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"CRYING STONES": A COMPARISON OF ABORTION IN JAPAN AND TIE UNITED STATES

Lynn D. Wardle

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*Lynn D. Wardle**

Various methods for destroying the unwanted child have been used in Japan. One, the abandoning of infants to the elements, may have given credence to the numerous tales of "crying stones." Mothers often abandoned their infants behind or near the large stone markers at crossroads, perhaps in the hope that travelers would find and adopt them. The crying of the babies, especially at night, caused some of the passers-by to think the stones were wailing.[1]

I. INTRODUCTION

The Hase Kannon temple at Kamakura, located approximately thirty miles south of Tokyo, is one of the most famous Buddhist temples in Japan. Climbing the steps to the main temple, home of a renowned twelfth-century gilt statue of Kannon, the Goddess of Mercy, visitors pass

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* Professor of Law, J. Reuben Clark Law School, Brigham Young University, Utah. Research for this Article was conducted while the author was a Visiting Professor of Law at Sophia University in Tokyo, Japan. The research was made possible in part by a grant from the David M. Kennedy Center for International Studies, Brigham Young University, by a summer research grant from the J. Reuben Clark Law School, Brigham Young University, and by the generosity of the Kawanaka Foundation. Invaluable comments and information were imparted by numerous experts on Japanese family planning including Professor Minoru Ishikawa, Professor Kenji Hayashi, Dr. Kiyoshi Hiroshima, Dr. Kiyoshi Okado, and Fr. Anthony Zimmerman. An early draft of this Article was presented to the Family Research Group, Comparative and International Law Center, Waseda University (Tokyo), from which many helpful responses were received. Valuable translation, interpretation, and research assistance were provided by Yasushi Tokui, Keiko Nagae, Todd Koyama, Douglas Hymas, Keith A. Call, and Patrick Shen. Additionally, without the assistance of the staffs at the National Diet Library, Sophia University Library, Tokyo University Library, and the Ministry of Health and Welfare, many valuable sources would have been inaccessible.

1. M. STANDLEE, THE GREAT PULSE: JAPANESE MIDWIFERY AND OBSTETRICS THROUGH THE AGES 153 (1959).

"Jizo Hall," a small edifice standing behind an incense altar.[2] Surrounding this hall and on terraces up and around the hillside, more than 50,000 small stone statues of the Buddhist saint Jizo have been placed.[3] The statues are purchased and erected by parents of miscarried, stillborn, or most frequently, aborted children. Many of them are wearing hand-knitted caps and sweaters, surrounded by bottles, baby toys, and small gifts.[4] Here is the most eloquent manifestation of the anguish and acceptance by modern Japanese women of a practice that is as old as Japanese society itself.

This Article describes the history, practice, and regulation of abortion in Japan and draws comparisons with abortion history, practice, and regulation in the United States. The comparative study of abortion law is a new field of legal scholarship.[5] Professor Mary Ann Glendon has shown

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2. BETH REIBER, FROMMER'S DOLLAR-WISE GUIDE TO JAPAN AND HONG KONG '88-'89 188 (1988).

3. *Id.* I personally visited the Hase Kannon Temple at Kamakura in 1988, and marvelled at the tens of thousands of statues displayed there. It is now reported that only about one thousand statues remain on the hillside at any given time; after a year they are burned or buried to make way for others. BETH REIBER, FROMMER'S COMPREHENSIVE TRAVEL GUIDE: TOKYO '92-'93 258 (1992).

4. REIBER, *supra* note 2, at 188. *See also* Bruce Roscoe, *Death Courts Abortion Industry,* DAILY YOMIURI, Jan. 30, 1983, at 5; *Booming "Business of Terror,"* DAILY YOMIURI, Jan. 30, 1983, at 5. Japanese women are not the only women who have found comfort and release in the statues of Jizo. *See* GLORIA SWANSON, SWANSON ON SWANSON: AN AUTOBIOGRAPHY 1, 519 (1980) (giving a touching account of Gloria Swanson's secret abortion, decades of secret guilt, and her unburdening experience encountering Jizo in Japan).

5. Before 1987 several excellent comparative law studies of abortion were published. *See, e.g.*, Donald P. Kommers, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*, 1985 B.Y.U. L. REV. 371; SUSAN RUST BULFINCH, INTRODUCTION IN ABORTION LAW AND PUBLIC POLICY 3 (D. Campbell ed., 1984); Donald P. Kommers, *Abortion and Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255 (1977); John Gorby & Robert E. Jonas, *West German Abortion Decision: A Contrast to* Roe v. Wade, 9 J. MARSHALL J. PRAC. & PROC. 551 (1976); *see also* Richard Stith, *The New Constitutional and Penal Theory in Spanish Abortion Law*, 35 AM. J. COMP. L. 513 (1987); John A. Quinlan, *The Right to Life of the Unborn—An Assessment of the Eighth Amendment to the Irish Constitution*, 1984 B.Y.U. L. REV. 371 (1984); Marie T. Meulders-Klein, *The Right over One's Own Body: Its Scope and Limits in Comparative Law*, 6 B.C. INT'L & COMP. L. REV. 29 (1983); Bernard Hung-kay Luk, *Abortion in Chinese Law*, 25 AM. J. COMP. L. 372 (1977). However, most comparative studies of abortion law were either ignored or dismissed, perhaps due to the political sensitivity of the subject or the taboo widely observed by legal scholars against any criticism of permissive abortion laws. Professor Mary Ann Glendon's book, *Abortion and Divorce in Western Law*, however, provoked such a widespread reaction among chastened feminist legal scholars and privacy-apologists that it is fair to date the opening of this field

that abortion regulations can provide a revealing basis for comparative study of the cultural and legal values of different countries.[6] Her groundbreaking comparative study focused on the abortion and divorce laws in twenty nations in North America and Europe. Professor Glendon observed that "[f]rom the comparative point of view abortion policy in the United States appears singular . . . " because, for example, in America there is "less regulation of abortion in the interest of the fetus than any other Western nation . . . ."[7] Professor Glendon noted that the radical individualism of the American "privacy" doctrine, the broad absolutism of the right to destroy an unwanted child, the refusal to consider interests other than the pregnant woman's desires, and the marginal role the legislature has played in establishing the abortion policy were among the prominent factors that distinguished American abortion laws from those in Europe.[8]

Professor Glendon's landmark study did not consider the abortion laws of any Asian country. However, she hinted that in some Asian countries one might find as much "indifference" to prenatal human life as exists in American abortion law.[9] Thus, a comparative abortion law study

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of study from its publication. MARY A. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987).

6. GLENDON, *supra* note 5.

7. *Id.* at 24, 2.

8. *Id.* at 10-62. *See id.* at 57, 113 (describing the isolation and alienation of radical American individualism, particularly in abortion law). Moreover, "[o]nly in America has a vast profit-making industry grown up around abortion." *Id.* at 20.

9. If we were to broaden our field of comparison to include the seven Warsaw Pact nations, we still would not find any country where there is so little restriction on abortion in principle as there is in the United States . . . . Today, in order to find a country where the legal approach to abortion is as indifferent to unborn life as it is in the United States, we have to look to countries which are much less comparable to us politically, socially, culturally and economically, and where concern about population expansion overrides *both* women's liberty and fetal life.

Id. at 23-24. Professor Glendon may have had in mind countries like China, where forced abortion has been a government policy for years; *see* Steven W. Mosher, *A Mother's Ordeal*, READER'S DIG., Feb. 1987, at 52; STEVEN W. MOSHER, BROKEN EARTH: THE RURAL CHINESE (1983); Michael Weisskopf, *Abortion Tears at China's Society*, WASH. POST, Jan. 7, 1985, at 1; and India, where abortion has been strongly encouraged by the government and where sex-selection abortions are widely practiced; *see* Manju Parikh, *Sex-Selection Abortions in India: Parental Choice of Sexist Discrimination*, FEMINIST ISSUES, Fall 1990, at 19 (about 8,000 fetuses determined by amniocentesis to be female were aborted); Kusum, *The Use of Prenatal Diagnostic Techniques for Sex Selection: The Indian Scene*, 7 BIOETHICS 149-65 (Apr. 1993).

focusing on Asia is a logical and significant extension of Professor Glendon's initiative.

Japanese abortion law and practice provides a particularly suitable subject for comparison to American law and practice for two reasons. First, Japan and the United States have two of the most permissive abortion laws and two of the highest rates of abortion in the world.[10] On the surface they appear to be quite similar in terms of contemporary abortion policy and practice. Also, both countries are post-industrial societies; they are both affluent, highly educated, and influential in the world community. Yet beneath the apparent similarities of law and acceptance of abortion, there are many significant cultural differences between Japan and the United States, including language, history, customs, religion, and social values. These differences undoubtedly impact on the practice, perception, regulation, and consequences of abortion in the two countries.

Second, in terms of individual and social consequences of unrestricted abortion, Japan, in some ways, may be a generation "ahead" of the United States. In Japan, the current law authorizing abortion on permissive grounds and with very easy access dates back to the years between 1949 and 1952.[11] In the United States, legal policy allowing essentially unrestricted access to abortion dates back to only 1973.[12] Thus, to the extent that the experience is transferable across time and culture, an understanding of Japanese regulation and practice of abortion might benefit Americans as they seek to understand the consequences of a permissive abortion policy. This comparative knowledge also may be useful to shape American abortion doctrine in ways that could ameliorate some contemporary conflicts over abortion policy. Additionally, a comparative analysis of the abortion regulation experiences of America and Japan may be of interest to other countries struggling with the abortion issue.

Part II of this Article examines the historical development of abortion regulation in Japan and summarizes the country's contemporary abortion laws. Part III reviews the history of abortion regulation in the United States and outlines the constitutional doctrine of abortion privacy and abortion as a liberty interest. Part IV compares and contrasts the policies and doctrines of abortion regulation in Japan and the United States. Part V summarizes the current abortion practices and existing attitudes concerning abortion in both Japan and the United States. Part VI provides

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10. *See* GLENDON, *supra* note 5, at 14; *see infra* notes 45-81, 183-95 and accompanying text.

11. *See infra* notes 68-69 and accompanying text.

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

comparative assessments of abortion practices and attitudes in the two countries. Part VII provides concluding reflections about the comparative role of abortion practice and regulation in Japanese and American society.

II. THE HISTORY OF ABORTION REGULATION IN JAPAN

A. Abortion in Pre-Modern Japan (Pre-1867)

"*Datai mabiki*" is a phrase that is common to Japanese historians.[13] *Datai* means abortion; it is a harsh word that connotes destruction.[14] *Mabiki*, a term that literally means "thinning out," was originally applied to the thinning out of young plants, especially radishes, and is the traditional Japanese colloquial term used to refer to infanticide.[15] Historically, the practices of abortion and infanticide are nearly as old as Japanese recorded history. As the conjoined phrase suggests, there was no sharp distinction between abortion and infanticide.[16] Infanticide was cheaper and more common among the peasants and farmers, and in rural areas generally, while abortion appears to have been more common in the cities and among the upper classes.[17] "Abortion was associated with the elite—the Tokugawa families, the *daimyo*, the *samurai*, and the rich merchants. Infanticide was most prevalent among the peasants."[18]

Most scholars date the practice of abortion in Japanese history to the Heian period (A.D. 794-1185).[19] There are numerous references to abortion in the folklore and poetry of this period, indicating that abortion was openly practiced and publicly acknowledged—thus, probably not illegal.[20] Likewise, in the succeeding Kamakura period (A.D. 1185-1333),

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13. SUSAN B. HANLEY & KOZO YAMAMURA, ECONOMIC AND DEMOGRAPHIC CHANGE IN PRE-INDUSTRIAL JAPAN, 1600-1868 233 (1977).

14. *See* Tom Paton, *The Unwanted Pregnancy in Japan*, 40 JAPAN CHRIST. Q. 93, 94 (1974).

15. G.B. SANSOM, JAPAN, A SHORT CULTURAL HISTORY 508 (1936); IRENE B. TAEUBER, THE POPULATION OF JAPAN 29 (1958); Carl Mosk, *The Decline of Marital Fertility in Japan*, 33 POPULATION STUD. 19, 26 (1979).

16. TAEUBER, *supra* note 15, at 29.

17. *Id.* at 30; STANDLEE, *supra* note 1, at 101; *see also* HANLEY & YAMAMURA, *supra* note 13, at 233.

18. TAEUBER, *supra* note 15, at 30.

19. *See, e.g.*, Tsutomu Ishihara, *A History of Eugenic Protection Law*, 53 SANFUJINKA CHIRYO [OBSTETRICS & GYNECOLOGY TREATMENT] 391 (Yasushi Tokui trans., 1988) (1986) (on file with author). One writer noted that there are references to abortion in Japan as early as the early, or pre-Nara period (A.D. 710-784). Thomas K. Burch, *Induced Abortions in Japan*, 2 EUGENICS Q. 140 (1955).

20. BONSEN TAKAHASHI, DATAI MABIKI NO KENKYU [A STUDY OF ABORTION AND

there are ample literary references to abortion.[21] Japan's first identified abortionist, Tatewaki Chujo, was a surgeon living during the Azuchi-Momoyama period (A.D. 1568-1600).[22] By the seventeenth century, an abundance of medical literature had developed describing methods and practices of abortion.[23]

Before the Tokugawa period (A.D. 1600-1868), it appears that abortion was practiced sporadically, on a localized basis, and often associated with severe natural disasters such as drought and famine.[24] During the Tokugawa period, however, especially in the second half, abortion became commonplace.[25]

Many scholars have identified two reasons for the widespread acceptance and practice of abortion and infanticide during the two and one-half centuries of late feudalism during the Tokugawa period: (1) extreme poverty, especially among the peasant class in rural areas and lower-ranked warriors and (2) rampant sexual immorality, especially among the merchants, artisans, warriors, and governing elite in the urban areas.[26] Abortion and infanticide were so commonplace during this period that the population of Japan is said to have stabilized at about 26,000,000 for more than a century.[27] Extramarital sexual behavior was apparently rampant,

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INFANTICIDE] 1-10 (Douglas Hymas & Todd Koyama partial trans., 1989) (1936) (on file with author); Ishihara, *supra* note 19, at 391.

21. TAKAHASHI, *supra* note 20, at 5-9, 27-35.

22. STANDLEE, *supra* note 1, at 111.

23. *See id.* (noting that some methods for sure abortion were still "secret" or "sacred" in 1751); TAKAHASHI, *supra* note 20, at 6-26; Ishihara, *supra* note 19, at 391-93; HANLEY & YAMAMURA, *supra* note 13, at 233.

24. SANSOM, *supra* note 15, at 516. Nevertheless, early Christian missionaries in Japan from Europe noted the open, and to them, widespread practice of abortion as early as 1585. Ishihara, *supra* note 19, at 391.

25. Ishihara, *supra* note 19, at 391; Burch, *supra* note 19, at 140; HANLEY & YAMAMURA, *supra* note 13, at 38, 226-27; SANSOM, *supra* note 15, at 516.

26. *See generally* TAKAHASHI, *supra* note 20, at 10-26, 46; TAEUBER, *supra* note 15, at 30-31. "Practices of abortion and infanticide were prevalent throughout all social classes." RYOICHI ISHII, POPULATION PRESSURE AND ECONOMIC LIFE IN JAPAN 15 (1937).

27. *Family Planning*, *in* 2 KODANSHA ENCYCLOPEDIA OF JAPAN 246 (1983); HANLEY & YAMAMURA, *supra* note 13, at 38, 215, 226-33; HUGH BORTON, JAPAN'S MODERN CENTURY, FROM PERRY TO 1970 16, 174 (2d ed. 1970); ISHII, *supra* note 26, at 14-16; *but cf.* Akira Hayami, *Population Change*, *in* JAPAN IN TRANSITION, FROM TOKUGAWA TO MEIJI 280, 287-89 (Marius B. Jansen & Gilbert Rozman eds., 1986) (noting that scholars do not agree on the extent or the cause of the stabilized population); Mosk, *supra* note 15, at 22-23 (arguing that actual family size exceeded desired family size during the Tokugawa period).

especially in Edo (now Tokyo), the seat of the central government or *Shogunate.*[28] Yet formally, in both class-tied codes or mores of behavior, as well as in the law, adultery and fornication were strictly proscribed.[29] In practice, this restriction meant merely that infidelity and extramarital sexual activity were accepted so long as they could be kept quiet. However, if a breach of protocol came to light, as in the birth of a child out of wedlock, the consequences were severe. As a result, abortion and infanticide were widely practiced to preserve appearances and reputations by destroying the consequences of formally-proscribed extramarital sexual conduct.[30]

The other major factor contributing to abortion and infanticide during the Tokugawa period was poverty. The lower-ranked warriors were on a fixed stipend of rice; in order to maintain themselves and their positions, they felt compelled to limit family size, and thus resorted to abortion and infanticide.[31] The peasant class, who were mostly farmers, were under even harsher economic constraints: in the rigid hierarchy of the feudalistic social structure, farmers were severely oppressed and heavily taxed, so the pressures of poverty were overwhelming. Limitation of family size by infanticide and abortion was widely accepted as necessary to maintain minimum standards of subsistence. The literature surviving from the period is replete with references to the common people reluctantly performing abortions and infanticide because families were unable to support another child.[32]

By the middle of the eighteenth century, the high number of abortions and infanticide resulted in a growing economic problem: fewer children were growing up to become farmers. This resulted in stagnation, or a reduction in the amount of agricultural activity and a concomitant risk to the tax revenues of the government taken from the rice harvests. As a result the *bakufu* (central government) and *han* (regional governments) officials initiated remedial efforts to discourage abortion and infanticide

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28. *See* TAKAHASHI, *supra* note 20, at 10-26, 39-46; TAEUBER, *supra* note 15, at 29.

29. TAKAHASHI, *supra* note 20, at 20-25.

30. *See generally id.*; TAEUBER, *supra* note 15, at 29.

31. TAEUBER, *supra* note 15, at 31; TAKAHASHI, *supra* note 20, at 20-26; ISHII, *supra* note 26, at 14.

32. TAKAHASHI, *supra* note 20, at 5-6. A report to clan authorities at Senai in 1754 describes the problem:

> As soon as a baby is born [to farmers], its parents put it to death. All this is ascribable to their poverty. They prefer leading as best a life as they can without encumbrances to bringing up many children to hunger and penury, and restrict the number of their children to two or three.

TAEUBER, *supra* note 15, at 30.

and to encourage population growth in farming villages as a means to provide for increased agricultural production and tax revenues.[33]

By the last half of the Tokugawa period, the government made an overt, albeit feeble, effort to restrict abortion. It simultaneously adopted three approaches: moral exhortations, economic subsidies, and penal restrictions.[34] The moral appeal consisted of "the distribution of pamphlets [decrying the evils of destroying life] and the dispatch of preachers [i.e., Buddhist monks]."[35] Buddhist monks, whose religious beliefs encouraged respect for all living things, inveighed against infanticide and abortion, while intellectuals decried the decadence and moral degradation of the entire society, symptomized by abortion and infanticide.[36]

The systems of financial incentives instituted by the central and regional governments to discourage abortion and infanticide were remarkably sophisticated and progressive. By the end of the eighteenth century, government programs involving rice, and sometimes monetary, subsidies to support larger families had been adopted in most parts of Japan.[37] Bonsen Takahashi's definitive study of abortion and infanticide during the Tokugawa period describes, in considerable detail, numerous

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33. TAKAHASHI, *supra* note 20, at 1-2; HANLEY & YAMAMURA, *supra* note 13, at 233. A clan report written in 1754 describes the high incidence of abortion and infanticide among farm families and concludes: "[T]he prevalence of this usage is partly responsible for the wasted agricultural fields." TAEUBER, *supra* note 15, at 30.

34. ISHII, *supra* note 26, at 16.

35. *Id.*

36. TAKAHASHI, *supra* note 20, at 2-3; TAEUBER, *supra* note 15, at 30 (noting that most Buddhist sects repudiated family limitation practices that involved the taking of life, while Shinto beliefs contain no taboos against abortion); *id.* at 32 ("Peasants who were devout Buddhists were imported into areas where the destruction of life was severe."); *id.* at 31 ("*Shogun* and *daimyo* used teachers, priests, and professional exhorters to arouse the people . . . . [C]oncern over abortion and infanticide antedated concern over stability or decline in the population.")

37. TAEUBER, *supra* note 15, at 31-32. For example, in the Ashirakawa region the ruler in 1784 ordered that one sack of rice be given annually to each family that had raised five or more children. In 1787, another lord decreed that each newborn child should receive one sack of rice a year for seven years. In 1799, a graduated scheme was introduced.

> A third child was to receive two sacks the first year then one sack annually for four years; a fourth child, four sacks the first year and two sacks annually for six years; a fifth child, five sacks the first year, three sacks for two years, and two sacks for five years. Twins, in special danger of *mabiki* (abortion) were to receive 12 sacks annually for three years.

Id. at 32.

subsidy programs for large families that were introduced by the central and regional governments in the last half of the period.[38]

The earliest official decree or law penalizing abortion in Japan was enacted in the middle of the seventeenth century.[39] In 1646, the *bakufu* entered a decree applicable in the city of Edo, the de facto seat of government, which generally prohibited *commercial* abortion services and specifically banned abortion advertising by means of displaying large signs.[40] Twenty-one years later in 1667, the *bakufu* prohibited advertising abortions and performing private or secret abortions, holding such acts punishable by expulsion from the city of Edo. In 1680, the *bakufu* ordered that any doctor or woman involved in an abortion be taken for questioning; the punishment under this decree was unspecified.[41] The next official decree came 162 years later, just twenty-five years before the collapse of the Tokugawa regime, when the *bakufu* entered two decrees: one ordering persons requesting or performing abortions to be expelled from the city of Edo and the other providing that those who requested, arranged, or performed abortions be investigated and punished.[42]

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38. TAKAHASHI, *supra* note 20, *passim*.

39. While there were no official laws or decrees mentioning abortion before this time, it is difficult to say that abortion was or was not "illegal" in a broader sense, because the concept of law held by the Japanese during this feudal period was significantly different than the concept of law held by Westerners today. *See generally* YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW 8, 159-74 (Anthony H. Angelo trans. & ed., 1966).

40. TAKAHASHI, *supra* note 20, at 28, 31, 39-46; Ishihara, *supra* note 19, at 391-95.

> It appears that the government's issuance of the 1646 prohibition was not intended to eliminate abortion completely; rather, it was meant to prevent the commercialization of abortion, which might otherwise have been view[ed] as the government's acquiescence to the legality of abortion. Thus, while abortion remained illegal on an official level, it was not punished so long as those involved remained discreet.

Memorandum from Doug Hymas, Brigham Young University, to Lynn D. Wardle 3 (June 21, 1989) (on file with author) (explaining the proper translation of TAKAHASHI, *supra* note 20, at 27-46).

41. TAKAHASHI, *supra* note 20, at 39-46.

42. Ishihara, *supra* note 19, at 351-55; TAKAHASHI, *supra* note 20, at 39-46. Takahashi adds that the decree of 1680 punished the doctor who performed the abortion by prohibiting him from leaving his house for a while, but provided no punishment for those who asked for the abortion. *Id.* A pharmacist who blended an aborting poison could be imprisoned for a short time. *Id.* While in 1686 the punishment for extramarital affairs coupled with abortion was death; the severity of the punishment was due to the fact that adultery was deemed to be a very serious offense. *Id.* There is a recorded case of a woman who had an abortion being treated only as having engaged in negligent killing with the punishment being expulsion from the town. *Id.*

These decrees of the *bakufu* were effective only in the city of Edo. However, they served as models for the local lords. Thus, similar policies were adopted by the *han* governments.[43] Also, in connection with the efforts in the rural areas to prevent abortion and infanticide, many *han* governors required reporting and monitoring of pregnancies and "special investigations" of stillbirths.[44]

But the effort to restrict abortion through criminal sanctions was not vigorously enforced. The prohibition of abortion advertising was easily evaded by use of signs and words that clearly indicated to all persons the nature of the business without directly violating the law.[45] The restrictions were weak, the punishments modest or nonexistent, and the enforcement lax.[46]

B. Modern Abortion Regulation in Japan: From Meiji to World War II (1867-1945)

In 1867, after centuries of imperial figurehead status, the young Emperor Matsuhito declared that he would reassume the full sovereign powers of the Emperor. Imperial forces quickly defeated the armies loyal to the Tokugawa *shogunate* and the nineteen-year-old Emperor moved his court from Kyoto to Tokyo to complete the assumption of governing power. This ended nearly 700 years of military rule by the *shoguns*, and began one of the most remarkable and rapid modernizations of society recorded in human history. In the brief fifty-year *Meiji* (enlightened rule) era, Japan was transformed from a feudalistic society to a semi-democratic society, from the proverbial doormat of Asia to a world military power, from a backward agrarian country to a modern industrial nation, from an isolated, closed society, to a dynamic, vigorous participant in world affairs.[47]

Very early in his reign, the Emperor Meiji and his advisors decided that if Japan were to assume her place among the leading nations of the world, she would have to radically alter many of her old ways, and quickly adopt many Western ways. A dramatic decision was made to adopt a Western legal system, modified as necessary to accommodate Japanese culture. The young men of *Meiji* were sent to the leading Western nations, especially France and Germany, to study Western legal

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43. TAKAHASHI, *supra* note 20, *passim*; Mosk, *supra* note 15, at 26.
44. TAEUBER, *supra* note 15, at 31-32.
45. TAKAHASHI, *supra* note 20, at 35-39.
46. *Id.* at 35-46.
47. *See generally* BORTON, *supra* note 27, at 70-315.

systems, and a French legal scholar was hired to work full time to help the Emperor's staff, and later his parliament, to write a modern legal code.[48]

The first penal code was promulgated in 1880, the thirteenth year of the reign of Meiji, and took effect in 1882. Similar to European codes, particularly the French code, it prohibited abortion: a woman who had an abortion was subject to one to six months of imprisonment, and the person who performed the abortion was subject to one to three years of imprisonment. A doctor or midwife who performed an abortion was deemed guilty of a first-degree crime.[49]

About a quarter of a century later in 1907, this penal code was revised in favor of a more German-influenced model. It provided that any professional who performed an abortion, including doctors, midwives, or druggists, could be imprisoned for three months to five years; if the woman was injured in the process, the penalty ranged from six months to seven years.[50] These provisions, which became effective in 1908, form the basis for current Japanese criminal abortion prohibitions; abortion is still technically a crime in Japan.

The spirit of *Meiji* reforms permeated Japanese society; it was a dawn of a new era of hope and progress, and everyone in the nation sensed it. Social attitudes reflected and harmonized with the anti-abortion laws. Families were more willing to take a chance on the future; family size grew dramatically, the population increased, the economy flourished, and the incidence of abortion and infanticide fell substantially.[51]

Soon after the Emperor Meiji's death in 1912,[52] economic and political difficulties developed. One manifestation of the shaken economic and social confidence of the people was an increase in the number of abortions. Official concern over the revived practice of abortion also increased, and in the 1920s and 1930s, enforcement of the anti-abortion law became very active. Between 1918 and 1931 the number of arrests under the abortion provision ranged from 377 to 899.[53]

In 1940, the *Diet* (Japanese parliament) adopted the National Eugenic Law, patterned after legislation adopted in Nazi Germany.[54] This civil

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48. The significance of the adoption of a modern "Western" legal system by Japan cannot be overstated. Until this time, Japan had no concept of law as it is understood in the modern Western world. The words for "rights" and "legislation" did not even exist in the Japanese language before the *Meiji* era.

49. Ishihara, *supra* note 19, at 392.

50. *Id.*

51. *See generally* Mosk, *supra* note 15, at 26-27.

52. BORTON, *supra* note 27, at 285-86.

53. Ishihara, *supra* note 19, at 392. *See generally* BORTON, *supra* note 27, at 26-27.

54. Ishihara, *supra* note 19, at 392; Michiko Ishii, *The Abortion Problem and Family*

legislation authorized legal abortion in narrow circumstances—particularly for eugenic reasons—to preserve the purity of the race and to avoid burdens upon the nation; prior approval from a second doctor and report to a government agency were required.[55] The National Eugenic Law reflected the spirit of the times, which was to "bear children and swell the population."[56] Of course "defective" children would weaken the nation, so their abortion was authorized.

C. Post-Modern Abortion Regulations in Japan (1946-Present)

World War II, not surprisingly, had a very profound effect on all aspects of Japanese law and society, including abortion law and practice. At the start of the war, Japan was an aggressive military power which viewed Western society as degenerate and corrupted by too many luxuries.[57] By the end of the war, Japan lay in ruins. Following the war, a "massive flood of new attitudes and institutions" accompanied the American occupation.[58] One result of these "new attitudes" was increased pressure to loosen abortion laws.

Several factors contributed to this post-war pressure to liberalize abortion laws. First, there was very serious concern about starvation and rebuilding the economy. By the end of the war in September 1945, numerous cities had been obliterated by bombings, industrial capacity had been severely damaged, and agricultural production had been destroyed. The official military record of the Allied occupation of Japan describing the condition of agriculture at the end of the war states bluntly: "As a result of air and sea activities of the Allied [p]owers, Japan at the time of [s]urrender was reduced to a point where starvation was imminent."[59] The economy was totally ruined, millions of families were impoverished, and millions of foreign-living Japanese soldiers and civilians were about to be repatriated.[60] Many Japanese leaders feared that the additional pressure

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Law in Japan: A Reconsideration of Legalized Abortion Under the Eugenic Protection Law, 26 ANNALS OF THE INST. OF SOC. SCI. 64, 68 (1985) [hereinafter Michiko Ishii].

55. Ishihara, *supra* note 19, at 392.

56. *Family Planning*, *supra* note 27, at 246. The policy of strengthening the nation through population growth was embodied in a slogan adopted by the pre-World War II government of Japan: *Umeyo fusaseyo* (Bear children, swell the population). *Id.*

57. EDWIN O. REISCHAUER, JAPAN PAST AND PRESENT (2d ed. 1953).

58. O. REISCHAUER, JAPAN: THE STORY OF A NATION 210 (4th ed. 1970).

59. SUPREME COMMANDER FOR THE ALLIED POWERS, *Agriculture*, *in* 36 HISTORY OF THE NON-MILITARY ACTIVITIES OF THE OCCUPATION OF JAPAN, 1945-1951, at 2.

60. *See generally* SUPREME COMMANDER FOR THE ALLIED POWERS, *Public Welfare*,

of a post-war "baby boom" would greatly exacerbate suffering for the survivors of the war and thwart efforts at economic recovery.

Second, the chance to engage in social engineering experiments by promoting massive birth control efforts in the newly-conquered nation was irresistible to foreign population control experts. The Allies had determined that Japan must be transformed into a real democracy, not merely a token democracy. Family planners with international organizations theorized that population pressures had caused or contributed to Japanese militarism and aggression, and they argued for restricting population growth as a means to reduce Japanese national aggression.[61]

Third, there was the problem of public health and safety. During the postwar occupation, American servicemen impregnated Japanese girls, sometimes under circumstances that could be considered rape; this caused immense individual, familial, and social distress.[62] There was also a growing black market in abortion with the potential for harm to public health.[63]

Responding to these pressures, a group of doctors in the *Diet* proposed legislation to authorize abortion in "hard cases." The bill passed in 1948 and was known as the Eugenic Protection Law (the "EPL").[64] Modeled generally after the old National Eugenic Law, the new law provided that abortion was permitted in five very narrow categories—the broadest being for a woman whose physical health could be seriously affected by continuation of the pregnancy or subsequent delivery.[65] Her

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in 18 HISTORY OF THE NON-MILITARY ACTIVITIES OF THE OCCUPATION OF JAPAN, 1945-1951, at 1; REISCHAUER, *supra* note 57, at 223-24; *World War II*, *in* 8 KODANSHA ENCYCLOPEDIA OF JAPAN 271, 278 (1983); *Family Planning*, *supra* note 27, at 246; Kinko Nakatani, *The Status of Abortion in Japan and Some Issues*, 5 KEIO L. REV. 11, 19 (1985).

61. *See Population*, *in* 6 KODANSHA ENCYCLOPEDIA OF JAPAN 223, 224-25 (1983); *see also* Fumiko Y. Amano, *Family Planning Movement in Japan*, 23 CONTEMP. JAPAN 752 (1955).

62. *See Family Planning*, *supra* note 27, at 247 (stating that one reason for the more liberal abortion laws after World War II was to protect Japanese women who were impregnated by GIs from occupation forces).

63. Ishihara, *supra* note 19, at 393; SAMUEL COLEMAN, FAMILY PLANNING IN JAPANESE SOCIETY 19 (1983).

64. Michiko Ishii, *supra* note 54, at 66; COLEMAN, *supra* note 63, at 19. *See generally* Ishihara, *supra* note 19, at 393.

65. Law No. 156 of 1948, art. 14, *reprinted in Eugenic Protection Law in Japan*, ENGLISH PAMPHLET SER. NO. 68, (Ministry of Health and Welfare, Inst. of Population Probs., Tokyo, Japan), March 1, 1969, at 10 [hereinafter EPL]. The other four instances where abortion would be allowed were cases involving rape, leprosy, hereditary illness, and mental illness. *See id.* at 11; COLEMAN, *supra* note 63, at 19.

doctor would first need to file an application with the Eugenic Protection Committee in the local district. If the committee approved the request for abortion, the abortion could be performed by a qualified doctor who was certified to perform abortions.[66] Thus, the 1948 law was not a "liberal" abortion law either substantively or procedurally.

In the following year, 1949, several amendments were made to the EPL. The most profound change was that the health exception was enlarged: abortion would be permitted for "a mother whose health may be seriously affected by the continuation of the pregnancy or subsequent delivery because of physical *or economic* reasons."[67] The adoption of a broad economic justification for abortion changed Japanese substantive abortion law from restrictive to permissive. Thus, June 24, 1949, marks the point of adoption of liberal "grounds" for abortion in Japan. It is said that the reason for this "economic clause" was that black market abortions continued to flourish after the original EPL was enacted, most of which were motivated by economic reasons.[68]

Despite the broad substantive basis for abortion, practical access to abortion was still limited because of the restrictive procedural requirements. However, in 1952 the EPL was amended again to delete the requirement for committee approval, leaving the decision to perform an abortion in the hands of a single doctor.[69] Thus, Japan's transformation to a society in which abortion was virtually available on demand was completed in the three years from 1949 to 1952. This legislation effectively undermined and practically repealed the various laws restricting abortions that had been adopted since the progressive *Meiji* reforms of 1880.

Since 1952, abortion has been available in Japan on the very liberal ground of "economic hardship," upon the determination by a single physician that the abortion is appropriate under law. The impact of this procedural liberalization on the practice of abortion in Japan was drastic. Between 1952 and 1953 the number of reported abortions grew from 798,193 to 1,068,066—a thirty-four percent increase in one year.[70]

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66. EPL, *supra* note 65, at 11; COLEMAN, *supra* note 63, at 20; Ishihara, *supra* note 19, at 394. A second doctor could be designated by the committee to perform the abortion. EPL, *supra* note 65, at 6 (art. 5, para. 2).

67. Takishi Wagatsuma, *Induced Abortion in Japan*, *in* BASIC READINGS ON POPULATION AND FAMILY PLANNING IN JAPAN 101, 102 (M. Muramatsu ed., 3d ed. 1985).

68. Ishihara, *supra* note 19, at 394.

69. *Id.*; COLEMAN, *supra* note 63, at 20; Michiko Ishii, *supra* note 54, at 67.

70. *See infra* note 198 and accompanying text. *See also* Appendix A (containing

The EPL refers to abortion as an "artificial interruption of pregnancy," which in turn is defined as the induced expulsion of the fetus and placenta after viability.[71] A Ministry of Health regulation originally specified that viability existed after eight months of pregnancy;[72] in 1976 it was reduced to seven months;[73] in 1978 it was reduced to twenty-four weeks, measured from the last day of the last menstrual period.[74] Abortion is now officially permitted in Japan only in the first twenty-three weeks of gestation, measured from the last menstrual period—or in the first twenty-one weeks measured from the estimated date of conception.

The EPL and Ministry of Health regulations require doctors to complete extensive records on each abortion.[75] Technically, abortion is authorized only for married women.[76] The consent and "personal seal" of the husband of the woman seeking abortion is required in each case.[77] However, for a nominal cost any woman can buy a copy of her husband's "seal" stamp and "forge" his approval.[78] While the law does not explicitly authorize abortions to be performed on unmarried women, in practice such abortions occur frequently.[79] Theoretically, the consent of the parents of the unmarried woman, whether she is a minor or adult, is said to be necessary, but this requirement also appears to be honored more in the breach than in the observance.[80] Abortions may only be performed by "designated physicians," but virtually all obstetricians and gynecologists are designated physicians; there are approximately 13,000 designated physicians in Japan.[81]

Graph A-1, which outlines the number of abortions in Japan from 1949-1989).

71. EPL, *supra* note 65, at 3; *Japan: Eugenics and Protection of Maternal Health*, 16 INT'L DIG. OF HEALTH LEGIS. 690 (1965) [hereinafter EPMH]; Michiko Ishii, *supra* note 54, at 66.

72. Michiko Ishii, *supra* note 54, at 67.

73. *Id.*

74. *See id.*; COLEMAN, *supra* note 63, at 21. Ishii states that under the 1976 regulation, non-viability exists after less than *twenty-three* weeks of pregnancy. Michiko Ishii, *supra* note 54, at 67.

75. *See* EPL, *supra* note 65, at 18; EPMH, *supra* note 71, at 697.

76. *See* COLEMAN, *supra* note 63, at 23; *see generally* GEORGE M. KOSHI, THE JAPANESE LEGAL ADVISOR 132 (1970).

77. *See* COLEMAN, *supra* note 63, at 22.

78. *Id.* In Japan, signatures are normally made by a stamp, similar to what Americans know as a "rubber stamp," rather than by a handwritten signature. *Id.*

79. *See id.* at 23-25.

80. *See id.*

81. Wagatsuma, *supra* note 67, at 102; *Family Planning*, *supra* note 27, at 247. In 1988, the cost of an abortion in Japan during the first trimester was approximately

III. THE HISTORY OF ABORTION REGULATION IN THE UNITED STATES

A. The Regulation of Abortion Under Anglo-American Common Law (13th-19th Centuries)

From at least the thirteenth century, English common law prohibited abortion after the quickening (movement) of the fetus.[82] According to Blackstone:

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offense in quite so atrocious a light, but merely as a heinous misdemeanor.[83]

Pre-quickening abortions did not pose any conceptual problem in Blackstone's day, because before the advent of modern biology, it was believed that quickening was caused by the onset of life in the fetus. Even after quickening, abortion was not a practical problem because no safe method for performing abortions was known in England at the time.[84]

¥40,000-¥50,000 ($330-$415). Interview with Noriko O. Tsuya, Nihon University Population Research Institute, in Tokyo, Japan (July 8, 1988); Interview with Kiyoshi Okada, Head of Obstetrics and Assistant Director of Otsuka Metropolitan Hospital, in Tokyo, Japan (July 9, 1988). If it is to be a "secret" abortion—for example, if the woman is a minor or unmarried—it is common for the woman to pay substantial amounts on top of the ordinary fee. The average "designated physician" in Japan today performs 50 reported abortions per year and an indeterminate number of unreported abortions. *See* Wagatsuma, *supra* note 67, at 102.

82. Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1255 n.27 (1975). *See generally* Joseph W. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359, 366-67 (1979) (discussing the history of abortion law).

83. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *129, *130.

84. Because of the risk to her own life, a woman had to be desperate to attempt abortion. The primary methods of abortion were (1) to administer a poison to the woman which caused her to expel the child prematurely, but which could injure her as well; (2)

There were also many nonlegal institutions, including family, community, and the church, that significantly discouraged abortion. For these reasons, abortion proscriptions, while historically constant, were not of major legal significance before the nineteenth century.[85]

The common law general prohibition of abortion described by Blackstone was in effect in the American colonies. The political separation of America from Britain did not disturb the influence of the common law prohibition of abortion in the United States; the emergence of modern biology and scientific medicine in the nineteenth century did. Scientists began to understand the scientific facts of human reproduction as never before, and medicine progressed from an art to a science. This progression had two consequences that influenced the evolution of American abortion law. First, as newer and safer means for performing abortions were discovered and as religious influence waned, the practice of abortion increased.[86] Second, as society in general and doctors in particular learned more about the process of human prenatal development and as the incidence of abortion increased, opposition to abortion increased as well.

B. Codification of American Abortion Law (1821-1972)

The nineteenth century witnessed the dawning of a movement to codify and clarify the laws regulating abortion. In 1821, the Connecticut legislature passed the first American statute expressly outlawing abortion; it provided for life imprisonment for persons who performed abortions on quickened fetuses. Shortly thereafter other states enacted similar statutes.[87]

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to beat the woman about the abdomen to cause premature delivery, which could cause her internal injuries; and (3) to insert a rod or device into her vagina to pierce the placenta and cause premature delivery, which could perforate her internal organs. Because of these auxiliary risks, the common law, in the days of Bracton, who wrote circa 1255, prohibited striking a woman or giving her a potion to cause abortion. 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 241 (Samuel E. Thorne trans., 1968).

85. *See* Dellapenna, *supra* note 82, at 406. Often abortion was prosecuted in connection with what today would be called domestic violence, spouse abuse or wife-battering (physically assaulting wives or lovers). The fact that the brutal beating of the pregnant woman caused the premature death of the fetus exacerbated the odious nature of the assault and provided a separate, additional basis for enhancing the punishment of the assaulter. *See* Joseph W. Dellapenna, Dispelling the Myths of Abortion History, ch. IV.A. (unpublished manuscript, on file with author) (describing such cases).

86. ANDREW NEBINGER, *Criminal Abortion; Its Extent and Prevention, in* ABORTION IN NINETEENTH CENTURY AMERICA 331-32 (1974).

87. *See generally* LYNN D. WARDLE & MARY A. WOOD, A LAWYER LOOKS AT ABORTION 29-32 (1982); JAMES C. MOHR, ABORTION IN AMERICA, THE ORIGINS AND

In 1847, medical doctors, through their new organization the American Medical Association (the "AMA"), began a campaign to toughen and enforce laws prohibiting abortion. Physicians, whose ethical principles prohibited them from performing abortions, began to encourage expansion of the common law proscription of post-quickening abortions, arguing that gestation was a continuous process from inception and there was no basis for designating quickening as the critical stage.[88] The AMA resolution against abortion became the model for more than twenty new statutes throughout the country that prohibited abortion from gestation, not just quickening; it also became a model for a similar number of amendments to existing statutes.[89]

The new laws did not entirely eradicate the growing practice of abortion. For example, between 1849 and 1857 there were reportedly thirty-two abortion trials in Massachusetts, *but no convictions*.[90] Nevertheless, the formal legal repudiation of abortion by statute expanded. From 1860 through 1910, criminal statutes making abortions performed before or after quickening a felony were adopted by every state except Kentucky, which relied upon existing case law to declare abortion illegal.[91] However, all states allowed therapeutic abortions when necessary to save the life of the mother, and most states allowed abortions when necessary to protect the mother's health.

For nearly a century, abortion laws in the United States rested upon these principles. Abortions were illegal throughout gestation, except when necessary to save the life (or, in some states, health) of the mother. However, behind the written law was a different reality. Some doctors were willing to perform abortions surreptitiously, so the wealthy could obtain medically-assisted abortions, and dangerous back-alley abortionists offered their services to desperate, frightened, poorer women.[92]

The modern movement to liberalize abortion laws in America may be dated to 1959, when the American Law Institute proposed a Model Penal Code (the "MPC") that would liberalize existing abortion laws by allowing

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EVOLUTION OF NATIONAL POLICY, 1800-1900 226-45 (1978).

88. H.R. REP. NO. 1859 Report of Special A.M.A. Committee, *cited in* WARDLE & WOOD, *supra* note 87, at 31.

89. *Proposed Constitutional Amendments on Abortion: Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 22 (1976) (statement of Professor Joseph P. Witherspoon) [hereinafter Witherspoon].

90. *See* Ira Mark Ellman, *Survey of Abortion Law*, 1980 ARIZ. ST. L.J. 67, 95-96.

91. MOHR, *supra* note 87, at 229; *see also* Witherspoon, *supra* note 89, at 22-25.

92. *See* MOHR, *supra* note 87, at 93-97, 242-43.

abortion under three sets of circumstances: when childbirth posed a grave danger to the physical or mental health of a woman, when there was a high likelihood of fetal abnormality, or when the pregnancy had resulted from rape or incest.[93] The initial reaction to the reform proposal was not enthusiastic; it was not adopted by any state until 1967. However, by 1970 fourteen states had adopted the MPC abortion proposal. In addition, in 1970 and 1971, four states repealed their traditional abortion prohibitions and replaced them with statutes that allowed a pregnant woman to receive an abortion on request, without stating a reason and during a limited period of time, which was usually in early pregnancy, subject to second-opinion and other procedural restrictions. Thus, by 1971 there was a clear trend in the states to moderately liberalize the nineteenth century criminal abortion statutes.[94]

C. Constitutionalization of American Abortion Law (1973-Present)

In January 1973, the United States Supreme Court handed down its landmark decision in *Roe v. Wade*,[95] establishing as the law of the land a woman's right to obtain an abortion as part of a *constitutional* right of privacy. The case involved a challenge, brought by an indigent, pregnant, single woman, to the Texas abortion law that prohibited abortions except when necessary to save the life of the mother. A federal district court concluded that the Texas law was unconstitutional and the Supreme Court affirmed.

After a lengthy, though selectively incomplete, review of the history of abortion regulation, the Court, in an opinion written by Justice Blackmun, determined that the case turned on an unwritten right of privacy.

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[96]

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93. MODEL PENAL CODE § 207.11 (Tentative Draft No. 9, May 8, 1959). This provision was formally adopted in 1962, MODEL PENAL CODE § 230.3 (1962).

94. *See generally* WARDLE & WOOD, *supra* note 87, at 42-44.

95. 410 U.S. 113 (1973).

96. *Id.* at 153.

Next, Justice Blackmun found that there was no compelling state interest to justify traditional abortion prohibitions. The Court reasoned that the major motivation behind the restrictive laws was to protect a pregnant woman from "a procedure that placed her life in serious jeopardy,"[97] but this interest was not compelling because mortality rates appeared to be lower for women undergoing early, legal abortions than for childbirth. The state's interest in forbidding abortion to protect prenatal persons was also rejected. The Court reasoned that a fetus is not a person; therefore, a state has no Fourteenth Amendment interest in protecting an unborn from deprivation of life. The Court further opined that since philosophers and theologians were still debating about when life begins, the interest in protecting prenatal life did not justify laws prohibiting abortion.[98]

Finally, Justice Blackmun prescribed, in unusual detail, a trimester scheme for the regulation of abortion that he argued was constitutionally mandated. During the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. Beginning in the second trimester, a state may regulate the abortion procedure in ways that are reasonably related to maternal health. Finally, in the third trimester, in the case of a viable fetus (which the Court stated occurred generally at twenty-eight weeks, but possibly as early as twenty-four weeks) a state may promote its interest in the potentiality of human life by regulating and even proscribing abortion, except where it is medically necessary for the preservation of the life or health of the mother, as defined by the Court elsewhere as including such matters as family size and finances.[99]

Two justices dissented, arguing that "nothing in the language or history of the Constitution" supported the creation of a sweeping constitutional right to abortion and that the legality of abortion is more appropriately left to legislative, than to judicial, judgment.[100] Justice Rehnquist argued that "the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[101] He also characterized the majority decision as "judicial

97. *Id.* at 149.
98. *Id.* at 159.
99. *Id.* at 164-65.
100. *Id.* at 171, 221 (White and Rehnquist, JJ., dissenting).
101. *Id.* at 173-74 (Rehnquist, J., dissenting).

legislation";[102] Justice White saw it as "an exercise of raw judicial power."[103]

In a companion case, *Doe v. Bolton*,[104] the Supreme Court also struck down several procedural impediments to obtaining an abortion that were part of the Model Penal Code, including requirements that abortions be performed in accredited hospitals, that a hospital committee approve the abortion, and that two doctors concur in the recommendation for abortion.

The sweeping decisions of the Supreme Court in *Roe v. Wade* and *Doe v. Bolton* revolutionized the law and practice of abortion in the United States. *Roe* effectively invalidated, wholly or in significant part, existing abortion laws in all of the states. It also had a profound impact on life, lifestyle, and behavior in the United States.[105] The number of abortions in the United States rose dramatically immediately after the *Roe* decision and has remained at a level significantly higher than any other Western democratic nation.[106] Alternative interests such as the unborn child, the father, and society have been largely ignored by the absolutist "privacy" approach. Thus, *Roe* sparked what has become one of the most heated political and social controversies of our time. Abortion is now widely considered in symbolic terms as a badge of autonomy, an expression of individual privacy, or as an exercise of a constitutional right—for many it is no longer a serious moral issue.

However, *Roe* was only the beginning of a new and extensive judicial doctrine. During the next two decades, the Court decided more than two dozen major abortion cases, expanding the "right of privacy." In *Planned Parenthood v. Danforth*,[107] the Court invalidated a Missouri spousal consent requirement for married women which gave their spouses a "veto" power over their private decisions to have abortion.[108] A spousal notification, as distinguished from spousal consent, requirement was later

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102. *Id.* Many federal judges have subsequently described *Roe* as a case of "judicial legislation." *See* Calderia, *Judges Judge the Supreme Court*, 61 JUDICATURE 208, 212 (1977).

103. *Roe*, 410 U.S. at 222 (White, J., dissenting with Rehnquist, J., joining).

104. 410 U.S. 179 (1973). The Georgia statutes that were invalidated in *Bolton* had been based on the liberal proposals of the MPC.

105. Stanley Henshaw et al., *Abortion in the United States, 1978-79*, 13 FAM. PLAN. PERSP. 6, 7 (1981) (containing table 1, which shows that the number of reported abortions doubled between 1973 and 1979).

106. *Id.* at 11.

107. 428 U.S. 52 (1976). *See also* Bellotti v. Baird, 442 U.S. 662 (1979) (invalidating a Massachusetts parental participation law where there was no judicial bypass provision).

108. *Danforth*, 428 U.S. at 69.

invalidated on the ground that they might lead to abuse by the spouse required to be notified.[109] In *Danforth*, a Missouri requirement of parental consent before an abortion could be performed upon an unmarried minor was declared unconstitutional as inconsistent with the privacy right of minor women.[110] However, in *H.L. v. Matheson*[111] the Supreme Court upheld a Utah law that required doctors performing abortions upon unmarried minors to notify their parents, if possible, prior to the abortion.[112] Likewise, in *Planned Parenthood Association of Kansas, Missouri, Inc. v. Ashcroft*,[113] the Court upheld a Missouri requirement that a minor secure parental consent or judicial consent after a finding of sufficient maturity or, in the alternative, a finding that it would be in the minor's best interests, before obtaining an abortion.[114] In recent cases, the Court has reemphasized that reasonable parental notice requirements will be upheld, provided there are judicial bypass provisions built into the statute.[115] Thus, in most cases parental notification is constitutional, and parental consent may even be required so long as a procedure for quick judicial override or bypass is provided.

Restrictions on the use of public resources to facilitate abortion is another major issue that the Court has wrestled with repeatedly. The Court has consistently upheld such restrictions. In 1977, the Court upheld funding restrictions in three cases. In *Maher v. Roe*,[116] the Supreme Court upheld a Connecticut regulation limiting public assistance for abortions (but not childbirth) to those certified to be "medically or psychiatrically necessary."[117] The Court rejected the argument that it violated the Equal Protection clause of the Fourteenth Amendment or the right of privacy of indigent women and held that the restrictions were rationally related to legitimate state interest in preserving prenatal life.[118] State use of funds

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109. Planned Parenthood v. Casey, 112 S.Ct. 2791, 2832 (1992).

110. *Danforth*, 428 U.S. at 74.

111. 450 U.S. 398 (1981).

112. *Id.* at 405-07.

113. 462 U.S. 476 (1983).

114. The Court later made it clear that parental consent could not be required in all cases, even if the minor were under the age of fifteen. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 438-42 (1983).

115. Planned Parenthood v. Casey, 112 S.Ct. 2791, 2832 (1992); Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990); Hodgson v. Minnesota, 497 U.S. 417 (1990).

116. 432 U.S. 464 (1977).

117. *Id.* at 466.

118. *Id.* at 478.

to encourage an alternative (i.e., a childbirth) was distinguished from the use of criminal sanctions to prohibit abortion.[119]

Three years later in 1980, the Supreme Court reconfirmed that public funding of abortion is not required by the Constitution. In *Harris v. McRae*[120] and *Williams v. Zbaraz*,[121] the Court upheld the congressional Hyde Amendments and state counterparts, which prohibited the expenditure of funds to pay for abortions except when necessary to preserve the life of the mother (and in some years, to preserve her health, or in case of rape or incest), rejecting challenges based on equality, religion, and due process.

In 1989, in *Webster v. Reproductive Health Services*,[122] the Court reiterated its prior rulings when it upheld Missouri statutes that prohibited the expenditure of public funds, the use of public facilities, or the use of public employees to perform or encourage abortions not necessary to save the life of the mother. The Court emphasized that a state is not required to be in the abortion business and may restrict the use of public resources.[123] Two years later, in *Rust v. Sullivan*,[124] the Court upheld, against both statutory and constitutional attacks, federal regulations that prohibited recipients of federal family planning funds from counseling, advocating, referring for, or promoting abortion as a means of birth control. The Court has never struck down any legislation restricting the direct or indirect public funding of abortion. Since control of the purse is a clearly-established legislative responsibility, some deference to the separation of powers may explain this record.

Other collateral regulations of abortion have a checkered record in the Supreme Court. In 1983, in *City of Akron v. Akron Center for Reproductive Health, Inc.*,[125] the Court invalidated several provisions of an Akron abortion ordinance, including: a requirement that all abortions after the end of the first trimester be performed in a hospital; a detailed "informed consent" requirement, even though informed consent laws had

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119. *Id.* at 475. In *Beal v. Doe*, 432 U.S. 438 (1977), the Court upheld a Pennsylvania regulation providing state funds only for therapeutic abortions. In *Poelker v. Doe*, 432 U.S. 519 (1977), the Court upheld the policy of a city-funded hospital restricting the performance of elective abortions on the grounds that the public entity could opt to use its scarce resources to encourage childbirth rather than perform abortion.

120. 448 U.S. 297 (1980).

121. 448 U.S. 358 (1980).

122. 492 U.S. 490 (1989).

123. *Id.* at 510.

124. 111 S.Ct. 1759 (1991).

125. 462 U.S. 416 (1983).

previously been upheld;[126] a provision requiring a twenty-four-hour delay between the obtaining of informed consent and the performance of an abortion; and a requirement that fetal remains following an abortion be disposed of in a humane and sanitary manner.

Likewise, in *Thornburgh v. American College of Obstetricians and Gynecologists*,[127] the Court invalidated statutory provisions that set medical standards for preserving the life of viable fetuses and that required a woman be informed of the name of the physician who had performed the abortion, the "particular medical risks" of the abortion procedure to be used, the risks of childbirth, the possibility of "detrimental physical and psychological effects," the possibility of medical assistance benefits available for childbirth and prenatal care, the fact that the father would be liable for assistance in supporting the child, and the agencies that offered alternatives to abortion.[128] However, there were powerful dissenting opinions in both *City of Akron* and *Thornburgh* criticizing *Roe* as embodying "a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved

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126. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

127. 476 U.S. 747 (1986). *Thornburgh* involved a Pennsylvania statute enacted after Colautti v. Franklin, 439 U.S. 379 (1979), which struck down a Pennsylvania standard-of-care requirement designed to ensure adequate medical attention for babies whose mothers had undergone abortion after the point of viability.

128. *Thornburgh*, 476 U.S. at 747. For the Court, Justice Blackmun sharply condemned the provisions as designed to deter the exercise of freedom of choice. The requirement of disclosure of facts regarding fetal development was also invalidated after Justice Blackmun characterized them as nothing less than an attempt to discourage abortion and intrude into the privacy of the woman and her physician. Justice Blackmun reasoned that other provisions were impermissibly designed to protect the life and interests of the viable fetus subject to abortion. The majority invalidated requirements that the physician performing post-viability abortions exercise the degree of care required to preserve the life and health of an unborn child intended to be born alive and to use the abortion technique that would provide the best opportunity for the unborn child to be born alive unless it would present a significantly greater medical risk to the woman's life or health, and that a second physician be present during the performance of an abortion when the fetus was possibly viable. Having condemned what it considered the wrongful intent of the Pennsylvania legislature, the majority refused to accept the state's good faith construction of the statute, and found that it would require pregnant women to bear increased medical risks in order to save viable fetuses, failed to explicitly contain a medical-emergency exception, and curtailed the performance of post viability abortions—all in contravention of the fundamental right to abortion privacy. *Id.* at 768-71.

in the abortion context."[129] In 1992, the Court largely overturned *City of Akron* and *Thornburgh*.[130]

The dissenting justices in *City of Akron* and *Thornburgh* signaled a growing dissatisfaction with the *Roe* doctrine. The Court upheld all of the challenged abortion regulations in *Webster v. Reproductive Health Services*,[131] including restrictions on the use of public resources and a declaration of Missouri's legislative policy that "the life of each human being begins at conception." Four justices specifically proposed to eliminate the trimester scheme adopted in *Roe*. *Webster* was widely read as signalling a significant moderation of the previous rigid extremes of the *Roe* doctrine. However, three years later, in *Planned Parenthood v. Casey*,[132] the plurality of O'Connor, Kennedy, and Souter, joined by Justices Blackmun and Stevens, long-time defenders of *Roe*, reaffirmed the basic principles of *Roe v. Wade*.[133] At the same time, however, the plurality rejected the trimester scheme of *Roe* and substantially lessened the standard of judicial review of laws regulating abortion. Under the new standard, a law or regulation will pass constitutional scrutiny if no "undue burden" is imposed on the basic "liberty interest" in abortion.[134] Four dissenters argued that *Roe* should be overruled entirely. The *Casey* Court upheld informed consent requirements, a mandatory twenty-four hour waiting period, parental consent requirements, and mandatory reporting and recordkeeping provisions, invalidating only a spousal notification requirement.[135] Despite persistent criticism of the analysis and opinion in *Roe*, the Supreme Court has refused to overrule *Roe v. Wade* for twenty years. While holdings in several cases since *Roe v. Wade* appear to have eroded certain aspects of that decision, the *Casey* opinion suggests that the current Court is not prepared to overturn the central holding in *Roe, and* that the right to have an abortion on demand before the fetus is viable is a liberty right in the United States that is protected by the Due Process Clause of the Constitution and cannot be unduly restricted. The United States Supreme Court recognizes "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters

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129. *Akron*, 462 U.S. at 452-75 (O'Connor, White, and Rehnquist, JJ., dissenting); *Thornburgh*, 476 U.S. at 782 (Burger, C.J., dissenting).

130. Planned Parenthood v. Casey, 112 S.Ct. 2791, 2818-22 (1992).

131. 492 U.S. 490 (1989).

132. 112 S.Ct. 2791 (1992).

133. *Id.* at 2821 (noting that "[a] state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.").

134. *Id.*

135. *Id.*

so fundamentally affecting a person as the decision whether to bear or beget a child."[136] Thus, Supreme Court precedents "have respected the private realm of family life which the state cannot enter."[137]

However, some regulation of abortion is permissible. After two decades, the process and substance of American abortion policy is still in a state of tension. State legislatures continue to try to regulate and restrict abortion, and federal courts continue to broadly review and usually invalidate large parts of such legislation.

IV. A COMPARISON OF ABORTION LAW AND PRACTICE IN JAPAN AND THE UNITED STATES

Based on the foregoing, there are several significant differences in American and Japanese abortion policy and laws. These differences can be categorized as relating to the details of the substance of the laws, the process by which they were developed, and their cultural significance.

A. Differences in the Details of Contemporary Abortion Law

The specific details of contemporary Japanese and American abortion laws are notably different. First, in the United States abortion is permitted until viability; no justification is necessary. The abortion decision is constitutionally declared to be a purely private choice of the pregnant woman. In Japan, abortion is permitted in five specific circumstances that the legislature has determined to outweigh the social interest in preventing the destruction of prenatal life. In most cases, abortion is virtually available on demand in both countries. However, as a matter of both doctrine and theory of law, it is not available as of right in Japan, but only as a matter of balancing social concerns.

Second, restrictions on post-viability abortions also differ between the two countries. Japan has an absolute restriction on abortions after viability, clearly defined as the beginning of the twenty-second week of fetal life.[138] Restrictions on post-viability in the United States are not as black and white. States may constitutionally restrict post-viability abortions. Only about one-half of the American states proscribe abortion after fetal viability.[139] The extent to which courts will allow restrictions

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136. *Id.* at 2807; Carey v. Population Services International, 431 U.S. 685 (1977).

137. *Casey*, 112 S.Ct. at 2807 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

138. *See supra* note 74 and accompanying text.

139. Lynn D. Wardle, *"Time Enough"*: Webster v. Reproductive Health Services *and*

even after viability is an issue that has been fraught with uncertainty. In more than half of the cases in which a state's post-viability restrictions have been challenged, the Supreme Court has invalidated those restrictions.[140] Moreover, the Supreme Court has adopted a very abstract definition of viability (i.e., the time at which a doctor determines that the fetus may survive outside the womb) which has proven extremely difficult to apply.[141] Japanese law, which specifies a gestational limit in terms of weeks, is much more precise and practical. Clearly, Japanese law provides more protection for the late-term fetus.

Third, Japanese law explicitly requires the consent of the husband in order to obtain an abortion.[142] In the United States, spousal consent and even mere spousal notification requirements have been declared unconstitutional.[143] Likewise, in the United States, the abortion rights of minors are essentially the same as for adult women. Consent of the parents of minors, therefore, cannot be absolutely required, but parental consent or parental notification provisions have been upheld so long as a judicial bypass option is available allowing the minor to obtain *ex parte* judicial approval for abortion without any parental involvement.[144] By contrast, abortions on minors and unmarried women are not explicitly authorized, and therefore, are technically prohibited by Japanese law.[145] The Japanese judiciary takes no part in the process of facilitating abortion for teenagers or acting as substitute parents to authorize abortion.[146]

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the Prudent Pace of Justice, 41 FLA. L. REV. 881, 961-62, app. A-2 (1989) (listing 24 states with post-viability abortions regulations).

140. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986); Colautti v. Franklin, 439 U.S. 379 (1977); Planned Parenthood v. Danforth, 428 U.S. 52, 81-84 (1986); *but see* Planned Parenthood Ass'n. of Kansas City v. Ashcroft, 462 U.S. 476 (1983); *Webster*, 492 U.S. at 513-19.

141. *See generally Colautti*, 439 U.S. at 379; *but see Webster*, 492 U.S. at 513-21.

142. As has been pointed out, however, this law is easily avoided by many Japanese women. *See supra* note 78 and accompanying text.

143. *Casey*, 112 S.Ct. at 2826-31; *Danforth*, 428 U.S. at 67-72.

144. *See supra* notes 110-15 and accompanying text.

145. *De facto*, minors and unmarried women can get abortions in Japan, as Graphs D-1 and D-2 show. *See* Appendix D, notes 227-28. Growing numbers of Japanese teenagers are obtaining abortions, though compared to the rate and number of American teenagers having abortions, the Japanese experience with abortions for teenagers is relatively minor. *See also supra* notes 76-80 and accompanying text.

146. *Cf.* ROBERT H. MNOOKIN, Bellotti v. Baird: *A Hard Case*, *in* IN THE INTEREST OF CHILDREN ADVOCACY, LAW REFORM, AND PUBLIC POLICY 150, 239 (1985) (noting that in a Massachusetts study 1300 minors sought judicial consent for abortion in lieu of parental notification; only five were turned down by Massachusetts courts, and they obtained abortions elsewhere).

Fourth, the two countries also differ in the degree to which the method of abortion may be regulated. In Japan, the performance of abortions is substantially regulated. The medical association of doctors who perform abortions and the Ministry of Health and Welfare have established numerous regulatory standards and directions. In the United States, such regulations are routinely invalidated by the courts.[147] Thus, Japanese law recognizes and tries to balance family and social interests in abortion, whereas American abortion law places the unilateral desires of the individual pregnant woman above all other interests.

Fifth, abortion is still *officially* a crime in Japan.[148] The effect of the EPL is to create broad exceptions to the criminal proscriptions. In the United States, all criminal abortion statutes proscribing abortion have been effectively declared unconstitutional by *Roe v. Wade* and its progeny.[149]

Sixth, American courts generally have upheld abortion funding restrictions, finding no federal law requiring public funding of abortion.[150] Nevertheless, as a matter of state law or interpretation of state constitutional doctrines, public funding of abortion is provided in thirteen states, including several of the largest.[151] Early in 1993, the federal regulations which prevent promotion of abortion by recipients of federal family planning funds were suspended pending promulgation of new regulations.[152] In Japan, national health insurance excludes abortions performed for "economic" reasons—the largest category.[153] Abortion is subsidized for the poor and for government employees, but it appears "that

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147. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 478 U.S. 747 (1986); City of Akron v. Akron Center for Reproduction Health, Inc., 462 U.S. 416 (1983); *Danforth*, 428 U.S. at 63-65, 75-79, 81-84; *cf. Casey*, 112 S.Ct. at 2791 (overturning *Thornburgh* and *Akron*, upholding regulations on abortion, and announcing a policy ostensibly friendly to mere regulations that do not impose undue burden on women seeking abortion. However, a spousal notification requirement was invalidated on the basis of mere speculation that some women might become victims of spousal abuse).

148. *See* Michiko Ishii, *supra* note 54, at 65.

149. *See Casey*, 112 S.Ct. at 2816-21.

150. *See supra* notes 116-21 and accompanying text.

151. Thirteen states paid for more than 150,000 abortions in 1990; eight as a result of allegedly voluntarily adopted funding decisions; five as a result of state court decisions. Rachel Benson Gold & Danile Daley, *Public Funding of Contraceptive, Sterilization and Abortion Services, Fiscal Year 1990*, 23 FAM. PLAN. PERSP. 204, 209 (1991).

152. 58 Fed. Reg. 7455 (1993); *see also* 51 Cong. Q. Wkly Rep. 182 (Jan. 23, 1993).

153. COLEMAN, *supra* note 63, at 28.

their numbers are few."[154] "As a rule, recipients of abortion in Japan pay for them out of their own pockets and without subsidy."[155]

In summary, despite broad and apparent similarities in the substance of formal abortion law and in the practical availability of abortion in the United States and Japan, there are significant doctrinal differences. Japanese abortion law formally commands more respect for prenatal life and is more limited in its allowance of abortion than the abortion privacy doctrine of the United States. Moreover, the law as administered in Japan provides more practical regulatory restriction of abortion than the judicially-allowed operative abortion laws in the United States.

B. Differences in the Methods of Development of Current Abortion Policy

There are at least five important differences in the methods of development of current Japanese and United States abortion policies. First, abortion policy has been set by completely different governing bodies. The current abortion policy of the United States was established by judicial decree.[156] The right to an abortion prior to viability of the fetus was created by the Supreme Court of the United States in *Roe v. Wade*. Advocates of unrestricted abortion in America turned to the federal judiciary to achieve their desired abortion law reforms when they found the legislatures unwilling or too slow-moving and cautious to make the radical changes they desired.[157] In the two decades since *Roe v. Wade* was decided, other branches of the federal government and state legislatures have had only peripheral involvement in formulating American abortion policy; the federal courts have taken the initiative, set the fundamental rules of the prevailing federal policy, and rigorously policed state compliance.[158] In Japan the policy of nonrestrictive abortion was enacted by the legislature.[159] During the forty-five years since the EPL was adopted in Japan, Japanese courts have had almost nothing to do with the

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154. *Id.*

155. *Id.* Insurance pays a doctor about one-seventh the amount a private patient will pay, and typically, Japanese doctors decline to do much insurance work. *Id.* at 29.

156. Roe v. Wade, 410 U.S. 113 (1973), *modified by* Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992).

157. *See* WARDLE & WOOD, *supra* note 87, at 43.

158. Federal judicial initiative in developing American abortion policy has been so extensive and dominant that it is not much of an exaggeration to say that there is only one branch of government when it comes to this issue.

159. *See supra* notes 64-81 and accompanying text.

shaping or administration of abortion policy. Abortion policy has been virtually the exclusive province of the national legislature and the Ministry of Health and Welfare.

Thus, ironically, Japanese abortion policy is much more democratic than American abortion policy. Moreover, the American judiciary has been aggressively anti-democratic in this area, judicially amending the Constitution making pre-viability abortion a right found within the realm of personal liberty, which the government may not enter.[160] Moreover, the American judiciary has invalidated hundreds of laws enacted by elected representatives in the state legislatures.[161] The policy determinations of Japanese legislators have been unmodified in any significant respect by the Japanese courts. Thus, the permissive Japanese abortion law probably is much more reflective of and responsive to contemporary social values, than are the permissive abortion laws of the United States.

Second, the current abortion policy in Japan, which essentially permits abortion-on-demand, is consistent with centuries of pre-Meiji customs and values, whereas American policy represents a profound departure from its historical traditions.[162] For centuries, Japan has used abortion regulation as a means of furthering economic policies of the government. The Japanese government has manipulated its abortion laws to raise tax revenues, increase or reduce the population, supply the military and work force needs, and so forth.[163] While traditional religious beliefs such as Buddhism have opposed the destruction of life, religious practices and principles have been of only occasional, secondary significance in the establishment of Japan's abortion policy. Thus, current abortion policy is consistent with the governmental tradition of using abortion to foster economic interests of the nation. In contrast, contemporary abortion policy in the United States is strikingly inconsistent with centuries of Anglo-American common law and tradition.[164] Historically, Anglo-American abortion policy reflected the long-established value of the sanctity of human life, which is conspicuously absent from current legal policy towards abortion. The absolute rejection of such moral

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160. *See supra* notes 133-37.

161. Wardle, *supra* note 139, at 940; Professor Glendon has observed that the judicial source of American abortion doctrine makes it "singular" in the developed world. GLENDON, *supra* note 5, at 24-25. "Nowhere have the courts gone so far as has the United States Supreme Court in precluding further statutory" regulation of abortion. *Id.*; *see also id.* at 40-45.

162. *See supra* notes 87-94 and accompanying text.

163. *See supra* notes 26-64 and accompanying text.

164. *See supra* part III.C.

considerations in *Roe* and its progeny, establishing pre-viability abortion as a matter of personal liberty, deviates sharply from the traditional position of Anglo-American abortion policy, from the history of Judeo-Christian principles influencing Western legal traditions generally, and from the centuries-old rules prohibiting abortion, specifically.[165]

Third, the level of policy-making has changed dramatically in the United States, whereas it has been consistent in modern Japan. Japan's abortions laws are established as a matter of national policy. Contemporary Japanese abortion law is uniform and centralized; it applies throughout Japan. This uniform application is consistent with the largely homogenous, centralized nature of Japanese society and the history of its government and laws. All medical practices and domestic issues are regulated by the national government in Japan. In the United States pre-viability abortion policy is also nationalized and centralized, established by judicial decree of the Supreme Court interpreting the "Supreme Law" of the land. However, that centralization is in stark contrast to the pluralistic nature of American society and the American system of federalism. Prior to *Roe v. Wade*, abortion regulation was, and most other medical regulation still is, largely a matter of state law. The nationalization of abortion policy also diverges significantly from historical American preference for state regulation of domestic matters, criminal matters, and other issues implicating local, social, and moral concerns.

Fourth, the ideological influences that have produced the current nonrestrictive abortion policies in Japan and the United States differ significantly. In Japan, permissive abortion laws were adopted primarily because of a severe economic crisis and as a means to achieve national economic recovery and development. In the United States, the motivating ideology stemmed from radical individualism and the desire to eliminate encumbrances to promiscuous lifestyles and to escape from restrictive personal responsibilities.

Fifth, the adoption of permissive abortion policies represents significantly different social conflict outcomes in Japan than in the United States. In an important sense, the revolution in American abortion law effected by *Roe v. Wade* and its progeny represented a significant victory in cultural conflict between two classes of Americans with divergent viewpoints.[166] The elite-and-advantaged class, with its fashionably

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165. *See generally* JOHN T. NOONAN, JR., *An Almost Absolute Value in History, in* THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES (John T. Noonan ed., 1970).

166. *See* JAMES HUNTER, CULTURE WARS, THE STRUGGLE TO DEFINE AMERICA 42-49, 188-92 (1991).

unconventional or super-conventional values and opportunities and its insider influence in clubby judicial circles, triumphed over the common-and-egalitarian class with its traditional moral values and influence in popular branches of government. In Japan, however, the adoption of a permissive, postwar abortion law replacing the Nazi Germany-inspired abortion provisions represented a step away from notions of ethnic elitism and racial supremacy. The continuing emphasis on family planning and the absence of explicit authority for abortion by unmarried women or minors in Japanese law reaffirms, rather than replaces, traditional moral values.

C. Differences in the Cultural Significance of Current Abortion Policies in Japan and the United States

The interrelationship of law and culture are extensive and complex, so it should come as no surprise that despite some broad similarities in the permissive abortion laws of Japan and the United States, the cultural and social significance of contemporary abortion policy in these nations differ in several significant respects. First, the differences between dualistic Japanese abortion law and congruous American abortion law reflect different views about formal consistency within each society. Theoretically, as discussed above, Japanese law allows abortion in only five specific circumstances, but in practice allows abortion-on-demand. Given the importance of formal appearances in Japanese culture and the equal importance of informal, unspoken values at the practical level, dualism and the apparent incongruities between formal and applied law are pervasive throughout Japanese legal culture.[167] Thus, the dualism of contemporary Japanese abortion policy is culturally consistent and understandable. In the United States, the legal doctrine of abortion privacy accurately reveals and legitimatizes the actual practice of abortion-on-demand. In American legal culture, congruence in the law—aspiring to congruity between the written law and the applied law—is highly valued.[168] Thus, the American abortion personal liberty doctrine demonstrates American belief in formal-practical congruence, i.e., that the written law should describe social reality (what is really permitted or

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167. *See* NODA, *supra* note 39, at 13-18, 159-60, 218-22; *see generally* FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 73-76, 166, 198, 205-13 (1987).

168. *See generally* JULIUS COHEN ET AL., PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW 195, 198 (1958); G. William Walster et al., *New Directions in Equity Research*, 25 J. PERSONALITY & SOC. PSYCHOL. 151 (1973); *cf.* Paul Bohannan, *The Differing Realms of the Law*, 67 AM. ANTHROPOLOGIST (pt. 2) 33, 37 (1965).

prohibited), minimizing any gap between the written law and its application.[169]

Second, the Japanese dualistic approach allows for flexibility, whereas the American approach is quite absolutist. The Japanese formal law serves a hortatory purpose; it does not condone disrespect for the sanctity of prenatal life; it admonishes that abortion is a serious matter, allowable only in very special circumstances. The law as applied, however, largely turns the decision whether or not to have an abortion over to the conscience of the persons more immediately concerned—the pregnant women, their families, and their medical service providers. It allows them to bend, stretch, finesse, even disregard the values articulated in the written law, but it does not allow them to gloat over it or claim social justification for doing so. The American doctrine of personal liberty as it applies to pre-viability abortions, on the other hand, is uncompromising. Declared as a rule of constitutional mandate, it commands instant and absolute supremacy. States may not impose any undue burden upon a woman's choice to a pre-viability abortion as it is a "liberty" right protected by the Due Process Clause of the Fourteenth Amendment. In practice, virtually no significant restriction of pre-viability abortion has been or can be sustained.[170] Thus, the dualism of Japanese abortion law allows flexible individualized application and accommodates deviation from the standards expressed in the formal law while the American radical libertarian approach is rigid and inflexible.

Third, the Japanese approach is inclusive, while the American approach is exclusive. The dualism of Japanese law may be seen as a way of recognizing and showing respect for conflicting sets of values (the formal law recognizes one set of values, while operational standards recognize another, conflicting set of values). Thus, while pro-life Japanese citizens may be frustrated that abortion is available on demand as a practical matter, the formal law provides them with the comforting assurance that their values are not unrecognized. In principle, their values are given some degree of official standing and respect. The American doctrine of privacy, however, decrees total nonrecognition for the values of pro-life Americans. It interprets the Constitution—the most revered and powerful source of legitimacy—as mandating that the *only* legally

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169. *See infra* note 170 and accompanying text.

170. Even after *Casey*, any law that has any significant impact on a woman's abortion decision is, by Supreme Court definition, unduly burdensome. 112 S.Ct. at 2821 (O'Connor, Kennedy, Souter, JJ., plurality opinion) (if a mere regulation "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion" before viability, then the strictest standard of judicial review applies).

cognizable significant consideration, at least before the fetus is viable, is the pregnant woman's private choice. Other values and concerns, including sanctity of human life, social morality, marital integrity, and parental concern, are constitutionally irrelevant.[171] Thus, the dualistic Japanese approach fosters respect, encourages discourse, and builds community more readily than the exclusive and absolutist American privacy doctrine.

Fourth, permissive abortion laws in Japan reflect an effort to balance social interests with the private desires of the individual woman, whereas the American approach is strictly individualistic. Thus, strict Japanese laws proscribing abortion after viability, which are defined more restrictively than is generally permissible in American abortion law, and Japanese requirements for spousal consent and parental approval, that are impermissible in the American abortion doctrine, demonstrate that permissive abortion is a matter of social accommodation of competing interests, not a matter of a woman's exclusive, private rights.[172] In Japan, the law explicitly allows abortion only for five specific purposes,[173] even though "economic purpose" is interpreted to allow abortion for any reason. Nevertheless, the legal policy behind Japan's liberal abortion laws does not consider abortion to be a purely "private" choice. In the United States, abortion-on-demand was adopted for the explicit purpose of effectuating a "do-your-own-thing" privacy principle. Abortion-on-demand is deemed a fundamental constitutional liberty. According to the Supreme Court of the United States, the *only* constitutionally relevant consideration[174] during the first six months of pregnancy is whether the pregnant woman wants an abortion, even if she is only a minor.[175]

Fifth, ironically, Japanese law "privatizes" the abortion decision much more than the American "right of privacy" has done. In Japan the implicit message of the law is that abortion is acceptable only for very serious reasons, a message that encourages privacy about the process. Moreover, as applied, the law leaves it to the individuals directly affected to determine, by reference to informal, cultural standards (which are not

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171. Parental participation seems to be the sole exception, but even parental interests in being notified and giving counsel must be ignored if the minor seeking abortion is a "mature minor" (whatever that means), or if a judge decides that abortion is in the best interests of the minor. Bellotti v. Baird, 443 U.S. 622, 647-48 (1979).

172. *See generally* Michiko Ishii, *supra* note 54, at 73 (arguing that Japanese law is defective because it does not protect a woman's right to control her reproduction).

173. *See generally supra* notes 65-68 and accompanying text.

174. Aside from minor regulatory details, if the states choose to impose them.

175. *See supra* note 171 (discussing a judicial by-pass for "mature minors").

insignificant in Japanese society) how to apply the law in their particular circumstances, a practice which embodies the core notion of privacy. Thus, under the dualistic Japanese abortion law, the ultimate decision is very much a " private" matter. In the United States, the "privacy doctrine" works against actual privacy. Privacy is a very "public" right in America. Under the doctrine of abortion privacy and personal liberty, the abortion decision is decreed to be legally acceptable which leads many American women to expect social, or even personal, acceptance of their choice of abortion-on-demand.[176] Thus, the American "right to privacy," in the abortion context, has produced false and frustrating public expectations.

Sixth, Japanese abortion law may be modified much more easily than American abortion law. In Japan, there is a constant tension between the value articulated in the law as written and the value underlying the law as applied. The acceptance of sources of law other than positive legislation allows for the flexible practice of "administrative guidance."[177] When the administrators of the law choose to tighten the policy they need not change the written law and go through the highly-visible legislative process with potentially disruptive and possibly embarrassing attendant public controversy. Likewise, if Japanese administrators desire to loosen abortion restrictions, they still do not need to modify the written law; they can discreetly look the other way, tacitly ignore the written law, and encourage reliance on the custom of abortion-on-demand. In the United States, on the other hand, the basic abortion doctrine has been cast in constitutional concrete: The right to abortion-on-demand without any significant legal barrier is deemed a fundamental constitutional right.[178]

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176. Thus, Americans periodically witness the spectacle of women parading in streets, carrying signs proclaiming "no apology" and "my right," and participating in other public expressions of private self-justification. Somehow, those demonstrations (and demonstrators) seem tragically hollow, unconvincing, and unconvinced. They more than faintly suggest attempts to self-convince, obtain public approbation, or otherwise escape from the "privacy" proclaimed in *Roe*.

177. *See generally* Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 926-32 (1984); Kazuo Yamanouchi, *Administrative Guidance and the Rule of Law*, 7 LAW IN JAPAN 22-31 (Peter Figdor trans., 1974), *reprinted in* HIDEO TANAKA, THE JAPANESE LEGAL SYSTEM 353-403 (1976).

178. From time to time the Supreme Court has admonished that the right of abortion privacy is not absolute. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154 (1973). But since *Roe*, the Court has never upheld any significant substantive restriction of the abortion decision, but has only upheld some (not all) regulations of the method of implementing the absolutely private decision (e.g., some informed consent regulations, some medical regulations, some family participation regulations, etc.). *See, e.g.*, Planned Parenthood

As a *constitutional* right, it cannot be modified or fine-tuned by mere legislation or administrative regulation. Only a constitutional amendment or the judicial equivalent can change a constitutional right; and the Supreme Court of the United States has repeatedly insisted that it has such high regard for the principle of *stare decisis* that does not intend to reconsider or significantly modify the central holding in *Roe*.[179] Thus, the American law concerning abortion is much more rigid, must less receptive to change, than the Japanese law of abortion.

Seventh, the permissive Japanese abortion law has more cultural legitimacy than the permissive American abortion doctrine. American law proclaims the formal notion that pre-viability abortion is a matter of personal liberty, but it lacks the cultural substance of privacy in practice. Japanese law, however, proclaims that abortion is a matter of serious social concern, but both that message and the law as practiced encourage privacy. As noted earlier, dualism is culturally pervasive and accepted in Japan; but in the United States, it is seen as a sign of failure, of moribund rigidity in legal policy.

Eighth, the Japanese permissive abortion law also has more political legitimacy than the American abortion doctrine. Both countries purport to be democratic nations, built on the belief that government derives its just powers from the consent of the governed. As noted earlier, the Japanese abortion law was enacted by the legislature through democratic means. The elected representatives of the people enacted it and have perpetuated it intact for forty years.[180] The abortion policy of the United States, on the other hand, was declared by judicial fiat[181] and has been perpetuated by the unelected, life-tenured judiciary, striking down hundreds of abortion regulating laws enacted by state legislatures.[182]

Ninth, the enforcement of abortion restrictions in Japan and the United States has been historically similar in that abortion restrictions in both countries have often been ignored or weakly enforced. However,

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v. Casey, 112 S.Ct. 2791, 2822-33 (1992) (upholding some, but not all, regulations and reaffirming that the basic abortion decision is a fundamental right that cannot be unduly burdened).

179. *See, e.g.*, *Casey*, 112 S.Ct. at 2808-16; City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 419 n.1 (1983).

180. *See supra* notes 47-81 and accompanying text.

181. *Roe*, 410 U.S. at 222 (White and Rehnquist, JJ., dissenting) (describing *Roe* as "an exercise of raw judicial power").

182. *See* Wardle, *supra* note 139, at 940 (noting more than 300 state abortion laws enacted in the 15 years following *Roe*, most of which were invalidated in whole or in part).

such restrictions have been consistently ignored in Japan.[183] The lack of enforcement has been more episodic in American history. Such incongruence between the written law and the law as applied is a traditional, accepted, pervasive facet of Japanese culture, whereas consistency between the written law and the law as applied is an established aspiration of the American legal culture.[184]

Thus, the current abortions policies of Japan and the United States have some broad similarities. However, comparison of the specific details of the respective abortion laws and comparison of the current laws in terms of their respective legal histories and cultures reveal that there are profound dissimilarities between the abortion laws of Japan and the United States.

V. CURRENT ABORTION PRACTICES AND ATTITUDES IN JAPAN AND THE UNITED STATES

A. The Reliability of Abortion Data in Japan and the United States

Determining the actual incidence of abortion in Japan is very difficult. Japanese law requires all doctors who perform abortions to report monthly, on detailed forms provided by the government, the number of abortions they have performed and other relevant information.[185] This data is collected, processed, and the results are published annually.[186] Thus, the number of abortions officially reported in Japan is available. However, there is some disparity between the number of abortions officially reported by Japanese doctors and the number of abortions actually performed.[187] It has been said that "[t]he estimates of Japanese

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183. *See supra* notes 45-81 and accompanying text.

184. *See supra* notes 167-69 and accompanying text.

185. *See* EPL, *supra* note 65, at 18; EPMH, *supra* note 71, at 697.

186. *See, e.g.*, STATISTICS INFORMATION DEPARTMENT, MINISTRY OF HEALTH AND WELFARE, 1986 EUGENIC PROTECTION LAW STATISTICS REPORT (1986).

187. CHRISTOPHER TIETZE, INDUCED ABORTION: A WORLD REVIEW 24 (5th ed. 1983) [hereinafter TIETZE 5TH EDITION] (noting that scholars believe the number of abortions performed is grossly underreported); JEAN VAN DER TAK, ABORTION, FERTILITY, AND CHANGING LEGISLATION: AN INTERNATIONAL REVIEW 32 (1974) (estimating that actual abortions to be from 1.5 to 3.7 times the reported number); JAPANESE ORGANIZATION FOR INTERNATIONAL COOPERATION IN FAMILY PLANNING, INC., BIRD'S-EYE VIEW OF POPULATION AND FAMILY PLANNING IN JAPAN 32 (1987) (acknowledging that official data are suspect); *Japan's Fertility Trends Linked to Late Marriage, Unique Social Factors, Heavy Reliance on Abortion*, 19 FAM. PLAN. PERSP. 166 (July/August 1987) ("[I]t is well known that abortions in Japan have been substantially

demographers and public health specialists . . . place the actual number of abortions at anywhere from one and a half to four times the reported figures."[188]

There are at least three possible reasons for this alleged disparity in the number of abortions performed in Japan. First, doctors do not like to report all abortions because they can evade taxes and "pocket" the money from unreported abortions.[189] Second, the desire of many women in Japan for anonymity and secrecy concerning their abortion may encourage underreporting.[190] Third, Japan is very concerned about its national image and in the past has been very sensitive to international criticism of its legalization of what, in practice, amounts to abortion-on-demand.[191]

However, the alleged underreporting of Japanese abortions may be exaggerated. Experts working for or with family planning programs have an obvious interest in inflating the number of abortions.[192] Based on analyses of fertility and other data associated with pregnancy and abortion, Dr. Noriko Tsuya has concluded that the rate of underreporting of abortion is significantly lower now than estimated in the past.[193]

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underreported through the years . . . .").

188. COLEMAN, *supra* note 63, at 4; *see also Family Planning, in* 2 KODANSHA ENCYCLOPEDIA OF JAPAN 246, 247 (estimates that the actual number is twice as great as the officially reported number of abortions); Michiko Ishii, *supra* note 54, at 69; TIETZE, 5TH EDITION, *supra* note 187, at 24, 30, 31 (official abortion reports are "grossly incomplete" and it appears that "a substantial majority of legal abortions" are unreported). Stanley Henshaw, *Induced Abortion: A World Review, 1990*, 22 FAM. PLAN. PERSP. 76, 78-79 (1990) (estimating that the number of abortions in Japan in 1975 was 2,250,000—"about three times the official reported number for that year").

189. COLEMAN, *supra* note 63, at 4, 39; VAN DER TAK, *supra* note 187, at 32. Coleman describes a scandal that occurred a few years ago in Japan when the government decided to investigate the reporting of abortions in connection with a tax investigation of certain Tokyo clinics and doctors who were performing abortions and discovered a substantial amount of unreported income from unreported abortions. COLEMAN, *supra* note 63, at 39.

190. *See* COLEMAN, *supra* note 63, at 27 (discussing the desire of many Japanese women to maintain privacy in seeking an abortion); Interview with Kiyoshi Okada, Head of Obstetrics and Assistant Director of Otsuka Metropolitan Hospital, Japan (July 9, 1988); Interview with Kenji Hayashi, M.D., Ph.D., Tokyo, Japan (June 4, 1988).

191. *See, e.g.*, COLEMAN, *supra* note 63, at 23 (referring to the "unwelcome stigma of Japan, the 'abortion heaven'") (quoting Michio Okuyama, *Jinko Ninshin Chuzetsu ni Kansuru Iji Funso to Sono Mondaiten* [*Complaints Against Doctors Involving Induced Abortion and Their Problem Points*], SANFUJINKA NO SEKAI, Jan. 1975, at 35-37).

192. Greater numbers of abortions would enhance the appearance of public acceptance of the practice of abortion and could be used to justify increased funding for abortion-supporting and other birth control programs.

193. Dr. Tsuya estimates that since 1975 there has been very little underreporting

Moreover, even if the official Japanese statistics are underinclusive, they provide helpful information. For instance, they provide a profile of the frequency of abortions performed in Japan. Even if the numbers are low, the official reports may provide an indication of the trend of abortion incidence over the years.[194]

Of course, the number of officially reported abortions in the United States is also lower than the number of abortions actually performed. The official statistics concerning the number of abortions performed in the United States are published by the Centers for Disease Control (the "CDC"), but abortion experts argue that the CDC data, which is dependent on various state indices, underreports the number of abortions actually performed by approximately fifteen percent.[195] The most thorough abortion data comes from the Alan Guttmacher Institute (the "AGI"), a research organization associated with Planned Parenthood that aggressively collects the data directly from abortion providers.[196] Experts allied with the AGI have estimated that even their numbers are three to six percent underinclusive.[197] Thus, the best available data on the number of abortions performed in Japan and the United States are probably underinclusive.

B. Incidence and Characteristics of Abortion in Japan and the United States

Graph A-1 shows the number of abortions officially reported in Japan and data collected and published by the Population Council, a population control organization.[198] The official data shows that the number of

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of abortion by married women in Japan. Since most abortions are performed on married women, this suggests that the overall abortions reports are not significantly inaccurate. Noriko O. Tsuya, Proximate Determinants of Fertility Decline in Japan After World War II, at 143-44 (1986) (unpublished Ph.D. dissertation, University of Chicago).

194. There is no reason to believe that there are more unreported abortions today than there were 10, 20, or 30 years ago.

195. CHRISTOPHER TIETZE, INDUCED ABORTION: 1979 19-26 (1981) [hereinafter TIETZE 3RD EDITION]. The CDC depends on data collected by the states, and not all states have complete or comparable abortion reporting requirements.

196. The abortion statistics reported for the United States herein are based upon AGI data.

197. *See, e.g.*, Stanley K. Henshaw et al., *Abortion in the United States, 1979 and 1980*, 14 FAM. PLAN. PERSP. 1, 7 (1982).

198. Appendix A. Sources: STATISTICS INFORMATION DEP'T, MINISTRY OF HEALTH AND WELFARE, 1986 EUGENIC PROTECTION LAW STATISTICS REP. 1, 15 (1986); MATERNAL AND CHILD HEALTH DIV., CHILDREN AND FAMILIES BUREAU, MINISTRY OF HEALTH AND WELFARE, STATISTICS RELATING TO MATERNAL AND CHILD HEALTH IN JAPAN 1, 52 (1987); MATERNAL AND CHILD HEALTH DIV., CHILDREN AND FAMILIES

abortions rose from 250,000 in 1949 to a peak of nearly 1,200,000 abortions in 1955, and since then, steadily dropped to approximately 500,000 abortions today. Since 1949, the EPL has authorized five reasons for granting an abortion: four of them "hard," narrow circumstances and the fifth, which is the most broad, for economic or physical harm to the woman.[199] According to government statistics, 99% of all abortions in Japan are currently performed for health or economic reasons.[200]

Graph A-2, using data reported by the AGI, shows the incidence of abortion in the United States since 1972, the year before *Roe* was decided.[201] It shows that the rate of abortion in the United States increased fairly steadily since the Supreme Court decision in *Roe v. Wade* to approximately 1,500,000 in 1979 and has plateaued since then between 1,500,000 and 1,600,000 abortions annually. The number of abortions reported in the United States for 1988, the last year for which the AGI data is available, was approximately 1,590,000.

The Japanese data indicates that there was a rapid and dramatic increase in the number of abortions following the Japanese enactment of abortion-on-demand rules of law in 1949. Subsequently, there was a

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BUREAU, MINISTRY OF HEALTH AND WELFARE, STATISTICS RELATING TO MATERNAL AND CHILD HEALTH IN JAPAN (1990); INST. OF POPULATION PROBLEMS, MINISTRY OF HEALTH AND WELFARE, ANNUAL REP. OF THE INSTITUTE OF POPULATION PROBLEMS WITH SELECTED DEMOGRAPHIC INDICATORS 27 (1990); STATISTICAL OFFICE, DEP'T OF INT'L ECONOMIC AND SOCIAL AFFAIRS, UNITED NATIONS, 1990 DEMOGRAPHIC Y.B. 348 (1992); Minoru Muramatsu, *Effect of Induced Abortion on the Reduction of Births in Japan*, 38 MILBANK MEMORIAL FUND Q. 153, 155 (1960); TIETZE 5TH EDITION, *supra* note 187, at 30-31; *see also Fertility Control Transition from Abortion to Contraception in Japan Since 1948*, 4 INT'L REV. MOD. SOC. 43, 48 (1974).

199. EPL, *supra* note 65, at 10-11; EMPH, *supra* note 71, at 693-94. The four more "narrow" circumstances are mental illness of the pregnant woman or her spouse, hereditary disease, leprosy, and rape.

200. *See* Michiko Ishii, *supra* note 54, at 69; *see also infra* note 232 and accompanying text.

201. Appendix A. Sources: CENTERS FOR DISEASE CONTROL, ABORTION SURVEILLANCE, ANNUAL SUMMARY, 1978, at 29 table 1 (1980); Stanley K. Henshaw et al., *Abortion in the United States, 1979 and 1980*, 14 FAM. PLAN. PERSP. 1, 6 (1982) (estimating 3% to 6% shortfall in data); Stanley K. Henshaw et al., *Abortion Services in the United States, 1981 and 1982*, 16 FAM. PLAN. PERSP. 119, 121 (1984); Stanley K. Henshaw, *Trends in Abortion, 1982-84*, 18 FAM. PLAN. PERSP. 34 (1986); *Contraception and Abortion Costs Are Tiny Portion of U.S. Health Spending*, 18 FAM. PLAN. PERSP. 37 (1986); Stanley K. Henshaw et al., *Abortion Services in the United States*, 1984 and 1985, 19 FAM. PLAN. PERSP. 63 (1987); Stanley K. Henshaw et al., *Characteristics of U.S. Women Having Abortions, 1987*, 23 FAM. PLAN. PERSP. 75 (1991); Stanley K. Henshaw, *Abortion Trends in 1987 and 1988: Age and Race*, 24 FAM. PLAN. PERSP. 85 (1992) [hereinafter *Trends in 1987 and 1988*].

leveling-off of abortion rates for about a decade, followed by a slow but steady drop in the incidence of abortion. This pattern is similar to that seen in America, where there was a dramatic increase in the number of abortions in the years following *Roe*, and later, leveling off after seven or eight years. Currently, there are indications that there may be a slight downturn in the incidence of abortion.

Since the total population of Japan is about one-half that of the United States and the total number of abortions reported is about one-third that of the United States, the rate[202] and ratio of abortions[203] are currently estimated to be lower in Japan than in the United States. That is, a lower percentage of pregnancies in Japan result in abortions than in the United States. Using government statistics, Graphs B-1[204] and B-2[205] show that the Japanese rate of abortion per 1,000 women of childbearing age is significantly lower than the rate of abortion among American women.[206] Likewise, the ratio of abortions to known pregnancies is higher in the United States than in Japan. Nearly thirty percent of all known pregnancies in the United States are now aborted.[207]

The rate of repeat abortions[208] is not and has never been officially reported in Japan, perhaps due to the Japanese sensitivity to world opinion regarding their practice of abortion. But Christopher Tietze, a statistics expert with many years of experience in the pro-abortion movement, reported in 1983 that a small study in Tokyo revealed that 61% of abortions were "repeat abortions" during the period from 1967 to 1972.[209] Furthermore, Tietze wrote that "adjustment to the age distribution of all abortions in Tokyo (in 1970) raises the proportion of repeaters to sixty-eight percent . . . ."[210] Four years earlier, Tietze reported that a 1971

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202. The abortion rate is calculated as abortions per 1000 women of childbearing age.

203. The abortion ratio is the percentage of known pregnancies that end in abortion.

204. Appendix B. Sources: *supra* note 198.

205. Appendix B. Sources: *supra* note 201.

206. *See supra* note 192 and accompanying text. Even if the underreporting of abortion in Japan were greater than the underreporting in the United States, this comparison is very telling because the rate of underreporting in Japan would have to be substantially higher than in the United States for the rate and ratio of abortion in Japan to match the rate and ratio of abortion in the United States. Given Dr. Tsuya's study, it seems unlikely that there is that much underreporting of abortion in Japan today.

207. *Trends in 1987 and 1988*, *supra* note 201, at 86 (28.6% of all known U.S. pregnancies ended in abortion in 1988).

208. Abortions performed on women who previously have had one or more abortion.

209. TIETZE 5TH EDITION, *supra* note 187 at 61 (citing J. Miyamoto, *Background Considerations on Induced Abortion*, 18 J. INT'L FERTILITY 5-12 (1973)).

210. *Id.*

study in Japan revealed that 45% of all Japanese women ages twenty to forty-nine and 50% of all Japanese women ages thirty-five to forty-nine had at least two abortions, and 32% and 34%, respectively, had at least three abortions.[211] Samuel Coleman cites estimates that the average Japanese woman experiences two abortions during her married life.[212] As Table B-1 shows, in the United States, the number of repeat abortions has steadily climbed since *Roe v. Wade*, and as of 1987 accounted for 42.2% of all abortions.[213] That figure is up from 15.2% just thirteen years earlier. Thus, in a given year, it appears that more abortions in Japan are the woman's second, third or other multiple abortion than in the United States—but the gap is rapidly closing.

The marital status of women undergoing abortions is not officially reported in Japan either, but extensive surveys have addressed the subject and consistently indicate that about 70% of all abortions in Japan are performed on married women.[214] This figure differs dramatically from American practice, where more than 80% of all abortions are performed on *unmarried* women.[215] Table B-2 shows the percentage of American women undergoing abortions who are not married.[216] The percentage has steadily risen; in 1987, the last year for which such data has been reported by the AGI, it was over 82%.[217]

C. Illegitimate Births and Adoptions in Japan and the United States

The practice of abortion in Japan has had a definite impact on reducing the number and rate of illegitimate births. As Table C-1[218]

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211. TIETZE 3RD EDITION, *supra* note 195, at 60.

212. COLEMAN, *supra* note 63, at 4.

213. Appendix B. Source: Stanley K. Henshaw et al., *Characteristics of U.S. Women Having Abortions, 1987*, 23 FAM. PLAN. PERSP. 75, 79 table 5 (1991).

214. *See, e.g.*, COLEMAN, *supra* note 63, at 5.

215. Henshaw et al., *supra* note 213, at 76 table 1.

216. Appendix B. Sources: Stanley K. Henshaw et al., *Characteristics of U.S. Women Having Abortions, 1987*, 23 FAM. PLAN. PERSP. 75, 76 table 1 (1991); Stanley K. Henshaw et al., *Characteristics of U.S. Women Having Abortions, 1982-1983*, 19 FAM. PLAN. PERSP. 5, 6 table 1 (1987); Stanley K. Henshaw et al., *A Portrait of American Women Who Obtain Abortions*, 17 FAM. PLAN. PERSP. 90, 92 table 1 (1985); Stanley K. Henshaw & Kevin O'Reilly, *Characteristics of Abortion Patients in the United States, 1979 and 1980*, 15 FAM. PLAN. PERSP. 5, 8 table 4 (1983); Jacqueline Darroch et al., *Abortion in the United States, 1977-1978*, 11 FAM. PLAN. PERSP. 329, 337 table 4 (1979).

217. *Id.*

218. Appendix C. Sources: U.N. DEP'T OF INT'L ECONOMICS & SOCIAL AFFAIRS,

demonstrates, the number of illegitimate births in Japan has dropped from nearly 40,000 in 1952 to less than 13,000 in 1989. Likewise, the illegitimate birthrate[219] has fallen from 2% to 1% in Japan.

Table C-1 also shows that abortion has had a negative effect on adoption in Japan. The number of adoptions of minors has dropped from nearly 45,000 in 1949 to only about 1,600 in 1989. In large part, Japanese scholars candidly attribute this drop to "the decreased supply of adoptable children."[220]

Table C-2 shows the number of illegitimate births, illegitimate birth rate, and adoptions in the United States.[221] Ironically, the number of children born out of wedlock has more than doubled in America as the number of abortions has increased. Moreover, the rate of illegitimacy[222] has also more than doubled since *Roe v. Wade* legalized abortion-on-demand.[223] However, the number of unrelated adoptions in the United States has dropped significantly since *Roe*.

STATISTICAL OFFICE, 1990 DEMOGRAPHIC Y.B. at 348, U.N. Doc. ST/ESA/STAT/SER.R/20, U.N. Sales No. E/F.91.XIII.1 (1992); U.N. DEP'T ECONOMICS & SOCIAL AFFAIRS, STATISTICAL OFFICE, 1981 DEMOGRAPHIC Y.B. at 823, U.N. Doc. ST/ESA/STAT/SER.R/11, U.N. Sales No. E/F.82.XIII.1 (1983); U.N. DEP'T OF INT'L ECONOMICS & SOCIAL AFFAIRS, STATISTICAL OFFICE, 1975 DEMOGRAPHIC Y.B. at 760, U.N. Doc. ST/ESA/STAT/SER.R/4, U.N. Sales No. E/F.76.XIII.1 (1976); STATISTICS BUREAU, MANAGEMENT AND COORDINATION AGENCY, JAPAN STATISTICAL Y.B. 724 (1987); STATISTICS BUREAU, MANAGEMENT AND COORDINATION AGENCY, JAPAN STATISTICAL Y.B. 724 (1989); STATISTICS BUREAU, MANAGEMENT AND COORDINATION AGENCY, JAPAN STATISTICAL Y.B. 726 (1990); STATISTICS BUREAU, MANAGEMENT AND COORDINATION AGENCY, JAPAN STATISTICAL Y.B. 726 (1992); STATISTICS AND INFORMATION DEP'T, MINISTERS SECRETARIAT, MINISTRY OF HEALTH AND WELFARE, VITAL STATISTICS 1990, JAPAN 78, 79, 109 (1992).

219. The illegitimate birthrate compares the number of illegitimate births to the total number of births.

220. *See* Ichiro Kato, *The Adoption of Majors in Japan, in* AN AGING WORLD—DILEMMAS AND CHALLENGES FOR LAW AND SOCIAL POLICY 161, 163 (J. Eekelaar & D. Pearl eds., 1989).

221. Appendix C. Sources: U.S. DEP'T OF HEALTH & HUMAN SERVICES (PUB. H. SERV. CENTERS FOR DISEASE CONTROL, NAT'L CENTER FOR H. STAT.), I VITAL STATISTICS OF THE UNITED STATES 190 table 1-76 (1989); NATIONAL COMMITTEE FOR ADOPTION, 1989 ADOPTION FACTBOOK 60-61 (1989); NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK 120 table 7 (1985).

222. The rate of illegitimacy is figured as the number of children born out of wedlock per 1000 births.

223. As Table C-2 reveals, the rate of illegitimate births rose by 33.6 and 32.9 in the two five-year periods before *Roe v. Wade*. In the following five-year periods, the rate rose by 33.4, 39.6 and 54.3 illegitimate births per 1000 births, respectively.

D. Age, Gestation, and Reason for Abortion in Japan and the United States

Table D-1[224] shows the total number of abortions performed on women of various age groups in Japan. The number of abortions performed on women in each age group over twenty years of age has significantly decreased between 1955 and 1986. However, the number of abortions performed on Japanese teenagers, while still very small compared to the number of teenage abortions in the United States, has nearly doubled in those same years.

Table D-2[225] shows the Japanese rate of abortion per 1,000 women in various age groups. Again, the data shows that the rate of abortion has steadily declined in every age group except teenagers. The rate of teenage abortions has nearly doubled from 3.2 to 6.1, between 1980 and 1989. Notice that in 1955 only 1.2 per 1,000 teenagers had abortions, but in 1989, that rate had increased five-fold to 6.1.

Table D-3[226] shows comparable data for the United States. The rate of abortions performed on American teenagers has actually risen. Also, the raw number of abortions on minors has actually increased. While the rate of increase is greater in Japan, abortion among teens remains considerably higher in the United States than in Japan.

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224. Appendix D. Sources: MATERNAL AND CHILD HEALTH DIV., CHILDREN AND FAMILIES BUREAU, MINISTRY OF HEALTH AND WELFARE, STATISTICS RELATING TO MATERNAL AND CHILD HEALTH IN JAPAN 52 (1987); MATERNAL AND CHILD HEALTH DIV., CHILDREN AND FAMILIES BUREAU, MINISTRY OF HEALTH AND WELFARE, STATISTICS RELATING TO MATERNAL AND CHILD HEALTH IN JAPAN (1990); STATISTICS INFORMATION DEP'T, MINISTRY OF HEALTH AND WELFARE, 1986 EUGENIC PROTECTION LAW STATISTICS REP. 15 (1986); U.N. DEP'T OF INT'L ECONOMICS & SOCIAL AFFAIRS, STATISTICAL OFFICE, 1990 DEMOGRAPHIC Y.B. at 351, U.N. Doc. ST/ESA/STAT/SER.R/20, U.N. Sales No. E/F.91.XIII.1 (1992); U.N. DEP'T OF INT'L ECONOMICS & SOCIAL AFFAIRS, STATISTICAL OFFICE, 1989 DEMOGRAPHIC Y.B. at 338, U.N. Doc. ST/ESA/STAT/SER.R/19, U.N. Sales No. E/F/.90.XIII.1 (1991); U.N. DEP'T OF INT'L ECONOMICS & SOCIAL AFFAIRS, STATISTICAL OFFICE, 1988 DEMOGRAPHIC Y.B. at 392, U.N. Doc. ST/ESA/STAT/SER.R/18, U.N. Sales No. E/F.89.XIII.1 (1990).

225. Appendix D. Sources: MATERNAL AND CHILD HEALTH DIV., CHILDREN AND FAMILIES BUREAU, MINISTRY OF HEALTH AND WELFARE, STATISTICS RELATING TO MATERNAL AND CHILD HEALTH IN JAPAN 52 (1987, 1990); STATISTICS INFORMATION DEP'T, MINISTRY OF HEALTH AND WELFARE, 1986 EUGENIC PROTECTION LAW STATISTICS REP. 15 (1986).

226. Appendix D. Sources: Jacqueline D. Forrest et al., *Abortion in the United States, 1977-1978*, 11 FAM. PLAN. PERSP. 329 (1979); Stanley Henshaw, *Abortion Trends in 1987 and 1988: Age and Race*, 24 FAM. PLAN. PERSP. 85 (1992).

Graphs D-1[227] and D-2[228] are based on the graphs prepared by the Japan Family Planning Association, using figures provided by the Japanese government. Graph D-1 shows very visibly the trend of increasing numbers of abortions among Japanese minors. Graph D-2 compares that trend with the dramatic overall drop in the number of induced abortions in Japan. These graphs indicate the reason why Ministry of Health officials are so concerned about the rising incidence of abortion among Japanese teenagers. Western influences have had a tremendous impact on Japanese youths, including the promotion of increased abortion and premarital sexual activity among youths, which is still at low levels as compared with Western nations, but is rising significantly as compared with past Japanese levels.[229]

Table E-1[230] shows the number of abortions performed by period of gestation in Japan. The far-right column indicates the percentage of abortions performed after twelve or more weeks for the years indicated. The percentage of these "late abortions" has generally dropped from eight percent in 1955 to six percent in 1986.

As Table E-2[231] shows, in the United States the number of late abortions (after twelve weeks) quickly dropped from about 15% to about 9%, where it has stabilized for more than a decade after the legalization of abortion. This significant number of late abortions, nearly 150,000 annually, may reflect an increased denial on the part of American women

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227. Appendix D. Sources: Japan Family Planning Association (based on official Japanese government data); *see generally* Interview with Haruo Kanogai, Director, Planning & Development, Japanese Family Planning Association, Tokyo, Japan (June 28, 1988) (notes on file with author).

228. Appendix D. Sources: Japan Family Planning Association (based on official Japanese government data); *see generally* Interview with Haruo Kanogai, Director, Planning & Development, Japanese Family Planning Association, Tokyo, Japan (June 28, 1988) (notes on file with author).

229. Kenji Hayashi, Note, *Adolescent Sexual Activities and Fertility in Japan*, 32 BULL. INST. PUB. HEALTH 88 (1983); *see generally* Interview with Kenji Hayashi, National Public Health Institute, Tokyo, Japan (June 1988).

230. Appendix E. Sources: MATERNAL AND CHILD HEALTH DIV., CHILDREN AND FAMILIES BUREAU, MINISTRY OF HEALTH AND WELFARE, STATISTICS RELATING TO MATERNAL AND CHILD HEALTH IN JAPAN 52 (1987); STATISTICS INFORMATION DEP'T, MINISTRY OF HEALTH AND WELFARE, 1986 EUGENIC PROTECTION LAW STATISTICS REP. 15 (1986).

231. Appendix E. Sources: Stanley K. Henshaw et al., *Characteristics of U.S. Women Having Abortions, 1987*, 23 FAM. PLAN. PERSP. 75, 79 table 5 (1991); Stanley K. Henshaw et al., *Characteristics of U.S. Women Having Abortions, 1982-1983*, 19 FAM. PLAN. PERSP. 5, 6 table 1 (1987); Stanley K. Henshaw et al., *Abortion in the United States, 1978-1979*, 13 FAM. PLAN. PERSP. 6, 17 table 10 (1981).

not wanting to accept the fact that they are pregnant. This denial is expected since most abortions are performed on single women, many of whom are minors.

Table F-1[232] shows statistics on the percentage of abortions performed for the reason of "physical or economic" health condition of the woman in Japan. This figure has remained steady at 99.8% since 1980 and has never dropped below 99.2% in the past thirty years.

Comparable data is not available for the United States. No agency of the federal government collects this information, and revealingly, the AGI does not regularly report the reasons behind a woman's choice to have an abortion.[233] However, at least one state, Utah, has required abortion providers to record the reasons given by women for obtaining abortions. Table F-2[234] provides this data. By process of elimination, well over 98% of all abortions are performed for reasons of personal choice or convenience. This data is consistent with the reports of isolated surveys of women having abortions in other locales.[235]

E. Attitudes About Abortion in Japan and the United States

1. Japanese Attitudes About Abortion

Japanese society allows, and many Buddhist sects encourage, women who have had abortions and their husbands to feel and express their grief,

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232. Appendix F. Sources: MATERNAL AND CHILD HEALTH DIV., CHILDREN AND FAMILIES BUREAU, MINISTRY OF HEALTH AND WELFARE, EUGENICS PROTECTION STATISTICS REP. (1991); MATERNAL AND CHILD HEALTH DIV., CHILDREN AND FAMILIES BUREAU, MINISTRY OF HEALTH AND WELFARE, EUGENICS PROTECTION STATISTICS REP. (1987).

233. The AGI aggressively collects and reports virtually every other conceivable type of information about abortion, abortion providers, and women who obtain abortion, so it is unlikely that this gaping hole in their regular research is unintentional. Only once has the AGI investigated and reported the reasons for abortions and the results revealed that only 1% of 1900 women seeking abortions in 1987 who responded to the survey indicated that rape or incest was a motivation, 7% identified a personal health problem as a motivation, and 13% mentioned concern about possible health problems of the fetus (but only 8% of women so indicating who provided further details had sought medical advice about their concerns, which were based on such things as drinking alcohol while pregnant). *See generally* Aida Torres & Jacqueline D. Forrest, *Why Do Women Have Abortions,* 20 FAM. PLAN. PERSP. 169 (1988).

234. Appendix F. Source: UTAH DEP'T OF HEALTH, INDUCED ABORTIONS IN UTAH (1978-1990 eds.).

235. *Id.*; *see also* Geraldine Faria et al., *Women and Abortion: Attitudes, Social Networks, Decision-Making*, 11 SOC. WORK IN HEALTH CARE 85 (1985) (stating that of 517 women seeking abortion, 0.8% gave reason as rape, 1.2% fear about pregnancy, and 6.0% physical problems; but 33.5% said they lacked parental readiness, 25.9% had financial problems, 15.3% had no partner, etc.).

sorrow, and sense of loss for the child.[236] These Buddhist sects in Japan provide a religious ritual or performance intended to assuage the grief and alleviate the regret. This ritual involves the practice of placing *mizuko Jizo* (statues of Jizo)[237] and observing *mizuyo kuyo* (requiems for the unborn).

Jizo is a *bodhisattva* (Buddhist saint) in the Buddhist pantheon who stands at the border of this life and the next, guarding the souls of the dead on the road to salvation. In Japan, Jizo has become the special guardian of stillborn, miscarried, or aborted children—*mizuko Jizo*—as they pass through the children's limbo.[238] For 200 years, parents of aborted children in Japan have erected and prayed before statues of Jizo to ease their conscience after having an abortion. In 1983, a Japanese newspaper reported that in Saitama-ken, Shiunzanji, a special *mizuko Jizo* temple, sold over 9,000 statues of Jizo priced at ¥80,000, ¥120,000, and ¥150,000.[239] In 1988, when the author visited Kamakura, then home to more than 50,000 Jizo statues, small Jizo statues were being sold in the Hase Kannon temple for ¥2,000 to ¥20,000.[240]

The religious memorial rites performed for the dead children are called *mizuyo kuyo*.[241] Sometimes the mothers or parents of aborted fetuses buy wooden prayer slats, called *ihai*. At one temple in the city of Kyoto, between 10,000 and 20,000 memorial slats are erected each year and then burned at the end of the year. These *ihai* typically cost ¥30,000 each or ¥40,000 for two. Mourners may take them home and pray before them.[242]

The messages left at the temples after the *mizuyo kuyo* ceremonies reveal that many who have procured abortions seek mercy and

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236. *See* Tamihiko Tonomura, *Atoning for Abortion*, ASAHI SHINBUN, Jan. 30, 1989, *reprinted in* ENGLISH IN HUMAN LIFE REV., Spring 1989, at 123; Kevin Flinn, *A Life Issue*, FAR EAST, Nov. 1983, at 3, 4-5.

237. *"Mizuko"* means aborted or miscarried child. *"Jizo"* refers to a Buddhist saint. *Mizuko Jizo* could be described as statues of "infant *Jizos.*" *See supra* notes 2-4 and accompanying text.

238. *Mizuko* literally means child of the water, or unseeing child. COLEMAN, *supra* note 63, at 60. *See also* KAMAKURA HASEDERA, THE HASE KANNON TEMPLE (1988) (on file with author).

239. Bruce Roscoe, *Booming Business of Terror*, DAILY YOMIURI, Jan. 30, 1983, at 5 (about $650 to $1250 at the writing of this Article).

240. At the writing of this Article was about $15 to $150.

241. Flinn, *supra* note 236, at 3-4.

242. At the writing of this article about $250 and $330, respectively. Anthony Zimmerman, Memorial Service for Aborted Children in Japan 3 (1983) (unpublished manuscript, on file with the author); Roscoe, *supra* note 239, at 5.

forgiveness. For example, a message might read, "My baby I am sorry. You came too early for us. I came here to apologize . . . I feel guilty. Please forgive your foolish father . . . ."[243] Others fear the harm that the angry spirits of aborted children might cause to their families' health, business, or social success. "I aborted my first baby. I want my second child to be free from any bad feeling that the first child might have . . . . We neglected this rite. Our business was bad. It is better since we came for *mizuyo kuyo*."[244]

In recent years there has been some public controversy over exploitation of *mizuko kuyo* practices by some unscrupulous priests and profiteers.[245] Some vulnerable, guilt-ridden women who have had abortions have been persuaded to spend enormous sums to placate the spirit of their aborted children or the offended deity. Periodically, Japanese newspapers run stories about such abusive practices and editorialize against con-artists masquerading as religious persons. But the legitimate Buddhist beliefs and practices are deeply entrenched and widely respected. Advertisements for memorial services and *mizuko kuyo* are commonplace, and *mizuko Jizo* statues abound. Even some Western women who have had abortions have found solace and comfort in the *mizuko Jizo* traditions of Japan.[246]

Public opinion surveys in Japan reflect this remarkably honest and healthy facet of the practice of abortion in Japan, an attitude that appears to be unique among developed nations. Since 1950, the Mainichi Newspaper Population Problems Research Council has conducted biennial surveys of popular opinion of abortion in Japan. The survey is administered in the form of a questionnaire distributed to the respondents at their homes by survey personnel.[247] Though not scientific, these surveys are extremely useful in examining how the Japanese feel about the practice of abortion in Japan.

As Graph G-1[248] indicates, the figures reflecting the percentage of women willing to admit that they have had an abortion, and the number of abortions to which they are willing to admit remained stable from the mid-1960s to the mid-1980s, but have swung somewhat since then.[249]

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243. Flinn, *supra* note 236, at 4-5.

244. *Id.* at 5.

245. COLEMAN, *supra* note 63, at 65-66.

246. *See supra* note 235; SWANSON, *supra* note 4, at 519.

247. COLEMAN, *supra* note 63, at 237.

248. Appendix G. Source: THE POPULATION PROBLEMS RESEARCH COUNCIL OF THE MAINICHI NEWSPAPERS, SUMMARY OF THE 2D-18TH NATIONAL SURVEYS ON FAMILY PLANNING (1952-86).

249. It is difficult to determine whether the number of admitted abortions is accurate.

Graph G-2[250] shows the percentage of respondents who indicated feelings of guilt about abortion; note that there has been a relatively steady upward trend since 1963. Likewise, there has been a significant upward trend in recent years in the percentage of respondents who indicated they felt sorrow for the fetus. The percentage who responded that they had no feelings about their abortion one way or the other has dropped from nineteen percent to only six percent.

Graph G-3[251] shows answers to questions about approval of abortion (either without limitation, under certain conditions, or complete disapproval). Note the profound consistency in the middle category—about two-thirds of the population surveyed have consistently approved abortion only under limited conditions. The number that approve it under any condition and the number who completely disapprove of it have remained constantly low.

Finally, Table G[252] shows answers to questions about conditions in which abortion should be permitted. The only condition that has received majority approval throughout the thirty-five years surveyed is protection of the mother's health. In this decade, overwhelming approval has also been expressed for abortion in cases of rape and hereditary defect. These three conditions—health of the mother, rape and hereditary defect—make up the three "hard cases." Overall, less than a majority have approved of abortion in cases where contraception fails or where bad economic conditions exist. However, in recent years, there has been a noticeable change of sentiment toward favoring abortion in those two circumstances as well.

2. Attitudes About Abortion in the United States

There is no widely practiced grieving process comparable to the Buddhist practices associated with Jizo for American women or men involved with an abortion.[253] Because abortion has been cloaked in the

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See supra notes 192-93 and accompanying text.

250. *Id.* Appendix G. Source: THE POPULATION PROBLEMS RESEARCH COUNCIL OF THE MAINICHI NEWSPAPERS, SUMMARY OF THE 2D-18TH NATIONAL SURVEYS ON FAMILY PLANNING (1952-86).

251. Appendix G. Source: THE POPULATION PROBLEMS RESEARCH COUNCIL OF THE MAINICHI NEWSPAPERS, SUMMARY OF THE 2D-18TH NATIONAL SURVEYS ON FAMILY PLANNING (1952-86); *see supra* notes 192-93 and accompanying text.

252. Appendix G. Source: THE POPULATION PROBLEMS RESEARCH COUNCIL OF THE MAINICHI NEWSPAPERS, SUMMARY OF THE 2D-18TH NATIONAL SURVEYS ON FAMILY PLANNING (1952-86).

253. There is a religious concept widely understood in the United States that provides

garb of "rights," the issue is presented in rather absolute terms—either one supports or opposes the "right" to abortion.[254]

The continuing efforts of state legislatures to enact various abortion restrictions, despite hostile judicial review, substantial litigation expenses, and potential liability for attorneys fees, demonstrate grassroots-level public dissatisfaction with the right of abortion articulated in *Roe v. Wade*. Between 1973 and 1988, state legislatures enacted more than 300 separate bills regulating abortion.[255] In 1992 alone, more than 300 bills regarding abortion were introduced in state legislatures, most of which proposed further regulations.[256]

Table H shows the results of the National Opinion Research Council's longitudinal survey of attitudes of Americans about abortion and other issues.[257] It and other reliable public opinion surveys have long shown that most Americans do not favor abortion-on-demand, nor do they favor absolute prohibition of abortion. Rather, their opinions depend on the circumstances surrounding the abortion.[258] Consistently, American public

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a method of recognition, acceptance of responsibility, remorse, and relief comparable to the Jizo practices in Japan. It is the Judeo-Christian concept of repentance. There is evidence that many women (significant in number though small in percentage) who have had an abortion have turned to religion and by the process of repentance have found personal peace. *See* MICHAEL T. MANNION, ABORTION AND HEALING 6-11, 17-23, 28-33, 61-65 (1986).

But repentance involves acceptance of guilt, and that is an unacceptable condition for persons who believe that they have a fundamental *right* to have (encourage or perform) abortions. Thus, the socially-acceptable American guilt-relief process of repentance is socially *unacceptable* in part because of the legal posture in which the nonregulation of abortion has been cast.

254. Religion and religiosity already are known to be the most reliable predictors of Americans' attitudes about abortion. *See, e.g.*, William Marsiglio & Constance L. Shehan, *Adolescent Males' Abortion Attitudes: Data from a National Survey*, 25 FAM. PLAN. PERSP. 162 (1993). Since abortion supporters are generally non-religious to begin with, and since religion is unmistakably associated with opposition to abortion, it is not surprising that advocates of abortion generally do not embrace the religious concept of repentance as a means of coping with the emotional consequences of abortion.

255. *See* Wardle, *supra* note 139, at 940 n.319.

256. *See* Terry Sollom, *State Legislation on Reproductive Health in 1992*, 25 FAM. PLAN. PERSP. 87 (1993).

257. Appendix H. Sources: Wardle, *supra* note 139, at 984 table C-3 (identifying the sources of the data including J. DAVIS, GENERAL SOCIAL SURVEYS 1972-84 (1984)).

258. Abortion polls that involve few questions with only two or three options "overestimate the proportions of respondents who either favor a ban on all abortions or who would allow abortion under all circumstances." Elizabeth Cook et al., *Measuring Public Attitudes on Abortion: Methodological and Substantive Considerations*, 25 FAM. PLAN. PERSP. 118 (1993). *See also* RAY J. ADAMEK, ABORTION AND PUBLIC OPINION

opinion has supported legal abortion in the "hard cases," such as when the mother's life or health is endangered, when the pregnancy has resulted from rape or incest, or when the fetus would be born with a severe birth defect. On the other hand, most Americans have consistently opposed abortions based on "social grounds," namely, to prevent the birth of unwanted or illegitimate children, or to limit family size.

Graph H-1 shows the results of a 1991 Gallup Poll of Americans' attitudes on acceptable reasons for abortion during the first three months of pregnancy.[259] Graph H-2 reflects the same poll regarding acceptable reasons for abortion but focuses on the results after the first three months of pregnancy. In both cases, the "hard reasons" for abortion receive much more support than the "social reasons;" none of the latter are supported by a majority of Americans, even in the first trimester of pregnancy. When gestational age is added as a consideration, only two of the "hard reasons" for abortion—to save maternal life or pregnancies resulting from incest—are supported by a majority of surveyed Americans.

The most significant revelation of this data is that the current American legal policy of "the right of abortion privacy," allowing minor regulation but no restriction of abortion until viability, and only optional restrictions thereafter, is at variance with the attitudes about abortion held by most Americans. Thus, there is a significant gap between the existing abortion doctrine and the social mores of most Americans.

VI. A COMPARISON OF ABORTION PRACTICES AND ATTITUDES IN JAPAN AND THE UNITED STATES

A. A Comparison of Abortion Data and Practices in Japan and the United States

There are six important similarities and four important differences in the contemporary abortion practices of Japan and the United States. The first similarity is that in both Japan and the United States, the "official" government reports of abortion incidence are somewhat underinclusive. Historically, the problem has been less severe in the United States primarily because the private family-planning industry has provided more reliable statistics on abortion. Despite the underinclusive reports in both Japan and the United States, the reported number, rate, and ratio of

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IN THE UNITED STATES (NRL Education Trust Fund 1986).

259. Appendix H. Source: The Gallup Organization, *Abortion and Moral Beliefs, A Survey of American Opinion* (commissioned by Americans United for Life, released Feb. 28, 1991).

abortions are very high—much higher than in comparable developed nations.[260]

Second, in significant ways the incidence of abortion in Japan is about a generation ahead of the United States. In Japan, the number of abortions, both officially reported and independently estimated, has been slowly but steadily declining for a few years. In the United States, the number of abortions has flattened out. Thus, the United States seems to be following the historical pattern established by Japan: an early dramatic rise in the number of abortions during the first decade following the institution of liberal abortion policies, a stabilization of the abortion right after the second decade, then a gradual decline in the abortion rate during the next twenty-five years.

Third, since the legalization of elective abortion, the number of children adopted in both Japan and the United States has fallen dramatically. Thus, the effect of liberal abortion policies on adoption has been the same in Japan and the United States—devastating. Obviously, in both countries, abortion is preferred over adoption as a method of dealing with the dilemma of "unwanted" children. Disposing of the unwanted burdens certainly is quicker and less embarrassing than arranging for other families to adopt them. Thus, in both countries, the legal policy and the practice illustrate that the prevailing attitude favors the convenience of the members of the present generation, who are both voters and consumers, over the primary needs of the future generation.

Fourth, public policy, in both Japan and the United States, tacitly accepts the use of abortion as a method of birth control. Neither country has any restriction on multiple abortions, and the rate of multiple abortions in both countries is extremely high. Thus, family planning policy in both countries accepts the use of abortion as a "safety net" for the failure or nonuse of contraceptives.

Fifth, both United States and Japanese abortion laws substantially promote the policy preferences and enhance the financial interests of medical professionals. Doctors enjoy monopolies in the provision of abortion services in both countries. Abortion is a quick and profitable kind of medical practice. The established medical associations in both countries resist any change in the current abortion law that would significantly restrict or regulate abortion.[261]

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260. Stanley K. Henshaw, *Induced Abortion: A Worldwide Perspective*, 18 FAM. PLAN. PERSP. 250, 252 (1986).

261. *See Abortion, in* 1 KODANSHA ENCYCLOPEDIA OF JAPAN 5 (1983); *Women in Japan, History of, in* 8 KODANSHA ENCYCLOPEDIA OF JAPAN 263 (1983); *see also* Roe v. Wade, 410 U.S. 113, 143 (1973) (discussing AMA support for elective abortion);

Sixth, in both countries, most people do not favor either allowing or prohibiting abortions for all reasons. Rather, in both countries, most people favor allowing abortion in "hard cases," but oppose abortion performed for social or financial reasons.

The most striking difference between abortion practices in Japan and the United States relates to sexual and marital responsibility. In Japan, where seventy percent of all abortions are obtained by married women, abortion is performed primarily to limit family size—abortion being considered a socially acceptable method for married couples to avoid having more than the socially acceptable two or three children. It is a "fall-back" method of family planning in a country where safe, but less reliable, contraceptives are widely used. Although more reliable methods of contraception exist, they are potentially more dangerous, and therefore, have historically been illegal.[262] As the Dalkon Shield-IUD fiasco has shown,[263] regulation of dangerous contraceptives is not as strict in the United States; lack of access to contraceptives or the legality of abortion certainly do not explain the permissive practice. In the United States, where eighty percent of all abortions are obtained by single women, the primary motivation is a desire to evade the commitments and responsibilities of marriage and parenthood.[264] Thus, abortion kills two

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Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 752 (1986) (suit by American College of Obstetricians and Gynecologists); *Amici* briefs supporting abortion were filed by the AMA and other medical organizations in Webster v. Reproductive Health Center, Inc., 492 U.S. 490 (1989), and Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992).

262. ATOH, THE USE OF INDUCED ABORTION IN RELEVANCE TO CONTRACEPTION USE IN SUMMARY OF 18TH NAT'L SURVEY OF FAMILY PLANNING 111, 122 (The Population Problems Research Council 1986). *See generally* COLEMAN, *supra* note 63, at 30-56.

263. The A.H. Robins company ("Robins") manufactured the Dalkon Shield, an IUD (intra-uterine device for preventing conception) inserted into an estimated 2.2 million American women (and up to one million women in other countries). The Dalkon Shield caused injuries in the women ranging from infection to death. After more than 10,000 women had filed civil suits against Robins, and several thousand had recovered judgments, the company filed for bankruptcy protection. Ultimately, more than 300,000 women filed claims for damages caused by the IUD. Screening of the claims left nearly 200,000 recoverable claims. The federal court approved a $2.475 billion dollar fund to compensate the injured women. *See* Morton Mintz, *When Expediency, Not Law Prevails*, LEGAL TIMES, Sept. 11, 1989, at 28.

264. It would be inaccurate to state that abortion is used for "family planning" in the United States since most of the women seeking abortion are not married or "planning" a family. The major reasons for abortion in the United States relate to "family prevention," evasion of parental obligations, and protection of promiscuous lifestyles. *See supra* note 233.

birds with one stone: the woman remains available to participate in extramarital or recreational sex and avoids having children at a time that is inconvenient to her or her male partner. In both countries, the rate and number of repeat abortions is exceptionally high, approaching one-half of all abortions in the United States and about two-thirds in Japan. Thus, it appears that in both countries abortion is used as a convenient "fall-back" method of birth control.

Second, the impact of abortion on sexual behavior differs in America and Japan. In Japan, abortion has led to a one-half drop in the number and rate of children born out of wedlock. But in the United States, the number of children born out of wedlock has doubled since *Roe v. Wade*. There are several possible explanations for this discrepancy. Cultural differences in attitudes toward premarital sexual activity probably explain part of the discrepancy; the widespread social acceptance of out-of-wedlock birth in the United States, contrasted with the strong social stigma on extramarital births in Japan, also contributes to the discrepancy.[265] In addition, there are strong cultural influences, such as familial influences and social morality, that continue to discourage extramarital sexual behavior in Japan. Conversely, in America, not only are the traditional influences that discourage extramarital sex waning, but the popular culture and media affirmatively encourage extramarital sexual behavior. Finally, the abortion law in Japan conveys the message that abortion is a serious matter, implying that the conduct creating the dilemma for which abortion is needed is serious. In the United States, the privacy doctrine may be translated by immature persons as an endorsement of the "I-can-do-whatever-I-want-to-do" attitude conducive to sexual and parental irresponsibility.

Third, in Japan, about ninety-four percent of all abortions are performed in the first eleven weeks of gestation, measured from the last menstrual period. In the United States, only about ninety percent of all abortions are performed within the first twelve weeks from the last menstrual period. Thus, the percentage of late-pregnancy abortions in the United States is roughly twice as great as in Japan.

Fourth, in Japan, the numbers, rates, and percentages of abortions among minors are increasing, but they are only a small fraction of the teenage abortion statistics in the United States. Because of other cultural reasons, such as the pronounced emphasis on sex for American youth and

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265. Differences in the welfare systems probably explains some of the differences in births out of wedlock. The welfare programs of the United States provide economic support for women that give birth to children out of wedlock and to their children, which could be perceived as an economic incentive for out-of-wedlock births.

adults, teenage abortions in the United States are dramatically higher than in Japan. In the United States, the family planning industry views abortion by sexually active pregnant teens as part of the solution to the problem of acceptable teenage promiscuity. In Japan, the increased incidence of abortion among teens is viewed as a serious social problem, and abortion is therefore not encouraged among minors.

B. A Comparison of Attitudes About Abortion in Japan and the United States

Broad social values influence how abortion and abortion laws are received and justified in Japan and the United States. Four fundamental value contrasts are noteworthy. The first conceptual difference between abortion justifications in Japan and the United States relates to the societal influence of the value of equality of an individual human life. Japan has a history of being a hierarchical/vertical society; the United States historically has aspired to be an egalitarian/horizontal society. Thus, in Japan, justification for abortion has been expressed in hierarchical terms that rank the relative value of lives.[266] For example, maintaining the mother's *quality of life* is a significant justification for abortion in Japan inasmuch as all facets of the mother's life are valued more than that of the life of the fetus; just as all facets of a husband's life would have traditionally been valued more than that of his wife's life; or facets of a warrior's life were valued more than a peasant's life. However, the growing gap between the large percentage of Japanese women who admit to feeling "guilty" about abortion or feeling "sorry for the fetus" and the small percentage of women who appear unaffected suggests that a new egalitarian value system may be quietly emerging in Japan.

In the United States, since at least 1776, the social, moral, and legal tradition is that all persons are created equal. Thus, the first great abortion reform legislation, which swept the country in the mid-nineteenth century and prohibited abortion during the entire pregnancy rather than only after quickening, was implicitly based on the assumption that human beings are entitled to equal protection from the very beginning of incipient life.[267] Since those laws were considered and passed during the same time that the anti-slavery laws and constitutional amendments were adopted, the egalitarian basis for the traditional American proscription of nontherapeutic abortion is firmly established. The egalitarian nature of American society

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266. *See supra* notes 17 and 18 and accompanying text.

267. *See supra* notes 87-89 and accompanying text.

has forced advocates of abortion to adopt a posture in which the living, growing, and unborn fetuses are deemed "nonpersons,"[268] because if the unborn were deemed to be actual or incipient members of the community ("persons," in legal terminology), they would presumptively be entitled to equal protection for their lives under basic and pervasive notions of equality. Perhaps because of the irreconcilable inconsistency of American abortion doctrine with basic American notions of equality, the justifications of abortion-on-demand in the United States are becoming more hierarchical. Thus, some feminist justifications arguing for abortion-on-demand in terms of female empowerment emphasize the greater worth of the mother, as compared to the unborn child, and totally exclude the fetus from consideration in analysis.[269] Thus, while Japanese are apparently becoming more egalitarian in their attitudes toward abortion, the American doctrine is becoming more hierarchical.

Second, the practice of abortion in Japan relates to the sense of fatalistic destiny that has long characterized the religious traditions of that country. The philosophy of acceptance, that there is nothing one can do about a bad fortune, is a concept that has been a part of Buddhism and Confucianism for centuries.[270] The same quality and social character that contemporary writers often mistakenly identify as "dependence" is the modern manifestation of this ancient notion of destiny, acceptance, and fatalism. In this perspective, abortion is "tragically accepted" by families who feel compelled to have abortions to conform to national family limitation stereotypes or because of harsh economic limitations, in spite of their love or desire for children.

In the United States, the policy of abortion-on-demand has been tied to an ethic of individualism, privacy, empowerment, and choice.[271] The

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268. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 150-52, 157 (1973) (fetus is not a "person"). Comparing development in abortion law with development in the law of slavery and racial equality, which were historical contemporaries in the mid-nineteenth century America, the emergence in 1973 of the "nonperson" justification for denying protection to vulnerable prenatal human beings is a remarkable and ironic ideological throwback.

269. *See, e.g.*, Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 79-85 (1990); Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1242-62 (1992); Gloria Steinem, *The Ultimate Invasion of Privacy*, MS., Feb. 1981, at 43-44.

270. *See generally* NODA, *supra* note 39, at 172-74; UPHAM, *supra* note 167, at 67-69, 160, 218.

271. *See Roe*, 410 U.S. at 153; Planned Parenthood v. Casey, 112 S.Ct. 2791, 2831 (1992); Laurence Tribe, *Foreword: Toward a Model of Roles in the Due Process of Law*, 87 HARV. L. REV. 1 (1973).

theme of the rugged individual who is free to escape the consequences of an undesired fate portrays abortion as a beneficial avenue of escape from a bad destiny. Thus, in both Japan and the United States, there are tensions and conflicts between the practice of abortion and underlying values; in Japan, it produces a sense of tragic necessity and regret, while in America, it produces suppressed guilt disguised as liberation.

Third, the Japanese practice of abortion allows for mourning and grieving.[272] Acknowledgement of responsibility is socially encouraged in Japan. The result—open ritual grieving for abortion—is beneficially and compassionately healing with respect to the feelings of the woman and is also very honest by recognizing that a child's life has been sacrificed. The American approach is to deny responsibility, suppress guilt, and repress mourning. Guilt or grief is deemed a sign of weakness. Feminists shouts of "no apology" and "no shame" and the legal principle that abortion is a fundamental constitutional right, intimidate American women and obstruct their grieving.[273] However, many American women who have abortions are deeply ambivalent; many others grieve the loss of their children.[274] The denial-of-grief pattern may be directly related to the problem of replacement pregnancies and multiple abortions, at least among American teens.[275] The American feminist denial-of-grief approach may

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272. *See supra* part V.E.1.

273. *See, e.g.*, DAVID C. REARDON, ABORTED WOMEN: SILENT NO MORE x-xii, 22, 27-40, 73 (1987); Michael W. McConnell, *How Not to Promote Serious Deliberation About Abortion*, 1991 U. CHI. L. REV. 1181, 1191 (criticizing Laurence Tribe's insensitive advocacy of abortion); OUR BODIES, OURSELVES (1973). *See also* Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 124 (1989) (blaming anti-abortion laws and activists for creating political climate in which women dare not express their grief because they are defensive about abortion). *See generally* SARAH BETTENWEISER & REVA LEVINE, *Breaking Silence*, *in* FROM ABORTION TO REPRODUCTIVE FREEDOM 121, 122 (Marlene Gerber Fried ed. 1990) ("While the pro-choice movement has been on the defensive, it has felt the need to minimize the emotional aspects of abortion . . . .").

274. *See* MAGDA DENES, IN NECESSITY AND SORROW 57, 60-61, 89-90 (1976); LINDA BIRD FRANCHE, THE AMBIVALENCE OF ABORTION 60, 64, 75, 84-100 (1978); REARDON, *supra* note 273, *passim*; Kenneth McAll & William P. Wilson, *Ritual Mourning for Unresolved Grief After Abortion*, 80 S. MED. J. 817 (1987); Sharon Gustafson, *Regulating Adoption Intermediaries Ensuring that the Solutions Are No Worse than the Problem*, 3 GEO. J. LEGAL ETHICS 837, 841 n.19 (Spring 1990) (doctor who has performed approximately 20,000 abortions notes grief after abortion—sometimes a year or two later); Larry G. Peppers, *Grief and Elective Abortion: Breaking the Emotional Bond*, 18 OMEGA 1, 7 (1987) (generally grieving follows abortion, and "some women suffer tremendous emotional trauma").

275. *See* Nancy H. Horowitz, *Adolescent Mourning Reactions to Infant and Fetal Loss*, 59 SOC. CASEWORK 551, 556 (1978).

be politically profitable in the short-term, but considering the long-term peace and wholeness of the lives of the women affected by abortion, it is jejune and callous.

Fourth, in America, the approach to abortion has focused on "rights." In Japan, abortion regulation has focused on relationships. The Japanese approach is more sensitive to the non-economic, intangible dimensions of life, especially bonds and relationships, and is more holistic. It is designed to produce compromise and reconciliation and to accommodate, at least to some extent, the interests of all persons involved in the relationship. The American approach tends to focus on conceptualisms and abstractions, where principle and form are given precedence over feelings and substance, and absolutes allow for no principled compromise.

Thus, in Japan, abortion, as a practice, has been justified in terms of social necessity, and the current practice reflects a need to conform to what is expected of a "good Japanese"—no more than two or three children per family. In America, the practice of abortion has been anti-social and justified in terms of strict individual values; the practice of abortion-on-demand has been articulated in terms of privacy and the "right to be let alone,"[276] thereby rejecting any social interest.

VII. CONCLUSION

This Article has shown that despite broad similarities of permissive abortion policies, the abortion laws of Japan and the United States are significantly different. Japanese abortion law is less absolute, more flexible, recognizes and balances more interests, more democratic, more reflective of existing social mores, and more protective of late-term prenatal life than the abortion law of the United States. Japanese abortion law, at least facially, establishes a moral position; the American abortion doctrine is emphatically amoral. The current Japanese abortion doctrine is more consistent with historical approaches and values than is the current American abortion doctrine. Culturally, politically, and legally, the

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> Conceiving again at a median . . . of nine and one-half months for the Abortion Group suggests that many may have had difficulty accepting the previous loss. Twenty-five said that they purposely became pregnant again as a replacement for the previous loss. Thirteen did not admit planning the subsequent pregnancy, but avoided contraception even though they were aware of the consequences of doing so.

Id.

276. Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Japanese abortion doctrine has more legitimacy and provides more privacy-in-practice than the abortion doctrine of the United States. The Japanese abortion law is more open to modification, discussion, and compromise than the American abortion doctrine.

In terms of abortion practices, it appears that the Japanese experience is about one generation ahead of the American experience, and that the pattern of abortion incidence in the United States seems to be following the Japanese pattern. Abortion is used for birth control in both countries, but in Japan, it is used by married women to limit family size, whereas in the United States, it is used by single women to destroy the lifestyle-threatening consequences of extramarital and recreational sexual activity. In Japan, abortion is perceived and practiced as a matter of culturally-defined family and parental responsibility; in the United States, it is done to evade marital and parental responsibility. There is a higher percentage of late-term abortions in the United States, and teens account for a larger proportion of American abortions than in Japan. Repeat abortions are common in both countries. In Japan, permissive abortion has resulted in fewer illegitimate births (by half) and a lower rate of illegitimate births (by half), whereas in the United States, the number and rate of illegitimate births has doubled since permissive abortion was mandated. However, in both Japan and the United States, the number of adoptions has dramatically fallen since the modern adoption of abortion-on-demand policy.

In both countries, few people favor either abortion-for-all-reasons or abortion-for-no-reasons. Most Japanese and Americans favor abortions for "hard cases" only. The most striking difference about attitudes regarding abortion is the willingness to grieve and acknowledge guilt in Japan. In America, recognition of grief is socially unacceptable in the "right-to-abortion-privacy" culture.

Doubtless, differences in laws and legal policy account for some discrepancy in abortion practice and attitude in Japan and the United States. Also, differences in culture must account for some of the discrepancy in abortion practice and attitude. It is difficult to precisely determine which differences are due to laws and which are due to other aspects of culture. Undoubtedly, the question of effect of abortion laws on abortion practices and attitudes merits further examination. The serious comparative study of abortion law and practice, now just beginning to receive scholarly attention, is long overdue.

This comparison of Japanese and American abortion law confirms Professor Glendon's observation that "[f]rom the comparative point of

view abortion policy in the United States appears singular"[277] because in America there is "less regulation of abortion in the interest of the fetus,"[278] not only than "any other western nation," but also less than one of the oldest and largest Asian nations as well. Although Japan is quite different from the United States "politically, socially, culturally" and in terms of "concern about population expansion," clearly in Japan legal "indifferen[ce] to unborn life" is not as great as it is in the United States.[279] This study has confirmed Professor Glendon's observations that the abortion laws of the United States are the most extremely individualistic laws known.[280] It also validates Professor Glendon's observation that the absolutism and radical individualism of the American abortion laws have contributed to polarization of the issue in the United States.[281] Clearly, there is much that wise lawmakers in the United States could learn from Japan's, and other countries', abortion laws and experiences.

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277. GLENDON, *supra* note 5, at 24.

278. *Id.* at 2.

279. *Id.* at 23-24.

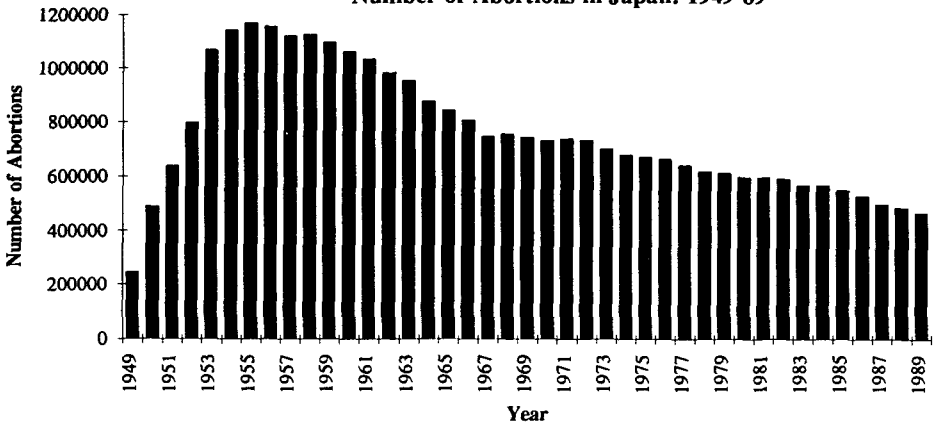
280. *See supra* notes 6-9 and accompanying text.

281. Professor Glendon has criticized the U.S. Supreme Court for stifling the "potentially creative and collaborative processes" of legislation. GLENDON, *supra* note 5, at 45. Moreover, she suggests that "[w]hen legislative processes are allowed to operate, political compromise is not only possible but typical." *Id.* at 40. *See also id.* at 24-25.

APPENDIX A

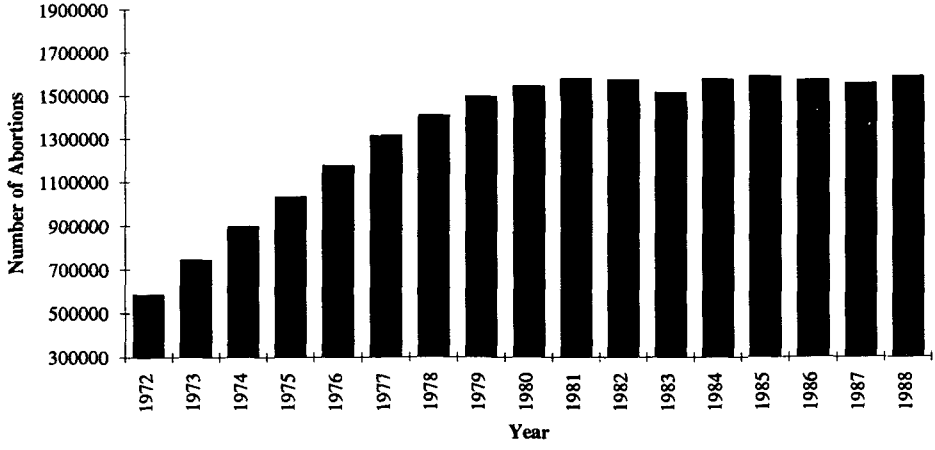
Graph A-1

Number of Abortions in Japan: 1949-89



Graph A-2

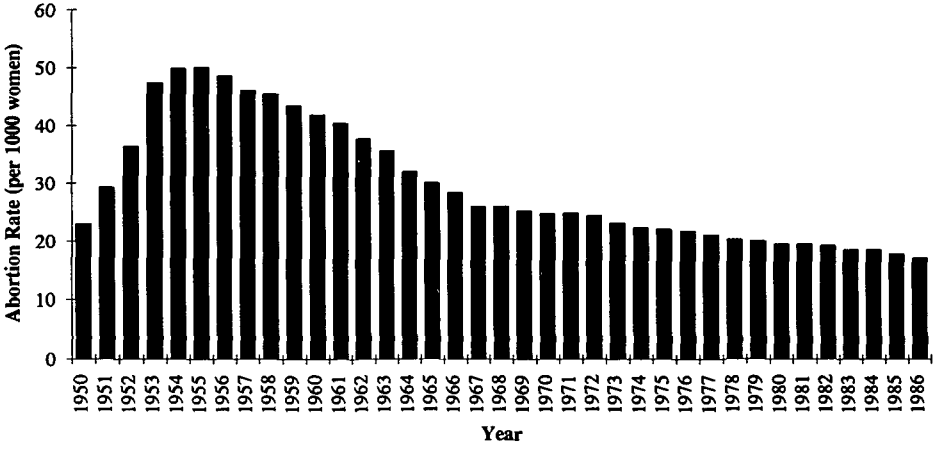
Number of Abortions in the United States: 1972-88



APPENDIX B

Graph B-1

Abortion Rate in Japan: 1950-86



Graph B-2

Abortion Rate in the United States: 1973-88

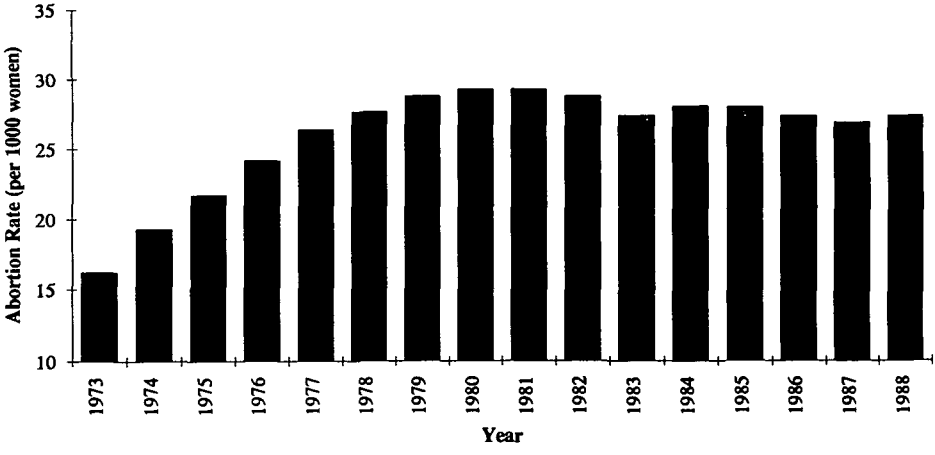


Table B-1

Percentage of Women Obtaining Abortions Having Second or More Abortions in the United States

1972	-----
1973	-----
1974	15.2%
1975	21.5%
1976	22.7%
1977	26.6%
1978	29.5%
1979	31.7%
1980	33.0%
1981	35.1%
1982	36.8%
1983	38.8%
1984	-----
1985	40.5%
1986	41.4%
1987	42.2%

Table B-2

Percentage of Women Having Abortions Who Are Not Married in the United States

1972	-----
1973	71.0%
1974	72.4%
1975	73.7%
1976	75.4%
1977	77.2%
1978	76.5%
1979	78.5%
1980	79.4%
1981	81.1%
1982	80.9%
1983	81.3%
1984	-----
1985	-----
1986	-----
1987	82.4%

APPENDIX C

Table C-1
(part 1)

Illegitimate Births, Illegitimate Birth Rate, and Adoptions in Japan: 1948-90

Year	Illegitimate Births	Illegitimate Birth Rate (percentage)	Adoptions
1948	----------	----------	39,530
1949	----------	----------	44,699
1950	----------	----------	39,115
1951	----------	----------	----------
1952	39,622	2.0	----------
1953	35,036	1.9	----------
1954	30,899	1.8	----------
1955	29,018	1.7	28,530
1956	25,895	1.6	----------
1957	23,429	1.5	----------
1958	23,051	1.4	----------
1959	21,649	1.3	----------
1960	19,612	1.2	----------
1961	18,438	1.2	----------
1962	17,962	1.1	----------
1963	17,427	1.1	----------
1964	17,229	1.0	----------
1965	17,452	1.0	16,157
1966	15,523	1.1	----------
1967	16,977	0.8	----------
1968	17,999	1.0	----------
1969	17,510	0.9	----------

Table C-1
(part 2)

Illegitimate Births, Illegitimate Birth Rate, and Adoptions in Japan: 1948-90

Year	Illegitimate Births	Illegitimate Birth Rate (percentage)	Adoptions
1970	17,982	0.9	9,800
1971	17,278	0.9	----------
1972	17,724	0.9	----------
1973	17,730	0.8	----------
1974	16,547	0.8	----------
1975	15,266	0.8	6,103
1976	14,207	0.8	----------
1977	13,812	0.8	----------
1978	13,164	0.8	----------
1979	12,857	0.8	----------
1980	12,548	0.8	3,727
1981	13,201	0.9	3,550
1982	13,076	0.9	3,290
1983	13,862	0.9	3,138
1984	14,747	1.0	3,056
1985	14,168	1.0	2,804
1986	13,398	1.0	2,764
1987	13,138	1.0	2,348
1988	13,324	1.0	1,820
1989	12,826	1.0	1,588

Table C-2

Illegitimate Births, Illegitimate Birth Rate, and Adoptions in the United States: 1972-86

Year	Illegitimate Births	Illegitimate Birth Rate (percentage)	Adoptions Unrelated
1972	403,200	12.4	65,335
1973	407,300	13.0	59,200
1974	418,100	13.2	49,700
1975	447,900	14.3	47,700
1976	468,100	14.8	-----
1977	515,700	15.5	-----
1978	543,900	16.3	-----
1979	597,800	17.1	-----
1980	665,747	18.4	-----
1981	686,605	18.9	-----
1982	715,227	19.5	50,720
1983	737,893	20.3	-----
1984	770,355	21.0	-----
1985	828,174	22.0	-----
1986	878,477	23.4	51,157
1987	933,013	24.5	-----
1988	1,005,299	25.7	-----
1989	1,094,200	27.1	-----

APPENDIX D

Table D-1

Induced Abortions by Age of Women in Japan: 1955-89

Year	Under 20	20-24	25-29	30-34	35-39	40-44	45-49	Over 50
1955	14,475	181,522	309,195	315,788	225,152	109,652	13,027	268
1960	14,697	168,626	304,100	278,978	205,361	80,716	9,650	253
1965	13,303	142,038	235,458	230,352	145,583	68,515	6,611	237
1970	14,314	141,355	192,866	187,142	134,464	54,101	6,656	162
1975	12,123	111,468	184,281	177,452	123,060	56,634	5,596	208
1980	19,048	90,337	131,826	177,506	123,277	50,280	5,215	132
1981	22,019	90,523	123,825	185,009	118,528	50,724	5,246	141
1982	24,478	90,257	113,945	181,148	121,809	53,133	5,095	127
1983	25,843	89,235	103,597	165,680	126,215	52,862	4,539	104
1984	28,020	90,293	101,304	155,376	135,629	53,571	4,366	117
1985	28,038	88,733	95,195	142,474	139,594	51,302	4,434	94
1986	28,424	84,931	90,479	130,218	141,672	47,299	4,511	121
1987	27,542	81,178	86,663	117,866	131,514	48,262	4,408	105
1988	28,596	82,585	83,734	110,868	123,387	52,477	4,241	83
1989	29,675	83,931	79,579	103,459	111,373	54,409	4,237	72

Table D-2

Rate of Abortions (per 1,000 females) by Age of Women in Japan: 1955-86

Year	Under 20	20-24	25-29	30-34	35-39	40-44	45-49
1955	1.2	43.1	80.8	95.1	80.5	41.8	5.8
1960	1.4	40.2	73.9	74.0	62.7	29.4	3.8
1965	1.6	31.1	56.0	56.0	38.8	21.2	2.5
1970	2.0	26.4	42.2	44.7	32.9	14.7	2.1
1975	1.8	24.7	34.3	38.4	29.2	13.8	1.5
1980	3.2	23.3	29.3	33.2	26.8	12.0	1.3
1982	4.1	23.2	27.9	33.3	26.8	12.2	1.2
1983	4.5	22.8	26.1	32.3	26.3	11.8	1.1
1984	4.9	22.9	25.8	32.7	26.9	11.5	1.1
1985	5.1	22.0	24.6	31.5	26.2	11.2	1.1
1986	5.4	21.3	23.5	30.4	25.2	10.9	1.1
1987	5.8	19.8	22.4	28.9	24.3	10.7	1.0
1988	5.9	19.6	21.6	28.0	24.1	11.0	1.0
1989	6.1	19.5	20.4	26.4	23.5	10.8	0.9

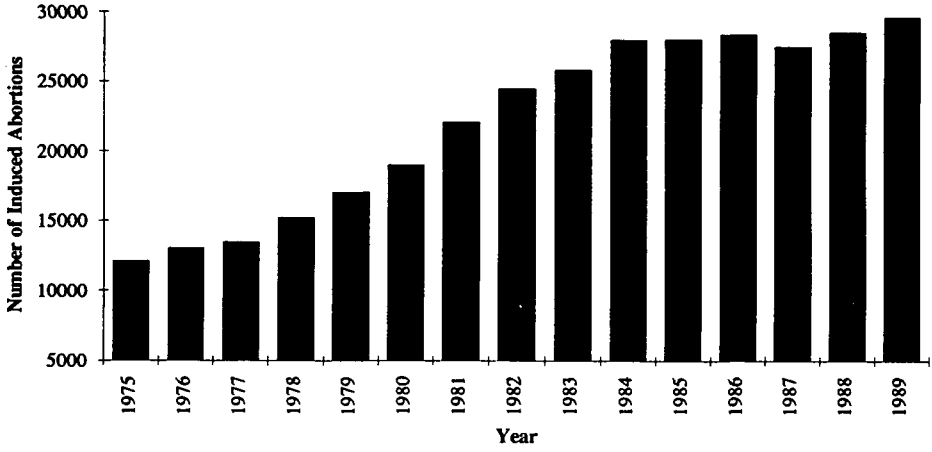
Table D-3

Numbers and Rates of Induced Abortions in the United States by Age of Women Having Abortions

Year	Age Group	Number of Abortions	Rate/1000
1988	<20	406,370	45.5
	20-24	519,600	54.2
	25-29	347,250	31.8
	30-34	197,210	18.1
	35-39	95,870	9.9
	40 or >	24,450	3.0
1987	<20	395,910	43.8
	20-24	518,290	52.5
	25-29	337,450	30.8
	30-34	191,540	17.9
	35-39	93,030	9.8
	40 or >	22,890	2.9
1980	<20	-------	44.4
	20-24	-------	51.4
	25-29	-------	30.8
	30-34	-------	17.1
	35-39	-------	9.3
	40 or >	-------	3.5
1977	15-19	397,320	38.2
	20-24	450,900	45.3
	25-29	247,360	27.8
	30-34	124,720	16.0
	35-39	61,870	9.8
	40 or >	22,060	3.8

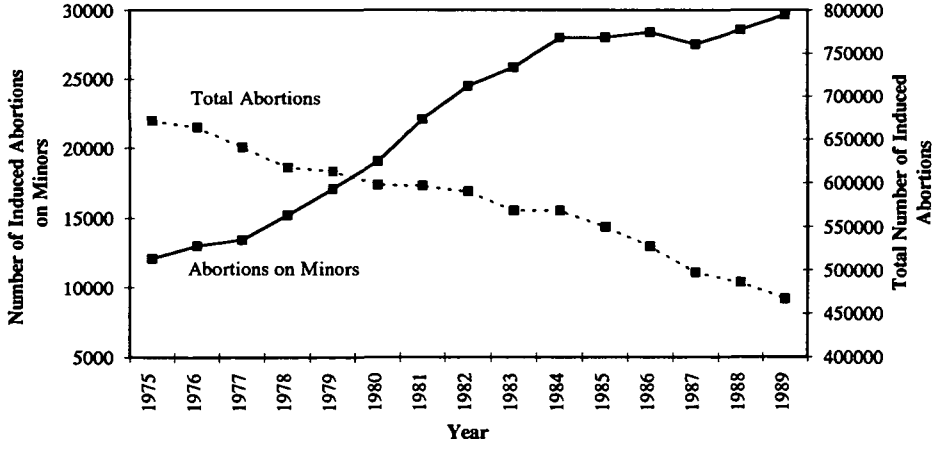
Graph D-1

Number of Induced Abortions on Females Under the Age of 20 in Japan: 1975-89



Graph D-2

Total Number of Abortions vs. Number of Abortions on Minors in Japan: 1975-89



APPENDIX E

Table E-1

Induced Abortions by Period of Gestation in Japan: 1955-86

Year	Under 8 Weeks	8-11 Weeks	12-15 Weeks	16-19 Weeks	20-23 Weeks	24-27 Weeks	% at 12+ Weeks
1955	555,463	517,861	35,710	30,190	22,094	8,358	8%
1960	545,000	443,979	29,183	20,592	17,081	6,846	7%
1965	460,013	335,920	19,028	13,282	10,063	3,910	6%
1970	408,182	290,198	14,795	9,280	6,309	2,458	5%
1975	399,423	250,194	10,907	5,606	3,625	1,215	9%
1980	304,398	258,621	20,634	7,849	5,991	----	6%
1982	305,528	250,286	19,474	8,505	6,069	----	6%
1983	296,280	240,091	17,841	7,913	5,715	----	5%
1984	296,564	237,449	18,439	9,178	6,852	----	6%
1985	285,704	228,159	18,323	10,047	7,362	----	7%
1986	276,374	217,392	17,148	9,566	6,867	----	6%
1987	260,783	204,312	16,571	9,572	6,171	----	7%
1988	257,502	197,210	16,170	9,200	5,778	----	6%
1989	250,090	187,397	15,442	8,449	5,343	----	6%

Table E-2

Percentage of Abortions by Age of Gestation of Fetus at Time of Abortion in the United States (measured by last menstrual period)

Weeks of Gestation	1987	1985	1983	1978	1973
8 or <	50.8	51.1	50.3	50.2	38.2
9-10	26.7	26.8	26.9	27.6	29.7
11-12	12.5	12.4	13.3	13.3	17.5
13-15	5.8	5.7	5.3	4.5	6.0
16-20	3.6	3.5	3.4	3.6	7.2
21 or >	0.6	0.5	0.8	0.8	1.4

APPENDIX F

Table F-1

Percentage of All Abortions in Japan Performed for Health or Economic Necessity Reasons

Year	Percentage of Abortions for Health or Economic Reasons
1988	99.8%
1987	99.8%
1986	99.8%
1985	99.8%
1980	99.8%
1975	99.4%
1970	99.2%
1965	99.7%
1960	99.7%

Table F-2

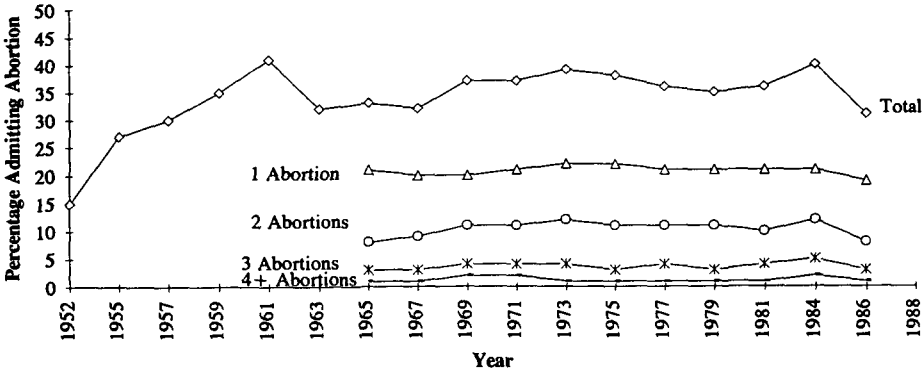
Reported Reasons for Abortion in Utah

		Abortions performed because of:				
Year	Total Performed	Maternal Life	Fetal Malform.	Rape	Incest	After 20th Week
1978	3,130	18	7	26	4	None
1979	3,697	13	4	37	2	None
1980	4,086	10	9	28	2	None
1981	3,842	18	17	26	0	None
1982	3,987	19	11	21	2	None
1983	3,778	22	15	17	1	None
1984	4,022	21	22	27	0	1
1985	4,129	29	25	33	1	None
1986	4,450	36	30	30	1	None
1987	5,556	21	29	31	3	5
1988	4,732	20	20	24	3	None
1989	4,950	16	21	27	1	6
1990	4,786	21	28	56	1	4
	---	---	---	---	---	---
Total Number:	54,145	264	238	383	21	16
(percent):	(100%)	(0.49%)	(0.44%)	(0.71%)	(0.04%)	(0.03%)

APPENDIX G

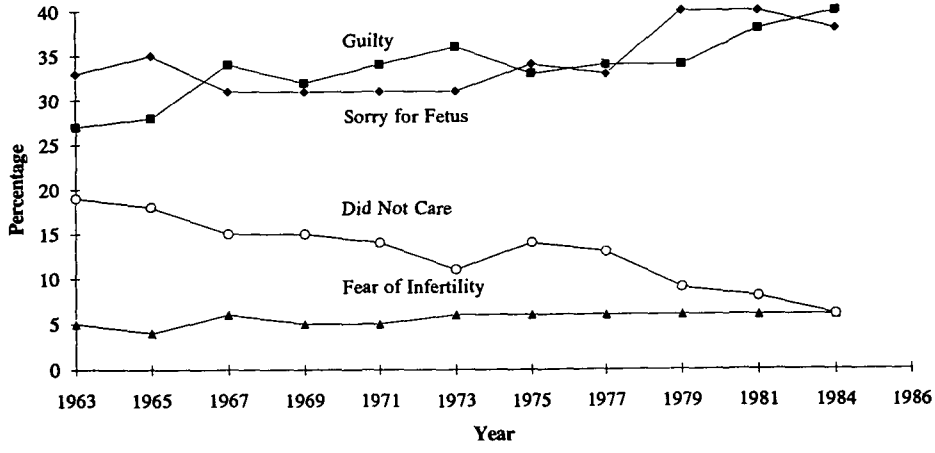
Graph G-1

Number of Japanese Women Admitting to Having an Abortion (by percent): 1952-88



Graph G-2

Feelings of Japanese Women Regarding Abortions Received (by percent): 1963-84



Graph G-3

Percentage of Japanese Married Women Who Approve of Abortion: 1965-86

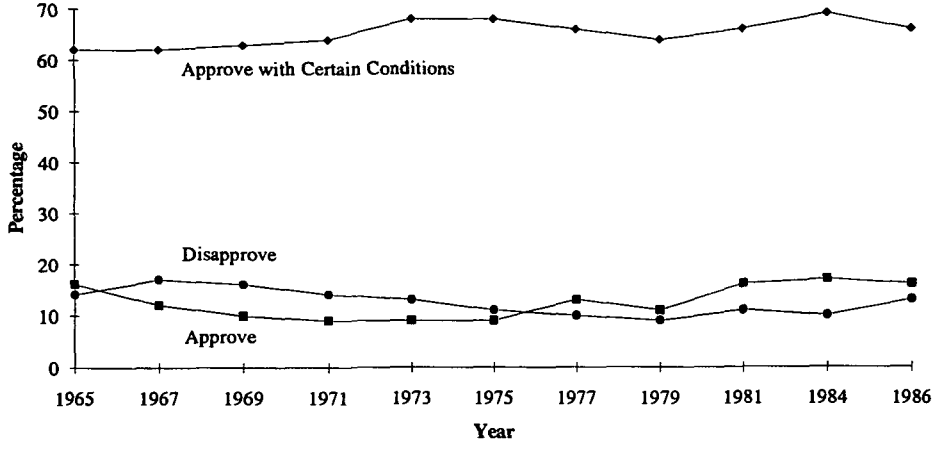


Table G

Japanese Opinion Regarding Conditions Under Which Abortion Should Be Permitted (percentage of women approving)

Year	Contraceptive failure	Bad Economic conditions	Mother's health	Rape	Hereditary defect
1951	----------	38	59	44	61
1953	----------	35	53	47	50
1957	----------	31	54	51	47
1959	13	30	52	40	44
1961	----------	----------	----------	----------	----------
1963	----------	----------	----------	----------	----------
1965	----------	----------	88	31	29
1967	----------	----------	84	30	24
1969	----------	----------	84	32	30
1971	----------	----------	84	33	25
1973	----------	----------	85	35	27
1975	----------	----------	85	35	26
1977	----------	----------	84	37	24
1979	----------	----------	----------	----------	----------
1981	28	37	----------	84	----------
1984	34	50	98	97	77
1986	47	72	----------	----------	95
1988	----------	----------	----------	----------	----------

APPENDIX H

Table H

National Opinion Research Council (University of Chicago): Percentage of Respondents Favoring Specific Circumstances as Legal Grounds for Abortions.*

Question: "Please tell me whether or not you think it should be possible for a pregnant woman to obtain a legal abortion . . .

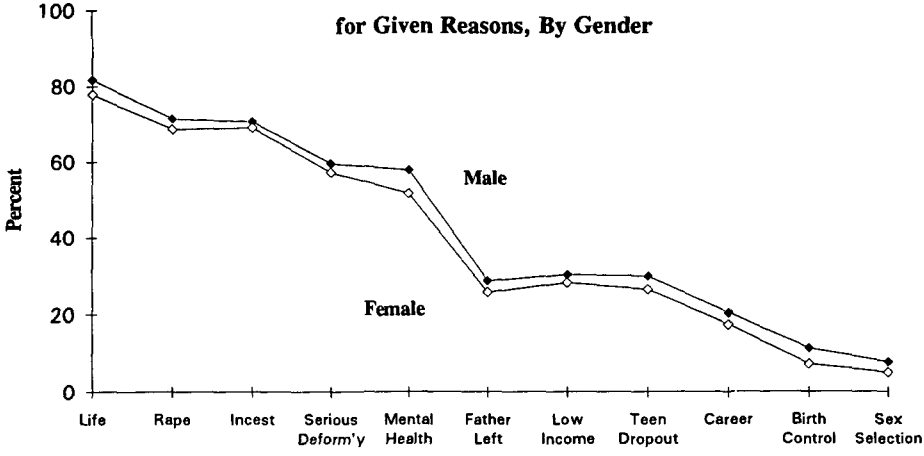
1) If the woman's own health is seriously endangered by the pregnancy?"
2) If she became pregnant as a result of rape?"
3) If there is a strong chance of serious defect in the baby?"
4) If the family has a very low income and cannot afford any more children?"
5) If she is not married and does not want to marry the man?"
6) If she is not married and does not want any more children?"
7) If the woman wants it for any reason?" (not asked prior to 1977)

	1965	1972	1973	1974	1975	1976	1977	1978	1980	1982	1983	1984	1985	1987	1988
1)	73	88	90	90	88	89	88	88	88	89	85	87	87	88	86
2)	59	74	80	83	80	80	80	80	80	83	78	77	78	80	77
3)	57	74	82	83	80	82	83	80	80	81	75	77	76	79	76
4)	22	46	52	52	50	51	52	45	50	50	41	44	42	45	40
5)	18	40	47	48	46	48	47	40	46	47	37	43	40	41	39
6)	16	38	46	45	44	45	44	39	45	46	37	41	39	41	39
7)	---	---	---	---	---	---	36	32	39	39	32	37	36	39	35

*The results represent the number of "yes" answers to the total number of "yes," "no," "don't know," and "no response" answers.

Graph H-1

Acceptability of Abortion in the United States During the First Three Months for Given Reasons, By Gender



Graph H-2

Acceptability of Abortion in the United States After the First Three Months for Given Reasons, Whole Sample