Article

Mothering under the Shadow of Patriarchy: The Legal Regulation of Motherhood and Its Discontents in Taiwan

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I. INTRODUCTION

In the Taiwanese society, the designated gender roles for a woman are, in chronological sequence, filial daughter, dutiful/chaste wife, and virtuous/loving mother. Women are not only required to conform to these expected roles, but also to do so in the proper order: A woman is to become a wife, and a wife is to become a mother. In particular, a mother is presumed to be married to a man: "the dominant image of the 'mother' is first and foremost that of a married woman," an image that brings with it a tacit assumption of heterosexuality.[1] Normality and deviance are constructed accordingly: An adult female who marries at a proper age and who then bears children and rears them is regarded as an ideal woman and is legally encouraged to fulfill her responsibilities as both a wife and a mother; whereas a woman who is not heterosexual, an overage single woman, or an unwed mother is, to draw on these frequently cited examples, culturally defined as a deviant with defects and is legally disadvantaged as such. Without oversimplifying the context, one can state that heterosexual marriage and motherhood are mandatory institutions for Taiwanese women, and women who make personal choices not to become wives and mothers find themselves on the margins of acceptability and, thus, of social acceptance. As Martha Fineman contends, "all women must care about the social and legal construction of motherhood": "women will be treated as mothers (or potential mothers) because social construction and its legal ramifications operate independent of individual choices."[2]

In most Asian societies that stress the importance of continuing the patrilineal family, the significance of motherhood is overwhelming. It is a calling for women to bear children, especially sons, so as to pass down the paternal blood of the women's husbands' or fathers'. American anthropologist Margery Wolf has offered the following vivid observation based on her fieldwork in Taiwan during the 1960s:

> [Until] a young woman becomes the mother of one of the

1. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 227 (1999). Martha Fineman also states: "No one speaks of a 'married mother' – the primary connector of husband and wife is assumed in the unadorned designation of 'Mother'." (MARTHA FINEMAN, THE NEUTRAL MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 148 (1995)). Martha Chamallas and Martha Fineman's comments were made in another social context, nonetheless, similar phenomenon (the habitual association of the role of "mother" and that of "wife") can also be found in Taiwan. Their observations hence help us conceptualize the state of motherhood in Taiwan.

2. MARTHA FINEMAN, *supra* note 1 at 51. Katharine Franke accuses legal feminist theory of not questioning the patriarchal assumption that women must reproduce and become mothers during their lifetimes (Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L. REV. 181, 190-91 (2001), Martha Fineman's quoted statement has adequately responded to this charge, which was based on a mistaken understanding of legal feminism.

> family's sons, she feels very insecure. As the rituals of her wedding day make clear, she retains few claims on her father's family, and unless she bears a child of her husband's family, she will have no right there. She wants to become pregnant, and if she is married to the eldest son she is made to feel that she must become pregnant. Her mother-in-law begins asking embarrassingly blunt questions about her menstrual cycle and allows her to overhear the disgusted comments she makes to her friends. The watchful eyes of village women with few other interests take note of any swelling of her breasts or expanding of her waistline and as the months go by comment questioningly on the absence of such symptoms.[3]

Socially and culturally, a woman is judged and valued in the light of her ability to become a "xianqi liangmu" (dutiful wife and loving mother). An ideal woman must perform the two roles simultaneously. Traditionally, it was legitimate to divorce a wife who failed in her mission to produce male offspring, and this failure would also entitle the husband to take concubines who would bear him children. This essential connection of a wife to procreation continues to exist, although the law no longer treats the wife's barrenness as grounds for judicial divorce.[4] Infertility, for instance, is medically and culturally treated as a woman's problem in Taiwan. That the medical profession profiles the female when a couple seeks medical advice for infertility is both an indication and a practice of Taiwan's patriarchal culture, which blames the wife, rather than the husband, for failing to produce children.[5] The deeply-rooted cultural notion of women as patriarchal tools of "chuanzong jiedai" (producing a son to carry on the paternal family), supported by the legal presumption of legitimacy and by the paternal preference rule of surnames, is a further reification of the female body, making motherhood per se more an institution of oppression and less a source of emancipation. As such, motherhood is constructed, located, and defined in the institution of the patriarchal family, this structuring of which echoes Martha Fineman's proclamation of motherhood as a "colonized category" that is "initially

3. MARGERY WOLF, WOMEN AND THE FAMILY IN RURAL TAIWAN 149 (1987).

4. Interpretation no. 2495, the Da-li-yuan (1945).

5. For a detailed discussion of gender politics and infertility treatment from a feminist medical sociologist's perspective, *see* Chia-ling Wu, *Taiwan de sin shengjhih keji yu singbie jhengjhih 1950-2000* [The New Reproductive Technologies and Gender Politics in Taiwan, 1950-2000], 45 TAIWAN: A RADICAL QUARTERLY IN SOCIAL STUDIES 1 (2002). According to Wu's study, both the patients and doctors of infertility clinics follow a "lady first" policy, meaning that infertility is primarily deemed a woman's problem and that people tend to profile the female body for the cause of infertility. Her study also indicates that, although there has been a growing push to relocate the focus of infertility examination on the male since the 1990s, it has not yet prevailed in practice.

defined, controlled and given legal content by men."[6]

Women's reproductive capacity, one of the so-called most distinct biological truths that differentiate the female sex from the male sex, has divided feminist opinions, which range from a celebration of motherhood on one side of the spectrum (motherhood as a woman's blessing and the source of liberation) to a rejection of motherhood on the other side (motherhood as a woman's curse and the source of oppression). Yet, the disagreement between various feminist positions might not — or, at least, need not — be as divisive as it appears. Here, Andrienne Rich's theory in which a distinction is made between the experience of motherhood and the institution of motherhood is useful. In Catharine A. MacKinnon's suggestion that "a sex equality perspective on motherhood begins in a critique of the inequalities of the institution in order to reclaim the possibilities for the experience,"[7] the first step in the fashioning of a feminist account of motherhood is to de-colonize motherhood by critically examining its social and legal construction with a deliberate consideration of its local-specific context.

My discussion of motherhood begins with the question of whether one has to be a mother, a question that is commonly understood as a matter of choice. I shall argue that, just as marriage is a hierarchal institution masked as a contract, motherhood is a mandatory institution into which one appears to enter voluntarily. In this section, I particularly focus on the right to abortion, a right that is supposed, but often fails, to convey the idea of sex equality, as well as on the use and abuse of new reproductive technologies. Then, I will explore how the institution of motherhood is constructed pursuant to patriarchal norms by discussing, firstly, discrimination that, when targeting mothers in the workplace, is established on the ideal male worker presumption; and, secondly, the gendered allocation of parental rights and responsibilities that reinforces two important sets of binary oppositions: voluntary fatherhood versus compulsory motherhood and superior fatherhood versus inferior motherhood. Through out this article, a comparative study of Taiwan and the U.S. is provided in order to critically bridge American feminist legal theory and Taiwan's locality.

II. TO BE OR NOT TO BE A MOTHER: A MATTER OF CHOICE?

Given that the female is the sex that bears children and given that motherhood is socially and legally tailored to the interests of patriarchy, a woman's capacity to determine whether, when, and how to be a mother

6. Martha Fineman, *supra* note 1, at 38.
7. CATHARINE A. MACKINNON, SEX EQUALITY 1191 (2001).

(that is, her reproductive freedom and the conditions allowing and limiting her exercise of it) has been viewed by feminists as a critical site in which the subordination of women operates with great force. While feminists are torn in their opinions of this oppression and its relation to the potential of mothering, the negative social and legal consequences of motherhood have served as a note of caution to both sides of the feminist spectrum, particularly to those feminists who are celebrative of the affirmation of motherhood and who ignore or downplay relevant criticism of the injustices lurking in the shadows of maternity. The fact that women have been coerced into maternity as a result of enforced impregnation during wartime or in peace, have suffered the reproductive consequences of sex due to limited or non-existent access to reproductive controls, and have been prevented, especially when belonging to historically underprivileged groups (*e.g.*, the poor and racial-ethnic minorities) from procreating through involuntary abortions or compulsory sterilization, to name but a few methods of subordination, suggest that reproduction, while usually equated with womanhood, is not always voluntarily chosen or resisted in a sex-unequal society. Simply put, women are constantly disadvantaged and oppressed because of their reproductive capacities, that is, on the basis of their sex.

In this section, I tackle two topics regarding childbearing (the first function of mothering)[8]: firstly, whether and how motherhood can be resisted via an exercise of the right to abortion, and, secondly, the implications of new reproductive technologies in women's reproductive freedom. My discussion of these two topics does not, however, lead to the implication that women who become mothers are but compromised victims of false consciousness, enforced impregnation, or insufficient access to reproductive controls. And, yet, this discussion will demonstrate my point that, in a society where son-preference prevails, the availability of reproductive technologies can and often does turn itself against females by perpetrating the view that women must procreate male offspring.

8. The two functions of mothering, childbearing and childrearing, are often collapsed into one because women are usually the primary childbearers and childrearers. M.M. Slaughter deliberately separates the two functions so as to illustrate her point that "it is social relations that produce female Motherhood," that "there is nothing in nature that requires women to Mother, or prevent men from doing so." *See* M.M. Slaughter, *The Legal Construction of 'Mother', in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL CONSTRUCTION OF MOTHERHOOD 73 (Martha Fineman & Isabel Karpin eds., 1995). While I focus my discussion on childbearing in this section, it should be noted that, because women are socially constructed as mothers who bear and also raise children, the two functions of mothering are mutually constitutive concepts that do not operate independently.

A. *Resisting Motherhood: The Right of Abortion and Its Discontents*

In the United States, contraception and abortion, while not illegal under English or colonial common law, became restricted and criminalized after the second half of the nineteenth century, a time when the search for women's reproductive freedom was already well underway. The rhetoric and strategies of the pro-reproductive-freedom movement have gone through several different phases, according to Linda Gordon, moving from the "voluntary motherhood" advocacy in the latter half of the nineteenth century, to the "birth control" movement of the early twentieth century, to the "planned parenthood" campaign during and after the 1920s, and finally to "the right of determination" movement beginning in the early 1970s.[9] The Supreme Court decision in 1973, *Roe v. Wade*, signaled a milestone in the pro-abortion-rights movement, supporting a woman's right to abortion in the name of privacy rights combined with a medicalized view of pregnancy. Since then, the doctrine of privacy, rather than of equal protection under the law, has prevailed on the issues of both contraception and abortion. The abortion controversy, which Joan William describes as "a gender war over the issue of whether women are or should be citizens of the republic of choice,"[10] has become a sharpened and heated confrontation between pro-choice and pro-life factions. To protest against the legal protection of abortion, anti-abortion groups have adopted various strategies, which go as far as to include physical intimidation, death threats, and violence against abortion clinics, as well as against doctors who perform abortion surgeries;[11] these acts are, according to some anti-abortion advocates, justified in the name of the potential lives of unborn children.

Overshadowed by the rhetoric of privacy, the mainstream pro-abortion-right rationale has produced unsatisfactory results and even backlashes, which have invited various feminists to re-articulate the nature of a woman's right to an abortion in ways that repudiate the paradigm of privacy, so popular among pro-choice factions since the 1980s. Of greatest concern to feminists who oppose the privacy rationale, it may be fair to say, is how such a justification of the right to abortion

9. LINDA GORDON, WOMAN'S BODY, WOMAN'S RIGHT: BIRTH CONTROL IN AMERICA (1990).

10. Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y. U. L. REV. 1559, 1574 (1991).

11. Fortunately, the 9th Circuit of Appeals has affirmed a Portland jury's verdict that anti-abortionists had engaged in "true threats" by publishing "wanted posters" and setting up a website that described doctors who perform abortions as "baby butchers, which fall outside of the First Amendment protection (Planned Parenthood v. American Coalition of Life Activists, 2002). Following the U.S. Justice Department's recommendation in refusing to hear the appeal, the U.S. Supreme Court has let stand this ruling on June 26, 2003.

fails to address and promote sex equality.[12] That is, women are "erased" under the rhetoric of privacy and choice. In the words of Catharine A. MacKinnon, one of the feminists who pioneered the paradigm shift from privacy to equality, the right to abortion as a privacy right has furnished women with "the control over reproduction that is controlled by 'a man or The Man', an individual man or the doctors or the government" while also entitling men "to be let alone to oppress women one at a time."[13] Hence, a justification of the right to abortion that is based on privacy operates to support, rather than to challenge, male supremacy. To re-conceptualize the right to abortion as a sex equality right and to advocate an analysis of abortion restrictions as caste- or status-enforcing state action, Reva Siegel also argues that abortion-restrictive regulation counts as state action compelling first pregnancy and then motherhood, both of which force women "to assume a role and to perform work that has long been used to subordinate them as a class."[14]

On the subject of abortion, this line of feminist scholarship that seeks to re-orient the theory of the right of abortion in the sex equality framework is especially enlightening in the Taiwanese context in that such a re-orientation throws light on the significance of the social organization of reproductive relations, on one's understanding of the regulation of abortion, and on the problems of the mainstream feminist treatment of the right to abortion as a right of choice and self-determination, which has been inspired by American liberal feminism. The shift from privacy to sex equality suggests that feminists should, first and most obviously, be aware of the regulation of abortion and its relationship with sex equality, but also — and less obviously — that feminists should explore the implications of reproduction as a mechanism in the maintenance of both the patrilineal line and the state policy of population control.

Unlike its extremely divisive U.S. counterpart, abortion in Taiwan attracts relatively low-key discussion and debate. The generally low number of Christians on the island is one of the many arguable factors for

12. *See, e.g.*, Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Catharine A. MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, *in* Catharine A. MacKinnon, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93-102 (1987); Catharine A. MacKinnon, *Reflections on Sex Equality under Law*, 100 YALE L. R. 1281, 1308-24 (1991); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Reva Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, *in* Martha Fineman & Isabel Karpin eds., *supra* note 8, at 43-72.

13. Catharine A. MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 100, 102 (1987).

14. Reva Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, *in* Martha Fineman & Isabel Karpin eds., *supra* note 8, at 65. *See also* Reva Siegel, *Reasoning from the Body: a Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

this fact, although other religions that are more prevalent than Christianity exist in Taiwan and advocate against abortion.[15] Still, Taiwan's relatively high tolerance of abortion does not imply that abortion there is a routine matter unaccompanied by social/cultural condemnation and legal restriction, or that women enjoy more reproductive freedom because of this surface tolerance. The reality suggests quite the opposite: the prevalence of abortion in Taiwan, it may sound bizarre to say, actually symbolizes the material existence of sex inequality. The following discussion will illustrate why easy and affordable access to abortion and contraception, regardless of legal constraints, does not suffice substantive reproductive freedom in the Taiwanese context.

In Taiwan, the historically long and deeply rooted practices of abortion and infanticide were commonly practiced with minimum government intervention. The Japanese colonial government banned abortion through the application of the prewar Japanese Criminal Law in 1896,[16] which was modeled after French and German laws grounded in both Christian doctrines and the criminalization of abortion. Under this law, not only women who obtained abortion, but also those who performed abortions, were subject to punishment that included imprisonment. In practice, the ban on abortion was poorly enforced, reflected by the fact that, from 1908 to 1943, there were only 16 convictions for the crime of abortion.[17]

The legal ban on abortion survived the end of Japanese rule in Taiwan until 1969 when the Executive Yuan issued "The Guiding Principles of the Population Policy of the Republic of China," which legalized abortion on the basis of eugenics- and health-related concerns. The postwar Criminal Law in Taiwan, as did its prewar counterpart, criminalized abortion by making it a criminal offense to obtain or perform consensual abortions, to perform nonconsensual abortions, and to advertise or broker for abortions (Arts. 288, 289, 290, 291 and 292). Despite the legal ban, abortion was

15. Buddhism, for instance, proscribes against the killing of any life form. It maintains that, by having an abortion, one kills a human who has a soul, and that abortion is hence sinful. The belief in a "fetus ghost" (that a dead fetus would become a haunting spirit of fetus), which derived from traditional religious beliefs, was inspired by Japanese practices, and gained widespread acceptance in the 1970s, is used to advocate disapproval of abortion and to discipline sexuality. This use of the image of the fetus resembles the strategy of American anti-abortion activists. For a comprehensive discussion of fetus ghost beliefs in Taiwan, *see* MARC L. MOSKOWITS, THE HAUNTING FETUS: ABORTION, SEXUALITY, AND THE SPIRITUAL WORLD IN TAIWAN (2001).

16. In Japan, the government first codified abortion as a crime under Japan's first modern Criminal Code, which took effect in 1882. This Criminal Code was applied to Taiwan in 1896. *See* TAY-SHENG WANG, LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE, 1895-1945: THE RECEPTION OF WESTERN LAW 47 (2000). Later, the Japanese government enacted the 1907 Criminal Code, which was applied to Taiwan in 1908. The 1907 Criminal Code made the punishments for abortion more severe.

17. *See* TAIWAN SHENG SINGJHENG JHANGGUAN GONGSHU, TAIWAN SHENG WUSHIHYI NIAN LAI TONGJI TIYAO [Statistics on the Province of Taiwan in 51 years], table 165 (1946).

easily obtainable and commonly practiced throughout Taiwan before its partial legalization.[18] Without legal protection and governmental support, illegal abortions, while easily accessible in private or back-street clinics, were a costly and risky proposition for women who terminated their pregnancy at the risk of their health and even lives. Most women had knowledge of the illegality and physical dangers of abortion,[19] but it did not stop them from obtaining one.[20] This discrepancy between legal restriction on abortion and the prevailing violations of it is not uncommon in countries where abortion is formally available on demand, for instance, Switzerland, Israel and New Zealand.

In contrast to this formal ban on illegal abortion and its being flouted, the use of contraception was not illegal and was, for the good of the nation, even officially promoted as part of the official family planning policy. The government became aware of the rapid population growth in the late 1950s and launched a series of birth control campaigns focusing on contraception in the name of family planning to cope with it. With the U.S. providing it with huge financial, human, and technological support, this official birth control movement has gained great success, resulting in an increased use of contraception and notable decreases in the fertility rate.[21] This achievement of state interests, including the U.S. sponsors' interests in controlling population growth in developing countries and in promoting contraception pills and the IUD Lippes Loop, manufactured in the U.S., has had significant gender implications.

First of all, abortion was legalized under this top-down birth control campaign. Art. 6 of "The Guiding Principles of the Population Policy of the Republic of China" of 1969 provided that a pregnant woman or her spouse, when medically diagnosed as carriers of genetic diseases, hereditary insanity, or infectious diseases, all three of which made abortion necessary, could ask for an induced abortion. Legalized as such, access to abortion was provided more as a tool to serve the state's interest in controlling the quality and quantity of its population, and less as a

18. CHRISTOPHER TIETZE & STANLEY HENSHAW, INDUCED ABORTION: A WORLD REVIEW 26 (1986).

19. According to the 1971, 1983, and 1984 surveys, a high percentage of women interviewees (63%, 74%) knew that abortion was illegal. *See* TONG-MING LEE, JIEYU YU JIATING JIHUA TUIHSIN YINSHAN TAIWAN DICHU SHENYU SHUIZHUN YANJIU [A study on the impact of birth control and family planning in Taiwan](1979); Mei-ling Lee, *Duotai hefahua jhih cian taiwan funyu shihshih duotai gaikuang* [A profile of women obtaining abortion before the legalization of abortion in Taiwan], 13 GONGGONG WEISHENG [public health] 181 (1986).

20. In a 1969 study, it was reported that about 10 to 20% of the respondents had had abortions. *See* RONALD FREEDMAN & JOHN Y. TAKESHITA, FAMILY PLANNING IN TAIWAN: AN EXPERIMENT IN SOCIAL CHANGE 94 (1969). This percentage is very likely an underestimate.

21. For an introduction on Taiwan's family planning program, *see* ARLAND THORNTON & HUI-SHENG LIN, SOCIAL CHANGE & THE FAMILY IN TAIWAN, 298-304 (1995). *See* CHUNG-TUNG LIU, NYUSING YILIAO SHEHUEI SYUE [Women's medical sociology] 192-204 (1998) for a feminist critique of this family planning program.

means to facilitate women's freedom in the termination of pregnancies. That pregnant women were able to obtain induced abortions on medical grounds was but a byproduct of the official population policy. Moreover, legal abortions were provided under the framework of family planning, reflecting the government's intention to promote birth control so as to regulate the size of the family, and hence its access was limited to a particular group of women within the heterosexual family—married women. The narrow application of this right was in conformity with the contraception policy under "The Ordinance to Implement Family Planning in the Region of Taiwan," issued by the Executive Yuan in 1968, which provided preferential means of contraception to married women, particularly to those who had given birth to at least three children and to those in financially strained circumstances.[22] Put together, this birth control policy was primarily shaped by population control and family planning concerns.

This ignorance of gender inequality in the promotion of birth control has produced a new form of subordination. Perceiving reproduction as a female matter and making women solely responsible for birth control, the government targeted the female sex in its contraception campaign, promoting the use of contraceptive pills as well as the IUD, Lippes Loop in particular, without either reviewing their safety records and side effects or releasing such information to the public. As a result of this negligence, the campaign led to serious violations of women's health.[23] The use of condoms and male sterilization as relatively convenient and safe methods of contraception were left out of this governmental propaganda. By recklessly placing the responsibility of birth control on women, the state encouraged them to use contraception and to have abortions at the expense of their health and lives. In return, the government could control the population.

The gendered nature of this birth control policy remained largely unchanged when legal access to abortion was further broadened in 1984. "The Eugenics and Health Protection Law," drafted in 1971 (but placed on

22. It is questionable whether contraceptive means were made affordable to impoverished families as an affirmative step to promote reproductive freedom. Liu has cautioned that this policy was an official attempt to reduce the population of the poor. *See* CHUNG-TUNG LIU, *supra* note 21, at 196. Similar phenomenon can also be found in the U.S.. For example, Patriicia J. Williams has revealed how sterilization as a method of birth control has subordinated women of color. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 216 (1991).

23. *See* Chung-tung Liu, *supra* note 21, at 196-69. Lippes Loop, for instance, was introduced to Taiwan and became the major contraceptive method under this governmental birth control campaign only two years after its first release in the U.S. It has been proven that the installation of Lippes Loop can lead to various problems. According to Liu's study, about 50% of women who had had Lippes Loop removed it, and 80% of these removals were due to untoward side-effects (*id*. at 198).

hold until the dictator President Chiang Ching-kuo gave his instruction to reduce the population growth rate in ten years),[24] was made into law in 1984 and came into effect in 1985. When introduced to the Legislative Yuan and the public in 1982, this bill gave rise to a huge controversy, attracting opponents who argued on religious, ethical, and social grounds in favor of both the rights of the fetus and the regulation of sexuality. In contrast, supporters of the bill based their arguments on the preferability of population control, social stability, and the protection of women. Most notably, 154 individual women filed a collective petition with the Legislative Yuan demanding the passage of the law, using a compromised strategy that, while sponsoring the legalization of abortion, excluded minority feminist voices that, based heavily on American pro-choice rhetoric, supported a woman's right to self-determination and control over her own body. As a commentator has pointed out, there was no mention of "right" in the collective petition, according to which abortion was conceptualized as a necessary approach to the rescue of those who had conformed to traditional gender roles but who had unfortunately been victimized, particularly pregnant rape victims and adolescents.[25] Thanks to the KMT's authoritarian rule, under which it was easy to silence dissenting opinions and resolve a controversy, this bill was successfully made into law without objection after the President spoke out demanding its passage. To be sure, "The Eugenics and Health Protection Law" is a product of population and social control policy, as its statement of purpose clearly indicates in a rather conservative tone: "the purpose of this law is to implement a eugenics and health policy, to improve the quality of the population, to protect the health of mother and child, and to facilitate the happiness of the family" (Art. 1).[26]

Under this law, which remains in effect today, abortion is legally

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24. *See* Yenlin 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).

25. For a discussion of this controversy and women's petitioning for legal abortion, *see id*. at 53-59; Chung-tung Liu, *supra* note 21, at 204-10; TSAI-WEI WANG, FEMINISM AND THE FORMATION OF COLLECTIVE IDENTITY WITHIN THE WOMEN'S MOVEMENT IN CONTEMPORARY TAIWAN 163-67 (Ph.D. diss., University of Pittsburgh, 1997).

26. In a comparative study of abortion laws worldwide, Taiwan's abortion law is categorized as restrictive legal abortion based on "socioeconomic" grounds, meaning that it permits "consideration of a woman's economic resources, her age, her marital status, and the number of her living children." (Anika Rahman, Laura Katzive, & Stanley K. Henshaw, *A Global Review of Laws on Induced Abortion, 1985-1997*, 24 INTERNATIONAL FAMILY PLANNING PERSPECTIVES 56, 57 (1998)). While the above statement is not entirely inaccurate, it should be noted that these considerations are the result of liberal interpretations of the law, rather than of an explicit language of the law. In the Center for Reproductive Rights' 2005 report on the world's abortion laws, Taiwan is listed in the same category "socioeconomic grounds (also to save the woman's life, physical health and mental health)." *See* The Center for Reproductive Rights, *The world's abortion law*, *at* http://www.crlp.org/pub_fac_abortion_laws.html.

available on demand in the cases of fetus impairment; pregnancy resulting from rape, seduction, incest,[27] or endangerment of the physical and mental health of the mother (Art. 9), provided that she has the consent of her spouse or guardian if she is a minor, and that the fetus is within twenty-four weeks of pregnancy (Arts. 3 and 15 of the Law Governing the Enforcement of the Eugenics and Health Protection Law). This piece of legislation has provided a broadly and vaguely defined reason for married women to obtain a legal abortion: abortion is permitted "if the pregnancy or labor could either affect the mother's psychological well-being or family life" with the consent of her spouse (Art. 9). For unmarried girls and women, there is also a relatively broad justification for legal abortion, provided that "there is medical reason to believe that the pregnancy or labor could endanger or damage the mother's physical or mental health." In this regard, a female minor must obtain permission from her guardian.

Based on eugenics, health, and medical grounds, legal abortions of this kind empower doctors, husbands, parents, and the state with an incidental contribution to women's right to legally terminate pregnancies. Lest we forget, the legalization of abortion serves to release doctors from the legal responsibility of performing abortion, invests them with the power to exercise (as medical professionals) control over women's bodies, and indeed grants them the right to determine whether a girl or woman is entitled to obtain a legal abortion. It facilitates her husband's, as well as her parents', domination over wife/daughter's female sexuality and reproductive capacity by requiring spousal and parental consent: as the plurality opinion in *Planned Parenthood v. Casey* (505 U.S. 833, 1992), a decision that invalidated the requirement of spousal notification, states: "The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion...For the great majority of women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife's decision." The Taiwanese government has ignored both the dangers that women assume when they receive illegal abortions and the unequal conditions of conception, in which sex inequality informs how sexuality is defined and practiced (for instance, how women have traditionally been required to reproduce for the patriarchal family).

This gender-insensitive restrictive abortion law is not only

27. In this regard, "The Eugenic and Health Protection Law" stipulates that one may obtain an abortion to terminate a pregnancy resulting from sexual intercourse between two individuals who are barred by law to marry. It theoretically shall include conception during incest, adultery, and a divorced woman's sexual intercourse with one with whom she, prior to her divorce, had had an adulterous relationship. Yet, "The Law Governing the Enforcement of the Eugenic and Health Protection Law" provides a limited interpretation, therein, and applies it to the case of incest only (Art. 13).

fundamentally flawed; it is also poorly implemented, a weakness that further limits the law's contribution to women's reproductive freedom. Prior to March 1992, eugenic protection doctors who were entitled to perform abortion had to obtain an appointment from the Health Department (Art. 5 of "The Eugenics and Health Protection Law") and were limited in number. The cost of abortion was not covered by either public or labor insurance.[28] One of the immediate and on-going results of the lack of affirmative access to legal abortion and its legal restrictions has been the existence of a high percentage of illegal abortions following the partial decriminalization of abortion: The vast majority of women still go to private or illegal clinics to obtain abortions.[29] In the American context, Reva Siegel has concluded, "too often, legal restrictions on abortion do not save fetal lives but instead subordinate women, especially poor women, to unsafe, life-threatening medical procedures."[30] However, it should be noted that, in Taiwan, only a very low percentage of maternity deaths is due to illegal or unsafe abortions, a statistic that can possibly be explained in that licensed doctors perform most illegal abortions.[31] Most doctors do not adhere to the restrictions of "The Eugenics and Health Protection Law" in offering their abortion services because, as a result of governmental reluctance in the prosecution of illegal abortions,[32] the risk of a doctor losing her or his license and facing criminal responsibilities is extremely low.

B. *The Use and Abuse of New Reproductive Technologies: Female-selective Abortion and Assisted Reproductive Technologies*

Through comparative lenses, two different politics of abortion can be found in two distant countries, one located in the East and the other in the West, both seemingly at odds with themselves. Regardless of Taiwan's formally more restrictive abortion law, abortion is widely practiced and readily available, whereas, in the United States, the Constitution upholds

28. Yenlin Ku, *supra* note 24, at 58-59.

29. Marc L. Moskowits, *supra* note 15, at 21; Yenlin Ku, *supra* note 24, at 59. According to Marc's field research, one can easily obtain an abortion in private clinics, or in public hospitals with the authorization of her guardian or spouse, regardless of the other stipulations in the law. He suspects that this case can be attributed to the government's reluctance to prosecute illegal abortions except in cases where the wife obtains an abortion without her husband's consent (*id.* at 21, 176 fn. 5).

30. Reva Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, *in* Martha Fineman & Isabel Karpin eds., *supra* note 8, at 65.

31. Chung-tung Liu, *supra* note 21, at 212-13.

32. According to judicial statistics published by the Judicial Yuan, from 1995 to 2004, on average fewer than four persons were convicted per year by the regional courts for participating in an illegal abortion. *See* the Judicial Yuan's statistic report *at* http://w2.judicial.gov.tw/juds/report/sf-6.htm.

women's unrestrictive right to abortion in the name of privacy, though numerous practical obstacles, as well as state law restrictions, stand in the way of women's access to abortion. In neither case do women enjoy reproductive freedom in a gender-equal fashion. What is more, easy access to abortion in Taiwan, while appearing to endow women with the unofficial freedom to terminate unwanted pregnancies, might have in fact encouraged women to contribute to their very own subordination with the help of new technologies.

The abuse of sex-selective technology in the aborting of female fetuses suggests the need to replace the neutral term "sex-selective abortion" with a more accurate one: "female-selective abortion" (FSA).[33] Studies have shown that female-selective abortion has prevailed in Asia since sex-selective technologies became available,[34] but only Korea, China, and some parts of India have attempted to restrict such practices.[35] Sex-selective abortions are not limited to Asia. In the U.S., for example, studies also reveal some Americans' preference that the first-born and the only child be male, and the parents' willingness, although relatively uncommon, to use sex-selective technologies to satisfy their preferences.[36] In Taiwan, before it became technologically possible to determine the sex of a fetus, conventional wisdom provided various methods by which to impregnate a wife with a male fetus. One such method simply involved subjecting her to endless childbearing until at least a male child was born. "It is a truth universally acknowledged that Chinese daughters are the byproducts of attempts to produce Chinese sons,"[37] so contends Hill Gates. The invention of female-selective technologies has modernized and facilitated this kind of male-dominated reproduction. Striking evidence indicates a rise of the sex ratio at birth (SRB) since the mid 1970s from 106 to 110, which also increases with parity: In 1987, the SRB was 107 for first births, 108 for second births, 110 for third births, and 114 for fourth births; in 1990, the SRB for fourth births had reached 128.[38] Both sociologists and demographers speculate that this increase of SRB has

33. I side with anthropologist Barbara D. Miller's opinion that the term "female-selective abortion" is more appropriate in Asian societies because sex-selective abortion in these societies "is almost completely directed at aborting female fetuses and preserving male fetuses." (Barbara D. Miller, *Female-Selective Abortion in Asia: Patterns, Policies, and Debates*, 103 AMERICAN ANTHROPOLOGIST 1083, 1092 fn. 2 (2001)).

34. *Id.* at 1083-95.

35. Daniel Goodkind, *Should Parental Sex Selection Be Restricted? Ethical Questions and Their Implications for Research and Policy*, 53 POPULATION STUDIES 49, 49 (1999).

36. April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?* 10 WIS WOMEN'S L.J. 161, 171-72 (1995); Barbara D. Miller, *supra* note 33, at 1092 fn. 3. Currently, state laws in Pennsylvania and Illinois impose restrictions on sex-selective abortions.

37. HILL GATES, CHINA'S MOTOR: A THOUSAND YEARS OF PETTY CAPITALISM 121 (1996).

38. Barbara D. Miller, *supra* note 33, at 1085.

resulted from the growing use of prenatal sex screening and abortion.[39]

Female-selective abortion, as April Cherry powerfully contends, "is based on male preference and female subordination [and] ... if available on a large scale, would be used to victimize women and girls both individually and as a social group, serving to disempower women and continue their subordination. Sex-selective abortion used under patriarchy strengthens patriarchy."[40] When a fetus is aborted because it is female, the implication is that the female sex as a group is less valuable and less wanted. It is estimated that, solely for the purpose of eliminating, one by one, the undesired female sex, four to five thousand fetuses were aborted annually in Taiwan between 1996 and 1998.[41] To date, the government of Taiwan has yet to take affirmative steps to stop the abuse of abortion as such, not even when it constitutes a clear violation of the Eugenics and Health Protection Law. This tolerance towards female-selective abortion therefore serves to exploit women's reproductive capacities, not to facilitate their reproductive freedom.

The abuse of abortion and the misuse of sex-selective technologies is suggestive not only of the problems arising from an abortion policy that fails to address the reality of sex inequality, but also of the rhetorical limitations of pro-choice activists who, in defense of abortion rights, invoke the fundamental idea of privacy. Since the first effort to promote women's reproductive freedom, Taiwanese feminists have adopted the pro-choice approach, inspired by American liberal feminism, advocating women's right of self-determination and free choice, a line of advocacy that leads to the paradoxical support for, on the one hand, a woman's freedom to choose to terminate a pregnancy and, on the other hand, restrictions on female-selective abortions. In Korea, where the politics of abortion is similar to its Taiwanese counterpart's, the majority of feminists has chosen the same approach and hence faces an identical dilemma, prompting some feminists to take an anti-abortion stand for the purpose of protesting against female-selective abortion.[42]

To define abortion as an issue of choice thus ignores the conditions and constraints under which women make choices. The existence of choices that are bound by social parameters should not be taken as evidence of a woman's inability to make positive decisions in the face of her very own victimization of herself. Yet, as Catharine A. MacKinnon

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39. *See id*. at 1085; Arland Thornton & Hui-Sheng Lin, *supra* note 21, at 287; Chia-ling Wu, *shengjhih zihjhu pian* [on reproduction], in *1999* TAIWAN NYUCYUAN BAOGAO [the 1999 annual report of Women's Rights in Taiwan] 95 (The Awakening ed., 1999) ; Chung-tung Liu, *supra* note 21, at 214-5.

40. April L. Cherry, *supra* note 36, at 219-20.

41. Chia-ling Wu, *supra* note 39, at 95.

42. *See* Naryung Kim, *Breaking Free From Patriarchy: A Comparative Study of Sex Selection Abortion in Korea and the United States*, 17 UCLA PAC. BASIN. L.J. 301 (2000).

puts it, "in a context of mass abortions of female fetuses, the pressures on women to destroy potential female offspring are tremendous and oppressive unless restrictions exist. While under conditions of sex inequality monitoring women's reasons for deciding to abort is worrying, the decision is not a free one, even absent governmental intervention, where a male life is valued and a female life is not."[43] Various reasons have led women to prefer sons over daughters: pressure from their husbands and parents-in-law to produce a male heir, the desire of wives to secure their positions in the family, and their longing for more power under the shadow of patriarchy, to name but a few. To be sure, most women obtain female-selective abortions by their very own choices, but the question is, "how much value do these choices have when they may ultimately increase the subordination and vulnerability of women,"[44] particularly when such choices result in a decline in the reproduction of the female sex. The liberal approach to a woman's right to abortion, overshadowed by the pursuit of personal choices, fails to account for this practice of sex inequality and cannot provide affirmative methods to combat it.

Equally troubling are the very same problems attributable to the rhetoric of choice in the use of assisted reproductive technology (ART). In the U.S., ART has raised considerable distress and debates among feminists regarding how the availability, access, and practice of these technologies affect women as a group considering the intersection of race/ethnicity, class, and sexual orientations.[45] At the center of the feminist controversy over ART is whether it affirms some women's reproductive choices by commercializing and exploiting other women's bodies, and hence restricting, rather than facilitating, women's reproductive freedom as a whole; or whether it empowers women by detaching the linkage between heterosexual intercourse and reproduction, thus facilitating women's right to choose and to control their own motherhood, and diversifying their ways of practicing motherhood. Bluntly put, how do we perceive women's choices of practicing motherhood through ART? As I have emphasized in the previous discussion on the abuse of sex-selective abortion, the constraints on the

43. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L. R. 1281, 1317 n.157 (1991).

44. April L. Cherry, *supra* note 36, at 218-19.

45. *See e.g.*, Anita Allen, *Privacy, Surrogacy and the Baby M Case*, 76 GEO. L. J. 1759 (1988); Nancy Ehrereich, *Surrogacy as Resistance? The Misplaced Focus on Choice in the Surrogacy and Abortion Funding Contexts*, 41 DEPAUL L. REV. 1369 (1992); Laura R. Woliver, *Reproductive Technologies, Surrogacy Arrangements, and the Politics of Motherhood*, *in* Martha Fineman & Isabel Karpin eds., *supra* note 8, at 346-59; April L. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, 10 TEX. J. WOMEN & L. 83 (2001).

conditions under which women make their choices should not be overlooked. From this perspective, an examination of the practices and legal regulation of ART in the case of Taiwan reveals that the capacity of ART to serve the interests of women of all races/ethnicities, classes and sexual orientations remains highly debatable.

ART includes various kinds of technologies, including treatment of infertility in female bodies, artificial insemination (using the husband's semen [AIH] or using a donor's semen [AID]), in-vitro fertilization (IVF), intracytoplasmic sperm injection (ICSI), and surrogacy. These technologies are most often used by heterosexual couples to combat infertility. In a society where excessive importance is placed on the continuance of the patrilineal line, the demands for ART are overwhelming. In 1986, the Department of Health preliminarily responded to the growing use of ART and the lack of related legal regulations by issuing "The Guideline of the Ethics of Assisted Reproductive Technology" after the very first test-tube baby was born in Taiwan in 1985.[46] Under this guideline, only legally married couples with incurable infertility or genetic diseases were entitled to use ART. The couple shall not use donor sperm and donor eggs simultaneously, and the wife shall be capable of nurturing the embryo in her own uterus. ART is limited to non-commercial practices, and gestational surrogacy is absolutely prohibited. Hence, a child born through the legal use of ART must be carried by the wife and bear a genetic relationship with either the father or the mother. It is obvious that, by limiting the access to ART to heterosexual married couples, by requiring a genetic connection between the resulting child and the couple, and by necessitating the engagement of the wife's uterus, the law is an attempt both to resist the challenges that ART poses to traditional Taiwanese practices and to defend the traditional Taiwanese definition of parenthood and the heterosexual family. In its exclusion of lesbian or gay couples, single women, and even unmarried heterosexual couples from ART, this policy operates in such a way as to address and to weaken potential threats to the continuation of the patriarchal family in Taiwan. The policy, as an authorization of ART use, does not diversify the forms of family or increase women's reproductive choices.

This guideline sets up the framework for the 1994 "Measurements to Regulate Assisted Reproductive Technology,"[47] which has served as the basic law until now. It lays out more detailed regulations on the use of ART, and retains all of the above-mentioned restrictions. Rigid bans on legal access to ART have invited criticism from various camps, among

46. Announcement no. 597301, the Department of Health of the Executive Yuan (1986).
47. Announcement no. 83071000, the Department of Health of the Executive Yuan (1994).

which is a particularly outspoken group in favor of legalized surrogacy for infertile married women, and have resulted in a noticeable dissonance between the law and reality. In 1997, the Director-General of the Department of Health announced a plan to lift the ban on surrogacy in a draft of "The Artificial Insemination Law," which is to replace the 1994 "Measurement to Regulate Assisted Reproductive Technology." It immediately stirred up a heated and lasting debate over the legalization of surrogate motherhood, and, in the wake of this controversy, the Department of Health finally decided to outlaw surrogate motherhood in its finalized draft, which was approved by the Executive Yuan and sent to the Legislative Yuan for discussion in 1999. As of May 2005, the status of the bill remains undecided.

Regarding surrogacy, feminists stand on both sides of the pro-legalization and anti-legalization camps, and advocate positions that are strikingly similar to their positions regarding the legalization of prostitution.[48] This curious coincidence of positions echoes Carole Pateman's observation in her groundbreaking book, The Sexual Contract, that "most of the arguments used to defend or condemn prostitution have appeared in the controversy over 'surrogate' motherhood."[49] Indeed, this feminist contention over surrogate motherhood and the use of ART in general bears a strong resemblance to its American counterpart, a resemblance that can to a certain extent be attributed to American feminism's overwhelming influence on Taiwanese feminists.[50] Debunking the patriarchal assumption of women as tools of reproduction in the continuation of the family line, but displaying sympathy for women's suffering in Taiwan's patriarchal society, some feminists side with infertile women's advocacy groups and support the legalization of surrogate motherhood, but for somewhat different purposes: to protect the rights of surrogate mothers; to maximize women's control over their bodies, including laboring with and commercializing their wombs; and to grant single women, members of the LGBTQ community, unmarried heterosexual couples, and married heterosexual couples who do not meet the requirements imposed by the law unfettered access to ART so as to deconstruct the dominance of the traditional heterosexual family and to subvert the definition of motherhood. On the other end of the spectrum are feminists who, out of a similar compassion for women who suffer oppression in a patriarchal society that commands them to reproduce,

48. For a review on Taiwanese feminists' debate over surrogate motherhood, *see* Mei-hua Chen, *Wu-hua huo jie fang:nyu-sing jhu-yi jhe guan yu dai-li yun-mu de jheng-lun* [Reification or emancipation: feminist discussions on surrogate motherhood], 52 THE TAIWAN LAW REVIEW 8 (1999).

49. CAROLE PATEMAN, THE SEXUAL CONTRACT 211 (1988).

50. To select but one piece of the overwhelming available evidence, most of the vocal feminists on both sides of this debate have received graduate degrees in the United States.

oppose surrogate motherhood on the grounds that it objectifies and commercializes women's bodies and sexuality, that it further perpetrates their economic and class disadvantages by purchasing some women's reproductive choices at the cost of those who cannot afford to exercise these choices, and that new technologies of this kind serve to facilitate, rather than to confront, old patriarchal traditions that glorify women's childbearing destiny.

Both sides have their conservative alliances: people who endorse women's reproductive obligations based on patriarchal demands, and people who condemn ART as an immoral and unethical use of technologies that runs counter to nature. This blending of traditionally opposed political groupings further complicates the feminist war for or against ART and makes it unfair for either party to charge the other with "sleeping with the enemy." The reality of ART practice in Taiwan seems to support partial views of both sides. On the one hand, single women and sexual minorities have begun to seek underground help from ART and openly demand legal access to it, a trend that does help to subvert the traditional norms of motherhood.[51] On the other hand, it is indeed troubling that ART has been misused to provide sex-selective AIH for the purpose of producing male children.[52] It is equally troubling that ART has led to sex-insensitive practices that result in the physical and emotional traumatization of the very women whom ART was intended to help.[53] Of further concern is the reality that many women turn to ART out of a depressed and desperate need to fulfill their motherhood responsibilities, and many women who are willing to provide gestational services are motivated by economic hardship. Questioning these women's decisions invites the accusation that such questioning denies these and other women the valued attributes of agency and autonomy; yet, as Kathryn Abrams has noted, "women's agency under oppression is necessarily partial or constrained, because women must contend with—and are not presently capable of completely disarming, either collectively or individually—structures and practices that operate to deny or mitigate that capacity."[54] Whether ART strengthens or weakens these "structures and practices," and to what extent ART empowers or disempowers women, are the questions to be asked and answered when tackling the issues that ART has raised.

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51. Chia-ling Wu, *supra* note 5, at 44-45.

52. *Id*. at 52.

53. Chia-ling Wu, *supra* note 39, at 99-100.

54. Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory,* 95 CHICAGO L. R. 304, 306 n. 11 (1995).

III. REGULATING MOTHERHOOD: MOTHERHOOD IN THE INSTITUTION OF FATHERHOOD

Not all women who become pregnant want to terminate their pregnancies. Not all those who want to discontinue their pregnancies, for whatever reason, get what they want. Most women who have given birth become the primary caretakers of their children. What, then, are the implications of childbearing and childrearing in women's lives? How does the law shape the institution of motherhood and women's experiences under it, which in turn inform decisions of whether or not to become a mother? In this section, I will argue that, mothering accompanies discrimination and inequality both in the labor market, which idealizes the male worker, and in the family, where mothers are located and subordinated.

A. *Motherhood in the Labor Market System*

Regardless of divisive feminist views on the implications of women's reproductive capacity, it is generally agreed that this capacity has long been used to shape and naturalize women's subordinate status. Particularly in the workplace, it serves as a justification for the exclusion of women and keeps them at the feet of the socio-economic ladder. The market (public) and family (domestic) distinction allocates production in the former and reproduction in the latter, and assigns responsibilities accordingly. That is, it is assumed that the market worker bears no reproductive burdens, and the caregiver no work responsibilities. It is then obvious why the workplace has been a hostile environment for the female sex, coupled, as it so often is, with reproductive capacity and responsibilities. Pregnancy discrimination and the lack of maternal and childcare leave are the two major forms of disadvantages from which women suffer because of motherhood.

Until the mid-1970s, employers in the United States routinely rejected pregnant applicants, dismissed pregnant workers when the pregnancies came to their attention, and refused to reinstate those who wished to return after childbirth — such was "the maternal wall," so to speak. The massive entrance of women into the workplace in the 1960s and 1970s has exaggerated this problem, inviting litigations challenging various forms of pregnancy discrimination prompted by the growing awareness of women's subordination and by the increasing availability of legal remedies. Beyond all question, the activism of second-wave feminism has played an important role in this struggle against employment discrimination. In 1978, the Pregnancy Discrimination Act (the PDA) was passed, which amends Title VII to ensure that "women affected by pregnancy, childbirth,

and related medical conditions shall be treated the same as other persons not so affected but similar in their ability or inability to work." The equal protection theory underlying the PDA is to treat pregnancy as a disability, a lack of certain qualities associated with "mankind." This theory has its advantages in that it makes the sex-plus theory unnecessary in pregnancy discrimination cases; but it also exhibits drawbacks due to its embrace of the male standard, leaving large numbers of women employees unprotected or poorly protected: "[E]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees."[55]

In an attempt to ease the conflict between work and family, the Family and Medical Leave Act, which was passed and signed into law in 1993, takes one step further and provides, in a gender-neutral fashion, job security for women in the areas of pregnancy and childbirth, but does so with limited eligibility and an ignorance of the needs of caregivers who are mostly women.[56] In Christine Littleton's words, it "leaves women out by bringing men in."[57] Nevertheless, this gender-neutral approach is still beneficial in redrawing the line between work and family and reshaping the gendered division of labor, as it permits men to take leaves to provide carework for their family members. A recent Supreme Court decision serves as a good example. To the surprise of feminist activists and court watchers, the U.S. Supreme Court (the same Court that outlawed the Violence Against Women Act), in a case brought by a male plaintiff who took leave to care for his wife, ruled that "the FMLA is narrowly targeted at the fault line between work and family — precisely where sex-based overgeneralization has been and remains strongest." (Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003)).

The pursuit of the PDA and its aftermath has triggered the tension between the special treatment versus equal treatment approach that has split the feminist community, resulting in a paradigm shift in feminist legal scholarship, that is, the renouncement of the sameness versus difference method trapped in male-defined standards. As Joan Williams has persuasively argued, the workplace is premised on the myth of the male ideal worker who enjoys immunity from childbearing and childrearing and whose existence is dependent on the flow of care work from women.[58] Because the workplace is constructed as such, the exclusion and marginalization of women due to pregnancy and childbirth

55. Troupe v. May Dep't Stores Co., 20 F. 3d 734, 738 (7th Cir. 1994), cited from Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J. L. REFORM 371, 395 (2001).

56. *See* Laura T. Kessler, *id.* at 419-28; Christine Littleton, *Does It Still Make Sense to Talk About 'Women'?*, 1 UCLA WOMEN'S L.J. 15, 19-38 (1991); JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 237 (2000).

57. Christine Littleton, *id.* at 15, 19.

58. *See generally* Joan Williams, *supra* note 56.

are two related and inevitable outcomes that neither the sameness nor the difference approach can adequately address and ameliorate. The case of Taiwan supports this view.

Ever since industrialization and capitalization created the workplace in Taiwan, the marriage bar and maternal wall, among others, have blocked women's entry or re-entry into the workforce, shaped occupational segregation, and produced wage gaps. Unsurprisingly, Taiwanese employers resemble their U.S. counterparts in habitually using non-pregnancy as a job qualification, dismissing pregnant employees, and denying promotion to those who have taken maternity leave or refusing to restore them. According to official statistics, among married women between the ages of 15 and 64, the number of those who left their jobs because of marriage and childbirth and have remained unemployed ever since grew from 14.13% and 4.86% in 1979 to 20.43% and 8.08% in 2000 respectively. Although the number of those who, despite having once resigned because of marriage and childbirth, have come back to work grew from 0.99% and 0.73% in 1979 to 7.31% and 6.47% in 2000,[59] the average length of time that women spent away from work due to marriage and childbirth also grew from 45.40 months and 40.28 months in 1979 to 89.80 months and 72.19 months in 2000.[60] Indeed, "'mummy tracks' often become 'mummy traps'."[61]

This reinforcement of the maternal wall sharply contrasts with the growing body of law that, due to the collective efforts from various feminist groups, protects women against pregnancy discrimination. Prior to the initial successful challenge against pregnancy discrimination in employment in 1987, the law, to a limited degree and in a protective fashion, essentially prohibited pregnancy and maternity discrimination in the employment of women. The law, however, was under-inclusive, under-enforced, and rarely used, as in the case of marriage status discrimination. The 1947 Constitution provides equal protection (Art. 7), the right of work (Art. 15), and maternal protection (Arts. 153 and 156), which, under the milieu of martial law, were but empty words. The Factory Law provides for an eight-week paid maternity leave (Art. 37), a four-week paid miscarriage leave (Art. 23 of The Ordinance to Implement the Factory Law), infant-feeding facilities and childcare (Art. 24 of The

59. *See* table 6 "Current Employment status of married women aged 15-64 years in the Taiwan Area," in FU-JIOU HUN-YU YU NYU YE DIAO CHA [A survey on women's marriage, childbirth, and employment] (Directorate-General of Budget, Accounting and Statistics of the Executive Yuan ed., 2000).

60. *See* table 8 "average length since quitted because of marriage till had a job again for married women aged 15-64 years in Taiwan Area," and table 9 "average length since quitted because of childbirth till had a job again for married women aged 15-64 years in Taiwan Area," *id.* (English titles of the tables are original from the book cited.)

61. DEBORAH L. RHODE, JUSTICE AND GENDER 122 (1989).

Ordinance to Implement the Factory Law), and night-shift restrictions for pregnant and female workers (Art. 13). In the case of violations, these regulations that "accommodate" motherhood in the production-workplace are either unenforceable or meekly enforced.[62] The Labor Standard Law (LSL), which until 1998 excluded most occupations in which women are disproportionately represented (the service sector),[63] provides the same maternity leave (Art. 50) and night-shift restrictions (Art. 49), plus infant-feeding hours (Art. 51) and pregnant workers' entitlement to request a transfer to another position with "light duty" (Art. 52). It also forbids employers from terminating the contract during maternity leave (Art. 13). Similarly light punishments for violations of these articles are provided (Arts. 77, 78, 79).[64]

The prevalence of pregnancy discrimination has proven the ineffectiveness of these labor laws. Provisions related to maternity leave are poorly observed. The Council of Labor Affair's survey report indicates that 30.4% of all industries covered by the Labor Standard Law and only 18.2% of the service sector had provided paid maternity leave.[65] Moreover, the flaws of these labor laws are not limited to their narrow coverage, poor enforcement, and protectionist tone. By treating reproductive events as female matters and as exceptions, the laws strengthen the gendered division of labor within the family and in the labor market, hence perpetrating the subordination of women. They sustain, rather than deconstruct, the myth of the male ideal worker. Restrictions on night shifts and the entitlement to a job transfer, for instance, function to marginalize female workers by excluding them from certain jobs in the name of maternity protection, and legitimate discrimination in the guise of accommodating gender differences. Moreover, there is no specific regulation in these laws that prohibits the use of non-pregnancy as a job qualification; such a regulation would respond to the common practices among employers who reject pregnant applicants or, in the guise of the freedom of contract, demand female employees to sign an agreement according to which they will voluntarily

62. The Ordinance to implement the Factory Law provides no enforcement for Art. 24 on infant-feeding, facilities, and childcare. The person in charge of the factory shall be fined in the amount of NT$ 2,000 to 10,000 for the violation of Art. 13 of the Factory Law (restriction on night shifts) and NT$ 1,000 to 5,000 in the violation of Art. 37 (maternity leave).

63. Announcement no. 037287, the Council of Labor Affairs of the Executive Yuan (1997); Announcement no. 047494, the Council of Labor Affairs of the Executive Yuan (1997). The banking business has been included in the Labor Standard Law coverage in 1997. (Announcement no. 146732, the Council of Labor Affairs of the Executive Yuan (1996).)

64. With regard to night-shift restrictions, the Labor Standard Law imposes the more severe punishment of a six-month jail term or a fine of no more than NT$ 20,000 (Art. 77).

65. THE COUNCIL OF LABOR AFFAIRS OF THE EXECUTIVE YUAN, JHONG HUA MIN GUO BASHIHCI NIAN TAIWAN DICYU SHIHYE DANWEI LAODONG TIAOJIAN GAIKUANG DIAOCHA BAOGAO [the 1998 Annual Survey on labor conditions in Taiwan] (1998).

resign after becoming pregnant or giving birth.

The first official response to such practices came in 1986 when the Ministry of the Interior declared that employers who require female workers to sign an agreement according to which they will voluntarily resign by the end of their maternity leave constituted a violation of Art. 72 of the Civil Code (against the public order and good custom); hence, such agreements were void.[66] Yet, this official instruction did not even function to regulate the government's very own employment policy. Shortly after the lifting of martial law on July 15, 1987, a group of female employees at the National Dr. Sun Yat-sen Memorial Hall (an official institution affiliated with the Ministry of Education), with the help and support of various feminist groups, gathered to protest against the Memorial Hall's policy that required women to resign from their jobs either when pregnant or upon reaching the age of thirty. The result was a partial success: The Memorial Hall amended its contract and removed such restrictions, but insisted on an annual renewal of the contract, which left female employees' rights in jeopardy.[67]

This event triggered the drafting of and campaign for the "Gender Equality in Employment Law." Soon after the Memorial Hall's formal response, the Awakening formed a special committee to draft and petition an equal employment bill, which was first introduced to the public in 1989, followed by a ten-year struggle to win its battle in the Legislative Yuan. Prior to this legislative milestone, feminist groups had been actively uncovering and correcting the prevalence of pregnancy discrimination in the workplace through various means, including holding press conferences to reveal pregnancy discrimination cases, organizing female worker unions, litigations, and legislative campaigns. The government has responded to these confrontations with moderation. In 1992, the Legislative Yuan passed "The Employment Service Act," (ESA) which applies to all employers and goes further to provide more extensive protection for employees, including an equal employment provision that contains the following stipulation: "to achieve equal employment opportunity for our citizens, employers shall not discriminate against applicants or employees on the basis of race, class, language, thought, religion, party affiliation, birthplace, gender, appearance, disability or previous membership to a labor union" (Art. 5).[68] The Act also urges

66. Announcement no. 431187, the Ministry of Internal Affairs of the Executive Yuan (1986). This announcement concerns the Japanese company Sony's employment policies in Taiwan. In Japan, Sony's employment policies had already been ruled unconstitutional in the 1960s, but the company's oversea branch in Taiwan continues to practice these discriminatory policies. Special thanks to renowned Japanese legal feminist, Tsunoda Yukiko, for providing this valuable information.

67. Tsai-wei Wang, *supra* note 25, at 208-09.

68. In 2002, this article was revised to expand protective measures against employment

central and local governments to set up employment discrimination arbitration committees to monitor and implement the legal protection of employees (Art. 5 of the Ordinance to Implement the Employment Service Act). Interestingly, there has been little opposition to the view that pregnancy discrimination is a form of gender discrimination and, hence, a violation of the stipulation of the Employment Service Act. What is in dispute is how to identify and determine pregnancy discrimination.

In 1994, a Taipei-based credit union laid off nine female employees due to their violation of the employment contract that required them to resign voluntarily after getting married or becoming pregnant. Protests and criticism against this act of gender discrimination brought tremendous pressure to bear on the government, and the Council of Labor Affairs of the Executive Yuan was forced to impose a penalty of fines on the credit union in accordance with Art. 62 of the Employment Service Act. Soon after this dispute was "settled," the Council of Labor Affairs notified all credit unions (which, in Taiwan, have acquired a notorious reputation for routinely discriminating against female applicants and employees based on marital status and pregnancy), requesting them to amend their employment contracts and remove bans on marriage and pregnancy so as to comply with the Constitution and the laws.[69] Yet, the punishment (a fine of NT $3,000 to 30,000) has been too light to deter employers from such practices.

Other than the national government, local authorities have also contributed to an enforcement of the ban on pregnancy discrimination. In 1995, the Taipei City Government, as the pioneer, established the very first employment discrimination arbitration committee.[70] Since then, nearly 95% of employment discrimination cases that this city committee has handled have involved gender discrimination, and 81% of them are pregnancy discrimination cases,[71] a statistic that shows both the prevalence of pregnancy discrimination in the workplace and female workers' growing consciousness in the fight against such discriminatory

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discrimination based on "race, social class, language, belief, religion, political party, origin, sex, marital status, appearance, features, disability, or past membership to a labor union." It also forbids employers from performing the following practices when recruiting or hiring workers: 1) engaging in fraudulent advertisement or notice; 2) detaining the applicant's ID card, work permit, or any other identification documents against his or her will; 3) holding financial means or asking for a deposit from a job applicant; 4) assigning a jobseeker to the execution of a task with a nature that runs counter to public orders or decent morals; 5) submitting false documents or fake samples for physical checkups in the legal procedures related to the application, recruitment, introduction, or management of foreign workers. Also, the 2002 amendment has significantly increased the amount of fines for employment discrimination.

69. Announcement no. 50763, the Council of Labor Affairs of the Executive Yuan (1994).

70. As of May 2005, twenty-three out of twenty-five counties and cities in Taiwan have established employment discrimination committees.

71. *See* the department of Labor of the Taipei city's report, *at* http://www.esctcg.gov.tw/angel/disk2/book/b-e2-03.htm.

policies. The standard of scrutiny adopted by the committee, however, is worrying. According to a study on pregnancy discrimination cases, as they were handled by the Taipei City Employment Discrimination Arbitration Committee, cases that involve disparate treatment of female employees or applicants, meaning employment contracts that clearly stipulate non-pregnancy as a job qualification, are deemed facial discrimination and a violation of the Labor Standard Law and the Employment Service Act. The committee has also followed the example of the U.S. Supreme Court's 1991 decision of *International Union, UAW v. Johnson Controls, Inc.* (499 U.S. 187) and ruled against the policy of fetal protection, under which the employer unilaterally suspends or transfers pregnant employees in the name of fetal vulnerability. But facial discrimination cases constitute only a handful of these pregnancy discrimination cases. The majority of pregnancy discrimination cases are of the so-called "mixed motive discrimination" variety, that is, discrimination based on both legal motivations (professional qualifications, efficiency, and the like) and illegal motivation (pregnancy per se). The rulings in half of these cases have favored the employers, who provided the courts with "proof" of the irrelevance of pregnancy in the dismissal or job transfer.[72]

This formal equality approach suggests that, as long as employers abandon their conventionally blatant approach to discrimination against women and successfully disguise it in gender-neutral terms, they are only one step away from beating a gender discrimination charge. The reality indicates that this message has been well received. Instead of committing facial discrimination, employers use various strategies to dismiss pregnant employees, including the annual renewal of employment contracts and a deliberate overburdening of pregnant employees to force them to resign, to name but a few.[73] It is even more difficult to prove pregnancy discrimination in hiring practices. In most cases, a pregnant woman would not even bother to apply for a job. Adopting the disparate treatment theory for a definition of pregnancy discrimination thus functions to condemn only a small proportion of employment discrimination cases. That job qualifications are designed under the framework of the male ideal worker is thus left unchallenged.

The "Gender Equality in Employment Law" broke legislative ground when it was passed in 2001. The law, which became enforceable on International Women's Day in 2002, specifically prohibits gender discrimination in the workplace, from one's first day on the job through to

72. Chao-yuan Huang, *Huaiyun cishih shihli jiantao: taipeishih jiouye cishih pingyi weiyuanhuei anjian fensi* [Reviewing cases of pregnancy discrimination: an analysis of cases handled by the employment discrimination arbitration committee of the city of Taipei], presented at the third National Conference on Women's Issues, Taipei, Taiwan (1998).

73. Mei-hua Chen, *supra* note 48, at 64-65.

one's retirement, and gives some hint as to the changes taking place in the equality standard. Under this law, discrimination is defined as "disparate treatment based on sex,"[74] a phrase that appears to signify the formal equality standard, but the Enforcement Rules of the Gender Equality in Employment Law issued by the Council of Labor Affairs further provides a substantial definition of "disparate treatment" as when "an employer treats an employee or an applicant disadvantageously directly or indirectly based on sex," the wording of which creates the possibility of an alternative interpretation of discrimination through a shift in focus from "difference" to "disadvantage." Whether this will lead to a paradigm shift from formal equality to substantial equality in the arena of the workplace is still unclear at this initial stage.

The practical definition of "disparate treatment" aside, this law has made remarkable headway in the outlawing of pregnancy discrimination and the providing of more extensive maternity/childcare leave, childcare services, and infant-feeding hours and facilities to promote equality in the workplace more affirmatively. The law unequivocally forbids employers from prescribing or arranging in work rules, labor contracts, and collective bargaining agreements provisions that force the employee to leave her or his job or to apply for leave without payment when s/he marries, becomes pregnant, or engages in child-birth or child-raising activities. The law also forbids employers from terminating a labor contract based on the above-mentioned factors. Any prescription or arrangement that contravenes these provisions, and termination of the labor contract as such, shall be deemed null and void (Art. 11), and the employer shall be subject to a fine of NT $ 10,000 to 100,000 (Art. 38). The law requires employers to provide menstruation leave as sickness leave on demand, mandatory paid maternity leave for childbirth and miscarriage, mandatory paid paternity leave for two days, unpaid parental leave on demand with insurance coverage (Arts. 15 and 16), infant-feeding hours and adjustment of working hours and time schedules for the purpose of childcare on demand (Arts. 17, 18), family leave as common leave (Art. 19), and infant-feeding and childcare facilities (Art. 23). Employers are also prohibited from refusing to reinstate employees who have exercised these rights unless there are justifiable reasons (Art. 17), from denying bonus payment to them, from under-evaluating their job performance, and from taking disciplinary action against them (Art. 21). It is further required that the relevant authorities assist employees who, "due to the reasons of marriage, pregnancy, child-birth, child-care or

74. The official translation of this law is "treating employees discriminatorily because of sex." Nevertheless, the original language clearly indicates that "employers shall not impose disparate treatment on employees because of sex/gender."

taking personal care of their families," have left their jobs and that employers make serious efforts to rehire them (Art. 25), so as to foster their re-entry into the workplace.

The Gender Equality in Employment Law is both an important accomplishment and a drop in the bucket. It addresses equality in ways that unfold and resist discrimination clothed in the sanctity of the contractual agreement, it challenges the gendered notion of reproduction by granting spousal paternal leave and gender-neutral parental leave, it contests the allocation of reproduction in the private sector by socializing reproductive and care responsibilities, and it affirmatively demands that the workplace be renovated into a mother-friendly and caretaker-friendly place. Simply put, the law has taken a significant step toward deconstructing the male ideal worker and accommodating the needs of caretakers. Nonetheless, its gender-neutral tone still perpetuates the myth and assumption that care work is equally shared within the family.[75] For instance, entitlements to parental and family leave are granted to both male and female employees in an attempt to reshape the division of labor in the family, but an employee with a spouse who is unemployed is denied such entitlements unless there is a justifiable reason. This rule thus helps very little to redistribute care work in a family composed of a working husband and a housewife. The law is also premised on the heterosexual, two-parent family, and hence leaves out concerns for, among many others, single mothers and same-sex couples. For instance, family members of single pregnant women and lesbian partners of pregnant lesbians, who, under existing law, cannot be considered "spouses," are excluded from enjoying paternal leave, which is provided for legal spouses only.[76] Neither a lesbian mother's partner nor a gay father's partner can apply for parental leave, to which only legal parents are entitled.

The limitations of the Gender Equality in Employment Law can also be attributed to its compromising nature. As a product of tough bargains between feminist lobbyists and opposing forces that dominated the Legislative Yuan and capitalist circles, this law combines progressive provisions with exceptional rules and allows employers to dodge responsibilities imposed by these provisions. With permission from the relevant authority, an employer can, for instance, reject an employee's application for reinstatement after the expiration of parental leave, provided that, among other reasons, "the change of the nature of business

75. Some feminists do endorse a gender-neutral program of maternity leave and childcare with the hope of beginning the process of "delinking caregiving from body shape." (Joan Williams, *supra* note 56, at 238-39).

76. If "family members" and "other major events" in Art. 20 are loosely interpreted, they may be entitled to apply for family leave. Nonetheless, family leave shall be incorporated into normal leave, which makes it less beneficial than paternal leave.

necessitates a reduction in the workforce and the terminated employee cannot be reassigned to other suitable positions" (Art. 17). Its coverage is more extensive than any other labor laws and has included public officials, educational personnel, and military personnel, but only employers with more than thirty employees are required to provide paternal leave, a readjustment of working hours and schedules, and family leave (Arts. 16, 19 and 20), and only employers with more than 250 employees are required to provide child-care facilities (Art. 23). Most importantly, little, if any, punishment is provided for enforcement of the law. This lack of enforcement is exactly what eased the law's passage through the Legislative Yuan. And, yet, as mild as it is, the law has produced a conservative backlash. Since the Gender Equality in Employment Law came into force, employers have outspokenly and explicitly expressed their unwillingness to comply with the law, their reluctance to hire women, and their plans to cut back on the number of female employees. These reactions will not only hinder the promotion of gender equality in the workplace, but also foster women's unemployment. The Council of Labor Affair's survey released before the first anniversary of the implementation of the Gender Equality Employment Law also indicates its limited implementation. Only 3.3% of the 2463 companies interviewed have set up nursery facilities, and, during the law's first year in effect, only 83 male workers took family leave. Mandatory maternity leave, on the other hand, has been much more successful, with 79.5% of the companies allowing their female employees to take maternity leave.[77]

Indeed, as the secretary-general of "the Taiwan Women's Link" and a current member of the Taipei City Parliament, Chia-ching Hsu, concludes, workplace equality is "a tough sell in Taiwan."[78] It is even more of a tough sell when a female employee lacks Taiwanese citizenship, as is the case of pregnancy discrimination against female migrant domestic workers. Taiwan first opened the gate for migrant workers in 1989. Authorized by the Employment Service Act of 1992 (Art. 45), the Council of Labor Affairs drafted and announced "the Measures for Employment Permission and Supervision of Foreign Persons" in the same year mainly for the purpose of regulating migrant workers. Under this law, migrant workers are subject to strict supervision prior to and after their arrival, including regular medical check-ups every six months. Female migrant workers have to take pregnancy tests before they enter Taiwan, and, if a female migrant worker is found to be pregnant, then her working visa will be denied (Art. 15). Until 2002, such women were to undergo, among

77. Staff writer, *Gender-equality law gets mixed results: council*, TAIPEI TIMES, March 06, 2003, at 4.

78. Chia-ching Hsu, *Workplace equality is a tough sell in Taiwan*, TAIPEI TIMES, March 14, 2002, at 8.

many other treatments, a pregnancy test every six months, and whoever tested positive was to be dismissed and deported (Art. 22).

This provision has made non-pregnancy a job qualification of the official governmental policy governing female migrant workers, a situation that indeed clashes with the government's efforts to combat pregnancy discrimination against Taiwanese women. Studies on migrant domestic workers in Taiwan have shown how these women's sexualities are monitored, regulated and even violated by their employers, along with the state government, in everyday life and through regular supervision.[79] The purpose of this official non-pregnancy policy is twofold. On the one hand, by making non-pregnancy a precondition for female migrant workers' residence in Taiwan, the employers and the government are free from the costs of reproduction; the policy hence maximizes their interests in female migrant workers' labor. On the other hand, the policy fosters the state's strict immigration policy that controls Taiwan's population and minimizes the number of citizen candidates of foreign origins, particularly those from so-called "under-developed countries." Female migrant workers are thus subordinated based on a combination of sex and nationality.

Thanks to protests from labor rights groups and a few feminist organizations, "the Measures for Employment Permission and Supervision of Foreign Persons" was finally revised in 2001 and the revised version, which retains non-pregnancy as a precondition for a working visa but removes pregnancy tests from the list of medical check-ups, took effect in 2002. What is more, the 2002 Gender Equality in Employment Law applies to both Taiwanese citizens and non-citizens. Legally speaking, pregnancy is no longer a justification for dismissal and deportation. Female migrant workers are also entitled to paid maternity leave. However, both the vulnerability of female migrant workers' status (for instance, the limitation on the maximum duration of their employment contract)[80] and the very nature of their working conditions in "private homes" suggest that the accomplishments of legal revisions in this area should not be exaggerated.

B. *The Gendered Allocations of Parental Rights and Responsibilities*

The gendered division of the public versus the private situates the

79. *See generally*, Chin-ju Lin, *wai-yong jheng-ce yu nyu-ren jhih jhan* (The state policy that divides women: rethinking feminist critiques of 'the foreign maid policy' in Taiwan), 39 TAIWAN: A RADICAL QUARTERLY IN SOCIAL STUDIES 93 (2000); PEI-JIA LAN, MULTIPLE IDENTITIES, GLOBAL DIVISONS (Ph.D. diss., Northwestern University, 2001).

80. According to the Employment Service Law, the maximum duration of a migrant worker's contract is three years (Art. 52).

workplace on the premise that motherhood belongs to the domestic sphere. The public-private opposition does not mean that motherhood dominates the place where it is located, but rather, as the following discussion will demonstrate, motherhood is defined and situated in the institution of fatherhood, which inscribes its subordination. My major concern is how motherhood is constructed as a natural and social institution that compels women to perform the role of mother, and fatherhood a social one that allows men to opt in or opt out. I will explore this dichotomous "volunteer fatherhood versus draftee motherhood conceptualization"[81] — that is, the construction of "legal fatherhood versus natural motherhood"[82] — from two perspectives. Firstly, I will analyze how the law of legitimacy, which establishes the legal mother-child and father-child relationships, privileges the heterosexual marriage and favors unwed fathers. My second concern is how the construction of motherhood subordinates it to that of fatherhood, as expressed by the law of the child's citizenship and ethnic status, and the allocation of parental rights and responsibilities.

1. *Voluntary Fatherhood versus Compulsory Motherhood*

On the subject of the paternity and maternity conceptualization, Carole Pateman contends that "fatherhood never quite escapes from uncertainty ... no uncertainty can exist about knowledge of maternity ... maternity is a natural and a social fact ... Paternity has to be discovered or invented."[83] In her essay that encourages feminists to embrace biology as a strategic device, or to "reclaim biology for feminists," Katharine K. Baker offers a similar observation, stating, "traditionally, no one (save possibly the mother) was ever completely sure of paternity, and everyone (who saw the pregnancy) was completely sure of maternity. This led to a jurisprudence in which marriage and support, as much as biological connection, determined fatherhood."[84] Indeed, the "mysterious nature" of paternity has even led many scholars, from the nineteenth-century socialist Friedrich Engels[85] to the twentieth-century feminist Mary O'Brien,[86] to believe that men's need to overcome the uncertainty surrounding paternity triggers and maintains the institution of patriarchy,

81. Karen Czapanskiy, *Volunteers and Drafters: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991).

82. Kif Augustine-Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 VAL J. INT'L L. 93, 104-11 (2000).

83. Carole Pateman, *supra* note 49, at 34-35.

84. Katharine K. Baker, *Biology for Feminists*, 75 CHI.-KENT L. REV. 805, 820 (2000).

85. FRIEDRICH ENGELS, THE ORIGINS OF THE FAMILY, PRIVATE PROPERTY AND THE STATE (1972).

86. MARY O'BRIEN, THE POLITICS OF REPRODUCTION (1981).

in particular the monogamous family.

The law prescribes, describes, and legitimates both anxiety over paternity and certainty over maternity by inventing the rules of legitimacy. Marriage legitimates children and establishes legal parenthood between the married couple and the children. A legitimate child can be de-legitimated to prevent a man from fathering a child with whom he has no genetic relationship; and an illegitimate child, also called "filius nullius," "bastard," or "child born out-of-wedlock," can be legitimated by the father's acknowledgement. On the other side of the coin, a mother does not legitimate her child, and maternity is rarely contested. It is thus evident that the law of legitimacy is created to be a man's rule, under which "legitimation outside of marriage remains a man's act"[87] and maternity is presumed to be a natural fact, hence irrelevant.

The irrelevance of the law of legitimacy to maternity is reflected in the way the law determines maternity. In American law, she who gives birth to the child is the child's legal mother.[88] The mother does not legitimate or de-legitimate a child through her acknowledgement or denial of motherhood because it "just is." Taiwanese family law follows the very same logic, stipulating that an illegitimate child's legal relationship to the mother is deemed to be legitimate and no acknowledgement by the mother of the child is necessary (Art. 1605). As such, maternity is presumed, passive, and compulsory. She is bound to assume the legal responsibilities and rights of the mother, regardless of the child's legal status: Like it or not, she has to be the responsible reproducer, the draftee mother. On the other hand, legal paternity is rebuttable; and needs to be established and acknowledged in the case of an illegitimate child. It means that a man can be either a responsible reproducer or an irresponsible one, which options, although not entirely determined by his willingness, rely to a significant extent on his discretion to choose or evade fatherhood.

The autonomy of fatherhood finds its origins in the law of legitimacy. Under Taiwanese family law, paternity-legitimacy is established through two routes: marriage to the child's mother and acknowledgement. Firstly, the husband of the child's mother is presumed to be the father, but the law grants him the opportunity to rebut this presumption. It stipulates that, where the wife conceived during the continuance of a marriage, the child so born is presumed to be a legitimate child fathered by the husband; the husband, if he can prove that he is not the biological father, may bring an action for disavowal within one year after he has learned of the child's

87. Catharine A. MacKinnon, *supra* note 7, at 578.

88. This law is beginning to change in the aftermath of technological advances that make it possible to separate the genetic and gestational work of motherhood. For an introduction of the issue of legitimacy in American law, *see* ROSEMARIE SKAINE, PATERNITY AND AMERICAN LAW 33-55 (2003).

birth (Art. 1063). Once a judgment of disavowal is granted, the child is de-legitimated and becomes an illegitimate child like a child born out of wedlock. An illegitimate child, that is, a child with no legal paternity relationship, can be legitimated and thus establishes her or his legal relationship with the father when the biological father marries the biological mother (Art. 1064) or when the biological father acknowledges the child through either active expression or the fact of maintaining the child (de facto acknowledgement) (Art. 1605).

The law enables the mother to coerce the unwilling biological father into acknowledging the illegitimate child, but grants her this right with the stipulation that she meet strict burdens and requirements so as to protect a man from being compelled into wrongful fatherhood. In any of the following cases, the biological mother may claim acknowledgment from the biological father: where it is the fact that the biological mother and the biological father cohabited during the period of conception; where paternity can be proved from documents conducted by the father; where the mother conceived through rape or seduction by the biological father; and where the biological mother was impregnated by the biological father because of his abuse of power (Art. 1067).[89] Furthermore, the mother must exercise this right of claim within seven years of the child's birth (Art. 1067). On the contrary, there is no restriction on a father-initiated paternity action because it involves a willing father.

A similar rule can be found in American law, under which a mother-initiated paternal proceeding is usually accompanied by procedural and evidentiary burdens that are stricter than what accompanies a father-initiated paternal proceeding. Karen Czapanskiy contends that this discrepant treatment of mother and father with respect to paternal proceedings reflects "the notion that family law supports and reinforces fathers as volunteers."[90] Likewise, the case of Taiwan suggests the law's intention and function in promoting volunteer fatherhood. By defining how fatherhood is performed, it also constructed paternal responsibility as an essentially economic matter. The father's "de facto acknowledgement" is constituted by the fact that he has maintained the child, and simply paying for the child's maintenance will suffice.[91] That is to say, financial support alone can make the transformation from irresponsible fatherhood to responsible fatherhood: To hold him accountable is to make him pay. Financially tying together men and

89. The illegitimate child or other statutory agent is also entitled to claim acknowledgement under the same conditions. The illegitimate child must exercise this right within two years after s/he reaches the age of maturity (Art. 1067).

90. Karen Czapanskiy, *supra* note 81, at 1431.

91. Judgment no. 1125, the Supreme Court (1934); Judgment no. 1167, the Supreme Court (1955).

mothers and their illegitimate children, as Martha Fineman argues, "[obscures] the magnitude and dimensions of the economic deprivations that make it difficult for women who make decisions to reproduce or to raise their children."[92] It also affirms the notion of the breadwinner father and caretaking mother, and thus wins paternal support for mothers at the cost of the reinforcement of existing gender roles.

The restrictions on mother-initiated paternity proceedings, on the other hand, punish women for sex and reproduction outside of marriage, that is, for producing an illegitimate child, and provide them with incentives to legitimate and de-stigmatize the child by marrying the biological father. First of all, the law demands "solid evidence" for a mother to be eligible for a claim of acknowledgment: the fact of cohabitation or written documents provided by the natural father. In cases of impregnation through rape, seduction, and abuse of power, such evidence is not required. These exceptions seemingly provide more protection for mothers who are the victims of sexual violence by taking into consideration the conditions under which the mother became pregnant while also punishing men who violate sex norms by making them responsible reproducers. Yet, their wishes are only respected to the extent that they demand the victimizer-fathers' engagement in parenting; not when they want to deny the victimizer fathers' paternal rights. The mother and the illegitimate child are entitled to disavow an alleged father's acknowledgement, but only when there is no genetic relationship between the child and the alleged father. That is, an acknowledgment of paternity based on biological truth, such as the fact that the mother was impregnated by the biological father through an act of rape, cannot be disavowed. In her critique of unwed fathers' rights, Mary L. Shanley contends, "attention to the circumstances under which conception took place is necessary to ensure that the child was not conceived as the result of abusive behavior toward the mother."[93] Awarding victimized mothers of sexual violence the right to demand involuntary fatherhood, but no right to contest unwanted fatherhood, thus works to perpetrate the traditional notion of parenthood and to assure men's entitlement to the fruits of their criminal behavior, rather than to affirm the autonomy of victimized mothers.

The sanctions on women's sexuality also function through a denial of a mother's entitlement to claim acknowledgment from the biological father on the basis of her sexual intercourse with a third party or through proof that the mother led a licentious life within the period of conception

92. Martha Fineman, *supra* note 1, at 211.

93. Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 84 (1995).

(Art. 1068). Hence, a mother who brings an action to claim acknowledgement from the biological father will also expose herself to public scrutiny of her sex life and invite insults from the unwilling father who, under this law, is entitled to challenge this claim by charging her with "unchastity" to undermine her credibility. This does not only affirm the ideology of chastity that subordinates women's sexuality by punishing unchaste mothers, but also facilitates volunteer fatherhood by empowering an unwilling father's defense against the mother. Besides, paternal preference in determining the surname of the child also functions to prevent an unwed mother from obtaining acknowledgement from the birth father because the child will have to switch to the father's surname once legitimated (Art. 1059). In 1997, the Ministry of Internal Affairs issued an instruction to permit a legitimated child to retain the mother's surname, provided that both parents reach an agreement.[94] Conditioned on the father's consent, this exception empowers the unwed mother only to a limited extent. It supports the point argued below that fatherhood, once established, is superior to motherhood.

2. *Superior Fatherhood versus Inferior Motherhood*

The gender schema of volunteer fatherhood versus draftee motherhood ensures that mothers will, and feel obligated to, care for their children, whereas fathers are welcome to take part in parenting if they so prefer: Fathers have an opportunity and mothers have a responsibility; fatherhood is by choice and motherhood is by default. Furthermore, these two types of parenthood, biological determinism of motherhood and volunteerism of fatherhood, are not arranged as equals but located in a hierarchy: Once fatherhood has been established, it triumphs over motherhood, and in a gendered fashion: Fatherhood is about financing and motherhood is about nurturing. This hierarchically gendered arrangement of parenthood can be explored from two aspects: firstly, the ability of fathers and mothers to transmit citizenship and ethnic status to their children; and, secondly, the substances of parental rights and responsibilities that embrace the gendered division of labor.

The legal regulation of mothers and fathers in the transmission of citizenship-nationality determines which sex is entitled to produce citizens of the nation to which s/he belongs, as well as which sex shall take the legal responsibility of a parent. Conventionally, a citizen-mother alone could not transmit her citizenship to her child. In the U.S., all

94. Instruction no. 8601453, the Ministry of Internal Affairs of the Executive Yuan (1997). The Statute of Names, has been amended in 2003 to permit the custodial parent, either mother or father, to change the child's surname to her or his surname in the event that the child holds a surname that is different from the custodial parent.

women, married or unmarried, did not have a statutory right to transmit citizenship until the enactment of the Act of 1934 that entitled U.S. citizen-mothers to confer citizenship on their foreign-born children and that granted U.S. women independent nationality rights.[95] Later, the Nationality Act of 1940 mandated that children born out-of-wedlock to U.S. citizen-mothers could become U.S. citizens if paternity was not established during minority.[96] This legislation, despite entitling women to produce U.S. citizens with non-U.S. citizen men off U.S. soil, assumed these mothers to be secondary parents who took parental responsibilities only when the fathers failed to claim their entitlements. In 1952, the Immigration and Nationality Act was amended to eliminate the requirement of the absence of established paternity. Since then, U.S. citizen-mothers have been entitled, by default, to transmit citizenship to, and assume parental responsibilities for, children born on foreign soil. On the other hand, unwed U.S. citizen-fathers, in order to transmit citizenship to their foreign-born children, are required by 8 U.S.C. § 1409(a) to acknowledge and legitimate these same children. Declared constitutional in *Miller v. Albright* (523 U.S. 420, 1998) and confirmed by *Nguyen v. INS* (121 S. Ct. 2053, 2001), this provision assumes that maternity is established immediately upon the birth of a mother's child (biologically mandated), whereas an unwed man is not legally considered a father until he takes affirmative steps to assume post-birth parental responsibility for this child (legally formulated), which endorses the notion of voluntary fatherhood versus compulsory motherhood and the sexually irresponsible father versus the sexually responsible mother in the name of "biological differences between the two sexes."[97]

One of the implications of this gendered jus sanguinis doctrine is the exclusion of foreign-born mixed race children of U.S. citizenry.[98] As Justice Stevens in Miller notes, the overwhelming majority of children born to U.S. soldiers are born to men. In many Asian countries including Taiwan, these men have left behind most of the children (consequently

95. For the U.S. policy on married women's citizenship between 1855 and 1934, *see* CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP (1998).

96. According to Kristin Collins, in practice, unwed mothers were allowed to transmit citizenship to their foreign-born children prior to the 1934 and 1940 legislative acts, although it conflicted with the statutory rules. *See* Kristin Collins, *When Fathers' Rights Are Mothers' Duties: the Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669, 1691-92 (2000).

97. *See e.g.*, Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557 (2000); Kristin Collins, *id.*; Kif Augustine-Adams, *supra* note 82; Manisha Lalwani, *The 'Intelligent Wickedness' of U.S. Immigration Law Conferring Citizenship to Children Born Abroad and Out-of-wedlock: A Feminist Perspective*, 47 VILL. L. REV. 707 (2002).

98. Kif Augustine-Adams, *supra* note 82, at 112-13; Kristin Collins, *supra* note 96, at 1701-02.

illegitimate) that they "begot" with local women of color, women who are not entitled to U.S. citizenship and paternal support because the fathers of their children failed to "grab the opportunity" to develop a meaningful relationship with them either by marrying the mother or by claiming paternity responsibility during the children's minority. In Taiwan, the children that U.S. servicemen left behind, who suffered from the combined stigmatization of illegitimacy, paternal abandonment, mixed race blood, became citizens of Taiwan because their fathers' identities were unknown or because the fathers did not come forward to acknowledge their children. The citizenship law of Taiwan adopts the doctrine of jus sanguinis, and jus soli citizenship exists as an exception only when a child is born in the territory of Taiwan to parents who are unknown or stateless persons.

Prior to its 2000 amendment, the doctrine of jus sanguinis under the 1929 Nationality Act was a patrilineal one, which banned a citizen-mother from conferring citizenship to a child that she had conceived with her foreign husband or a foreign man who had later acknowledged the child. It mandated that a citizen-father transmit citizenship to his child born-in-wedlock (Art. 1 of the 1929 Act) and out-of-wedlock, provided that he had acknowledged the child (Art. 2 of the 1929 Act). A citizen-mother married to a foreign husband could not confer citizenship to her child. An unwed citizen mother could not transmit citizenship to her child if the foreign father had acknowledged the child. It was only when the father's identity was unknown (Art. 1 of the 1929 Nationality Act) or when the father had not acknowledged the child (Art. 2 of the 1929 Act) that the citizen-mother's child could inherit the citizen-mother's citizenship. Premised on the notion of the patrilineal family, this doctrine of citizenship invested male citizens with, and deprived female citizens of, the right to create citizens of the nation through their children, making nationality-citizenship a gendered construction with the system of patrilineality built into it. That the child should adopt the father's identity and become a citizen of his nation is further supported by the 1953 "Law Governing the Application of Law to Civil Matters Involving Foreign Elements," which stipulates that the law of the country of which the father is a national shall apply to the relationship between parents and children (Art. 19).

The supremacy of fatherhood and the patrilineal nature of parenthood also found its expression in the ability of aboriginal parents to transmit a legal ethnic identity to their children. Pursuant to the provisions of the 1956 and 1980 "Regulation Governing the Identities of the Aboriginal People," children of an interethnic marriage between an aboriginal and a non-aboriginal adopted their fathers' ethnic identities. Hence, the child of an aboriginal father married to a non-aboriginal was considered, and

should be registered as, an aboriginal, whereas the child of an aboriginal mother married to a non-aboriginal was not considered an aboriginal. An aboriginal father's child born out-of-wedlock obtained his aboriginal status provided that he had acknowledged the child, whereas an aboriginal mother's illegitimate child could only adopt the mother's ethnic identity in the absence of the father's acknowledgement. Again, men were entitled to define and produce members of their ethnic groups, whereas women were deprived of the right to do so. This lack of parity also connoted the hegemony of the patriarchal Han-Chinese culture, which, inscribed in the law, suppressed the autonomy of individual aboriginal groups and endangered their survival.[99]

That only a "bastard's mother" could confer citizenship and ethnicity to her child (that is, women as secondary parents were entitled to parental privileges only when fathers failed to assume responsibility) does not conflict with the notion of "volunteer fatherhood vs. draftee motherhood." It privileged paternal choice by granting the father the discretion (with limitations) to decide whether or not to make his child a citizen of his nation or a member of his ethnic group either through marriage to the mother or through acknowledgement of the child, and facilitated maternal responsibility by making mothers take sole and ultimate responsibility when the father chose to be absent. This state-of-affairs, in turn, informed the desire to maintain the heterosexual two-parent family and protected men from unwanted paternal responsibilities. This gendered assignment of child's citizenship-ethnicity supports my contention that fatherhood is constructed as a voluntary and superior institution, whereas motherhood, a compulsory and subordinate one.

The collective efforts of feminist groups and individual Taiwanese women who suffered from the inability to confer citizenship to their children conceived with foreign husbands argued that the disparate treatment between female and male parents in the transmission of citizenship to their children violated the Constitutional protection of sex equality. These efforts helped pave the way for a revision of the Nationality Act in 2000, which invested all citizen-mothers, married or unmarried, with the ability to transmit citizenship to their children with foreign fathers (Art. 2 of the 2000 Nationality Act).[100] The following year, the passage of the new "Aboriginal Identity Law" made additional headway by granting children of an interethnic marriage between an

99. Whether group membership will be defined in a gender equal fashion (if the aboriginal people were allowed to govern themselves) is, of course, a thorny issue.

100. This new provision applies to children who were minors when the new law took effect in 2000. It hence benefits children who were born to citizen-mothers prior to 2000 and who were unable to obtain citizenship under the old law, provided that they had not yet reached the age of maturity in 2000.

aboriginal and a non-aboriginal the aboriginal status if named according to the aboriginal naming rules (Art. 4). The husband and wife who meet these requirements are hence invested with the discretion to negotiate their children's ethnic status. An unwed aboriginal mother's child with a non-aboriginal father will lose the aboriginal status if the father acknowledges the child, unless the parents have agreed to give the child the mother's surname, or to name the child in accordance with the mother's tribe's naming rule (Art. 6). On the other hand, an unwed aboriginal father's illegitimate child with a non-aboriginal mother can obtain aboriginal status if he acknowledges the child and if the child adopts the father's surname or is named following the father's tribe's naming rule (Art. 6). Hence, unwed parents of an interethnic child can also negotiate to determine the child's ethnic status.

These recent legal changes certainly empower a mother's entitlement to confer citizenship and ethnic status to her child. In terms of ethnic identity, the law further permits interethnic parents to determine the child's ethnic status through an agreement on how to name the child. As a step towards the formation of an egalitarian family, these reforms have reformulated citizenship and ethnicity in a gender-neutral fashion based on the myth that father and mother are two equal partners in parenthood, whereas in reality their distinct bargaining powers are conditioned by sex, ethnicity-nationality, and class. However, the law of the country to which the father is a national still triumphs over the mother's national law under the provisions of the "Law Governing the Application of Law to Civil Matters Involving Foreign Elements." The scenario that man becomes a father through an act whereas woman becomes a mother by nature (the voluntary nature of fatherhood and the biological determinism of motherhood) also remains uncontested. Under the new law, fathers are not able to transmit citizenship or aboriginal status to children without marrying the mothers or legitimating their children. On the other hand, the mother-child relationship is taken for granted as a biological fact, not a legal construction. Acknowledgement continues to be a man's act and a male choice, and women alone still assume parental responsibilities unless the fathers of their children choose or are compelled to acknowledge the children. That women's entitlements to parental privileges have been empowered is true; and yet the extent of this empowerment remains slight, indeed.

Adopting a gender-neutral approach to correct father-supremacy in the transmission of citizenship and ethnic status hence fails to fundamentally challenge and change the gendered nature of parenthood that subordinates mothers. Likewise, the transformation to gender neutrality in the allocation of parental rights and responsibilities has equalized motherhood only to a limited degree. The postwar family law

has, from its beginning, employed the design of joint-authority and joint-responsibility in regulating legal parenthood, stipulating that "parents" have the right and duty to protect, educate, and maintain their minor children (Art. 1084), that "parents" are the statutory agents of their minor children (Art. 1086), that "parents" have the rights to use and to reap the fruits deriving from the separate property of a minor child (Art. 1087),[101] and that "parents" jointly exercise their rights and duty in regard to a minor child unless it is provided otherwise by the law (Art. 1088). These gender-neutral provisions are premised on the myth of "neutral" parenthood in which fathers are able, willing, and required to nurture as much as mothers are able, willing, and required to provide. Yet, the tradition of father-supremacy was not formally erased in its entirety, as the law further specifically mandated that a minor child's separate property shall be managed by the father, and by the mother when the father was unable to perform this right and duty (Art. 1088 of the 1931 Civil Code), and that parental rights with regard to a minor child shall be exercised by the father if the parents were not in agreement as regards to the exercise of such rights (Art. 1089 of the 1931 Civil Code).

These provisions that granted fathers priority in exercising parental rights hence sustained father-supremacy by assuming, on the one hand, the father's superior fitness for parenthood and, on the other, the mother's incompetence, particularly in terms of economic matters. Consequently, the provisions undermined and cancelled the doctrine of joint-exercise — after all, a mother's entitlement to negotiation was an empty promise when the father had the final say — but left alone the principle of joint-responsibilities, except that, in the statutory matrimonial property regime prior to its 2002 amendment, the father assumed the primary responsibility of household expenses including child support (Art. 1026 of the 1931 Civil Code). This again confirmed the mother's economic incapability.

The 1985 amendment of the Civil Code took the first step in the transformation towards gender-neutral parenthood by lifting the father's priority in managing a minor child's separate property while also neutralizing the legal assignment of the child's domicile. A Constitutional challenge brought by two individual mothers with support from various feminist groups, as well as from members of the Legislative Yuan, triggered the second move. Liang, a mother separated from her husband, who was trying to divorce her through a legal technicality,[102] and Chang, a mother suffering from domestic violence inflicted by her husband, who

101. Property that accrues to minor children through inheritance, gifts, or other gratuitous titles constitutes their separate property (Art. 1087).

102. Judgment no. 30, the Taipei District Court (1993); Judgment no. 175, the Supreme Court (1993), Judgment no. 438, the Supreme Court (1994).

had been convicted because of it,[103] were both denied custody of their minor children by the courts because their husbands assumed priority when there was a conflict between two parents. Having exhausted all legal means, the mothers, along with the Legislative Yuan, petitioned the Council of Grand Justices in 1994 to contest the constitutionality of Art. 1089 on the grounds that it violated the Constitutional guarantee of sex equality.

These petitioners argued that father-supremacy in the exercise of parental rights discriminated against mothers because father-supremacy was determined solely on the basis of sex, weighed the father's interests over the child's interests, and stood in conflict with the "best interests of the child" doctrine and the "tender years" doctrine that prevailed in Western jurisdictions. They also argued that the Grand Justices should emulate the German Federal Constitutional Court, which in 1959 struck down a similar version of this father supremacy provision (Art. 1628 of the German Civil Code) for its violation of the principle of sex equality. The Grand Justices promptly responded, handing over a unanimous decision in favor of the petitioners in fewer than two months, (Interpretation No. 365, issued on September 23, 1994). The Justices who forged this landmark interpretation first argued that the KMT lawmakers' decision back in the 1920s to grant priority to fathers was legitimate and just because it was based on "traditional cultural customs and social settings at that historical moment," but proceeded to contend this legislation was passé in view of social changes that had, since, awarded women the same access to education and employment as men. The Grand Justices hence concluded that this father-supremacy provision infringed on the principle of sex equality and contradicted women's actual status in family lives. Yet, instead of invalidating this article immediately, the Grand Justices took an unusual step by declaring that this article would cease to be effective within two years, and instructed the Legislative Yuan to amend the law according both to the principles of sex equality and to the best interests of the child, and to authorize the closest senior relatives, the family council or the family court, to make the final decision.[104]

In spite of its contribution to the lifting of statutory father-supremacy, this interpretation voiced several troubling messages. Sex equality was defined in a "those who are the same shall be treated the same and those

103. Judgment no. 20, the Hsin-ju District Court (1988), Judgment no. 50, the Supreme Court (1988), Judgment no. 817, the Supreme Court (1989).

104. This interpretation has stirred a constitutional debate as to whether the Council of Grand Justices is specifically entitled to instruct the Legislative Yuan on how to amend the law, and whether instruction of this kind violates the principle of separation of power and inappropriately intervenes with the autonomy of the legislation. While I will not venture into this controversy, it should be noted that this extraordinary decision indicates the Grand Justices' strong intention to implement the idea of sex equality.

who are differently situated shall be treated differently" fashion. It is in this specific instance that the Council of the Grand Justices for the first time explicitly declared that sex classification is permissible only when based on biological differences, or different social roles resulting from such biological differences. According to this doctrine, justification for the notion of father-supremacy — particularly in the 1920s — pivoted on the assumption that men and women were differently situated in such a way that the father was, a priori, the more competent parent. This version of gender and parenting has, since then, been outlawed because, in contemporary societies that have Western-based legal practices, men and women are deemed to be similarly situated and, therefore, equally competent as parents.

First of all, this constitutional interpretation suggests that the law is to mirror the nature of any given social reality, not to pursue justice affirmatively. An understanding of the power of law as such fails to acknowledge its function in shaping the social reality as well as in producing progressive changes. Secondly, the Grand Justices' comprehension of women's present status could hardly survive a reality check. Women do not enjoy the same access to education and employment as men; neither do they assume an equal status in family lives. The Justices' interpretation was thus informed by a nonexistent "reality." Thirdly and most importantly, this sameness and difference approach does not lead to substantive equality. As shown in this case, it risks reinscribing differences that reflect and shape inequality, and assumes the very sameness that denies the relevance of women's experiences.

In response, the Legislative Yuan passed an amendment of Art. 1089 in 1996, which stipulates joint parental rights and responsibilities and chooses the court from among the three options proposed by the Grand Justices to be the final authority in the determination of important matters with regards to minor children. This authority is to apply the "best interests of the child" doctrine, whenever there is a disagreement between two parents. The law of post-divorce custody arrangements underwent revisions that simultaneously removed paternal preference and redesigned the issue of custody as a matter of parental negotiation (Art. 1055). This legislation adheres to the notion of formal equality in that it addresses parental rights and responsibilities in gender-neutral terms. By containing the doctrine of the "best interests of the child," the legislation shifts the focus from parents to children. It also moves away from the model of the extended family under which senior relatives act as arbitrators, although the law continues to invest the nearest senior relatives and the family council with the authority to correct parents who abuse their rights over

the children (Art. 1090).[105]

While the removal of statutory father preference is indeed a progressive effort, the legislators seem to believe that the granting of joint-authority and responsibility to the father and mother, as well as their entitlement to negotiate for custody arrangements, is sufficient evidence of equality. This belief assumes the existence of two equal parents with equivalent capital and bargaining power, and hence turns a blind eye to the reality of mothers' disadvantages and the gendered implications of the "neutral" parental fitness standard. Namely, it does little to challenge and redesign the superior institution of fatherhood affirmatively. The recently introduced doctrine of "the best interests of the child," which appears in a neutral disguise and has prevailed in the United States since the 1980s, is gender-neutral neither in theory nor in application, as experiences in the U.S. have suggested.[106] Being required to step in when negotiations between two parents fail and when a custody arrangement is detrimental to the child (Art. 1055, 1089), the court is also advised to consider the wishes of the minor child, the opinions of authorities, and the guidelines of social welfare organizations when applying the best interests of the child standard to a case in which the exercise of parental rights is to be determined (Art 1089). Similarly, in deciding custody arrangement, the court is to consider social workers' visiting reports (Art. 1055-1). To concretize the standard of the best interests of the child, as well as to guide the court toward a discretionary exercise of its powers, the new law has further stipulated factors that the court shall consider: 1) the age, sex, and health of the child, and number of children of the parents; 2) the wishes of the child and needs for the child's personality development; 3) the age, occupation, moral character and performance, health, economic resources, and living conditions of the parents; 4) the wishes and attitudes of the child's parents regarding the protection and education of the child; and 5) the relationship and affiliation between the parents and the child, or between the minor child and other cohabiting people (Art. 1055-1).

According to the "best interests of the child" doctrine, "parents" and "parenthood" appear to be gender-neutral concepts, whereas in reality they are gendered identities and gendered practices. For instance, the

105. A proposal to amend this article, which substitutes the court for senior relatives and the family council to serve as the authority to supervise the exercise of parental rights, is pending discussion in the Legislative Yuan.

106. *See e.g.*, Susan Beth Jacobs, Note: *The Hidden Gender Bias Behind 'the Best Interest of the Child' Standard in Custody Decisions*," 13 GA. ST. U.L. REV. 845 (1997). "The Best Interest of the Child" standard invites a wide range of critiques in addition to its gender bias, and some scholars have been developing alternatives to remedy its flaws. David L. Chambers, for instance, proposes the "primary caretaker" assumption, which principally determines custody in accordance to the facts of caretaking. *See* David L. Chambers, *Rethinking Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

"economic resources of the parent" criterion, which purportedly safeguards the child's interests without preferences based on sex, has significant gender implications. As two studies on post-1996 court decisions of custody arrangements indicate, the courts habitually use economic competence as a necessary, but not sufficient, factor in determining custody.[107] Judges tend to grant custody to economically competent parents and hence seldom consider child support awards, although the new law specifically mandates that each parent's child-support obligation shall not be changed because of divorce (Art. 1116-2).[108] This criterion and its judicial practice prejudice, on the one hand, non-custodial mothers trapped in poverty by labeling them as less suitable parents and by denying their custody rights, and, on the other hand, custodial mothers by placing a double-burden on them: They must simultaneously support and care for the child alone. For mothers, it is to a certain extent a lose-lose situation.

The 1996 amendment, which transfigures superior fatherhood and inferior motherhood into the neutered institution of parenthood, has triggered a dramatic transition in the court's custody decisions from the implementation of paternal presumption to the granting of custody to mothers by upholding traditional maternal roles.[109] While some regard it as a grand success for sex equality, this transformation is in fact disquieting, as the pursuit of equality in a gender-neutral fashion fails to account for the significance and relevance of gender in the construction and deconstruction of inequality, and hence risks perpetrating women's subordination embodied in traditional gender roles. In the aftermath of statutory paternal preference, mothers do enjoy improved legal entitlements related to parental rights, such as custody arrangements, but, in continuing to assume the role of caretaker, they remain trapped in a vicious cycle and are forced to balance the conflict between work and family by assuming inferior economic positions, which in turn prevent them from being equals at home. Meanwhile, care work remains devalued and unsupported, whereas economic resources are deemed to be of paramount importance. This liberal legal reform to eliminate the superiority of fatherhood and to equalize motherhood does not

107. Hungen Liu, *Mother or Father: Who Receives Custody? The Best Interests of the Child Standard and Judges' Custody Decisions in Taiwan*, 15 INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY 185, 204-06 (2001); Wen-may Ray, Y*i zihnyu zueijia liyi jhih ming: lihun hou fumu duei weichengnian zihnyu chyanli yiwu singshih yu fudan jhih yanjiou* [in the name of the best interests of the child: a study of parental rights and responsibilities with regard to minor children after divorce], 28 NATIONAL TAIWAN UNIVERSITY LAW REVIEW 245, 268-69 (2000).

108. Hungen Liu, *supra* note 107, at 205-06.

109. Liu's investigation of two regional courts shows that, in 75% of all contentious cases, judges granted mothers custody, and that many judges explicitly mentioned the importance of a "loving mother" and a "mother's love and care." *See id*. at 206, 208.

fundamentally challenge the patriarchal norms that define and locate motherhood in its subordination to fatherhood. Equally unsettling is the design of negotiations between a mother and father, negotiations that purport to honor parental autonomy based on the myth that both parents are equally situated individuals. How compelling can a mother's bargaining power be in a society where patrilineality prevails? Clearly not compelling enough, and, as a result, the departure from paternal preference to neutered parenthood empowers mothers only in a limited way while leaving the patriarchy's definition of motherhood largely uncontested.

IV. CONCLUSION

In this essay, I have examined two dimensions to the legal and social institution of motherhood in the hopes of demonstrating the ways in which this institution is informed by patriarchal norms and shapes women's subordination accordingly. My investigation of the entrance to motherhood, that is, of a women's "choice" (a choice that is conditioned by a sex-unequal society) to be or not to be a mother, shows that the right of abortion mainly emerged from the government's abortion policy that was overshadowed by concerns over population control and eugenics policies. Prevailing preferences for sons have also led to the misuse and abuse of both abortion rights and new reproductive technologies, through which female fetuses are aborted and male fetuses are honored with life. I have also discussed women's experiences as they relate to mothering in the labor market, which is premised on the male ideal of worker norms and which, hence, subordinates mothers to the "burdens" of pregnancy and childcare. Women's experiences in the family have also been treated herein and have been shown to involve two sets of unequal relationships that function together to shape mothers' experiences of subordination. In keeping with these analyses, I have put forward a critique of formal equality, as a notion, to suggest that the gendered experiences and institution of motherhood cannot be affirmatively reconstructed using the method of gender-neutrality.

Catharine A. MacKinnon suggests that, in order to reclaim the possibilities for women's experiences of motherhood, one must begin with a critique of the inequalities embedded in the institution of motherhood.[110] I would like to further suggest that such a critique must be founded on a localized understanding of women's reality. This essay, which is an attempt to establish a feminist account of a motherhood that operates under the shadow of patriarchy in Taiwan, represents my desire to provide

110. Catharine A. MacKinnon, *supra* note 7, at 1191.

the basis for further work aimed at the promoting of material changes through legal activism. How we get there from here is never an easy question to answer, and the many possible solutions to this problem are sure to inspire vigorous and thought-provoking debate.

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