

# CHINA'S ONE-CHILD POLICY: ILLEGAL CHILDREN AND THE FAMILY PLANNING LAW

## I. INTRODUCTION

How sad it is to be a woman!  
Nothing on earth is held so cheap.  
Boys stand leaning at the door  
Like gods fallen out of heaven.  
Their hearts brave the Four Oceans,  
The wind and dust of a thousand miles.  
No one is glad when a girl is born:  
By her the family sets no store.<sup>1</sup>

Fu Xuan wrote these lines long ago, but little seems to have changed in the ensuing centuries to alter the inferior status of Chinese women. True, Chinese women no longer serve as concubines or bind their feet,<sup>2</sup> but their births are often decried as catastrophes in a society where families are only permitted one child.<sup>3</sup> Chi An, whose fight against China's one-child policy (OCP) was recounted by Steven Mosher, describes the circumstances surrounding her birth as dismal at best.<sup>4</sup> While her elder brother was ushered into the world with cere-

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1. Fu Xuan, *reprinted in* Cathy C. Cardillo, *Violence Against Chinese Women: Defining the Cultural Role*, 19 *WOMEN'S RTS. L. REP.* 85, 87 (1997) (old Chinese poem).

2. Ann D. Jordan, *Women's Rights in the People's Republic of China: Patriarchal Wine Poured From a Socialist Bottle*, *J. CHINESE L.*, Vol. 8, No. 1, available at <http://www.columbia.edu/cu/chinalaw/backissues/issue81/jordan.html> (last visited Oct. 22, 2004).

3. Mary H. Hansel, *China's One-Child Policy's Effects on Women and the Paradox of Persecution and Trafficking*, 11 *S. CAL. REV. L. & WOMEN'S STUD.* 369, 377 (2002) (explaining that couples are under intense pressure to produce a son, with mothers losing face if they give birth to a girl instead).

4. STEVEN W. MOSHER, *A MOTHER'S ORDEAL: ONE WOMAN'S FIGHT AGAINST CHINA'S ONE CHILD POLICY* 6 (1994).

monial feasts that would leave her grandparents in debt for years, she says of her own birth, “[s]o uneventful was my coming into the world that no one remembers the exact date on which it happened.”<sup>5</sup>

This preference for sons, exacerbated by the OCP, has created widely skewed male-to-female population ratios in China;<sup>6</sup> the result is a dire shortage of women, especially in rural areas, and a resurrection of the ancient practice of wife-buying.<sup>7</sup> Although some women are trafficked in violation of international law,<sup>8</sup> Chinese women now actively participate in their own sale at bridal auctions where bride prices can reach 15,000 yuan (\$1,800).<sup>9</sup> But China’s 1980 Marriage Law prohibiting the exaction of monies or gifts for marriage makes these marriages illegal.<sup>10</sup> Therefore, the children of these unions, as well as those children born “out-of-plan,”<sup>11</sup> have no legal identity.<sup>12</sup> Conse-

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5. *Id.*

6. Hansel, *supra* note 3, at 377.

7. See Elizabeth Spahn, *Shattered Jade, Broken Shoe: Foreign Economic Development and the Sexual Exploitation of Women in China*, 50 ME. L. REV. 255, 277–78 (arguing that economic reform combined with the OCP has created a “massive modern resurgence in the sale of women and children”). Wife-buying includes not only bride prices agreed upon between families, but the internal trafficking of Chinese women. *Id.*

8. Women are often brought into China, notably from Vietnam and Thailand, to be sold as brides or prostitutes. According to Vietnam’s Ministry of Public Security, between 1991 and 1999 at least 22,000 women and children were illegally sent to China. The real figure could be much higher. Moreover, authorities from China’s Guangxi province reported that 80 percent of Vietnamese women illegally residing there were victims of trafficking. *Protecting Children From Modern Day Slavery: UNICEF Calls for Intensified Efforts to Protect Children at Regional Conference on Human Trafficking*, UNICEF Report, at <http://www.unicef.org.vn/traffick.htm> (last visited Oct. 2, 2004).

9. See, e.g., Peter Goff, *Costly Women*, S. CHINA MORNING POST, Aug. 5, 2003, at 11 (noting that while the average bride price was approximately 3,000 yuan (\$360) a few years ago, the norm now is approximately 15,000 yuan (\$1,800)). All conversions of Chinese yuan to American dollars reflect an exchange rate of \$1 to 8.277 yuan, the rate current as of Nov. 13, 2003, and then rounded to the nearest \$10 increment.

10. MARRIAGE LAW OF THE PEOPLE’S REPUBLIC OF CHINA, English version (effective Jan. 1, 1981) [hereinafter MARRIAGE LAW], at <http://www.isino.com>.

11. “Out of plan” refers to those births unauthorized by the state, either because the couple did not have a birth quota or had exceeded the number of children permitted by the OCP.

quently, China faces the burgeoning problem of a large floating population unable to qualify for basic government services such as education and health care.<sup>13</sup>

This Note will explore the incidental effects of the OCP, specifically, the rapidly rising woman shortage and the growing practice of wife-buying in the context of conflicting legal goals. By prioritizing the OCP, China faces a dilemma. It can either ignore the prohibitions against wife-buying in its Marriage Law and allow trafficking to continue, thus implicitly endorsing the discrimination of women, in opposition to its status as a party to the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW);<sup>14</sup> or it can enforce the Marriage Law's prohibitions and produce an even larger class of unauthorized children, in violation of China's commitment to the Convention on the Rights of the Child.<sup>15</sup>

Part II of this Note explores the background of the OCP and the events leading to its codification. In Part III, the Note analyzes the effects of the OCP, primarily on women and unauthorized children. Part IV explains China's law in the context of the OCP, particularly the conflict between the OCP and statutes concerning marriage and the welfare of children. Finally, Part V assesses the legal ramifications of the OCP, both in China and the international community.

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12. *Report on Implementation of CEDAW in the People's Republic of China*, Human Rights in China, at 78, Dec. 1998 [hereinafter *Report on CEDAW*], available at [http://iso.hrichina.org/download\\_repository/A/cedaw%2098.doc](http://iso.hrichina.org/download_repository/A/cedaw%2098.doc).

13. *Unfair Burdens: Impact of the Population Control Policies on the Human Rights of Women and Girls*, Human Rights in China (1995) [hereinafter *Unfair Burdens*], at [http://iso.hrichina.org/iso/article\\_id=371&subcategory\\_id=16](http://iso.hrichina.org/iso/article_id=371&subcategory_id=16).

14. Convention for the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

15. Convention on the Rights of the Child, G.A. Res. 44/25, annex 445 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) (Article 2(2) states that "[s]tate parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.").

## II. BACKGROUND: THE ONE-CHILD POLICY

A. *History of the OCP*

China had a population of approximately 540 million people when the People's Republic of China (PRC) took control in 1949.<sup>16</sup> Just three decades later, the population had exploded to more than 800 million.<sup>17</sup> This population explosion came at the urging of Mao Ze-Dong, who referred to birth control as a bourgeois plot to visit "bloodless genocide" upon the Chinese people.<sup>18</sup> Mao's population policy, however, also reflected the need of the PRC's agrarian society for more workers.<sup>19</sup>

By the late 1970s, Chinese officials had determined that China's arable land could no longer sustain its growing population.<sup>20</sup> With a population of 1.25 billion at the end of 1998,<sup>21</sup> China must provide for twenty-two percent of the world's population on only seven percent of the world's arable land.<sup>22</sup> The government first attempted to conquer the population problem with the "wan, xi, shao" campaign, or the "Later, Longer,

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16. Gordon J. MacDonald, *How Reliable Are Population Statistics From China?*, International Institute for Applied Systems Analysis (1999), at [http://www.iiasa.ac.at/Research/LUC/ChinaFood/argu/argu\\_01.htm](http://www.iiasa.ac.at/Research/LUC/ChinaFood/argu/argu_01.htm). See also FARHANA HAQUE RAHMAN, *THE STATUS OF RURAL WOMEN IN CHINA* 82 (International Fund for Agricultural Development 1995) (attributing the population boom to a declining mortality rate and increasing birth rate).

17. See MacDonald, *supra* note 16. Despite low fertility levels in China now, this substantial population increase from the 1950s to the early 1970s is the driving force behind China's population growth. Population projections for China are very uncertain, however, with projections differing by as many as 200 million people. *Id.*

18. Lisa B. Gregory, *Examining the Economic Component of China's One-Child Family Policy Under International Law: Your Money or Your Life*, 6 J. CHINESE L. 45, 48 (1992). Mao promoted his political ideology with the slogan: "The more babies the more glorious are their mothers." Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program*, 8 YALE J.L. & FEMINISM 145, 148 (1996).

19. See Gregory, *supra* note 18, at 48.

20. *Id.*

21. Xizhe Peng, *Population Policy and Program in China: Challenge and Prospective*, 35 TEX. INT'L L.J. 51 (2000).

22. Antoaneta Bezlova, *China to Formalize One-Child Policy*, ASIA TIMES, May 24, 2001 [hereinafter *China to Formalize*]. Despite China's immense geographical size, a limited area is suitable for agriculture, which makes population growth and the ensuing pressure on arable land a very serious problem. See RAHMAN, *supra* note 16, at 82.

Fewer” policy.<sup>23</sup> The campaign ordered couples to wait until later in life to marry, to wait longer between births, and to cap the number of children per family at two.<sup>24</sup> However, when population specialists determined that a two-child policy would not help them realize their goal of zero population growth by 2000, the PRC abandoned the campaign and implemented the one-child policy.<sup>25</sup>

Chinese officials have cited numerous reasons to justify the OCP, among them, declining health and living standards, particularly a lack of housing, food, and jobs for its people.<sup>26</sup> The government has emphasized that compulsory population reduction is necessary and should be pursued even if the personal costs to families are high.<sup>27</sup> Shen Gaoxing, director of the Education Department of China’s State Family Planning Commission, claimed in 1984 that “[i]f we had adopted an appropriate policy during the 1950s and 1960s we would not have had to advocate a one-child-per-couple policy now.”<sup>28</sup>

Although the OCP has been in effect since 1979,<sup>29</sup> the PRC did not adopt a single coherent law to regulate family planning un-

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23. See Peng, *supra* note 21, at 52–53 (noting that the policy set the minimum marriage age at twenty-five for males and twenty-three for females, promoted a two-child norm, and recommended a birth interval of four years).

24. See Rachel A. Bouman, *China’s Attempt to Promote Domestic Adoptions: How Does China’s One-Child Policy Affect Recent Revisions in China’s Adoption Law and Measure Up to the Hague Convention?*, 13 *TRANSNAT’L L.* 91, 96 (2000).

25. *Id.* at 97, *citing* H. Yuan Tien, *Redirection of the Chinese Family: Ramifications of Minimal Reproduction 3* (Working Paper No. 67, 1984) (explaining that with a two-child policy, China’s population would increase at a rate of nine to ten births per every one thousand people).

26. See Gregory, *supra* note 18, at 48. See also Julian Baum, *China Birth-Control Policy: Controversial But Very Effective*, *CHRISTIAN SCI. MONITOR*, Aug. 1, 1984, at 9.

27. See Li, *supra* note 18, at 150. Population control has been cited as the most important step in the economic development of China, with the alternatives being poverty, high infant mortality and malnutrition. *Id.* The government used slogans such as “with two children you can afford a 14-inch TV, with one child you can afford a 21-inch TV” to encourage families to have fewer children. Patrick Goodenough, *China’s Gender Imbalance Stems From ‘Family Planning’ Policy*, *CNS NEWS*, Apr. 6, 2001 [hereinafter *China’s Gender Imbalance*], at <http://cnsnews.com/ViewForeignBureaus.asp?Page=//ForeignBureaus\archive\200104\For20010406a.html>.

28. Baum, *supra* note 26.

29. *Report on CEDAW*, *supra* note 12, at 78.

til recently.<sup>30</sup> The adoption of the Law of the People's Republic of China on the Population and Family Planning (Family Planning Law) essentially codified the OCP.<sup>31</sup> While family planning regulations were included in other laws, notable among them the Constitution of the People's Republic of China<sup>32</sup> and the 1980 Marriage Law of the People's Republic of China,<sup>33</sup> their provisions are not specific. For example, the 1980 Marriage Law finds that both a husband and wife have a duty to practice family planning, but does not set out any procedures for doing so.<sup>34</sup> The minimum age requirement for marriage, a relic of the "wan, xi, shao" campaign contained in Article 6 of the Marriage Law, is another tool used by the government to control the population.<sup>35</sup> The Family Planning Law, however, goes further and codifies the essential element of the OCP. It states that each family may have only one child unless they satisfy the special criteria for a second child established in other regulations.<sup>36</sup>

### *B. Exceptions to the OCP*

Although China's population control policy is known as the OCP, this is slightly misleading. At first, the OCP was enacted

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30. See Patrick T.C. Hui, *Birth Control in China: Cultural, Gender, Socio-economic and Legislative Perspectives in Light of CEDAW Standards*, 32 H.K.L.J. 187, 188 (2002).

31. *Id.* at 200.

32. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, English version (effective Dec. 4, 1982) [hereinafter CONSTITUTION], at <http://www.isino.com>. Article 25 provides: "The state promotes family planning so that population growth may fit plans for economic and social development." *Id.*

33. See MARRIAGE LAW, *supra* note 10. Article 2 provides: "A marriage system based on the free choice of partners, on monogamy and on equality between man and woman shall be applied. The lawful rights and interests of women, children and old people shall be practised. Family planning shall be practised." *Id.* See also MARRIAGE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (REVISED), English version (effective Apr. 28, 2001) (retaining the same language) [hereinafter MARRIAGE LAW (REVISED)], at <http://www.isinolaw.com>.

34. MARRIAGE LAW, *supra* note 10, art. 12.

35. Anthony M.W. Law & Alisa W.C. Kwan, *Family Law, in CHINESE LAW* 423 (Wang Guiguo & John Mo eds., 1999). See also MARRIAGE LAW (REVISED), *supra* note 33, art. 6 (providing: "No marriage may be contracted before the male party has reached 22 years of age and the female party 20 years of age. Late marriage and later childbirth shall be encouraged.").

36. LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON THE POPULATION AND FAMILY PLANNING art. 18, English version (effective Sept. 1, 2002) [hereinafter FAMILY PLANNING LAW], at <http://www.isinolaw.com>.

uniformly throughout China; it has since been changed to accommodate the concerns of rural farmers.<sup>37</sup> In rural areas, the policy is often thought of as the one-son-or-two-child plan.<sup>38</sup> If the first child is a girl, couples may apply for a second-birth permit; these permits usually cost approximately 4,000 yuan (US \$500).<sup>39</sup> This policy reflects both the needs of an agriculturally based society in which sons are critical for the continued livelihood of the family,<sup>40</sup> and the beliefs of Chinese rural peasants that they are dishonoring their ancestors if they do not extend the male line.<sup>41</sup>

There are several other exceptions to the OCP. Multiple births, such as twins or triplets, are usually not a violation of the policy.<sup>42</sup> Moreover, when both parents have no siblings of their own or have just returned from living overseas, the government often permits them a second child as a reward.<sup>43</sup> Members of minority groups are usually permitted more than one child, although this policy varies by region and minority group.<sup>44</sup> Finally, if a child is killed or dies of a non-genetic ill-

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37. See Bouman, *supra* note 24, at 97.

38. Chu Junhong, *Prenatal Sex Determination and Sex-Selective Abortion in Rural Central China; Statistical Data Included*, POPULATION & DEV. REV. No. 2, Vol. 27, at 259 (June 1, 2001).

39. *Id.* (noting that while couples are technically not allowed a second child if the first child is a boy, impoverished local governments will sometimes agree to officially register the second boy for approximately 12,000 yuan (US\$1,500)).

40. *Id.* at 97.

41. See Nicholas D. Kristof, *China's Crackdown on Births: A Stunning, and Harsh, Success*, N.Y. TIMES, Apr. 25, 1993, at A1 [hereinafter *China's Crackdown*].

42. See Heather M. Schmidt, *The Cycle Created by China's One-Child Policy*, unpublished note (2002), at 8.

43. See Bezlova, *China to Formalize*, *supra* note 22.

44. See Gregory, *supra* note 18, at 53 (noting that non-Han Chinese, not under the auspices of the OCP until 1989, must now comply, but are usually permitted three or four children instead of only one). Minority groups that inhabit sparsely populated regions may usually have as many children as they wish because of manpower needs. Most Han Chinese are not willing to move to these areas, making population growth the only affordable or practical labor source. There are also religious reasons for allowing ethnic minorities, of which there are 55 different groups, to have more children. See Schmidt, *supra* note 42, at 8.

ness, couples are usually permitted another child.<sup>45</sup> However, even if a second child is permitted, local governments typically require that couples wait five years before having the second child to diminish the woman's fertile period and thus her ability to even conceive a second child.<sup>46</sup>

### C. Implementation of the OCP

While enforcement of the OCP varies by region, national government directives and resolutions explicate implementation measures.<sup>47</sup> First, couples must be married and must be issued birth permits prior to attempting to conceive a child.<sup>48</sup> In some areas, couples may have to wait for years for the permission to conceive because of the number of couples planning to have babies within that community.<sup>49</sup> After bearing the permitted number of children, women are required to wear an intrauterine device (IUD) or be sterilized.<sup>50</sup> While the policy initially called for either spouse to use "effective" and "long term" contraception after the birth of one child,<sup>51</sup> the government tightened restrictions in 1982, and required IUD insertion for women with one child.<sup>52</sup> Women who proceed with unauthorized pregnancies, especially after having the permitted number of children, are forced to terminate the pregnancy.<sup>53</sup> Women may be required to undergo forcible abortion, even as late as the

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45. See Goodenough, *China's Gender Imbalance*, *supra* note 27 (noting that "sterilization, one of the principal forms of birth control, may also be performed when parents suffer from alleged 'genetic disorders,' a practice justified by the eugenic objective of 'improving the quality of the population.'").

46. LITA LINZER SCHWARTZ & NATALIE K. ISSER, *ENDANGERED CHILDREN: NEONATICIDE, INFANTICIDE, AND FILICIDE* 26 (2000).

47. See Li, *supra* note 18, at 152.

48. *Unfair Burdens*, *supra* note 13. See also Tara A. Gellman, *The Blurred Line Between Aiding Progress and Sanctioning Abuse: United States Appropriations, the UNFPA and Family Planning in the P.R.C.*, 17 N.Y.L. SCH. J. HUM. RTS. 1063, 1066 (2001) (a birth permit is also referred to as a "birth-allowed certificate" or a "family-planning certificate").

49. See Li, *supra* note 18, at 152.

50. Ann Noonan, *One-Child Crackdown*, NATIONAL REVIEW, Aug. 16, 2001, <http://www.nationalreview.com/comment/comment-noonan081601.shtml>.

51. See Li, *supra* note 18, at 153.

52. Michael Weisskopf, *Abortion Policy Tears at China's Society*, WASHINGTON POST, Jan. 7, 1985, at A1 [hereinafter *Abortion Policy*].

53. See *Unfair Burdens*, *supra* note 13.

ninth month of pregnancy.<sup>54</sup> Moreover, after unplanned births, one spouse must be sterilized.<sup>55</sup> Between 1979 and 1984, 31 million women and 9.3 million men were sterilized, totaling almost one-third of all married productive couples.<sup>56</sup>

Despite the adoption of the national Family Planning Law, implementation and enforcement of the OCP is still carried out *ad hoc* by significantly different local regulations.<sup>57</sup> Implementation has thus been a top-down process, with the central government placing serious restrictions on the intimate aspects of individuals' lives.<sup>58</sup> The OCP has been implemented by party directives, not the rule of law.<sup>59</sup> Local authorities must enforce the policy and meet birth quotas set by the central government. Failure to meet quotas can result in demotion, salary reduction, and disciplinary sanctions for government officials.<sup>60</sup> As Ann Noonan explains:

This has led to the use of local informants to discover unauthorized pregnancies, monitoring women's menses at the work

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54. Noonan, *supra* note 50. See also Weisskopf, *Abortion Policy*, *supra* note 52 (noting that as late as the 1950s, abortion was criminally punishable as murder in China); Patrick Goodenough, *China's 'One-Child Policy' Results in Forced Abortions, Infanticide*, CNS NEWS, Feb. 14, 2001 (stating that a 1999 report by the International Planned Parenthood Foundation estimates that approximately 750,000 Chinese girls are aborted each year) [hereinafter *China's 'One-Child Policy'*], <http://www.cnsnews.com/ViewPrint.asp?Page=\ForeignBureaus\archive\200102\For20010214c.html>.

55. See Li, *supra* note 18, at 153. See also Weisskopf, *Abortion Policy*, *supra* note 52 (noting that sterilization is required for one member of every couple with two or more children).

56. See Weisskopf, *Abortion Policy*, *supra* note 52. See also Kristof, *China's Crackdown*, *supra* note 41 (stating that the proportion of couples sterilized or using contraception rose to 83.4% in 1992 from 71.1% in 1988); *Unfair Burdens*, *supra* note 13 (Only 16.9 percent of sexually active men use any form of contraception at all, primarily because contraception use by men is considered insulting in China's male-dominated society. Consequently, men tend to be ignorant of reproductive issues, and consider abortion to be a method of contraception.).

57. J. CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT 262 (1999). See also Zhang Xianchu, *Family Law*, in INTRODUCTION TO CHINESE LAW 320 (Wang Chenguang & Zhang Xianchu eds., 1997).

58. See Li, *supra* note 18, at 151.

59. *Id.* (explaining that government officials handle all aspects of implementing the policy, including the meting out of punishments).

60. *Id.* at 152.

place, and the implementation of draconian measures which include violence against women, forcible late-term abortions, forced IUD insertion, forced sterilization, the detention of pregnant women or their family members, and destruction of "over-birth" families' homes.<sup>61</sup>

While each province and city is awarded an annual quota for births, local officials, including members of neighborhood committees and production units, are responsible for apportioning the number of births among their members.<sup>62</sup> Work units and neighborhood committees decide not only how many children a family may have, but when they may have a child.<sup>63</sup> Women who fail to receive birth quotas are often induced to abort, even if it is their first child.<sup>64</sup>

#### D. Compliance With the OCP

Compliance with the OCP is induced in a number of ways, and the consequences of noncompliance fall under several categories.<sup>65</sup> In some areas, the OCP is strictly enforced and those in noncompliance are subject to the most severe penalties, while in other areas even national policies are not enforced.<sup>66</sup> Penalties openly imposed by the policy include fines, disqualifications for benefits, administrative demotion and dismissal from employment.<sup>67</sup> These penalties differ significantly among regions.<sup>68</sup>

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61. Noonan, *supra* note 50.

62. Gregory, *supra* note 18, at 52.

63. See, e.g., MOSHER, *supra* note 4, at 146 (noting that prior to marriage, couples are read the official policy on birth planning; a woman must receive a quota from her work unit before getting pregnant and must use contraception until receiving that quota).

64. *Id.* Chi An, as director of her work unit's family planning clinic, took extensive measures to ensure that her work unit complied with the birth quotas. Women illegally pregnant were forced into isolated storerooms for family planning study sessions and kept there for days or even weeks until they "voluntarily" consented to an abortion. *Id.* at 268-70.

65. See Li, *supra* note 18, at 154.

66. *Id.* at 154-55.

67. *Id.* at 154. See, e.g., Tianjin Family Planning Regulations, reprinted in *Forced Abortion and Sterilization in China: The View From the Inside: Hearing Before the Subcommittee on International Operations and Human Rights of the House Committee on International Relations*, 105<sup>th</sup> Cong. 2 (June 10, 1998) [hereinafter *Hearings*].

68. James Kynge, *China Steps Up Enforcement of 1-Child-Per-Family Law*, L.A. TIMES, May 6, 1990, at A4.

For example, in Chongqing, a family with more than one child may face sanctions that include the deprivation of farmland or fines of up to three times the couple's annual income; in Guangdong, however, fines for an extra child are considered a form of tax on the affluent or a matter of bribing the right people.<sup>69</sup> In other regions, such as Fujian, the standard fine for children born outside family planning rules is twice a family's gross annual income, with additional unauthorized births incurring fines assessed in increments of 50 percent of annual income per child. In Guangzhou, a fine may be 30 to 50 percent of an average resident's income over a seven-year period.<sup>70</sup>

Another form of inducement includes police-sanctioned psychological intimidation, mandatory study sessions, visits by authorities and menstrual cycle monitoring.<sup>71</sup> The Chinese government claims that its family planning policy "combines government guidance with the voluntary participation of the people,"<sup>72</sup> yet Steven Mosher provides a chilling account of voluntary compliance:

There are cases in China where brute force is used to perform abortion and sterilization. But more commonly, the Chinese government abides by its own Orwellian definition of voluntary, which is to say that you can fine the woman; you can lock her up; you can subject her to morning-to-night brainwashing sessions; you can cut off the electricity to her house; you can fire her from her job; you can fire her husband from his job; and you can fire her parents from their jobs. All of this psychological mauling, sleep deprivation, arrest, and grueling mistreatment is inflicted upon these women in order to break their will to resist. But as long as the pregnant women walk the last few steps to the local medical clinic under their own

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69. Gregory, *supra* note 18, at 53–54. See also Elisabeth Rosenthal, *Rural Flouting of One-Child Policy Undercuts China's Census*, N.Y. TIMES, Apr. 14, 2000, at A8 (noting that fines have not been the most effective means of preventing illegal births) [hereinafter *Rural Flouting of One-Child Policy*]; Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881, 901 (2000).

70. U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *China Country Report on Human Rights Practices for 1997* (Jan. 30, 1998) [hereinafter *China Country Report*], <http://usinfo.state.gov/regional/ea/uschina/rights97.htm>.

71. See Li, *supra* note 18, at 154. See also Hansel, *supra* note 3, at 373.

72. See Gerrie Zhang, *U.S. Asylum Policy and Population Control in the People's Republic of China*, HOUS. J. INT'L L. 557, 566 (1996).

power, then the abortions that follow are said to be “voluntary.”<sup>73</sup>

The national government gives local officials great autonomy in its methods of persuasion.<sup>74</sup> As Shen Guoxiang, director of the State Family Planning Commission in 1990, noted, “Normally the women are willing to abort. But if they are not, then the local cadres come ‘round to persuade them a little.’”<sup>75</sup>

A final tactic to induce compliance involves the use of force by government agents, and often includes physical brutality, property destruction, detention, beatings and demolition of residences.<sup>76</sup> In some areas, terrorizing women and their families has become routine for population control officials.<sup>77</sup> For example, local officials often collapse the houses of women who refuse to abort their unauthorized children; in one village, officials pulled down the houses of six women pregnant with their second or later child and forbid other families in the village from providing them with shelter.<sup>78</sup> Chinese women and their families have little to no recourse against local officials and there is no evidence of prosecutions of local officials who have abused their authority.<sup>79</sup>

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73. See Scott Weinberg, *An End to the One-Child Quota?*, Feb. 2000 (quoting Steven Mosher, of the Population Research Institute, speaking at a conference on human rights in China), available at <http://www.catholic.net/rcc/Periodicals/cwr/Feb2000/Dossier3.html>.

74. See Kynge, *supra* note 68.

75. *Id.*

76. See Li, *supra* note 18, at 158. See also Hansel, *supra* note 3, at 373 (noting that violence is used most often in cases of extreme policy violations; for example, government officials blew up the home of a family with three children).

77. See *Unfair Burdens*, *supra* note 13 (explaining that because national law does not prohibit any specific enforcement measures as cruel or illegitimate, local authorities have the implicit power to use any means they wish).

78. Liu Yin, *China's Wanted Children; They Come for Unborn Babies in the Dead of the Night. Liu Yin Witnesses Peking's Brutal Attempts to Control Soaring Rural Birth Rates*, INDEPENDENT (London), Sept. 11, 1991, at 25.

79. *Unfair Burdens*, *supra* note 13.

## III. EFFECTS OF THE OCP ON WOMEN

A. *Positive Impact on Population Growth*

Thus far, the OCP has been fairly effective at achieving the PRC's main objective: the reduction of the birth rate.<sup>80</sup> Chinese officials claim that the OCP has prevented 330 million births in the past three decades.<sup>81</sup> Moreover, because of China's large population, the OCP has played a significant role in reducing worldwide population growth; the average growth rate in Asia, excluding China, was 0.3 percent higher than China's between 1980 and 1990.<sup>82</sup> According to the government, the OCP has reduced the average number of children per woman in China from 5.8 in 1970 to 1.8 today.<sup>83</sup> Many demographers, however, place the rate closer to 2.1, while some estimate that it is as high as 2.6 children per woman.<sup>84</sup> Despite the demographic discrepancies, the PRC attributes nationwide gains to the OCP, among them a 35 percent rise in China's GDP since 1995, increased grain output sufficient to allow China to feed its own population, lower mortality rates and improved educational opportunities.<sup>85</sup>

Nevertheless, the government is concerned with reports from the 2000 census indicating that rural couples are not complying with the OCP.<sup>86</sup> While China's census office adjusted its raw figures somewhat to account for unregistered children,<sup>87</sup> unannounced spot checks by China's State Statistics Bureau indicate that the Census has undercounted by up to 40 percent in some

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80. Hansel, *supra* note 3, at 376.

81. Bezlova, *China to Formalize*, *supra* note 22.

82. Peng, *supra* note 21, at 62.

83. Rosenthal, *Rural Flouting of One-Child Policy*, *supra* note 69.

84. U.S. Embassy, Beijing, P.R.C., *available at* <http://www.usembassy-china.org/cn/eng/sh/sandt/fertil21.htm> (Oct. 1997). Demographers consider 2.1 children per woman to be the replacement rate, the rate at which a population must reproduce to maintain its population size. *Id.*

85. *China Holds Back Population Growth*, XINHUA ECON. NEWS SERVICE, Mar. 7, 2001.

86. Noonan, *supra* note 50.

87. Unregistered children are those children born outside the system. Families who have more than one child will often attempt to hide those children from the government. The result is an uncounted floating population ineligible for state benefits such as education and health care. *See generally Report on CEDAW*, *supra* note 12.

villages.<sup>88</sup> The PRC remains optimistic about the OCP and its results,<sup>89</sup> however, and even claims that “the idea of family planning and the importance of reproductive health have been widely accepted by the public.”<sup>90</sup>

### *B. Negative Consequences*

The OCP, however, has engendered a myriad of negative consequences, notably the rise of sex discrimination against women and its contingent repercussions.<sup>91</sup> Men vastly outnumber women in China; there are 60 million more men than women in China today.<sup>92</sup> Female babies are considered expendable,<sup>93</sup> and sex-selective abortions and infanticides have become commonplace solutions for eliminating unwanted girl children.<sup>94</sup> Many girls who survive selection are abandoned to orphanages,<sup>95</sup> sold on the baby black market,<sup>96</sup> or endure second-class lives, where

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88. Rosenthal, *Rural Flouting of One-Child Policy*, *supra* note 69.

89. *See China Holds Back Population Growth*, *supra* note 85 (noting that China has successfully held population growth to the natural rate of one percent in the past five years).

90. Bezlova, *China to Formalize*, *supra* note 22 (statement by Shi Chun-jing, vice director of the Regulation Department of the State Family Planning Commission, in support of the Family Planning Law).

91. Hansel, *supra* note 3, at 376. *See also* Michael Weisskopf, *China's Birth Control Policy Drives Some to Kill Baby Girls*, WASHINGTON POST, Jan. 8, 1985, at A1 (Women absorb the blame when the child is female, often finding themselves subject to beatings, the scorn of their families and divorce. The pressure on women to produce a son has reportedly driven women to suicide or mental institutions.) [hereinafter *Drives Some to Kill Baby Girls*]; Penny Kane & Ching Y. Choi, *China's One Child Family Policy*, BRIT. MED. J. (1999) (noting that China has one of the highest suicide rates in the world for women in their reproductive years).

92. Goodenough, *China's 'One-Child Policy'*, *supra* note 54.

93. *See* Kane & Choi, *supra* note 91.

94. *See* Goodenough, *China's 'One-Child Policy'*, *supra* note 54.

95. DEATH BY DEFAULT: A POLICY OF FATAL NEGLECT IN CHINA'S STATE ORPHANAGES 2-3, Human Rights Watch (1996) (noting that the vast majority of children in orphanages have consistently been healthy infant girls) [hereinafter DEATH BY DEFAULT].

96. Hannah Beech Xicheng, *China's Infant Cash Crop*, TIME PAC., Jan. 29, 2001 (While some women are selling their extra children because they violate the OCP, other women, often from extremely impoverished villages, have become full-time baby machines, rationalizing that it is cheaper to raise babies for sale than pigs.), available at <http://www.time.com/time/pacific/magazine/20010129/china.html>.

they are concealed from the government because their parents did not register them.<sup>97</sup> Ironically, the abduction and trafficking of Chinese women is rapidly increasing as men, especially in rural areas, attempt to accommodate for the shortage of wives and mothers created by their discrimination against female children.<sup>98</sup>

### C. China's Preference for Male Children

Confucian tenets largely defined a woman's status in the traditional Chinese social structure.<sup>99</sup> Every woman grew up knowing the four virtues:

[F]irst, a woman should know her place in the universe and behave in compliance with the natural order of things; second, she should guard her words and not chatter too much or bore others; third, she must be clea[n] and adorn herself to please men; and fourth, she should not shirk from her household duties.<sup>100</sup>

The traditional Chinese marriage was preeminently a contract and the most common means of recruiting female labor into families.<sup>101</sup> Wives were bought and sold in the market for productive and reproductive labor. While bridegrooms' families occasionally paid dowries, the bride price was the predominant economic feature of the marriage and reflected the net gain to the husband's family in obtaining the bride's labor.<sup>102</sup> A daughter was often considered an outsider from the moment of her birth.<sup>103</sup> Because she would no longer bring economic benefit to her own family once she was given to her husband's family, a daughter was "like spilled water."<sup>104</sup>

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97. See Abrams, *supra* note 69.

98. Hansel, *supra* note 3, at 377. See also Kane & Choi, *supra* note 91.

99. Cardillo, *supra* note 1, at 88.

100. See Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verite and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347, 378–79 (1996).

101. Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1642–43 (2000).

102. *Id.*

103. Cardillo, *supra* note 1, at 88.

104. *Id.*

When the Communist government took control of China in 1949, however, the status of women seemed poised for a change. The PRC worked to establish women as equals, both legally<sup>105</sup> and by making them part of the class struggle under the slogan, “women hold up half the sky.”<sup>106</sup> The education and propaganda campaigns of the new Communist regime had an effect, and skewed sex ratios improved between 1949 and 1970.<sup>107</sup> As Judith Banister, a social science professor at Hong Kong University of Science and Technology, noted, “Mao, for all his failings, did say that ‘women hold up half the sky,’ ... and it did have an impact. The attack on the patriarchal family was very strong and very effective.”<sup>108</sup>

Women did not hold up half the sky for long. When severe economic hardships shattered much of Mao’s ideology in the 1960s and early 1970s, the OCP was adopted to counter overpopulation, famine and poverty.<sup>109</sup> With the aid of modern technology, namely ultrasound machines, many Chinese reverted to traditional practices, promoting the birth of sons over daughters.<sup>110</sup> While Confucian ideology does play a role in son preference, the concerns of parents for their economic futures is also determinative.<sup>111</sup> When Mao was alive and in power, those working in state-owned industries could depend on the “iron rice bowl”<sup>112</sup> to provide for them in their old age, but his death

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105. The Constitution provides: “Women in the People’s Republic of China enjoy equal rights with men in all spheres of life, in political, economic, cultural, social and family life.” CONSTITUTION, *supra* note 32, art. 48. See also Anna M. Han, *Holding Up More Than Half the Sky: Marketization and the Status of Women in China*, 11 J. CONTEMP. LEGAL ISSUES 791, 798 (2001) (noting that the 1950 Marriage Law, although largely unknown, attempted to address inequalities between men and women).

106. See Margaret Y.K. Woo, *Biology and Equality: Challenge for Feminism in the Socialist and Liberal State*, 42 EMORY L.J. 143, 147–48 (1993).

107. Henry Chu, *In China, 7 Brides for 14 Brothers; A Male-Centered Tradition and a ‘One-Child’ Policy Have Created a Huge Demographic Imbalance. Trafficking in Women Is a Brisk Business*, L.A. TIMES, Feb. 14, 2001, at A1.

108. *Id.*

109. Cardillo, *supra* note 1, at 89.

110. Rosenthal, *Rural Flouting of One-Child Policy*, *supra* note 69.

111. Cardillo, *supra* note 1, at 90.

112. See Woo, *supra* note 106, at 150. The “iron rice bowl” is a metaphor for the Chinese social security system created to provide food and shelter for all Chinese citizens from womb to tomb. Benefits included subsidized medical care, housing, education and a pension upon retirement. *Id.*

and the decline of those industries destroyed that security.<sup>113</sup> Article 49 of China's Constitution requires that "children who have come of age...support and assist their parents."<sup>114</sup> Chinese courts have expansively interpreted the duty of support to include not only financial assistance, but also the personal care and spiritual comfort of a parent.<sup>115</sup> Although Chinese law is gender neutral with regard to support duties, i.e., women have the same obligation as men to provide for their parents, the reality is far different. First, seventy percent of the jobs targeted for elimination in antiquated state-owned industries were held by women.<sup>116</sup> In many cases, women simply do not have the economic means to support a family.<sup>117</sup> Second, women typically "belong" to the family they marry into, meaning that they could not care for the elders in their birth family or work in the family business.<sup>118</sup> Sons, on the other hand, "come with a lifetime guarantee of security. They will work in the fields, support elderly parents and carry on the family line."<sup>119</sup> These cultural as-

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113. See James Walsh, *Born to Be Second Class; in China, Old Biases Against Women Have Emerged Once Again*, TIME, Sept. 11, 1995, at 46.

114. CONSTITUTION, *supra* note 32, art. 49.

115. Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 100 (1998). The Constitution and the Marriage Law provide that "the following family members have duties of support: (1) spouses, (2) parents and children (including natural, adoptive, and stepparents and stepchildren), (3) grandparents and grandchildren (if the grandchildren's parents are deceased), and (4) siblings (if their parents are dead or destitute)." *Id.* at 97.

116. See *id.* See also Woo, *supra* note 106, at 151-52. While women constituted 38 percent of the labor force in the 1980s, China's focus on privatization and economic efficiency during the 1990s has made unemployment a serious problem, with women bearing the brunt of it. Moreover, women have typically been segregated into light industries, such as service, textile and food processing, making their normal earnings less than that of men. *Id.*

117. NICHOLAS D. KRISTOF & SHERYL WUDUNN, CHINA WAKES 216 (1994) (While women may have greater economic opportunities today, they encounter greater discrimination. Most jobs available to women "are on assembly lines in the noisiest, dirtiest industries.").

118. Hansel, *supra* note 3, at 378. See also Woo, *supra* note 106, at 153 (noting that women "bear the double burden of home and work"). But see Peng, *supra* note 21, at 59 (arguing that the responsibility for the elderly falls on women, thus preventing them from working outside the home).

119. *Disappearing Girls; In China and South Korea, a Gender Gap Causes Worries*, ASIaweek, Mar. 3, 1995, at 32 [hereinafter *Disappearing Girls*]. According to Confucius, the failure to carry on the family line was the way to

sumptions, compounded with economic disenfranchisement and magnified by the OCP, continue to oppress Chinese women and are the leading cause of sex-selective practices in China.<sup>120</sup>

*D. Sex-Selective Abortion, Female Infanticide,  
and Abandonment*

Millions of girls, some five percent of female babies that should be born every year, are considered missing,<sup>121</sup> victims of sex-selective abortion, female infanticide, abandonment, and non-registration.<sup>122</sup> As many as 15 million babies have disappeared since the introduction of the OCP.<sup>123</sup> Sex-selective abortions, often voluntarily sought by couples, have become extremely common.<sup>124</sup> Although the PRC has outlawed sex-selective abortions,<sup>125</sup> the State Statistical Bureau acknowledged in a 1996 report that the practice was still common in rural areas.<sup>126</sup> In 1999, the International Planned Parenthood Federation estimated that, after gender screening, 500,000 to 750,000 Chinese girls are aborted annually.<sup>127</sup> Regulations and laws have been ineffective thus far in enforcing the ban on prenatal sex-selection because the root cause of prenatal sex-selection—son preference—persists.<sup>128</sup> The ubiquity of ultrasound technol-

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show the greatest disloyalty to ancestors. Weisskopf, *Drives Some to Kill Baby Girls*, *supra* note 91.

120. Hansel, *supra* note 3, at 378.

121. "Missing," as used here, means that these women are missing from China's population, either because they were never born (sex-selective abortion), were killed during their infancy, or are unregistered and thus not included in the Census.

122. *Caught Between Tradition and the State: Violations of the Human Rights of Chinese Women*, Human Rights in China, Fall 1995, at [http://iso.hrichina.org/iso/article.adp?article\\_id=369&subcategory\\_id=16](http://iso.hrichina.org/iso/article.adp?article_id=369&subcategory_id=16).

123. Sofianni Subki, *Open Arms for Daughters Too*, NEW STRAIT TIMES, Apr. 21, 2003, at 1.

124. *Id.* at 379.

125. *Report on CEDAW*, *supra* note 12, at 88. Prenatal sex selection was outlawed in 1986 by the Ministry and Health and the State Family Planning Commission with the Notice on Forbidding Prenatal Sex Determination. Junhong, *supra* note 38, at 2.

126. Xiao Yu, *Young Women Threaten Plan to Control Numbers*, S. CHINA MORNING POST, Oct. 9, 1996, at 10.

127. See Goodenough, *China's Gender Imbalance*, *supra* note 27.

128. Junhong, *supra* note 38, at 3.

ogy<sup>129</sup> and the readiness of physicians to violate the law to engage in the lucrative sex-determination trade make enforcement extremely difficult, especially when officials are willing to look the other way.<sup>130</sup>

Infanticide is a criminal offense but, despite the continued practice, prosecutions are extremely unusual.<sup>131</sup> Abandonment, also a criminal offense,<sup>132</sup> surged in the 1980s, primarily because of the OCP.<sup>133</sup> Ninety-five percent of children in orphanages are healthy infant girls.<sup>134</sup> Placement in an orphanage, however, does not guarantee life.<sup>135</sup> Most children die shortly after admission into an orphanage, primarily from neglect, starvation, and exposure.<sup>136</sup> For example, in the Nanning orphanage in Guangxi province, staff and regular visitors “freely admitted that 90 percent of the 50 to 60 baby girls who arrived at the orphanage each month would end their lives there.”<sup>137</sup> Moreover, most abandoned children do not even make it to an orphanage,

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129. Jodi Danis, *Recent Development: Sexism and “The Superfluous Female”*: Arguments For Regulating Pre-Implantation Sex Selection, 18 HARV. WOMEN’S L.J. 219, 234–35 (1995) (noting that “many sociologists and obstetric practitioners acknowledge that widespread use of the technology may create a demographic sex imbalance favoring males”).

130. See Junhong, *supra* note 38, at 3 (observing that private connections and bribing make regulations against prenatal sex determination impossible to enforce).

131. *Report on CEDAW*, *supra* note 12, at 88. See also Li, *supra* note 18, at 116 (The large discrepancy between male and female babies cannot be explained solely by aborted female fetuses and concealed girl children. This leads some to conclude that female infanticide is not a rare phenomenon, but a factual reality.).

132. *China Country Report*, *supra* note 70 (noting that abandonment is punishable by fines and a five-year prison term).

133. DEATH BY DEFAULT, *supra* note 95, at 2–3.

134. Hansel, *supra* note 3, at 381.

135. See Tom Hilditch, *A Holocaust of Girls*, S. CHINA MORNING POST, Sept. 1995, at 39, reprinted in WORLD PRESS REVIEW (explaining that orphanage deaths tend to be the product of “sheer neglect”), available at <http://acc6.its.brooklyn.cuny.edu/~phalsall/texts/c-wnhol.html>. See also DEATH BY DEFAULT, *supra* note 95, at 3 (commenting that “[m]any institutions...appeared to be operating as little more than assembly lines for the elimination of unwanted orphans, with an annual turnover of admissions and deaths far exceeding the number of beds available”).

136. See generally DEATH BY DEFAULT, *supra* note 95.

137. Hilditch, *supra* note 135 (noting that the conditions at the Nanning orphanage are by no means exclusive to that orphanage, but are prevalent elsewhere).

but are placed in general-purpose institutions with even higher mortality rates.<sup>138</sup> Despite these problems, however, a 1991 report by the Hunan Civil Affairs Bureau did not find a single successful case of prosecution for abandonment.<sup>139</sup> Moreover, the Chinese government has shown itself to be unwilling to tackle the problem. In its initial report to the Committee on the Rights of the Child, the government stated that Chinese law only considers abandonment a crime “where the circumstances are grave enough.”<sup>140</sup>

### *E. Woman Shortage*

The Chinese cultural preference for boys, exacerbated by the OCP, is largely responsible for an alarming increase in the ratio of boys to girls,<sup>141</sup> arousing the concerns of both policymakers and scholars in China.<sup>142</sup> While statistics vary widely,<sup>143</sup> a 1995 mini-census by the Chinese government recorded a ratio of 118 boys to every 100 girls.<sup>144</sup> Considering that the worldwide biological norm is 106 males for every 100 females, China has a serious gender gap.<sup>145</sup> In some rural areas, a study has indicated that the sex ratio at birth was 125.9 males to 100 females, while the sex composition for all living children was 126.1 boys to 100 girls.<sup>146</sup> Generally, this skewed sex ratio can be attributed to three factors: (1) unregistered female births, (2) excess

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138. DEATH BY DEFAULT, *supra* note 95, at 3. Only two-fifths of China’s institutionalized orphans are placed in “child welfare institutes;” the rest are held in all-purpose “social-welfare institutes” where the inmates include elderly, mentally ill, severely retarded and physically disabled individuals. *Id.* at 79.

139. *Report on CEDAW*, *supra* note 12, at 89.

140. *Id.* (noting that the government is reluctant to enforce regulations against child abandonment because it is seen as implicit criticism of the OCP).

141. Rosenthal, *Rural Flouting of One-Child Policy*, *supra* note 69.

142. Junhong, *supra* note 38, at 1.

143. One study indicated that ratios were skewed as high as 131 males to 100 females. See Graham Hutchings, *Female Infanticide in China ‘Will Lead to Army of Bachelors,’* LONDON TELEGRAPH REP., available at <http://www.reagan.com/HotTopics.main?HotMike/document-4.11.1997.6.html>.

144. Chu, *supra* note 107.

145. *Disappearing Girls*, *supra* note 119. The natural, biological gender gap tends to even out by age 20, as males typically have a higher casualty rate than females. *Id.*

146. Junhong, *supra* note 38, at 5 (explaining that the differences in ratios reflects the practice of bearing children until a son arrives).

female infant mortality, and (3) heightened prenatal sex-selective abortion of female fetuses.<sup>147</sup> However, a survey of rural communities conducted by Chu Junhong found that prenatal sex determination was the primary cause of the rising sex ratio.<sup>148</sup>

This gender gap translates into a severe woman shortage.<sup>149</sup> There are now almost 100 million more men than women in China.<sup>150</sup> Meanwhile, 400,000 to 500,000 more boys than girls are born annually.<sup>151</sup> Unmarried men outnumber unmarried women by three to one,<sup>152</sup> and some estimate that China has close to 70 million bachelors who will never wed.<sup>153</sup> The surplus of single men from ages 20 to 44 is about 26 million now, enough to displace the populations of Arizona and Texas.<sup>154</sup>

Optimists have predicted that the gender gap will lead to an improved social status for women.<sup>155</sup> Historically, however, when gender discrimination produced similar, albeit much less worrisome, women shortages in China, the status of Chinese women did not improve.<sup>156</sup> Even these optimists concede that the imbalance is also likely to lead to an increase in rape and prostitution, thus mitigating any slight improvements Chinese women might gain.<sup>157</sup> Indeed, women in societies with large gender gaps tend to experience a variety of negative consequences.<sup>158</sup> As Scott Smith and Katherine Trent explain:

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147. *Id.* at 1.

148. *Id.* at 2.

149. Hansel, *supra* note 3, at 383.

150. Calum Macleod, *Life Begins Again For Chinese Girl Sold as Slave at 12*, INDEPENDENT (London), May 17, 2000, at 14 [hereinafter *Life Begins Again*].

151. *Disappearing Girls*, *supra* note 119.

152. Maureen Freely, *Freely Speech: Lives, Damned Lives and Statistics*, GUARDIAN (London), Aug. 19, 1994, at T5 (noting that for singles over thirty years of age, unmarried men outnumber unmarried women by thirty to one).

153. *Disappearing Girls*, *supra* note 119. See also VALERIE M. HUDSON & ANDREA M. DEN BOER, BARE BRANCHES: THE SECURITY IMPLICATIONS OF ASIA'S SURPLUS MALE POPULATION 179–81 (2004) (noting that some sources suggest that China may already have as many as ninety million bachelors).

154. Hansel, *supra* note 3, at 383.

155. Freely, *supra* note 152.

156. Junhong, *supra* note 38, at 11.

157. *Id.*

158. HUDSON & DEN BOER, *supra* note 153, at 202–03 (noting that it seems counterintuitive that women's social status would decline "as laws of supply

It is somewhat paradoxical that the increased “valuation” of women that accompanies high sex ratios severely limits their life options. Our results suggest that an undersupply of women, combined with men’s overwhelming structural power, leads to high marriage and fertility rates and low rates of divorce and illegitimacy. But high sex ratios also serve to delimit and constrain the roles women occupy. Hence, where women are in short supply, their levels of literacy and labor-force participation are low, both relative to men in their own society and to women in low-sex-ratio societies. Their suicide rate, relative to men’s, is also high. It would appear, then, given the current distribution of structural power, the relative undersupply of females entails few benefits and many costs to women.<sup>159</sup>

Although no one is certain how the woman shortage will impact China,<sup>160</sup> commentators argue that the gender gap will create social calamity “in a culture where getting married and having children is still a must—an act of filial duty.”<sup>161</sup> These surplus young bachelors are referred to as “guang gun-er,” or bare branches, in China;<sup>162</sup> the fear is that this frustrated “army of bachelors” could create serious social perils and instability.<sup>163</sup> According to evolutionary psychologist Robert Wright,

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and demand would suggest that . . . the relative scarcity of women would increase their value and thus make them more powerful”).

159. *Id.* at 203. Women in high-sex-ratio societies are more likely to be kidnapped or sold. Additionally, the age of female consent tends to drop, meaning that girls are married when they are very young; in some cases, before menarche. *Id.* at 203–04.

160. Junhong, *supra* note 38, at 11. *See also* Hansel, *supra* note 3, at 383–84 (commenting that recently, Chinese male immigrants have unsuccessfully attempted to lodge asylum claims in Western countries, claiming refugee status based on an inability to marry and reproduce).

161. Chu, *supra* note 107.

162. HUDSON & DEN BOER, *supra* note 153, at 187–88. One Chinese citizen explained:

This is a metaphor, which indicates that the unmarried men have nothing attached, just like bare branches. Bare branches give people an impression of bleakness and loneliness. It is quite similar to the lives of the unmarried men. They have no warm families, which can give them support and comfort; they have no children, who can take care of them when they become old.

*Id.*

163. Chu, *supra* note 107.

Womenless men ...compete with special ferocity. An unmarried man between twenty-four and thirty-five years of age is about three times as likely to murder another male as is a married man the same age. Some of this difference no doubt reflects the kind of men that do and don't get married to begin with, but ... a good part of the difference may lie in "the pacifying effect" of marriage. Murder isn't the only thing an "unpacified" man is more likely to do. He is also more likely to incur various risks—committing robbery, for example—to gain the resources that may attract women. He is more likely to rape.<sup>164</sup>

In fact, woman shortages have led to instability in the past: Mao's Communist revolution gained the support of poor young men by promising to find them wives.<sup>165</sup>

#### *F. Trafficking of Women*

The dearth of available women has already created a more immediate problem: the abduction and trafficking of women.<sup>166</sup> Trafficking usually involves the abduction, displacement and sale (or trade) of women.<sup>167</sup> Increasingly, women in China are kidnapped and sold into marriage to men desperate for wives,<sup>168</sup> primarily because "the demand by men for marriageable women cannot be met by local brides."<sup>169</sup> While economics may drive many peasant families to buy from a trafficker because it is cheaper to buy a wife than to pay a bride price,<sup>170</sup> the result is the same: women have become "tradable commodities."<sup>171</sup>

Often, women are lured away from their homes and families with false promises of employment.<sup>172</sup> Others are forcibly kid-

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164. ROBERT WRIGHT, *THE MORAL ANIMAL, WHY WE ARE THE WAY WE ARE: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* 100 (1994).

165. Chu, *supra* note 107.

166. Hansel, *supra* note 3, at 384. *See also China Country Report, supra* note 70 (noting that "a key reason for the abduction and sale of women is a serious imbalance in sex ratios in certain localities").

167. *See, e.g.,* Chu, *supra* note 107.

168. Junhong, *supra* note 38, at 11. *See also* Chu, *supra* note 107.

169. *China Country Report, supra* note 70.

170. Calum Macleod, *Life Begins Again, supra* note 150 (noting that buying a wife costs approximately 3,000 yuan, while bride prices usually exceed 10,000 yuan).

171. KRISTOF & WUDUNN, *supra* note 117, at 216.

172. Chu, *supra* note 107.

napped.<sup>173</sup> Once they reach their destination, these women are sold as wives, usually to farmers in the hinterlands.<sup>174</sup> Even babies have been brought into the cycle; traffickers have been arrested while selling baby girls to be reared as child brides for rural farmers.<sup>175</sup>

Even though trafficking is illegal in China,<sup>176</sup> the trade thrives, reflecting both the gender gap and the extremely low status of rural women.<sup>177</sup> In the past few years, China has stepped up its efforts to halt the trade and demonstrated its commitment with highly publicized arrests,<sup>178</sup> death sentences<sup>179</sup> and rescues.<sup>180</sup> Despite the national campaign to combat the trafficking of women and children,<sup>181</sup> however, conservative estimates of abducted women run into the tens of thousands each year.<sup>182</sup> Perhaps even more worrisome is that the publicity sur-

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173. Dorinda Elliot, *Trying to Stand on Two Feet*, NEWSWEEK, June 29, 1998, at 48.

174. Chu, *supra* note 107.

175. Elizabeth Rosenthal, *Bias for Boys Leads to Sale of Baby Girls in China*, N.Y. TIMES, July 20, 2003, at 6. See also HUDSON & DEN BOER, *supra* note 153, at 205.

176. Law Safeguarding Women's Rights and Interests, Criminal Law Article 141, English version, at <http://www.isinolaw.com>.

177. Rosenthal, *Harsh Chinese Realities Feed Market in Women*, N.Y. TIMES, June 25, 2001, at A8 [hereinafter *Harsh Chinese Realities*].

178. See, e.g., John Schauble, *Child Bride Reveals China's Shame*, AGE (Melbourne), Apr. 7, 2000, at 10 (telling the story of the liberation of Kang Minge, along with her one-year-old son, from life as a kidnapped child bride after two years, from age twelve to fourteen, as the wife of a farmer).

179. John Pomfret, *China Cracks Down on Abductions of Women, Kids*, WASHINGTON POST, May 11, 2000, at A23 (noting that thus far eight human traffickers have been executed).

180. Rosenthal, *Harsh Chinese Realities*, *supra* note 177. See also Elliot, *supra* note 173 (commenting that while the Chinese police arrested 143,000 people for participation in the slave trade and freed 88,000 kidnapped women and children between 1991 and 1996, brides often participate voluntarily); Pomfret, *supra* note 179 (noting that 10,000 kidnapping victims were freed in a five week period, demonstrating both the alarming growth in abductions as well as China's renewed commitment to halt the trade).

181. *Trafficking in Persons Report*, U.S. Dept. of State, June 2003 (stating that, while the PRC does not fully comply with the minimum requirements for the elimination of trafficking, it is making significant efforts to do so, notably through public awareness campaigns against domestic bride abuses).

182. Macleod, *Life Begins Again*, *supra* note 150. See also Spahn, *supra* note 7, at n.116 (noting that between 1980 and 1990, in Anhui province there

rounding the government's efforts against trafficking does not reflect reality.<sup>183</sup> Despite its claims, the government has failed to initiate a comprehensive campaign of arrests and prosecutions, particularly of officials who collude in the trafficking, of parents who sell their daughters, or of buyers.<sup>184</sup> Moreover, because many peasants regard wife-buying as normal, they usually sympathize with the buyer, often to the point of helping him keep his new wife imprisoned.<sup>185</sup> As Liu Bohong, a Beijing social worker, noted, "Local people will defend the man who buys a wife....Everyone sympathizes with him."<sup>186</sup> Escape is extremely difficult. Families of abducted women usually have no idea where their daughter has gone, and paying an investigator to find and rescue her costs about \$500, or ten years of a rural family's income.<sup>187</sup>

#### *G. Resurgence of Bride Price in Marriage Transactions*

The scarcity of women has altered the economics of marriage in another way: the resurgence of the bride price as an element of marriage brokering.<sup>188</sup> While the sale of women was permitted as late as 1906, the practice was eventually eradicated altogether by the Communist Party.<sup>189</sup> In fact, under the Marriage Law, the "exaction of money and gifts in connection with the marriage" is prohibited.<sup>190</sup> Despite the prohibition, the payment

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were 32,679 abducted women living in one county, most of them trafficked from other provinces).

183. *Report on CEDAW*, *supra* note 12, at 7 (stating that the government severely restricts reporting on trafficking, making it difficult to expose enforcement deficiencies).

184. *Id.* at 19. *See also* Schauble, *supra* note 178 (noting that Professor Hong Daode, of the University of Political Science and Law of China, commented that Chinese law targeted kidnappers, "but did not adequately punish buyers").

185. KRISTOF & WUDUNN, *supra* note 117, at 216 (For example, when a woman sold to a Shaanxi peasant tried to escape, she was tied to the bed. The second time, the peasant beat her, and the third time, "he gouged out her eyes.").

186. Elliot, *supra* note 173. *See also* KRISTOF & WUDUNN, *supra* note 117, at 216 (noting that local peasants often erect barricades to keep authorities out of their village).

187. Rosenthal, *Harsh Chinese Realities*, *supra* note 177.

188. *Id.*

189. Spahn, *supra* note 7, at 277.

190. MARRIAGE LAW (REVISED), *supra* note 33, art. 3.

of a bride price never completely faded out of practice,<sup>191</sup> and the gender gap created by the OCP has caused a rapid increase in the bride price in the past few years.<sup>192</sup> Bride prices have increased tenfold, from “ten (10) to forty (40) percent of the average net income of a rural family...to sixty-three (63) to one hundred eight-nine (189) percent of the average net family income....”<sup>193</sup>

Bride prices were outlawed primarily because they hindered the achievement of gender equality.<sup>194</sup> A woman was essentially sold to the groom’s family and the bride price served as compensation to her family for her upbringing.<sup>195</sup> The reemergence of the ancient practice of selling women reflects the view of women as commodities<sup>196</sup> to be traded for cash or even livestock.<sup>197</sup> Rural women are increasingly becoming willing participants in their own sale, seeing it as an opportunity to mitigate their families’ poverty.<sup>198</sup> Because of serious gaps in China’s legal framework, a woman’s willingness to participate in her own sale de-criminalizes the sale. Although the trafficking of

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191. See, e.g., MOSHER, *supra* note 4, at 150–51. Even after the Communist Revolution, bride prices were extracted from the families of grooms. Chi An explained:

It was custom in China for the bride to ask the groom’s family to buy her presents. The traditional bride price was six or nine ounces of pure gold in the form of heavy earrings, bracelets, and rings. Worn as jewelry during good times, they provided a hedge against famine during bad. After the revolution the Party forbade the buying and selling of gold. Now girls generally asked for the “three things that go round and the one that sounds,” namely, a bike, a sewing machine, a watch, and a radio. Sometimes they also demanded the “forty-eight legs,” a household of furniture, the legs of which totaled forty-eight.

*Id.*

192. Spahn, *supra* note 7, at 277.

193. *Id.*

194. Han, *supra* note 105, at 798 (explaining that the extraction of bride price from the groom’s family led to “mercenary marriages’ where women, especially from poor families, were bought and sold as commodities”).

195. *Id.* at 793 (noting that “marriage meant that females became legally divorced from their birth families”).

196. *Id.* Goff, *supra* note 9.

197. See, e.g., KRISTOF & WUDUNN, *supra* note 117, at 212 (recounting the story of an unmarried peasant buying a mentally retarded woman from a wife dealer with a calf, and then allowing her to die of starvation and exposure over the next winter).

198. Goff, *supra* note 9.

women by third parties is criminalized under Chinese law, such sales are not illegal when the transactions are completed by the women or their families.<sup>199</sup> These marriages are still illegal, and thus unregistered, but neither the women and their families, nor the bridegrooms, face criminal repercussions.<sup>200</sup>

#### *H. Effect of Non-Registration*

The social and economic implications of the OCP for children are far-reaching.<sup>201</sup> Those children born “out-of-plan” have no legal identity in China.<sup>202</sup> In the 1950s, the government created the household registration system, which “provide[s] a record of births, deaths, marriages, and changes in the household composition.”<sup>203</sup> Unauthorized children cannot be registered as legal residents, and are thus unable to obtain official documentation of their existence, including birth certificates and passports.<sup>204</sup> Some regions of China allow couples to register unauthorized children for a fee of anywhere from \$600 to \$2,400 per child.<sup>205</sup> But as a department head at the State Family Planning Commission said, “There are two types of people for whom fees are ineffective: the richest, who just pay them and don’t care, and the poorest, who can’t pay them and don’t care.”<sup>206</sup>

This deprivation of benefits to unauthorized children is also a case of conflicting legal enforcement.<sup>207</sup> For example, the 1994 Maternal and Infant Health Care Law (MIHCL) promises that the state will “provide essential conditions and material assistance to the development of undertakings for maternal and in-

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199. Spahn, *supra* note 7, at 278–79.

200. *Id.* (noting that unregistered marriages are unlawful even if both parties freely consent to the union).

201. *Unfair Burdens*, *supra* note 13.

202. *Report on CEDAW*, *supra* note 12, at 89.

203. Zhang, *supra* note 72, at 565.

204. *Unfair Burdens*, *supra* note 13. *See also* Xicheng, *supra* note 96 (noting that “black children” are unable to obtain passports).

205. Elizabeth Rosenthal, *Rural Flouting of One-Child Policy*, *supra* note 69 (observing that fees vary widely by region).

206. *Id.* *See also Report to CEDAW*, *supra* note 12, at 89–90 (A slogan on a wall in rural Hubei Province encapsulates the discrimination suffered by poor families and their unauthorized children: “The family wealth of those having children out-of-plan should all be lost. The families of those having children out-of-plan should be broken up and dispersed.”).

207. Li, *supra* note 18, at 171.

fant health care.”<sup>208</sup> Yet the law is not enforced because its provisions conflict with the penalties imposed by the OCP, a higher priority for the government.<sup>209</sup> The Marriage Law (revised) also aims to protect children by requiring that they all enjoy the same rights, including those of education and support, but it mitigates those rights by providing that other laws concerning illegal acts in the marriage and family shall prevail over the Marriage Law.<sup>210</sup> Accordingly, the provisions of the Family Planning Law prevail, including its policy of punishing parents for having unauthorized children by withholding their registration.<sup>211</sup>

Registration cards are required for claiming state subsidies, health care and admission to day care.<sup>212</sup> Therefore, unregistered children, referred to as “hei haizi” or “black children,” do not qualify for government subsidies, which include education, health care, pension and many forms of employment.<sup>213</sup> Without a residence card, these children become part of the floating migrant population, doomed to work at low-paying jobs that are often outside the protection of China’s labor laws.<sup>214</sup> Moreover, the government often uses registration benefits as a stick to enforce provisions of the OCP.<sup>215</sup> For example, in Fujian province, women who refuse to use IUDs lose grain rations and medical benefits for their first child, regardless of whether the child’s birth was authorized.<sup>216</sup>

The floating population is rising in China, with conservative estimates placing this migrant population at approximately 150

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208. MATERNAL AND INFANT HEALTH CARE LAW art. 2, English version, at <http://www.isinlaw.com>.

209. Li, *supra* note 18, at 171.

210. MARRIAGE LAW (REVISED), *supra* note 33, arts. 25, 49.

211. See Li, *supra* note 18, at 171.

212. *Unfair Burdens*, *supra* note 13.

213. Xicheng, *supra* note 96. See also Abrams, *supra* note 69 (A 15-year-old girl was recently granted asylum in the U.S. because as an unauthorized child she was denied access to education and her family had been extensively fined merely because of her existence.); Noonan, *supra* note 50.

214. See, e.g., KRISTOF & WUDUNN, *supra* note 117, at 214–16 (showing that women without residence permits are often forced to work in jobs where labor standards are low or where they are subject to pernicious forms of sexual harassment and molestation).

215. Gellman, *supra* note 48, at 1081.

216. Weisskopf, *Abortion Policy*, *supra* note 52.

million people.<sup>217</sup> This migrant population, attributed to the emergence of China's new market economy and an influx of rural laborers to urban commercial centers, has led to an erosion of the household registration system.<sup>218</sup> Members of the floating population are not entitled to the benefits of the state, even if they are registered since Chinese citizens can only receive their state subsidies in their place of household registration.<sup>219</sup> The floating population makes a sizeable contribution to the number of unregistered children, accounting for nearly one in eight births above the OCP quota.<sup>220</sup>

While the birth rate is fairly low in urban areas, with most residents adhering to the OCP, in rural areas there is a growing number of unauthorized children.<sup>221</sup> Census figures are notoriously poor at accounting for unregistered children, primarily because their parents hide them,<sup>222</sup> but unannounced spot checks by the State Statistics Bureau have discovered undercounts of up to 40 percent in some rural villages.<sup>223</sup> For example, Guangdong's Tanba township failed to report more than 2,000 births; almost 80 percent of women in Xin village had three or more children.<sup>224</sup> In rural areas, the number of children born third or later is often as high as 10.2 percent, compared to just one-tenth of one percent in cities like Beijing. Almost all of these children are illegal, and will remain unregistered and un-

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217. Kane & Choi, *supra* note 91. *But see* Rosenthal, *Rural Flouting of One-Child Policy*, *supra* note 69 (Susan Greenhalgh, professor at University of California at Irvine, said, "My sense is that nobody knows the actual population of the People's Republic of China . . . [a]nd that makes it impossible to engage in the economic and social planning that China needs to do.").

218. Zhang, *supra* note 72, at 565.

219. *See generally* MOSHER, *supra* note 4. *See also* Kane & Choi, *supra* note 91 (noting that migrants earn cash wages, are seldom eligible for state services, and do not draw attention to themselves by trying to obtain temporary registration, the result being a decline in the reliability of population statistics).

220. Zhang, *supra* note 72, at 566.

221. Rosenthal, *Rural Flouting of One-Child Policy*, *supra* note 69.

222. *Unfair Burdens*, *supra* note 13 (noting that unregistered children are overwhelmingly female, as parents hide them in order to try for the coveted son). *See also* Rosenthal, *Rural Flouting of One-Child Policy*, *supra* note 69 (commenting that after 20 years of the OCP, hiding children from the state has become second nature in many parts of China).

223. Rosenthal, *Rural Flouting of One-Child Policy*, *supra* note 69.

224. *Id.*

educated.<sup>225</sup> Sadly, the very factors that perpetuate the abduction and trafficking of women are perpetuated by the state's failure to register its illegal children. Poverty and lack of education often make women vulnerable to trafficking,<sup>226</sup> yet their children must suffer the same fate because they have no legal identity.

#### IV. RELEVANT LAWS AND TREATIES

##### A. *Marriage Law*

Under the traditional Confucian hierarchical structure, a marriage was preeminently a contract<sup>227</sup> and "usually the result of an agreement between two families, not two individuals."<sup>228</sup> Divorce proceedings, usually initiated by the husband, came about in much the same way.<sup>229</sup> Women had no choice in their marriage or divorce, and lacked economic independence.<sup>230</sup> Neither Chinese law nor Chinese culture provided any protection for women until the advent of Communism.<sup>231</sup>

Although the 1950 Marriage Law never became well known, it introduced the concept of marriage as an individual choice, a contract that must be entered into "without any interference or obstruction from third parties."<sup>232</sup> Even though it essentially outlawed child marriages and forced marriages, arranged marriages were still common.<sup>233</sup> By contrast, the 1980 Marriage Law was highly publicized even though the differences between the two laws were slight.<sup>234</sup> While the 1980 law affirmed the right of free choice in marriage, it also included rules on inheri-

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225. *Id.*

226. *China: Poverty 'Breeds' Woman Trafficking*, CHINA DAILY, Nov. 1, 2002.

227. See Ruskola, *supra* note 101, at 1642-43.

228. Janice A. Lee, *Family Law of the Two Chinas: A Comparative Look at the Rights of Married Women in the People's Republic of China and the Republic of China*, 5 CARDOZO J. INT'L & COMP. L. 217, 223 (1997).

229. *Id.* at 224 (arguing that suicide was a wife's only escape from a bad marriage).

230. *Id.* (noting that divorce was a calamity for Chinese women because of their lack of economic independence).

231. *Id.* at 226-27.

232. Han, *supra* note 105, at 798.

233. Lee, *supra* note 228, at 238 (noting that many wives still resorted to suicide as a way to escape unhappy marriages).

234. *Id.* at 239.

tance, family planning, adoption and support obligations of extended family.<sup>235</sup> Nevertheless, the law remained silent as to invalid marriages, failing to establish a system of regulation for invalid and revocable marriages.<sup>236</sup>

The revised Marriage Law, which became effective in 2001, differed significantly from the 1980 Marriage Law in that it established rules regarding invalid and revocable marriages. According to Article 8, a marriage is not established until it has been registered.<sup>237</sup> Under China's Marriage Law, there are several ways to make a marriage invalid. For example, the exaction of monies, i.e., bride price, would nullify the marriage,<sup>238</sup> as would failure to register it.<sup>239</sup> Moreover, women trafficked in violation of Chinese law, or those who are forced into marriage, may request revocation of their unions, essentially invalidating them.<sup>240</sup> Because the marriages would be invalid, none of these couples would be eligible for birth permits, and thus all of these children would be unregistered.<sup>241</sup>

While Article 10 provides circumstances in which a marriage is invalid,<sup>242</sup> Article 11 allows a party to request revocation of the marriage when it is based upon intimidation.<sup>243</sup> Article 12 complicates matters, however. Although an invalid or revoked marriage is completely invalid, parents of children born to these invalid unions have the same responsibilities to their children as do parents in valid marriages.<sup>244</sup> In actuality, however, parents of children born to invalid unions have greater responsibilities because although Article 25 states that "[c]hildren born

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235. Han, *supra* note 105, at 799.

236. Xiaoqing Feng, *A Review of the Development of Marriage Law in the People's Republic of China*, 79 U. DET. MERCY L. REV. 331, 333 (2002).

237. MARRIAGE LAW (REVISED), *supra* note 33, art. 8.

238. *Id.* art. 12.

239. Feng, *supra* note 236, at 349 (noting that *de facto* marriages are invalid).

240. MARRIAGE LAW (REVISED), *supra* note 33, art. 11.

241. *Report on CEDAW*, *supra* note 12, at 89.

242. MARRIAGE LAW (REVISED), *supra* note 33, art. 10 (stating that marriages shall be invalid for bigamy, prohibited relative relationships, where a party is unfit because of disease, and where either party is younger than the legal marriage age).

243. *Id.* art. 11 (intimidated parties must request revocation within one year of marriage registration or within one year of gaining their personal freedom).

244. *Id.* art. 12.

out of wedlock shall enjoy the same rights as children born in wedlock," it also provides that the parents shall bear all of the child's living and educational expenses.<sup>245</sup> Because the state typically assumes the burden of health and education expenses, the Marriage Law places both the parents and the children of invalid marriages at a distinct disadvantage.

Another dilemma not entirely solved by the revised Marriage Law is the validity of *de facto* marriages. A *de facto* marriage is one that meets the formal requirements of the Marriage Law and is not otherwise invalid, but has not been registered. The general rule is that *de facto* marriages are not legally binding.<sup>246</sup> Discussions surrounding revisions to the Marriage Law, however, imply that *de facto* marriages are revocable, but not invalid.<sup>247</sup> Therefore, if the cohabiting couple obtains a marriage certificate prior to revocation, the union will be valid.<sup>248</sup>

In rural areas, *de facto* marriages may include sixty to seventy percent of total marriages, with parties lacking either the intent or the monetary means to register their union.<sup>249</sup> This lack of registration has serious consequences for family planning;<sup>250</sup> parties to an unregistered marriage cannot obtain birth permits and, thus, any children of these unions are illegal and unregistered.

### *B. Family Planning Law*

The Family Planning Law, which essentially codifies the OCP, only became effective in December of 2001.<sup>251</sup> Prior to its promulgation, implementation of the OCP was spelled out by government directives and carried out by local officials.<sup>252</sup> Some commentators see the new law as a landmark in China's implementation of the OCP because it demonstrates the government's recognition of the implicit gender problems created by the OCP and is the first national attempt to address gender is-

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245. *Id.* art. 25.

246. Feng, *supra* note 236, at 348–49.

247. *Id.* at 349.

248. *Id.*

249. *Id.* at 346.

250. *Id.* at 347.

251. *See generally* FAMILY PLANNING LAW, *supra* note 36.

252. *See* Li, *supra* note 18, at 152.

sues on family planning.<sup>253</sup> For example, Article 22 prohibits discrimination and abandonment of female babies and their mothers while Article 35 prohibits sex selection and use of ultrasound technology for anything other than medical purposes.<sup>254</sup>

Nevertheless, the Family Planning Law does not change the essential elements of the OCP, namely a commitment to birth quotas and local implementation.<sup>255</sup> Moreover, much of the law is focused on the socioeconomic justifications for implementation of the OCP, not specific enforcement measures for it.<sup>256</sup> Most important, however, China's adoption of the Family Planning Law signifies China's continued commitment to the OCP.<sup>257</sup> China's previous failure to adopt a national law was seen as a convenient way to divert international criticism. The law's adoption, according to a panel member involved in the its drafting, demonstrates that family planning is now widely accepted.<sup>258</sup>

## V. LEGAL RAMIFICATIONS AND SUGGESTIONS FOR THE FUTURE

### A. *Legal Ramifications*

While the provisions of the Family Planning Law take precedent over the Marriage Law,<sup>259</sup> both laws require societal respect for the rule of law and a sound legal infrastructure to ensure enforcement and protection of promised legal rights.<sup>260</sup> Yet, the primary problem with implementation of the OCP has been the state's failure to adequately protect women and children.<sup>261</sup> These problems have not been alleviated since the adoption of the Family Planning Law. In fact, the unintended consequences of the OCP—gender discrimination, a woman shortage, and trafficking—may be exacerbated by strict enforcement of either the Family Planning Law or the Marriage Law.

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253. Hui, *supra* note 30, at 200.

254. FAMILY PLANNING LAW, *supra* note 36, arts. 22, 35.

255. *See id.* arts. 6, 7, 9, 12, 18.

256. *See id.* arts. 1, 2, 24, 25.

257. Hui, *supra* note 30, at 200.

258. *Id.*

259. MARRIAGE LAW (REVISED), *supra* note 33, art. 49.

260. Hui, *supra* note 30, at 204.

261. *See generally Report on CEDAW, supra* note 12.

Strict enforcement of the Family Planning Law could include stricter sanctions and increase the number of sex-selective abortions. On the other hand, strict enforcement of the Marriage Law could have serious consequences for China's next generation. Not only will unplanned births or unregistered children be unable to reap the benefits of the state,<sup>262</sup> but children theoretically falling within the OCP guidelines would be unregistered because of their parents' invalid marriages. Moreover, strict enforcement of the Marriage Law could force victims of trafficking to remain with their buyers because by revoking their marriages, these trafficked women would be forcing their children to be unregistered.

### *B. Possible Solutions*

While enforcement of the OCP has created a wide range of social, cultural and gender-related problems, China's recent adoption of the Family Planning Law reflects its long-term commitment to the policy.<sup>263</sup> Although the most effective solution would be a relaxation of the policy, that does not seem likely considering China's population problem and the shortage of relatively speedy, economical solutions.<sup>264</sup> While some commentators argue that public family planning education would eventually effectuate China's population goals, the reality is that it would not do so quickly enough to forestall the economic consequences of a baby boom in China.

Instead, China should focus on a reconstruction of its Marriage Law and amendments to its Family Planning Law. The largest hidden problem with the OCP is its effect on future generations, an effect that China could feel economically. By failing to register a large number of its children because of their unauthorized status, China is dooming them to an inferior existence. To begin, China could amend its Marriage Law so that children born out of wedlock and to invalid marriage arrangements, including *de facto* marriages, would not be unauthorized. In order for this change to be effective, however, China would also need to amend its Family Planning Law and prohibit the withholding of registration as a punishment for children

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262. *Unfair Burdens*, *supra* note 13.

263. *See generally* Hui, *supra* note 30.

264. Zhang, *supra* note 72, at 593.

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born out-of-plan. Moreover, China should give its Marriage Law equal weight and forbear valuing family planning over the rights and obligations of parents to their children. Finally, in order for China to demonstrate its commitment to human rights and gender equality, it must develop a comprehensive legal structure for enforcement of its prohibitions against trafficking and coercive family planning techniques. Without true enforcement of these prohibitions, as well as a crackdown on local corruption, China will be unable to garner popular support for the OCP or respect for the rule of law.

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\* B.A., University of Kansas (2002); J.D., Brooklyn Law School (Expected 2005). The opinions expressed in this Note are my own. I dedicate this Note to my parents, Mike and Alicia Harbin, for always supporting my interest in China. I would like to thank Erin McMurray and Lynn Diamond for their assistance with editing, and Professor Claire R. Kelly of Brooklyn Law School for offering her guidance throughout the process.