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Abortion in South Africa and the United States: An Integrative, Contrastive Comparative Analysis of the Effect of Legal and Cultural Influences on Implementation of Abortion Rights

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ABORTION IN SOUTH AFRICA AND THE UNITED STATES:

An Integrative, Contrastive Comparative Analysis of the Effect of Legal and Cultural Influences on Implementation of Abortion Rights

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"It is the way in which legal rights are translated into reality and the way they are supplemented by social change that determine whether they change women’s lives."

Thesis

Despite similarly progressive abortion rights laws, women in South Africa and the U.S. experience completely different levels of access to legal and safe abortions. In this paper, I will seek to explain the reasons for this disparity by describing the ways in which natural law has influenced the application of law in the U.S. and South Africa while examining the role of cultural values in the realization of abortion rights. I will take an integrative approach to explain ideological similarities and a contrastive approach to denote the cultural differences that have led to a de facto marginalization of South African women as compared to American women concerning access to abortions.

Introduction to Legal History and Ideology

Both the U.S. and South Africa take a teleological approach to abortion law due to their natural law traditions. Prior to current abortion law, the natural law tradition postulated that abortion was immoral and therefore always wrong. This shared historical attitude toward abortion can be traced to the English, who colonized both countries, furthering this ideology in the process. English legal scholars like Bracton, Fortescue, Coke, and St. Germain promoted the

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idea of natural law in the writings, which often had a great impact on the legal field and the English culture in general, which also translated to colonies.²

**Background/Legal Structure of South Africa and the U.S.**

In general, South African law is a hybrid of English common law, Roman-Dutch civil or statutory law drawing from national and provincial legislative acts; as well as indigenous customary or tribal law.³ South Africa was colonized first by the Dutch, then by the English, which is why it uses both civil and common law today. After the English gained control, the government passed The Native Administrative Act of 1927,⁴ which gave Black South Africans the option to subject themselves to the jurisdiction of separate, so-called native appeals courts run by tribal chiefs.⁵ This system has formalized what is today called customary law.⁶ South Africa’s ability to retain parts of its legal history from past eras illustrates the how important tradition is in South African culture.

**Common Law and Civil Law Traditions**

Though the U.S. and South Africa have a similar legal background in that both derive at least in part from the English, various social factors have led to a sharp difference in women’s access to abortion in these countries. In South Africa, which has perhaps the most progressive abortion rights laws in the world, many women still lack access to safe, legal abortions. In fact, however, in the U.S., which has a liberal abortion law as well, women have much greater access

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⁴ Native Administrative Act, No. 38, 1927.
⁶ *Id.*
to safe, legal abortions, with about four in 10 unwanted pregnancies ending in safe, legal abortion. It is apparent that the realization of the right to abortion reflect different values.

Constitutional Protections of the Right to Liberty for All

Values are often seen in a nation’s constitution. The provisions of the U.S. and South African Constitutions are respectively defined through judicial and statutory interpretation. In its Preamble, Bill of Rights, and other key provisions, the South African Constitution denotes a firm commitment to liberty. In South Africa, a woman’s choice to terminate her pregnancy is guaranteed by the constitution, which protects the right "to bodily and psychological integrity" including the right "to make decisions concerning reproduction" and "to security in and control over their body". This is reinforced through other constitutional rights, including the right to equality and to equal protection. In addition, the South African Constitution guarantees the right to life, privacy, and to have access to reproductive health care.

In the U.S., the right to privacy is a liberty interest encompassing the right to be free from governmental interference in choosing to terminate a pregnancy, and is identified as a fundamental right emanating as a penumbra from the ninth amendment and the substantive due process clause of the 14th Amendment. The U.S. Constitution guarantees equal protection of the laws to all similarly situated persons. In the U.S., the Supreme Court has identified several

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11 Id. at § 9.
12 Id. at §§ 11, 14, 27(1)(a).
14 U.S. Const. amend. 14, § 1; see also Reed v. Reed, 404 U.S. 71 (1971) (holding for the first time that the Equal Protection Clause of the 14th Amendment prohibits the naming of estate administrators based on gender discrimination).
fundamental rights emanating from other constitutional provisions, including the right to privacy to use contraceptives,\textsuperscript{15} to choose abortion before fetal viability,\textsuperscript{16} to liberty,\textsuperscript{17} and to life.\textsuperscript{18}

Initial U.S. Case Law Protecting the Right to Privacy to Terminate a Pregnancy

In the U.S., freedom from interference in obtaining an abortion was first identified as a fundamental right encompassed within the penumbra of the right to privacy in 1973 in the landmark decision, \textit{Roe v. Wade}.\textsuperscript{19} In 1969, Texas resident Norma L. McCorvey found that a state law interfered with her right to obtain a legal abortion absent evidence that she had been raped or that the pregnancy was the result of incest.\textsuperscript{20} The next year, using the alias Jane Roe, she challenged the statute in federal district court and won on the merits of her case, with the court finding that she had a constitutionally protected right to privacy to obtain an abortion.\textsuperscript{21} Because the lower court declined to grant declaratory relief, Roe appealed all the way up the Supreme Court, which in a 7-2 opinion authored by Justice Blackmun,\textsuperscript{22} held that a woman’s right to have an abortion is protected under the Due Process Clause of the 14th amendment as a private decision between her and the doctor, which encompassed a woman’s right to have an abortion up to the stage of fetal viability, which was deemed to occur at approximately 28 weeks.

\textsuperscript{15} See \textit{Eisenstadt v. Baird}, 405 U.S. 473 (1972) (holding that unmarried persons have a right to privacy to use contraception and engage in recreational sexual intercourse); see also \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965) (landmark case holding that the Constitution protects a right to marital privacy to use contraceptives).


\textsuperscript{17} U.S. Const. amend. 14, § 1.

\textsuperscript{18} Id.

\textsuperscript{19} 410 U.S. 113; see also \textit{Doe v. Bolton}, 410 U.S. 179 (1973) (companion case to \textit{Roe v. Wade}, infra, striking down as unconstitutional a Georgia abortion law).


\textsuperscript{21} \textit{Roe v. Wade}, 314 F. Supp. 1217 (N.D. Tex 1970) (holding that a woman has a right to privacy, but, denying injunctive relief); see also \textit{Griswold v. Connecticut}, 381 U.S. 479 (holding that the Constitution protects a right to marital privacy to use contraceptives, with a concurrence by J. Harlan stating that the right to privacy is protected by the Due Process Clause of the 14th amendment).

\textsuperscript{22} Following this case, Justice Blackmun developed and is still known for his legacy of being a staunch supporter for women’s rights and one of the more liberal Supreme Court justices, often encountering much criticism for his views.
of gestation or during the first trimester. The majority reasoned that by dissecting a woman’s pregnancy into trimesters, it could gauge the point at which the state had a more or less compelling interest in protecting the life of the fetus, which would help it balance the competing state interests. The Court rejected the argument that fetuses had a right to life, holding that the right to life begins at birth.

In its decision, the Court effectively changed the way America views abortion by identifying privacy as a fundamental right. By holding that the right to abortion could not be infringed upon by any state regulation absent a compelling interest narrowly tailored to meet its necessary end, the majority judicially attacked the stigma that state regulations had previously placed upon abortion services while widening access to abortions by invalidating those laws. Needless to say, Roe incited intense political opposition and support, dividing the country into “pro-lifers” and “pro-choicers,” and fueling political platforms to attract and repel voters for decades to come. Many people recognized the power Roe had to change the moral fabric of America as a result of its precedent as protection of the right to privacy for matters concerning the individual, marriage, family, and in sexual matters. In addition, the decision incited much public outcry, on either side of the spectrum. Prior to Roe v. Wade, America had traditionally held fairly conservative views concerning abortion, with most states having laws similar to the

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23 Roe v. Wade, 410 U.S. 113 (holding that women have a right to be free from state interference in obtaining abortion up through fetal viability and that competing state interests in regulating abortion, which are subject to strict scrutiny, grow stronger as the pregnancy advances). Medical advances have since shown fetal viability to occur at an earlier stage.
24 Id.
25 Id.
27 Id.
29 McCorvey herself eventually become a staunch advocate for the “pro-life” cause and now vocally opposes abortion.
31 Id.
Texas statute, permitting abortion only in instances of rape, incest, or threat of danger to the mother’s health.

Initial Statutory Law Regulating Abortion in South Africa

Just two years after *Roe*, the Abortion and Sterilization Act of 1975 was passed in South Africa. To a large degree, it reflected a conservative public opinion on abortion while advancing patriarchal and discriminatory practices embodied in apartheid-themed laws during that time. The Act was passed by the Afrikaaner-dominated National Party during the Apartheid era and sought to make abortion, which was previously only permissible to save the life of the mother, accessible under limited circumstances. However, its provisions were so restrictive that it actually reduced access to abortions for most women. The Act only allowed abortions when the woman’s mental or physical health was seriously threatened, there was a likelihood the child would be born with a severe handicap, or the pregnancy was the result of rape or incest, similar to the Texas statute at issue in *Roe*. It also required that the woman seeking abortion obtain approval from two doctors, independent of the abortion-performing doctor and in some instances, also of a psychiatrist or a magistrate. Because many women lived in rural areas where only one or two doctors were available, they could scarcely, if at all, meet this requirement. Annual estimates reveal that fewer than 1,000 legal abortions and about

32 Id.
33 Abortion and Sterilization Act, 2 of 1975.
38 Id.; 410 U.S. 113.
40 Id.
200,000 illegal abortions, of which 45,000 resulted in hospitalization, with 1,500 to 3,000 of those ending in death following the passage of this Act.\textsuperscript{41} White women received the majority of these abortion services, despite their minority status.\textsuperscript{42} Those with financial means traveled overseas to procure abortion services.\textsuperscript{43} For most black and colored women, the rigid requirements effectively precluded them from being able to obtain legal abortions.\textsuperscript{44} In addition, apartheid laws mandated the exclusion of black women from white hospitals to the effect that black women could not utilize provincial hospitals, leading to black and colored women seeking illegal abortions from unskilled persons for lack of access to legal services.\textsuperscript{45} Many of these women could not even afford the help of less skilled persons and attempted to self-terminate their pregnancies, leading to high maternal morbidity and mortality rates.\textsuperscript{46} Because the law was detrimental to the health of many mothers and did not adequately further the goals of the legislature, the medical field and other groups successfully pushed for abortion reform,\textsuperscript{47} which was granted immediately following the demise of apartheid.\textsuperscript{48}

\textit{A Look at the Second Statutory Provision for Abortion in South Africa}

\textsuperscript{42} \textit{Id.}
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.}
\textsuperscript{48} Population Policy Data Bank maintained by the Population Division of the Dept. of Economic and Social Affairs of the United Nations Secretariat.
The Choice on Termination of Pregnancy Act was passed in 1996 by the first post-Apartheid parliament. It sought to expand a woman’s right to obtain an abortion and embodied the African National Congress’ (ANC) policy framework ideal that each woman should have the right to choose whether or not to have a child according to her beliefs. Because of the apartheid-smeared history of South Africa, and the ANC’s platform of moving away from a legacy of legislated human rights violations, promulgation of the current abortion law was influenced in part by the recommendations of the International Conference on Population and Development (ICPD) and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). At the time of its passage, the Act was highly controversial, and the vast majority of the public did not support it. In recent years, however, it has been praised by international sources as one of the most progressive abortion rights acts in the world.

Similar to the trimester framework in Roe, the Act proscribes specific requirements for three different gestational periods. During the first twelve weeks of pregnancy, an abortion may be performed at the woman’s request, for any reason by a midwife, trained nurse, or medical doctor. However, between the twelfth and twentieth week, a pregnancy may only be terminated by a doctor if 1) it endangers the woman’s mental or physical health; 2) the fetus may suffer from a severe mental or physical defect; 3) the pregnancy is a result of rape or incest; or 4)

50 Id.
52 Population Policy Data Bank maintained by the Population Division of the Dept. of Economic and Social Affairs of the United Nations Secretariat.
54 410 U.S. 113.
55 Obtaining abortion for any economic, social, or personal reason is known as “abortion on demand,” which prior to the passage of this statute, was illegal. The Choice on Termination of Pregnancy Act, 92 of 1996.
if sustaining the pregnancy would significantly impair the woman’s social or economic status.\textsuperscript{56} After the twentieth week, a pregnancy may only be terminated if 1) it would endanger the mother’s life, 2) the fetus is severely malformed, or 3) there is a risk of severe injury to the fetus.\textsuperscript{57} The Act also provides that abortions must be performed in facilities meeting certain staffing and equipment requirements and have received the approval of the Member of the Executive Council (MEC) responsible for health.\textsuperscript{58} In addition, an abortion may only be performed with the informed consent of the woman.\textsuperscript{59} If a minor woman is pregnant, a healthcare professional must advise her to discuss the abortion with her parents, guardian, or family, although she may decline to do so and still obtain the abortion. If she decides to discuss the abortion with her parents, guardian, or other family members, and after doing so still wants an abortion, she may obtain one. Further, when a pregnant woman is mentally ill or in a coma, her pregnancy may be terminated with the consent of her spouse or guardian or on the authority of two doctors without their consent. An exception is that if the woman is severely mentally ill or has been unconscious for a long time, the consent of a male life-partner, parent, or legal guardian is required.\textsuperscript{60}

Generally, only medical doctors may perform abortions. Nurses who have received special training may also perform abortions up to the twelfth week of pregnancy.\textsuperscript{61} A healthcare professional who does not want to participate in abortion procedures may decline taking an active role through the conscientious objection provision, although they must refer the woman to

\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Facilities with a 24-hour maternity service that meet other requirements do not require the MEC’s approval to perform abortions within the first twelve weeks.
\textsuperscript{59} The Choice on Termination of Pregnancy Act, 92 of 1996.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
another health worker if they refuse. However, by law, such worker is required to assist in a procedure that is necessary to save the life of the patient. In addition, healthcare workers must inform a woman of her rights and options. Many abortion centers will seek to provide pre- and post-abortion counseling, although the statute does not require them to do so. Abortions are free at some state hospitals or clinics, although this is sometimes contingent on whether or not the woman was referred by a health worker. If a woman obtains an abortion through a private doctor or hospital, fees will be incurred.

Readdressing Abortion in the U.S.

Unlike in South Africa, where its 1970’s-era abortion legislation was so restrictive that it fueled a push for a more progressive statute, Roe was seen as progressive precedent at the time it was decided in 1973. Further, while the South African consensus was in favor of a more liberal policy that would widen access to abortion services, the dichotomous American national consensus favored limited abortion rights. In the 1992 seminal case, Planned Parenthood of Southeastern Pennsylvania v. Casey, the Supreme Court had its first opportunity to overturn

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62 Id.
64 The Choice on Termination of Pregnancy Act, 92 of 1996.
67 Id.
68 410 U.S. 113.
70 Limited abortion is described as abortion rights with legal constraints, such as informed consent, medical facility reporting requirements, parental notification, etc. See Devins, Neal, How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars, 118 Yale L. J. 1319 (2009) (stating that even today, more than 80% of Americans are in favor of some form of abortion rights, while more than 70% support restrictions on abortion rights, reflecting largely public sentiment following Roe v. Wade); see also Grubb, Andrew, Abortion Law - An English Perspective, 20 N.M. L. Rev. 649 (1990).
Roe\textsuperscript{72} since the liberal Justices Brennan and Marshall were replaced with conservative Bush-appointees, Souter and Thomas.\textsuperscript{73} In \textit{Casey}, the Court considered the constitutionality of a state law regulating abortion.\textsuperscript{74} The statute at issue was the Pennsylvania Abortion Control Act of 1982, of which five provisions were challenged under \textit{Roe}.\textsuperscript{75}

Due to the change in composition of the Court, only two supporters of the earlier precedent remained, Justices Stevens and Blackmun,\textsuperscript{76} leading to expectations that \textit{Roe}\textsuperscript{77} would be overruled.\textsuperscript{78} Initially, it appeared as though \textit{Roe}\textsuperscript{79} would be overturned because it was expected that Justice Souter would vote with the conservative bloc of the Court.\textsuperscript{80} However, just two days after the oral argument, Justice Souter surprised all at the conference of the Justices when he joined those in support of reaffirming the 1973 precedent.\textsuperscript{81} Shortly thereafter, Justice Kennedy, who was expected to be the swing vote, also joined the liberal bloc to reaffirm the essential holding of \textit{Roe}.\textsuperscript{82}

The provisions at issue required that a woman seeking an abortion provide her informed consent prior to the procedure and be given certain information at least 24-hours prior to obtaining an abortion.\textsuperscript{83} The statute also mandated that minor women provide notification either

\textsuperscript{72}410 U.S. 113.  
\textsuperscript{73}505 U.S. 833.  
\textsuperscript{74}Id.  
\textsuperscript{75}Id.; 410 U.S. 113.  
\textsuperscript{76}Blackmun, who authored \textit{Roe v. Wade}, 410 U.S. 113, became its most faithful advocate in subsequent years, often speaking in favor of women’s right to abortion, while Stevens showed his support in two later decisions that reaffirmed \textit{Roe}. 410 U.S. 113; \textit{City of Akron v. Akron Center for Reproductive Health}, 462 U.S. 416 (1983); \textit{Thornburgh v. American College of Obstetricians and Gynecologists}, 476 U.S. 747 (1986).  
\textsuperscript{77}410 U.S. 113.  
\textsuperscript{78}Devins, Neal, \textit{How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars}, 118 Yale L. J. 1318.  
\textsuperscript{79}410 U.S. 113.  
\textsuperscript{80}Lane, Charles. \textit{All Eyes on Kennedy in Court Debate on Abortion}. The Washington Post. (Nov. 8, 2006) \textless http://www.washingtonpost.com/wp-dyn/content/article/2006/11/07/AR2006110701333_pf.html\textgreater. last accessed Nov. 23, 2012.  
\textsuperscript{81}Id.  
\textsuperscript{82}Id.; 410 U.S. 113.  
\textsuperscript{83}Id.
to their parent(s) or legal guardian(s) and obtain their consent prior to obtaining an abortion.\textsuperscript{84} However, the Court provided a judicial bypass option when parental permission could not be secured.\textsuperscript{85} There was also a spousal notification provision required that married women notify their husbands of their intent to abort prior to undergoing the procedure.\textsuperscript{86} Women were exempted from compliance with the aforementioned provisions in the event of a medical emergency. Lastly, the statute mandated that abortion-providing facilities meet certain reporting requirements.\textsuperscript{87}

The Court reaffirmed a woman’s constitutional right to obtain an abortion, holding that such right is a liberty interest grounded in the Due Process Clause of the 14th amendment.\textsuperscript{88} While in \textit{Roe},\textsuperscript{89} the Court framed the issue as a privacy interest, in this case, the Court characterized the right to abortion as a liberty interest, instead of a right to privacy. The Court overruled the trimester framework established in \textit{Roe},\textsuperscript{90} and changed the standard of review.\textsuperscript{91} Instead of applying a standard of strict scrutiny to determine whether a law regulating abortion is valid, the Court established the lesser “undue burden” standard. It held that a law poses an undue burden and must be struck down as unconstitutional if it has the purpose or effect of placing a substantial obstacle in the path of the woman seeking to abort a nonviable fetus.\textsuperscript{92} This standard had been previously developed by Justice O’Connor in her dissent in \textit{Akron v. Akron Center for Reproductive Health}.\textsuperscript{93} In addition, the Court struck down the “trimester framework” for determining fetal viability, holding that a fetus will no longer be deemed viable solely

\begin{footnotes}
\item[84] \textit{Id.}
\item[85] \textit{Id.}
\item[86] \textit{Id.}
\item[87] \textit{Id.}
\item[88] \textit{Id.}
\item[89] 410 U.S. 113.
\item[90] \textit{Id.}
\item[91] \textit{Id.}
\item[92] \textit{Id.}
\item[93] 462 U.S. 416 (1983).
\end{footnotes}
According to gestational age. Recognizing the impact of medical and technological advances, the Court acknowledged that a fetus could actually be deemed viable, or capable of life outside the womb, as early as 22 weeks instead of the 28 weeks previously thought.

Using the new undue burden standard, the plurality upheld four of the five provisions, invalidating the spousal notification requirement only. The Court held that this provision placed a substantial obstacle in the path of women seeking abortion of a non-viable fetus because it granted husbands too much power over their wives, and could contribute to spousal abuse.94

The Supreme Court affirmed its commitment to stare decisis in upholding the “essential holding” of Roe.95 However, by overturning the trimester framework and altering the standard of review, Chief Justice Rehnquist, in his dissent, held the Court’s commitment to stare decisis as orbiter dicta. By sanctioning limited abortion, the Supreme Court managed to acquiesce to those on either side of the very active abortion debate, thereby avoiding lighting the match to the brushwood of the public abortion debate.96

The Supreme Court’s moderate approach to Casey97 contrasts the ultra-liberal approach taken by the South African legislature when it passed the Choice on Termination of Pregnancy Act98. The legislature’s enactment of the comparatively progressive statute, specifically guaranteeing a woman’s right to abortion on demand99 occurred virtually at the same time

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94 Planned Parenthood v. Casey, 505 U.S. 833.
95 410 U.S. 113.
96 Although the Court’s approach to Casey was creative, it upheld the precedent, to enforce the stability of the Court and protect its legitimacy. However, in upholding Roe, 410 U.S. 113, the Court allowed for changes that were appropriate for the political climate of the day, illustrating its wide authority. As Learned Hand once said, “Both the slavish obedience of civilian judges to codes, and their freedom from precedent, are largely myth.”. 505 U.S. 833; see also Devins, Neal. How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars, 118 Yale L. J. 1319.
97 505 U.S. 833.
98 Act 92 of 1996.
99 Abortion on request/demand is an abortion obtained for various social, economic, or personal reasons. Conservative abortion laws did not permit abortion on demand, traditionally limiting abortion prerequisites to rape, incest, or the risk of danger to the life and health of the mother. See Sarkin, Jeremy. Patriarchy and Discrimination in Apartheid South Africa’s Abortion Law, 4 Buff. Hum. Rts. L. Rev. 141 (1998).
apartheid ended, and reflected the very progressive policy goals of the first post-apartheid government. Whereas, in *Casey*, the Supreme Court appeased pro-lifers and pro-choicers and carefully avoided the public outcry that took place after *Roe*, such a compromise would not have been desirable or possible in South Africa on the heals of apartheid. Because the Abortion and Sterilization Act was so restrictive that it had the effect of precluding access to safe and legal abortions for black and colored women while imposing barriers in access for white women to obtain a legal abortion, any attempt to appease those in support of it would likely have been met with great resistance from all segments of society, saving the religious conservatives.

*The Role of Religion in Shaping Public Opinion Concerning Abortion in South Africa*

Although the majority of South Africans are diametrically opposed to racial oppression, an indicator of their political liberalism in this area, much of the populace has traditionally held to conservative political values in other areas, namely women’s rights. Being an indigenously tribal culture, one of the most influential social forces in South Africa is tribal leaders who have historically favored practices like polygamy and primogeniture over abortion rights. These values endured under apartheid due to the dominance of customary law governance in the black community, which perpetuated traditional andocentric tribal moral values that do not include a

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100 *Id.*
101 505 U.S. 833.
104 The Abortion and Sterilization Act, No. 2 of 1975.
106 *Id.*
woman’s right to choose.\textsuperscript{108} Being influenced by prevailing societal values, black South African women to this day tend to oppose abortion.

Moreover, South Africa is a predominantly Christian nation, with 80% of the 45 million inhabitants self-identifying as Christians or attenders of Christian churches.\textsuperscript{109} All Christian denominations value the sanctity of human life.\textsuperscript{110} This means that approximately 80% of the South African population have a conflict between their religious values and the Choice on Termination of Pregnancy Act,\textsuperscript{111} which instead of reflecting Christian morals, reflected the legislature’s positivistic approach to promulgating law.\textsuperscript{112} With such a high percentage of spiritually-based moral opposition to abortion, it was only a matter of time before the statute would be legally challenged. In 1998, The Christian Lawyers Association, a public interest group, challenged the constitutionality of the statute on the grounds that it violated the constitutional provision that everyone has the right to life.\textsuperscript{113} The Pretoria High Court took a positivist approach when it granted an exception and dismissed the case, holding that there was no cause of action because a fetus is not a person according to the purposes of the constitution, and therefore does not have a right to life.\textsuperscript{114} In reaching his conclusion, Justice McCreath espoused a strictly positivistic approach that excluded religious and moral values and beliefs.\textsuperscript{115} However, it has been suggested that Justice McCreath took a purposivist statutory

\begin{thebibliography}{9}
\bibitem{108} Id.
\bibitem{111} Act 92 of 1996.
\bibitem{112} Id.
\bibitem{114} Smit, Marius, The Headlong Rush to Amoral Activism - Positivism or Alternative Adjudication? 2008 J.S. Afr. 728.
\bibitem{115} Id.
\end{thebibliography}
interpretative\textsuperscript{116} approach not completely devoid of value judgment when he disallowed medical empirical evidence which would have sought to prove that life, and thus personhood begins at conception and not birth.\textsuperscript{117} Drawing from this line of reasoning, the natural conclusion that would follow is that the High Court did not take a completely positivistic approach and in fact, discriminated against Christian moral and religious beliefs.\textsuperscript{118} If in fact the court chose to uphold legislative policy goals in this manner, it effectively made a value judgment, placing a greater value on protecting the woman’s right to reproductive choice and freedom than on protecting the right to life of the fetus. However, if the Court instead maintained a strictly positivist approach, it very wisely avoided overtly weighing the life of the fetus against the rights of its mother, and in doing so, sidestepped a potentially explosive public policy issue, similar to the U.S. Supreme Court’s delicately handling of \textit{Casey} ruling.\textsuperscript{119}

\textit{Implementing Abortion Laws in the U.S. and in South Africa}

Implementation in the U.S. of the \textit{Casey}\textsuperscript{120} abortion standard has taken place with relatively few issues. The decision was widely published at the time it was handed down, making public knowledge pervasive. Yet, while the basic protection of a woman’s right to abortion is well understood by the American populace, implementation is still somewhat challenged by access issues stemming from issues with Medicaid funding and state statutory waiting periods.

\textit{Barriers to Funding Abortion in the U.S.}

\textsuperscript{116} Justice Learned Hand espoused the notion that courts equitably fill gaps by asking what the legislature would do. \textit{See Usatorre v. The Victoria}, 172 F. 2d 434.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.}
\textsuperscript{119} 505 U.S. 833.
\textsuperscript{120} \textit{Id.}
In the U.S., as in South Africa, women of lower socio-economic backgrounds rely heavily on the public sector for health care financing. At the U.S. federal level, the Family Planning Services and Population Research Act, signed by President Nixon in 1970, authorizes funding for contraception and family planning services to organizations like Planned Parenthood, which service low-income populations. However, although qualifying low-income women may benefit from Medicaid financing of some reproductive health services, including birth control, gynecological exams, and related health screenings, abortion services are only funded in instances of incest, rape, or life endangerment. The Hyde Amendment is a rider provision that was initially passed in 1976 in direct response to the Roe decision and has been attached to annual appropriations bills since then. It only affects federal funding allocated for the Department of Health and Human Services, which administers the Medicaid program.

The initial version of the amendment did not provide for any exceptions to the stringent “no funding for abortion” stance. Since then, it has been amended several times, but its natural law-based opposition to abortion has remained the same. In 1994, President Clinton

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122 This is an amendment to Title X of the Public Health Service Act, 42 U.S.C. 6A (1944).
124 A rider is a provision added to a bill that is not necessarily connected with the bill’s overall subject. Riders are usually used as a political tool to pass a provision that would not muster enough support to support on its own. Denning, Brannon P. and Brooks R. Smith. Uneasy Riders: The Case for a Truth-in-Legislation Amendment, 1999 Utah L. Rev. 957 (1999).
125 410 U.S. 113.
signed into law the current version of the amendment, which allows federal funding for abortion under Medicaid for cases of rape, incest, and maternal life endangerment, much like the statute that was struck down in *Roe v. Wade* and similar antiquated state statutes, as well as the restrictive, andocentric 1975 Abortion and Sterilization Act of South Africa.

Many have argued, including pro-abortion rights groups, individuals, and organizations, that the amendment disproportionately targets low-income women. A 2008 study published by the Kaiser Foundation indicates that 32 states follow the federal standard, only funding abortion in cases involving maternal life endangerment, rape, and incest. In contrast, 17 states fund all or most medically necessary abortions, exceeding federal requirements. Of the 17 states that exceed federal funding requirements, 13 have done so pursuant to court orders, while only four have done so voluntarily.

Federal funding guidelines pose significant barriers to women seeking abortions. Only 37% of eligible women receive Medicaid funding for their abortions. Of the 32 states that fund abortion only in cases of rape, incest, or maternal life endangerment, 21 require only a doctor’s note, and 11 require a police report or social services agency report. Four states require either a police statement or a doctor’s note verifying the victim was medically incapable

129 *The Hyde Amendment, Pub.L. No. 103-112 (1993).*
130 410 U.S. 113.
131 See Pub. L. No. 103-112; Act 2 of 1975. It should be noted that this same provision can be found in the South African Choice on Termination of Pregnancy Act, 92 of 1996, which differs from the Hyde provision in that it only requires satisfaction of these criteria between the 12th and 20th weeks of gestation.
134 See A-1.
135 *State Funding of Abortions Under Medicaid, as of June 1, 2012*. The Kaiser Family Foundation.
of filing a police report.\textsuperscript{137} Two states, Texas and Rhode Island, require a doctor’s statement and instructs the doctors to tell victims of rape to file a police report.\textsuperscript{138} There are other requirements that vary by state, most of which only serve to preclude access to Medicaid funding. According to a statistical average of the past 5 years, computed by the Rape, Abuse, and Incest National Network, 54\% of rapes are never even reported to police.\textsuperscript{139} Usually, Medicaid officials decline to reimburse the hospitals absent police reports and doctor’s statements, which have also been required under the Hyde Amendment in order to qualify a victim for the rape exception.\textsuperscript{140} Concerning the incest exception, little to no research has uncovered state trends in proof requirements. However, one can presume that any such requirements would likely be extremely difficult, if not impossible, to meet in most cases, for obvious reasons. Further, by requiring women to prove they were either raped or a party to incest, the latter of which generally being analogous with childhood molestation, the woman’s right to privacy is infringed upon in a profound way, and she is ultimately deterred from pursuing an abortion.\textsuperscript{141}

\textit{Qualifying Rape in the U.S.}

As if these provisions weren’t invasive enough, Congress has recently introduced even more restrictive federal abortion funding requirements. In 2011, the House passed a bill which mimicked the relevant language in the Hyde Amendment, differing solely in its qualification of Medicaid-eligible rape as “forcible rape”.\textsuperscript{142} Using this term, tea-party-backed Rep. Todd Akin (R-MO) recently asserted in a televised interview with St. Louis Fox network affiliate KTVI-TV,

\footnotesize{\textsuperscript{137} Id. \\
\textsuperscript{138} Id. \\
\textsuperscript{140} Id. \\
\textsuperscript{141} Id. \\
\textsuperscript{142} No Taxpayer Funding for Abortion Act, H.R. 3, 112th Cong. (2011).}
concerning rape, that “If it’s a “legitimate rape,”[143] the female body has ways to try to shut that whole thing down,” thereby insinuating that women don’t get pregnant if they are “really raped,” and as such don’t require funding for abortion procedures. Needless to say, his statement greatly offended the American public, even causing former Republican Vice Presidential candidate, Paul Ryan, who up until about this time had collaborated with Akin on abortion issues, to disassociate himself from the representative and the concept of distinguishing “legitimate” or “forcible” rape from any other kind of rape. Notwithstanding the extreme offensiveness of his statement, the rationale for qualifying rape is not without political gain. The No Taxpayer Funding for Abortion Act,144 which passed the House by a sweeping majority, but, failed to pass the Senate, seeks to withdraw all funding for Medicaid-covered abortions stemming from “forcible rape”.145 Though the bill does not define the term, its deliberate divergence from otherwise identical language in the Hyde Amendment supports the inference that its inclusion would likely have given way to various judicial interpretations, yielding an array of outcomes depending on the jurisdiction and/or the personal outlook of the judge, perhaps even despite any professed commitment to neutrality, as was seen in the South African case, Christian Lawyers Association v. Ministry of Health.146

Funding Abortion in South Africa

In South Africa, the government has made a strong commitment to protecting the right to abortion for every woman by offering abortion services through public hospitals, free of charge,
so long abortion is sought within the first three months of gestation. The remaining provisions of the Choice on Termination of Pregnancy entitle a woman to a free abortion conducted by a doctor between the twelfth and twentieth weeks only in instances of life endangerment, severe malformations of the physical or mental health of the fetus, rape or incest, or serious economic drawbacks. Following the twentieth week, abortion may be had for free only in the event of life endangerment to the mother, severe fetal malformation, or fetal injury risk. As of now, there is no limit on the number of state-funded procedures a single woman may have, so long as she meets the specified requirements and go to an approved facility. Of course, this is not good economic policy because it could serve to encourage women to seek abortions as a contraceptive method, instead of as a last resort. So, in South Africa, as contrasted with the U.S., the funding of abortions is largely borne by the state, which has not yet enacted laws which serve as a barrier to access. However, this does not mean that women realize this right to a high degree, as many other cultural factors affect a woman’s realization of her right to obtain a government-funded abortion.

Waiting Period Barriers to Access in the U.S. and South Africa

In the U.S., many state legislatures have enacted waiting requirements similar to the one that was upheld in *Casey*. According to a 2006 study conducted by The Center for Reproductive Rights, 30 state legislatures have imposed mandatory waiting periods before a woman may undergo an abortion procedure. Five of the 30 states no longer enforce this practice, some having been enjoined from doing so by federal or state courts. The delays are

147 Choice on Termination of Pregnancy Act, 92 of 1996.
148 *Id.*
149 *Id.*
150 505 U.S. 833.
151 *Id.*
intended to ensure that a woman receives health risk information, typically in person from a health care provider, prior to undergoing the procedure. The waiting periods range from 1-hour in South Carolina to 2-days in Tennessee, excluding the day on which information is given and the day of the procedure.\textsuperscript{153}

Again, the South African national Parliament has mandated no similar requirement. The Provincial legislatures have not done so either, though they retain jurisdiction over marital issues, under which heading this issue could creatively fall, if only in part.

\textit{Parental Consent Requirements}

In the U.S., a state may issue a law requiring minor women to gain the consent of a parent or legal guardian prior to undergoing an abortion procedure.\textsuperscript{154} However, this procedure has a judicial bypass procedure to ensure that access is not truly impaired by any such mandate, as would be the case in the instance of medical emergency threatening the life of the minor parent. Thirty-seven states require parental notification and/or consent prior to termination of a minor’s pregnancy, although not all states enforce this requirement, ensuring that it pose no undue burden for any young woman seeking access to abortion.\textsuperscript{155}

In South Africa, the Choice on Termination of Pregnancy Act\textsuperscript{156} denotes a similar provision whereby health care professionals must instruct minor women to consult with a parent, guardian, or family member regarding her decision to have an abortion prior to undergoing the procedure. However, the statute also provides that the choice is hers and any failure to provide notification and/or gain parental consent cannot serve to prevent her from realizing her

\textsuperscript{153} Id.
\textsuperscript{154} See Planned Parenthood v. Casey, 505 U.S. 833.
\textsuperscript{156} Act 92 of 1996.
constitutional right to abortion.\textsuperscript{157} By omitting this potential barrier to access, the South African law is more progressive than the U.S. standard.

\textit{Moral Attitudes and Disparities Along Racial Lines}

Perhaps the most powerful barrier to access to abortion in the U.S. and in South Africa are cultural attitudes, as influenced by notions of morality. In both nations, though in law, progressive, in practice, individuals are guided by their inner mores, which dictate their political thought. These feelings have led to disparities in access to care among black women, who in both countries, tend to be more socially conservative.

Currently, there are significant disparities in the rates of abortion among minority and white women in the U.S., regardless of income.\textsuperscript{158} In the U.S., 52.4\% of all abortions are obtained by white women, while 40.2\% are procured by black women.\textsuperscript{159} In a 2009 study conducted among 29 reporting areas by the U.S. Centers for Disease Control (CDC), data shows that black women obtain abortions at higher rates than white women due to higher incidences of unintended pregnancies resulting largely from disparities in lack of access to and effective use of contraceptives,\textsuperscript{160} with the former group reporting 32.5 abortions per 1,000 women aged 15-44 years and the latter reporting just 8.5 abortions among its corresponding respondents.\textsuperscript{161}

While no similar statistics have been made available for South Africa in particular, the 2008 abortion rate was 29 per 1,000 women of childbearing age in the African continent.\textsuperscript{162}

Further, it can be inferred that black women in South Africa account for the majority of abortions

\textsuperscript{157} Id.
\textsuperscript{160} Id.
in terms of raw numbers, considering that black people comprise roughly 80% of the population, similar to the U.S., where white Americans, who account for roughly 66% of the population, comprise the majority of abortions. Additionally, it has been proven that social and cultural values about motherhood militate against the acceptability of abortion. Inequitable gender relations, male dominance, poverty among women, and lack of resources have also led to an inability to obtain abortions.

*Abortion Maternal Mortality Rates*

Despite the high degree to which black South African women avail themselves to abortion and despite its availability to the populace, health disparities persist. Research has shown that legalization alone will not ensure adequate implementation of abortion services in South Africa. A recent study revealed that 49% of abortions performed on women between the ages of 13 and 19 were conducted outside a hospital or clinic and were therefore likely to be unsafe. Some of the reasons women continue to seek out illegal abortion providers include lack of knowledge on where and how to access safe providers; social stigma of obtaining an abortion from communities; judgmental and critical hospital staff; and concerns over confidentiality and cost. Evidence suggests that although public health facilities are legally required to provide abortion on request, public-sector nurses frequently chastise clients, particularly younger women, for being sexually active, irresponsible, and for seeking to

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terminate their pregnancies.\textsuperscript{168} Thus, the legalization of abortions has inadvertently contributed to the increase in illegal abortions conducted by untrained persons who are neither doctors nor nurses. Because many of the illegal abortion providers are unskilled, their efforts tend to result in complications which place those seeking services in the hospital to correct these incomplete abortions. This poses a huge price for the government, as it seeks to repair botched operations. Moreover, as a result of apartheid, two separate and unequal health systems persist to this day, with the quality and accessibility of healthcare remaining inadequate to address the economic and health issues of the rural black population.\textsuperscript{169}

Moving forward, the government of South Africa will need to address the issue of implementation in order to make the Choice on Termination of Pregnancy Act useful to its female populace. By increasing knowledge through dissemination of educational materials and advertisements about the Act and abortion in general, South Africa will better equip its female citizens with the information it needs to make better reproductive choice decisions that will result in decreased maternal mortality and morbidity rates.

In the U.S., maternal mortality and morbidity rates are relatively high for a western nation, and reflect to a large degree the level of racial disparities experienced in American society.\textsuperscript{170} The black to white ratio of maternal mortality, irrespective of education or income level, has remained essentially unchanged for the past 50-60 years, holding at 3.4 - 4.0.\textsuperscript{171} This holds true for abortion-related deaths. Some of the steps being taken to combat this disparity include part of the problem with South African realization to successful implementation of its abortion law: lack of knowledge. Studies have shown that black women and health care

\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{171} Id.
providers lack knowledge about the health risks of abortion, and are therefore more likely to undergo unsafe procedures.\textsuperscript{172} Perhaps because abortion is disfavored in the black community due to traditional religious and cultural beliefs, young women are less inclined to discuss these matters openly with healthcare professionals, thereby placing themselves at greater risk for complications during abortion procedures due to lack of knowledge.

\textit{Conclusion}

Despite the similarities in the abortion-governing laws of the U.S. and South Africa, South African women have yet to fully realize their full rights due to a lack of effective implementation, at least partially influenced by the culture. Lack of knowledge and social stigma stemming from cultural and religious beliefs lead to high rates of illegal abortions in South African society, contributing to high maternal morbidity and mortality rates. The same holds true in the U.S.

Though both societies have made great efforts, not wholly unsuccessful, towards neutralizing subjective influences of religion and culture from their respective decision-making spheres, traditions hold strong in the area of implementation. As such, it may take longer to see the benefit of abortion laws in South Africa due to the strength with which traditional tribal societal values have informed society. Perhaps as values shift over time, the South African people will push for better implementation of its progressive abortion-rights statute, and see a more informed and empowered female populace.

\textsuperscript{172} \textit{Id.}