ratios eventually level out to 100-100 by adulthood. By 1993, the Korea Institute of Health and Social Affairs reported that 115.6 boys were being born for every 100 girls, and that 20,800 female fetuses were presumed to have been killed through surgical abortions in hospitals across South Korea. *First Sex Determination Arrests in South Korea*, Agence France Presse, Oct. 1, 1996.

65. Public Welfare Law, ch. 2, art. 19-2 (Medical Practices Act) (Originally passed Nov. 28, 1987; amended January 7, 1994).

66. *Id.* ch. 7, art. 67 (Penal provisions relating to Article 19-2).

67. As a result of the new law, ultrasounds became a new way for doctors to make more money “on the side.” *Female Feticide Causes Social Uproar in South Korea*, Agence France Presse, March 20, 1996.

68. *Id.*

69. He was found to have charged \$620 for sonograms since 1993. *First Sex Determination Arrests in South Korea*, *supra* note 64.

the objections raised are based mainly on the national social effects predicted: higher rates of sexual crimes, the shortage of brides for men, and increased discrimination against women in the form of heightened competition from their male counterparts.<sup>70</sup> Critics blame the country's "deeply rooted preference for boys and overall social discrimination against women," but only go so far as to criticize abortion for sex selection purposes. It is truly an awkward position for women's rights activists in Korea to demand abortion rights on the one hand while calling for stricter enforcement of a law that, in effect, takes away from those same rights.<sup>71</sup> In order to understand how such an illogical position developed and continues to exist, one must examine the ways in which women and sex are treated within Korean law.

### THE STATUS OF WOMEN IN KOREAN LAW

#### *Adultery*

Prior to the enactment of Article 241 in the Criminal Code in 1953, a wife's adultery was a crime and grounds for divorce in Korea. The same was not true for a husband's adultery. Although the law has since been amended to apply equally to both spouses, it still draws criticism as a violation of the right to human dignity and worth<sup>72</sup> and physical freedom.<sup>73</sup>

#### *Property law*

Until the 1990 revision of the Family Law, the patriarch of a family was presumed to be the household head in control of familial affairs and duties. As a result of the revisions, the eldest male's authority to determine the location of the family residence has been revoked, and his obligation to support the family has been abolished. However, the sequence of succession remains unchanged so that the legal household headship goes from 1) the first son to 2) other sons, 3) daughters, 4) wife, 5) mother, and 6) daughters-in-law.<sup>74</sup>

70. See *supra* note 34; *Next Asian Crisis*, WASH. TIMES, Jan. 22, 1999.

71. Added to the scope of the problem is the fact that abortion is simply seen as a form of contraception. The general public's awareness and understanding of the abortion issue fails to rise to the level of sophistication that can be observed in the United States. Any debate surrounding the acceptability of late-term abortions *after* amniocenteses and ultrasound scannings—that serve as the central source of objection to sex selection abortions in the U.S.—is hard to come by in Korea. See *infra* pp. 23-24 for a discussion of birth control education.

72. South Korean Constitution, art. 10.

73. *Id.* art. 12; See generally Kyong-Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L. J. 71 (1997).

74. See Choi, *supra* note 47; Civil Code, art. 984.



Furthermore, the Family Law Revisions of 1990 finally gave a woman the right to request, upon divorce, a share of the property accumulated during the course of the marriage. As a result of the new law, wives are now entitled to alimony regardless of the cause of divorce.<sup>75</sup> Also prior to the revisions, upon the intestate death of a patriarch, unmarried daughters received one-half of what sons received, while married daughters received only one-quarter of a son's share. The wife of the deceased, remarkably, also received one-half of that amount given to her son(s). These rules of division were revised once previously in 1977 to treat unmarried daughters and wives equally with sons, but married daughters were still only entitled to a quarter of their brothers' share. The 1990 revisions finally eliminated the male-preference bias by determining intestate court-ordered divisions as follows: the wife is entitled to 1.5 times the share of offspring, and all offspring receive equal shares.<sup>76</sup>

### *The Constitution*

Ever since the end of the Korean War, Korea has been significantly influenced by American constitutionalism.<sup>77</sup> The United States Military Government in Korea issued the "Ordinance of the Rights of the Korean People" in 1948 which included the twelve major liberties found in the U.S. Bill of Rights. Since then, Korean courts have continued to import "constitutional concepts and principles involving individual liberties and freedom developed by the United States Supreme Court."<sup>78</sup> However, the actual effects of such attempts to emulate American constitutionalism have been slow in coming.

Particularly related to the status of women in Korean society is the Equal Protection Clause of the Constitution. The provision has survived numerous amendments to the Constitution and remained virtually intact to state: "Every national of the Republic of Korea is equal before the law. No person shall be subjected to discriminatory treatment in any area of political, economic or cultural life, or on account of sex, religion or any other social status."<sup>79</sup> Despite the promising language of the law, however,

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75. For detailed discussion of the effect on divorce proceedings and adultery, see *id.* at 1438.

76. *Id.* In other words, the inheritance ratio is Wife: Son: Daughter = 3:2:2.

77. See generally Ahn, *supra* note 73. Even before then, the Provisional Government of Korea, established in Shanghai, China during the Japanese occupation of the Korean peninsula, drew upon the American Declaration of Independence in drafting their own. The first Constitutional Charter also borrowed extensively from the American Constitution.

78. Ahn, *supra* note 73, p. 73.

79. S. KOREA CONST., art. 11(1), para. 1.

the Korean Supreme Court's<sup>80</sup> interpretations of the clause have amounted merely to phrases such as "only arbitrary and unreasonable discrimination is prohibited"<sup>81</sup> or "fair discrimination which serves distributive justice is allowable."<sup>82</sup> It is further significant that all legislative classification is analyzed under one standard of review, the "reasonable test," which basically parallels the U.S. "rational basis test."<sup>83</sup>

There is hopeful speculation that alternative approaches and diversified standards of review will result from equal protection claims arising out of gender-based discrimination.<sup>84</sup> Women have been systematically excluded from political offices, as well as upper-level positions in employment across all sectors.<sup>85</sup> Also, as discussed above, laws relating to adultery, marriage, divorce, and property have carried distinctive features of male dominance and female subordination persistently throughout the evolution of Korean constitutionalism. Despite recent developments in the legal status of women, the fact still remains that the legal system itself must change in order to effectively address the problem of unjust treatment of women in Korea.<sup>86</sup>

#### THE REALITY OF ABORTION FOR KOREAN WOMEN

In light of the legal background that permits perpetuation of male-preferences inherent in Korean society, it is not difficult to understand the dilemma faced by pregnant Korean women who are pressured—both explicitly and implicitly, and perhaps subconsciously—to produce a male heir.<sup>87</sup> While some optimistic

80. The Korean court system mirrors that of the U.S. federal court system, with regional district courts, appellate courts, and one Supreme Court located in the capital city of Seoul.

81. Mar. 29, 1966, DaePan 65 Nu 69 (Sup. Ct.)

82. Sep. 7, 1954, DaePan 54 MiSang (Sup.Ct.), cited in Ahn, *supra* note 73, p. 101. More recently, the new Constitutional Court chose to elaborate on their interpretation of the clause by stating, "treating the like equally, and the unlike unequally." *Id.* at 101.

83. Ahn goes on to speculate that the Korean courts' single "reasonableness test" continues to prevail due to Korea's long history as a mono-cultural state. *Id.* at 102.

84. *Id.*

85. Choi, *supra* note 47, p.1439. See also Yi-Soo Kang, *The Status of Korean Women in Statistics*, 8 YEO SUNG KWA SA HOE [WOMEN & SOCIETY] 23 (1998).

86. In-Ryong Shin, *The Inequality of Women in the Korean Legal System*, KOREA JOURNAL, in SONG, *supra* note 47, pp.1419, 1429.

87. In Korean tradition, failure to bear a son was one among seven evils for which women were accountable and for which husbands were entitled to expel their wives. The remaining six were: disobedience to parents-in-law, adultery, jealousy, hereditary disease, garrulousness, and larceny. YUNG-CHUNG KIM, *WOMEN OF KOREA: A HISTORY FROM ANCIENT TIMES TO 1945*, cited in Rosa Kim, Note, *The Legacy of Institutionalized Gender Inequality in South Korea: The Family Law*, 14 B. C. THIRD WORLD L. J. 145, 147 (1994).

sociologists claim that “the new generation” has moved beyond the traditional desire for sons,<sup>88</sup> surveys conducted as recently as 1998 show that the practice of sex selection abortion continues regularly.<sup>89</sup> Among 812 pregnant women surveyed by the Korea Housewives Association, 13.4 percent “checked” the sex of their fetuses prior to delivery, and 44.8 percent of those women aborted the pregnancy upon discovering that they were carrying a female.<sup>90</sup> Fifty-seven percent of all those surveyed replied that they would still prefer a boy if they were to become pregnant again, and 49 percent said *they themselves would like to be born as boys if they were reborn*.<sup>91</sup>

Each year, approximately US\$27.3 million is spent on illegal sex determination tests and abortions.<sup>92</sup> It is also significant that half of the women who requested the ultrasound scans in the survey above did so on their own, while the other half was prodded to do so by in-laws and husbands.<sup>93</sup> Oftentimes, the pressure to have sons “comes from the women themselves, particularly mothers-in-law” and women feel that they have “failed their husbands” by not producing a male heir.<sup>94</sup>

These societal, cultural, and familial pressures, in conjunction with the virtual non-enforcement of the laws governing

88. The National Statistical Office cites a decrease in baby boy ratios from 113.3 in 1995 to 108.4 in 1998 per 100 baby girls. *Divorce Surge as Couples Cope with Recession*, KOREA HERALD, Nov. 5, 1998; See also Sheryl WuDunn, *Korean Women Still Feel Demands to Bear a Son*, N.Y. TIMES, Jan.14, 1997 (stating that “[e]ven as greater numbers of women. . .stand by their baby girls, they also feel an age-old obligation to bear sons.”). However, the national ratio is expected to reach 123.4 (adult) males to 100 (adult) females by the year 2010 as a result of sex selection abortion practices that took place in the early 1990’s. See *Rampant Abortions to Result in Severe Shortage of Brides*, KOREA HERALD, July 22, 1997; *Next Asian Crisis*, *supra* note 70. In 1994, Korea ranked first in the world, with a ratio of 115.4 baby boys to 100 baby girls. Although that position has been since relinquished to China, figures from that year show that the ratio was as high as 205.9 boys for third-borns and 237.7 boys for fourth-borns per 100 girls. See Jung-Jin Oh, *The Abortion Problem Reflected in the Law*, 8 YEO SUNG KWA SA HOE [WOMEN & SOCIETY] 95 (1997) for further details.

89. *Pregnant Women Continue to Abort Female Fetuses*, KOREA HERALD, Dec. 23, 1998.

90. *Id.*

91. *Id.* emphasis added.

92. *Rampant Abortions to Result in Severe Shortage of Brides*, *supra* note 88.

93. See *supra* note 89; 812 women were surveyed by the Korea Housewives Association.

94. See Wudunn, *supra* note 88. The article tells of a woman who chose to have an abortion upon finding out that she was pregnant with her second daughter. Five years later, when she did have another daughter, her father-in-law came to her recovery room at the hospital to ask when she could get pregnant again. He also handed her a newspaper advertisement on how to give birth to sons, and prayed for a son at the family ancestral worship ceremony. The woman also relates how strangers on the street express pity upon seeing her two daughters and comment, “Oh, you must bear a son.”

abortion and the testing and disclosure of the fetus's sex, inevitably create an atmosphere conducive to the continuation of sex selection abortions in Korea. Despite the fact that Korea's annual per capita abortion rate is five times higher than that of the United States,<sup>95</sup> there is little criticism of these figures within Korean society. The relatively unrestrained accessibility to abortion prevents many from recognizing its illegal status, and the women who either choose or are pressured to seek an abortion see themselves as beneficiaries of the government's failure to strictly enforce its anti-abortion laws.

In addition to its usage as a sex selective mechanism, the problem of abortion in Korea sprouts from the fact that it is simply used as another form of contraception. Elements of Confucian mindset are blamed for Korean women's avoidance, and even feigned ignorance, of contraceptive techniques.<sup>96</sup> Whereas government statistics reveal that approximately one out of every two married women in Korea have experienced two abortions on the average, only 3 percent of Korean women use oral contraceptives.<sup>97</sup> As a result of the sensationalized stories of side effects from oral contraceptives with high hormone levels in the 1960's, many women still shy away from the practice.<sup>98</sup> Furthermore, the lack of proper sex education creates grounds for other "misconceptions and plain false rumors about contraception."<sup>99</sup> Confucian influences against publicized notions of sexuality and sexual practices are reflected in statistics that show 40 percent of fertile Korean women turn to sterilization to prevent unwanted pregnancies.<sup>100</sup> This oddly indicates another way in which women choose to relinquish control over their own reproductive cycles rather than to acknowledge or be reminded of their own

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95. Welsh, *supra* note 46. Approximately 1.59 million abortions are performed annually in the U.S. Abortions- Estimated Number, Rate, and Ratio, by Race: 1972 to 1988 U.S. Bureau of the Census, Statistical Abstract of the United States 83 (1993).

96. Pil-Wha Chang, a professor at Ewha Women's University, states that "sexuality is viewed as a taboo subject more in Korea than in other societies due to Confucian values. Because chastity is the primary virtue under such values, women are discouraged from speaking about sexual issues and encouraged not to have any knowledge or control over her body. Even when women know about contraceptives and other options, they do not dare take measures." Welsh, *supra* note 46.

97. *Team Schering Challenging Sex Taboos*, KOREA HERALD, Sept. 8, 1998.

98. *Id.*

99. *Id.* Such unwillingness to acknowledge sex as a social phenomenon is also reflected in the high levels of unreported rapes. Only 2% of an estimated 250,000 rapes were reported in 1991. See Rosa Kim, *supra* note 87, n.9. See also Chang's comment in Welsh, *supra* note 96.

100. *Id.*

sexuality on a regular basis, as would be required by other forms of birth control.<sup>101</sup>

### THE CHALLENGE FOR WOMEN'S RIGHTS ACTIVISTS IN KOREA

Given the fact that feminism in the United States and other developed nations has always been linked to the struggle to keep abortion legal and accessible, many outsiders are surprised to find Korean feminist activists among the limited numbers of citizens who openly criticize the country's high abortion rates.<sup>102</sup> Faced with the reality that abortions are being performed to eliminate female fetuses and are thereby significantly reducing the female population, these feminists see no other choice but to take an anti-abortion stance that contradicts their slogans in support of "self determinism for women." The fight for fundamental rights to reproductive freedom has lost popular support due to the fact that abortion services are readily available to women. As a professor at a Seoul university observed, there is "really no reason for anyone to protest the restrictive Penal Code or the stipulations of the Maternal and Child [Welfare] Law because lack of enforcement has rendered them meaningless."<sup>103</sup>

To understand this peculiar situation of feminists in Korea requires extensive familiarity with the cultural and social atmosphere of Korea in which abortion takes place. The main reason why American feminist legal theories in support of abortion rights fail to translate to the situation in Korea stems from the "communal" nature of Korean society. Despite the apparent modernization in attitudes and lifestyles, Koreans cannot deny their mono-cultural, mono-racial history entrenched in long-standing Confucian tradition. The Korean concept of "individual" is still heavily influenced by family and the surrounding society, and individual actions cannot be taken without first considering the consequences to oneself as well as to one's family and society as a whole.

Korean abortion rights arguments surrounding sex selection abortion fail on two levels. Until abortion is secured as a constitutional right, it is virtually futile to speak of limitations on choice and liberty that sex selection abortion regulations may impose, for a non-existent choice cannot be further limited. As

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101. *Id.* Fifteen percent use intra-uterine devices, and another fifteen percent choose condoms for birth control.

102. *Id.*

103. Welsh, *supra* note 46, quoting Frank Tedesco, Sejong University professor and author of "Buddhism and Abortion" (University of Hawaii Press).

abortion must be preceded by sexual activity,<sup>104</sup> the issue of abortion is necessarily tied to a woman's control over her own body. This point is accentuated by the fact that abortion procedures can result in serious medical side effects.<sup>105</sup> Psychological injuries arising from guilt, depression, and stress have also been linked to abortion, as well as to the inability to choose abortion by those who view it as murder.<sup>106</sup> The debates surrounding the validity and constitutionality of Korean anti-abortion laws ignore these effects borne by the woman who is both the perpetrator and victim of the procedure. In order for the dialogue on sex selection abortion to progress, participants must first retrace their steps to the beginning and clearly establish the right for a woman to determine what is in her own best interest.

Unfortunately, this "personal autonomy" approach presents a direct conflict with the second factor responsible for the failure of current sex selection abortion debates. While "the right to privacy" and "the right to be free from state intrusion in personal decisions" serve as the backbone of American abortion rights,<sup>107</sup> such claims for *individual* rights fail to take into consideration the conditions in Korea that incite abortions as well as the resulting societal repercussions. The argument given by those feminists influenced by U.S. ideology that "the constitutional right to privacy also protects Korean women's right to abortion" is deficient in that it stops short of recognizing that many *pregnancies* themselves are not a matter of choice for many women.<sup>108</sup> The male-biased gender structure of Korean society essentially strips women of their right to privacy when it comes to matters of sexuality and reproduction;<sup>109</sup> pregnancies often result from the assumed duty to bear a son or from insufficient knowledge of contraceptive use.

Recent debates among American feminist activists may provide some guidance to their Korean counterparts who seek an

104. Except for limited cases involving IVF procedures. See also CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSE ON LIFE AND LAW* (1987). "Abortion is inextricable from sexuality" *Id.* at 93.

105. See generally Young-Sook Park & Eun-Hee Lee, *Reproductive Body: The Reality of Pregnancy and Delivery*, 8 YEO SUNG KWA SA HOE [WOMEN & SOCIETY] 78 (1997). The most commonly noted physical side effects include pain, irregularity, arthritis, infertility, and uterine cancer.

106. Oh, *supra* note 88, p. 107.

107. See discussion on *Roe* and *Casey*, *supra* pp.5-8.

108. Oh, *supra* note 88. Although the focus in the U.S. has changed since *Casey* from privacy to liberty, the author here refers to the long-standing history of U.S. privacy doctrines.

109. See discussion *supra passim*, on pressures to have boys, and on the limited access to contraceptives. See also April L. Cherry, *Choosing Substantive Justice: A Discussion of Choice, Rights, and The New Reproductive Technologies*, 11 WIS. WOMEN'S L. J. 431 (Summer 1997).

operable framework to argue for fundamental reproductive rights while supporting regulations on sex selection abortion. In contrast to initial opposition to any form of regulation that would threaten or impinge upon hard-won abortion rights, there has been a type of re-focusing noted within the discussions on sex selection abortions. In analyzing the morality of sex selection abortion, one approach is to examine the act itself and the varying degrees of impact on society.<sup>110</sup> Another approach would be to judge the morality of an act by whether or not it violates a prescribed moral rule.<sup>111</sup> This type of consequentialist analysis is "often understood as protecting the public sphere from the harmful acts of individuals."<sup>112</sup> Finally, the pragmatic analysis requires exploration of each objection to sex selection abortion *in light of* the overall context.<sup>113</sup> A further modified pragmatic framework looks more to the structures of historical and contemporary discrimination rather than the unique experiences of individuals.<sup>114</sup>

In Professor April Cherry's view, the fetus itself has no moral status as it does not exist outside of the woman's body. However, she recognizes that "the fetus' existence can have a profound impact on the lived experience of the woman,"<sup>115</sup> and therefore asserts that the "reality of the women's lives which make abortion necessary. . . is the context in which the abortion of an ungendered fetus must be considered."<sup>116</sup>

The sex-identified fetus subject to abortion becomes engendered because a decision to abort the fetus is made based on cultural notions of what it means in the society to be gendered male or female. Thus, a particular sex-identified fetus becomes a representative of its gender. Under these circum-

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110. See Cherry, *supra* note 11. The deontological perspective views acts as inherently right or wrong regardless of their consequences for human happiness or sadness. See *id.* at 176-178 for more detail.

111. See *id.*

112. See *id.* at 179-181. Under this ethical tradition, abortion generally is morally defensible if the net beneficial consequences to society of permitting abortion are greater than the net benefits of prohibiting abortion. Cherry further points out that this consequentialist approach fails to address the problem of indeterminacy (the actual outcome is hard to predict). It also fails to recognize that an individual decision to opt for sex selection abortions could be a correct decision if the oppressive circumstances in a woman's life or environment—such as severe discrimination, hardship, and the violent death of their subsequently born daughters—provide a moral defense. A consequentialist analysis could also be used to argue that a prohibition of sex-selective abortion inhibits sexual equity by reinforcing the socio-political subordination and oppression of women.

113. See *id.* at 181-183.

114. See CORNELL WEST, *THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM* (1989), cited in Cherry, *supra* note 11, n.106.

115. See Cherry, *supra* note 11, p. 184.

116. *Id.*

stances the aborting of a female fetus would be a declaration concerning the social value of women or girls: that we are, as a group, less valuable and unwanted. . . We can thus consider sex-blind abortions justified by a woman's right to decide her future or because we believe that fetuses lack morally relevant characteristics, and at the same time consider sex-selective abortions morally unjustified because the abortion impliedly and immediately asserts that the lives of women and girls are less valuable or less desirable.<sup>117</sup>

In this way, Cherry agrees with Korean feminists' analysis that the individual rights argument alone is insufficient to protect the practice of sex selection abortions: "Arguments in favor of liberty, autonomy in decision-making, and self-determination for women in the reproductive sphere are legally and morally compelling. . . . [However, t]he focus on individual rights has allowed us to neglect larger issues of social need and justice."<sup>118</sup> She asserts that rights and rights rhetoric can only be useful if they are not separated from issues of social justice and other ethical concerns. In effectively and ethically supporting rights in the reproductive arena, feminists must make sure that new forms of subordination do not arise out of those rights sought. In other words, feminism must consider whether the right to choose abortion, as it is currently framed by liberalism, truly increases women's reproductive freedom or increases the exploitation of women's reproductive capacities.<sup>119</sup>

Sex selection abortions are distinguished from other reproductive rights such as the right to contraceptives and the right to choose abortion in that its "consequences do not lie in the dismantling of patriarchal domination."<sup>120</sup> While abortion gives women control over whether or when to have children, sex-selection abortion gives men (husbands and families) greater influence over women's reproduction and the sexual composition of future generations. Women's rights activists in Korea must also recognize this distinction in order to overcome the apparent illogic in their arguments. To fight for women's right to control their own reproductive capacities is not to say that women should serve as vehicles that allow further perpetuation of male-centered cultural attitudes. As Cherry so aptly states: "rights discourse must also include an understanding of the historical and

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117. *Id.* The constitutional right to safe and legal abortion was fought for by many women on these grounds. On the other hand, the critical legal studies and feminist movements have taught us that this ideology of liberty has, on numerous occasions, deflected our attention from the investigation of reproductive technology as an institution of patriarchy.

118. *Id.* at 212.

119. *See id.*

120. *Id.* at 219.



contemporary injustices towards women, as well as an understanding of women's social training in patriarchy which often requires women to collude with patriarchy to their own disadvantage."<sup>121</sup>

### CONCLUSION: REALISTIC STEPS FOR KOREA

In matters of reproductive freedom, it is possible for individual rights to work against the interests of the group. A woman's choice to abort her female child-to-be can result in support for the social discrimination and inequalities that gave rise to such a choice. The cycle becomes ultimately vicious.

Choice resonates as a quintessential U.S. value, set in a context of a social history that has gradually allowed all sorts of oppressive so-called options, such as prostitution and pornography to be defended in the name of women's right to choose.<sup>122</sup>

In the United States, some obstacles to sex selection abortions already exist in the form of legislation "designed to persuade women to choose childbirth over abortion," without severely impacting the availability of legal abortion.<sup>123</sup> Although many feminists argue that legal prohibition of sex selection abortion is "politically imprudent, given the precarious nature of women's reproductive rights,"<sup>124</sup> the tides seem to be turning in favor of some form of regulation in light of the cumulative effect on women as a class. On the whole, they advocate informal social deterrence and consciousness-raising rather than legal prohibition.<sup>125</sup>

In Korea, despite apparent U.S. influences, the fact remains that women there do not own such "hard-won reproductive rights." The struggle for women's physical autonomy must continue in conjunction with social mechanisms that can foster an awakening of thought within women. The prohibition of sex selection abortion must be identified and understood as society's objection to the discriminatory element within the practice. It is a means to broaden rights for women rather than an obstacle. Denying women the opportunity to choose male children may

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121. *Id.* at 216-17.

122. JANICE RAYMOND, *WOMEN AS WOMBS* ix-x (1993).

123. *Casey*, 112 S.Ct. at 2825; See discussion *supra*, pp. 7-8.

124. Cherry, *supra* note 11, pp. 220-221. If the state is allowed to question women's judgment regarding the abortion decision, the very foundation of women's reproductive freedom will be shattered. See generally TABITHA POWLEDGE, *TOWARD A MORAL POLICY FOR SEX CHOICE IN SEX SELECTION OF CHILDREN* (Neil G. Bennett ed., 1983), quoted in Cherry, *supra* note 109. In order to protect the improvements women have already achieved, society should seek no legal restrictions on reproductive freedom, even on a technology that will be used selectively against females. *Id.*

125. See Cherry, *supra* note 11, p.221.

actually provide the oppressed with an opportunity “to take steps to change their status.”<sup>126</sup> While a call for “Substantive Justice” has only recently emerged in American sex selection abortion debates, feminists in Korea have been arguing for the concept for some time already.<sup>127</sup> In light of the social circumstances that provide for the perpetuation of patriarchy and female devaluation, the “importance of individual choice or preference to the question of the permissibility of sex-selection abortion becomes secondary to the issue of substantive justice for women as a social group.”<sup>128</sup> As the practice of sex selection abortion in Korea is based on patterns of male preference and female subordination—and thus works only in favor of males—it is not difficult to argue for the prohibition of such practices in the interests of all Korean women. The efforts to secure fundamental rights to reproductive freedom must continue, however, as a different movement altogether.

In order to address the high rates of abortion in general, not only must the Medical Practices Act be more strictly enforced, there must be nationwide efforts to raise awareness of contraceptive methods and other issues related to sexuality and reproduction. The status of women, in reality and as perceived *by the women themselves* can only be improved through education and empowerment. Increased public sensitivity to the problem of using abortion as a form of contraception, and increased understanding and acknowledgement of women’s rights to control their own reproductive capacities will heighten popular support for the need to establish abortion as a fundamental right to which women are entitled. Sex selection abortion is a manifestation of the traditional, male-oriented way of thinking among members of Korean society. The task for those selected individuals who seek to abolish the practice is to take a comprehensive approach that affects all facets of society—in the family, in the law, and within the minds of women themselves.

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126. Roberts, *supra* note 27.

127. See generally Cherry, *supra* note 11, for a discussion on substantive justice versus individual rights.

128. *Id.* at 223.

