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# The Missing Girls of China: Population, Policy, Culture, Gender, Abortion, Abandonment, and Adoption in East-Asian Perspective

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## ARTICLES

### THE MISSING GIRLS OF CHINA: POPULATION, POLICY, CULTURE, GENDER, ABORTION, ABANDONMENT, AND ADOPTION IN EAST-ASIAN PERSPECTIVE

DAVID M. SMOLIN\*

Almost two decades ago, the Nobel-laureate economist Amartya Sen highlighted the issue of missing women in “large parts of Asia and Africa.”<sup>1</sup> Sen noted a possible 100 million missing females, which he attributed to a failure to provide women with equivalent levels of medical care, food, and social services, leading to excess female mortality.<sup>2</sup> Sen saw this failure as a complex cultural phenomenon which, while occurring only in developing nations, could not be explained by either poverty or by an East-West contrast.<sup>3</sup> Instead, Sen focused on cultural factors impacting the “status and power of women in the family,”<sup>4</sup> including employment outside of the home, ownership of assets, literacy, and education.<sup>5</sup>

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<sup>1</sup> Amartya Sen, *More Than 100 Million Women Are Missing*, N.Y. REV. BOOKS, Dec. 20, 1990, available at <http://ucatas.ucsc.edu/gender/Sen100M.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

Sen revisited the issue in 2003, noting that while mortality and survival for women had improved, the problem of missing females was now found in natality, with approximately the same percentages of females now being eliminated by sex-selective abortion.<sup>6</sup> Thus, the situation had grown worse in China, and only slightly improved in India, Pakistan, Bangladesh, and Western Asia.<sup>7</sup> Sen called for “intensive research” into the issue of “[s]ex bias in natality.”<sup>8</sup>

This Article responds to Professor Sen’s call for further research by focusing particularly on China. (A planned future Article will address India.) China’s sex-ratio imbalance is of special significance in numerous ways. First, as a matter of scale and sex-ratio imbalance, China has the most significant missing-girl problem of any nation in the world.<sup>9</sup> Second, China’s sex-ratio imbalance is “often seen as an unintended consequence” of China’s population-control policies, meaning that the policy is one of the significant factors in producing the imbalance.<sup>10</sup> Hence, the missing girls problem creates another perspective from which to view China’s extraordinary state control of procreation. Third, China’s missing girls problem represents an important facet of gender discrimination in the contemporary world, which demands further scrutiny and analysis.<sup>11</sup> Fourth, because sex-selective abortion has become a major means by which females are intentionally eliminated from families, it raises anew legal and ethical questions about abortion in particular, and modern technological control over procreation in general.<sup>12</sup> Fifth, there is the practical question of how to ameliorate

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<sup>6</sup> Amartya Sen, *Missing Women—Revisited: Reduction in Female Mortality Has Been Counterbalanced by Sex Selective Abortions*, 327 BRIT. MED. J. 1297, 1297 (2003), available at <http://www.bmj.com/content/327/7427/1297.full.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1298.

<sup>9</sup> See *id.*; Xinran Xue, *Gendercide: The Worldwide War on Baby Girls*, ECONOMIST, Mar. 6, 2010, at 13, 78-79.

<sup>10</sup> *Id.* at 77. Of course, as the *Economist* article recounts, that is not “the whole story.” *Id.* Nonetheless, another *Economist* article urges China to “scrap the one-child policy” as a means to ameliorate the missing girls problem, and so it is obviously viewed as a significant factor. George Bullard, *The War on Baby Girls: Gendercide*, ECONOMIST, Mar. 4, 2010, available at <http://bullardjournal.blogs.com/bullardjournal/2010/03/the-war-on-baby-girls-gendercide-from-the-economist-march-4-2010.html>.

<sup>11</sup> See Sen, *supra* note 1; see also Sen, *supra* note 6; Xue, *supra* note 9, at 13, 77-80.

<sup>12</sup> See Wei Xing Zhu, Li Lu & Therese Hesketh, *China’s Excess Males, Sex Selective Abortion, and One Child Policy: Analysis of Data from 2005 National Intercensus Survey*, 338 BRIT. MED. J. 920, 920 (2009), available at

a problem relating to procreation, which is itself an unintended consequence of a massive act of state intervention in the area of procreation. Sixth, there is a significant link between China's population-control policies, the consequent missing girls problem, and China's intercountry adoption program.<sup>13</sup> That link requires further scrutiny now that intercountry adoptions from China are significantly decreasing, and evidence has emerged of population control officials illicitly obtaining children to sell to orphanages.

The focus of this Article is China. Nonetheless, the title of "East Asian" perspective is designed to suggest that these issues should ultimately be examined from a comparative perspective. East Asian societies have shared both a notable economic rise and a sharply declining fertility.<sup>14</sup> Japanese and South Korean fertility levels have dropped well below replacement levels, creating the specter of rapidly shrinking and aging societies.<sup>15</sup> China and South Korea have shared historical variants of a patrilineal family system and sex ratio imbalances in recent times; Japan, by contrast, has a different history of family structures and has not faced a significant issue, in modern times, with sex ratio differentials.<sup>16</sup> While a full comparative scope will not be attempted in this Article, the title's suggestion is that one would be appropriate, and some initial lines of suggestion will be made. Beyond East Asia, the comparison to India and South Asia will ultimately also be quite significant, given India's sex ratio imbalance and the combined weight of China and

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[http://www.bmj.com/cgi/reprint/338/apr09\\_2/b1211](http://www.bmj.com/cgi/reprint/338/apr09_2/b1211) (noting that "[s]ex selective abortion accounts for almost all of the excess males").

<sup>13</sup> See, e.g., KAY ANN JOHNSON, WANTING A DAUGHTER, NEEDING A SON: ABANDONMENT, ADOPTION, AND ORPHANAGE CARE IN CHINA (Amy Klatzkin ed., 2004); see also Barbara Stark, *Baby Girls From China in New York: A Thrice-Told Tale*, 2003 UTAH L. REV. 1231 (2003).

<sup>14</sup> See, e.g., DAVID E. BLOOM, DAVID CANNING & JAYPEE SEVILLA, THE DEMOGRAPHIC DIVIDEND 44, 45 (2003) (exploring possible relationships between demographic change and economic performance, including in East Asia).

<sup>15</sup> Lam Peng Er, *Declining Fertility Rates in Japan: An Ageing Crisis Ahead*, 26 E. ASIA 177, 177, 179, 186 (2009); see BLOOM, CANNING & SEVILLA, *supra* note 14, at 46-48; see also Midori Shimada, *Fertility Rate Decline in Japan from the Perspective of Gender Inequality and Social Problems of Modern Japanese Family* (Spring 2009) (unpublished M. Social Work thesis, University of Jyväskylä), available at [https://jyx.jyu.fi/dspace/bitstream/handle/123456789/21260/URN\\_NBN\\_fi\\_jyu-200906251750.pdf?sequence=1](https://jyx.jyu.fi/dspace/bitstream/handle/123456789/21260/URN_NBN_fi_jyu-200906251750.pdf?sequence=1).

<sup>16</sup> See, e.g., G. William Skinner, Professor, Dep't of Anthropology, Univ. of Cal., Davis, *Family and Reproduction in East Asia: China, Korea, and Japan Compared* 2, 3, 10, 17, 18 (Oct. 8, 2002), [www.sfaa.gov.hk/doc/en/scholar/seym/Prof\\_Skinners\\_report.doc](http://www.sfaa.gov.hk/doc/en/scholar/seym/Prof_Skinners_report.doc).

India both experiencing these differentials.<sup>17</sup> This Article occasionally widens the scope to South and Southeast Asia; these comparisons will be made more fully in a subsequent Article.

## I. STATISTICAL AND HISTORICAL APPROACHES

The scale and significance of China's missing girls problem can be evaluated through modern statistics and historical demographic study. Such approaches provide significant information and questions relevant to ethical, legal, and public policy analysis.

### A. *Statistical Measures of China's Sex Ratio Imbalance*

Statistically, the best evidence available indicates that China's sex ratio, at birth, currently or within the last ten years, has been in a range of 117 to 124 males per 100 females, or 1.17 to 1.24; the most recent data available indicates a rate at or somewhat above 120/100.<sup>18</sup> The normal sex ratio at birth is generally considered to fall in a range from 105 to 107 males per 100 females,<sup>19</sup> with a common figure used for China being 106/100, or 1.06.<sup>20</sup> Thus, China appears to be missing, in rough terms, approximately 10% of its females at or near birth.<sup>21</sup>

There are difficulties with these statistics. First, much of the published research analyzes data based on relatively small samples or percentages of the population.<sup>22</sup> Second, at least some of the

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<sup>17</sup> VALERIE M. HUDSON & ANDREA M. DEN BOER, BARE BRANCHES: SECURITY IMPLICATIONS OF ASIA'S SURPLUS MALE POPULATION 65 (2004) (discussing both China and India).

<sup>18</sup> Zhu, Lu & Hesketh, *supra* note 12, at 921-23.

<sup>19</sup> *Id.* at 920.

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., Xue, *supra* note 9, at 78 (quoting Chinese Academy of Social Sciences for rates of 124/100 from 2000 to 2004 and 123/100 at present, and United Nations for graph showing rate of more than 120/100); Monica Das Gupta, Woojin Chung & Li Shuzhuo, *Is There an Incipient Turnaround in Asia's 'Missing Girls' Phenomenon?*, (Feb. 1, 2009) (World Bank Policy Research, Working Paper No. 4846), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1354952](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354952); Zhu, Lu & Hesketh, *supra* note 12, at 920-25; see Shuzhuo Li, 4TH ASIA PAC. CONFERENCE ON REPROD. & SEXUAL HEALTH & RTS., *Imbalanced Sex Ratio at Birth and Comprehensive Intervention in China* 8, app. at 2 (2007), available at <http://www.unfpa.org/gender/docs/studies/china.pdf>.

<sup>22</sup> See, e.g., HUDSON & DEN BOER, *supra* note 17, at 156; Avraham Eberstein, *The "Missing Girls" of China and the Unintended Consequences of the One Child Policy*, 45 J. HUM. RESOURCES 87, 91 n.6 (2010) (listing sample sizes for Chinese census data of either 1% or one per thousand); Zhu, Lu & Hesketh, *supra* note 12, at 920 ("inter-census survey of 2005 . . . was carried out on a representative 1% of" the total Chinese population).

census data fails to explicitly match mothers to children, and it does not cover children “no longer living at home.”<sup>23</sup> Third, China’s population control policies create incentives to hide births and children, and efforts to separate the data-gathering process from enforcement may not remove the distortive impact of those policies on the accuracy of the data.<sup>24</sup> Fourth, there are concerns that political pressures might corrupt the process of gathering and distributing demographic data in China, causing government officials at various levels to alter the data.<sup>25</sup> Fifth, there can be controversy over the exact baseline or “normal” sex ratio for China.

Despite these difficulties, the statistical information that exists appears to have demonstrated to a significant degree of certainty that China is missing about 10% of females at birth.<sup>26</sup> Further, Emily Oster’s hypothesis that the sex ratio imbalance is due to a natural disease process (Hepatitis B) has upon examination proven incorrect; hence, Oster herself has abandoned it.<sup>27</sup> Thus, it is apparent that the sex ratio imbalance is overwhelmingly due to human intervention, rather than any natural disease process.

Statistical evidence has also verified the common-sense inference that the sex ratio imbalance is significantly caused by China’s population control policies. The first, somewhat crude statistical confirmation is the significant rise in sex ratio imbalance that occurred under the first several decades of enforcement of the policy. China had achieved something close to a normal sex ratio in the period prior to the start of the so-called “one-child” policy in 1979-1980,<sup>28</sup> and it is difficult to account for the severe imbalances since then, apart from China’s unprecedented government control over

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<sup>23</sup> Eberstein, *supra* note 22, at 91.

<sup>24</sup> Cf. HUDSON & DEN BOER, *supra* note 17, at 156 (noting that census data in China is collected by census surveyors).

<sup>25</sup> See *id.* at 174-75.

<sup>26</sup> See *supra* notes 17-22.

<sup>27</sup> See Eberstein, *supra* note 22, at 96 & n.15 (referencing Emily Oster, *Hepatitis B and the Case of the Missing Women*, 113 J. POL. ECON. 1163 (2005); Ming-Jen Lin & Ming-Ching Luoh, *Can Hepatitis B Mothers Account for the Number of Missing Women? Evidence from Three Million Newborns in Taiwan*, 98 AM. ECON. REV. 2259, available at <http://homepage.ntu.edu.tw/~mjlin/HBV%20and%20Missing%20Women-2008.pdf>; Emily Oster, Gang Chen, Xinsen Yu & Wenyao Lin, *Hepatitis B Does Not Explain Male-Biased Sex Ratios in China* (Apr. 16, 2008) (unpublished National Bureau of Economic Research paper), available at <http://home.uchicago.edu/eoster/hbvnotecon.pdf>.

<sup>28</sup> See JAMES Z. LEE & WANG FENG, *ONE QUARTER OF HUMANITY: MALTHUSIAN MYTHOLOGY AND CHINESE REALITIES, 1700-2000*, at 53 (1999); see also Therese Hasketh, Li Lu & Zhu Wei Xing, *The Effect of China’s Policy After 25 Years*, 353 NEW ENG. J. MED. 1171, 1171-76 (2005).

procreation in the ensuing decades.<sup>29</sup> More precise confirmation comes by comparing variations in sex ratio imbalances to variations in population control policies or enforcement, as well as by documenting differential sex ratios based on birth order and gender of prior children. Thus, where the one-child policy is not applied (as in autonomous regions or as applied to certain minority populations), the sex ratio is essentially normal.<sup>30</sup> Where the population control policies are enforced in such a way as to permit families a second child where they have a first-born daughter, sex ratios for first children are essentially normal; however, the ratios rise significantly for successive children, particularly based on gender.<sup>31</sup> When population control policies are enforced with particular strictness, overall sex ratios become worse, and a sex ratio imbalance appears even in first-born children.<sup>32</sup> The recent disclosure of a normal sex ratio in a locale, Yicheng County, long operating under an experimental two-child policy, further underscores the role of the one-child policy in producing a sex ratio imbalance.<sup>33</sup> All of these statistics and data confirm that families are attempting to simultaneously avoid the punitive and coercive elements of China's population control policies while still ensuring they meet the felt need for a son.

Clearly, culture plays a significant role in this felt family "need" for a son.<sup>34</sup> It is the population control policies, however, that push families to the extraordinary step of eliminating daughters, because it cuts off the alternative of accepting the daughter while continuing to try for a son. Hence, when the Chinese government either cuts off or makes very expensive the step of having an additional child, a significant percentage of families seek some means of eliminating the daughter from their limited allocation of children in order to reserve the spot for a hoped-for son. Thus, while cultural factors alone might produce some sex ratio imbalance, the

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<sup>29</sup> See JOHNSON, *supra* note 13, at 4-5; see generally Eberstein, *supra* note 22.

<sup>30</sup> See HUDSON & DEN BOER, *supra* note 17, at 156-67; Eberstein, *supra* note 22; Zhu, Lu & Hesketh, *supra* note 12.

<sup>31</sup> Hasketh, Lu & Xing, *supra* note 28, at 1171-76; see Eberstein, *supra* note 22.

<sup>32</sup> See Hasketh, Lu & Xing, *supra* note 28; Eberstein, *supra* note 22.

<sup>33</sup> See Jane Macartney, *Success of Secret Two-Child Policy Could Force Chinese Rethink on Family Planning*, TIMES (London), Mar. 19, 2010, available at <http://www.timesonline.co.uk/tol/news/world/asia/article7067834.ece>; Bill Schiller, *China's Happy Two-Child Experiment*, THESTAR.COM (Apr. 23, 2010), <http://www.thestar.com/news/insight/article/799721-china-s-happy-two-child-experiment>.

<sup>34</sup> See, e.g., JOHNSON, *supra* note 13.

population control policy has clear statistical impacts in substantially worsening China's sex ratio imbalance.<sup>35</sup>

The more difficult question is whether there can be any statistical demonstration of what happens to the "missing girls." There is no indication that the Chinese are practicing any systematic and successful techniques for sex selection prior to conception, presumably because such techniques are not demonstrably effective. (The presumption that such techniques are ineffective frees us from having to survey the various methods by which some may attempt to manipulate the child's gender prior to conception.) Further, there is no indication that the Chinese are practicing, in significant number, highly expensive pre-implantation techniques, such as in-vitro fertilization in combination with pre-implantation diagnosis of gender. Thus, virtually all researchers presume that while the Chinese are conceiving children according to a normal sex ratio of approximately 1.06, something is causing about 10% of the females to go "missing."<sup>36</sup>

Sex-selective abortion, infanticide, abandonment, and the hiding of over-quota female children are the major ways in which females might statistically disappear from China's population.<sup>37</sup> Statistical confirmation of the prominence of such methods is found in analyzing the interval between births according to gender. The longer average interval prior to subsequent male births is explainable by use of abortion, infanticide, or abandonment to eliminate an intervening female.<sup>38</sup> This evidence, however, merely points to the existence of females who were brought to the point of a sex-selective abortion (generally twenty weeks or later) or birth, prior to some intervention that would make them "disappear" for purposes of China's population control policies. This birth interval data is strong evidence for the prior presence of the later missing females, but not sufficient evidence of what actually caused the disappearance.

Sex-selective abandonment poses difficult questions as to the measurement of sex ratios in China. Chinese social welfare institutions were reportedly overwhelmed with abandoned baby girls in the 1980s and 1990s, due to the enforcement of the one-child policy.<sup>39</sup> The question is how such babies are counted in Chinese statistics. Because relinquishment is not a legal option in China, and

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<sup>35</sup> See generally Eberstein, *supra* note 22; JOHNSON, *supra* note 13, at 4-5.

<sup>36</sup> See, e.g., sources cited *supra* notes 13, 17-18.

<sup>37</sup> See, e.g., Hasketh, Lu & Xing, *supra* note 28.

<sup>38</sup> See Eberstein, *supra* note 22, at 94-96.

<sup>39</sup> See JOHNSON, *supra* note 13, at 1-23, 43-48, 49-64, 76.



abandonment is a crime, those who give birth and then abandon their babies are seeking to avoid becoming legally associated with the child in any way.<sup>40</sup> Hence, abandoned babies would escape any household counting of children, as abandoned babies would not be associated with their original families. One question, then, is whether abandoned babies who find their way into some form of government care are then counted as a part of the population. Another question is whether there is a larger number of surviving abandoned babies who never find their way into official government care, but nonetheless survive, being cared for officially or unofficially in some sort of family setting.<sup>41</sup>

For most of the relevant period, abandoned babies coming into government care usually have lived in social welfare institutions or orphanages, with intermittent use of foster care.<sup>42</sup> One unknown is whether a proportionate number of children in government care are added back into the population when China does its census. An additional unknown is the death rate for abandoned infants; thus, there is the question of whether abandoned babies who die ever get counted in the census. Because abandonment in China serves as a substitute for relinquishment, it seems that many abandoned infants survive as their mothers deliberately leave them in places where they would be found.<sup>43</sup> To the degree that such babies survive, sex-selective abandonment should not impact China's sex ratio, at least to the degree that statistics are accurate. However, even assuming that many abandoned babies survive initial abandonment, there have been reports of very high death rates in Chinese orphanages.<sup>44</sup> Even if one discounts the controversial *Dying Rooms* documentary and lengthy Human Rights Watch report from the 1990s as being over-sensationalized or inaccurate in suggesting a deliberate policy of allowing infants to die, it was appar-

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<sup>40</sup> *Id.* at 91-92; see Patricia J. Meier & Xiaole Zhang, *Sold Into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 CUMB. L. REV. 87, 128 (2008), available at <http://www.ethicanet.org/MeierZhang.pdf>; Nilo Luo & David M. Smolin, *Inter-country Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 601 (2005); Barbara Demick, *A Family in China Made Babies Their Business*, L.A. TIMES, Jan. 24, 2010, available at <http://articles.latimes.com/2010/jan/24/world/la-fg-china-adopt24-2010jan24>.

<sup>41</sup> See JOHNSON, *supra* note 13, at 71-73.

<sup>42</sup> *Id.* at 62-63, 196, 204; Liu Meng & Zhu Kai, *Orphan Care in China*, 7 SOC. WORK & SOC'Y 43, 46-47 (2009), available at [http://www.socwork.net/2009/1/special\\_issue/mengkai/SI\\_MengKai.pdf](http://www.socwork.net/2009/1/special_issue/mengkai/SI_MengKai.pdf).

<sup>43</sup> See Meng & Kai, *supra* note 42, at 47.

<sup>44</sup> See JOHNSON, *supra* note 13, at 41-43.

ently correct that there were very high mortality rates for abandoned babies living in Chinese government orphanages, at least during the initial years after implementation of the one-child policy.<sup>45</sup> Were abandoned infants who died in institutions ever counted in reports on China's population? The presumption is, of course, that death rates later declined significantly in Chinese social welfare institutions due to improvements in care.<sup>46</sup>

Some abandoned infants have been adopted. The number of abandoned babies leaving China for inter-country adoption, while very significant for inter-country adoption and the affected children and families, is not large enough to make a statistically significant difference to China's sex ratio balance.<sup>47</sup> A child officially adopted within China would presumably be counted in census figures. The Chinese government, however, imposed significant limitations on domestic adoption during the 1980s and 1990s to ensure that such adoptions were not used to bypass population control limitations. These disincentives to official domestic adoption kept the numbers of such adoptions relatively small, while also creating an incentive toward unofficial or informal adoptions.<sup>48</sup> Claims of large numbers of informal or unofficial adoptions, however, raise difficult questions. Were such children found and acknowledged in census and other data, or were they hidden in such a way that they are overlooked?<sup>49</sup>

This raises the closely-related issue of China's unregistered, over-quota, and hidden children.<sup>50</sup> Parents concerned with repercussions from over-quota births might hide the birth and child by several means, including sending the child away to relatives, friends, or others. The question of how many such "shadow" (i.e., unofficial) children China has, and the proportion of girls, is significant. Statistically, one can look for such children by trying to

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<sup>45</sup> See *id.* at 41-48, 186-92; Patrick E. Tyler, *In China's Orphanages, a War of Perception*, N.Y. TIMES, Jan. 21, 1996, available at <http://www.nytimes.com/1996/01/21/movies/television-in-china-s-orphanages-a-war-of-perception.html>; Anne F. Thurston, *In a Chinese Orphanage*, 277 ATLANTIC MONTHLY 28 (1996), available at <http://www.theatlantic.com/past/docs/issues/96apr/orphan/orphan.htm>; see generally YOUTUBE, <http://www.youtube.com> (search "the dying rooms").

<sup>46</sup> See JOHNSON, *supra* note 13, at chs. 2-5.

<sup>47</sup> See Eberstein, *supra* note 22, at 96; *infra* notes 177-213 and accompanying text.

<sup>48</sup> See Luo & Smolin, *supra* note 40, at 610-16; JOHNSON, *supra* note 13, at 155-82.

<sup>49</sup> See JOHNSON, *supra* note 13, at 72, 155-82; LEE & WANG, *supra* note 28, at 57.

<sup>50</sup> See, e.g., LEE & WANG, *supra* note 28, at 57.

discover if girls, statistically absent at birth, reappear in significant number at older ages.<sup>51</sup>

Amidst these various possibilities, it seems most likely that the large-scale availability of sonogram machines and the legal and practical availability of abortion have led sex-selective abortion to become the primary means by which females are missing from the population.<sup>52</sup> The exact date when sex-selective abortion became primary is difficult to determine, but this presumably occurred more than ten years ago (i.e., before 2000). Ultrasound machines were reportedly introduced into use in China in the 1980s, reaching country hospitals by the late 1980s and “rural townships by the mid-1990s.”<sup>53</sup> In 2003, Kay Johnson, a leading scholar of abandonment and adoption in China, cited the likelihood of sex-selective abortions leading to a decrease in sex-selective abandonments, and, in all likelihood, this trend had originated many years earlier.<sup>54</sup>

The progressive nature of the sex ratio imbalance also suggests that the increasing availability of ultrasound machines accelerated the imbalance, as the imbalance has worsened as ultrasound machines have become increasingly available. Thus, James Lee and Wang Feng note that “sex-selective behavior [has] grown even sharper . . . as sex-selective abortion has become widely available.”<sup>55</sup> They provide the following statistical accounting of this growing imbalance:

1977-1981: 108

1985-1989: 113

1990-1994: 115<sup>56</sup>

Other sources give slightly different statistics but confirm the progressive nature of the imbalance through the 1980s and 1990s.<sup>57</sup>

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<sup>51</sup> See Zhu, Lu & Hesketh, *supra* note 12, at 920.

<sup>52</sup> See *id.* (“Sex selective abortion accounts for almost all the excess males.”); Hesketh, Lu & Xing, *supra* note 28, at 1173 (“Sex-selective abortion after ultrasonography undoubtedly accounts for a large proportion of the decline in female births.”); Eberstein, *supra* note 22; Shuzhuo, *supra* note 21, at 5 (“[R]ecent studies have found that it is sex-selective abortion, rather than female infanticide or underreporting, that is actually behind the rise in China’s SRB. . . .”); Jasper Becker, *Lost Girls of China*, WEEKEND STANDARD, Feb. 5-6, 2005, available at <http://www.thestandard.com.hk/stdn/std/Weekend/GB05Jp01.html> (quoting demographer Judith Bannister’s conclusion that “[m]ost of the girls are missing because of late-term abortions”).

<sup>53</sup> Zhu, Lu & Hesketh, *supra* note 12, at 5.

<sup>54</sup> See JOHNSON, *supra* note 13, at 206-09; see also *supra* notes 52-53 and accompanying text.

<sup>55</sup> LEE & FENG, *supra* note 28, at 57.

<sup>56</sup> *Id.*

Multiple sources report that by 2005, the ratio had worsened to a range of 118 to 120, with the more likely figure being around 120.<sup>58</sup> The optimistic scenario is that the rate at which the sex ratio is worsening has declined, indicating that the sex ratio has recently, or is about to, level off.<sup>59</sup> Projections for the future include: (1) the possibility of the ratio worsening to 125 (which given some estimates of a ratio of 124, may have already occurred); (2) the imbalance remaining at 2005 levels (118 to 120); (3) the ratio decreasing to a lesser imbalance around 109; and (4) a return to a normal sex ratio.<sup>60</sup> Of course, it is possible that adjustments in Chinese law and policy, discussed below, might be able to impact future sex ratios.<sup>61</sup>

To this point, it does not appear that Chinese efforts to prevent sex-selective abortions directly through legal prohibitions have been successful, although the problem might have been much worse in the absence of such laws. The government prohibited “techniques to identify foetal sex for non-medical purposes” in 1994, and reinforced and reapplied this principle in subsequent legal and policy directives in 2001, 2002, 2003, and 2006.<sup>62</sup> Sex-selective abortion has been prohibited since 2001.<sup>63</sup> These legal directives are themselves evidence of the practice of sex-selective abortion, indicating that the government was significantly aware of the problem by the early 1990s and has become increasingly concerned with the practice. Of course, making fetal sex identification

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<sup>57</sup> See, e.g., Hasketh, Lu & Xing, *supra* note 28, at 1172 (showing rates of 1.06 in 1979, 1.11 in 1988, and 1.17 in 2001); Eberstein, *supra* note 22, at 90 (demonstrating progressive imbalance tracked for second and third births).

<sup>58</sup> See Das Gupta, Chung & Shuzhuo, *supra* note 21, at 3, 12, 14 (showing rates around 120 or higher); Zhu, Lu & Hesketh, *supra* note 12, at 921 (“[T]otal sex ratio at birth for the 12 months to October 2005 was 120 (119 to 121) for the whole sample . . . .”); Avraham Y. Eberstein & Ethan Jennings Sharyginn, *The Consequences of the ‘Missing Girls’ of China*, 23 WORLD BANK ECON. REV. 399, 406 (2009) (2005 sex ratio at birth listed at 118).

<sup>59</sup> See Das Gupta, Chung & Shuzhuo, *supra* note 21, at 8-9.

<sup>60</sup> See Eberstein & Sharyginn, *supra* note 58, at 407; Xue, *supra* note 9, at 78 (indicating sex ratio imbalances of 123-24).

<sup>61</sup> See *infra* Part IV.

<sup>62</sup> See Shuzhuo, *supra* note 21, at 8, app. at 2 (including in Table 1: Law of the People’s Republic of China on Maternal and Infant Health Care (1994); Stipulations on Family Planning Technical Services (2001); Population and Family Planning Law of the People’s Republic of China (2002); Stipulation on Forbidding Non-medical Aimed Fetus Sex Determination and Sex Selective Abortion (2003); Decision of the Central Committee of the Communist Party of China and the State Council on Fully Enhancing Population and Family Planning Programme and Comprehensively Addressing Population Issues (2006)).

<sup>63</sup> See *id.*

and sex-selective abortion illegal renders these acts clandestine and, hence, more difficult to measure. In a context, however, where abortion is generally legal and there is broad access to both ultrasound and abortion, enforcement of the legal prohibition is extraordinarily difficult.

*B. Historical Contexts for China's Sex Ratio Imbalance*

Historically, it is reasonably clear that China has, for centuries, lived with a significant sex ratio imbalance, which was created in significant part through sex-selective infanticide. Measuring the historical sex ratio imbalance against the contemporary one is difficult due to the lack of precise and comprehensive measures of the distant past. Nonetheless, scholars have provided significant glimpses of China's historical sex ratio imbalance within the context of a large-scale practice of infanticide.

For example, Lee and Wang estimate that, in some regions of China, "as many as half of all newborns were sometimes killed by their families."<sup>64</sup> Hence, "survivorship" was frequently a matter of (family) choice, the most prominent choice being the elimination of daughters.<sup>65</sup> For example, as many as one-tenth of all daughters born into the imperial lineage from 1700 to 1830 were victims of infanticide.<sup>66</sup> A study of peasants born between 1774 and 1873 finds that between "one-fifth and one-quarter of all females died from deliberate infanticide."<sup>67</sup>

The ethical and legal place of infanticide and sex selection in Chinese history appears mixed. Valerie M. Hudson and Andrea M. den Boer collected sources indicating that infanticide was "constantly condemned throughout Chinese history,"<sup>68</sup> became a crime in the twelfth century,<sup>69</sup> and was subsequently legally condemned by a variety of orders, decrees, and punishments.<sup>70</sup> Lee and Wang agree that there is a long history of making infanticide illegal in China, but they introduce a contrasting theme of infanticide as rational and ethical within a historical Chinese cultural context.<sup>71</sup>

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<sup>64</sup> LEE & WANG, *supra* note 28, at 47.

<sup>65</sup> *See id.*

<sup>66</sup> *See id.* at 49-50.

<sup>67</sup> *Id.* at 51 (citing JAMES LEE & CAMERON CAMPBELL, FATE AND FORTUNE IN RURAL CHINA: SOCIAL ORGANIZATION AND POPULATION BEHAVIOR IN LIAONING 1774-1873 (1997)).

<sup>68</sup> *See* HUDSON & DEN BOER, *supra* note 17, at 141.

<sup>69</sup> *Id.* at 139.

<sup>70</sup> *Id.* at 140-41.

<sup>71</sup> LEE & WANG, *supra* note 28, at 60-61.

A major theme of Lee and Wang is to refute the Malthusian libel that the Chinese essentially bred indiscriminately until checked by starvation and misery, while the modern Western world employed the apparently more rational “preventive” check of restricting and delaying marriage.<sup>72</sup> From this perspective, female infanticide becomes a response to this libel by indicating the use of choice and rational planning in controlling population.<sup>73</sup> Hence, a female infanticide rate of 10% (which likely existed throughout much of Chinese history) “could reduce the annual population growth rate by approximately 30 percent.”<sup>74</sup> From this perspective, infanticide appears as an important part of a rational demographic system designed to adjust demographic behavior in order to maximize collective utility.<sup>75</sup> Further, Lee and Wang discuss the duties of household heads to “have more sons and therefore presumably to kill more daughters.”<sup>76</sup> This suggests female infanticide as a familial duty in at least some circumstances, rather than as an anti-social act.

Lee and Wang further argue that human neonates were not considered fully human, but “young animals,” and killing infants was not perceived as murder, but rather as a form of “postnatal abortion.”<sup>77</sup> Hence, infanticide historically “was a product of rational decision making embedded in a peculiar cultural attitude toward life.”<sup>78</sup> Therefore, female infanticide can be characterized historically in diverse ways that emphasize it either as a deeply-entrenched pathology in Chinese society or as a highly rational, utility-maximizing duty deeply integrated into an effective societal set of demographic practices.

Within this historical context, sex-selective abortion is viewed as the natural successor to sex-selective infanticide.<sup>79</sup> In a contemporary context where infanticide “is now both illegal and widely considered immoral,” but abortion is “legal and encouraged,” “[i]t is therefore hardly surprising that Chinese take advantage of the recent dissemination of ultrasound technology to control not only

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<sup>72</sup> *Id.* at 4.

<sup>73</sup> *See id.* at 60-61.

<sup>74</sup> *Id.* at 107 (citing William Lavelly & R. Bin Wong, *Revising the Malthusian Narrative: The Comparative Study of Population Dynamics in Late Imperial China*, 57 J. ASIAN STUD. 714 (1998)).

<sup>75</sup> *See id.*

<sup>76</sup> *Id.* at 128.

<sup>77</sup> LEE & WANG, *supra* note 28, at 61.

<sup>78</sup> *Id.* at 60-61.

<sup>79</sup> *See id.* at 61-62.

the number but also the sex composition of their children.”<sup>80</sup> A long cultural context of controlling reproduction, in terms of number and gender, by eliminating nascent human life is simply transferred from infanticide to abortion.

Another significant context for China’s historical sex ratio imbalance, beyond infanticide, is “a primordial prejudice against daughters,” dating back to “the origins of ancestral worship in the second and third millennia B.C. . . . reinforced by a patrilineal and patrilocal familial system, [and] supported by the imperial and especially late imperial state, which systematically discriminated against daughters.”<sup>81</sup> In addition, a dowry custom would have obligated rich families to pay a significant amount to marry off their daughters, although poor families might receive a bride price.<sup>82</sup> Thus, under the Chinese family systems, daughters were destined to become a part of someone else’s family with their obligations in adult life toward their husband’s family. Sons meant a life-long emotional gain, continuation of the family line, financial security in terms of the obligation toward taking care of elderly parents, and possibly the receipt of a dowry at marriage. Cultural beliefs in the inferiority of females were thus reinforced by a family structure in which daughters were “perceived by most families as a net economic and emotional loss.”<sup>83</sup>

The major question posed by this historical record of stark sex discrimination is the extent of progress for women, particularly since the Communist Revolution, as well as the possibilities for further change. The worsening sex ratio of China since the imposition of the 1979 population control policy is an indication that sex discrimination in the valuation of daughters remains prominent in China. Women, presumably, have made significant gains in some areas of life in China; despite those gains, however, Chinese families, under the pressures of governmental population control policies, appear to have returned to historical levels of sex selection, employing abortion rather than infanticide as the primary means.<sup>84</sup> Regardless of the change of means used to eliminate daughters, the collective reproductive decisions of Chinese families appear to re-

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<sup>80</sup> *Id.* at 61.

<sup>81</sup> *Id.* at 47 (A patrilineal family system is one where individuals belong to their father’s family, and therefore, descent passes through the male line; a patrilocal system is where married couples live with or near (and likely under the authority of) the husband’s parents).

<sup>82</sup> *Id.* at 60, 81.

<sup>83</sup> LEE & WANG, *supra* note 28, at 48.

<sup>84</sup> *See generally* Zhu, Lu & Hesketh, *supra* note 12.

flect a deep continuity with the past. From this perspective, assumptions that modernization, economic development, the employment of women, the shrinking of family size, communist party ideology, and government propaganda would more or less automatically lead to the equality of women may need to be re-examined. Instead, modern technology, small families, and government control of reproduction have now spawned a new Leviathan of sexism and a rebirth of historical devaluations of daughters in Chinese society.

## II. POPULATION CONTROL, DECLINING FERTILITY, AND THE DEVALUATION OF GIRLS AND WOMEN

The economic rise of East Asia has been accompanied by stark changes in reproductive behavior. China, Japan, and South Korea have experienced sharp decreases in fertility.<sup>85</sup> Both Japan and South Korea developed fertility rates well below replacement level, producing the specter, if changes do not occur, of aging and shrinking societies.<sup>86</sup> The present and future impact of these demographic changes on East Asian economies and societies remain unsettled. Some perceive the economic rise of East Asia as positively impacted by a demographic bonus induced by fertility declines; others warn, however, that in the longer term, aging and shrinking societies may experience grave economic and social consequences.<sup>87</sup> It is possible that both are true: The demographic transition to low fertility produces an initial economic benefit during an interim in which the ratios of workers to dependents are favorable; as the population ages and shrinks, however, the ratios of workers to dependents becomes unfavorable and produces an economic detriment.<sup>88</sup>

In terms of this Article's focus on sex ratio imbalance, it should be noted that China and Korea have far more in common as societies with long histories of some form of the patrilineal family structure and a significant sex ratio imbalance in recent years. By comparison, for much of Japan's history, the family structure has been rather different from that of China and Korea, and in

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<sup>85</sup> See BLOOM, CANNING & SEVILLA, *supra* note 14 (exploring relationships between economics and demographics in the context of East Asia and elsewhere); Shimada, *supra* note 15; Peng Er, *supra* note 15.

<sup>86</sup> Peng Er, *supra* note 15.

<sup>87</sup> Compare BLOOM, CANNING & SEVILLA, *supra* note 14 with Hasketh, Lu & Xing, *supra* note 28.

<sup>88</sup> See BLOOM, CANNING & SEVILLA, *supra* note 14.



modern times, there has not been a sex ratio imbalance.<sup>89</sup> Nonetheless, the context of sharp declines in fertility is common to these East Asian societies and may be useful for comparative purposes.

In retrospect, the sharp decline in fertility rates throughout East Asia raises the obvious question of whether China could have adequately addressed its population concerns without imposing its coercive one-child policy. Other East Asian nations have, after all, accomplished sharp fertility declines without imposition of such a draconian policy.<sup>90</sup> In addition, the sharpest declines in China's fertility occurred in the decade prior to imposition of the one-child policy under a largely voluntary population policy.<sup>91</sup> Thus, it is unclear whether a coercively enforced policy was necessary or whether less drastic means of state influence would have been better. There is also the question of whether a two-child policy would have been both more effective and also less subject to unfortunate, unintended consequences, such as the sex ratio imbalance. The recent announcement that a previously secret, experimental two-child policy produced both lower fertility rates and near normal sex ratios underscores this question.<sup>92</sup>

China's population control policies represent an extraordinary degree of state control over procreation, governing not only the number of children, but also the timing of marriage and procreation, and often the choice of contraceptive method.<sup>93</sup> While the government has imposed the norm of one child per family on significant portions of the population (hence the term "one-child policy"), in practice there are various exceptions to the one-child norm. Thus, the one-child rule has not been applied to ethnic minorities, and families in rural areas are often permitted a second child where the first child is a daughter.<sup>94</sup> Where a child dies or has a non-genetic disability, families may be permitted an additional child.<sup>95</sup> Multiple births (such as twins) may not be treated as a vio-

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<sup>89</sup> See Skinner, *supra* note 16, at 17-19.

<sup>90</sup> See Hasketh, Lu & Xing, *supra* note 28, at 1172.

<sup>91</sup> See *id.*

<sup>92</sup> See Macartney, *supra* note 33.

<sup>93</sup> See, e.g., SUSAN GREENHALGH & EDWIN A. WINCKLER, GOVERNING CHINA'S POPULATION (2005) (extensively analyzing the development of China's political control of population and population policies from 1949-2004); SUSAN GREENHALGH, JUST ONE CHILD, SCIENCE AND POLICY IN DENG'S CHINA (2008) (focusing on development and selection of the one-child policy and policy debates in China between 1978 and 1980); Hasketh, Lu & Xing, *supra* note 28; HUDSON & DEN BOER, *supra* note 17, at 152-54.

<sup>94</sup> See Macartney, *supra* note 33.

<sup>95</sup> HUDSON & DEN BOER, *supra* note 17, at 153.

lation of the policy. More recently, two only-children who marry are permitted to have two children.<sup>96</sup>

Enforcement methods have varied significantly between rural and urban areas and also vary depending on whether the individual is working for a state or private enterprise. The geographic region, the political era, and the proclivities and pressures faced by local governmental and population control officials also impact enforcement methods.<sup>97</sup> Because China's population control policies are a mixture of law and government policy, it is not possible to state any universal enforcement policy. Population policies, population targets, and particular population campaigns may be initiated centrally, but they are enforced or imposed in diverse ways at the local level.<sup>98</sup> Thus, although some enforcement methods, such as coerced abortions, may not be specifically authorized or may even be illegal, they have been periodically imposed by some local officials in response to pressures to meet certain population targets or quotas.<sup>99</sup> Thus, waves of strict enforcement have come and gone at particular times. Financial penalties are a mainstream form of enforcement, but they vary by locale, year, and individual discretionary decisions of local officials; while financial penalties have often been quite onerous for many families, they have also sometimes allowed wealthier families to essentially pay their way out of the strict policy.<sup>100</sup> Loss of employment may follow an over-quota birth in some situations.<sup>101</sup> Coercive sterilizations, coercive contraceptive use, and coercive monitoring of women's contraceptive use

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<sup>96</sup> See, e.g., Zhu, Lu & Hesketh, *supra* note 12; Hesketh, Lu & Xing, *supra* note 28; Nicole M. Skalla, *China's One-Child Policy: Illegal Children and the Family Planning Law*, 30 BROOK. J. INT'L L. 329, 333-40 (2004). See generally GREENHALGH & WINCKLER, *supra* note 93; HUDSON & DEN BOER, *supra* note 17, at 152-54; Macartney, *supra* note 33.

<sup>97</sup> See GREENHALGH & WINCKLER, *supra* note 93, at 212-44; *One Child Policy Testimony: Hearing Before the Human Rights Comm'n, Washington, D.C.*, (Nov. 5, 2009) (statement of Harry Wu, Director of Laogai Research Foundation), available at <http://laogai.org/system/files/One%20Child%20Policy%20Testimony.pdf>.

<sup>98</sup> GREENHALGH & WINCKLER, *supra* note 93, at 212-44.

<sup>99</sup> Louisa Lim, *Cases of Forced Abortions Surface in China*, NPR, Apr. 23, 2007, available at <http://www.npr.org/templates/story/story.php?storyId=9766870>.

<sup>100</sup> See *The Consequences of Coercion: China's One Child Policy and Violence against Women and Girls: Hearing Before U.S. Congressional Tom Lantos Human Rights Caucus* (Nov. 10, 2009) (statement of Reggie Littlejohn, President, Women's Rights Without Frontiers), available at <http://www.pearlsofchina-thefilm.com/littlejohn2.pdf>.

<sup>101</sup> *Rethinking China's One-Child Policy: The Child in Time*, ECONOMIST, Aug. 19, 2010, at 31 (In March 2010, a law lecturer in Beijing lost his job due to the birth of a second child as he sought a son; he "ignored officials who wanted the fetus aborted.").

and monthly cycles all appear tremendously intrusive by Western standards, as does a requirement often imposed to get permission even for a first birth within marriage. There are reports of family homes being razed in retaliation for over-quota births.<sup>102</sup> Yet, these reports of draconian government control coexist with reports of isolated rural areas where enforcement appears rather lax.<sup>103</sup> Overall, the context for these varied enforcement efforts has been sometimes fierce resistance to the policy, particularly in some rural areas. This resistance has often been gender specific, as some rural families with only daughters have been unwilling to cease their procreative efforts to have a son.<sup>104</sup>

Although the policy is often said to be broadly accepted and embraced at this point by the Chinese people, harsh enforcement methods that have been imposed during various campaigns have engendered serious conflict between state and society. The policy has imposed untold suffering, particularly for Chinese women, whose bodies have been the locus of conflict and state control.<sup>105</sup> Clearly, it would have avoided much social discord and individual trauma if China could have addressed national population concerns through gentler and more humane means.<sup>106</sup> While one does not expect the Chinese State to admit that the policy was a mistake, indications of a move toward a de facto two-child policy may at least represent the hope of future adjustments.

It remains an irony that China, which implemented a more draconian and strict population control policy, has been less effective than its East Asian neighbors in achieving population stabiliza-

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<sup>102</sup> Thomas L. Hunker, *Generational Genocide: Coercive Population Control as a Basis for Asylum in the United States*, 15 J. TRANSNAT'L L. & POL'Y 131, 135 (2005).

<sup>103</sup> See HUDSON & DEN BOER, *supra* note 17, at 152-54; see generally LESLIE T. CHANG, *FACTORY GIRLS* (2008) (reporting rural area with little apparent enforcement of one-child policy).

<sup>104</sup> See JOHNSON, *supra* note 13, at 55-57, 73-74, 206-07; GREENHALGH & WINCKLER, *supra* note 93, at 95, 104-06, 108-12, 122-28, 130-40, 166-201, 212-44; Eberstein, *supra* note 22, at 89, 99-105, 111-15; Hasketh, Lu & Xing, *supra* note 28; Lim, *supra* note 99; Skalla, *supra* note 96; Susan Tiefenbrun & Christie J. Edwards, *Gendercide and the Cultural Context of Sex Trafficking in China*, 32 FORDHAM INT'L L. J. 731 (2009); Zhu, Lu & Hesketh, *supra* note 12; see generally STEVEN W. MOSHER, *A MOTHER'S ORDEAL* (1993) (describing population control worker's fight to keep her second baby).

<sup>105</sup> See, e.g., GREENHALGH, *supra* note 93, at xi-xii; GREENHALGH & WINCKLER, *supra* note 93, at 212-32, 258-80; MOSHER, *supra* note 104, at 205-09, 256-59; XINRAN, *MESSAGE FROM AN UNKNOWN CHINESE MOTHER* (Nicky Harman trans., 2010); Lim, *supra* note 99; Tiefenbrun & Edwards, *supra* note 104, at 780.

<sup>106</sup> See *id.*

tion.<sup>107</sup> Thus, for a variety of demographic reasons, China's population continues to grow, even as it has achieved a theoretically below-replacement fertility rate. Of course, the economic situation of China has been quite different from that of Japan and South Korea; nonetheless, this comparison underscores the question of whether China's method of addressing population issues was, despite its draconian nature, as effective as other methods would have been.<sup>108</sup> Although often credited with avoiding the birth of several hundred million people, it is entirely possible that China could have achieved a similar statistical result with a different policy.<sup>109</sup>

China thus finds itself in the ironic position of officially still enforcing a one-child policy even as Japan and South Korea, with significantly lower fertility rates than China, have moved beyond population stabilization and now seek to counter their declining and aging population with new policies that encourage greater fertility.<sup>110</sup> It is doubtful that China will soon follow Japan and South Korea in seeking to raise fertility rates; it is foreseeable, however, that China may do so in the decades to come.

Within this East Asian context of declining fertility, the question of impacts on women's equality is surprisingly muddled. Based on certain ideological presuppositions, one might have supposed that reducing fertility would advance women's freedom and equality by freeing women from the gender-specific tasks of bearing and nurturing children. Of course, this model of attaining gender equality—by making women's lives more like men's—may itself reflect deeply misogynistic presuppositions. Must tasks engaged in primarily or uniquely by women necessarily be less valuable?<sup>111</sup> Nonetheless, apart from ideological or ethical debates, declining fertility has produced mixed results for women. First, in low fertility societies it can be possible for a woman to devote virtually her entire life to the education and nurture of a single child, given the intense pressure for that child to achieve advancement and success.<sup>112</sup> Hence, lower fertility rates do not necessarily refocus women away from child-care roles, but instead may artificially intensify the societal pressures and expectations under which both

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<sup>107</sup> See, e.g., Hasketh, Lu & Xing, *supra* note 28, at 1172.

<sup>108</sup> See *id.*

<sup>109</sup> See, e.g., *id.*; *Population Projections Tables by Country and Group*, WORLD BANK, <http://data.worldbank.org/data-catalog> (last visited Oct. 21, 2010).

<sup>110</sup> See Hasketh, Lu & Xing, *supra* note 28, at 1172.

<sup>111</sup> Cf. AMANDA GOUWS, (UN)THINKING CITIZENSHIP: FEMINIST DEBATES IN CONTEMPORARY SOUTH AFRICA 123-25 (2005).

<sup>112</sup> See, e.g., GREENHALGH & WINCKLER, *supra* note 93, at 258.

women and children live.<sup>113</sup> Second, it has turned out that declining fertility and increased economic success and education can accompany the transmission of cultural norms that deeply disadvantage women. In particular, in some instances these factors can accelerate sex ratio differentials and the systematic elimination of females from the population and family.<sup>114</sup> The pressures to have a son and male heir in some East Asian societies, and to minimize daughters and have a son in South Asian societies, can be accelerated, rather than reduced, in low fertility contexts.<sup>115</sup> As a practical matter, if one must have a son, then lower fertility makes one choosier about the gender of each child, making the elimination of females more, rather than less, likely.<sup>116</sup> Similarly, a middle class and educated status can increase the practical availability of sex-selective abortion to families in India, making it normative for some.<sup>117</sup>

Thus, the assumptions that rising income levels, increased education for women, and lowered fertility levels intrinsically reduce gender discrimination have proven false.<sup>118</sup> In some cultural contexts, these factors produce grossly disproportionate sex ratios, indicating the large-scale and systematic elimination of females from the family and population, primarily through sex-selective abortion.<sup>119</sup>

On a related matter, societies that emphasize late marriage and low fertility can also occasion large-scale prostitution and trafficking of women.<sup>120</sup> Prostitution may even be viewed culturally as protecting the family in some circumstances, providing a sexual outlet that is viewed as protecting the low fertility, late-marriage “official” family. These tendencies can be sharply accelerated by a sex ratio imbalance, because it leaves men marrying even later, or not at all, and also creates a motivation to traffic women for the

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<sup>113</sup> See, e.g., *id.* at 256-58.

<sup>114</sup> See, e.g., Eberstein, *supra* note 22, at 109.

<sup>115</sup> See *id.*; Tiefenbrun & Edwards, *supra* note 104, at 734.

<sup>116</sup> See Tiefenbrun & Edwards, *supra* note 104, at 734.

<sup>117</sup> See SUNIL K. KHANNA, FETAL/FATAL KNOWLEDGE: NEW REPRODUCTIVE TECHNOLOGIES AND FAMILY-BUILDING STRATEGIES IN INDIA 98-99 (2010); Eberstein, *supra* note 22, at 109 (explaining that, in India, a sex ratio imbalance is correlated with both falling fertility and a rise in the mother’s educational level).

<sup>118</sup> See Eberstein, *supra* note 22, at 109.

<sup>119</sup> See *id.*; Tiefenbrun & Edwards, *supra* note 104, at 770-71.

<sup>120</sup> See NICHOLAS D. KRISTOF & SHERYL WUDUNN, HALF THE SKY: TURNING OPPRESSION INTO OPPORTUNITY FOR WOMEN WORLDWIDE 23-24 (2009); see also Tiefenbrun & Edwards, *supra* note 104, at 735-36.

purpose of obtaining a wife.<sup>121</sup> Hence, both China's one-child policy, as well as declining fertility occurring without coercive population policies, can be causally related to the increasing sexual exploitation of women and girls as found in contemporary forms of human trafficking.<sup>122</sup> Of course, trafficking also has and does exist in high fertility societies; the surprise from certain Western ideological perspectives is the degree to which it thrives and even worsens in low fertility societies.

The sex ratio imbalance objectively demonstrates the necessity of culture-specific analysis of gender discrimination. Controversial narrative accounts defended by particular women's rights advocates in one cultural context—such as reduced fertility leading to the emancipation of women in the West—may not translate easily into other cultural contexts. Statistics on sex ratio imbalance in particular settings, locales, and nations provide a more concrete and specific way of evaluating at least one aspect of gender equality: the question of whether females are allowed to exist in equal numbers to males. The cross-cultural study of sex ratio imbalances, including their causes and effects, are an important corrective to primarily ideological discourse on gender equality.

### III. RE-EVALUATING THE ABORTION DEBATE THROUGH A COMPARATIVE LENS: ABORTION, GENDER EQUALITY, TECHNOLOGICAL CONTROL OF PROCREATION, AND THE MISSING GIRLS OF ASIA

The apparent fact that sex-selective abortion is the primary means of eliminating females in China (and India) can also be examined in the context of ongoing debates over abortion. Sex-selective abortion is an unfamiliar context for many in the United States, where abortion remains a highly controversial issue. Abortion rights proponents in the United States have commonly portrayed abortion rights as necessary to the equality and liberty of women.<sup>123</sup> According to this argument, legal availability of abortion liberates women while assisting them in achieving a practical equality with men.<sup>124</sup> Women require the control of their own bodies and procreative processes in order to be free and in a position

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<sup>121</sup> See Tiefenbrun & Edwards, *supra* note 104, at 752.

<sup>122</sup> Eberstein, *supra* note 22, at 109; Tiefenbrun & Edwards, *supra* note 104, at 780; see KRISTOF & WUDUNN, *supra* note 120.

<sup>123</sup> Caitlin E. Borgmann, *The Meaning of "Life": Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 555-56 (2009).

<sup>124</sup> See generally *id.*

to participate fully in economic, cultural, and political life.<sup>125</sup> From this perspective, women cannot be equal citizens with men unless they retain the abortion liberty.<sup>126</sup>

This abortion rights narrative meets the counter-argument, from the pro-life movement within the United States, that abortion disadvantages women. Concretely, abortion is viewed by some as facilitating the abandonment of women and children by irresponsible males, rather than assisting females in achieving equality.<sup>127</sup> Theoretically, the abortion rights movement is viewed as an attempt to attain women's equality by making them more like men, evidencing a misogynistic foundation for women's rights. Contextually, the theoretical abortion rights argument, upon closer examination, sends many women a profoundly disturbing message: that they can only be equal to men in their liberty and participation in American society if they are willing to kill their own children and offspring.<sup>128</sup> Further, it is women, and not men, who must undergo abortions and authorize the death of their own offspring in order to achieve liberty and equality. After all, if abortion really is necessary to liberty and equality, this necessity would apply to the majority of women who believe that life begins either at conception or implantation; if abortion is necessary to liberty and equality, the willingness to actually choose abortions is necessary to make that liberty and equality a practical reality. If abortion is necessary to liberty and equality, then women who believe that abortion is the killing of their own offspring must be willing to abort and authorize the killing of their own offspring in order to achieve that liberty and equality.<sup>129</sup>

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<sup>125</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); see also ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND WOMEN'S FREEDOM* 109, 133 n.7 (1990).

<sup>126</sup> See PETCHESKY, *supra* note 125; Reva B. Siegal, *Siegal, J., Concurring, in WHAT ROE V. WADE SHOULD HAVE SAID* 63 (James Balkin ed., 2005); LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 105 (1992); see also *Arguments in Favour of Abortion*, BBC, [http://www.bbc.co.uk/ethics/abortion/mother/for\\_1.shtml](http://www.bbc.co.uk/ethics/abortion/mother/for_1.shtml) (last visited Oct. 21, 2010).

<sup>127</sup> See Teresa Stanton Collett, *Collett, J., Dissenting, in WHAT ROE V. WADE SHOULD HAVE SAID* 190 (James Balkin ed., 2005).

<sup>128</sup> See Michael Stokes Paulsen, *Paulsen, J., Dissenting, in WHAT ROE V. WADE SHOULD HAVE SAID* 205 (James Balkin ed., 2005).

<sup>129</sup> See, e.g., Collett, *supra* note 127, at 187-95; Paulsen, *supra* note 128, at 205; David M. Smolin, *Why Abortion Rights are Not Justified by Reference to Gender Equality: A Response to Professor Tribe*, 23 J. MARSHALL L. REV. 621, 637-60 (1990) (reviewing TRIBE, *supra* note 126); Erika Bachiochi, *Pro-Life Feminism & Embodied Equality: De-*

The abortion debate within the United States can be viewed as unusual or even dysfunctional; it certainly appears to be more prominent of an issue in the United States than in most other societies. For better or worse, however, the United States tends to export both sides of its deeply divided abortion rhetoric. Thus, there are attempts to internationalize norms of abortion liberty that would require every nation to legalize elective abortion through most or all of pregnancy. On the other hand, there are efforts to promote a pro-life position that seeks to retain or reimpose legal prohibitions on most abortions, especially elective abortions, based on the viewpoint that human life begins at conception.

These divergent positions seem largely irrelevant in the context of China. First, the pro-choice position, which characterizes access to legal abortion as a critical part of an individual, procreative liberty, appears absurd within a modern Chinese context. In fact, women in China do possess the right to have an abortion, and abortion, as a practical matter, is readily available; however, possession of this right is quite far from being a sign or part of individual, procreative liberty.<sup>130</sup> The context of the Chinese “abortion liberty,” if one wanted to call it that, is a virtual total lack of overall procreative freedom. Women’s entire procreative life, including age at marriage and first child; permission to have a child; whether and when to have a second child; the use of contraception; and the contraceptive method involved, are under governmental oversight and control.<sup>131</sup> Thus, in China, the legality and availability of abortion are tools of the state made available to individuals to effectuate a state policy of governmental control of procreation and population. While the Chinese government presumably prefers that births be avoided by approved contraceptive means, making abortion legal and accessible effectuates the government’s policy of preventing the birth of over-quota children through the provision of a backup method for contraceptive failure or non-use.<sup>132</sup> Therefore,

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bunking the Autonomous Male as Archetype for Sexual Equality, Address Before the University Faculty for Life’s Annual Conference (June 2010); Richard Stith, *How the Abortion Option Can Make Women More Vulnerable to Exploitation and Abandonment* 1,

<http://mirrorofjustice.blogs.com/mirrorofjustice/stith/abortionwomenvulnerable.pdf>; cf. Robin West, *West, J., Concurring in the Judgment*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 140-44 (James Balkin ed., 2005).

<sup>130</sup> Tiefenbrun & Edwards, *supra* note 104, at 760-61; see GREENHALGH & WINCKLER, *supra* note 93, at 258.

<sup>131</sup> See GREENHALGH & WINCKLER, *supra* note 93, at 258.

<sup>132</sup> Tiefenbrun & Edwards, *supra* note 104, at 760-61.



while women have a practical legal right to access abortion in China, they frequently lack the practical right to refuse abortion, carry the child to term, and raise the child as their own.<sup>133</sup> Indeed, the very concept of procreative freedom, which makes the choice of the individual sovereign, does not fit within a nation that has spent more than a generation insisting that the State and society, rather than the individual and family, have first place in making procreative decisions.<sup>134</sup> In a broader historical sense, the ideal of individual procreative choice is inconsistent with a Chinese cultural heritage where multi-generational, extended families (or the elders or patriarchs of such), rather than the individuals or couples directly involved, were considered the primary decision-makers regarding procreation.<sup>135</sup>

The pro-life or anti-abortion messages typical within the United States similarly has grave difficulties in practically translating to a contemporary Chinese environment. A primary goal of the anti-abortion movement in the United States has been achieving legal prohibitions, restrictions, and regulations on abortion, and preventing governmental funding of elective abortion. The notion of the state prohibiting abortions is far-fetched, and even irrelevant, in modern China, as the legal availability of abortion is, based on population control policy, presumably considered necessary. At least so long as the Chinese State is concerned with the still-growing population, the state will view widely available abortion as a necessary component of governmental policy. Of course, if the time comes when China, like Japan and Korea, becomes primarily concerned with the negative impact of a shrinking and aging population, such calculations could change. For the present, however, any pro-life efforts in China must operate within a context of abortion being legal, widely accessible, and generally encouraged as a way to end any unwanted or unapproved pregnancies.

A more complex question concerns the susceptibility of Chinese culture to the pro-life message that the embryo and fetus are human persons who may possess an ethical, if not a legal, right to life. Lee and Wang argue that historically, “[i]nfanticide . . . was a product of rational decision making embedded in a peculiar cultural attitude toward life.”<sup>136</sup> Infants, they argue, historically were not considered fully “human” but rather were considered “just

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<sup>133</sup> *Id.*

<sup>134</sup> See GREENHALGH, *supra* note 93, at 258-61; GREENHALGH & WINCKLER, *supra* note 93, at 245-46.

<sup>135</sup> See LEE & WANG, *supra* note 28, at 125.

<sup>136</sup> *Id.* at 60-61.

young animals.”<sup>137</sup> Infanticide was therefore “postnatal abortion” which, while illegal, was not considered “immoral.”<sup>138</sup> While today infanticide is “widely considered immoral,” as well as illegal, abortion is “both legal and encouraged.”<sup>139</sup> The presumption of this point of view is that in Chinese culture what was once true of the neonate remains true for the embryo and fetus: They are widely considered not yet fully human.

The implication, in modern China, that women and men experience abortion as ethically non-problematic is belied by other indications of deep trauma associated with the Chinese practice of abortion. Much of the trauma is due to the peculiar features of the modern Chinese abortion experience, which at their worst have included women being forced to abort wanted pregnancies during the third trimester.<sup>140</sup> Because sex-selective abortion after ultrasound generally occurs at or after twenty weeks, these abortions would involve a late second trimester abortion of a known daughter. These kinds of late-term abortions would be more akin to infanticide than an early first trimester abortion, because a late term fetus physically looks much like a neonate and because much of the bonding experienced in pregnancy would have already occurred before the abortion. Forced late term abortion of a wanted child and sex-selective abortion of a rejected daughter both involve a woman with substantial experience of a live fetus within her, a fetus whose felt presence within the womb and gender identity through ultrasound could mark with particularized characteristics. These sorts of abortion experiences, like the infanticide experiences of prior generations, presumably leave their mark, even on individuals living in societies or families committed to their necessity. The self and societal silencing of this trauma should not leave us to assume that Chinese women simply undergo these experiences without ethical and psychological difficulty.<sup>141</sup>

The failure to provide Chinese women with basic respect and care in the provision of reproductive services, whether they involved abortion, sterilization, insertion of IUDs, or other procedures has increased the traumatic experience of abortion within China. Thus, throughout much of the one-child policy era, Chinese women have frequently not been given any pre-operative or

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<sup>137</sup> *Id.* at 61.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See GREENHALGH & WINCKLER, *supra* note 93, at 223.

<sup>141</sup> Cf. GREENHALGH & WINCKLER, *supra* note 93, at 258-63; MOSHER, *supra* note 104, at 223-335; XINRAN, *supra* note 106; Lim, *supra* note 99.

postoperative information on medical procedures and their likely side effects.<sup>142</sup> The entire concept of informed consent appears to have been largely foreign; because the government assumed the women needed the procedures in question to meet the requirements of the population policy, there apparently was no felt need to inform women on what was going to be done, let alone provide them with choices as to whether to undergo procedures or alternatives to the government's preferred methods.<sup>143</sup>

Further, abortions reportedly have been done without anesthesia, "causing what women describe as pain so unbearable it is like having one's heart cut out."<sup>144</sup> While economic factors would presumably be brought forward to explain such a practice, it is consistent with a tendency toward cost-cutting at the expense of the well-being and health of women, whose bodies have been the locus of control for the government's population control policies.

Traumatic abortion experiences do not equate to support for the pro-life view of fetal life. They could, of course, simply lead to calls for provide better care and respect for women in the context of reproductive services, as well as a condemnation of forced or coerced abortions: both of which would, in themselves, be entirely appropriate recommendations. In the longer term, however, as Chinese society develops, the troubled Chinese experience with abortion under coercive population control policies could be a foundation for a cultural consideration of the human characteristics of at least older, more developed fetuses. Chinese culture, although ancient, is not static, and could develop organically in a variety of directions.

In the United States, one context for the abortion debate is the underlying debates over sexual freedom, the place of marriage in society, and unmarried parenthood. In a society where single women and men often become sexually active at young ages, but likely will not marry until sometime between their mid-twenties and early thirties,<sup>145</sup> many abortions are a response to unintended pregnancies produced by sexual activity among single people not yet willing to become committed to either one another or the raising

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<sup>142</sup> GREENHALGH & WINCKLER, *supra* note 93, at 263.

<sup>143</sup> *See id.*; Hasketh, Lu & Xing, *supra* note 28, at 1171-72.

<sup>144</sup> GREENHALGH & WINCKLER, *supra* note 93, at 261 (citing Jing-Bao Nie, *Voices Behind the Silence: Chinese Moral Beliefs and Experiences of Abortion in Cultural Context* (1999) (unpublished Ph.D. dissertation, Institute for the Medical Humanities, University of Texas Medical Branch) (on file with author)).

<sup>145</sup> *See* D'Vera Cohn, *The States of Marriage and Divorce*, PEW RES. CTR. (Oct. 15, 2009), <http://pewresearch.org/pubs/1380/marriage-and-divorce-by-state>.

of a child.<sup>146</sup> Yet, marriage remains relatively popular in the United States, unlike some Scandinavian societies where marriage itself is becoming relatively unusual; similarly, child-bearing remains relatively popular in the United States, compared to some extremely low fertility societies, where childbearing is increasingly unpopular. Hence, in the United States, abortion is often about avoiding unwed parenthood. This avoidance of unwed parenthood is relative, rather than absolute: in recent years, out of approximately 2.7 million single women becoming pregnant annually, about 1.7 million, or 60%, choose childbirth over abortion—with perhaps only 40,000 choosing to give the child up for adoption.<sup>147</sup> Abortions performed on single women constitute approximately 85% of all abortions.<sup>148</sup> Although approximately 40% of births, 1.6 to 1.7 million of 4.1 to 4.3 million annual births, are to single women,<sup>149</sup> one could surmise that there is a class disparity to these statistics, with many in the middle classes still very concerned to avoid unwed motherhood.

In the United States, abortion increasingly is also associated with poor or lower income unmarried women who are already single parents when they become pregnant; many are either living with or in an ongoing relationship with the man responsible for the

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<sup>146</sup> See Lawrence B. Finer, Lori F. Frohwirth, Lindsay A. Dauphinee, Susheela Singh & Ann M. Moore, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPECTIVES ON SEXUAL & REPROD. HEALTH 110, 117 (2005), available at <http://www.guttmacher.org/pubs/psrh/full/3711005.pdf>.

<sup>147</sup> Brady E. Hamilton, Joyce A. Martin & Stephanie J. Ventura, *Births: Preliminary Data for 2008*, CTRS. FOR DISEASE CONTROL & PREVENTION 13 (2010), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58\\_16.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_16.pdf) [hereinafter 2008 *U.S. Birth Statistics*]; Joyce A. Martin, Brady E. Hamilton, Paul D. Sutton, Stephanie J. Ventura, Fay Menacker, Sharon Kirmeyer & T.J. Matthews, *Births: Final Data for 2006*, CTRS. FOR DISEASE CONTROL & PREVENTION 11, 54 (2009), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57\\_07.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_07.pdf) [hereinafter *U.S. 2006 Final Statistics*].

<sup>148</sup> Stanley K. Henshaw & Kathryn Kost, GUTTMACHER INST., *Trends in the Characteristics of Women Obtaining Abortions, 1974 to 2004*, at 9, 11 (2008), available at <http://www.guttmacher.org/pubs/2008/09/23/TrendsWomenAbortions-wTables.pdf>; Rachel K. Jones, Mia R.S. Zoina, Stanley K. Henshaw & Lawrence B. Finer, *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSPECTIVES ON SEXUAL & REPROD. HEALTH 6 (2008), available at <http://www.guttmacher.org/pubs/journals/4000608.pdf>; *U.S. 2006 Final Statistics*, *supra* note 147.

<sup>149</sup> See Rob Stein & Donna St. George, *Number of Unwed Mothers has Risen Sharply in the U.S.*, WASH. POST, May 14, 2009, at A06, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/13/AR2009051301628.html>; 2008 *U.S. Birth Statistics*, *supra* note 147, at 3; *U.S. 2006 Final Statistics*, *supra* note 147.

pregnancy.<sup>150</sup> Thus, the proportion of aborting women who are poor, and already single mothers, has been increasing in the United States.<sup>151</sup> In these instances, abortion is not about avoiding unwed motherhood in the first instance, but most likely about the significant number of poor and lower income women in the United States who become mothers without marrying, and for whom additional children would pose particular economic difficulty. In the context of the United States, where single motherhood is associated with poverty,<sup>152</sup> these abortions are a reflection of class and race-based relationships between unwed motherhood and poverty. The racial aspects are evident in higher rates of abortion, unwed motherhood, and poverty among some minority groups.<sup>153</sup> This increasing number of abortions among lower-income single mothers is, therefore, also a part of the ongoing debate about the place of marriage in American society.

In China, by contrast, during the early years of the one-child policy, abortion arose in the context of State control over the procreative choices of married couples, in combination with a cultural need to have a male child. The availability of abortion was not about safeguarding the sexual freedom of single people or the place of marriage in society, but rather about the State providing a backup method for avoiding over-quota births when preferred contraceptive methods failed or were not used. More recently, as young adults have become more sexually active, the practice of single people using abortion to avoid unwed births is reportedly becoming more common.<sup>154</sup> Even here the role of the state is, if anything, to promote, rather than restrict, abortion in the service of society controlling the quantity, quality, and life circumstance of children. Indeed, even if the couple would like to marry and raise their child, state control of both marriage and procreation may force them into aborting the child.<sup>155</sup> Similarly, a single woman not interested in marrying the father has no real option to have and

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<sup>150</sup> See Rachel K. Jones, Lawrence B. Finer & Susheela Singh, *GUTTMACHER INST., Characteristics of U.S. Abortion Patients, 2008*, at 5-6, 8-9 (2010), available at <http://www.guttmacher.org/pubs/US-Abortion-Patients.pdf> [hereinafter *Characteristics of U.S. Abortion Patients*]; see also Finer, Frohwirth, Dauphinee, Singh & Moore, *supra* note 146, at 112, 116.

<sup>151</sup> *Characteristics of U.S. Abortion Patients*, *supra* note 150, at 8-9.

<sup>152</sup> See, e.g., Amy L. Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 *FAM. L.Q.* 567, 575-77 (2007), available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1219&context=upenn\\_wps](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1219&context=upenn_wps).

<sup>153</sup> See *id.*

<sup>154</sup> See, e.g., CHANG, *supra* note 104, at 101.

<sup>155</sup> See generally Lim, *supra* note 99.

keep her baby in contemporary China.<sup>156</sup> Single women who become pregnant are by social custom and governmental policy channeled into abortion, and most of them likely never seriously consider not having an abortion.<sup>157</sup> Thus, even if the last ten years have brought single individuals greater sexual freedom, that “freedom” does not include those aspects of sexuality that include bearing, birthing, and caring for one’s own children.

Fundamentally, the debate over whether abortion aids or hinders women’s equality has an odd resonance in a society where a high percentage of abortions are performed specifically to eliminate females.<sup>158</sup> Abortion as femicide or gendercide is hardly a foundation for furthering women’s equality. This most obvious of points has not yet been fully incorporated into debates about abortion in the United States, despite evidence that some immigrant populations in the United States are practicing sex-selective abortion.<sup>159</sup>

The Western presumption that advances in medical control of procreation—whether abortion, contraception, or assisted reproductive technologies—will further individual choice, therefore, represents a culturally-bound failure of both vision and imagination. At least as early as Aldous Huxley’s *Brave New World* (originally published in 1932), it has been possible to imagine a world where technology advances in human procreation empower the State rather than the individual or family.<sup>160</sup> China’s population control policies are an important reminder that technological and scientific control over human procreation does not inherently serve either human liberty or human equality. To the contrary, such can strengthen the control of the State or society and weaken the range of individual choice, as they give the State or society increasingly effective means to control the procreative choices of individuals.

Viewing human procreation purely through the lens of individual liberty and equality turns out to be a distorted and limited perspective. In fact, virtually all human societies are concerned, to one degree or another, with the quantity, quality, and upbringing of the next generation. There is an intrinsic societal dimension to

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<sup>156</sup> *Id.*

<sup>157</sup> *See id.*

<sup>158</sup> *See generally* Jeff Jacoby, *Choosing to Eliminate Unwanted Daughters*, BOSTON GLOBE, Apr. 6, 2008, available at [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2008/04/06/choosing\\_to\\_eliminate\\_unwanted\\_daughters/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/04/06/choosing_to_eliminate_unwanted_daughters/).

<sup>159</sup> *See id.*

<sup>160</sup> *See* ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932).

the creation and nurture of offspring. This does not justify coercive the state policies that have existed in China,<sup>161</sup> but it does remind us of the need to evaluate procreative choices through multiple lenses.

As the possibilities for technological control over human procreation increase, societal pressures on individuals are arguably likely to increase. When we can theoretically control the quantity, quality, and timing of offspring to a significant degree, then failing to do so can appear as an anti-social act, if not a crime. From this perspective, as technology advances, human freedom can contract as it becomes obligatory to employ those means of control to advance a socially acceptable result.

Historically, infanticide was used as a crude, but effective, control over the quantity, timing, and perceived quality of offspring.<sup>162</sup> Abortion has largely, but not completely, taken the place of infanticide.<sup>163</sup> Of course, modern contraceptive methods also play a significant role, but despite multiple contraceptive technologies, it is notable how often, in the contemporary world, abortion essentially serves as both a primary and backup form of "birth control."<sup>164</sup>

Given these considerations, the United States abortion rights and pro-life positions both appear naïve in a Chinese context. The American abortion debate presupposes a context where the individual pregnant woman, the biological father of the child, and the fetus/unborn child are the primary protagonists, with supporting or subsidiary roles for the parents of the pregnant woman, extended family members, and friends. In the East Asian conception, however, the demands of State, society, and multi-generational family, dominate, with the individual procreators struggling against an overwhelming tide should they attempt to buck those demands.<sup>165</sup> Someday, people may wonder: how could those who debated procreative freedom and gender equality not see the larger picture of the demands of society? How could they have not seen the obvious risks that increasing technological control over procreation would limit human freedom and strengthen gender and other hierarchies?

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<sup>161</sup> See Lim, *supra* note 99.

<sup>162</sup> See generally Jacoby, *supra* note 158; Lim, *supra* note 99.

<sup>163</sup> See *supra* notes 68-81 and accompanying text.

<sup>164</sup> See, e.g., Rachel K. Jones, Jacqueline E. Darroch & Stanley K. Henshaw, *Contraceptive Use among U.S. Women Having Abortions in 2000-2001*, 34 PERSPECTIVES ON SEXUAL & REPROD. HEALTH 294 (2002), available at <http://www.guttmacher.org/pubs/journals/3429402.html>.

<sup>165</sup> See generally Parts I-II.

In the context of China, abortion has played a dual role that represents an uneasy bargain among the differing concerns and wishes of the State and Chinese families.<sup>166</sup> For the State, abortion became an important backup means of avoiding a significant number of unapproved births, whether the abortion was instigated at the insistence or suggestion of the State or was instigated by the individuals or families involved against the backdrop of governmental population control policies.<sup>167</sup> Without abortion, the fertility rate presumably would have been significantly higher in China. For families, abortion, in the context of the State's population control policies, became a means to seek the needed male heir by eliminating females who would otherwise take up the family's limited allotment of children.<sup>168</sup> While prenatal screening for gender and sex-selective abortion were made illegal by the State,<sup>169</sup> making sex-selective abortion illegal where the State not only permits abortion, but strives to make it readily available, is highly impractical and probably doomed to failure. Hence, the State has chosen to embrace the population limiting aspects of abortion as more important than the unintended (for the State) consequence of a sex ratio imbalance; the State, in short, has kept abortion legal and easily available because of its role in limiting population, despite being aware of the large-scale use of abortion to eliminate females.<sup>170</sup>

State officials, moreover, at some level must be aware that in the longer term, eliminating females is a particularly effective means of limiting population.<sup>171</sup> As a practical and statistical matter, eliminating females over several generations limits population more effectively than does the removal of people from an age cohort in a gender neutral way.<sup>172</sup> Further, eliminating females and a sex ratio imbalance is apparently a return to a method of population control practiced over hundreds of years in Chinese history.<sup>173</sup> Thus, although an unbalanced sex ratio has been described as a dangerous, potentially destabilizing event that will unleash millions of "bare branches" males upon Chinese society,<sup>174</sup> this argument

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<sup>166</sup> See generally *id.*

<sup>167</sup> See generally Jacoby, *supra* note 158; Lim, *supra* note 99.

<sup>168</sup> See Jacoby, *supra* note 158.

<sup>169</sup> See *supra* notes 62-63 and accompanying text.

<sup>170</sup> See generally Jacoby, *supra* note 158.

<sup>171</sup> See *id.*

<sup>172</sup> See *id.*

<sup>173</sup> See *supra* notes 72-76 and accompanying text.

<sup>174</sup> See HUDSON & DEN BOER, *supra* note 17.



against a sex ratio imbalance may prove erroneous. Even if the current generation of Chinese officials is persuaded to create policies against the sex ratio imbalance based on the “bare branches” argument, there is a danger that within a decade or two they will, through empirical observation, come to reject that argument. Instead, it may appear that the vast majority of “bare branches” in China are relatively powerless rural men, who pose relatively little threat to Chinese society or the Chinese State, even if they are unable to marry, traffic women to obtain wives, or contribute to the high level of prostitution in China.<sup>175</sup> There is a danger, therefore, that although China may officially condemn sex-selective abortion and the sex ratio imbalance, these could become a long-term strategy for locking into place the State’s population control gains. China would save face by officially condemning the sex ratio imbalance, while at the same time maintaining policies that tend to produce an imbalance.

There are nascent indications that China may eventually overcome its cultural bias against girl offspring.<sup>176</sup> In current Chinese society, some in urban areas are embracing daughters as ultimately providing more security and care, and less expense, to their parents.<sup>177</sup> Daughters are said to care better for their aged parents and are less expensive because the parental obligation to supply a living space to adult children who marry generally only applies to sons.<sup>178</sup> In those parts of China that culturally and legally embrace a two-child norm, the perfect family may increasingly be viewed as including one son and one daughter. No one could firmly predict, thus, whether these countervailing trends may eventually produce a normal sex ratio or whether China’s return to its historic sex ratio imbalance will be very long term or virtually permanent.

Even if China does overcome its sex ratio imbalance, there is a severe danger that the practice of sex-selective abortion will persist. As China experiences changing and diverse cultural norms and expectations regarding the gender of children, the abiding norm being created may be the practice of determining the gender of children through sex-selective abortion. This practice may in the future be applied equally against male, as well as female, fetuses. If a couple already has a son, they may abort a second male fetus in pursuit of their “perfect” family of one boy and one girl. If an urban family planning to have just one child is persuaded that daugh-

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<sup>175</sup> See generally *id.*

<sup>176</sup> See generally Eberstein, *supra* note 22.

<sup>177</sup> *Id.*

<sup>178</sup> See *id.*

ters are better, they may abort a first son. Sex-selective abortion in the longer term may survive, even if discrimination against girls is eventually overcome. In that context, it is relevant that there is already evidence of occasional use of sex-selective abortion to eliminate boys.<sup>179</sup>

Unleashing the genie of abortion as a means of “reproductive choice” may, in the context of future generations, refer not merely to the choice of whether to have a child now, but whether to have a son or daughter. This, along with the increasing use of abortion by single people in China,<sup>180</sup> may be the abiding legacy of so-called “reproductive freedom” in a Chinese context. The logical variant of a model of “reproductive freedom” in an Asian context may be the freedom to use abortion to determine gender at birth.

The rise of China creates the possibility that it, rather than the United States or Europe, will increasingly provide a normative framework for many other societies.<sup>181</sup> If sex-selective abortion becomes normative in China, it may become normative for essentially the whole world over the next century. Further, even if resentment or concern about Chinese power limits its influence, what China and India, and more broadly East and South Asia, do as a whole will have an enormous consequence. Not only do these regions comprise half or more of humanity, their economic and cultural significance seem destined to grow enormously.<sup>182</sup> Hence, it will no longer be enough to conceptualize issues, such as abortion and reproductive technologies, through a Western lens; increasingly one will have to be willing to contextualize these issues in multi-cultural fashion, with East and South Asian experiences and perspective being of central concern. The social significance of abortion may, in the longer term, be set as much, or more, by how it is used in Asian settings, rather than how it is used in Western societies.

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<sup>179</sup> See *id.* at 96.

<sup>180</sup> See Jacoby, *supra* note 158.

<sup>181</sup> See JOSHUA KURLANTZICK, CHARM OFFENSIVE: HOW CHINA'S SOFT POWER IS TRANSFORMING THE WORLD (2007).

<sup>182</sup> See, e.g., PETE ENGARDIO, CHINDIA: HOW CHINA AND INDIA ARE REVOLUTIONIZING GLOBAL BUSINESS (2007); JAGDESH SHETH, CHINDIA RISING (2008); *Contest of the Century*, ECONOMIST, Aug. 21, 2010, available at <http://www.economist.com/node/16846256> 9.

#### IV. REDUCING CHINA'S SEX RATIO IMBALANCE AND PRACTICE OF SEX SELECTIVE ABORTION

The prior section suggests two related, but possibly distinct, goals: (1) reducing China's sex ratio imbalance; and (2) reducing the practice of sex-selective abortion.

These goals are distinct because, although sex-selective abortion over the past generation, and today, is generally practiced to eliminate females, it already is sometimes practiced to eliminate males and could someday operate in a way that is statistically gender neutral. Fetuses would still be targeted for elimination based on their gender, but an equal or almost equal number of male and female fetuses might be so targeted. Thus, these two goals sometimes will be addressed separately, even though they are closely related.

In regard to the first goal, the most obvious way to eliminate China's sex ratio imbalance would be to cease China's coercive population control policies. China had achieved close to a normal sex ratio immediately before imposing coercive population control policies,<sup>183</sup> and the subsequent imposition of a coercive population control policy is almost certainly a primary cause of the subsequent imbalance in sex ratios in China. This does not mean, of course, that the population control policy is the only factor, but simply that, in the cultural context of China at that time, the imposition of the one-child policy was enough to push the country toward a significant sex ratio imbalance.

It is not clear, however, that the removal of a coercive population control policy would fully normalize sex ratios in China.<sup>184</sup> It may not be possible to simply turn the clock back to 1980. The Chinese people have grown accustomed over thirty years to smaller families and the use of abortion to manipulate sex at birth. Now that these norms are established, they may not be easy to reverse, even if the law itself is changed—particularly in urban areas where the perceived cost of raising children is quite high. This is suggested by the norm of small families and very low fertility found in other East Asian societies that have not imposed a coercive population control policy. If one looks to both East and South Asia, experiences in both South Korea and India demonstrate that sex-

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<sup>183</sup> See generally LEE & FENG, *supra* note 28.

<sup>184</sup> See Lesley Wexler, *Allowing Girls to Hold Up Half the Sky: Combining Norm Promotion and Economic Incentives to Combat Daughter Discrimination in China*, 7 CHI. J. INT'L L. 79 (2007) (discussing debate on whether a removal of China's population control policies would create a normal sex ratio in China).

selective abortion and an unbalanced sex ratio can arise in a context of declining fertility in the absence of a coercive population control policy.<sup>185</sup> Wherever families feel an imperative to have only one or two children, and have a cultural need or desire for a certain sex child, sex-selective abortion can become a significant practice, regardless of whether the State, society, or economic factors are the primary impetus toward low fertility.<sup>186</sup>

The norm of the one-child family, however, has not taken hold in rural China to the same degree as urban China. The countryside saw more significant resistance in earlier years to the imposition of population control policies and has continued to see higher fertility rates than urban China.<sup>187</sup> Presumably, the rural custom of perceiving children as an economic asset persists to some degree in the countryside. Population control officials thus have generally permitted a second child in rural areas where the first child was a daughter.<sup>188</sup> Nonetheless, in rural areas, sex-selective abortion is still practiced, particularly after the first birth; thus, a second or third daughter is increasingly likely to be aborted, as the family uses abortion to save a spot for a boy.<sup>189</sup> In this context, lifting the coercive population control policy probably would effectively reduce sex-selective abortions, as families not faced with fines or other penalties might, in a rural setting, be more willing to accept an additional daughter and try again for a son. Rural areas may have retained the sense that a child is not necessarily such an overwhelming financial burden, and thus, be willing to accept daughters, so long as they have the capacity to try again for a son. Further, even in urban areas, a large percentage of individuals would like to have two, rather than one, child,<sup>190</sup> and thus, removal of a coercive one-child policy could lessen the numbers of sex-selective abortions.

China, of course, is a large and complex place, and it is difficult to predict the large-scale, systemic impact of any particular policy. Nonetheless, there is reason to expect that the elimination of coercive population control policies would significantly alleviate

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<sup>185</sup> See *supra* Part II.

<sup>186</sup> See *id.*

<sup>187</sup> See *supra* notes 93-105 and accompanying text.

<sup>188</sup> *Id.*

<sup>189</sup> See *id.*

<sup>190</sup> See Hasketh, Lu & Xing, *supra* note 28 (According to one survey, 43% of Chinese women in urban areas still preferred two children.); *supra* notes 84-86 and accompany text.

the sex ratio imbalance in China, even if it did not totally normalize it.

This speculation about the impacts of completely eliminating coercive population control policies, however, is most likely entirely academic. Once the State has absorbed into itself the authority to control procreation, most likely it will be loath to give it up. The capacity of the Chinese State to establish political control over the timing and number of children is a remarkable development and enlargement of state power,<sup>191</sup> which in the context of China may be irreversible, for the foreseeable future. Hence, it seems more likely that the State will attempt to refine, rather than eliminate, its control over population. The State, in short, will likely try to fine-tune the engine of population control so as not to create the unintended consequence of a sex-ratio imbalance, while maintaining a primary focus on population size and quality. To the degree that it sees the recently publicized “success” of the experimental two-child policy as a model, this will involve continuing draconian State power over procreation. In the now touted two-child experiment, the government decreed relatively late ages for marriage and the first child and a significant gap in time between the first and second children.<sup>192</sup> This sort of two-child policy retains the State as primary decision-maker throughout the procreative process. It is not a matter the State simply permitting an allocation of two children, but rather of the State scripting exactly when one may marry, have a first child, and then go on to a second child.<sup>193</sup>

If one assumes that the Chinese State intends to refine, rather than abandon, coercive population control policies, then the options for impacting sex ratio imbalances and sex-selective abortion both shrink and enlarge. The option of eliminating coercive governmental control over procreation is eliminated, but the entire engine of such control remains open to modification. Although this author personally opposes, as a political and ethical matter, such coercive State control of procreation, the persistence of this kind of governmental power makes it important to explore the most likely or “effective” forms of population control policies, in terms of the goals of normalizing sex ratios and reducing sex-selective abortions.

The most obvious question is whether the experimental two-child policy from Yicheng County would serve as the basis for a new, de jure or de facto, national two-child policy. The policy re-

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<sup>191</sup> See GREENHALGH & WINCKLER, *supra* note 93; GREENHALGH, *supra* note 93.

<sup>192</sup> See Macartney, *supra* note 33.

<sup>193</sup> See *supra* notes 80-86 and accompanying text.

portedly met the goal of reducing fertility more effectively than the national one-child policy, while attaining a normal sex ratio.<sup>194</sup> The question is whether it would have these impacts if scaled up to the entire country. Although this author lacks the specialized demographic knowledge and data necessary for a full evaluation of this question, it seems reasonable to assume that a national two-child policy would, at a minimum, significantly reduce the sex ratio imbalance. As compared to a one-child policy, statistically there would be fewer circumstances in which a family lacked a son and faced the decision of whether to abort a daughter in order to preserve their last allocated child for a son. Although this statistical difference would be reduced by the fact that, in many rural areas, families with a first daughter already are able to have a second child, the allowance of a second child throughout China logically could be expected to significantly alleviate the sex ratio imbalance.

Further, there is the difficult question of how the Yicheng County policy would work in a highly urbanized area, like Beijing or Shanghai. Yicheng County is divided between rural farming and town areas; the towns have reportedly already absorbed a one-child social practice, despite the two-child policy.<sup>195</sup> In areas where the urban population was more dominant, however, the statistical predominance of the one-child social practice would be more significant. And presumably, a town in Yicheng County is not fully comparable to a large urban area like Beijing or Shanghai. Under these circumstances, it is possible to doubt that the Yicheng County policy would have the same results in large urban centers in China. The question of whether a two-child policy would return sex ratios to normal in highly urban settings would depend on whether the new social trends in urban areas favoring daughters, would statistically overcome the longstanding Chinese cultural need to have at least one son, in a context where many, perhaps most, families voluntarily choose to have only one child.

It would be very interesting to know whether, in Yicheng County, sex-selective abortion nonetheless was significantly practiced, and if so, whether it was applied equally to male and female fetuses. Statistically, a County, where most people have exactly two children and many town residents have only one child, may have a normal sex ratio simply because it works out that way statistically, as families with one or two children accept whatever gender child they conceive. Alternatively, such could occur by many two-child families using abortion to ensure they have a “perfect” family of one boy

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<sup>194</sup> See sources cited *supra* notes 33-34.

<sup>195</sup> See *id.*

and one girl. According to anecdotal press reports, there are “two-son” and “two-daughter” families in Yicheng County who have simply accepted the gender of the children they conceived, despite a preference to have a child of both genders.<sup>196</sup> Further, after the two-child policy replaced the one-child policy, abortion rates reportedly plummeted, and population control officials no longer had much need to apply coercive enforcement, instead finding their role shifting to education and ensuring provision of reproductive services (contraception and abortion). Tensions between government and the people reportedly declined significantly, assisting the ideal of a harmonious society.<sup>197</sup>

It is difficult to know whether these reports are accurate or are distorted by the desire to deliver positive news. If the reports are accurate, then it would appear that even though this policy remains highly coercive and intrusive by Western standards, by contemporary Chinese standards it is largely in accord with the combined wishes of the Chinese State and its people. Overall, it would appear that the Yicheng County policy has inculcated a social norm of accepting whichever gender is conceived, rather than using abortion to eliminate female fetuses or to attain the “perfect” family of one boy and one girl.

If these reports about Yicheng County are accurate, then it raises a question: Why don’t families in Yicheng County use abortion to ensure their preference for a son or a daughter? The answer may be that abortion is itself far more difficult and traumatic than many have presumed, even in cultural settings like China, which lacks a significant anti-abortion or pro-life movement or voice. In addition, it should be considered that sex-selective abortions in the context of China generally would be relatively late-term abortions, done at a time after the woman would have had extensive intimate experience with the life of the fetus within her.<sup>198</sup> In a context where there is general agreement between government, individuals, and society regarding the norm of the one to two-child family, with the family allowed to choose between the two, the desire to “have a son” or to “have a daughter” may not be strong enough to overcome a natural aversion to late-term abortion. Furthermore, in a context where the overall abortion rate was significantly reduced, and where abortion was much less commonly practiced within marriage, the notion of a married woman going for an abortion might appear aberrant rather than normative. Where

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<sup>196</sup> *See id.*

<sup>197</sup> *Id.*

<sup>198</sup> *See supra* notes 138-39 and accompanying text.

abortion is much less common and not generally used by the State or families as a means of population or birth control, its attractiveness for gender selection may be significantly reduced.

Given these very positive reports, it is very likely that the Yicheng County experiment, if nationalized, would represent a vast improvement over China's current population control policies, and would likely ameliorate, even if not entirely eliminate, both sex ratio imbalances and the practice of sex-selective abortion. Even though it is impossible to perfectly predict its impact in large urban settings or in other parts of the country, there seems to be little risk making this adjustment. There is very little risk that nationalization of the Yicheng County policy would lead to a population boom, given the increasing prevalence of a one-child social practice in urban areas, and the current policy of permitting a second child in rural areas when the first child is a girl.<sup>199</sup> Indeed, the clarity and simplicity of the Yicheng County policy might lead to a slightly lower national fertility rate than the current, more complex and exception-ridden one-child policy, due to the capacity of the two-child policy to create a clear and predictable set of legal and social expectations. The primary risk is that the two-child policy would not be as effective in ameliorating the sex ratio imbalance and the practice of sex-selective abortion, as it has reportedly been in Yicheng County. However, it would almost certainly ameliorate those practices to a significant degree. Frankly, the only reasons not to immediately shift to the two-child policy would be the Chinese aversion to rapid policy change, based on a fear of instability; the fear that such a change would be viewed as an admission of past errors; or the desire to maintain a sex ratio imbalance based on its long term capacity to "lock in" low fertility through the multi-generational elimination of females. The last reason would be particularly foolish, given that China may in the future find, in the context of an aging and shrinking population, that it regrets eliminating China's future mothers.

Given the nation's propensities, it is likely that China will quietly and slowly move toward a two-child policy as a matter of practical enforcement, but will delay formal announcement of such a shift for some time. Thus, the one-child policy may remain the official policy, but enforcement against second children may become less onerous, or made applicable to smaller percentages of the population. There may be a perception that this approach saves face and is more in accord with social stability. Unfortunately,

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<sup>199</sup> See *supra* notes 185-88 and accompanying text.



this kind of subtle and uneven move toward a two-child policy may fail to capture much of the benefit of the Yicheng County policy. It is possible that many of the positive impacts of the Yicheng County policy come from its simplicity and clarity, in a context where the norms being announced are generally compatible with the will and customs of most people. In other words, a hidden two-child policy may, for various reasons, retain a higher degree of hidden reproductive behavior by the people, including sex-selective abortion, than would an open two-child policy. What has reportedly been achieved in Yicheng County may have occurred in part because the open embrace of the change to a two-child policy allowed a substantial overlap of the goals and values of State, society, and family. Under those circumstances, while abortion is most likely still sometimes used to conform their procreative results to state norms (including abortion by unwed mothers), the use of abortion to achieve familial gender goals may have largely ceased. A shared goal on the quantity and timing of children allows for a shared goal of a gender balanced, less discriminatory society.<sup>200</sup>

Beyond lifting or refining China's population control policies, there are other possible ways to influence China's sex ratio imbalance. These efforts attempt to directly address the cultural norms, practices, and contexts under which families feel they "need" a son in order to have a complete family. One could label these interventions imprecisely as "cultural" approaches to ameliorating the sex ratio imbalance in order to contrast them with approaches based on changes to population control policy. Thus, one can view the patrilocal and patrilineal family, inheritance, land ownership, and other economic and property practices favoring males, and the lack of secure medical and retirement systems as together creating a cultural impetus for a son.<sup>201</sup> Theoretically, if one could eliminate the felt need for a son and any cultural bias against girls, it should be possible to eliminate the sex ratio imbalance regardless of whether the government alters the one-child policy.<sup>202</sup> In addition, the combination of altering population control policies and addressing cultural issues could be most effective.

Each of these cultural issues is a part of the felt imperative for a son. The patrilineal family suggests that a family only survives if there is a son to carry on the family line.<sup>203</sup> The patrilocal family

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<sup>200</sup> See *supra* notes 189-95 and accompanying text.

<sup>201</sup> See JOHNSON, *supra* note 13 at 3-4, 83-87; LEE & WANG, *supra* note 28, at 47-48; Shuzhuo, *supra* note 21, § 5.3.

<sup>202</sup> See Shuzhuo, *supra* note 21, § 5.3.

<sup>203</sup> *Id.*

makes a daughter a temporary visitor in her natal family, suggesting that investments in her life and upbringing amount to “watering someone else’s garden.”<sup>204</sup> Where males, rather than females, inherit property or control land, females become both less empowered and less significant to their families. The lack of a secure pension system emphasizes the need for children as a primary retirement or pension system; in the context of a society where sons bear the obligation to support their parents in retirement, while daughters become a part of their husband’s family, the need of a son becomes a practical necessity in planning for old age.<sup>205</sup> The lack of a secure medical care system, while perhaps less directly related, is part of a context where family savings are imperative, adults feel financially insecure, and the safety net of a son may be considered absolutely necessary.<sup>206</sup>

Obviously some of these cultural issues are, apart from the sex ratio issue, critically important for the people of China. For example, the attainment of secure and reliable health care and retirement systems for China would advance the nation and life of the people in innumerable ways. Such large-scale tasks are easier said than done; nevertheless, these goals should be priorities even apart from the issue of sex ratio balance. Thus, China should effectively address these fundamental insecurities in the lives of the people, but one cannot predict the rate of progress.

Other matters, such as the patrilineal and patrilocal family, present complex questions of State intervention and cultural change, as well as questions of whether the State can practically address them on a national, rather than on a pilot project, basis. Recent changes in the laws of South Korea, which in 2008 abolished the patrilineal family registration system in favor of a new individual family registration system, would offer an interesting comparison for the potential for state or legally-induced change in these areas.<sup>207</sup> Still other issues, such as inheritance and land own-

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<sup>204</sup> Tamera Jacka, *Approaches to Women and Development in Rural China*, 15(49) J. CONTEMPORARY CHINA 585, 598-91 (2000), available at <http://web.rollins.edu/ntlairson/china/womandevchina.pdf>.

<sup>205</sup> See JOHNSON, *supra* note 13, at 3-4; LEE & WANG, *supra* note 28, at 47-48; Shuzhuo, *supra* note 21, § 5.2.

<sup>206</sup> See, e.g., Sharon LaFraniere, *Chinese Hospitals are Battlegrounds of Discontent*, N. Y. TIMES, Aug. 11, 2010, available at [http://www.nytimes.com/2010/08/12/world/asia/12hospital.html?\\_r=2&src=me&ref=homepage](http://www.nytimes.com/2010/08/12/world/asia/12hospital.html?_r=2&src=me&ref=homepage).

<sup>207</sup> See Jang Wook, *The New System Recognizes Women’s Rights and Non-Traditional Families*, JOONGANG DAILY, Jan. 29, 2008, available at <http://joongangdaily.joins.com/article/view.asp?aid=2885630>.

ership, illustrate a gap between the written law and customary practices, as the legal elevation of women to a position of equality under official law has already been accomplished in many ways, and yet often has not been translated into customary practice, particularly in rural areas.<sup>208</sup>

Addressing each individual cultural factor in detail is beyond the scope of this paper, as a close examination of any one of them could be a paper in itself. The relevant question, for purposes of the sex ratio imbalance, is whether China should simultaneously address the population control and cultural causes of the sex ratio imbalance, or whether a program addressing only the cultural factors is sufficient. Because sex ratio imbalances clearly have a cultural component that exists apart from population control policies, and the one-child policy is technically gender neutral, it can be argued that adjustments to China's population control policy are unnecessary for this purpose.<sup>209</sup> Thus, the official Chinese response to sex ratio imbalances so far seems to be solely focused on the cultural factors, although there are indications that some unofficial relaxation of the one-child policy could be driven in part by concerns with the sex ratio imbalance.<sup>210</sup>

The Chinese government has addressed the cultural causes of the sex ratio imbalance by developing pilot programs and has sought to scale up the successful ones. These pilot programs include the "Chauhu Experimental Zone Improving Girl-Child Survival," which was purported to have reduced the sex ratio imbalance in the relevant area from 125 in 1999 to 114 in 2002, and the "Care for Girls" campaign, which reportedly reduced the sex ratio imbalance in 24 counties from 133.8 in 2000 to 119.6 in 2005.<sup>211</sup> Since 2006, the Chinese government has been seeking to scale up the Care for Girls program to the entire nation.<sup>212</sup> As a part of the Care for Girls campaign, the Chinese government has also targeted the "two illegalities" of illegal fetal sex identification and sex-selective abortion, although it is difficult to discern how much success or effort there is in regard to such legal prohibitions.<sup>213</sup> Over-

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<sup>208</sup> See Skinner, *supra* note 16; Wexler, *supra* note 184, at 83-85; GENDER EQUALITY AND SOCIAL INSTITUTIONS IN CHINA, *available at* <http://genderindex.org/country/china> (last visited Oct. 20, 2010).

<sup>209</sup> Cf. Shuzhuo, *supra* note 21, § 5.3; Wexler, *supra* note 184, at 90-92.

<sup>210</sup> See Valerie M. Hudson, *The Missing Girls of China and India: What Is Being Done?*, 41 CUMB. L. REV. 67 (2010).

<sup>211</sup> See Shuzhuo, *supra* note 21, § 7.2.

<sup>212</sup> *Id.* § 7.2.3.

<sup>213</sup> See *id.* §§ 7.1.2, 7.2.2.

all, the Chinese government's cultural approaches employ combinations of positive and negative incentives aimed at families conceiving daughters and are designed to induce them to birth and nurture girls. These approaches might be viewed as "educational," media, and propaganda efforts to target the cultural and economic causes of China's sex ratio imbalance.<sup>214</sup>

This author would argue that purely cultural interventions by the State, in the absence of any changes in population policy, would, at a minimum, significantly delay success in alleviating China's sex ratio imbalance. Effective interventions in these cultural areas may be lacking or may be decades away from being accomplished; further, the kinds of cultural interventions attempted by the Care for Girls campaign are unlikely to accomplish a normal sex ratio quickly, if at all. This is implicitly recognized by the Chinese target goal, under the national Care for Girls campaign, of normal sex ratios in fifteen years.<sup>215</sup> This is also suggested by the fact that even the pilot Care for Girls program failed to achieve anything close to a normal sex ratio in its first five years; while a reduction from 133.8 to 119.6 is impressive (if accurate), it still leaves 10% of females missing from the population.<sup>216</sup> Thus, sole use of this kind of cultural intervention is inconsistent with the fact that China already has created one generation with a severe sex ratio imbalance, and China should not be willing to create a second similar generation.

Settling for cultural interventions that are likely to take at least another generation to take effect furthers the risk of China re-settling, as a long-term norm, into a sex ratio imbalance. Historically speaking, a sex ratio imbalance is apparently normal for China. Modern methods of procreation control offer new methods to achieve this traditional Chinese norm. Another generation of ineffective government opposition to a sex ratio imbalance may simply establish such imbalance as a societal norm. Just as sex-selective infanticide was illegal, but broadly practiced in China for hundreds of years, sex-selective abortion may become established as a cultural practice in the face of official laws and pronouncements against it.<sup>217</sup>

The sex ratio imbalance and practice of sex-selective abortion have been a direct response by the Chinese people to the artificial pressures created by the State's imposition of the one-child policy,

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<sup>214</sup> See *id.* §§ 7.2 to 4.4 & app.

<sup>215</sup> See *id.* § 7.2.3.

<sup>216</sup> See *id.* § 7.2.2.

<sup>217</sup> See *supra* notes 62-78 and accompanying text.

and has persisted despite the State seeking to prohibit disclosure of fetal gender and sex-selective abortion. This suggests that merely adding more State-imposed pressure in the area of procreative practice will not necessarily produce the intended result; instead, what is required is a lessening of the artificial, State-imposed pressure. The fundamental difficulty with the one-child policy has been that most Chinese families, even after thirty years of the policy, would prefer to have two children, rather than one.<sup>218</sup> Removing the contradiction that exists in a nation that prefers two children per family, and a State that enunciates a one-child norm with uneven enforcement and multiple exceptions, would relieve a primary discordance between the State and its people. Until that discordance is removed, State intervention in the areas of family and procreation, including cultural interventions in opposition to sex-selective abortion, will lack credibility. Put another way: The one-child policy has nurtured a reflexive resistance to State authority in the area of procreation; only by removing the policy, or making the policy consistent with broadly held social norms and desires, will this practice and pattern of resistance be ended.

This understanding of sex-selective abortion in China as a form of resistance to State authority is contestable. It is often said that most Chinese citizens support China's population control policies.<sup>219</sup> A more nuanced description suggests that while most Chinese support the concept and necessity of limiting population, the details of the policy, and the means employed to enforce it, have often been resisted.<sup>220</sup> This author would suggest that to see what Chinese citizens truly think of the policy, you have to look at what they do as well as what they say. In that context, the use of sex-selective abortion has represented a persistent and systemic resistance to the Chinese State. Families place their individual and familial needs ahead of the expressed demands of the Chinese State, albeit in a way that generally goes unpunished, being revealed primarily in statistical, rather than individual, form.

Ultimately, then, an effective intervention against sex-selective abortion and the sex ratio imbalance will be implemented when the Chinese government realizes that the coercive one-child policy has introduced an unnecessary and deep instability into Chinese society. These instabilities include discordance between State and

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<sup>218</sup> See Hasketh, Lu & Xing, *supra* note 28, at 1174 (stating that 57% of Chinese women want two children, 5.8% want more than two children, and 35% want one child).

<sup>219</sup> See, e.g., LEE & WANG, *supra* note 28, at 133-34.

<sup>220</sup> Cf. GREENHALGH & WINCKLER, *supra* note 93, at 2-3.

society in regard to procreative matters, a deeply entrenched pattern of resistance against State authority that has grown over time, and a sex ratio imbalance that may cause China's population over several generations to decline too deeply, leading to the instabilities created by an aging and shrinking society. Further, this sex ratio imbalance limits the possibilities for rebalancing and stabilizing the population due to the physical absence of females from the population; it will be ineffective to urge mothers to have more children in the future when a significant percentage of females are completely absent from the population.

This author would suggest that these instabilities are, over the long term, more serious than the ones more commonly put forward: the dangers of millions of bare branch males lacking wives and increased trafficking activities. These inter-related effects—bare branch males and increased trafficking—are indeed predictable impacts of China's population control policies. Both involve substantial suffering and should be avoided simply because of their human cost. Emphasizing them as sources of instability, however, may be inaccurate because their victims are probably too powerless to destabilize society. Most of the bare branch men are likely poor, low-status rural males who are unlikely to destabilize society. China, unfortunately, has lived for centuries with lower status males who were unable to marry, and this pattern has been persistent enough to make it seem unlikely that this is a consistently destabilizing element. Trafficked women are even less likely to destabilize society, despite the tragic nature of their victimization. A corollary ill of an increase in purportedly "voluntary" prostitution, which in China is also related to the habits of some of China's rich and powerful men, is also unlikely to politically destabilize any ruling regime, even if it can be condemned as immoral and contrary to family life.

Once the Chinese government is sufficiently convinced of the negative impacts of the sex ratio imbalance, in terms of instability and demographic considerations, it will likely be willing to simultaneously make significant and visible alterations to China's population control policies and pursue cultural interventions. Until that time, China will attempt to address the sex ratio imbalance "on the cheap," by making largely superficial and hidden changes to the population control policy and by relying primarily on cultural interventions that will take another decade, at least, to accomplish their purpose.

## V. CHINA'S INTERCOUNTRY ADOPTION PROGRAM IN EAST ASIAN PERSPECTIVE

China's intercountry adoption program, even at its 2005 peak of approximately 8,000 annual adoptions to the United States<sup>221</sup> and approximately 14,500 total annual adoptions,<sup>222</sup> can account for only a small fraction of China's abandoned or missing girls. While China has sent slightly over 100,000 children abroad for intercountry adoption since the intercountry adoption program was started in the early 1990s,<sup>223</sup> this number, in relationship to the tens of millions of missing girls in China's population over that same period, is too small to be of much statistical significance. From this perspective, China's population policies and consequent missing girls phenomenon is a very important context for understanding intercountry adoption, while intercountry adoption remains a largely peripheral matter for those concerned with China's population control policies, demographics, and sex ratio imbalance. However, this author would still suggest that experts in population policy, demographics, and children's rights issues pay some heed to intercountry adoption from China, because what happens there can offer some clues as to broader issues affecting much larger groups of people. In addition, the approach of the Chinese government to intercountry adoption is very much a part of the story of China's approach to population.

China's intercountry adoption practices, like the related issues of sex ratio imbalance and declining population, is best viewed in a broader East Asian context. East Asia has been deeply significant to the history of intercountry adoption over the last sixty-five years. After World War II, United States soldiers adopted Japanese children orphaned by the atomic bombs, creating, along with adoptions from Germany, a modern precedent for war as a context for

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<sup>221</sup> *Total Adoptions to the United States*, U.S. DEP'T OF STATE, [http://adoption.state.gov/news/total\\_chart.html](http://adoption.state.gov/news/total_chart.html) (last visited Sept. 29, 2010) [hereinafter *Adoptions to the United States*]; *China: Country Information*, U.S. DEP'T OF STATE, available at <http://www.adoption.state.gov/country/china.html> (last visited Sept. 30, 2010) [hereinafter *China Country Information*]; *Immigrant Visas Issued to Orphans Coming to the U.S., Top Countries of Origin*, U.S. DEP'T OF STATE (on file with author) [hereinafter *Top Countries of Origin*].

<sup>222</sup> See Peter Selman, *The Rise and Fall of Intercountry Adoption in the 21st century*, 52(5) INT'L SOC. WORK 575, 583; *Intercountry Adoption Statistics*, AUSTL. INTERCOUNTRY ADOPTION NETWORK, available at <http://www.aican.org/statistics.php?region=0&type=birth> (last visited Sept. 30, 2010) [hereinafter *Origin Statistics*].

<sup>223</sup> *Origin Statistics*, *supra* note 222.

intercountry adoption.<sup>224</sup> The Korean War was the original impetus for Americans to adopt Korean children, but the practice of intercountry adoption from Korea has continued ever since, leading South Korea to be the longest continuously operating country of origin.<sup>225</sup> There have been approximately 200,000 Korean children adopted into various Western nations over more than fifty years; however, the issue of why such a wealthy and developed nation has continued to be a significant country of origin remains deeply divisive.<sup>226</sup> The existence of a large group of Korean adult adoptees has significantly altered intercountry adoption discourse, because many of these adoptees write memoirs emphasizing the experience of being a trans-racial adoptee.<sup>227</sup> Korean adoptees take diverse stances on intercountry adoption along a range from extremely critical to overwhelmingly positive; some Korean adoptees have taken leadership positions in agencies and organizations concerned with adoption.<sup>228</sup> Significantly, from 1972 to 1987 more than half of all internationally adopted children coming to the United States were Korean.<sup>229</sup>

Southeast Asia has also been very significant to intercountry adoption. War was once again the impetus for intercountry adoption in Vietnam, as the American withdrawal from South Vietnam was the context for the controversial Baby-Lift operation in April 1975.<sup>230</sup> Several thousand children were rushed out of Vietnam in the closing days of the war,<sup>231</sup> creating issues later when some of their biological family members sought the return of their chil-

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<sup>224</sup> See E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* 33-34 (Harvard Univ. Press 1998).

<sup>225</sup> Hollee McGinnis, *South Korea and Its Children*, N.Y. TIMES, Nov. 27, 2007, available at <http://relativechoices.blogs.nytimes.com/2007/11/27/south-korea-and-its-children>.

<sup>226</sup> See TOBIAS HUBINETTE, *COMFORTING AN ORPHANED NATION: REPRESENTATIONS OF INTERNATIONAL ADOPTION AND ADOPTED KOREANS IN KOREAN POPULAR CULTURE* (2005); TOBIAS HUBINETTE, *KOREAN ADOPTION HISTORY*, available at [http://www.tobiashubINETTE.se/adoption\\_history.pdf](http://www.tobiashubINETTE.se/adoption_history.pdf).

<sup>227</sup> See generally, JANE JEONG TRENKA, *THE LANGUAGE OF BLOOD* (2005).

<sup>228</sup> David M. Smolin, *South Korean Adoptions in Global Perspective*, SECOND INTERNATIONAL SYMPOSIUM ON KOREAN ADOPTION STUDIES 104 (Aug. 3, 2010) (over-viewing extensive roles of Korean adoptees).

<sup>229</sup> Selman, *supra* note 222, at 582.

<sup>230</sup> See generally *Nguyen Da Yen v. Kissenger*, 528 F.2d 1194 (9th Cir. 1975); DANA SACHS, *THE LIFE WE WERE GIVEN: OPERATION BABYLIFT, INTERNATIONAL ADOPTION, AND THE CHILDREN OF WAR IN VIETNAM* (2010).

<sup>231</sup> Marilyn Elias, *'Danang' Reopens the Hidden Wounds of War*, USA TODAY, Mar. 19, 2003, at 5D; *Operation BabyLift*, AIRLIFT/TANKER Q., Spring 2005, at 6; see generally SACHS, *supra* note 230.



dren.<sup>232</sup> Many perished when one of the planes transporting large numbers of infants and care-givers crashed shortly after take-off.<sup>233</sup> Thus, the Baby-Lift continues to evoke divided opinion, viewed by some as a great example of humanitarian effort, and by others as an example of Western, neo-colonialist arrogance.<sup>234</sup>

In recent years, Vietnam and Cambodia have been among the nations where rapidly increasing numbers of intercountry adoptions were followed by scandals involving abusive adoption practices, and then various closures and moratoria.<sup>235</sup> Vietnam and Cambodia became representative of nations where children were obtained illicitly through force, fraud, or funds; given false paperwork as legitimately relinquished or abandoned orphans; and then processed through the official channels of the intercountry adoption system.<sup>236</sup> The Hague Convention on Intercountry Adoption, completed in 1993 prior to the scandals in Vietnam and Cambodia, was created with an objective of preventing the “abduction, the sale of, or traffic in children.”<sup>237</sup> The work and preparation of the Convention indicates a clear understanding of these abusive practices, their prevalence in some “sending nations” in the late 1980s and early 1990s, and the need to control the financial aspects of intercountry adoption in order to avoid such misconduct.<sup>238</sup> Despite the use of the term “traffic in children” in the Hague Adoption Con-

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<sup>232</sup> See generally *In re Hua*, 405 N.E.2d 255 (Ohio 1980); *Doan Thi Hoang Anh v. Nelson*, 245 N.W.2d 511 (Iowa 1976); Paul J. Buser, *Habeas Corpus Litigation in Child Custody Matters: An Historical Minefield*, 11 J. AM. ACAD. MATRIM. LAW 1 (1993); Robert E. Tomasson, *Connecticut Invalidates Adoption of 2 Vietnamese*, N.Y. TIMES, Dec. 28, 1980, § 1, p. 28; see generally SACHS, *supra* note 230.

<sup>233</sup> See *Operation BabyLift*, *supra* note 231, at 7-8; see generally SACHS, *supra* note 230.

<sup>234</sup> Cf. *Nguyen Da Yen*, 528 F.2d 1194; *CHERIE CLARK, AFTER SORROW COMES JOY* (2000); *Statement on the Immorality of Bringing South Vietnamese Orphans to the United States*, ADOPTION HIST. PROJECT (Apr. 4, 1975), <http://darkwing.uoregon.edu/~adoption/archive/SIBSVOUS.htm>; see generally SACHS, *supra* note 230.

<sup>235</sup> David M. Smolin, *Child Laundering*, 52 WAYNE L. REV. 113, 132 (2006).

<sup>236</sup> *Id.* at 125; Trish Maskew, *Child Trafficking and Intercountry Adoption: The Cambodian Experience*, 35 CUMB. L. REV. 619, 621 (2005); *Adoption: Vietnam*, SCHUSTER INST. INVESTIGATIVE JOURNALISM, <http://www.brandeis.edu/investigate/gender/adoption/vietnam.html> (last visited Sept. 29, 2010); see also *Summary of Irregularities in Adoptions in Vietnam*, EMBASSY OF THE UNITED STATES, HANOI, VIETNAM (Apr. 25, 2008), [http://vietnam.usembassy.gov/irreg\\_adoptions042508.html](http://vietnam.usembassy.gov/irreg_adoptions042508.html).

<sup>237</sup> *Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption*, 32 I.L.M. 1134, 1139 (May 29, 1993). [hereinafter *Hague Convention*].

<sup>238</sup> David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. LOUISVILLE L. REV. 441 (2010).

vention,<sup>239</sup> and in the preparatory materials,<sup>240</sup> there has since been substantial controversy over whether abducting or buying children for intercountry adoption legally is a form of trafficking.<sup>241</sup> This author has popularized (but not invented) the term “child laundering” as a useful term for describing the particular kind of misconduct in which children are illicitly obtained, given false paperwork as legitimately obtained “orphans,” and then processed through the intercountry adoption system.<sup>242</sup>

The significance of East Asia and Southeast Asia for intercountry adoption provides a context for the rise of China as the most significant country of origin in the intercountry adoption system since the finalization of the Hague Convention in 1993.<sup>243</sup> In order to understand this period of time, a statistical overview is helpful. Intercountry adoptions to the United States roughly tripled, rising from 7,377 adoptions in 1993 to a peak of 22,990 adoptions in 2004.<sup>244</sup> The rise in adoptions to the United States helped drive a parallel increase in global intercountry adoptions—from approximately 20,000-23,000 adoptions in 1993 to approximately 45,000 adoptions in the peak year of 2004.<sup>245</sup>

China and the United States played somewhat parallel roles during this period of time, with China replacing South Korea as the most significant sending nation,<sup>246</sup> while the United States continued its prior role as the most significant receiving nation.<sup>247</sup> Not surprisingly under these circumstances, more than two-thirds of

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<sup>239</sup> *Hague Convention*, *supra* note 237, at 1139.

<sup>240</sup> Smolin, *supra* note 238, at 447-61.

<sup>241</sup> See generally Smolin, *supra* note 235; David M. Smolin, *Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 VT. L. REV. 1 (2007); David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281 (2004).

<sup>242</sup> See generally Smolin, *supra* note 235.

<sup>243</sup> See generally Selman, *supra* note 222, at 582 (discussing influence of intercountry adoption from Asian countries).

<sup>244</sup> See *Immigrant Visas Issued to Orphans Coming to the United States: Top Countries of Origin*, SUNNY RIDGE FAM. CTR. (Feb. 10, 2010), [http://www.sunnyridge.org/pdf/Immigrant\\_Visas\\_Issued\\_Orphans\\_Coming\\_US.pdf](http://www.sunnyridge.org/pdf/Immigrant_Visas_Issued_Orphans_Coming_US.pdf); *Total Adoptions to the United States*, U.S. DEP'T OF STATE, [http://adoption.state.gov/news/total\\_chart.html](http://adoption.state.gov/news/total_chart.html) (last visited Sept. 29, 2010).

<sup>245</sup> See Peter Selman, *Intercountry Adoption in the New Millennium: The “Quiet” Migration Revisited*, 21 POPULATION RES. & POL'Y REV. 205, 209-10 (2002); Selman, *supra* note 222, at 576.

<sup>246</sup> See Selman, *supra* note 245, at 212-14.

<sup>247</sup> See Selman, *supra* note 245, at 210 (United States as leading receiving country from 1980 to 1998); Selman, *supra* note 222, at 576 (United States as leading receiving country from 1998 to 2007); *Origin Statistics* *supra* note 222.

China's internationally adopted children have gone to the United States.<sup>248</sup> The United States, as the leading receiving nation, has received more than half of all internationally adopted children, meaning that more children have come to the United States for adoption than all of the other receiving nations combined.<sup>249</sup> China in recent years combined with Guatemala and Russia to comprise a trio of sending nations that account for most of the rise in intercountry adoptions from 1993 to 2004, and a majority of all adoptions to the United States.<sup>250</sup> Overall, China's role from 1993 to the present has been uniquely important to the development of the intercountry adoption system, sending children in significant numbers not only to the United States, but also Australia, Canada, Denmark, Finland, France, the Netherlands, Norway, Spain, Sweden, and the United Kingdom.<sup>251</sup> Hence, China has played a very significant role in the adoption programs of many receiving nations. Over 100,000 Chinese children have been sent to other nations for intercountry adoption over the last two decades, most of them in the last decade.<sup>252</sup>

The period from 2004 to the present has seen a sharp reversal, with intercountry adoptions to the United States declining from almost 22,990 in 2004 to 12,753 in 2009,<sup>253</sup> and a parallel decline in global intercountry adoption statistics.<sup>254</sup> One of the most controversial issues in intercountry adoption has been the cause of this decline. Some blame ideological opposition to intercountry adoption for the decline.<sup>255</sup> Others (including this author) blame the decline primarily on the failure of the intercountry adoption system to prevent abusive adoption practices, including child laundering, leading to scandals, closures, moratoria, and a reluctance of potential sending nations to participate in the system.<sup>256</sup>

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<sup>248</sup> See *Origin Statistics*, *supra* note 222.

<sup>249</sup> See Selman, *supra* note 222, at 578-79; Selman, *supra* note 245, at 210-11; Smolin, *supra* note 238 at \_\_\_\_; *International Adoption Statistics by Receiving Country*, AUSTL. INTERCOUNTRY ADOPTION NETWORK, <http://www.aican.org/statistics.php?region=0&type=receiving> (last visited Sept. 29, 2010) [hereinafter *Receiving Nation Statistics*].

<sup>250</sup> See Selman, *supra* note 245, at 213-14; Selman, *supra* note 222, at 579-81; Smolin, *supra* note 236 at \_\_\_\_; *Origin Statistics*, *supra* note 222.

<sup>251</sup> See, e.g., *Receiving Nation Statistics*, *supra* note 249.

<sup>252</sup> See *Origin Statistics*, *supra* note 222.

<sup>253</sup> See Smolin, *supra* note 238 at \_\_\_\_; *Adoptions to the United States*, *supra* note 221.

<sup>254</sup> See Selman, *supra* note 222, at 576-77; *Origin Statistics*, *supra* note 222; *Receiving Nation Statistics*, *supra* note 249.

<sup>255</sup> See Smolin, *supra* note 236 at \_\_\_\_ (quoting Professor Elizabeth Bartholet).

<sup>256</sup> See *id.* at \_\_\_\_.

China has been a significant part of the decline in intercountry adoptions, both to the United States and other nations.<sup>257</sup> Chinese intercountry adoptions peaked a year later than the overall system, reaching a peak of 7,903 adoptions to the United States and approximately 14,500 globally in 2005.<sup>258</sup> Since then, there has been a steady decline of adoptions to the United States, as follows:

2005: 7,903 (peak year)

2006: 6,492

2007: 5,453

2008: 3,911

2009: 3,001<sup>259</sup>

Although available global intercountry adoption statistics are not as exact, it appears that global intercountry adoptions from China declined from the 2005 peak of around 14,500 to less than 6,000 in 2009.<sup>260</sup>

From 2005 to 2010, the wait times for United States citizens seeking to adopt a healthy baby or toddler from China have increased dramatically, from less than nine months to forty or forty-one months by 2010.<sup>261</sup> This increase in wait times occurred even though the Chinese government issued regulations, effective May 1, 2007, that made the qualifications for prospective adoptive parents significantly more restrictive, and thereby reduced the number of possible applicants.<sup>262</sup> In addition, an increasingly high percentage of the children who are being sent for intercountry adoption are much older or have serious disabilities, to the point where

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<sup>257</sup> See Selman, *supra* note 222, at 581, 589-90.

<sup>258</sup> *Adoptions to the United States*, *supra* note 221; Selman, *supra* note 222, at 580.

<sup>259</sup> *Adoptions to the United States*, *supra* note 221.

<sup>260</sup> See Selman, *supra* note 222, at 583; *Origin Statistics*, *supra* note 222.

<sup>261</sup> Brian Stuy, *If You Don't Pay Any Money, How Will You Find Any Babies?*, RESEARCH-CHINA.ORG (Sept. 30, 2009, 7:34 PM), <http://research-china.blogspot.com/2009/09/if-you-dont-pay-any-money-how-will-you.html>; *Intercountry Adoption, China: Country Information*, U.S. DEP'T OF STATE, <http://www.adoption.state.gov/country/china.html> (last visited Sept. 27, 2010) [hereinafter *China Adoption Information*]; see generally David Crary, *Wait Times Expand Sharply for Adoptions from China*, BOSTON GLOBE, Apr. 10, 2008, at 9A, available at [http://www.boston.com/news/nation/articles/2008/04/10/wait\\_times\\_expand\\_sharply\\_for\\_adoptions\\_from\\_china](http://www.boston.com/news/nation/articles/2008/04/10/wait_times_expand_sharply_for_adoptions_from_china).

<sup>262</sup> Catherine Donaldson-Evans, *China's New Adoption Laws Will Affect Many Waiting Parents in U.S.*, FOX NEWS.COM (Mar. 22, 2007), <http://www.foxnews.com/story/0,2933,260391,00.html>; see *China Adoption Information*, *supra* note 261.

the majority are now considered special needs adoptions;<sup>263</sup> this is a very significant change, which further indicates a radical reduction in the number of healthy infants and toddlers currently available for intercountry adoption.

By 2005, prospective adoptive parents and the international adoption community believed that China had a virtually unlimited number of baby girls eligible for adoption.<sup>264</sup> The theory was that the one-child policy had caused mass abandonments of baby girls on such a large scale that the government's child welfare system became overwhelmed.<sup>265</sup> According to the standard account, China's decision to open up a large-scale intercountry adoption program in the early 1990s was a direct reaction to the large-scale abandonments of baby girls produced by the combination of the one-child policy and the cultural impetus for a son.<sup>266</sup> Intercountry adoption simultaneously provided a way to transfer some abandoned children out of China's crowded social welfare institutions and into families, while also providing financial support for some of those institutions through required and voluntary orphanage donations.<sup>267</sup> China also may have viewed the program diplomatically, as creating a tie between China and receiving nations like the United States.<sup>268</sup> Thus, from China's perspective, the intercountry adoption program was to serve the national interest and to provide for some of the baby girls abandoned as an unintended consequence of the one-child policy.<sup>269</sup>

Kay Johnson's significant work also emphasized that domestic adoption historically existed in various forms in China and potentially could have increased to meet the needs of many of China's abandoned baby girls.<sup>270</sup> Johnson argued that the Chinese government perceived domestic adoption as sometimes being used to

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<sup>263</sup> See David Crary, *Most Adoptions from China Now Special-Needs Cases*, BOSTON GLOBE (Mar. 28, 2010), [http://www.boston.com/news/nation/articles/2010/03/28/most\\_adoptions\\_from\\_china\\_now\\_special\\_needs\\_cases/](http://www.boston.com/news/nation/articles/2010/03/28/most_adoptions_from_china_now_special_needs_cases/).

<sup>264</sup> See, e.g., Barbara Demick, *Some Chinese Parents Say Their Babies Were Stolen for Adoption*, L.A. TIMES, Sept. 20, 2009, available at <http://articles.latimes.com/2009/sep/20/world/fg-china-adopt20> (One adoptive parent states, "When we adopted in 2006, we were fed the same stories, that there were millions of unwanted girls in China . . .") [hereinafter "Chinese parents"].

<sup>265</sup> Luo & Smolin, *supra* note 40, at 602.

<sup>266</sup> *Id.* at 601-02, 606.

<sup>267</sup> See, e.g., JOHNSON, *supra* note 13, at 33-34, 142-45; Luo & Smolin, *supra* note 40, at 603, 605.

<sup>268</sup> See Luo & Smolin, *supra* note 40, at 603-04.

<sup>269</sup> See *id.*

<sup>270</sup> See JOHNSON, *supra* note 13, at 109-10.

avoid the limitations of the government's population control policies, and therefore, implemented policies that significantly suppressed official, domestic adoption.<sup>271</sup> Johnson also argued that even disabled children traditionally had been adoptable domestically within China, but that the eugenics mindset of the government, which emphasized fewer children of high quality, deeply suppressed domestic adoption of disabled children.<sup>272</sup> Left undetermined was the question of how many of China's missing daughters were being hidden and unofficially adopted.<sup>273</sup>

Accounting for the dramatic drop in Chinese adoptions from 2005 to the present is an important part of the current controversy over the global falling of intercountry adoptions.<sup>274</sup> Within the intercountry adoption community there is a certain measure of defensiveness and fear that leads the community to instinctively believe that the decline must be due to an ideological or political decision to arbitrarily restrict intercountry adoption.<sup>275</sup> The intercountry adoption community characteristically tends to blame nationalistic pride by sending nations or anti-intercountry adoption activism by international organizations for decreasing numbers or other difficulties with intercountry adoption.<sup>276</sup> Ironically, sometimes China's restrictions on who may adopt is put forward as evidence of China seeking to limit the numbers of adoptions.<sup>277</sup> The assumption is that there are still virtually limitless numbers of healthy young children in China's orphanages and that China is arbitrarily refusing to allow them to be adopted.<sup>278</sup> Of course, even if that were true, the restrictions on who may adopt would be ir-

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<sup>271</sup> *Id.* at 94-95.

<sup>272</sup> JOHNSON, *supra* note 13, at 26-27.

<sup>273</sup> See generally JOHNSON, *supra* note 13,

<sup>274</sup> See David Crary, *Foreign Adoptions by Americans Drop Sharply*, ASSOCIATED PRESS (Nov. 17, 2008), [http://www.usatoday.com/news/nation/2008-11-17-3481490130\\_x.htm](http://www.usatoday.com/news/nation/2008-11-17-3481490130_x.htm).

<sup>275</sup> See Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 159-61 (2007).

<sup>276</sup> See Bartholet, *supra*, note 275, at 152.

<sup>277</sup> See Bartholet, *supra*, note 275, at 160-61. David Crary, *For Third Straight Year, Foreign Adoptions in U.S. Decline*, ASSOCIATED PRESS (Dec. 4, 2007), <http://the.honoluluadvertiser.com/article/2007/Dec/04/il/hawaii712040308.html>.

<sup>278</sup> See Bartholet, *supra* note 275, 160-61; Crary, *supra* note 277; see also Brian Stuy, *What are the Problems in China?*, RESEARCH-CHINA.ORG (Oct. 14, 2008), [http://research-china.blogspot.com/2008\\_10\\_01\\_archive.html](http://research-china.blogspot.com/2008_10_01_archive.html) (documenting that U.S. adoption agencies typically tell adoptive parents that hundreds of thousands of infants are abandoned each year in China, with one stating that there are 15 million healthy orphan girls in China).

relevant to the issue of the falling numbers, because even with those restrictions, wait times for prospective adoptive parents have risen from less than nine months to forty or forty-one months.<sup>279</sup> The declining numbers of intercountry adoptions, in short, cannot be due to a lack of eligible, prospective adoptive parents.

The fundamental issue, then, is whether there is a large population of healthy infant and toddler orphans in government care who are arbitrarily being kept out of the intercountry adoption system. So far as this author is aware, no evidence has been put forward that this is occurring. There is statistical evidence of an increase in the population of children in government care through 2005, which is consistent with the increase in intercountry adoptions that peaked in that year. The official estimates of fewer than 69,000 to 78,000 abandoned or orphaned children of all ages living in state care in 2005 are much more modest than might be expected from United States adoption agency rhetoric or the numbers of children in government care in other nations, but they do represent an increase from official figures for prior years.<sup>280</sup> However, this author is not aware of any evidence of a continuing increase in orphanage population after 2005. Instead, there are a variety of reports that, overall, suggest that a significant and increasing proportion of children in government care are disabled and that the numbers of abandoned, healthy infants in government care have declined very significantly from the higher numbers in 2005.<sup>281</sup> Indeed, Kay Johnson reportedly stated in 2010: "In the

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<sup>279</sup> See *supra* note 260.

<sup>280</sup> Cf. JOHNSON, *supra* note 13, at 204, 207 (China's Ministry of Civil Affairs reports 46,500 children in care in 2000 and just over 50,000 in 2001); Liu Meng & Zhu Kai, *Orphan Care in China*, 7 SOC. WORK & SOC'Y 1 (2009), available at [http://www.socwork.net/2009/1/special\\_issue/mengkai](http://www.socwork.net/2009/1/special_issue/mengkai) (according to Ministry of Civil Affairs, numbers of abandoned children and children residing in child welfare homes increased substantially from the late 1980's to 1999 and continued to increase from 1999 to 2005, with 78,000 abandoned children living in child welfare homes in 2005); Joshua Zhong, *573,000 Orphans in China: Exactly How Many Orphaned Children are There in China*, CCAI UPDATE (Mar./Apr. 2006), [http://www.chinesechildren.org/Newsletter%5CWindow%20to%20China/WTC\\_03\\_2006.pdf](http://www.chinesechildren.org/Newsletter%5CWindow%20to%20China/WTC_03_2006.pdf). The Chinese Ministry of Civil Affairs, Beijing Normal University, and Save the Children (U.K.) reportedly commissioned a study of China's orphaned children and found fewer than 69,000 living in Chinese orphanages, of which more than half were medical special needs children. A much larger group of 450,000 "orphans" were reportedly living with relatives.

<sup>281</sup> See, e.g., Zhong, *supra* note 280 (more than half of all children living in Chinese orphanages as of 2005 were medical special needs children); Jessica Pegis, *China's Stolen Children: An Interview with Kay Johnson*, O Solo Mama (Jan. 4, 2010, 00:07), <http://osolomama.wordpress.com/2010/01/04/chinas-stolen-children-an-interview-with-kay-johnson> [hereinafter Johnson Interview].

early 1990s, there were lots of real foundlings. Some orphanages would fill the hallways with cribs. There aren't many foundlings now. There are some, but they're few and far between, and so people who want to adopt find it harder to find them."<sup>282</sup>

What would have caused Chinese orphanages to receive much fewer healthy young infants and children since 2005? One logical explanation would be that sex-selective abortions increasingly have replaced sex-selective abandonments in China. While this shift from sex-selective abandonment to sex-selective abortion is well documented,<sup>283</sup> there is a fundamental problem of timing. Most likely, the transition to sex-selective abortions had substantially occurred by 2000,<sup>284</sup> and yet the years 2000 to 2005 saw a substantial increase, rather than decrease, in both intercountry adoptions and (reportedly) orphanage population.<sup>285</sup>

Consider the following statistics on Chinese adoptions to the United States, remembering that these figures drive and parallel China's overall intercountry adoption program, because the majority of China's internationally adopted children have gone to the United States:

1991	61
1992	206
1993	330
1994	787
1995	2130
1996	3333
1997	3597
1998	4206
1999	4108
2000	5058
2001	4705
2002	4677
2003	6857
2004	7038
2005	7903

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<sup>282</sup> Johnson Interview, *supra* note 281; see also Jenny Bowen, *Blues Skies for Orphans, HALF THE SKY FOUND.* (Aug. 26, 2007), <http://www.halfthesky.org/journal/?p=63> (orphanage director quoted as saying that, due to changes in China, "[n]ow it is rare in these smaller city [orphanages to] receive healthy abandoned infants"). Johnson is one of the primary originators of the standard account of orphanages overwhelmed with abandoned baby girls after imposition of the one-child policy. Johnson Interview, *supra* note 281.

<sup>283</sup> See *supra* notes 52-55 and accompanying text.

<sup>284</sup> See *supra* notes 53-54 and accompanying text.

<sup>285</sup> See *supra* notes 242-44, 280-81 and accompanying text.



2006 6492  
2007 5453  
2008 3911  
2009 3001<sup>286</sup>

It is notable that China did not significantly open its intercountry adoption program until more than a decade after imposition of the one-child policy caused sharp increases in abandoned girls.<sup>287</sup> By the time that the intercountry adoption program had really accelerated in the mid-1990s, ultrasound machines had become widely available in China, causing a sharp trend toward sex-selective abortions.<sup>288</sup> The timing of the problem of sex-selective abortion can be indicated by the fact that China first legislated against prenatal sex determination in 1994.<sup>289</sup> Yet, for the next decade, intercountry adoptions rose significantly as sex ratios (and presumably the practice of sex-selective abortion) grew even worse, rising until at least 2000 and perhaps even to the present day.<sup>290</sup> Under these circumstances, there does not initially appear to be any correlation between intercountry adoption rates and the rising incidence of sex-selective abortion in China.

Another possible explanation for declining intercountry adoption is a rise in domestic adoptions in China. International adoption law, under the subsidiarity principle, favors domestic adoption over intercountry adoption,<sup>291</sup> and hence an increase in domestic adoption would generally be seen as a positive development. The story of domestic adoption in China, as indicated immediately above, is significant and complex. There were varied forms of domestic adoption historically practiced in China, which could have potentially absorbed into families many of the infant girls abandoned in the wake of the imposition of the one-child policy.<sup>292</sup> The

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<sup>286</sup> See *China Adoption Information*, *supra* note 261; *Top Countries of Origin*, *supra* note 221; *Origin Statistics*, *supra* note 222.

<sup>287</sup> Some adoptions, with varying degrees of international connection, occurred from 1981 to 1989 before the opening of a comprehensive intercountry adoption program; these included "foreigners and overseas Chinese citizens, including individuals in Macau, Hong Kong, and Taiwan," adopting Chinese children. Patricia J. Meier & Xiaole Zhang, *Sold into Adoption: The Human Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 CUMB. L. REV. 87, 97 (2009).

<sup>288</sup> See *supra* notes 52-55, 80-81 and accompanying text.

<sup>289</sup> See *supra* note 62 and accompanying text.

<sup>290</sup> See *supra* notes 54-58, 242-44 and accompanying text.

<sup>291</sup> See *Hague Convention*, *supra* note 237, at 1139; Convention on the Rights of the Child, 1577 U.N.T.S. 3 (Nov. 20, 1989), available at <http://www.hivlawandpolicy.org/resources/view/225>.

<sup>292</sup> See *supra* notes 47-51 and accompanying text.

government, however, interpreted domestic adoption negatively as a potential means to bypass population control limits.<sup>293</sup> The fact that domestic adoption could and was sometimes used to bypass population control limits created a state of hostility toward domestic adoption in China, even when it involved strangers adopting abandoned infants and children.<sup>294</sup>

The 1992 Adoption Law, which opened up intercountry adoption, suppressed official domestic adoption by limiting domestic adoption to childless couples who were at least thirty-five years of age and by allowing adoption of only one child, male or female.<sup>295</sup> Adopting a child, in effect, counted against a couple's allotment of children under the one-child policy; the decision to adopt a girl could mean that the couple would never legally be able to have a son.<sup>296</sup> Thus, the 1992 Adoption Law was designed to protect population control norms, rather than to facilitate domestic adoption of China's abandoned baby girls. Under these circumstances during the 1980s and 1990s, unofficial and hidden adoptions far exceeded the number of official adoptions, with one scholarly estimate of over 500,000 unofficial adoptions annually during the 1980s.<sup>297</sup> Unfortunately, it is difficult to verify whether such high estimates of unofficial domestic adoptions were anything close to accurate; although it is virtually certain that unofficial adoptions and related means of hiding over-quota girls far outstripped official domestic adoptions, the number could have been much less than the 500,000 estimate indicates. Unofficial adoptions created grave difficulties for the children, who lacked the benefits of registration, and also for the adoptive parents, who faced state persecution for their provision of a home and care to a child.<sup>298</sup>

China significantly amended the Adoption Law, effective in 1999, by reducing the minimum age to adopt to thirty, and allowing adoption of multiple abandoned, orphaned, and disabled children living in social welfare institutions regardless of whether the

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<sup>293</sup> See *supra* notes 271-73 and accompanying text.

<sup>294</sup> See JOHNSON, *supra* note 13, 162-67.

<sup>295</sup> See JOHNSON, *supra* note 13, at 118-19; see Adoption Law (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 4, 1998, effective Apr. 1, 1992), available at [http://fwcc.org/previous\\_site/china\\_adoption\\_law\\_98.htm](http://fwcc.org/previous_site/china_adoption_law_98.htm) [hereinafter Adoption Law].

<sup>296</sup> Adoption Law, *supra* note 295.

<sup>297</sup> JOHNSON, *supra* note 13, at 247 n.11 (citing Sten Johannson & Ola Nygren, *The Missing Girls of China: A New Demographic Account*, 17 POP. & DEV. REV. 35-51 (1991); *Adoption in Contemporary China*, 19 RENKOU YANJIU [POPULATION RESEARCH] 6, 19 (1995)).

<sup>298</sup> JOHNSON, *supra* note 13 at 164-67.

couple was childless.<sup>299</sup> The prior requirement that the couple be childless and adopt only one child, however, applied unless the child was living in a social welfare institution.<sup>300</sup> This change was made in a context where most unofficial adoptions were of children found outside of social welfare institutions by persons essentially finding the child before the government did. The law created a positive incentive for adopting children officially out of government orphanages, because it should be possible for the children to receive the benefits of official registration. Official adoptions did increase significantly, from 6,000-8,000 annually prior to the 1999 law to 56,000 in 2000.<sup>301</sup> Despite the restriction that the new exceptions only applied to children adopted from state institutions, some were able to convert previously illegal adoptions to legal adoptions under the law.<sup>302</sup> Hence, the law apparently created a significant, but temporary, upsurge in official domestic adoptions, because some existing de facto arrangements were converted into legal adoptions.<sup>303</sup> Since 2001 official domestic adoptions have stayed in the range of 35,000-45,000 per year, with 37,000 registered in 2008.<sup>304</sup> Based on these statistics, there is no evidence of a rise in official domestic adoptions that could account for the falling numbers of intercountry adoptions. Under these circumstances, however, it is difficult to ascertain if the combined total of official and unofficial adoptions have increased, given the difficulty of tracking unofficial adoptions; nonetheless, this author is not aware of any specific evidence of such increases from 2005 to the present. Given the lack of such evidence, and a lack of significant legal changes governing domestic adoption since the 1999 amendments, it is difficult, as a matter of timing, to show that dramatically falling intercountry adoptions since 2005 are due to a rise in domestic adoptions.

Another explanation for declining intercountry adoptions include rising incomes in China, which could decrease abandonments and increase domestic adoptions. This theory is plausible, although it is difficult to understand why rising incomes would cause such a sharp decline in the short period from 2006 to the present. In addition, a relaxation in China's population control

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<sup>299</sup> Adoption Law, *supra* note 295.

<sup>300</sup> *Id.*

<sup>301</sup> *Adoptions to the United States*, *supra* note 221; *China Country Information*, *supra* note 221; Selman, *supra* note 222.

<sup>302</sup> Adoption Law, *supra* note 295.

<sup>303</sup> JOHNSON, *supra* note 13, at 147-52, 179-80.

<sup>304</sup> Johnson Interview, *supra* note 281.

policies could reduce abandonments. The primary difficulty with this theory is in demonstrating a significant, overall relaxation of population control policies during this critical period from 2005 to the present.

Thus, there are difficulties with the standard explanations of the sharp declines in intercountry adoptions and in the number of healthy young infants and toddlers in government care from 2005 to the present. However, a somewhat more complex theory that includes the factors of sex-selective abortion and unofficial domestic adoption, but combines them with new evidence of child trafficking, is available.

The most persuasive explanation for the decline in intercountry adoptions, this author would argue, builds on the increasing evidence that orphanages have systematically provided financial incentives to obtain children, including baby girls, since at least 2000. Until 2005, most, including this author, assumed that China's intercountry adoption system was generally free of the child laundering, child trafficking, and abusive adoption practices that created scandals in many other sending nations.<sup>305</sup> China was perceived as a well-organized, model intercountry adoption system.<sup>306</sup> Although there were serious controversies about the level of care of children in orphanages and about the connections between China's one-child policy and large numbers of abandoned girls, the actual workings of the intercountry adoption system were viewed as a positive model.<sup>307</sup> Given the emphasis on the one-child policy and the cultural need for a son as inducing large-scale abandonments, it was assumed that the children offered for intercountry adoption were legitimately abandoned, even if there was controversy about the role of the one-child policy in encouraging or coercing such abandonment.<sup>308</sup>

This perception was challenged by the publicizing of the Hunan Adoption Scandal in international media in 2005. This scandal revealed a connection, in at least one instance, between child trafficking, Chinese orphanages, and intercountry adoption.<sup>309</sup> The case arose in November 2005 with the arrest of two women carrying

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<sup>305</sup> See Luo & Smolin, *supra* note 40, at 598-99; Child Laundering, *supra* note 233 at 124-25.

<sup>306</sup> Smolin, *supra* note 235, at 125 n.30.

<sup>307</sup> Luo & Smolin, *supra* note 40, at 614-15.

<sup>308</sup> *Id.* at 606.

<sup>309</sup> Meier & Zhang, *supra* note 287, at 87-91; Brian Stuy, *Hunan-One Year After-Part One*, RESEARCH-CHINA.ORG (Oct. 9, 2006, 10:15 MDT), <http://research-china.blogspot.com/2006/10/hunan-one-year-after-part-one.html>.

babies at the Hengyang county train station in Hunan province in Southern China.<sup>310</sup> Along with the women, there were officials from a local orphanage and a senior citizens' home who were planning to receive the children.<sup>311</sup> As the case developed, it turned out that the Hengyang Social Welfare Institute had been purchasing babies from intermediaries (traffickers) since 2002.<sup>312</sup> While the Chinese government took great efforts to characterize this as an aberration unrelated to intercountry adoption, evidence has accumulated indicating a systemic problem. It appears that, since at least 2001, Chinese orphanages resorted to paying significant sums to obtain children.<sup>313</sup> In addition, Chinese orphanages were, in effect, recruiting and seeking children for the orphanages, actively using scouts or intermediaries (traffickers), and sometimes making false promises to induce abandonments.<sup>314</sup> Further, population control officials have sometimes taken children from original families against their will, with the specific motivation to sell them to orphanages participating in intercountry adoption.<sup>315</sup> This evidence suggests a totally different picture of the Chinese intercountry adoption and orphanage systems.

The stereotype of underfunded orphanages overwhelmed with huge numbers of abandoned baby girls apparently was no longer accurate by 2000. Financially, orphanages participating in intercountry adoption benefited from the funds received by compulsory donations of \$3,000 per child (since raised to \$5,000 per child) and additional voluntary donations sent from interested and grateful

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<sup>310</sup> Meier & Zhang, *supra* note 287, at 87-91; Stuy, *supra* note 309.

<sup>311</sup> Meier & Zhang, *supra* note 287, at 88.

<sup>312</sup> Meier & Zhang, *supra* note 287, at 87-91.

<sup>313</sup> See Meier & Zhang, *supra* note 287, at 102; Demick, *supra* note 40; Barbara Demick, *A Young Chinese Girl Pines for Her Twin*, L.A. TIMES, Sept. 20, 2009, available at <http://articles.latimes.com/2009/sep/20/world/fg-china-twins20>; Demick, *supra* note 264; Peter S. Goodman, *Stealing Babies for Adoption: With U.S. Couples Eager to Adopt, Some Infants are Abducted and Sold in China*, WASH. POST, Mar. 12, 2006, at A01; Beth Loyd, *China's Lost Children*, ABC NEWS (May 12, 2008), available at <http://abcnews.go.com/International/story?id=4774224&page=1>; *News Reports of Adoption Irregularities in China*, SCHUSTER INST. FOR INVESTIGATIVE JOURNALISM, <http://www.brandeis.edu/investigate/gender/adoption/ChinaNews.html> [hereinafter Schuster China Reports].

<sup>314</sup> See Meier & Zhang, *supra* note 287, at 102; Demick, *supra* note 40; Demick, *supra* note 313; Demick, *supra* note 264; Goodman, *supra* note 313, at A01; Loyd, *supra* note 313; Schuster China Reports, *supra* note 313.

<sup>315</sup> See Meier & Zhang, *supra* note 287, at 88; Demick, *supra* note 40; Demick, *supra* note 313; Demick, *supra* note 264; Goodman, *supra* note 313, at A01; Loyd, *supra* note 313; Schuster China Reports, *supra* note 313.

organizations and adoptive parents in the West.<sup>316</sup> While these benefits did not extend to all Chinese orphanages, the ones fortunate enough to participate learned that intercountry adoption could transform their institutions.<sup>317</sup> Whether this meant beautiful new buildings, better programs for the children, or direct benefits for the directors and staff, such benefits were clearly addictive.<sup>318</sup> Institutions not approved to participate directly in intercountry adoption could share in the benefits by obtaining adoptable children and selling/transferring them to approved orphanages.<sup>319</sup> However, as orphanages in 1995-2000 became addicted to the financial rewards of international adoption, they found themselves in a situation where far fewer children were coming into the orphanage through traditional channels.<sup>320</sup> If Chinese orphanages waited, as in the past, for adoptable, healthy babies to be brought to them, they would receive very few of those infants. Hence, one of the most valuable insights of the recent literature on the sale of children to Chinese orphanages is that the orphanages were actively in the market for children by 2001.<sup>321</sup> This indicates that, by 2000, there was already a shortage, rather than a glut, of healthy, adoptable young infants in China.

Once these facts related to child trafficking are connected to the available information on sex-selective abortion and domestic adoption, a coherent time-line can be discerned. Sex-selective abortions would have reduced the number of abandoned, healthy baby girls significantly by 2000, substituting sex-selective abortions for the prior sex-selective abandonments. In the meantime, a widespread practice developed not only of unofficial adoptions, but also the frequent use of intermediaries—who could be termed traffickers—in making such placements. While direct family-to-family transfers occurred, these were less significant to intercountry adop-

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<sup>316</sup> See Meier & Zhang, *supra* note 287, at 88-102; Demick, *supra* note 40; Demick, *supra* note 313; Demick, *supra* note 264; Goodman, *supra* note 313, at A01; Loyd, *supra* note 313; Schuster China Reports, *supra* note 313; see also JOHNSON, *supra* note 13, 188-92 (documenting benefits to orphanages of compulsory and voluntary donations).

<sup>317</sup> See JOHNSON, *supra* note 13, at 188-92.

<sup>318</sup> *Id.*

<sup>319</sup> See Meier & Zhang, *supra* note 287, at 88; Demick, *supra* note 40; Demick, *supra* note 313; Demick, *supra* note 264; Goodman, *supra* note 313, at A01; Loyd, *supra* note 313; Schuster China Reports, *supra* note 313; see also JOHNSON, *supra* note 13 at 188-92 (documenting benefits to orphanages of compulsory and voluntary donations).

<sup>320</sup> See JOHNSON, *supra* note 13, at 188-92.

<sup>321</sup> *Id.*

tion, because intermediaries would be far less involved in those informal adoptions. Babies abandoned in one locale would be obtained by traffickers, who would then sell them to families in other locales for domestic adoption. Young boys, increasingly, have been subject to kidnapping in China, given their high value and the rarity of healthy baby boys being abandoned; initially, traffickers were most likely able to obtain young girls from abandonments, although, as time passed, some girls were likely kidnapped as well. Therefore, China's severe suppression of official, domestic adoption prior to 1999—through various policies and the very restrictive 1992 law—contributed to an underground market in children, as the roles that otherwise would be fulfilled by the government or adoption agencies were fulfilled by intermediaries who, being illicit, were termed traffickers. The 1999 change in China's adoption law, while able to lift official domestic adoptions from a range of 6,000-8,000 to a range of 35,000-45,000 a year,<sup>322</sup> was still too restrictive to eliminate the need for an underground market in children; further, this illicit market had become entrenched in Chinese society. Indeed, those involved could frequently make the same kinds of ethical claims for themselves as the mainstream adoption system, by maintaining that they were merely saving otherwise abandoned babies from an unfortunate fate and transferring unwanted children into families that needed and wanted them.<sup>323</sup>

Orphanages, between 2000 and 2005, had a substantial financial incentive to place ever more children internationally. Equipped with the \$3,000 per child compulsory donation, they could easily outbid the domestic market for infants—particularly for girls, who while very popular for intercountry adoption purposes, were much less expensive in the domestic adoption market. Hence, the increase in intercountry adoptions from 2000 to 2005 was driven by orphanages entering the illicit market for healthy baby girls. Ethically, the orphanages could hope that the traffickers were merely directing otherwise abandoned babies their way. Unfortunately, given the gray/black market nature of the transactions, some of these babies were instead obtained by force by greedy population control officials eager to profit through sales to intermediaries or orphanages; an unknown number may have also been kidnapped from migrants or other vulnerable populations.<sup>324</sup>

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<sup>322</sup> Adoption Law 1999, *supra* note 295.

<sup>323</sup> *Cf.* Demick, *supra* note 40.

<sup>324</sup> See Meier & Zhang, *supra* note 287, at 89-91; Demick, *supra* note 40; Demick, *supra* note 313; Demick, *supra* note 264; Goodman, *supra* note 313, at A01; Loyd, *supra* note 313; Schuster China Reports, *supra* note 313.

These child trafficking practices also clearly explain the drop in intercountry adoptions since 2005. After the Hunan scandal was internationally publicized, China was clearly concerned with maintaining the reputation of their intercountry adoption program. Ironically, China ratified the Hague Adoption Convention on November 16, 2005, within days of the initial Hunan arrests.<sup>325</sup> The initial strategy of the Chinese government to the scandal was to institute a face-saving prosecution and then impose a media shutdown of reporting on the subject.<sup>326</sup> In a context where successful prosecutions of abusive adoption practices in sending nations are rare,<sup>327</sup> the fact that China secured significant convictions and imposed criminal sentences<sup>328</sup> could appear impressive. The government, therefore, was prepared to brush aside claims that the scandals indicated deeper issues with China's intercountry adoption program, as well as complaints that many of the worst offenders were "protected" and left unprosecuted.<sup>329</sup> The government, however, was apparently concerned about avoiding a repetition of the scandal.<sup>330</sup> According to China adoption researcher, Brian Stuy, China's Central Authority for Intercountry Adoption (CCAA) unofficially broached the subject at a February 2006 meeting with orphanage directors from fifteen provinces.<sup>331</sup> Stuy's report, relying on a source who attended the event, states that the CCAA told the orphanage directors they would be protected if they paid no more than 500-1,000 yuan (about \$62.50 to \$125).<sup>332</sup> The theory was that such a small sum could be justified as necessary expenses for transport or temporary care of a child, at least to foreigners to whom the sum might appear quite small. The scandal, however, involved orphanages paying a significantly higher sum of 2,500 yuan (about \$312.50) to obtain babies from traffickers.<sup>333</sup>

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<sup>325</sup> *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HCCH, available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) (last visited Sept. 29, 2010).

<sup>326</sup> Meier & Zhang, *supra* note 287, at 89-90.

<sup>327</sup> See, e.g., Smolin, *supra* note 235, at 145-46; David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 468 (2005).

<sup>328</sup> Meier & Zhang, *supra* note 287, at 89-90.

<sup>329</sup> *See id.*

<sup>330</sup> *See* Stuy, *supra* note 261.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *See* Stuy, *supra* note 261.



The difficulty, then, was that the CCAA imposed a limit that made intercountry adoption no longer competitive for infants in the gray-market that had developed in China for healthy baby girls. Hence, Chinese orphanages faced the choice of either risking prosecution if caught paying competitive sums, or else limiting themselves to payments that were noncompetitive. Enough orphanages abided by the warnings from the CCAA to cause a swift decline in intercountry adoptions that accelerated even after the temporary ban on intercountry adoption from Hunan had been lifted.<sup>334</sup>

This explanation neatly ties together the role of increasing sex-selective abortions and unofficial, domestic adoptions in a way that explains the precise chronology of China's intercountry adoption statistics. Even if one does not specifically rely on the report of the alleged statements by the CCAA to orphanage directors in February 2006, it is clear that the Hunan scandal is the turning point in China's adoption program. Indeed, viewed positively, the evidence indicates that the CCAA was able to enforce an anti-trafficking norm among Chinese orphanages to a sufficient degree to make intercountry adoption increasingly uncompetitive with the illicit domestic market for children in China. While some continued to offer larger sums for babies after 2005, a large number apparently have not, making them uncompetitive.<sup>335</sup>

Ethically, the story of Chinese adoptions is complex. To the degree that unethical or harmful behavior is involved, there is plenty of blame to go around. Some, such as Professor Johnson, seem to primarily blame China's population control policies for pressuring parents into abandonments and suppressing official domestic adoptions, as well as for putting a price tag on children's heads through financial fines on over-quota children.<sup>336</sup> Interestingly, in a recent interview, Johnson provocatively indicates that "we" (apparently a reference to Western adoption agencies and adoptive parents) created "an entire industry . . . on the backs of these children," which can be characterized as a kind of participation in trafficking.<sup>337</sup> Nonetheless, in her view, the primary blame

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<sup>334</sup> See *id.*

<sup>335</sup> See Meier & Zhang, *supra* note 287, at 88-102; Demick, *supra* note 40; Demick, *supra* note 313; Demick, *supra* note 264; Goodman, *supra* note 313, at A01; Loyd, *supra* note 313; Schuster China Reports, *supra* note 313; Stuy, *supra* note 261.

<sup>336</sup> See, e.g., JOHNSON, *supra* note 13 at 145-47; Johnson Interview, *supra* note 281; Kay Johnson, Challenging the Critique of International Adoption: The Case of China, Address at the Intercountry Adoption Summit (Sept. 24-26) (on file with author).

<sup>337</sup> Johnson Interview, *supra* note 281.

appears to fall on the coercive pressures created by China's population control policies.<sup>338</sup> Some may want to place the blame more squarely on an intercountry adoption system in which illicit child laundering activities are all too common. Others presumably would prefer to blame China's cultural sex bias.<sup>339</sup> It is difficult to define trafficking in a context where even "voluntary" abandonments are made in the context of a coercive population control policy. Some children are obtained through force by population control officials illicitly using their office to obtain children for sale to orphanages, while other children are literally kidnapped. Orphanages have been recruiting children and buying them from intermediaries and families, and a shadowy, illicit gray market in children, in which the origins of the children are unclear, has flourished in China and has become deeply intertwined with China's orphanages.<sup>340</sup>

## VI. CONCLUSION

This article has been intellectually ambitious in analyzing disparate yet highly related phenomena. This intellectual ambition comes from addressing simple yet significant questions, including the causes and possible solutions to the sex ratio imbalances of China, and the causes of the diminishing numbers of intercountry adoptions from China. In addition, the article has focused both on statistical data and ideological controversies, as any adequate analysis and set of solutions must engage both. Hopefully this article will be a part of a stream of scholarship which successfully engages these issues, and thus proves relevant to all those concerned with the human and practical dimensions of these significant issues.

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<sup>338</sup> *See id.*

<sup>339</sup> Wexler, *supra* note 184, at 91-92 (discussing sex ratio imbalance and gender preference); Shuzhou, *supra* note 21, at 8 (discussing sex ratio imbalance).

<sup>340</sup> *See* Johnson Interview, *supra* note 281; *see supra* notes 305-313 and accompanying text.