

# ADOPTION IN CHINA: PAST, PRESENT AND YET TO COME

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## I. INTRODUCTION

The classic symbol of a family tree is a pyramid, except in China. There, the one-child policy has turned the family tree upside down for decades by limiting couples to one child.<sup>1</sup> The impact of the one-child policy was significant and multi-faceted not only on families, but also society. It has affected the labor force, care for the elderly, and most importantly, the gender composition of the Chinese population, with more men being born than women.<sup>2</sup>

The one-child policy has also impacted international family law. With Chinese families limited only to one child, thousands of American families have been able to adopt Chinese children since the People's Republic of China opened its orphanages to international adoption more than two decades ago.<sup>3</sup>

As international adoption became more popular, children's best interests became a central issue.<sup>4</sup> At the core of the justifications for international adoption from China, or the cross-border movement of children for permanent placement in families, were the country's high number of adoption candidates and government policies, including the one-child policy.<sup>5</sup> However, the cultural continuity in Chinese domestic adoption remained.<sup>6</sup>

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<sup>1</sup> See *infra* Part II.B.

<sup>2</sup> See, e.g., Jamie Jordan, *Ten Years of Resistance to Coercive Population Control: Section 601 of the IIRIRA of 1996 to Section 101 of the REAL ID Act of 2005*, 18 HASTINGS WOMEN'S L.J. 229, 235 (2007).

<sup>3</sup> "Between 1985 and 2006, 62,389 children were adopted to the United States from China." Elisa Poncz, *China's Proposed International Adoption Law: The Likely Impact on Single U.S. Citizens Seeking to Adopt from China and the Available Alternatives*, 48 HARV. INT'L L.J. 74, 78 (2007). For a history of adoption from China to the United States, see Robert S. Gordon, Comment, *The New Chinese Export: Orphaned Children—An Overview of Adopting Children From China*, 10 TRANSNAT'L L. 121, 124 (1997).

<sup>4</sup> Some have questioned whether the mass international adoption of children deprives them of a right to their culture and homeland. See generally Kay Johnson, *Politics of International and Domestic Adoption in China*, 36 LAW & SOC'Y REV. 379 (2002). The "best interests of the child" standard often guides Anglo-American courts in reaching decisions pertaining to children, such as child custody battles. For a useful background on the best interests standard, see John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J.L. REFORM 57, 64 n.23 (2006).

<sup>5</sup> See *infra* Part II.B.

<sup>6</sup> See *infra* Part II. By "cultural continuity," this Article means the significantly unaltered continuation of cultural attitudes and practices.

Indeed, China has a rich custom and history of domestic adoption, with many children placed in Chinese adoptive homes rather than abroad. At times, this custom of adoption even surmounted bureaucratic technicalities, resulting in the sanctioning of innumerable adoptions legally unrecognized for various reasons.

This history suggests that Chinese families would organically expand to two children after China recently shifted from the one-child policy to a two-child policy. However, intersecting with this legal change are demographic changes. Specifically, countries around the world have been dealing with decreased fertility rates.

This Article explores the future of adoption in China and the demographics of the Chinese family. Part II begins by examining the cultural continuity of Chinese domestic adoption, finding it to be relatively substantial. Part III considers modern adoption law and policy in China, focusing on the previous one-child policy. Finally, Part IV turns to the future of Chinese adoption and families, particularly in light of global demographic trends with the potential to impact China.<sup>7</sup>

## II. DOMESTIC ADOPTION IN CHINA

Domestic adoption has an important history in China. This Part thus considers domestic adoption in two phases of Chinese history and the continuity between them: imperial China (221 B.C. to 1911) and the People's Republic of China (1949 to present).<sup>8</sup>

### A. *Adoption in Imperial China*

In examining the history of Chinese adoption, two aspects of adoption must be considered: black letter law and custom. The strength of each, and the dynamic between them, creates the differences between the role of adoption in imperial China and its role in the modern People's Republic of China.

The imperial law codes were relatively sophisticated, with a definitive version emerging in 1740, consisting of 436 sections.<sup>9</sup> Researchers also

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<sup>7</sup> For the proposition that the Chinese government may already be placing more orphans domestically, as evidenced by its restrictions on international adoption, see Poncz, *supra* note 3, at 76.

<sup>8</sup> See generally DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 8 (1976).

<sup>9</sup> *Id.* at 7. For a translation of the Qing code, see GEORGE THOMAS STAUNTON, TA TSING LEU LEE, *BEING THE FUNDAMENTAL LAWS, AND A SELECTION FROM THE SUPPLEMENTARY*

discovered codes going back to the Tang Code of 653, which consisted of 501 articles.<sup>10</sup> Some work has also been done on the legal system of the Han dynasty.<sup>11</sup>

Yet, little of this law was dedicated to adoption, making cultural attitudes and traditions on adoption far more important than legal regulations. In fact, there was a noteworthy absence of legislation outside the penal realm, with the law often less focused on regulating civil matters, such as adoption, between groups and individuals.<sup>12</sup> The considerable penal nature of Chinese imperial codes may have had several reasons, for example, to embody and enforce Confucian ethical values.<sup>13</sup>

When considering adoption in imperial China, it is useful to distinguish between the adoption of girls and the adoption of boys, each of which had different purposes and processes. Male adoption was integral to imperial Chinese society as a cornerstone of many families, and the family was arguably the most important unit in Chinese society.<sup>14</sup> A major reason for the significance of the family stems from the ideology of Confucius, which influenced the empire until the 1911 Revolution.<sup>15</sup> Indeed, a characteristic of Confucianism is the notion that social relations belong to the natural order. Accordingly, order within the family means order within society, which, in turn, is the order of nature.

A man's social identity related to his place in the family, which included the clan beyond the nuclear family. The clan consisted of an extended family spanning several generations and collateral lines residing together. Family members were organized in a clan by age, gender, and degree of kinship.<sup>16</sup>

Of particular importance in the clan were the male figures. In fact, there was often a duty for a man to have a son to maintain his bloodline. The

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STATUTES, OF THE PENAL CODE OF CHINA (George Staunton trans., T. Cadell & W. Davies 1810); GUY BOULAIS, tr., MANUEL DU CODE CHINOIS (Guy Boulais trans., Ch'eng-wen Publ'g Co. 1966) (1924).

<sup>10</sup> BODDE & MORRIS, *supra* note 8, at 7.

<sup>11</sup> *Id.* at 8.

<sup>12</sup> *Id.* at 3-4.

<sup>13</sup> *Id.* at 5.

<sup>14</sup> JAMES Z. LEE & CAMERON D. CAMPBELL, FATE AND FORTUNE IN RURAL CHINA 21 n.33 (2007).

<sup>15</sup> Benjamin Schwartz, *On Attitudes Toward Law in China*, in GOVERNMENT UNDER LAW AND THE INDIVIDUAL 36-37 (Milton Katz ed., 1957). Despite the competing influence of the legalists, much of Chinese history has been shaped by Confucianism. *Id.*

<sup>16</sup> See generally BODDE & MORRIS, *supra* note 8, at 35.

daughter could not continue the bloodline as she married into another family.<sup>17</sup>

Marriage served as the primary means for acquiring male heirs, the lack of which created grounds for divorce. In practice, men did not need to divorce when extramarital relationships were sanctioned for procreative reasons.<sup>18</sup> The Qing Code even permitted a secondary wife. If neither a wife nor a concubine could produce an heir, then a man adopted a son into the family.<sup>19</sup> Adoption has thus been one of the most important means by which to continue a man's lineage in China, with this form of adoption called "ritual adoption" or "ritual succession," the latter referring to a succession to the ancestor cult and property.<sup>20</sup>

Ritual adoption therefore composed an important subset of adoptions in China.<sup>21</sup> A common form of ritual adoption was nephew-adoption. If a man did not have a nephew, then he could adopt a similarly aged child in the extended family and, failing this, in the population of the same surname.<sup>22</sup> This hierarchy of potential adoptive sons was also embodied in legal codes, such as a sub-statute commenting on Article 78 of the Qing Code.<sup>23</sup>

Nonetheless, there was also some customary adoption of "outsiders," who were seen as having undivided loyalties. This resulted in the *bieng-lieng-kia* form of adoption: adoption from strangers.<sup>24</sup> This form of adoption often resembled modern international adoption not only because the adoptive child was an outsider, but also because the child broke all ties with the birth family and became solely part of the adoptive family.<sup>25</sup> One important rule governing these adoptions was that the adoptive son generally had to be of the same generation as a biological child if the parent had one. Indeed, the

<sup>17</sup> For a useful and brief treatment of the legal system in China, see K. ZWEIGERT & H. KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 316–25 (Tony Weir trans., 1992).

<sup>18</sup> See, e.g., Janice A. Lee, Note, *Family Law of the Two Chinas: A Comparative Look at the Rights of Married Women in the People's Republic of China and the Republic of China*, 5 CARDOZO J. INT'L & COMP. L. 217, 223 (1997).

<sup>19</sup> "[T]he prominence given to notions of blood affinity in early modern Europe has no Chinese counterpart." ANN WALTNER, *GETTING AN HEIR: ADOPTION AND THE CONSTRUCTION OF KINSHIP IN LATE IMPERIAL CHINA* 47 (1990).

<sup>20</sup> See MAX WEBER, *ESSAYS IN ECONOMIC SOCIOLOGY* 182 (Richard Swedberg ed.).

<sup>21</sup> ARTHUR P. WOLF & CHIEH-SHAN HUANG, *MARRIAGE & ADOPTION IN CHINA* 108 (1980).

<sup>22</sup> SANTARO OKAMATSU, *PROVISIONAL REPORT ON INVESTIGATIONS OF LAW AND CUSTOMS IN THE ISLAND OF FORMOSA* 8 (1902).

<sup>23</sup> *THE GREAT QING CODE* 106 (William C. Jones et al. trans., 1994).

<sup>24</sup> WOLF & HUANG, *supra* note 21, at 110.

<sup>25</sup> *Id.*

extensive rules governing adoption indicated its importance in Chinese culture.<sup>26</sup>

Although the law sanctioned ritual adoptions, there were also “informal adoptions,” which often proceeded according to custom. These adoptions occurred for both genders and were not directly related to maintaining family lineage.<sup>27</sup> In an informal adoption, a deed would typically be drawn for the adoption. Occasionally, a ceremony would take place. Indeed, custom arose to acknowledge and sanction informal adoptions that were not legally recognized.<sup>28</sup>

In both ritual and informal adoptions, there could be a commercial element. One reason for an exchange of money may have been to compensate the child’s biological parents for their past support of the child.<sup>29</sup> This commercial element is present in today’s international adoptions as well, with the average cost of \$10,000 to \$20,000 for an American to adopt a Chinese infant.<sup>30</sup> Nonetheless, the commercial element of Chinese domestic adoptions did not customarily prevent the complete integration of a child into the adoptive family.

The background to the term *minglingze*—used to describe adopted children, particularly from outside the adoptive family—reveals one view of adoption. The term derives from the belief that wasps took the young of mulberry insects and transformed them into wasps, making them their own children.<sup>31</sup> Without a doubt, most adoptions, whether informal or ritual, integrated the child completely into the family.

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<sup>26</sup> *But see* Anna Jane High, *China’s Orphan Welfare System: Laws, Policies and Filled Gaps*, 8 E. ASIA L. REV. 127, 140 (2013) (“Traditional Chinese law, predicated on Confucian norms of filial piety and the sanctity of filial bloodlines, prohibited adoption outside of one’s clan, and traditional Chinese texts ‘argue against adoption.’” (citation omitted)).

<sup>27</sup> Johnson, *supra* note 4, at 384.

<sup>28</sup> *See supra* note 27 and accompanying text.

<sup>29</sup> OKAMATSU, *supra* note 22, at 8.

<sup>30</sup> Gordon, *supra* note 3, at 143–44; Johnson, *supra* note 4, at 387–88.

<sup>31</sup> Specifically,

[a]ccording to folk belief, the wasp raps and taps outside its nest, in which it has put the mulberry insects’ young, and prays, “Be like me, be like me.” After a period, young wasps emerge. Thus, one who is adopted is known as *minglingzi*, implying that they are transformed into the likeness of the parents who raise them.

Johnson, *supra* note 4, at 383.

Thus, adoption has been embedded in Chinese culture. While the law sanctioned only one subset of adoptions, custom facilitated many informal adoptions.<sup>32</sup>

A number of adoptions have involved girls. Today, most international adoptions from China are of girls. For example, 95% of the Chinese children adopted by Americans in 2006 were female.<sup>33</sup>

Historically, the adoption or entry of girls into the Chinese family was of little legal significance and did not alter the genealogy books.<sup>34</sup> Nonetheless, much custom and practice regarding the adoption of girls existed, illustrating its importance. For example, in the era of Kangxi, the term *shin-pu* described girls adopted to marry the son of the adopting family.<sup>35</sup>

Eventually, girls were adopted into Chinese families for various reasons. Some childless couples adopted daughters in the hope of “leading in” a son.<sup>36</sup> If no son followed, they had a daughter to care for them.<sup>37</sup> Furthermore, such couples could hope for a son-in-law to marry into the family.<sup>38</sup> Otherwise, the daughter would marry into another family, who would benefit from her services.<sup>39</sup> Even if a family were to lose an adoptive daughter, however, girls retained their value because of their perceived emotional care, loyalty, and intimacy.<sup>40</sup>

Skeptics have pointed to more nefarious reasons for the adoption of girls. A 1930’s report suggested that many girls were essentially being bought and sold.<sup>41</sup> Indeed, the term “*mui tsai*” was a euphemism for maid-servants bought from poor families rather than paid wages. Occasionally, lowly adopted daughters even accompanied brides as dowry. Some girls may even

<sup>32</sup> PETER CONN, *ADOPTION: A BRIEF SOCIAL AND CULTURAL HISTORY* 37 (2013) (noting the various adoption practices in imperial China).

<sup>33</sup> Allison Hurwitz, *Information Packet: The Adoption of Chinese Girls by American Families* 7 (2003), [http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/information\\_packets/chinese-girls-adopted-by-americans.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/information_packets/chinese-girls-adopted-by-americans.pdf) [<https://perma.cc/T379-GMZV>].

<sup>34</sup> WALTNER, *supra* note 19, at 122.

<sup>35</sup> OKAMATSU, *supra* note 22, at Appendix XV.

<sup>36</sup> Johnson, *supra* note 4, at 385.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* A son-in-law would join the family to benefit from the family’s wealth. *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 386.

<sup>41</sup> GAVIN URE, *GOVERNORS, POLITICS AND THE COLONIAL OFFICE: PUBLIC POLICY IN HONG KONG, 1918–58*, at 56–59 (2012).

have been sold into prostitution.<sup>42</sup> Such purposes for acquiring girls were eventually made illegal.<sup>43</sup>

Custom often banned the worst maltreatment of girls: a number of clans punished parents who sold their daughters as concubines or into prostitution. Several made it an offense for parents to sell their children into servitude or to give them away to religious temples.<sup>44</sup> According to some Chinese clans, disgracing a child humiliated the ancestors. Some clans even required the offending parents to be excluded from the ancestral hall, expunged from the genealogy, or expelled from the clan.<sup>45</sup> Infanticide was also illegal and punishable by the clan.<sup>46</sup>

Most commentators have drawn a distinction between the customary adoption of girls and those acquired for other purposes. The main difference was that an adopted daughter would gain the status of a biological daughter, whereas the others would be household members without becoming daughters.<sup>47</sup>

In sum, innumerable girls were integrated into adoptive families in China, creating much custom to accommodate their adoption. While an important form of adoption remained the ritual adoption of boys, both boys and girls were adopted informally.

Thus, during imperial times, cultural practice often trumped the law governing adoptions, resulting in adoptions not necessarily legitimized by the law. As illustrated by this history of Chinese domestic adoption, black letter law only partially affected domestic adoptions in imperial times, with a robust tradition of adoption existing outside the legal realm.

Today, China has implemented more formal and stricter adoption law despite this long custom of informal adoption, but some domestic adoptions are still not reported to the Chinese government for various reasons.<sup>48</sup> Indeed, any consideration of the adoption law in the modern People's

<sup>42</sup> Carl T. Smith, *The Chinese Church, Labour and Elites and the Mui Tsai Question in the 1920's*, 2 J. HONG KONG BRANCH ROYAL ASIATIC SOC'Y 91, 91-92 (1981).

<sup>43</sup> Johnson, *supra* note 4, at 384. For example, the use of adopted girls as household servants became illegal after 1949. *Id.*

<sup>44</sup> LIU HUI-CHEN WANG, *THE TRADITIONAL CHINESE CLAN RULE* 59 (1959).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Johnson, *supra* note 4, at 384. However, both groups of girls typically had marriages arranged for them. *Id.*

<sup>48</sup> "Assessing the extent of domestic adoption is difficult for two reasons: parents almost never adopt children through formal channels, and few researchers study domestic adoption in modern China." 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, 105 (2008).



Republic of China must consider its hallmark one-child policy, which shaped the current patterns of domestic adoption of Chinese children and paved the way for increased international adoption.

### *B. Adoption in the People's Republic of China*

Adoption law in modern China is more detailed than its imperial counterpart. In fact, despite a long history of adoption practices, China first enacted detailed legislation recognizing adoption in 1981.<sup>49</sup> Part of the catalyst may have been the one-child policy, which resulted in many children becoming available for adoption.<sup>50</sup>

In the 1990's, the Chinese government undertook further reforms to its adoption regime. Most importantly, it finally recognized certain customary adoptions in the 1991 Adoption Law of the People's Republic of China. Specifically, Article 7 allowed childless citizens under thirty-five to adopt collateral blood relatives without all of the usual legal restrictions.<sup>51</sup>

The Chinese government once again revised its adoption law in 1998, likely in response to a surge in the orphan population.<sup>52</sup> Most importantly, the minimum age of adoptive parents was lowered to thirty.<sup>53</sup> The 1998 law further relaxed adoption restrictions by allowing couples with children—previously allowed to adopt only special needs children or those whose parents were deceased—to adopt children in social welfare institutions whose parents were not known.<sup>54</sup>

The legislative framework currently in place, for both domestic and international adoption, must be viewed in the context of China's previous

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<sup>49</sup> "Chinese law did not even recognize adoptions until 1981, when it officially allowed domestic adoptions." Curtis Kleem, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoptions*, 28 GA. J. INT'L & COMP. L. 319, 320–21 (2000).

<sup>50</sup> "Prior to China's population control regimes, there was little need for international adoption as extended families adopted the Chinese children." Rachel A. Bouman, Comment, *China's Attempt to Promote Domestic Adoptions: How Does China's One-Child Policy Affect Recent Revisions in China's Adoption Law and Measure Up to the Hague Convention?*, 13 TRANSNAT'L LAW. 91, 115 n.4 (2000).

<sup>51</sup> Adoption Law of the People's Republic of China, 1991, art. 7.

<sup>52</sup> Adoption Law of the People's Republic of China Amendment, 1998, art. 8.

<sup>53</sup> *Id.* This emphasis on minimum age requirements for adoptive parents has little foundation in custom, although one rule in customary adoption is that the adoptive parent be of another generation than the child. See *supra* notes 22–23 and accompanying text.

<sup>54</sup> Adoption Law Amendment, 1998, *supra* note 52, art. 8. See also Jini L. Roby, *Understanding Sending Country's Traditions and Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls*, 6 J. L. & FAM. STUD. 303, 315 (2004).

one-child policy. This policy was at the cornerstone of any discussion regarding adoption because it restricted the number of domestic homes available for adoption, resulting in many children whose families were unable to care for them.<sup>55</sup>

China's astronomical population growth impaired the communist government's ability to centrally plan for its citizenry.<sup>56</sup> Therefore, in 1979, the Chinese government implemented a policy to limit each family to one child.<sup>57</sup> Subsequent law supported this policy, such as Article 3 of the 1991 Adoption Law of the People's Republic of China: "Adoption shall not contravene laws and regulations on family planning."<sup>58</sup> Parents therefore could not raise more than one child, stagnating domestic adoption and prompting much international adoption.

The high cultural meaning attached to the male family line in China<sup>59</sup> did not necessarily include daughters.<sup>60</sup> However, the value of girls remained. Many parents presumed that girls provided a good source of emotional intimacy and physical care, even more so today given the mobility of society and the prioritization of economic rewards.<sup>61</sup> Furthermore, many parents did

<sup>55</sup> Bouman, *supra* note 50.

<sup>56</sup> 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. 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.

David M. Smolin, *The Missing Girls of China: Population, Policy, Culture, Gender, Abortion, Abandonment, and Adoption in East-Asian Perspective*, 41 CUMB. L. REV. 1, 15 (2010–2011).

<sup>57</sup> Gordon, *supra* note 3, at 131. There were exceptions to the one-child policy. For example, parents may have been able to raise additional children upon paying a fee. In some rural areas, two children per family were allowed. See, e.g., Johnson, *supra* note 4, at 389 n.6. See also Carter Dillard, *Prospective Parents and the Children's Rights Convention*, 25 AM. U. INT'L L. REV. 485, 513 (2010) (summarizing research that showed that most of the Chinese population (more than seventy percent) lived in areas with a policy fertility level at 1.3 to 2.0 children per couple).

<sup>58</sup> Adoption Law of the People's Republic of China, 1991, Art. 3. For further legal background on the one-child policy, see Xizhe Peng, *Population Policy and Program in China: Challenge and Prospective*, 35 TEX. INT'L L.J. 51 (2000).

<sup>59</sup> See *supra* Part II.

<sup>60</sup> See generally 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 (2006).

<sup>61</sup> Johnson, *supra* note 4, at 386.

not feel their family complete without both a son and daughter.<sup>62</sup> Lifting the one-child policy would thus suggest that some of the girls in the orphanage population would be domestically absorbed as some families would choose to include a daughter in their household. Historically, such an addition was treated as an organic growth of one's family.<sup>63</sup>

In light of the one-child policy, many Chinese families wanting to expand their families even petitioned immigration courts around the world seeking asylum on grounds of human rights.<sup>64</sup> The immigration courts in the United States have not offered protection from removal based on a couple's inability to procreate in their home country, which has been affirmed by both the Board of Immigration Appeals and the United States Court of Appeals.<sup>65</sup>

Despite the limitations placed on families in China, the data on domestic adoption shows that domestic adoptions account for the placement of many children. In the year 2000, there were 52,000 registered adoptions of Chinese children.<sup>66</sup> Approximately 10,700 were domestic and 6,700 were international adoptions from welfare institutes.<sup>67</sup> The number of domestic adoptions has only grown since 1992, when the Ministry of Civil Affairs of China reported 2,900 registered adoptions.<sup>68</sup> These numbers indicate that despite the liberalization of international adoption and the continued restrictions on domestic adoptions, there were many domestic placements of children in China,<sup>69</sup> illustrating the continued demand for domestic adoption.

There were 37,000 registered adoptions of foundlings in China in 2000, those children found outside of a welfare institution.<sup>70</sup> It is estimated that in fact there were many more adoptions of foundlings not registered, children who do not achieve legal status.<sup>71</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *See supra* Part II.

<sup>64</sup> *See, e.g.,* Zhao v. U.S. Dep't of Justice, 265 F.3d 83, 91–92 (2d Cir. 2001) (chronicling American immigration law on the one-child policy as a basis for relief from removal). *See also* Shao v. Mukasey, 546 F.3d 138 (2d Cir. 2008) (examining eligibility for asylum in the United States in the context of the one-child policy).

<sup>65</sup> *See Shao*, 546 F.3d at 138. The high cultural continuity in Chinese domestic adoption suggests that granting refugee status to those Chinese families desiring more than one child would result in many such applications.

<sup>66</sup> Johnson, *supra* note 4, at 392.

<sup>67</sup> *Id.*

<sup>68</sup> Weiguo Zhang, *Child Adoption in Contemporary Rural China*, 27 J. FAM. ISSUES 301, 308 (2006).

<sup>69</sup> *Id.* at 387–89.

<sup>70</sup> Johnson, *supra* note 4, at 392.

<sup>71</sup> *Id.* at 392.

Finally, some children retain their orphanage registration but reside with a Chinese family, whose members consider themselves to be the adoptive family despite the lack of legal recognition.<sup>72</sup> Such informal arrangements illustrate the high cultural continuity in domestic adoption in China. The proliferation of welfare and foster institutions has increased the number of children that lack legal status, but less than 1% of these children are adopted domestically.<sup>73</sup> The remainder of adoptees find domestic homes through informal means.<sup>74</sup>

Professor Kay Johnson has done much fieldwork in this area, finding that demand for domestic adoption remains high. She interviewed approximately 800 adoptive families between 1996 and 1999, noting that adoption was common in many rural areas, involved more girls than boys, and was rarely limited to the adoption of relatives.<sup>75</sup> According to her data, 56% of the adopted children were abandoned and 87% were girls.<sup>76</sup> The general view of the adoptive families was that their form of adoption was a "strong" one, aligning with the Hague Convention.<sup>77</sup> The results led Professor Johnson to conclude that "many families were willing to adopt the abandoned female children of strangers."<sup>78</sup>

Thus, the Chinese population has customarily enjoyed a long history of domestic adoption outside the law, a trend that has continued to the present despite restrictions on domestic adoption. This suggests that the relaxation of China's limitations on domestic adoption would increase demand for it and many informal adoptions would gain legal status.<sup>79</sup>

### III. INTERNATIONAL ADOPTION FROM CHINA

International adoption has been of major relevance to China for the last twenty years, when approximately 63,000 children were adopted to the

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<sup>72</sup> *Id.* at 393-94.

<sup>73</sup> Zhang, *supra* note 68, at 318-19.

<sup>74</sup> "Nearly 50% of the adoptions took place through intermediaries, 26% from kin, and 23% adopted children who were abandoned directly or with the assistance of their friends, kin, or neighbors." *Id.*

<sup>75</sup> Johnson, *supra* note 4, at 382.

<sup>76</sup> *Id.* at 382-83.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 383.

<sup>79</sup> See generally Poncz, *supra* note 3.

United States.<sup>80</sup> Thus, Americans share the interest of many Chinese families to adopt Chinese children.<sup>81</sup>

The circumstances of American families led to the international adoption of many Chinese children. Prior to World War II, there was a surplus of available American children needing homes. As this population of children declined following the Second World War,<sup>82</sup> Americans began adopting from humanitarian organizations that were placing orphans from war-torn European countries.<sup>83</sup>

The appeal of adopting from abroad grew with family law developments unfavorable to adoptive parents in the United States, culminating in the Baby Jessica and Baby Richard cases.<sup>84</sup> Furthermore, adopting from abroad facilitates a closed adoption and separation from the biological family.<sup>85</sup>

There are additional reasons for the rise of international adoption from China in particular. These include the one-child policy and the development of a robust international adoption program, the circumstances of adoptive families, and the international legal framework.

<sup>80</sup> See *supra* note 3 and accompanying text. However, international adoption into the United States has been decreasing generally: “[I]nternational adoption is in crisis. Such adoption into the United States has dropped in the short period since 2004, its peak year, to roughly half of what it was. It has dropped in each of these years, and most precipitously in the most recent years.” Elizabeth Bartholet, *Permanency Is Not Enough: Children Need the Nurturing Parents Found in International Adoption*, 55 N.Y.L. SCH. L. REV. 781, 783 (2010–2011).

<sup>81</sup> See *supra* Part II.

<sup>82</sup> “After the war, when Europe was rebuilt and its economic condition stabilized, the problem of orphaned children was resolved. Since that time, birthrates have fallen in the West, abortion and reliable methods of contraception have become available, and the stigma against women bearing children outside of marriage has declined.” Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 130 (1998). *But see* Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1434 (2006) (“While Americans point to the small number of healthy infants available in the United States, healthy African American newborns are ending up with white families in other countries such as Canada, France, and Germany.”).

<sup>83</sup> Gordon, *supra* note 3, at 124.

<sup>84</sup> *In re Clausen*, 442 Mich. 648 (1993); *In re Doe*, 638 N.E.2d 181 (Ill.), *cert. denied*, 115 S. Ct. 499 (1994). See also *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988) (affirming a woman’s right to change her mind after having agreed, under a surrogacy contract, to be artificially inseminated with a man’s sperm and to surrender the baby to him and his wife). The parent-child relationship is constitutionally protected and severing it to allow adoption may not be easy. See, e.g., *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

<sup>85</sup> “The recent growth in international adoption has been spurred, at least in part, by the desire of adoptive parents to return to closed, confidential adoptions where the identity of the birth mother is secret and there is no ongoing contact with her.” Malinda L. Seymore, *Openness in International Adoption*, 46 COLUM. HUM. RTS. L. REV. 163 (2015).

At stake in international adoption is the best interests of the children. Many modern communities recognize this venerable principle of maximizing children's welfare,<sup>86</sup> and it shapes both the domestic and international adoption of Chinese children.

#### *A. Reasons for International Adoption*

Various reasons exist for the demand for international adoption from China, including one view of international adoption that underestimates China's domestic adoption. For example, an American official involved in international adoption stated, "[w]ould-be Chinese parents are beginning to adopt more and more, but almost all of the adoptions are of blood relatives. . . . [t]raditionally, Chinese have almost never adopted complete strangers."<sup>87</sup> Another American adoption official, this time Chinese-born, was quoted as saying,

The concept [of adoption] hardly exists in Chinese culture. Nobody knows about it. . . . [A]doption has a long tradition in the U.S. To a Chinese if a child is not of his flesh and blood, he may not love the child as much as he loves his own children. Americans don't feel that way.<sup>88</sup>

However, these views conflict with much of the history and practices of Chinese domestic adoption.<sup>89</sup>

Another international belief holds that Confucianism may not only prioritize the adoption of a son instead of a daughter, but may also create hesitancy to adopt outsiders.<sup>90</sup> Chinese domestic adoption does not follow this ideology strictly,<sup>91</sup> although there may be some fear of outsiders. Even a son-in-law may be feared as an outsider who may leave the family at any

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<sup>86</sup> For a useful background on the American best interests principle, see John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J.L. REFORM 57, 64 n.23 (2006). Regarding the best interests principle in the English legal system, see KERRY O'HALLORAN, *THE WELFARE OF THE CHILD* 9–35 (1999).

<sup>87</sup> Johnson, *supra* note 4, at 381. American adoption agencies have been strictly regulated. Meier & Zhang, *supra* note 48, at 128–29.

<sup>88</sup> Johnson, *supra* note 4, at 381.

<sup>89</sup> See Bouman, *supra* note 50.

<sup>90</sup> See BODDE & MORRIS, *supra* note 8, at 35–36.

<sup>91</sup> Johnson, *supra* note 4, at 385.

time, potentially taking his children.<sup>92</sup> Accordingly, several Chinese clans had laid down rules rooted in the notion that “brotherly love prevents outsiders from taking advantage” of them.<sup>93</sup> However, Chinese customary adoption has often resulted in the adoption of outsiders, who are then made part of the family.<sup>94</sup> Many Chinese families need a male heir, and they may not consider their family complete without a daughter.<sup>95</sup>

Thus, certain stereotypes of Chinese domestic adoption assume little cultural continuity and underestimate domestic demand for adoption.<sup>96</sup> Yet, the history of domestic adoption in China has fluidly continued into the present, exhibiting a high level of cultural continuity.

Other than the perceptions of limited Chinese domestic adoption, there are several reasons that have prompted foreign families to turn to China for international adoption. For example, the one-child policy in China created a healthy and young female orphan population.<sup>97</sup> The Chinese government attributes the health of its orphans to the fact that few women in China abuse alcohol, tobacco, or drugs in general.<sup>98</sup> Thus, international adoption of Chinese children has flourished.

These factors contributed to significant demand for international adoption of Chinese children, creating some suspicion of baby trafficking<sup>99</sup> despite the Chinese government’s efforts to prevent it.<sup>100</sup> If some babies were stolen or bought instead of abandoned, the implication may be that the supply of children available for adoption cannot meet the demand for international adoption, or that the formal methods are too cumbersome or expensive.<sup>101</sup>

<sup>92</sup> James L. Watson, *Agnates and Outsiders: Adoption in a Chinese Lineage*, 10 MAN 293 (1975).

<sup>93</sup> HUI-CHEN WANG, *supra* note 44, at 61.

<sup>94</sup> See WOLF & HUANG, *supra* note 21, at 108–09.

<sup>95</sup> Johnson, *supra* note 4, at 386.

<sup>96</sup> For other misconceptions about international adoption, see Mary Landrieu & Whitney Reitz, Essay, *How Misconceptions About International Adoption Lead to a Violation of Human Rights Against Unparented Children*, 22 TUL. J. INT’L & COMP. L. 341 (2014).

<sup>97</sup> Gordon, *supra* note 3, at 130.

<sup>98</sup> *Id.*

<sup>99</sup> See generally Meier & Zhang, *supra* note 48.

<sup>100</sup> “In 1993, as a result of these illegal adoptions, the Chinese government suspended all adoptions. This prohibition lasted for ten months, during which time the Chinese government ratified procedural requirements for international adoptions.” Sara R. Wallace, Note, *International Adoption: The Most Logical Solution to the Disparity Between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?*, 20 ARIZ. J. INT’L & COMP. L. 689, 715 (2003).

<sup>101</sup> See generally *id.*; Elena Schwieger, *Getting To Stay, Clarifying Legal Treatment of Improper Adoptions*, 55 N.Y.L. SCH. L. REV. 825 (2010/2011).

### B. China's International Adoption Program

Over the years, China has focused on creating an international adoption program,<sup>102</sup> which has supplied a funding source for the orphanages.<sup>103</sup> In this way, the orphanage system became self-sufficient, requiring less subsidy from the Chinese government.<sup>104</sup>

In 1988, China began to allow foreigners with either Chinese heritage or close ties to the country to adopt Chinese children, relaxing both international and domestic adoption at the provincial level.<sup>105</sup> However, only a few American families adopted Chinese children in 1988.<sup>106</sup>

In 1991, the Adoption Law of China treated foreigners wanting to adopt Chinese children like Chinese citizens who wished to adopt.<sup>107</sup> Other 1990s legal reforms ultimately centralized and simplified foreign adoptions. However, the reforms also imposed certain restrictions on adoptive parents, who needed to be over thirty-five and childless.<sup>108</sup> Those who did not meet these requirements could only adopt a child with a mild or correctable condition.<sup>109</sup>

With further adoption law changes in 1998, the China Center for Adoption Affairs (CCAA) also indicated that it would allow foreigners with children to adopt abandoned children.<sup>110</sup> The only significant restriction added was that adopters could not suffer from diseases that made them medically unfit for adopting children.<sup>111</sup>

The CCAA then issued new regulations effective for all applications received after May 1, 2007.<sup>112</sup> Under these rules, adoptive parents must have been married at least two years, must have graduated from high school, and

<sup>102</sup> For an in-depth discussion of the legal framework regarding international adoption from China, see Kaidi Yu, Note, *What Can I Do for You, My Damaged Angel: Ways to Better Protect Special Needs Children Adopted from China*, 21 CARDOZO J.L. & GENDER 815 (2015); Crystal J. Gates, *China's Newly Enacted Intercountry Adoption Law: Friend or Foe?*, 7 IND. J. GLOBAL LEGAL STUD. 369 (1999).

<sup>103</sup> See Meier & Zhang, *supra* note 48, at 104–06.

<sup>104</sup> *Id.* at 100 (noting that government subsidies per orphan varied from one region to another, but ranged from 3,000–4,000 yuan (approximately U.S. \$375–\$500) to 110 yuan (U.S. \$13.75) per year).

<sup>105</sup> Kleem, *supra* note 49, at 321; Gordon, *supra* note 3, at 133.

<sup>106</sup> Gordon, *supra* note 3, at 133.

<sup>107</sup> Kleem, *supra* note 49, at 321.

<sup>108</sup> Gordon, *supra* note 3, at 134–35.

<sup>109</sup> *Id.*

<sup>110</sup> See Bethany G. Parsons, *Intercountry Adoption: China's New Laws Under the 1993 Hague Convention*, 15 NEW ENG. J. INT'L & COMP. L. 63 (2009).

<sup>111</sup> Adoption Law of the People's Republic of China Amendment, 1998, Art. 6.

<sup>112</sup> See Yu, *supra* note 102, at 822.



must have at least \$80,000 worth of assets.<sup>113</sup> They must not be deformed, mentally ill, blind in either eye, or have a body mass index over thirty-nine.<sup>114</sup> The China Center for Children's Welfare and Adoption (CCCWA) announced further changes to intercountry adoption procedures effective January 1, 2015.<sup>115</sup>

Thus, despite the initial liberalization of the 1991 adoption regime by the 1998 legal reform, the Chinese government moved to limit adoptions.<sup>116</sup> However, Chinese black letter law reveals only a partial picture of domestic adoptions—it is also important to consider the adoption practices occurring today that are informal and outside any legal framework.<sup>117</sup>

### C. *Legal Framework on International Adoption*

Much of the international legal framework creates a favorable environment for international adoption. International law governing intercountry adoption primarily consists of the (1) 1989 United Nations Convention on the Rights of the Child (CRC)<sup>118</sup> and (2) 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention).<sup>119</sup> The CRC prefers domestic

<sup>113</sup> China Center of Adoption Affairs, CCAA Draft Regulation, FAMILIES WITH CHILDREN (Sept. 22, 2013), <http://fwcc.org/index.php/legislation/24-china2/54-ccaa-draft-regulations> [<https://perma.cc/YA3-F66V>].

<sup>114</sup> Peter Selman, *From Bucharest to Beijing: Changes in Countries Sending Children for International Adoption 1990 to 2006*, in INTERNATIONAL ADVANCES IN ADOPTION RESEARCH FOR PRACTICE 9 (Gretchen Miller Wrobel & Elsbeth Neil eds., 2009). For commentary on the weight limitations for adoptive parents, see Kimberly A. Collier, Note, *Love v. Love Handles: Should Obese People Be Precluded From Adopting a Child Based Solely Upon Their Weight?*, 15 TEX. WESLEYAN L. REV. 31 (2008).

<sup>115</sup> Notice: *Changes to Requirements*, INTERCOUNTRY ADOPTION, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE (Dec. 31, 2014), <https://travel.state.gov/content/adoptionsabroad/en/country-information/alerts-and-notice/china14-12-34.html> [<https://perma.cc/74QH-2JMR>].

<sup>116</sup> See generally Poncz, *supra* note 3, at 75–77.

<sup>117</sup> See, e.g., High, *supra* note 26, at 164 (“The problem of unregistered children is not an unfamiliar one in China: ‘In 1988 the Public Security Bureau estimated that there were approximately one million [such] children.’ The UN Committee on the Rights of the Child has also expressed concern about the lack of registration of unknown numbers of Chinese children.” (citation omitted)).

<sup>118</sup> Convention on the Rights of the Child (CRC), G.A. Res. 44/25, at 167, U.N. GAOR, 44th Sess., U.N. Doc. A/44/49 (1989).

<sup>119</sup> The Hague Convention governs international adoptions and, although not legally binding in states that have not yet ratified it, it provides a well-respected and authoritative framework for international adoptions. The Convention's aims are

- 1) to ensure an international adoption occurs only if it is in the child's best interest; 2) to establish a system of cooperation among participating nations

placement, considering intercountry adoption appropriate when “the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.”<sup>120</sup> Meanwhile, the Hague Convention shares a similar principle that domestic adoption should be preferred over international adoption when possible within a reasonable amount of time.<sup>121</sup> Both treaties hold that the children’s best interests is the paramount consideration.<sup>122</sup>

This view of international adoption does not condemn international adoption, but values domestic placement. Such a position seeks the appropriate balance between domestic and international adoptions, preferring both over institutionalized care.

The best interests standard, however, has been used to support all sides of the debate on international adoption.<sup>123</sup> Many scholars have joined the worldwide debate on the side of domestic adoption when the choice is available.<sup>124</sup> They have expressed concern that international adoption costs children their cultural identity and heritage. Scholars have also pointed to the attendant temptation to traffic children.<sup>125</sup>

to assure their agreements are upheld, as well as to help curtail the sale of children; and 3) to ensure recognition of intercountry adoptions which conform with the Hague Convention’s requirements.

Gordon, *supra* note 3, at 125. *See also* Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (hereinafter *Hague Adoption Convention*), May 29, 1993, S. Treaty Doc. No. 105-51 (1998).

<sup>120</sup> CRC, *supra* note 118, art. 21(b).

<sup>121</sup> *See Hague Adoption Convention, supra* note 119.

<sup>122</sup> Specifically, Article 3 of the Convention on the Rights of the Child provides, “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” CRC, *supra* note 118, art. 3. Chapter 1, Article 1 of the Hague Convention reads, “The objects of the present Convention are – a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law.” *Hague Adoption Convention, supra* note 119, art. 1.

<sup>123</sup> Rebecca Worthington, Note, *The Road to Parentless Children is Paved with Good Intentions: How the Hague Convention and Recent Intercountry Adoption Rules Are Affecting Potential Parents and the Best Interests of Children*, 19 DUKE J. COMP. & INT’L L. 559, 566–68 (2009). The best interests standard inquiries into the best interests of a child, allowing an individual approach to each child’s circumstances. *See also supra* note 86.

<sup>124</sup> *See generally* Johnson, *supra* note 4. For additional concerns regarding international adoption, see Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101 (1998); David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U.L. REV. 281 (2004).

<sup>125</sup> *See supra* notes 99–100 and accompanying text.

Commentators have also noted that international adoption is invaluable to children,<sup>126</sup> underscoring the benefits of placing a child in a committed, loving family. Indeed, international adoption provides a significant source of permanent homes to the world's orphans.<sup>127</sup> It allows children to become citizens of the wealthiest countries and offers the benefits of multicultural bonds.<sup>128</sup> Studies have also shown that the permanent placement of children in individual homes is preferable to institutionalization.<sup>129</sup>

In sum, there is an important role for international adoption and the legal framework that supports it. International adoption from China has been driven by the country's one-child policy, but even though the policy has been lifted, another force has come into play—demographic changes affecting families worldwide.

#### IV. DEMOGRAPHIC CHANGES

Various factors—including the recent one-child policy and the attendant legal framework—have combined not only to make many children available for international adoption from China, but also to keep families in the country small. However, recent legal changes that moved away from the one-child policy allow Chinese families to expand. The question is what will happen to international adoption from China and what the Chinese family will look like in the next few generations given new global demographic changes, despite the country's shift away from the one-child policy.<sup>130</sup> There is potential for tension between people's desire to have children, including through domestic adoption, and the demographic shifts toward smaller families.

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<sup>126</sup> See, e.g., Bartholet, *supra* note 80; Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT'L. L.J. 179 (2003).

<sup>127</sup> D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349, 349 (2005).

<sup>128</sup> David M. Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 CAP. U. L. REV. 413 (2007).

<sup>129</sup> See, e.g., Rachel J. Wechsler, *Giving Every Child A Chance: The Need for Reform and Infrastructure in Intercountry Adoption Policy*, 22 PACE INT'L L. REV. 1, 7 (2010).

<sup>130</sup> See, e.g., Wei-Jun Jean Yeung & Cheryll Alipio, *Transitioning to Adulthood in Asia: School, Work, and Family Life*, 646 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 14 (2013) (citing Frank F. Furstenberg, *Transition to Adulthood: What Can We Learn from the West*, in *TRANSITIONING TO ADULTHOOD IN ASIA* 14 (Wei-Jun Jean Yeung et al. eds., 2013) (describing the "Second Demographic Transition" as a period characterized by low fertility, high cohabitation, and divorce)).

This Part explores whether the global trend toward lower fertility will replace China's one-child policy in keeping families in the country relatively small. Lower fertility around the world has resulted from other demographic shifts that have been impacting China too, such as lower marriage rates and delays in having children.<sup>131</sup>

Marriage rates around the world have been decreasing. For example, the number of never-married Americans has hit record highs.<sup>132</sup> Civil unions have replaced marriage for many couples in France.<sup>133</sup> Cohabitation, or living outside of marriage, has been increasing around the world.<sup>134</sup>

People are less likely to marry these days for various reasons: no money, no time, or no desire to tie the knot.<sup>135</sup> Great expectations for marriage may be causing many to delay it.<sup>136</sup> Others simply refuse to settle, and women with careers can afford it. One survey suggests many factors predicted whether a couple would cohabit instead of marry: the ethnicity of the woman, the religiosity of the woman, whether the woman's parents had

<sup>131</sup> Demographers define "very low fertility" as a birthrate below 1.5 children. Europe's total fertility rate (TFR) from 1995 to 2000 was 1.42 children per woman. . . . In 2002, 28 nations experienced very low fertility including Switzerland (1.4), Germany (1.3); Austria (1.3); Italy (1.3); Spain (1.2); Greece (1.3); Japan (1.3), Russia (1.3); the Czech Republic (1.1); and most other Eastern European nations.

Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-Lawrence World*, 23 QUINNIPIAC L. REV. 447, 457 (2004). See also Sarah Harper, *Youth--A Scarce Commodity Within An Ageing World*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 479 (2007) (noting the high proportion of the population that is aging).

<sup>132</sup> Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RESEARCH CENTER (Sept. 24, 2014), <http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/> [<https://perma.cc/YF4S-LBYS>].

<sup>133</sup> "If trends continue, new civil unions will outnumber marriages in France." Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 37 (2012). See also Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 47, 57 (2014) ("In each year since 2001, the number of PACSs issued has increased, and among opposite-sex couples there are currently two PACSs issued for every three marriages.").

<sup>134</sup> In the United States, 7.5 million heterosexual couples cohabitated in 2010, versus fewer than 500,000 in 1960. Anna Stępień-Sporek & Margaret Ryznar, *The Consequences of Cohabitation*, 50 U.S.F. L. REV. 75, 77 (2016).

<sup>135</sup> JANE LEWIS, THE END OF MARRIAGE? INDIVIDUALISM AND INTIMATE RELATIONS 29-42 (2001).

<sup>136</sup> KATHRYN EDIN & TIMOTHY J. NELSON, DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY (2013); *Poor People Value Marriage As Much As the Middle Class and Rich, Study Shows*, UCLA NEWSROOM (July 16, 2012), <http://newsroom.ucla.edu/releases/poor-people-value-marriage-as-236346> [<https://perma.cc/R5XZ-5CF6>].

separated, whether the couple had children from previous relationships, and home ownership.<sup>137</sup>

Countries have taken different approaches to the problem of delay or lack of marriage,<sup>138</sup> and the attendant impact on population growth. Faced with declining marriage rates,<sup>139</sup> the local government in Japan has even turned to matchmaking.<sup>140</sup> In China, parents have become involved as matchmakers.<sup>141</sup>

<sup>137</sup> Alissa Goodman & Ellen Greaves, *Cohabitation, Marriage and Relationship Stability*, IFS BRIEFING NOTE BN 107 (2010), <http://www.ifs.org.uk/bns/bn107.pdf> [<https://perma.cc/FV7S-XDR6>].

<sup>138</sup> Indeed, the affected nations have already begun to respond and have adopted a wide range of incentives—tax advantages, cash benefits, child-care subsidies and opportunities, parental leave, new employment policies—aimed at encouraging women to have more babies. Studies of these policies have reached mixed conclusions as to their impact.

Marsha Garrison, *The Decline of Formal Marriage: Inevitable or Reversible?*, 41 FAM. L.Q. 491, 517 (2007). See also Lynn D. Wardle, *Children and the Future of Marriage*, 17 REGENT U. L. REV. 279, 281–82 (2005) (“During the past decade, every American state has engaged in at least one government activity or made at least one policy change intended to strengthen marriage or two-parent families. These programs include: (1) marriage education in high schools; (2) incentives for pre-marriage counseling; (3) free or low-cost marriage-preparation programs for low-income couples; (4) free or low-cost marriage skill-development programs for low-income couples; (5) revision of social-security laws to reduce the ‘marriage penalty’ for low income couples who marry (some welfare programs encourage couples not to marry by reducing the level of public assistance available to a couple if they are married, but not reducing the amount of assistance if they cohabit without marriage); (6) providing low-cost or no-cost counseling for married couples; (7) encouraging participation of nonmarital fathers in the rearing of their children; and (8) education of nonmarital fathers and mothers about the advantages for children whose fathers and mothers are married. Additionally, three path-breaking states have enacted ‘covenant marriage’ laws that provide official recognition for the marriage vows of persons who want to make stronger public commitments to marriage.”).

<sup>139</sup> Hiroshi Ishida, *The Transition to Adulthood Among Japanese Youths: Understanding Courtship in Japan*, 646 ANNALS AM. ACAD. POL. & SOC. SCI. 86, 87 (2013).

<sup>140</sup> David McNeill & Chie Matsumoto, *Fertility Crisis in Japan: Let the State Find You a Mate*, INDEPENDENT (Nov. 9, 2009), <http://www.independent.co.uk/news/world/asia/fertility-crisis-in-japan-let-the-state-find-you-a-mate-1817736.html> [<https://perma.cc/X23F-JGJD>].

<sup>141</sup> We found evidence that, with regard to attitudes about cohabitation, Chinese elders are more conservative than Chinese youth. Moreover, middle-aged Chinese individuals report that Chinese youth have differing opinions on some issues surrounding marriage, but these perceptions of the youth’s attitudes about specific issues deviate from the youth’s actual opinions.

Yishan Xu & Bailey L. Ocker, *Discrepancies in Cross-Cultural and Cross-Generational Attitudes Toward Committed Relationships in China and the United States*, 51 FAM. CT. REV. 591, 591 (2013). See also Yishan Xu & Bailey L. Ocker, *Discrepancies in Cross-Cultural and Cross-Generational Attitudes Toward Committed Relationships in China and the United States*, 51 FAM. CT. REV. 591, 594 (2013) (“[P]arents [throughout Chinese cities] meet each other to play matchmakers for their children, because their children have no time to date.”).

When couples do marry in China, they encounter another phenomenon: higher divorce rates than previously.<sup>142</sup> With an increased instability in marriage, having children is a more difficult proposition.

Lack of social support for children and the global trend of equality between the genders have also lowered fertility rates. In a society wherein women burden much of the cost of having children,<sup>143</sup> they may be less likely to have children.<sup>144</sup>

These demographic changes relating to marriage make it more difficult to have multiple children, especially given the increasing costs of children and the emphasis on providing them with resources.<sup>145</sup> In the United States, for example, the cost of raising a child to the age of eighteen has been estimated to be well over \$100,000.<sup>146</sup> This figure does not include college expenses,

<sup>142</sup> *Divorce: A Love Story*, ECONOMIST (Jan. 23, 2016), <http://www.economist.com/news/china/21688901-while-government-talks-up-family-values-marriage-break-ups-are-soaring-divorce-love-story> [https://perma.cc/63AS-2USB]. See also Xin He & Kwai Ng, *Pragmatic Discourse and Gender Inequality in China*, 47 LAW & SOC'Y REV. 279, 281 (2013) (noting how divorce cases now comprise a large portion of civil trials in urban China); Catherine R. Chyi, Comment, *Lessons from China?: Keeping Divorce Rates Low in the Modern Era*, 23 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 285, 292 (2011) (outlining the liberalization of divorce laws and social norms in China in the twentieth century).

<sup>143</sup> For example, in the United States, women take part-time and flexible jobs more frequently than men, often to accommodate their children. See, e.g., Marianne Bertrand et al., *Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors*, 2 AM. ECON. J.: APPLIED ECON. 228, 230 (July 2010), <http://pubs.aeaweb.org/doi/pdfplus/10.1257/app.2.3.228> [https://perma.cc/D9S3-5KBE] (finding that many women curtail their paid work after having children); NEW YORK CITY BAR, *Law Firm Diversity Benchmarking Report: 2006 Report to Signatories of the Statement of Diversity Principles*, 17 (2006), <http://www.nycbar.org/images/stories/pdfs/firmbenchmarking06.pdf> [https://perma.cc/2ZGD-KK6U] (determining that over nine percent of New York City women attorneys work flexibly compared to about one percent of men); Marin Clarkberg & Phyllis Moen, *Understanding the Time Squeeze: Married Couples' Preferred and Actual Work-Hour Strategies*, 44 AM. BEHAV. SCIENTIST 1115, 1133 (2001) (noting that women, not men, typically prefer part-time work).

<sup>144</sup> Because women continue to assume a disproportionate share of family obligations, they pay a disproportionate price for these public policy limitations. Significant progress toward equal employment opportunity in fact as well as form will require far greater government support, such as expanded subsidies, tax incentives, and minimum requirements concerning childcare, workplace schedules, and family leave policies.

Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1197–98 (1994).

<sup>145</sup> “In developed societies, with their emphasis on ‘high-quality’ children requiring substantial investment, the process of weighing costs and benefits tends to translate into small families.” Karen Benjamin Guzzo, *New Partners, More Kids: Multiple-Partner Fertility in the United States*, 654 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 68 (2014).

<sup>146</sup> Mark Lino, *Expenditure on Children by Families, 2013*, U.S. DEP'T OF AGRIC., MISC. PUBL'N NO. 1528-2013, at 32 (2014), [https://www.cnpp.usda.gov/sites/default/files/expenditure\\_on\\_children\\_by\\_families/crc2013.pdf](https://www.cnpp.usda.gov/sites/default/files/expenditure_on_children_by_families/crc2013.pdf) [https://perma.cc/8WCY-RBMS]. In 1960, it was

which may total tens of thousands of additional dollars. The cost of a college education has increased each year, outpacing inflation.<sup>147</sup>

Some countries have offered tax incentives to offset the costs of having a child. For example, the United States has implemented some tax breaks for childcare and college tuition,<sup>148</sup> although Congress has been criticized for not doing more for families.<sup>149</sup> In this context especially, there is a strong case that tax law can incentivize individuals to act in a particular way, whether through tax breaks or tax penalties.<sup>150</sup>

Thus, the lifting of the one-child policy comes at a time when fertility rates are declining around the world. This demographic shift, caused by later

\$183,509 (in 2008 dollars). *Id.* In comparison, the cost of upbringing per child in Poland is 190,000 PLN (about \$65,000), according to experts from the Adam Smith Center. Anna Stępień-Sporek & Margaret Ryznar, *Child Support for Adult Children*, 30 QUINNIPIAC L. REV. 359, 362 n.10 (2012).

<sup>147</sup> See Ben Wildavsky, *Is That the Real Price?*, U.S. NEWS & WORLD REP., Sept. 6, 1999, 64 (“Since 1980, the average tuition at four-year institutions has more than doubled after adjusting for inflation, while the median family income for the parents of college-age children has increased just 12 percent.”). Divorced parents may be financially liable for their children’s college expenses. Stępień-Sporek & Ryznar, *supra* note 146.

<sup>148</sup> For family formation, tax incentives include the deduction of medical expenses and the adoption credit. See Anthony C. Infanti, *The House of Windsor: Accentuating the Heteronormativity in the Tax Incentives for Procreation*, 89 WASH. L. REV. 1185, 1215 (2014); Leah Carson Kanoy, Note, *The Effectiveness of the Internal Revenue Code’s Adoption Tax Credit: Fostering the Nation’s Future?*, 21 U. FLA. J.L. & PUB. POL’Y 201 (2010). For college tuition tax incentives, see Sean M. Stegmaier, *Tax Incentives for Higher Education in the Internal Revenue Code: Education Tax Expenditure Reform and the Inclusion of Refundable Tax Credits*, 37 SW. U. L. REV. 135 (2008).

<sup>149</sup> See, e.g., *infra* note 150. But see Mona L. Hymel, *The Population Crisis: The Stork, the Plow, and the IRS*, 77 N.C. L. REV. 13 (1998) (arguing that American tax policy should focus on reducing the fertility rate in the country).

<sup>150</sup> For the argument that economic incentives drive women’s behavior, see Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1033, 1040–41 (1993) (arguing that Congress should lower married women’s tax rates to encourage both marriage and married women’s participation in the labor force); see also EDWARD J. McCAFFERY, *TAXING WOMEN* 19–23 (1997) (noting that, because married couples often view the wife’s income as secondary, which is taxed at higher marginal rates, the tax code provides a disincentive for married women to work), and Jennifer L. Venghaus, Comment, *Tax Incentives: A Means of Encouraging Research and Development for Homeland Security?*, 37 U. RICH. L. REV. 1213, 1220 (2003) (observing that the tax code can change society’s behavior). However, other scholars have suggested that the tax code does not influence people’s behavior but that people’s behavior influences the tax code. See, e.g., Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1392 (1975) (noting that the tax code codifies social mores); Erik M. Jensen & Jonathan Barry Forman, *Making America Work*, 5 PITT. TAX REV. 165, 170 n.16 (2008) (book review) (suggesting that the tax code is indifferent to whether the husband or wife is the primary wage-earner, but that social expectations may be less so).

marriages, delayed childbirth, and divorce, may challenge the domestic placement of Chinese orphans and keep families small in China. In other words, these demographic changes may become the substitute for the one-child policy.

Thus, the one-child policy may now be re-created through demographic changes. While the government has lifted the one-child policy, the demographic changes occurring may be difficult to reverse. Not only may population growth in China be slower as a result,<sup>151</sup> but also international adoption may not be immediately reduced by the formal shift away from the one-child policy.

Although the one-child policy did not necessarily break the cultural continuity of domestic adoptions in China, demographic changes might do so. The question becomes whether cultural continuity in domestic adoptions can survive the demographic changes. Thus, the legal changes in China should not be considered out of the context of demographic changes occurring worldwide that affect the family. Their impact on domestic and international adoption, in turn, remains to be seen.

## V. CONCLUSION

In sum, the high cultural continuity of Chinese domestic adoption suggests that many domestic homes are available for Chinese children, placement in which would serve their best interests. The government's recent shift from the one-child policy to a two-child policy can accommodate this.<sup>152</sup>

However, the future of international adoption of Chinese children, and the future of Chinese families, is far from clear. Chinese adoption law has changed several times in the previous twenty years, with no guarantee of the permanence of current adoption law.<sup>153</sup>

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<sup>151</sup> It is likely that there will be some population growth, however. For example, "The universal second-child policy implemented early last year was a major factor in raising the number of births in China to 17.86 million last year, an increase of 7.9 percent and the highest annual number since 2000, according to the top health authority." Shan Juan, *Second-Child Policy Increases Births By 7.9 Percent*, NATIONAL HEALTH AND FAMILY PLANNING COMMISSION OF THE PRC (Jan. 23, 2017), [http://en.nhfpc.gov.cn/2017-01/23/c\\_71085.htm](http://en.nhfpc.gov.cn/2017-01/23/c_71085.htm) [<https://perma.cc/598H-SQJK>].

<sup>152</sup> "In the People's Republic of China, the underdevelopment of domestic adoption has similarly been a primary focus of concern." Blair, *supra* note 127, at 377.

<sup>153</sup> The recent CCAA restrictions may result in a move away from international adoption in China. See generally Poncz, *supra* note 3. "The conditions that have made China the most significant sending nation in the intercountry adoption system are not necessarily permanent."



Indeed, the future political and economic situation in China may allow families in the country to raise more children, reducing the number of children available for international adoption. On the other hand, global trends may suggest that families are becoming smaller and relatively unstable, which would undermine a reversion in China back to pre-one-child policy times.

The world has moved on since the introduction of the one-child policy in China, and it is now a very different place—the government’s artificial restriction on large families has been replaced by a natural one rooted in people’s preferences for small families and personal autonomy. Thus, the legal shift in China away from the one-child policy should not be considered outside the context of the demographic changes occurring worldwide that affect the family.

