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# When Abortion Became a Crime: Abortion, Infanticide, and the Law in Early Meiji Japan

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## Regulating Reproduction

In recent years, historians working on issues of gender and women's history have identified the inclusion of the "crime of abortion" statute in the new criminal code of 1880 as an important moment in the creation of modern gender ideology in Japan. Most notably, in her influential work *Sei no rekishigaku* 性の歴史学 (The Historiography of Sex), Fujime Yuki 藤目ゆき aligned the criminalization of abortion with state policy towards prostitution, venereal disease, and contraception and argued that these efforts on the Japanese government to regulate sexuality and reproduction were inspired by specific vision of a modern Japan nation with a large healthy population of workers and soldiers.<sup>1</sup> Working in the wake of Fujime's analysis, some scholars have raised questions about her conclusions. Ishizaki Shōko 石崎昇子 has explored the legal context and evolution of the abortion statutes and concluded that the Meiji state's policy toward abortion was inspired not by concern for producing a healthy citizenry but rather by Confucian notions of ethicality, which made the continuity and prosperity of the family essential to social order.<sup>2</sup> Kanazu Hidemi 金津日出実 examined the negotiations that went on between Gustave Emile Boissonade de Bontarabie, the French legal scholar hired to draft the criminal code, and the Japanese officials who were assisting him.<sup>3</sup> She argues that Japanese officials viewed the acts of abortion and infanticide in Japan as quite distinct from such practices in Europe and America: they were desperate if unacceptable responses to dire poverty and the decision to resort to them was made by the family. Rejecting Boissonade's assertion that the resort to abortion was evidence of the immorality of the individual woman involved, his Japanese counterparts argued successfully for the establishment of penalties that were far lighter than in the French criminal code that was Boissonade's model.

In this paper, my aim is to contribute to this debate over the motives and impact of the Meiji state's policy towards reproductive "crimes" by examining an important but heretofore largely unexamined moment; that is, the decade before the 1880 "crime of abortion" statute came into effect. In 1871, as a provisional solution to the need to create a new legal system, the Meiji government promulgated the *Shinritsu kōryō* 新律綱領 (The Essentials of the New Law), a penal code compiled by Japanese Confucian scholars who drew upon the statutes of the Chinese codes of the Ming and Qing periods. Then, in 1873 the government promulgated the *Keitei ritsurei* 改定律例 (Amended statutes and substatutes), which had the goal of clari-

fyng the *Shinritsu kōryō* statutes and bringing them more into line with Western concepts of punishment.<sup>4</sup> Within the *Shinritsu kōryō*, abortion itself was not specifically identified as a crime, but a common if unintended consequence of the act was: the section on homicide specified punishment for the male partner of an “unchaste woman” (*kanpu* 姦婦) who died as the result of an abortion.<sup>5</sup> The *Kaitei ritsurei* contained the same provision: according to article 198 of the statutes on homicide, if a woman died as a result of an abortion, the man who instigated it was to be sentenced to penal servitude for three years. But the *Kaitei ritsurei* also specifically designated abortion itself as a crime. In the section covering “Household and Marriage” article no. 144 stated, “Those who abort [are to be sentenced to] one hundred days [of penal servitude]. As for those who know of their intention and sell medicine or use some other technique to effect an abortion, this is the same crime. Even in the case of a woman, it is not allowed to commute the punishment.”<sup>6</sup> In addition, both the *Shinritsu kōryō* and the *Kaitei ritsurei* defined infanticide as an act of homicide.<sup>7</sup>

That scholars have focused on the abortion statute in the 1880 code, rather than these earlier laws, is not surprising: the *Shinritsu kōryō* and the *Kaitei ritsurei* were in effect for only a decade and were based upon a legal philosophy and system that was already coming under criticism from an increasingly Western-oriented elite. Thus, the codes of the 1870s seem to be a transitory and discontinuous moment in Japanese legal history. Nonetheless, the prosecutions that occurred under these statutes are significant because they marked the first attempts by the new central government to police the reproductive actions of its citizens and to impose a coherent “national” police upon the plurality of local practices, customs, and beliefs that shaped popular recourse to abortion and infanticide. Moreover, it was in this period that the discussions between Boissonade and his Japanese counterparts were taking place, and it seems likely that the information “produced” by the implementation of these early laws influenced perceptions of how, why, and by whom the acts of abortion and infanticide occurred. In fact, the number of cases prosecuted in these years was by no means insignificant. For example, in 1878, the first year for which statistics on reproductive “crimes” are available, 262 women were convicted of having an abortion, seventy men and sixty-five women were convicted of selling abortifacients or using other methods to induce an abortion, and 173 men and sixty women were convicted of for encouraging or aiding in the planning of an abortion. Two years later, in 1879, 306 women were convicted of having an abortion, seventy-two men and seventy-nine women were convicted of inducing abortions with drugs or other means, and 108 men and fifty-six women were convicted of encouraging or aiding an act of abortion.<sup>8</sup>

More suggestive than just these numbers of the cultural impact of these earlier laws is the popular discourse on abortion and infanticide that took form in the wake of the arrests, prosecutions, and convictions of the 1870s. Reports of reproductive crimes abound in the so-called “small newspapers” (*koshinbun* 小新聞) of the early Meiji period that specialized in human interest stories and had readership largely made up of urban commoners.<sup>9</sup> Typical of this kind of reportage is an article that appeared in the *Yomiuri shinbun* in 1878.<sup>10</sup> It tells of a pharmacist who, after the death of his adopted father, came to have a “strange relationship” with his adopted mother before becoming intimate with his young sister-in-law. Before long, “the stomach of the sister began to grow bigger and bigger.” The worried

couple are described as trying various things until a dose of “poison” produced the desired result. The article then concludes by noting that the abortion had come to light, and those involved arrested. A follow up article appeared a few weeks later.<sup>11</sup> It gave the name of the man involved (Yokoyama Ryūzō) and the name and age (O-Haru, fourteen) of his sister-in-law *cum* lover and repeated the facts of their case: after doing “bad things” to O-Haru and making her pregnant, the pharmacist Yokoyama gave her a drug that induced an abortion. The two were sentenced to one hundred days of penal servitude, although O-Haru’s sentence was reduced to a fine of twenty-five sen because of her age. The article concluded by declaring that O-Haru would probably never be able to make a good marriage.

Thus, an odd mixture of voyeurism, coyness, and moralization color these articles, leaving the reader to wonder whether laughter, contempt, or sympathy for the ruined O-Haru was the expected response. This lack of a clear narrative perspective points to the new opaqueness that the acts of abortion and infanticide acquired in this era as the new laws thrust these practices into a newly constituted public realm, exposing those involved to censure and punishment. The moral ambivalence associated with these practices is apparent as well in the ethnographic record. In the 1930s, a group of Japan folklorists endeavored to compile a record of customs related to reproduction in localities throughout Japan. Later published as *Nihon san'iku shūzoku shiryō shūsei* 日本産育習俗資料集成 (Collected Materials on Japanese Birth Customs), their work reveals that local informants believed that a fundamental shift in attitudes towards abortion and infanticide had taken place in the Meiji period. For example, a report from Chiba-ken states that “before Meiji, abortion and *mabiki* (i.e., infanticide) occurred openly and without shame. ... In fact, people felt ashamed instead if they were poor and still had many children.”<sup>12</sup> Describing another common motive for abortion, an informant in Niigata related that “in the case when the child did not have a father because [the pregnancy resulted from] an illicit relationship, it would be aborted.” Similarly, another informant stated that “in this region, before Meiji, people called an illegitimate child ‘a child of immorality’” and thus unmarried women typically sought an abortion.<sup>13</sup> What these fragmented pieces of information suggest is that after 1868, what had been commonplace, indeed socially expedient, acts began to be transformed into objects of sanction and shame.

In interrogating this moment of transformation, I want to focus not on the formulation of the *Shinritsu kōryō* and *Kaitēi ritsurei* statutes, but rather on how they functioned in practice as the law became an important medium for diffusing and enforcing state policies. In other words, I want to examine who was prosecuted, for what kind of acts, and how such crimes were judged and punished. To this end, my analysis is centered on the legal record constituted by the cases of infanticide and abortion that were prosecuted in local courts between 1877 and 1882 and then appealed upward to the Daishin'in, the Grand Court of Judicature, in Tokyo, which in 1875 began to function as the final court of appeals. The records of these cases, fifteen in all, reveal the traces of interaction between the fledgling new state, represented by police, prosecutors, and judges, and ordinary citizens, in relation to one of the most important issues in female experience and family life, the question of how to manage an unwanted pregnancy. To be sure, the cases that came before the Daishin'in represent only a tiny fraction of the prosecutions that occurred at the local level. For example, in 1878, a year in which 630 people were convicted of crimes related to acts of abortion and

infanticide, only one case involving abortion was reviewed by the high court. However, while the number of appealed cases was small, the very fact that they came before the Daishin'in suggests that some issue of legal significance or some dispute over the nature of the justice rendered was involved. Useful too is their geographic distribution.<sup>14</sup> Drawn from seven prefectures and from various regions of Japan, these cases allow us to see a sampling of the judgments made by courts from various regions of Japan, while the review of the high court in Tokyo and the decisions it rendered reveal how judges in Tokyo evaluated the decisions of the local courts.

In analyzing these cases, my aim is not to attempt to determine what “really” happened, nor to comment on the quality of the justice rendered by the Meiji courts. Rather, taking a hint from the work of Natalie Zemon Davis, I want to read the records as set of conflicting stories told about an act of abortion or infanticide.<sup>15</sup> The record of an appealed case in fact takes the form of a series of narratives.<sup>16</sup> Typically, it begins with a long summary of the testimony offered in the local court by the accused, which is then followed by a statement of the judgment of that court and its sentence. Next we encounter the objections raised by either the prosecutor or the defendant to court's decision: here another story is told as the appealing side explains how the original judgment conflicted with the statutes or with the evidence. The record then concludes by recording the decision of the high court to either uphold or revise the judgment of the local court. Needless to say, these stories were highly structured, not only by the story-tellers' varying degrees of knowledge of the law but also by a set of cultural assumptions about the nature of sexual relationships between married and unmarried men and women, about what constituted “normal” behavior within a family, about how wives and daughters, husbands and fathers should act. In crafting their stories before the judges, the defendants surely sought to explain their motives and describe their actions in terms they thought would resonate with the court. Thus, these carefully constructed stories reveal the interaction of ordinary people and the state (represented by its prosecutors and judges) in relation to the emergent government policy of pro-natalism.

### Telling Tales in the Courtroom

Let me begin with a case that came before the Daishin'in in 1878. Originally tried in the Muraoka court, it involved four members of Kikuchi Ryūhei's family, all of whom resided in Sogei village in Iwai county in Iwate Prefecture and concerned the death of an infant born to Ryūhei's unmarried daughter Etsu.<sup>17</sup> Worthy of note at the outset is the fact that Etsu herself was not among the defendants, and no testimony from her is included within the record of this case. Indeed, not a single direct statement is attributed to her in the lengthy record of this case. Instead, the story of her pregnancy, and the birth and death of her child is revealed in the testimony offered by Ryūhei and his fellow defendants, his wife Kotono, his mother Kan, and his eldest son Katsujirō, and Toda Gen'ei, the doctor who attended her. It is the statement of Kotono, her mother, that is most complete. As Kotono relates the story of this family crisis, sometime in August 1877, she became suspicious that Etsu was pregnant: the girl was not eating as usual and seemed bothered by stomach problems. Then one day, she saw Etsu binding her stomach with a long cloth known as *hara-obi*, an act typically performed by pregnant women from the fifth month onward. She questioned Shio, the wife of Katsujirō, who related

that Etsu was intimate with a man named Fujiwara Ankichi—this in spite of the fact that her family had recently entered into marriage negotiations with another family.

All but certain that Etsu was indeed pregnant, Kotono states that she then conferred with her husband. They agreed that the pregnancy would not only bring an end to this marriage proposal but also ruin Etsu's chances for a good marriage in the future and damage the reputation of the family as a whole. It was decided that Etsu would be taken to a local physician, Toda Gen'ei, and if she was indeed pregnant, the pregnancy would be aborted. When Toda confirmed Etsu's the pregnancy, Kotono told him of the family's concerns and asked him to help abort the fetus. He advised her that an abortion would be difficult since Etsu was already at least five months pregnant but agreed to provide a drug. After returning home, Kotono informed Ryūhei of what had transpired, but—according to her account—he continued to insist that an abortion was the only solution. Etsu then took the three packets of medicine Toda had provided but to no effect. Several days later Toda was consulted again, and he responded by providing another oral abortifacient, and when that failed he made use of *sashikusuri*, inserting a drug vaginally. When these efforts too failed, Toda advised Kotono that an abortion was not possible and suggested that she raise Etsu's child as her own. In her statement, Kotono relates that she again conveyed the doctor's opinion to her husband and the rest of the family but that Ryūhei in particular continued to voice concern for the shame this birth would bring.

On December 31, Etsu's labor began, and Toda was summoned. When it became apparent that Etsu was having difficulty delivering the child, the physician asked that another doctor be summoned, but the family was reluctant to involve anyone else. Finally, the next morning, Etsu's baby was born. Kotono stated that the infant did not appear well: it did not cry and moved its arms and legs weakly. Believing that it would not survive in any case, she asked Kan to kill it. While Toda was engaged in caring for Etsu, Kan smothered the infant with some old rags. After the departure of the physician, Kotono told Ryūhei and the other members of the family that the infant had died soon after its difficult birth. Ryūhei was relieved and told Katsujirō to bury the infant in the family garden. Kotono concluded her statement with the declaration that, with the exception of Toda and Kan, no one else had any knowledge of how the infant died.

In summarizing Kotono's testimony, I have tried to preserve some of the significant aspects of her story as she told it: her concern for establishing that the family had discussed repeatedly the issue of how to resolve this problematic pregnancy, her reiteration of the family's fear of public humiliation and its consequences for Etsu, and her insistence that the child, born after a traumatic delivery, seemed to be on point of death, precipitating her sudden decision to end its brief life. On the face of it, Kotono's story seems convincing, the reality effect strengthened perhaps by the homely details she includes—the glimpse of the *haraobi*, her conversations with her young daughter-in-law about Etsu's behavior, and the mention of the old rags used to smother the infant—but Ryūhei and Toda, and to a lesser extent, Kan and Katsujirō, tell the story of Etsu's pregnancy in very different terms. A case in point is the story told by Ryūhei, whom Kotono portrayed as the driving force behind the family's quest to end Etsu's pregnancy. He stated that after the failure of the first attempt at abortion, he himself was willing to allow Etsu's pregnancy to continue with the intention of raising the child as his

own. Indeed, according to Ryūhei, he took the failure of the abortion as evidence that “the child in the womb was surely destined to survive,” and he claimed to have no knowledge of further efforts to abort the fetus.

Toda Gen’ei was equally concerned to downplay his involvement. According to his statement, from the first he was convinced that an abortion was impossible because of the advanced state of Etsu’s pregnancy, and thus he had advised Kotono early on to resign herself to raising the infant. In fact, Toda claimed that none of the so-called abortifacients he had provided presented any danger to Etsu or her fetus—an assertion that was confirmed by another physician who offered testimony. Toda stated that he supplied these harmless drugs in order to placate the family until they accepted the inevitability of this birth. In relating the events surrounding the death of the infant, Toda asserted that Kotono was still unwilling to accept Etsu’s pregnancy and even in the “birth room” (*san’ya*) requested that he kill the infant upon its birth. Later, as Etsu’s conditioned appeared grave, the family refused to call in another doctor to aid him because they wished to keep the birth a secret. Moreover, Toda stated that he became aware of Kan and Kotono discussing the need to dispose of the infant as Etsu labored. Shortly after he finished attending to Etsu, he realized that they had in fact killed the infant. Toda acknowledged that he should have reported this to the authorities at once but had not, because “in any case it would not have revived the child.”

In contrast to these three stories, those offered by Kan and Katsujirō are far briefer. Kan’s account follows that of Kotono, with two important departures. Even more than Kotono, Kan stressed the poor condition of the new-born infant, noting that in her long experience, both bearing children herself and aiding other women, she had never seen such a baby, so weak it was unable to cry. She also insisted that the decision to smother it had been made by Kotono—and only after the birth. Thus, Kan adamantly denied Toda’s charge that they had spoken to him of killing the child when he arrived to treat Etsu. Katsujirō’s story coincides neatly with that of Ryūhei. He asserted that after the first failed abortion attempt, his understanding was that Etsu’s child was to be raised as the child of his parents. When the infant was killed, he had not even been present, having left the house to go to a local shrine in order to evoke its deity to save his sister’s life. Upon his return, he was told that the infant had died soon after birth and had buried it in the garden, at his father’s direction.

In making sense of these conflicting stories, we need to take note first of how they responded to the requirements of the *Shinritsu kōryō* and the *Kaitei ritsurei* statutes. The codes, like the Chinese statutes they were based upon, articulated different degrees of punishment according to the circumstances of the crime. Commenting on the codes’ exhaustive delineation of penalties according to who did what to whom, for what reasons, and under what other circumstances, one scholar has declared that within premodern Chinese law acts of homicide had nothing in common but a dead body.<sup>18</sup> Thus, the role of judges was to carefully determine punishment by analyzing the circumstances of the crime according to the multiple criteria used to determine its severity.

Addressing the issue of intent, the *Shinritsu kōryō* and the *Kaitei ritsurei* made an important distinction between “preconceived” murder (*bōsatsu* 謀殺) and “willful” murder (*kosatsu* 故殺). The former was defined an act of homicide in which the participant had prepared weapons in advance and acted with deliberation, while the latter was carried out in a state of emotion

in which the intent to kill was conceived at the time of the act and without preparation or planning.<sup>19</sup> Secondly, the codes distinguished between varying degrees of culpability when multiple people were involved in a criminal act. The term “participant” (*juhan* 従犯) was used to describe someone who assisted in carrying out a homicide but at the instigation of some other person, labeled the “principal” (*shuhan* 首犯). The codes called for more severe punishment for the principal with whom the intent to commit the crime had originated, even if that person was not directly involved in its performance.<sup>20</sup> A third important feature of the two codes was the concept of mitigation: judges were allowed to reduce the severity of the punishment by one to five degrees based upon factors such as the offender’s age, gender, health or well-being, status as a male heir or an only child, and so on.<sup>21</sup> From the perspective of these points of law, certain aspects of the competing narratives of the death of Etsu’s infant assume new meaning. Kotono’s concern to establish that she had consulted with others within the family, Ryūhei’s insistence that he had resigned himself to raising the infant, and Kan’s statement that she had acted only in response to Kotono’s prompting—all seem to be prompted by an awareness of the legal distinction between “principal” and “participant.” In the same way, Kan’s insistence that no one had asked Toda to kill the infant before its birth and that she had only acted after viewing the weak and seemingly abnormal infant carefully negotiates the distinction between “preconceived” and “willful murder.”

The record does not reveal how the judges came to their decision, but—whether out of sympathy for the accused or because of an unwillingness or inability to untangle the conflicting narratives—the sentences they issued were far lighter than might be expected. For one, they judged this to be a case of “willful” murder, even though this act of infanticide followed multiple failed attempts at abortion. Kotono was delineated as the “principal” and was sentenced to three years, but this was then reduced five degrees to a mere one hundred days, in recognition of what are vaguely described as “the circumstances” of her act. Kan was accordingly judged to be a participant and was sentenced as well to one hundred days. Ryūhei perhaps benefited greatest from the court’s largesse: while it recognized that he had “incited” the initial efforts to abort, he was sentenced to only thirty days because in the end the attempts at abortion had failed. Moreover, even this sentence was commuted to a fine of two yen and fifteen sen. In addition, Ryūhei was not found guilty of any involvement in the infant’s death and was fined one additional yen for its unlawful burial. Similarly, Katsujirō was fined a mere five sen for his role in the burial. In contrast, the physician Toda was treated with relative harshness. While the court accepted his argument that his drugs had had no ill effect, it held him responsible for not intervening to prevent Kan’s act, citing article 237 of the *Shinritsu kōryō* which made it a crime to fail to intervene to prevent an act of violence. He was sentenced to ninety days, but this was reduced to forty days based upon mitigation, and this sentence was then commuted to a fine of three yen.

But the case did not end with these judgments. The Muraoka prosecutor, Takeuchi Naoyoshi, disagreed with what he characterized as the undue lightness of the sentences and appealed the lower court’s rulings. In his lengthy statement to the high court, Takeuchi spoke contemptuously of what he characterised as the Muraoka court’s affirmation of the Kikuchi family’s concern for reputation and argued that none of those involved should be granted a reduction of the statutory sentences. For example, in relation to Kotono, Takeuchi ar-



gued that she had decided to kill her grandchild merely in order to conceal her daughter's misconduct, behavior for which Kotonno, as Etsu's mother, was ultimately responsible. He contrasted Kotonno's lack of concern for the life of the infant, with the motivation of impoverished parents who, in a misguided attempt to provide for their child, abandon it at the gate of a wealthy household. Noting that acts of child abandonment were punished by one hundred days of confinement, Takeuchi asked, can the act of Kotonno be weighed the same? The prosecutor dealt harshly with Ryūhei as well, pointing out that whatever the outcome, his intention had been that Etsu end her pregnancy. In regard to Toda, Takeuchi argued that he had full knowledge of the family's desire to abort the fetus and thus should have reported them to the authorities.

In the end, however, the verdict of the Daishin'in fell far short of the stiff sentences requested by Takeuchi. It confirmed the sentences of the lower court in relation to Kotonno, Toda, and Ryūhei and found Katsujirō to be not guilty of any crime. Only Kan suffered at the hands of the high court. As in the Qing penal codes upon which they were modeled, within the *Shinritsu kōryō* and *Kaitai ritsurei*, crimes were viewed through the prism of Confucian social relationships, and concepts of hierarchy based upon age, gender, kinship, and so on functioned to define the severity of the crime committed.<sup>22</sup> Generally, acts committed by a "senior" (*sonchō* 尊長) against a "junior" (*hiyō* 卑幼) were punished less severely than the reverse, but in addition, in the case of crimes committed against relatives, the closeness of the kinship relationship became another decisive factor in determining punishments. The degree of kinship was defined by the five kinds of mourning relationships specified in Chinese law, which specified different lengths of mourning behavior based the relative valorization of different kinds of kinship ties. Transferred to the realm of criminal law, this meant, for example, that in the case when a "junior" killed a senior relative of the third degree, his punishment was to be increased by three degrees over the penalty for the same crime against a non-related person, while the killing of a senior relative of the fourth degree brought an increase of only two degrees. This logic was reversed in the case when a "senior" killed a junior relation. A "senior" who killed a "junior" relative of the third degree was to have his punishment reduced by three degrees, while the murder of a junior relative of the fourth degree was to receive a reduction of only two degrees and that of a junior relative of the fifth degree carried a reduction of only one degree.<sup>23</sup> Thus, in the case of offenses against junior relatives, the penalties became heavier as the kinship relation becomes more distant.

Applied to the case of the Kikuchi family this meant that even though Kotonno was judged to be the principal in this act of homicide, her status as the maternal grandmother of the victim meant that she was punished less severely than Kan, the maternal great-grandmother. The high court ordered that Kan's sentence be increased to death by strangling, but then reduced this sentence six degrees, to a term of two years of penal servitude.

### **Reproduction, the Family, and the Law**

The new legal system thus situated the Kikuchi family's crisis within a new regime of justice: one in which intention, motive, premeditation, and agency vied with conceptions of kinship to determine who would be punished and how. In conceptualizing the difference between the early modern and modern policies toward reproductive "crimes," Sakurai Yuki

桜井由幾 has argued that in the Tokugawa period abortion and infanticide were treated as “crimes of the family” (*kazoku no tsumi* 家族の罪), while in the Meiji period they began to be viewed as “crimes of individuals” (*kojin no tsumi* 個人の罪).<sup>24</sup> Using Sendai and Tsuyama as examples, she argues that in domains that established penalties for abortion and infanticide, it was generally the household head (that is, the father or husband of the pregnant woman) who was singled out for punishment. Sawayama Mikako 沢山美果子 has also examined the case of Tsuyama and has suggested that Sakurai’s conclusions need some modification: she argues that before the 1830s, it was often the members of the *goningumi* who were held responsible for suspected acts of abortion and infanticide for failing to exercise adequate supervision over its members, while only after 1830, responsibility for reproductive crimes began to be assigned to the household—but in this case both husbands and wives were punished.<sup>25</sup> Nonetheless, Sakurai is correct in her recognition that after 1868 emergent legal system required a new and unfamiliar consideration of individual intentions and responsibility, even as—as the Kikuchi case reveals—reproductive choices often did not rest with a single person. Thus, prosecutors, judges, and defendants struggled over the issue of who had acted and why, questions that required them to make judgments about the relations of power and authority that exist within families and between sexual partners.

As the “silence” of Etsu within this record suggests, in those cases in which a abortion and infanticide took place within a clearly defined family context, authority for this decision either rested—or was presumed to rest—with someone other than the young pregnant woman herself. This is evident from another case originally in the Muraoka court, which involved the death of a female infant born to Terakura Banzō and his wife Tatsu.<sup>26</sup> Charged with the death were Terakura Tami, the mother of Banzō, Terakura Fuyo, his maternal grandmother, and Furutata Shiru, the mother of Tatsu. According to the statement offered by Tami all three women were present when Tatsu gave birth to her second child, a girl. After conferring with Fuyo and Shiro—but not with Tatsu apparently—she smothered the infant because it was born before its older brother was weaned, and she believed that Tatsu would be unable to successfully nurse both children. The lower court had convicted all three women guilty of willful murder, but their sentences differed: Tami was sentenced to three years of penal servitude, Fuyo to three years with a reduction based upon mitigation to two, and Shiru to death by strangling, with a reduction based upon six degrees of mitigation, to two years. As in the case of Kikuchi Kan, the harsher sentence of Shiru reflects the principle that distant relatives were to be punished more harshly than close ones in acts of violence against those viewed as “junior.”

In this case, too, the appeal was brought by the prosecutor who argued that the sentences were too lenient. He stated that Tami should have been found guilty of preconceived murder, that there was no basis for reducing Fuyo’s sentence, and that Shiru’s sentence should only have been reduced to three, not two years. But the high court disagreed. It confirmed the legality of the lower court’s decision in relation to Tami and Fuyo—but reduced Shiru’s sentence to only one year, an interesting departure from the decision rendered the year before in the case of Kikuchi Kan, whose sentence had been lengthened by the Daishin’in. In her statement to the high court, Shiru asserted that when the issue of the infant’s fate came up soon after her own daughter had given birth, she in fact was opposed to smothering it, because

she had few grandchildren and wanted another, but since her daughter had married into this family, she felt she could not strongly protest and that ultimately the decision was Tami and Fuyo's to make. It seems that this argument proved convincing: the judgment of the court was that, given the context, Shiru's passive stance was understandable, if still criminal, and thus reduced her sentence.

As these cases suggest, the decisions of the Daishin'in tended to confirm specific patterns of authority within the family, patterns generally oriented by Confucian conceptions of familial relations as the codes themselves required. At the same time, however, the high court did upon occasion reject the statutory requirements when a defendant or prosecutor successfully articulated their stance in relation to a seemingly shared cultural norm. Thus, Shiru's evocation of her "outsider" status within the household of her daughter's husband seems to have resonated with judges of the Daishin'in, with the result that she fared far better than Kan, whose defense was that she had acted at the direction of her daughter-in-law.

The court's concern to confirm patriarchal conceptions of familial authority is apparent in the case of Nakajima Matabei, who was tried and convicted in the Himeji court for participating in the murder of an infant born to Nishigaki Maki, his wife's niece. He was sentenced to three years of penal servitude.<sup>27</sup> Nakajima appealed his sentence to the Daishin'in. According to the testimony presented to the court, Nishigaki Maki had lived with Matabei and his wife Rie for several years before her marriage in 1879. However, the marriage soon failed, and Maki returned to the Nakajima home pregnant early in 1880. When she gave birth three months later, the child was smothered by Rie, who was later convicted and sentenced. Matabei was convicted of failing to intervene to stop this crime and was sentenced to ten years with a reduction based upon mitigation to three. In his appeal, Matabei argued that although he was present in the home at the time of the birth, he was drunk and knew nothing of what went on, that his wife told him the child was stillborn, and so he had buried it. He insisted that his wife had implicated him to lighten her own sentence. To this, the prosecutor countered by citing the story Matabei had told upon his arrest in which he related that Rie had questioned him about what to do with Maki's infant and that he had replied "do what you want" (*katte ni shiro* 勝手にしろ). In the end, the Daishin'in apparently concluded that, drunk or not, Matabei bore responsibility for this act, given that his wife had attempted to consult him, and his original sentence was confirmed.

Matabei's charge that his wife implicated him merely to lessen her own culpability may not have been baseless. In fact, the courts did indeed show sympathy to women who argued that they had deferred to their husbands in relation to decisions about reproductive matters, although, as the case of Kikuchi Kotono suggests, this defense did not prevail in every case. It was just such an argument that won Takenaka Shika, a thirty-seven year old woman who resided in Osaka prefecture, a reduced sentence.<sup>28</sup> Shika had been convicted of procuring an abortion and sentenced to one hundred days, but this decision was appealed by none other than the prosecutor, who asserted that the sentence was overly harsh in that Shika, a married woman, had sought out an abortion at the insistence of her husband Shōgorō who felt the family's poverty made it impossible to support a child. The prosecutor argued that the lower court had failed to consider the involvement of her husband, arguing that this was not her crime alone, but "a crime of family complicity" (*ikka kyōhan* 一家共犯). The response by

the court was to state that article 144 of the *Kaitai ritsurei* specifically held that women were to be held accountable for this crime and allowed the court to distinguish between principal and participant, but there was no foundation upon which to assert “family complicity.” That being said, the high court judges, while affirming Shika’s conviction, reduced her sentence significantly to sixty days.

### The Morality of Motive

As the Osaka prosecutor’s sympathy for the impoverished Shika and the Muraoka prosecutor’s scathing dismissal of Kikuike Kotono’s concern for reputation suggests, the motives that were perceived to have prompted an act of abortion or infanticide factored significantly in how a case was adjudicated. While prosecutors and judges could be lenient with obedient wives and desperate mothers, they regarded more harshly men and women who sought abortions in order to conceal illicit sexual relationships.<sup>29</sup> Of the fifteen appeals heard by the Daishin’in, five involved men found guilty of “instigating” an abortion in such circumstances. The appeals, four of which were initiated by the convicted men, rested upon the assertion that the decision to abort had in fact been made by the pregnant women themselves. Thus, it was the legal distinction between principal and participant that was at the heart of these cases.

The story told by Takagi Kyukichi revolves around just this issue.<sup>30</sup> In 1881, Takagi was convicted in the Sakai district court for encouraging Machitani Masu to procure an abortion and sentenced to one hundred days. In his statement before the high court, Takagi argued that when Masu became pregnant in 1880 after the two had become intimate, she told him at once that she wanted to abort the fetus rather than face the censure of “the world” (*sejin* 世人). According to Takagi, he was aware from the outset that “human life was not something to be killed,” but in order to take some time to consider what to do, he agreed with Masu for the moment. Then, before he could intervene, Masu secretly sought out a woman named Umamo Ino and had her perform the abortion. When he heard of what she had done, Takagi stated, he had immediately confessed his involvement to the police in the hope that it would win him some consideration from the court, but in fact he had been sentenced to the maximum. Takagi’s portrayal of himself as ethical, well-intentioned, and law-abiding apparently did not impress the judges of the high court: the Daishin’in simply confirmed the earlier sentence without comment.

The appeal brought by Sakuragi Tokujirō was similarly unsuccessful.<sup>31</sup> Sakuragi was sentenced in 1881 in the Kyoto district court to three years of penal servitude for instigating an abortion on the part of his lover Oi Toyo, who had died as a result of the abortion. According to Sakuragi, Toyo had sought the abortion without his knowledge while he was away on business for about ten days. He learned of it only when she visited him after his return, and then sometime later he learned that she had died. Sakuragi acknowledged that he had affixed his seal to a confession but insisted that this had been coerced and that he had had in no way participated in Toyo’s abortion. The response of the high court was once again to confirm the earlier sentence without comment.

A far more interesting defense was offered by Shimada Hisahachi who was been convicted in the Sakai district court in 1880 for compelling Sakamoto Ryū to seek an abortion and

sentenced to one hundred days. He appealed and in 1881 his case came up for review by the Daishin'in.<sup>32</sup> According to Shimada, in 1879, he had hired Ryū as a household servant in August 1879, after an introduction by Nakano Seizaburō. Sometime in mid-May of 1880, he began a sexual relationship with her, and a few months later she told him she was pregnant. According to Shimada, from the outset he had questioned whether he was responsible for her pregnancy. Nonetheless, fearing that exposure of their sexual relationship would cause an uproar in his family and out of feelings of “compassion” for Ryū he tried to help her by sending her to live with Nakano Seizaburō until she gave birth. In addition to providing for her support, he also gave her money so that she could buy medicines if she did not feel well. However, insisted Shimada, it was never his intention that she use this money to procure an abortion, nor had he encouraged her to seek one. However, he was later told by Nakano and Ryū that she had in fact had an abortion, and the two began to press him for money under the threat that they would expose his involvement. He argued that the evidence Nakano and Ryū had later presented against him in court was malicious and untrue. Like Takagi and Sakuragi, Shimada thus portrayed himself as the real victim in this case, although he surpassed them in presenting a negative picture of his one time lover. He argued he had been seduced by Ryū, who together with Nakano, manipulated him, took advantage of his generosity and concern for reputation, and tried to blackmail him. The court however was seemingly unimpressed: it confirmed his earlier conviction and sentence without comment.

Thus, in every case, the courts dealt severely with the men implicated in ending pregnancies that resulted from illicit sexual relations, suggesting that concern for punishing promiscuity was one intent of the prosecution of reproductive “crimes.” It is unclear whether the judges in fact believed that women were unlikely to have acted on their own to end their pregnancies, as the male defendants claimed, or were simply unwilling to have the men who figured in these relationships walk away unpunished. Certainly, little sign of sympathy for the women involved appears in the legal records of these cases. In court documents, prosecutors, judges, and their former lovers as well routinely refer to the woman in question, not by name, but by the disparaging term “the unchaste woman” (*kanpu*). And in each case, the women too were prosecuted, convicted, and sentenced. Worthy of note is the fact that these young women appear to have been “working girls” (*hōkōnin* 奉行人), that is, women employed as household servants or as workers in family enterprises who were no longer living within their natal households. Like the errant Etsu, Masu, Toyo, and Ryū too are “silent” within the record of the Daishin'in, and we hear of them only through the words of their former lovers. But unlike Etsu, who escaped prosecution while her mother, father, and grandmother were convicted, the court viewed these young women, not as passive before family manipulation, but as active agents who were complicit in ending their pregnancies.

### **The Business of Abortion: Abortion Providers and the Law**

Among the fifteen cases of reproductive crimes that came before the Daishin'in for review, six involved defendants who were charged with providing abortifacients or using other methods to cause an abortion. There is a good deal of evidence that abortion providers, many of them associated with the obstetrically-oriented medical schools, the *Chūjō-ryū* 中條流 and the *Kagawa-ryū* 賀川流, operated openly in early modern cities and towns.<sup>33</sup> The Meiji

government's desire to de-legitmate such forms of medical practice is evident in its 1869 edict prohibiting midwives from providing drugs or using other means to induce an abortion. This was followed in 1874 by the issuance of the Medical Act (*isei* 医制) that included a ban on the performance of abortions by both midwives and physicians. And as we have already noted, in 1873, promulgation of the *Kaitai ritsurei* made it a criminal act for anyone to use drugs or other means to induce an abortion. However, the testimony offered by defendants before the Daishin'in suggest that there was a good deal of ambiguity surrounding what might cynically be termed the "trade" in abortions. We have already encountered the figure of Toda Gen'ei who emphasized his efforts to save the life of Etsu's infant in spite of the frenzied efforts of the Kikuchi family to end their daughter's pregnancy. Yet, as we noted, even though the court accepted his assertion that the drugs he had supplied were not really abortifacients, it found him guilty of not intervening aggressively to save Etsu's child. His forty day sentence was significantly more severe than that of Etsu's father.

The harshness with which the high court dealt with Toda is typical of its dispensation of physicians charged with similar crimes. Another doctor convicted of providing an abortion was Sakamoto Shigehachi, who in 1881 had been sentenced to one hundred days by the Osaka district court for performing an abortion on Matsu, the wife of one Matsumoto Senjirō, at the request of her husband.<sup>34</sup> In his appeal, Sakamoto protested that Matsu had come to him complaining only of amenorrhea and had never mentioned the possibility of pregnancy. They had not spoken of abortion, and he had treated her only for "menstrual stagnation." As evidence, Sakamoto—like Toda Gen'ei—produced the prescriptions that named the contents of the medicines he had given her, which presumably did not include notorious abortion-inducing elements. Sakamoto's appeal rested upon the assertion that he had been deceived by his own patient, who had withheld essential information from him. In fact, it would not have been at all unusual for a woman to consult a doctor for just the complaint that Sakamoto attributed to Matsu, because, as Sawayama Mikako had demonstrated, in early modern Japan, the cessation of menstruation was often interpreted as a sign of bad health until fetal movement occurred, confirming pregnancy.<sup>35</sup> But it was equally true that abortifacients were often euphemistically described as medicines that would "make the month flow" (*tsuki wo nagasu* 月を流す). Thus, the ambiguity that surrounded the failure to menstruate made it possible for both women and those who provided them with medical treatment to obfuscate the issue of whether it was an abortion that was being sought. The response of the prosecutor was to point to the statement of Sakamoto's wife, Tei, who had testified that, at the direction of her husband, she had inserted something into Matsu's uterus—a "surgical" intervention that apparently was viewed as evidence that Sakamoto was not providing treatment for irregular menstruation. In the end, the judges of the Daishin'in seem to have accepted that Sakamoto did indeed know what he was doing, because they confirmed the original conviction and sentence without comment.

It was not only the "treatment" of physicians such as Toda and Sakamoto that came under the scrutiny of the courts, so too did the actions of "irregular" providers, often older women who had some knowledge of abortion techniques. For example in 1879, the Daishin'in reviewed the case of Chiba Matsuyo, a fifty-six-year old woman originally convicted in the Muraoka district court for providing abortions to two young women, both of whom later died

as a result.<sup>36</sup> According to Chiba's statement, she knew that ground cherry root (*hōzuki no ne* ほうずきの根) inserted into the uterus would cause an abortion, and young women came to ask her about this method. In August 1878, she was approached by Itō Tome, an unmarried woman, and in September 1878 by Kyū, the wife of Satō Fukuzō, both of whom requested help in ending their pregnancies. Chiba insisted that she had refused to treat them directly, but she acknowledged that, when pressed, she had given each of them small pieces of ground cherry root and described how to insert it vaginally. As a gesture of thanks (not payment, according to Matsuyo), both women had given her twenty-five sen. Sometime later she heard that both women had died as a result of their failed abortions. The lower court convicted her, stating that while she had not directly performed the abortions, she had aided these criminal acts by providing instruction. She was sentenced to seventy days of confinement but this was commuted that to a fine of one yen seventy-five sen because she was in ill health.

The appeal was brought by the prosecutor who argued that the sentence was too light, because Chiba must have done more than just provide information. The use of ground cherry root as an abortifacient was widely known, and the women would not have paid twenty-five sen (a substantial sum in the countryside, according to the prosecutor) to be told what they surely already knew. They had, he asserted, paid this amount, because Chiba had in fact actually performed the procedure upon them. He argued that Chiba should be sentenced to the three years specified in the statutes as the penalty for instigating an abortion, from which the woman involved later died. In fact, the prosecutor's argument is supported by ethnographic record of birth customs, *Nihon san'iku shūzoku shiryō shūsei*, in which references to the use of ground cherry root as an abortifacient abound. But while the high court agreed with his argument about the state of popular knowledge, it ultimately rejected the sentence of the lower court. The judges of the Daishin'in refused to hold Chiba directly responsible for the death of the two women, as the prosecutor demanded. In their statement, they pointed to medical testimony that direct cause of the women's death, heart failure, could have occur during a spontaneous miscarriage or a normal birth and argued that there was no clear causal link between her actions and their deaths. In the end, it increased Chiba's sentence to one hundred days but allowed this to be commuted to a fine of two yen fifty sen in consideration of her age and health.

## Conclusion

In the records constituted by the legal system of the 1870s, we have discovered ordinary citizens attempting to negotiate the Meiji state's new concern for regulating reproduction, a concern that situated reproduction in a new public arena, open to the scrutiny of police, prosecutors, and judges. A good number of questions have remain unanswered. One such issue is how these particular acts of abortion and infanticide came to light, when presumably most others did not. To be sure, in some cases the undoubtedly bloody and painful deaths of young women forced an inquiry that brought to light their fatal attempts at abortion, but it is unclear of how the apparently successful cases attracted the attention of police and prosecutors. Equally puzzling is the question of how defendants such as Sakuragi Tokujirō and Shimada Masaichi—men of apparently ordinary means, status, and education—marshalled the resources to appeal their convictions, to force the judges of the highest court of their day

to consider whether one hundred days was sufficient punishment for the role they played in the ending of the pregnancy of their lover. And of course, one is left to ponder the aftermath of the final judgments rendered by the Daishin'in. What happened to the Kikuchi family? So fearful of the loss of reputation, Ryūhei, Kotono, and Kan found themselves arrested, tried, convicted, and sentenced. It is impossible to know, and thus there is a frustrating lack of closure to the stories I have been trying to tell.

Yet, such lacunae notwithstanding, the records of the Daishin'in offer a new perspective on the goals and impact of the Meiji state's pro-natalist policy and the criminalization of abortion and infanticide that were part of its apparatus. As we have seen, the judgments of the high court defy easy generalization: whether the appeal originated with the defendant or the prosecutor, the Daishin'in in some cases increased sentences, in some cases reduced them, and in many cases simply confirmed the decisions of the earlier court. But in making these judgments, the men who sat on the high court adopted discernible patterns in rendering their decisions, employed a certain logic in order to valorize some forms of behavior and sanction others. We have seen, for example, that in evaluating the criminality of an act of abortion or infanticide, the judges viewed some motives as more valid than others: poverty was a mitigating factor, a desire to conceal illicit sexual activity was not. As this suggests, the emergent legal system of the Meiji state was implicated in enforcing a certain vision of social/sexual order. Implicit to this order was the confirmation of patriarchal authority within the family. The Meiji courts required fathers and husbands (and by extension mothers-in-law!) to be responsible for the sexual behavior and reproductive potential of their daughters and wives. Female defendants whose acts seemed to conform to this vision of social relations—Kotono, Shiru, and Shika, for example—were treated fairly generously by the judges of the high court, while such “unchaste women” as Masu and Ryū, who seemed to have stood outside the sphere of familial authority were treated harshly. But this validation of patriarchal authority also meant that men whose behavior failed to mesh with this vision of the family received little consideration from the high courts, as the fate of poor drunken Matabei reveals. Whether the defendants and their families in fact enacted these norms in their everyday life is of course a different question—what is apparent is that some defendants recognized the expediency of invoking such values in relation to the court, the representative of state power.

The stories told within the Daishin'in records thus seem to confirm the conclusion of Ishizaki Shōko, who argued that it was Confucian-influenced concepts of social order that led to the articulation of abortion and infanticide as crimes in the early Meiji period. Yet even as the courts worked to legitimate forms of family authority that resonated with Confucian norms, the legal system simultaneously required that the “crimes” of abortion and infanticide be viewed as acts committed by individuals—a position most explicitly demonstrated in the Daishin'in's rejection of the concept of “family complicity.” As the stories told to the Daishin'in reveal, the new arena of the law pitted family members against one another, requiring them to rethink, to articulate, and to identify who had made the decision about whether a pregnancy was to continue or not, whether an infant was to live or die. The result was to force the reconceptualization of abortion and infanticide into acts of “choice” of the part of a self-conscious subject. Historians of abortion and infanticide in Europe and North America have most often explored the prosecution of reproductive “crimes” as an the issue of



female bodily self-determination, arguing that from the nineteenth century onward women's desire to control their own fertility for financial, health, or other reasons came into conflict with state and civic forms of authority, among them religious institutions acting upon changing definitions of fetal life and medical professionals attempting to establish their control over reproductive strategies.<sup>37</sup> As the case of Japan suggests, the notion of "choice" too clearly "has a history"—it took form as new conceptions of gendered social subjects were being produced and enacted.

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## NOTES

<sup>1</sup> Fujime 1997, esp. pp. 11-47.

<sup>2</sup> Ishizaki 1997, pp. 53-70.

<sup>3</sup> Kanazu 1996, pp. 26-43.

<sup>4</sup> On these two early Meiji codes, I have found the following useful: Mizubayashi 1992 and Tezuka 1956. In English, see Ch'en 1980. Many of the statutes are available in English translation in Longford 1887, pp. 1-114.

<sup>5</sup> Mizubayashi 1992, pp. 262-263.

<sup>6</sup> *Ibid.*, p. 211.

<sup>7</sup> See articles no. 164 and 224 in the statutes on homicide in *ibid.*, pp. 244 and 275-276, respectively.

<sup>8</sup> *Naimusho nenpō hōkokusho, Bekkan 1*, pp. 83-83. In contrast to the large numbers of prosecutions in Japan, in 1900, in England and Wales, only eight women were charged and five found guilty of aborting a fetus, while in France in that year, seventy-three women were charged and of these twenty-eight were found guilty. In Germany, however, in the same year 411 people were convicted. See Koizumi 1934.

<sup>9</sup> On the nature of the "small newspapers," see Huffman 1997, pp. 89-95.

<sup>10</sup> *Yomiuri shinbun*, 30 April 1878.

<sup>11</sup> *Ibid.*, 9 May 1878.

<sup>12</sup> Onshi Zaidan Boshi Aikū Kai 1975, p.162.

<sup>13</sup> *Ibid.*

<sup>14</sup> The number of cases per prefecture was as follows: Chiba 2, Iwate 3, Hyogo 2, Shiga 2, Osaka 4, Fukuoka 1, Tokushima 1.

<sup>15</sup> Davis 1987.

<sup>16</sup> The form of the records of the appeals changes dramatically after 1882. The narrative elements I describe are no longer present: instead the record of the case becomes a rather dry summary of the legal issues involved.

<sup>17</sup> *Meiji zenki Daishin'in keiji banketsu roku* vol. 5, pp. 21-34. This 29-volume collection reprints Min-

istry of Justice records from Meiji 8 to Meiji 17.

<sup>18</sup> Meijer 1991, p. 24.

<sup>19</sup> Mizubayashi 1992, pp. 494-500.

<sup>20</sup> Ibid., pp. 501-507.

<sup>21</sup> Ibid., pp. 531-538.

<sup>22</sup> On Confucianism and Chinese law, I have found the following useful: Bodde and Morris 1967 and Sommer 2000.

<sup>23</sup> For the relative portion of the statute, as well as a useful commentary, see Mizubayashi 1992, pp. 165-166.

<sup>24</sup> Sakurai 1993, p. 126.

<sup>25</sup> Sawayama 1998, pp. 161-190.

<sup>26</sup> *Meiji zenki Daishin'in keiji hanketsu roku*, vol. 12, pp. 325-327.

<sup>27</sup> Ibid, vol. 15, pp. 294-295.

<sup>28</sup> Ibid., vol. 18, p. 24-25.

<sup>29</sup> In contrast, Sawayama Mikako has suggested that in early modern Tsuyama, married couples were punished more severely than unmarried couples, because it was thought "natural" that people should seek to hide the consequences of an illicit relationship, while a married couple had no such excuse. See Sawayama 1998b, pp. 170-171.

<sup>30</sup> *Meiji zenki Daishin'in keiji hanketsu roku*, vol. 19, pp. 222-223,

<sup>31</sup> Ibid., vol. 9, pp. 61-162.

<sup>32</sup> Ibid., vol. 18, pp. 170-171.

<sup>33</sup> On the Chūjōryū, see Ogata 1914 (1980), pp. 233-244, and Takada 1928, pp. 254-290. On the Kagawaryū, see Burns 2002.

<sup>34</sup> *Meiji zenki Daishin'in keiji hanketsu roku*, vol. 17, pp. 247.

<sup>35</sup> Sawayama 1998a, pp. 133-157. This ambiguity was not limited to Japan; see for example Duden 1991 and van de Walle and Reene 2001.

<sup>36</sup> *Meiji zenki Daishin'in keiji hanketsu roku*, vol. 5, pp. 67-71.

<sup>37</sup> This is certainly the dominant narrative in the histories of abortion in the U.S. and Great Britain. See, for example, Mohr 1978 and Brodie 1994). On the British case, see Keown 1988 and McLaren 1984.