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## ARTICLE

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### REGULATING PREGNANCY IN TAIWAN: AN ANALYSIS FROM AN ASIAN LEGAL FEMINIST USING FEMINIST LEGAL THEORIES

By: Chih-Chieh Lin\*

#### I. INTRODUCTION

With the increased application of fetal-protection policies, expectations regarding what a woman “should do” or “should not do” during pregnancy have become more widespread. In 2002, an Arkansas circuit court judge placed an unborn child in the custody of the state, based on evidence that the mother was using illegal drugs and had declined to receive any prenatal care.<sup>1</sup> The judge ordered the mother to stop using illegal drugs and to start prenatal care for her unborn child.<sup>2</sup> The judge later found the mother in contempt of court for failing to follow those orders.<sup>3</sup> The United States Unborn Victims of Violence Act of 2004 also recognizes that criminal offenses committed against pregnant women potentially have two victims — the mother and the unborn child.<sup>4</sup> Since the United States started the war on drugs, prosecuting pregnant women for using drugs with “possession of a controlled substance, delivering drugs to a minor, child abuse or neglect, cruelty to children, or even contributing to the delinquency of a minor,” has not been unusual.<sup>5</sup> In the wake new legislation regarding “fetal rights,” based on the belief that a fetus is a “potential human being” and thus deserving of protection, leaves women the clear target of this legislation. Fetal-protection policies, which treat an unborn child as an independent third-party and police women’s bodies and behaviors, raise several constitutional issues and feminist concerns, specifically whether these policies deprive women of fundamental rights to privacy and personal autonomy.<sup>6</sup>

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1 Ark. Dep’t of Human Servs. v. Collier, 95 S.W.3d 772, 773-74 (Ark. 2003).

2 *Id.*

3 *Id.* at 774-75.

4 18 UNITED STATESUNITED STATES. § 1841 (Supp. 2008).

5 RACHEL ROTH, MAKING WOMEN PAY: THE HIDDEN COST OF FETAL RIGHTS 146-47 (2000).

6 Deanna Rae Reitman, Note, *The Collision Between the Right of Women, the Right of the Fetus and the Rights of the State: A Critical Analysis of the Criminal Prosecution of Drug Addicted Pregnant Women*, 16 ST. JOHN’S J. LEGAL COMMENT. 267, 268 (2002).

Attempting to regulate pregnancy is not unique to the United States. In Taiwan, to maintain sustainable birthrates and ensure the health of newborns, the government has started to adopt a series of steps to regulate women. Taiwan has a complex historical background and mixed culture, including Chinese-Han, Japanese, aboriginal, and South-Asian. Taiwanese women have faced various types of gender inequalities throughout the nation's history. Although women in Taiwan now enjoy more personal liberties, the subordination of women still shadows Taiwanese society.

The recent fetal rights policy in Taiwan, which regulates women's reproductive freedom and erodes their decision-making autonomy during pregnancy, illustrates motherhood's inferior role in a patriarchal society. The emergence and analysis of such policy has a complicated dynamic. Changes in women's social status, the structure of gender roles within families, the increasing tendency to remain single and have fewer children, and the rapid expansion of transnational marriages are factors in the formation of the reproductive-based discrimination in Taiwan.

In this paper, I will discuss the connection between changing gender roles and the rise of fetal-protection policies in Taiwanese society. I will explore how the State applies its legislative, administrative, and judicial powers to police women's bodies and behaviors. Next, using feminist legal theory to analyze policies of fetal rights, I will argue that these fetal-protection policies not only subordinate and discriminate against women, but also offer no real protection to the unborn fetus. Finally, I will propose the "harmonious model," which provides support resources and health education for pregnant women and serves as a more effective gender-equal way to resolve potential conflicts of interest between a mother and the unborn fetus.

## II. AN OVERVIEW OF THE EVOLUTION OF GENDER EQUALITY IN TAIWAN

### *A. Mixed Cultures, Same Inferiority*

1. *The Ching Dynasty: Before 1895.* — The development of gender equality in Taiwan reflects a complex dynamic of political and cultural transformation. Before Japan acquired Taiwan in 1895 as a result of Japan's overwhelming victory in the Sino-Japanese War, Taiwan was part of the Chinese Empire under the Ching Dynasty. While there were several different ethnic groups in Taiwan, such as Aboriginal, Hakka, and Ho-lo, it was the Han Chinese (mainly

organized by Hakka and Ho-lo people) that immigrated to Taiwan from Mainland China that formed a majority of the society.<sup>7</sup>

The political and social beliefs of the Han Chinese were fundamentally influenced by Confucianism, which formed the group's perspectives of gender roles, marriage arrangements, and family structure.<sup>8</sup> Within Confucianism, the subordination of women takes many forms, especially in marriage and family relationships. Marriage and family structure under Confucianism have the following characteristics: "(1) monogamous relationships (but permits the existence of concubines), (2) firm heterosexual relationships, (3) marriage seen as the sole basis to establish a family, and (4) marriage/family seen as the single institution from which all relative relationships are generated."<sup>9</sup>

"According to the Han Chinese tradition, family membership, inheritance of property, and the distribution of authority are defined through the axis of father and son."<sup>10</sup> Therefore, under the laws of the Ching Dynasty as well as Han Chinese tradition, once a woman married, her labor and income belonged to her husband's family. She was to obey her husband and the elder members of his family and could not possess nor inherit any property either from her husband or her biological parents.<sup>11</sup> In this patriarchal society, a woman's social status was vastly inferior. The primary role of women was to please their husbands and to bear children, where having a male offspring to carry the husband's family's surname was the most important obligation for a married woman.

2. *The Colonial Period: 1895 to 1945.* — Around 1900, after Japan colonized Taiwan, Taiwan adopted modern codes mostly modeled on continental European law,<sup>12</sup> Although western-style criminal and administrative laws took effect, the Japanese government "respected" Taiwan's traditions with regard to family problems or

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7 See generally CIVIL ADMINISTRATION IN RURAL TAIWAN DURING THE CHING DYNASTY (YEN-HUEI, DAI, CH'ING-TAI T'AI-WAN ZHI HSIANG-ZHI) (1979).

8 See Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1623 (2000); see also Shu-chin Kuo, *A Cultural Legal Study on the Transformation of Family Law in Taiwan*, 16 S. CAL. INTERDISC. L.J. 379, 385 (2007).

9 See Kuo, *supra* note 9 at 832 (discussing Xiaoping Feng, *A Review of the Development of Marriage Law in the People's Republic of China*, 79 U. DET. MERCY L. REV. 331 (2002)).

10 Pei-Chia Lan, *Among Women: Migrate Domestic and Their Taiwanese Employers Across Generations*, in GLOBAL WOMAN 169-70 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2002).

11 TAY-SHENG, WANG, TAI-WAN FA-LEU-SHIH GAI-LU 106-107 LEGAL HISTORY IN TAIWAN] (2001).

12 Tay-sheng Wang, *The Legal Development of Taiwan in the 20<sup>th</sup> Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL'Y J. 531, 533 (2002).

inheritance disputes.<sup>13</sup> During this time, the Japanese government tried to import Japanese culture into Taiwanese society through its “imperialization of the subjects” policy.<sup>14</sup>

This policy attempted to transform the identity of Taiwanese people, from “Taiwanese” to being the people of the Japanese Empire or “Mikado,” by imposing the thought of Japanese superiority. Although Japan westernized its legal and political system after the Meiji Restoration of 1868, women’s lives and social status were not equal to men. “According to Japan’s conservative majority, the ideal Japanese woman devotes herself exclusively to familial and domestic affairs, including caring for children and elderly relatives.”<sup>15</sup> As a result, the new cultural ideas exported to Taiwan by the colonial government did not make any notable improvements in the subordination of Taiwanese women within their family lives.

From the middle of the colonial period to the time before World War II, the Taiwanese economy flourished. Following the development of domestic industry and business, and with a shortage of labor due to the war, women suddenly had access to Taiwan’s job market. Some female Taiwanese students, who came from rich families, were able to go to Japan to pursue medical degrees and return to practice in Taiwan.<sup>16</sup> Few locally educated women, after receiving short-term training, could be teachers in elementary schools or licensed midwives.<sup>17</sup> However, there were few professional women with this training. Most jobs for Taiwanese women were in manufacturing as factory laborers, porters on buses, conductors on trains, or servers in restaurants.<sup>18</sup> Salary and work conditions for most working women were poor.<sup>19</sup> Although they seemed to have more choices during the colonial period, their social status was still notably inferior to men.

3. *KMT Regime and Authoritarian Period: 1935 to 1987.* — In 1945, after Japan’s defeat in World War II, the Republic of China (“ROC”), led by Koumintang (“KMT”), acquired Taiwan. In late 1949, the island became a de facto state when the ROC central government moved to Taiwan due to its defeat in the civil war in

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13 WANG, *supra* note 12, at 346-50.

14 Wang, *supra* note 12, at 535.

15 M. Christina Luera, Comment, *No More Waiting For Revolution: Japan Should Take Positive Action to Implement the Convention on the Elimination of All Forms of Discrimination Against Women*, 13 PAC. RIM L. & POL’Y J. 611-12 (2004).

16 TAIWAN PROVENIENCE LITERATURE COMMITTEE, TAIWAN JIEN-DAI-SHIH, SOCIETY, VOL. 3 124 [Modern Taiwan History] (1995).

17 *Id.* at 122-23, 125-26.

18 *Id.* at 126-31.

19 *Id.* at 130-32.

Mainland China.<sup>20</sup> The KMT regime took control of Taiwan and attempted to solidify its authoritarian rule. Although the KMT regime brought some western-style codes from Mainland China, many elements of these liberal ROC laws were reduced, especially in the areas of “the constitution, administrative regulation, judiciary, and criminal justice — all of which were closely related to the national governing power.”<sup>21</sup> However, unlike the Japanese government, which basically respected Taiwan’s traditional customs in relation to family and inheritance issues, the KMT regime took a stricter attitude when its western-style family law conflicted with Taiwanese customs. According to the new laws under the KMT, men were not allowed to have concubines and the laws recognized women’s inheritance rights.<sup>22</sup>

Under martial law, many civil rights provisions in the ROC constitution froze. However, for the first time in Taiwan’s history, women acquired the right to vote and receive “compulsory education,” which included six years of elementary school and three years of junior high school education. During this authoritarian period, gender equality seemed to make some positive steps forward. A prosperous economy and the development of greater industry created tremendous work opportunities for Taiwanese women.<sup>23</sup> Moreover, compulsory education enhanced the average education level of Taiwanese women. With the improved level of education, women had more choices in the workplace. Additionally, implementation of a strict monogamy law and enforcement of the right to inherit, improved both a women’s status in the family and greater protection of her property.

Unfortunately, in spite of these changes, both public and private fields were still full of gender discrimination during this period of Taiwanese history. For example, according to family law at that time, a wife was obliged to live with her husband. A child would carry on the father’s surname only if the mother did not have a brother. In the workplace, women’s primary occupations were routine jobs such as industrial workers, nurses, or secretaries instead of the high social-status jobs such as professors, judges, or doctors. Even if a woman and man performed equal work, they might not earn equal pay. In sum, the subtle improvement of women’s economic and educational status did not shake the solid unequal gender roles under the shadow of patriarchy. “In the Taiwanese society, the designated gender roles for a woman are, in a chronological sequence, a filial daughter, dutiful

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20 WANG, *supra* note 12, at 537.

21 *Id.* at 537-38.

22 WANG, *supra* note 12, at 373.

23 TAIWAN PROVENIENCE LITERATURE COMMITTEE, *supra* note 17, at 236-37.

[and] chaste wife, and virtuous [and] loving mother.”<sup>24</sup> So although the economic environment improved and women’s mobility enhanced, this period never achieved formal or substantive gender equality.

4. *Liberal and Democratic Period: 1987 to Date.* — The lifting of martial law in 1987 heralded a new era for Taiwan and the Taiwanese women’s movement. The upgrading of the industrial infrastructure, modification of unreasonably restricted civil and political rights, and return of a number of academic elites who studied overseas, made Taiwan’s society more liberal and diverse. This period focused on human rights and Taiwanese women began to participate in political and social movements to change the existing inequality gap between men and women. Many women’s organizations formed to focus on economic inequality, women’s health, and legal inequality. The most remarkable achievement over the past fifteen years of organizing was the successful ratification of several gender-related laws.<sup>25</sup> These organization’s efforts accelerated the following legal reforms: (1) amending family to eliminate gender-discriminated marriage arrangements, (2) amending rape laws to include more types of sexual violations, (3) enacting the Anti-Rape Act to prevent sexual assaults, (4) enacting the Anti-Domestic Violence Act to protect disadvantaged members of the family, (5) enacting the Equal Protection Employment Act to provide equal treatment in the workplace, (6) enacting the Equal Protection in Education Act to ensure gender equality on campus, and (7) enacting Sexual Harassment Prevention Act to protect women’s sexual autonomy. Such legal reforms not only awakened public attention towards the subordination of women, but also formally improved women’s social status and legal rights.

While the women’s movement celebrated these remarkable legal achievements, women in Taiwan still face discrimination and subordination. On the surface, Taiwan is a modern, democratic country with many laws to ensure women’s rights; yet, its patriarchal culture defines what those laws actually mean. According to the 2005 Annual Report of Taiwanese Women’s Human Rights, many women believe that unequal gender values, such as the belief in male superiority, still hinder Taiwanese women from social participation. Moreover, traditional gender stereotypes and the lack of a comprehensive child-care policy continue to hinder women’s right to

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24 Chao-Ju Chen, *Mothering under the Shadow of Patriarchy*, 1 NTU L. REV. 45, 47 (2006).

25 Xia-Dan, Wang, *Gender and Law* (Xien-Bie Yu Fa-Lu) in GENDER AND TAIWAN’S SOCIETY (Xien-Bie Xiang-Du Yu Taiwan She-Huei) 160 (Shu-ling, Huang & Mei-Huei, Yu ed., 2007).

work.<sup>26</sup> When society expects a woman to be a devoted wife, a good mother, and an able housekeeper, she does not really enjoy gender equality. Working women who want to enter the public sphere and be financially independent are still expected to meet their family obligations. When faced with such a dilemma, those women try to find assistance from other women — their mothers, mother-in-laws, domestic helpers, and even foreign brides — to meet their family obligations or cover the labor shortage in the private sphere.

*B. The Role Replaced: Transnational Marriage and Foreign Brides*

The patriarchal tradition of “coupling-division” asks a Taiwanese woman to enter a heterosexual relationship, taking on the domestic work and child bearing, even if a woman has her own business. Taiwanese society evaluates a woman’s achievements by whom she marries, what education she gives to her children, and how she manages family affairs. To meet these social expectations, married women in Taiwan often find themselves engaged in a brutal battle — where they have to work as hard as men in public, while also assuming all of the housework and child rearing in private.

With the rise of women’s economic independence, more outstanding Taiwanese women are reluctant to take part in a traditional marriage.<sup>27</sup> Some women, even though they agree to wed, choose not to have children.<sup>28</sup> Recent changes in women’s economic and social status and the loosening of restrictive abortion laws, which allow women to terminate an involuntary pregnancy, stimulated a rapid decline in fertility rates in Taiwan.<sup>29</sup> According to 2006 national statistics, the fertility rate of child-bearing age Taiwanese women of was 1.11 percent, which was even lower than rates in the United States, Japan, France, and the United Kingdom.<sup>30</sup> However, “xianqi liangmu” defines what is considered a “good woman” and women who make personal choices not to become wives and mothers soon find themselves on the margins of social acceptance.<sup>31</sup> Women in homosexual relationships do not fare much better. In Taiwan, heterosexual couples enjoy the legitimacy of marriage and material

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26 TAIWAN FU-NUE REN-CHUENG DIAU-CHA BAU-GAU 24-26 (2006) [CHINESE ASSOCIATION FOR HUMAN RIGHT].

27 China Times, Jan. 27, 2008, available at <http://news.chinatimes.com/2007Cti/2007Cti-News/2007Cti-NewsContent/0,4521,110503+112008012700170,00.html>.

28 China Times, Jan. 12, 2008, available at <http://news.chinatimes.com/CMoney/News/News-Page/0,4442,content+120601+122008011200517,00.html>.

29 See 2006 Taiwan Year Book, Birth Rate from 1995-2004, [http://www7.www.gov.tw/EBOOKS/TWANNUAL/show\\_book.php?path=8\\_001\\_12](http://www7.www.gov.tw/EBOOKS/TWANNUAL/show_book.php?path=8_001_12).

30 China Times, Jan. 12, 2008, available at <http://news.chinatimes.com/CMoney/News/News-Page/0,4442,content+120601+122008011200517,00.html>.

31 Chao-Ju Chen, *supra* note 25, at 47.



reciprocity, in such things as dowry, wedding gifts, and assistance in buying a home. Since homosexuality is still taboo in Taiwanese society, gay and lesbian couples do not have the right to marry nor receive financial assistance to establish a family. They also face difficulty in the workplace, having problems obtaining seniority and promotions.<sup>32</sup>

Even with legal reforms, the patriarchal culture dominates the real world without regard to the type of relationships women engaged in. Many single women over the age of thirty-five in modern Taiwanese society feel ambivalent about marriage. On the one hand, they may enjoy economic independence and are spared from a marriage of necessity; on the other hand, they face anxiety and frustration regarding a perceived failure to fulfill the traditional roles assigned by society.<sup>33</sup>

As employment opportunities and social participation increase for Taiwanese women, traditional gender roles are challenged and women experience greater autonomy. Taiwanese men find it harder to pursue their “dream wives” from among these hard-working Taiwanese women. The growing number of transnational marriages show that many Taiwanese men chose to go overseas to find eligible marriage partners rather than adjust to the changing gender roles.. The prosperous economy and increasing globalization provide advantages for Taiwanese men to seek cross-border marriages in China and other South-Asian countries, such as Vietnam, Indonesia, and the Philippines.<sup>34</sup> The transnational-marriage wave reached its peak in 2004, during which almost one out of every four newly-wed brides was from China or South-East Asia.<sup>35</sup>

Although many foreign brides marry to pursue better lives in Taiwan, they face social isolation in their newly adopted country. Many of the men who seek transnational marriages are low-wage earners and insist on maintaining traditional gender roles. While native Taiwanese women increasingly refuse to play the role of loving wife and mother, foreign brides have filled the void in the marriage

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32 See Kuo, *supra* note 9, at 392.

33 See Yu-ning Chen & Mong Hwa Chin, *The Role Replaced: Unmarried Taiwanese Women and Foreign Brides*, in THINKING GENDER PAPERS 3 (2008), available at [http://repositories.cdlib.org/csw/thinkinggender/TG08\\_Chen\\_Chin](http://repositories.cdlib.org/csw/thinkinggender/TG08_Chen_Chin) (follow “Download the Paper” hyperlink).

34 According to the data, by the year of 2007, the affluent economic status of Taiwan is evidenced by an average GDP in Vietnam, Indonesia and China. See generally WORLD DEVELOPMENT INDICATORS DATABASE, WORLD BANK, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf> (July 1, 2008).

35 DEPARTMENT OF STATISTICS, MINISTRY OF INTERIOR, <http://sowf.moi.gov.tw/stat/gender/ps03-04.xls>.

market. As fertility rates drop for Taiwanese women, foreign brides' fertility rates are rising. Statistical data shows that in 1998, foreign brides delivered 1 out of 19.53 newborns; however, in 2005, 1 out of 7.8 newborn infants was delivered by a foreign bride.<sup>36</sup>

In addition to building a family, Taiwanese men pursue transnational marriages to find a woman to do the housework and take care of senior family members. While the men who go to developing countries to find brides may find it difficult to compete in the local Taiwanese marriage market, this is not true in other countries.<sup>37</sup> In contrast to many modern Taiwanese women, women in rural provinces of China or South Asia are willing to marry Taiwanese men and fulfill the patriarchal gender roles. Especially striking is that it is less expensive to marry than to hire a foreign domestic worker. Economically speaking, with the increase of Taiwan's annual wage, if a Taiwanese man wants to hire a foreign domestic servant to take care of the family, he would pay a minimum of \$8,500 (UNITED STATES) a year; while marrying a foreign bride to handle the housework would cost him only \$1,200 (UNITED STATES) for the dowry and the commission fee, giving economic incentives to marriage.<sup>38</sup> Moreover, "a wife will provide extra services that a cleaning lady will not: sex and childbearing."<sup>39</sup>

While Taiwanese society creates the demand for immigrant brides, female immigrants suffer from discrimination, encountering difficulties in both the public and private spheres: like obtaining permanent residency, citizenship, the right to work, and recognition of educational degrees.<sup>40</sup> Due to their minority status, language proficiency, and cultural background, foreign brides also face barriers integrating into their husbands' families. The Taiwanese government has noticed these problems and instituted a series of new policies to assist foreign brides and their transnational families. While these policies address discrimination and culture bias against foreign brides, by social organizations criticize them as policing female bodies and controlling reproductive freedom.<sup>41</sup>

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36 Tai-Lang, Jien, Taiwan Ren-Kou Chang-Che Yu Ren-Kou Jie-Kou Che Biang-Chien 74 [The Change of Taiwan's Population Policy and Population Structure]; Jiau-Yu Ze-Liau Yu Ien-Jiou [Education Information and Research] 1, 16 (2007).

37 Hung Cam Thai, *Clashing Dreams – Highly Educated Overseas Brides and Low-Wage UNITED STATES Husband*, in GLOBAL WOMEN 238-42 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2002).

38 Yu-ning Chen & Mong-hwa Chin, *supra* note 34, at 8.

39 *Id.*

40 Hsiao-hung Nancy Chen, *Human Rights' Issues Involved in Cross-Border Marriage*, 4-1 National Policy Quarterly (Kuo-Jia Cheng-Che Ji-Kan), 142 (2005).

41 Bruce Liao, *Our Law and Their Destiny in DO NOT CALL ME FOREIGN BRIDES* 146-69 (Xiao-juan, Xia ed., 2005).

### III. The Role of Motherhood in Taiwan: An Analysis Using Feminist Legal Theory

#### *A. Female Bodies and Population Control*

In comparison to women in the United States<sup>42</sup> and women in China,<sup>43</sup> Taiwanese women appear to enjoy more reproductive freedom with the passing of the Genetic Health Law in 1984. However, by looking more closely at the historical background of the Genetic Health Law, it is population policy, not women's autonomy, that defines a woman's reproductive freedom.

Due to controversial ethical issues, Taiwan's Genetic Health Law, first drafted in 1971, was placed on hold for thirteen years.<sup>44</sup> Prior to its 1984 passage, Taiwan had an extremely restrictive abortion law. Taiwan's Penal Code, forbade a woman from obtaining a legal abortion, even in cases of rape.<sup>45</sup> By severely restricting a woman's legal access to abortions, the only choice for those wishing to terminate an involuntary pregnancy was to have an unlicensed doctor, or ask a licensed doctor, to perform the unauthorized procedure. The passage of the Genetic Health Law, which has a provision for legal conditional abortions, reduced the number of illegal abortions in Taiwan.<sup>46</sup>

Because Taiwan is an island, limiting population growth is an important task for the government. After losing the civil war, the KMT regime brought more than 70,000 people to Taiwan from Mainland China — the military personnel, government officers, and refugees. In the 1960s, in response to a rapidly growing population, the government first advocated the population policy, "two are just

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42 Despite the 1973 Supreme Court decision of *Roe v. Wade*, 410 U.S. 113 (1973), which granted women the right to obtain an abortion, the issue remains controversial.

43 The Chinese government strictly maintains the "one-child" policy, under which women receive forcible abortions if they become pregnant again after having a child.

44 See Yen-lin, Ku, *Interaction Between the Women's Movement and Policy Formation: Analysis of Movement Strategies for Abortion Legalization and Equal Employment Opportunity*, 1 *Taiwan Studies* 44, 53 (1995-96).

45 David Sho-Chao Hung, *Abortion Rights in the United States and Taiwan*, 4 *CHI.-KENT J. INT'L & COMP. L.* 2, 15 (2004).

46 According to the law, under the following circumstances, a woman can undergo an induced abortion: "(1) if the woman or her husband has a genetic disease, infectious disease, or mental illness that may adversely affect eugenics, (2) if the woman or her husband's relatives within the fourth degree has a genetic disease that may adversely affect eugenics, (3) if the pregnancy or parturition would cause a fatal risk to the woman or cause mental or physical harm to the woman as determined by medical reason, (4) if the unborn baby will be born with a deformity as determined by medical reason, (5) if the woman was impregnated by rape or seduction or through a relative of which relationship the law would forbid as a marital one, and (6) if the pregnancy adversely affects the psychological or physical health of the woman or her family life." *Id.* at 17.

right,” which encouraged families to have only two children.<sup>47</sup> However, the population still grew at a rapid rate.<sup>48</sup> In 1979, the dictator President Chiang Ching-kuo mandated a new population policy<sup>49</sup> in which the annual rate of population growth should decrease to 1.25% in ten years and the government should protect eugenic health to enhance the quality of Taiwan’s people.<sup>50</sup> Following this mandate, the population policy changed from “two are just right” to “one is not too few; two are just right.”<sup>51</sup> Additionally, the government accelerated drafting of the Genetic Health Law and the congress finally passed it in 1984. Not surprisingly, the enactment of the Genetic Health Law drove the birth rate down from 2.05% to 1.75% in ten years, with the rate declining every year.<sup>52</sup> In 2006, with the birth rate fell to 1.115%.<sup>53</sup> Taiwan’s government has successfully suppressed population growth by loosening abortion restrictions in the name of eugenic protection.

While providing a legal alternative for women who seek an abortion, the purpose of the Genetic Health Law is not to ensure women’s reproductive freedom. The law is intended to help the government to exercise population control by decriminalizing doctor-performed abortions, and yet has the unintentionally provides the opportunity for abuse which has increased sex-selective technology. Before the passage of the Genetic Health Law, doctors who performed abortions committed a criminal offense, “providing assistance for abortion.” The Genetic Health Law protects doctors who perform abortions from criminal charges. The law also grants doctors the authority to determine whether a girl or woman is entitled to obtain a legal abortion, thus vesting doctors with the power and control over women’s bodies.<sup>54</sup> In essence, it is not women, but the government and the medical profession who benefit from the Genetic Health Law.

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47 Ting-I, Tsai, *Declining Birth Rate Worries MOI*, TAIPEI TIMES, Oct. 15, 2002, at 2, available at <http://www.taipeitimes.com/News/taiwan/archives/2002/10/15/175736>.

48 *Id.*; see also Ministry of the Interior, *Monthly Bulletin of Interior Statistics, Population by Single Year of Age*, <http://www.moi.gov.tw/stat/english/index.asp>.

49 Jien, *supra* note 37, at 6.

50 *Id.*

51 Tsai, *supra* note 48.

52 See MINISTRY OF THE INTERIOR, MONTHLY BULLETIN OF INTERIOR STATISTICS, NUMBER AND RATES OF BIRTH, DEATH, MARRIAGE, AND DIVORCE, <http://www.moi.gov.tw/stat/english/index.asp>.

53 MINISTRY OF THE INTERIOR, *supra* note 50. Compare DEP’T OF HEALTH AND HUMAN SERVS., CTR. FOR DISEASE CONTROL, BIRTHS: FINAL DATA FOR 2005, *Tables C, 1, 10, 32*, [http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56\\_06.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_06.pdf); POPULATION DIVISION OF THE DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS OF THE UNITED NATIONS SECRETARIAT, *World Population Prospects: The 2006 Revision and World Urbanization Prospects: The 2005 Revision*, <http://esa.un.org/unpp/index.asp?panel=2>.

54 See Chao-Ju Chen, *supra* note 25, at 57.

The ignorance of gender inequality in the promotion of birth control also creates a new form of subordination. According to observations from Taiwanese scholars, “the abuse of sex-selective technology in the abortion of female fetuses in Taiwan suggests the need to replace the neutral term ‘sex-selective abortion’ with the more accurate term ‘female-selective abortion.’”<sup>55</sup> In fact, “before it became technologically possible to determine the sex of a fetus, [the] conventional wisdom provided various methods to impregnate a wife with a male fetus.”<sup>56</sup> The easiest method “involved subjecting a woman to endless childbearing until at least a male baby was born.”<sup>57</sup> “The invention of female-selective technologies, [combined with loose abortion laws,] has modernized and facilitated male-dominated reproduction.”<sup>58</sup> Therefore, the Genetic Health Law, which permits women to receive legal abortion under the circumstance that the pregnancy adversely affects the psychological or physical health of the woman or her family life, provides a shortcut for those traditional families who do not want to have female babies.

Second-wave feminist, Susan Okin, argues that “the personal is political, and the public/domestic dichotomy is a misleading construct, which obscures the cyclical pattern of inequalities between men and women.”<sup>59</sup> The evolution of reproductive laws and birth control policies in Taiwan echoes such an argument and points out that power, which has always been understood as paradigmatically political, is also of central importance in family life. Although women’s rights groups in Taiwan expected to eliminate women’s subordination with passing the Genetic Health Law, hoping it would provide women with more choices to control their lives, they soon discovered that the law with its gender-neutral language reveals male-centric assumptions that have been used as a tool to reinforce gender inequality. As Catharine McKinnon argues, “gender is a question of power, especially of male supremacy and female subordination.”<sup>60</sup> Taiwanese society does not give women equal power in the private sphere of the family or in the public sphere of society. Thus, the law does not assure women’s autonomy, but provides an alternative to control women’s bodies.

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55 *Id.* at 59.

56 *Id.*

57 *Id.*

58 *Id.*

59 SUSAN OKIN, *JUSTICE, GENDER, AND THE FAMILY* 111 (1989).

60 CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination, in FEMINISM UNMODIFIED* 32, 40 (1987).

*B. Regulating Reproductive Freedom and Punishing Pregnant Women*

*1. Same Reproductive Issues, Two Different Policies.* — By deeming a woman's body a factory to produce healthy babies, Taiwanese society is eager to ensure the quality of the product, especially when the quantity of production continues to drop. The idea that babies can, and therefore should, be made "perfect" underlies pregnancy advice and both medical and social policing of pregnant women's lifestyles.<sup>61</sup> Fetal-protection advocates in Taiwan are trying to save the low birth rate and enhance the population quality by narrowing the scope of legal abortions to stop the declining population and regulating pregnant women's behavior to monitor the quality of newborns.

According to the Genetic Health Law, there are six situations that legally warrant an abortion.<sup>62</sup> Opponents, including religious groups and political parties, argue that the Genetic Health Law provides a loose restriction by permitting an abortion, when "the pregnancy either affects the mother's psychological or physical health or the mother's family life."<sup>63</sup> They believe that the scope of legal abortion under the Genetic Health Law is too broad as well as too vague.<sup>64</sup> For them, fetal personhood and family values should be protected by more restrictive abortion limitations.<sup>65</sup>

In 2007, there were several amendments to the Genetic Health Law came before the Taiwanese Congress. Two main amendments, supported by the different political parties, imposed more restrictions on women seeking abortions. According to the draft amendments, a woman who seeks abortion should first go through mental health counseling, followed by a compulsory six-day waiting period, before receiving the procedure.<sup>66</sup> This amendment sparked pointed protests. Women and feminist scholars accused the government of manipulating women's bodies to raise or lower population numbers.<sup>67</sup> With the strong opposition by feminist groups, the congress did not pass the amendment; however, the proposal to narrow the scope of abortion

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61 LAURY OAKS, *SMOKING & PREGNANCY- THE POLITICS OF FETAL PROTECTION* 19 (2001).

62 See Jien, *supra* note 37.

63 See Symposium: Amending Genetic Health Law with Diverse Perspectives, Dec. 32, 2002, available at Taiwan, <http://old.npf.org.tw/Symposium/s91/911231-IA.htm>.

64 *Id.*

65 *Id.*

66 Angelica Oung, *Legislature Mulls Changes to Abortion Rules*, *TAIPEI TIMES*, Jan. 5, 2007, at 2, available at <http://www.taipetimes.com/News/taiwan/archives/2007/01/05/2003343413>.

67 *Id.*

laws is on hold and the congress placed it back on the agenda. In addition to limiting legal abortions to save the falling population, the government also encourages Taiwanese couples to have more children. Many county governments have begun to provide compensation for nursing care to families with newborns.<sup>68</sup>

In contrast to restricting legal abortions available to Taiwanese women, the Taiwanese government encourages female immigrants in transnational families to take birth control. In an effort to address the ever increasing,<sup>69</sup> the Bureau of Health Promotion at the Department of Health provides financial support to foreign brides who seek birth control and legation.<sup>70</sup> Some counties, such as HsinChu and YuenLin, provide financial aid to foreign brides when they decide to seek an abortion to terminate the pregnancy.<sup>71</sup> Only foreign brides receive this assistance. Taiwanese women do not share this “benefit.”

Many transnational marriages in Taiwan take place among low-income families or in families that have handicapped family members.<sup>72</sup> If this financial assistance was part of a social-welfare program whose purpose was to reduce the medical expenses of the low-income families, the policy deserves support. However, this type of birth-control assistance reinforces the negative stereotypes and discriminatory medical checks on female immigrants, which sparks serious concern. Foreign brides coming from South Asia or China, are seen as coming from the least developed countries, where casual sex and contagious diseases are widespread.<sup>73</sup> These girls often have been unfairly labeled as indigent, greedy, and feculent. As a result, they receive multiple detailed physical exams when they try to immigrate to Taiwan. The first exam takes place in their hometown when they apply for a marriage visa, the second exam takes place when they enter Taiwanese territory, and the third exam takes place when they seek permanent residence in Taiwan.<sup>74</sup>

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68 See <http://www.baby-life.com.tw/baby-mother.com.tw/baby-life/2006/03/link-2.htm>.

69 See Jien, *supra* note 37.

70 See BUREAU OF HEALTH PROMOTION AT THE DEPARTMENT OF HEALTH, FINANCIAL AID FORM & GUIDE TO FOREIGN SPOUSES, available at <http://www.immigration.gov.tw/OutWeb/ch9/f9a-940809.html>.

71 See Health HisnChu County website available at [http://foreignbride.hcshb.gov.tw/health\\_inspection.php](http://foreignbride.hcshb.gov.tw/health_inspection.php); see also Heath Beureau website: <http://www.ylshb.gov.tw/newshis/index1.php?m=99&m1=14&m2=40&id=215>.

72 Yung-Che, Wang, *An Alalysis on Poverty of Families with Foreign/Chinese Spouse in Taiwan*, (*Wui-Ji Yu Da-Lu Pei-Ou Jia-Ting Zhe Pin-Qiong Fen Xi*), 4 JOURNAL OF SOCIAL WORK IN TAIWAN (TAIWAN SHE-HUI GONG-ZUO JI-KAN) 16-20 (Jul. 2005).

73 *Id.* at 175.

74 Xue-hui, Chen, *Are We a Family? in DO NOT CALL ME FOREIGN BRIDES* 174 (Xiao-juan, Xia ed., 2005).

Population policies toward transnational families and foreign brides reflect a deep fear and prejudice of the Taiwanese government and people, which says that immigrant women are not good enough to be mothers; they are poor, they cannot produce perfect babies, and they have no idea about educating children. Second-wave feminists, who primarily focus on relationships between men and women, cannot explain the discrimination against foreign brides in Taiwan. Third-wave feminist theories, which have broader views on aspects of female sexuality, economic mobility, and the multi-faceted nature of racial, ethnic, class and gender identities, provide more insight into the issue of reproductive freedom for foreign brides in Taiwan. Third-wave feminists are divided as to the identity of “women” as a group.<sup>75</sup>

On the one hand, [they] are demonstrably aware of discrimination against women and call for an end to double standards in sexual health and awareness, for the continued availability of birth control, and for more recognition of traditionally “female” roles such as caretaking. On the other hand, some third-wave writers claim that their brand of feminism ‘recognizes that the differences *among* women are as substantial as the differences *between* women and men.’<sup>76</sup>

The reproductive issue in Taiwan represents this dual perspective. While it seems that every woman in Taiwan faces pressure from the gender-structured family and traditionally patriarchal culture, foreign brides, different from Taiwanese women, have to battle racial prejudice and other cultural stereotypes as well.

Foreign brides, like women of color and low-income women in the United States, have not always had access to family planning resources or been a part of the pro-choice movement.<sup>77</sup> However, this does not grant the Taiwanese government authority to control the reproduction activities of these women. As Nsiah-Jefferson argues, it is “difficult for many middle-class . . . feminists to understand and include the different perspectives and experiences of poor and minority women. Thus, it is particularly important that adequate information on the needs and experiences of all women be made available.”<sup>78</sup>

The development of a complete health policy, which helps foreign brides to have access to (1) quality prenatal care, (2) resources to

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75 Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 118 (2007).

76 *Id.* at 118-19 (emphasis added) (quoting Rory Dicker & Alison Piepmeier, *Introduction to CATCHING A WAVE: RECLAIMING FEMINISM FOR THE 21ST CENTURY* 9-10 (Rory Dicker & Alison Piepmeier eds., 2003)).

77 Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women in FEMINIST JURISPRUDENCE* 322-23 (Patricia Smith ed., 1993).

78 *Id.*



ensure the birth of healthy, wanted children, (3) protection against sterilization abuse, (4) sufficient information about sex and birth control, and (5) safe and affordable abortions in Taiwan, is necessary. Furthermore, the Taiwanese people, both men and women, must eliminate the discrimination against foreign brides. Otherwise, policies regarding foreign brides will perpetuate, even escalate, existing class and racial biases instead of providing real help.

2. *Punishing Pregnant Women.* — Similar to the United States fetal-protection policy which allows for the potential of legal intervention with regard to women's behavior and conduct during pregnancy, the fetal-protection movement in Taiwan targets pregnant women to punish them for certain behaviors during pregnancy, such as drug addiction, HIV infection, and smoking.

Under the current Taiwanese legal system, whether under civil or criminal law, a "fetus" is not legally a "person." But, the laws apply different principles when deciding on the status of a fetus. The civil law adopts the "born alive" rule — that if a baby is born alive, it can enjoy the same legal capacity when it was still a fetus.<sup>79</sup> In the case in which someone hits a pregnant woman and causes harm to the fetus, once the fetus is born alive, the newborn can file a civil suit against the perpetrator, seeking tort damages. On the other hand, if the fetus dies due to the inflicted harm before the birth, it does not have any right to claim. Under the criminal system, the principles of criminal law are concerned with the time in which the action of harm took place. Therefore, if someone hits a pregnant woman and causes harm to the fetus, the perpetrator is only liable for assaulting the mother, since the fetus was not a human being at the time when the offense occurred.<sup>80</sup> Furthermore, if the assault causes the death of the fetus, the perpetrator can only be charged with an aggravated assault against the mother, not homicide, because the victim of a homicide must be a human being.<sup>81</sup>

According to the "born-alive" rule, if the mother causes harm to the fetus during pregnancy, once the fetus is born alive, the baby has a cause of action against the mother. However, there has never been such a case in Taiwan because legal tradition imposes liability on a third party, not the mother. Additionally, it is very difficult to prove causation between the mother's conduct and the harm. Therefore, the only criminal liability a pregnant woman may be charged with for harming her fetus in Taiwan is the crime of abortion. A woman

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79 CODE CIVIL [C. CIV.] art. 6 (Taiwan) (a person's legal capability begins at birth and ends at death).

80 CODE CRIM. [C. CRIM.] art. 277 (Taiwan) (One commits assault if he causes harm to human being's body or health.).

81 C. CRIM. art. 271 (Taiwan) (One commits homicide if he kills another human being.).

commits the crime of abortion when she aborts the fetus outside of the legal circumstances listed in the Genetic Health Law.

Since neither the civil code nor the criminal code recognize a fetus as a person before it is born, Taiwan's criminal system cannot follow the United States model, which recognizes criminal offenses such as assault, homicide, or child abuse for harm perpetuated against a fetus. Taiwan has developed a different strategy to regulate women's autonomy during pregnancy. First, as mentioned, political parties and religious groups have tried to amend the Genetic Health Law to impose more restrictions on abortions. Second, the legislature has begun to enact several administrative rules to regulate women's behavior during pregnancy. Third, the judicial system, exercising discretion at sentencing, usually orders more serious sanctions to drug-addicted women if they abuse drugs during pregnancy.

The 2007 amendment to the Tobacco Hazard Control Act shows how the government intervenes in the lives of pregnant women in the name of fetal-protection. Since 2000, health advocacy organizations, cooperating with fetal-rights supporters, sponsored a series of studies regarding smoking during pregnancy. These organizations highlighted the dangers of tobacco, describing how smoking mothers pass nicotine and carbon monoxide on to the fetuses and growing babies.<sup>82</sup> Medical and legal scholars who support fetal-protection policies published journal articles addressing that causation between smoking and harm to the fetus and they strongly advocate the need to prohibit smoking during pregnancy.<sup>83</sup> According to their surveys and legal analysis, the Tobacco Hazard Control Act should be amended to forbid smoking during pregnancy and that women who break the prohibition should be fined and receive medical treatment.<sup>84</sup> Anti-smoking advocates and scholars are not the only two groups who support the regulation. The government, for the purpose of population control, has considered smoking-during-pregnancy regulations as well. In 2007, the congress finally amended the Tobacco Hazard Control Act to prohibit smoking during pregnancy. If a pregnant woman violates the law, she will receive compulsive health education to quit smoking.<sup>85</sup>

These regulations are laughable. Technically, it is impossible for the government to tell whether a female smoker is pregnant. The only

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82 See John Tung Foundation, <http://www.jtf.org.tw/JTF03/03-01.asp>.

83 Shi, Hui-ling, *Fetal and Children's Protection under the Tobacco Hazard Control Act - An Opinion from the Expert* (Yien-Hai Fang-Zhe Fa Duei Tai-Er Ji Ying-You-Er Ying-lou Zhe Te-Bie Bao-Hu), 294 *Taipei Bar Journal*, 15-27 (2004); Yu-Bing, Kan, *A Study on Protection of Fetus and Young Children's Health Rights-focusing on the Proposal for Suppression Legislation of Tobacco Hazards*, *Journal of Children Welfare*, 43-62 (2003).

84 *Id.*

85 FAIGUI HUIBIAN, TOBACCO HAZARDS PREVENTION ACT, art. 12 (Taiwan).

possible way for the government to find a pregnant smoker is through prenatal check-ups. However, there are no legal means in Taiwan to require doctors to report a pregnant mother after the medical check, as smoking is legal. If congress enacts a law to force a doctor to make such a report, the rule would be held as an unconstitutional violation of people's privacy. Moreover, the amendment of the Tobacco Hazard Control Act requires pregnant smokers to receive "health education," as opposed to "medical treatment" or "group counseling." Whether "health education" effectively helps a pregnant smoker quit smoking is highly questionable. There are many other factors that can impact the health of a fetus. Second-hand smoke, for example, can cause low birth weights to a fetus.<sup>86</sup> Therefore, targeting only pregnant smokers while ignoring other harmful factors to the fetus does not protect "fetal rights." This merely reinforces gender discrimination and increases the unreasonable costs of motherhood.

The amendment of the Tobacco Hazards Control Act is unworkable and ineffective. Embedded in the legislation is an implied right of a fetus to grow up in an ideally healthy womb without any harm. However, does that right really exist? Does it accord to legal principles? Is it made with an unreasonable and discriminatory price toward women as a class? It seems that the government, the congress, and the scholars do not care. Unfortunately, with legal trends towards fetal protection, no one can guarantee that congress will enact similar laws such as an Alcohol Abuse Act or a Drug Abuse Act to protect fetal rights, regardless of whether these laws unreasonably intervene in women's autonomy.

Following the steps of congress, criminal courts in Taiwan support the policy of fetal-protection. Empirical data from court decisions, show that in cases involving a defendant who is a pregnant woman suffering from substance abuse, the court tends to impose a harsher sentence on the defendant. For example, in a Keelung District Court case, the court held that if "[t]he defendant uses drugs when she is two months pregnant . . . . Such a behavior not only harms herself, but also causes severe damage to the fetus . . . .The defendant should receive a strict sentence of imprisonment."<sup>87</sup> Similarly, the Miaoli District Court contends that if "[t]he defendant was a drug offender [and] . . . . She did not seek help to quit the addiction; instead, she continued to abuse drugs during pregnancy . . . . The defendant's

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86 See Chen Pei-chun, Li Hung-yo, Lin Puey-shiung & Sung Fung-chang, *Fu-Nu Chou-Yien Ji Er-Shou-Yien Han Di Chu-Sheng Ti-Zhueng Ying-Er*, Taiwan Gong-Gong Wei-Sheng Za-Zhi [*Maternal Smoking, Environmental Tobacco Smoking and Low Birth Weight*] 21-5 TAIWAN PUB. HEALTH MAG. 321-28 (2002).

87 KeeLung District Court, 94 Su Ze N. 189, Verdict.

behavior deeply affects the fetus's health . . . . Her conduct ignores that her fetus has the right not to be exposed to harmful substances . . . The defendant should be sentenced seriously."<sup>88</sup>

Determining whether a longer prison sentence effectively stops drug abuse during pregnancy is problematic. Compared to medical centers, drug treatment facilities in Taiwan's prisons are insufficient. While the government has made an effort to provide medical care to drug abusers, Taiwan's prison system continues to suffer from shortages of manpower and medical equipment.<sup>89</sup> Women abusing drugs during pregnancy are usually marginalized and suffer financial or other difficulties in society. Harsher sentences will not solve the problem; rather, it merely transfers the responsibility from the government to the pregnant mothers themselves making their situation worse.

The policy of punishing pregnant women for their behavior also extends to foreign brides. According to the Acquired Immuno-deficiency Syndrome Prevention Act enacted in 1990, if a foreign person in Taiwan is found to be HIV-positive, he or she should be deported immediately, even when the foreigner has a Taiwanese spouse.<sup>90</sup> Therefore, if a pregnant foreign bride is found to be HIV-positive and is in the early stages of pregnancy, i.e. before twenty-four weeks, the Taiwanese government will order her to leave Taiwan immediately.<sup>91</sup> If the discovery occurs during the middle or late stages of pregnancy, the government will expel the foreign bride from Taiwan after she gives birth.<sup>92</sup>

The HIV-infected woman can prove that she contracted the infection from her husband, the law allows HIV-infected foreign brides to file a complaint asking the government to review her case. However, her mandated immediate deportation makes it difficult for an HIV-positive woman to collect evidence and conduct the required legal procedures from overseas.<sup>93</sup> Another challenge is that under the

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88 Miao District Court, 93 Yi Ze N. 362, Verdict.

89 Jimmy Chuang, *Drug Rehabilitation Spot Getting Off to a Bumpy Start*, *TAIPEI TIMES*, May 2, 2004, at 3, available at <http://www.taipeitimes.com/News/taiwan/archives/2004/05/02/2003153812>.

90 Faigui Huibian, AIDS Prevention and Control Act art. 14 (Taiwan), available at <http://law.moj.gov.tw/Eng/Fnews/Fnews/FnewsContent.asp?msgid=1897&msgType=en&keyword=Immunodeficiency>.

91 Wu Hui-ru, *Taiwan AIDS Wui-Ju Pei-Ou Zai Fa-Lu-Shang De Kuen-Jing [A Difficult Situation in Law – HIV-affected Foreign Spouses in Taiwan]*, available at <http://migrant.coolloud.org.tw/node/11972>.

92 *Id.*

93 AIDS Prevention and Control Act (promulgated by the President of the Republic on Dec. 17, 1990, under Hua-Zong Yi Order No. 7210), art. 14-1, LAWS AND REGULATIONS DATABASE OF THE REPUBLIC OF CHINA (P.R.C.), available at <http://law.moj.gov.tw/Eng>.

Taiwanese Citizenship Act, a foreign bride must give up her original citizenship to obtain Taiwanese citizenship.<sup>94</sup> Therefore, an HIV-infected foreign bride is likely to become a refugee after being expelled by the government — they are forced to leave Taiwan without husbands, without their children, and without any claim to citizenship.

After much criticism, the congress amended the notorious regulations under the Acquired Immunodeficiency Syndrome Prevention Act in 2007. The title of the law has been changed to the “Legal Rights Protection Act of HIV-infected Patients,” which seems to focus more on providing assistance to HIV-infected patients rather than reinforcing the stigma of the illness. Under the new law, if a foreign bride is found HIV-positive, she is eligible to stay in Taiwan while filing the complaint and subsequent legal proceedings continue.<sup>95</sup> While the new rule is more generous to HIV-infected people, if an HIV-affected foreign bride fails to prove that she contracted the disease from her husband, the government will still expel her from Taiwan.

This, again, demonstrates the strong prejudice against female immigrants. The legislature contends that expelling HIV-infected foreigners seeks to protect public health and to curb the spread of AIDS.<sup>96</sup> As this policy demonstrates, HIV-infected foreign brides continue to be abandoned by Taiwanese society and government by condemning them for having a “shameful disease,” labeling them as unqualified mothers, and ordering them to leave Taiwan.

Policies like these send two messages. First, fathers have nothing to do with having a baby. Mothers bear the sole responsibility for maintaining the health and wellbeing of the fetus. Second, governmental interference in a woman’s body and her decision-making abilities is justifiable in the name of fetal-protection. These fetal-protection policies not only undermine respect for women’s bodily autonomy, but also ignore the reality of many women’s lives.<sup>97</sup> These policies discriminate against women as a group, and also create increased conditions for the oppression of foreign brides. As Mari

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94 Nationality Act (promulgated by the President of the Republic on June 20, 2001, under Hua-Zong Yi Order No. 9000118960), art. 9, LAWS AND REGULATIONS DATABASE OF THE REPUBLIC OF CHINA (P.R.C.), available at <http://law.moj.tw/Eng>.

95 HIV Infection Control and Patient Rights Protection Act (promulgated by the President of the Republic, under Hua-Zong Yi Order No. 7210), art. 20, LAWS AND REGULATIONS DATABASE OF THE REPUBLIC OF CHINA (P.R.C.), available at <http://law.moj.tw/Eng>.

96 HIV Infection Control and Patient Rights Protection Act (promulgated by the President of the Republic, under Hua-Zong Yi Order No. 7210), art. 1, LAWS AND REGULATIONS DATABASE OF THE REPUBLIC OF CHINA (P.R.C.), available at <http://law.moj.tw/Eng>.

97 OAKS, *supra* note 62, at 176.

Matsuda and Angela Harris explain, a “multiple consciousness” analysis is an important tool in examining gender issues in the century of globalization.<sup>98</sup> While most women in Taiwan encounter the patriarchal culture in their everyday lives, different groups suffer from different oppressions. The best way to change the system and to empower women is to base one’s analysis on a localized understanding of women’s reality. Such an understanding, deepens feminist theories and, helps find useful solutions to change the patriarchal system.

Additionally, the mother and fetus are not in adversarial relationship. Instead, the two constitute a unity. The fetus is in the womb of the mother, as a part of the mother. When fetal rights overshadow the great costs of motherhood, women will decide not to have babies or abort their pregnancies. Alternatively, when a fetus suffers from a serious health problem, it is a potential threat to the mother’s health. Fetal-protection policies focusing solely on fetal personhood places the burden and blame on the pregnant woman. This not only violates legal principles in Taiwan, but also creates unnecessary conflict between a mother and her fetus. The law must recognize that “[t]o deprive women of their right to control their actions during pregnancy is to deprive women of their legal personhood.”<sup>99</sup> From a feminist point of view, a pregnant woman should be aware of the intricate relationship between the health of the fetus and the health of the mother. Therefore, the government should provide medical advice and assistance to women to help them avoid behaviors dangerous to this relationship, instead of imposing sanctions or heaping condemnation upon them.

#### IV. CONCLUSION

Motherhood has two levels of meanings, as personal experience and as social institution.<sup>100</sup> While many women seek motherhood, and many women embrace it unsought, many women lose their lives or liberty (substantially or literally) becoming or trying not to become, mothers.<sup>101</sup> Catharine MacKinnon argues that to reclaim the possibilities for women’s experiences of motherhood, one must begin

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98 Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 297 (1989); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, in FEMINIST LEGAL THEORY 255 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

99 Dawn Johnsen, *The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 620 (1986).

100 CATHARINE MACKINNON, SEX EQUALITY 1991 (2001).

101 See *id.*

with a critique of the inequalities embedded in the institution of motherhood.<sup>102</sup> Through my observations, I conclude that while Taiwan claims to be a “democratic” and “rule of law” country, its efforts on gender equality — culturally, legally, and systematically — are still extremely insufficient. Many modern Taiwanese women embrace greater economic independence and an improved social status, while the patriarchal culture overshadows their personal choices, family lives, and the legal system. The gender stereotypes associated with motherhood dominate public opinions, laws, and governmental policies. Men in Taiwanese society have ironically turned to finding immigrant brides in order to satisfy the patriarchal requirements of “xianqi liangmu,” while the greater society remains prejudiced against the immigrant wives. Even more troublesome, the state enacts laws and policies which reinforce this prejudice rather than working to eliminate gender and racial discrimination.

Reproductive issues in Taiwan are representative of the greater complexities of the gender phenomenon. Traditional feminist theories that focus primarily on inequities between men and women help us to understand the underlying issues prevalent in the fight for reproductive rights, but does not reveal the whole picture. Third-wave feminist theories, which employ multiple feminist methods, provide us with a broader vision to recognize multiple levels of oppression involved in this issue. This awareness will help develop diverse and effective solutions that reform the inequalities present in the discussion of reproductive rights.

With many Asian countries currently facing falling population trends, feminists should be very concerned about the increased development of fetal-protection policies. Pregnancy regulation in Taiwan shows how the state controls women’s bodies and integrity in the name of protecting a fetus and how power is manipulated to compound prejudice and discriminatory practices against foreign brides. Such policies result in the erosion of reproductive choices for women, a decrease in incentives for women to bear children, the marginalization and discrimination of transnational families, and, ultimately, the failure of fetal-protection policies to achieve their goals. The answer to improving low birth rates and improving infant mortality lies in what the state can provide in social, medical, financial, and legal support to women, not in severe sanctions and regulations imposed on women.

It is time for health practitioners, anti-smoking organizations, anti-drug advocates, legal experts, and policy makers, to direct their energy

and resources away from fetal-centered moral politics that condemn those women who refuse to have babies, who immigrate to Taiwan from other countries, or who do not comply with health advice as bad wives or bad mothers. Instead, these actors should adopt a harmonious policy that centers on helping parents overcome obstacles in bearing children, eliminating the conflict between a fetus and a mother, and in breaking down traditional family structures based on strict gender roles and expectations. This is a better solution in encouraging Taiwanese women to have babies. Before such a solution is well proposed and constructed, the best way for women to treat the current fetal-protection policies is to understand it, analyze it, and then reject it.