

# ECONOMY VERSUS CARE: CHINA'S ECONOMIC AMBITIONS AND A CONUNDRUM IN ALTERNATIVE CARE

## INTRODUCTION

The citizens of the People's Republic of China (PRC) could once theoretically rest assured that the State would take care of their basic needs.<sup>1</sup> Orphans and abandoned children<sup>2</sup> were among those who could rely on the central government's guarantee of care.<sup>3</sup> However, shortly after the death of Mao Zedong in 1976, economic reform became a top priority.<sup>4</sup> The State revised its strategies and began to shirk its communist agenda.<sup>5</sup> The shift in priorities from implementing a successful class struggle (per the communist agenda) to entry into global capitalist markets and fostering economic growth took center stage.<sup>6</sup> As the communist PRC<sup>7</sup> began to wean its citizens off of welfare and eliminate socialist work units, the way in which care was delivered between 1949 and 1978 also began to change.<sup>8</sup> A new social method of foster care transpired, the central tenet of which was sharing the responsibilities of orphan care with individuals and families in the PRC.<sup>9</sup> This method has presented a host of issues—specifically, issues that grapple with the quality of care given<sup>10</sup> and

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<sup>1</sup> XIAOYUAN SHANG & KAREN R. FISHER, CARING FOR ORPHANED CHILDREN IN CHINA 112–13, 116 (2014); see Mark Selden & Laiyin You, *The Reform of Social Welfare in China*, 25 WORLD DEV. 1657, 1657–58 (1997).

<sup>2</sup> The Comment will use the term “orphan” as officially defined by the PRC: “children under age eighteen who have lost their parents through death *or abandonment* and do not receive support from others.” Liu Meng & Zhu Kai, *Orphan Care in China*, 7 SOC. WORK & SOC'Y 43, 44 (2009) (emphasis added).

<sup>3</sup> SHANG & FISHER, *supra* note 1, at 112–13, 116 (“Before the economic transition in the 1980s, under communism the state took full responsibility for protecting orphaned or abandoned children in urban areas.”); Meng & Kai, *supra* note 2, at 44.

<sup>4</sup> SHANG & FISHER, *supra* note 1, at 112.

<sup>5</sup> See *id.* at 112–13, 116. See generally Meng & Kai, *supra* note 2.

<sup>6</sup> See SHANG & FISHER, *supra* note 1, at 112–13.

<sup>7</sup> “China” has taken on a variety of different identifiers in even the last two-hundred years. To clear up the different terminologies used throughout this Comment, going forward, the PRC will be used to describe post-1949 China. Later in this Comment, the Republic of China (ROC) will be used to describe post-1911 to 1949 China (not to be confused with modern-day Taiwan). To describe pre-1911 China, it will be referred to either as either broadly as “dynastic China,” or specifically the “Qing Dynasty.” Ancient China will be referred to as “traditional China.” Finally, for the sake of simplicity, “China” will then be used to describe the society in a historical sense, consisting of all traditional China, dynastic China, the ROC, and the PRC periods. Please note that, although confusing, the distinctions have historical significance and implications that will serve to explain the history of alternative care in China.

<sup>8</sup> SHANG & FISHER, *supra* note 1, at 112–13; Meng & Kai, *supra* note 2.

<sup>9</sup> SHANG & FISHER, *supra* note 1, at 111, 116 (“The previous welfare system, monopolized by the state, was no longer enough to deal with the social challenges exacerbated by the market transition.”).

<sup>10</sup> See *id.* at 113 (One “challenge was financial constraints. State investment fell behind requirements to maintain welfare provision to orphans at an acceptable level.”).

the sheer number of orphans that institutions would have to accommodate.<sup>11</sup> The Chinese government has tried to regulate around these issues, but it is today confronted with the conundrum of striking a delicate regulatory balance between the quality of care provided and the quantity of orphans cared for.<sup>12</sup>

## I. TOPIC AND SCOPE

This attempt to strike a regulatory balance has resulted in regulations that one may argue should encompass a more comprehensive regulatory scheme—like those of Western countries—if they are to succeed. However, this Comment will not focus so much on asserting what policy fixes should be implemented or attempt to dictate direct solutions. Rather, it will identify some exemplary provisions from the regulations China has most recently implemented; contextualize how those regulations fit or match China’s current identity in the westernizing world; and explain why China’s socioeconomic and legal history may prevent it or deter it from a complete adherence to “Western” models. Although an outsider might be right to criticize seemingly incoherent regulations, it is not apparent that anyone without intimate knowledge of Chinese culture, history, and politics, as they relate to the current foster care situation in China, would be well-positioned to dictate propositions to the PRC. This Comment will highlight China’s foster care system and the struggle to regulate it that China, in all its unique circumstances, faces as the country grows as a modern state.

In particular, this Comment will discuss how China’s unique political, economic, cultural, and historical foundations make Western regulatory schemes improbable solutions for China’s alternative care dilemmas. This Comment will also attempt to divert from tendencies of becoming an imperializing or paternalizing Western critique. The scope of this Comment will stick to dispelling the stigma that the PRC lacks law with respect to foster care and explaining why, at least in the case of the PRC, the West should give the PRC more room to assess its own needs and solutions.

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<sup>11</sup> See *id.* (“[D]uring market transition, the previous urban system of protection faced new challenges. The first was that the number of orphans, especially children with disabilities, increased.”); Meng & Kai, *supra* note 2.

<sup>12</sup> See Wendy Zeldin, *China: New Measures on Foster Families*, *Global Legal Monitor*, LIBR. CONGRESS (Dec. 12, 2014), <http://www.loc.gov/law/foreign-news/article/china-new-measures-on-foster-families/>; *Ministry Sets Stricter Rules on Foster Care*, CHINA.ORG.CN (Sep. 29, 2014), [http://www.china.org.cn/china/2014-09/29/content\\_33643718.htm](http://www.china.org.cn/china/2014-09/29/content_33643718.htm).

## II. PURPOSE

This Comment will provide a comprehensive view of the direct causes of abandoned and orphaned children and the causes contributing to the exacerbation of the issue by policy and regulatory shortcomings. It is designed to engage in a theoretical discussion that brings the unconventional but realistic conclusion that while researchers and scholars can continue to criticize, lambast, laud, or inquire into how the PRC is regulating alternative care and whether they are living up to Western expectations, the PRC itself, in its purported autonomy, is in the best position to understand what will solve their foster care conundrum.<sup>13</sup> It will also show that China's regulations, although increasing the quality of care, end up restricting how many are able to be cared for by disqualifying caregivers via stricter regulations, and that they do this by adhering to General Assembly Guidelines for the Alternative Care of Children.<sup>14</sup> The only way to understand this sliding scale is to understand that it is the result of the PRC's transition to a market economy<sup>15</sup> and engagement with the globalized world. Moreover, one can only understand the implications of a marketized economy on alternative care and alternative care regulations if they understand the history of China and, specifically, the history of orphans in China. The purpose of this Comment is thus to provide an understanding of how all of these factors are interrelated and use that premise to ground conclusions on the complexity and uniqueness of the issue. The only reasonable conclusion this Comment can arrive at is that the PRC must find its own way to balance quality and quantity of care until it has the resources to endeavor to account for all of the abandoned or abused children produced by its currently massive population.

## III. STRUCTURE OF THE COMMENT

To organize these endeavors, this Comment will first explain the most common types of alternative care used today and then define some of the direct causes of the current foster care conundrum. This Comment will proceed to explain some of the exemplary provisions from the Ministry of Civil Affairs'

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<sup>13</sup> It may go without mentioning that the PRC is unlikely to be receptive towards proposals on how to handle their orphan population, regardless of how reputable the critic. *See generally* ROBIN MUNRO, HUMAN RIGHTS WATCH, DEATH BY DEFAULT: A POLICY OF FATAL NEGLECT IN CHINA'S STATE ORPHANAGES (1996); Information Office of the State Council of the People's Republic of China, *The Situation of Children in China*, XINHUA NET (Apr. 1996), [http://news.xinhuanet.com/zhengfu/2002-11/18/content\\_633190.htm](http://news.xinhuanet.com/zhengfu/2002-11/18/content_633190.htm) [[https://web.archive.org/web/20160822094457/http://news.xinhuanet.com/zhengfu/2002-11/18/content\\_633190.htm](https://web.archive.org/web/20160822094457/http://news.xinhuanet.com/zhengfu/2002-11/18/content_633190.htm)].

<sup>14</sup> *See* G.A. Res. 64/142, Guidelines for the Alternative Care of Children, ¶¶ 118–27 (Feb. 24, 2010), [https://www.unicef.org/protection/alternative\\_care\\_Guidelines-English.pdf](https://www.unicef.org/protection/alternative_care_Guidelines-English.pdf).

<sup>15</sup> *See* SHANG & FISHER, *supra* note 1, at 112–13.

most recently promulgated foster care regulations. Afterwards, this Comment will delve into a historical discussion that will provide the understanding necessary to realize China is its own special entity with *such* distinct legal, historical, political, cultural, and economic foundations that it may not be amenable to Western solutions.<sup>16</sup> The historical discussion will trace from the PRC to traditional China.

This discussion will mainly show why there is a foster care issue and how it is a direct result of the greater sociopolitical and historical changes that China has undergone in roughly the last century. The discussion will especially highlight items such as the transition to a privatized economy in which the government spends little on welfare<sup>17</sup> and where the market provides incentives that will, in theory, inevitably result in everyone's basic needs being satisfied.

The following sections will specifically discuss how this economic transition has left alternative care to only be accounted for by the State to a limited degree, which, in turn, means that all of the foster children in excess of what the State is willing to fund and bear<sup>18</sup> will only be taken care of if a qualified foster family accepts the duty—in exchange for a small stipend—to take these children on. All children more than those cared for by the State and by foster families will not be accounted for, legally or otherwise. The following will include analyses of the issue at hand, including how the increase in regulations has decreased the number of eligible foster families and how, although children will be safer in comparison to an unregulated foster care industry, fewer children will be taken care of as a result. Implications such as this, that occur as a result of the PRC following international protocol, are precisely why the PRC cannot be shoehorned into “universalized” solutions.

The nature of this seemingly simple issue<sup>19</sup> is quite complex. The complexity derives from the awkward position that modern China finds itself in—namely, between coerced Western conformity,<sup>20</sup> Maoist communism (known as

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<sup>16</sup> These categories of uniqueness influence foster care regulations by adding considerations that would not pose an issue to Western lawmakers or regulation promulgators, such as population, economic goals, legal priorities, political structure, and many other factors. This Comment will specifically focus on sociopolitical changes in the twentieth century and, in turn, the change of economic goals that have come with the period of economic reform and “Opening-Up.” See generally Martin King Whyte, *Paradoxes of China's Economic Boom*, 35 ANN. REV. SOC. 371 (2009).

<sup>17</sup> LESLIE K. WANG, *OUTSOURCED CHILDREN* 16 (2016).

<sup>18</sup> See SHANG & FISHER, *supra* note 1, at 112–13.

<sup>19</sup> This is not merely a regulatory and policy dilemma of balancing two competing factors.

<sup>20</sup> See, e.g., TEEMU RUSKOLA, *LEGAL ORIENTALISM* 198–235 (2013).

“Maoism”),<sup>21</sup> the semi-colonial period, and the legacy of traditional China. This adoption of various ideologies from throughout China’s long, constantly changing history can be seen as the ultimate explanation for what the PRC embodies—or does not—including its policies and law with respect to the status of orphan care. Only by understanding the context will one understand the conclusion of this Comment, which is, namely, that hegemonic Western prescriptions requiring all states that wish to join the Western globalized world to mirror the West may not suffice for China to realize its own prosperity in the area of alternative care.

#### IV. DEFINING THE PROBLEM

Since the PRC began the process of “reform and opening up” (*gaige kaifang*) in 1978, it has been moving towards a capitalist market economy while maintaining an authoritative body that is reputed for tight control.<sup>22</sup> The PRC has since experienced its famous economic miracle and alleviated poverty for over 600 million people in this transition.<sup>23</sup> Despite joining the Western globalized order, the PRC “is often presented dichotomously in the Western media as either a land of freewheeling opportunity or a dangerous threat to the industrialized world.”<sup>24</sup> Essentially, the PRC has certainly been labeled an antagonist to Western ideals and the “rule of law,” even while China has taken great strides to appease Western requirements.<sup>25</sup>

Though the PRC has been prosperous in its economic transition, economic disparities amongst its people continue to escalate, and many children have been strongly affected by the socioeconomic transformations.<sup>26</sup> Statistical analyses use different definitions for “orphan” that create different results in measuring the approximate numbers of the orphan population in the PRC.<sup>27</sup> Using the

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<sup>21</sup> See generally Iskra Research, *Maoism Versus Marxism*, MASS. INST. TECH. (May 1994), [web.mit.edu/fjk/www/editor/essays/maoism.html](http://web.mit.edu/fjk/www/editor/essays/maoism.html).

<sup>22</sup> WANG, *supra* note 17, at 5.

<sup>23</sup> *Id.* (citing *China Overview*, WORLD BANK (May 13, 2015), [www.worldbank.org/en/country/china/overview](http://www.worldbank.org/en/country/china/overview)).

<sup>24</sup> WANG, *supra* note 17, at 5.

<sup>25</sup> See, e.g., RUSKOLA, *supra* note 20, at 205–06 (2013) (relating to Western imperialism and strict international institutional conditions on the PRC’s accession to the WTO).

<sup>26</sup> WANG, *supra* note 17, at 5.

<sup>27</sup> See *id.* at 7. For example, the United Nations Children’s Fund (UNICEF) “defines orphans as children who have lost either one or both parents (and therefore may still be living with and/or supported by family members),” which is a broader definition than the PRC’s definition. *Id.* (citing *Orphans*, UNICEF PRESS CENTRE (June 10, 2015), [www.unicef.org/media/media\\_45279.html](http://www.unicef.org/media/media_45279.html)). The PRC uses a narrow official state definition that includes only children under the age of eighteen who have “lost their parents through death or abandonment and do not receive support from others.” *Id.* (citing Meng & Kai, *supra* note 2, at 143–57).

PRC's definition, the first government survey on orphans took place in 2005, where the PRC said that the nationwide orphan count was 573,000, and that 86.3 percent of those orphans were in rural areas.<sup>28</sup> The United Nations Children's Fund (UNICEF) China conducted a follow-up study in 2010 that found the number of orphans had risen to 712,000, a twenty-four percent increase in a mere five years.<sup>29</sup> Moreover, the UNICEF figure does not even account for over 250,000 children estimated to have never been officially registered at birth due to fear of one-child policy penalties, which would make them ineligible for state benefits—including education.<sup>30</sup>

Traditional tendencies in China's social culture seem to be a major cause of the abandonment rates and the orphan issue.<sup>31</sup> However, one could argue that pre-1949 China had managed its orphan population with much more efficiency than post-1949 China.

The first necessary step of the analysis is to understand specifically where this quantity of abandoned children is coming from, and there appear to be many social tendencies at the root of the issue. Because these traditional social tendencies may not be relinquishable, regulatory precision by the central government may be the most effective cure to the social ills brought on the orphaned children of China.

#### A. *Direct Causes of the Alternative Care Conundrum*

As previously mentioned, China's unique history—and all that comes with it—is the contextual reason for the orphan care dilemma. However, there are independent factors that directly contribute to abandonment rates that could fall into three major, but not exhaustive, categories, including: gender preference and the one-child policy, stigma towards children with disabilities, and rural poverty in the face of massive wealth disparity. Each will be discussed in turn.

##### 1. *Gender Preference and the One-Child Policy*

One of the traditional sociocultural traits contributing to the issue is male preference among Chinese families.<sup>32</sup> There are two inseparable prongs to this

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 8. While there was not a subsequent follow-up to the 2010 study, twenty-four percent is certainly an upward trend.

<sup>30</sup> *Id.*

<sup>31</sup> See *infra*, Part IV(A): Direct Causes of the Alternative Care Conundrum.

<sup>32</sup> Quanbao Jiang et al., *Demographic Consequences of Gender Discrimination in China: Simulation Analysis of Policy Options*, 30 POPULATION RES. & POL. REV. 619, 622 (2011).

issue. First, there is the prevalent idea that it is better to have a son than a daughter because a son is necessary for carrying on the family's lineage. The utility of having a son is seen to exponentially outweigh that of a daughter.<sup>33</sup> This is particularly true in rural China, where a lackluster social security system forces the immediate family to shoulder the responsibility of elder care.<sup>34</sup> In this situation, a son would be viewed as the designated family member to take on such responsibility, as daughters are expected to marry and move away or, at most, be equipped for "auxiliary help."<sup>35</sup> Thus, the elders' need for financial support is one practical reason why parents will favor sons,<sup>36</sup> but the practicality is attributable to antiquated views of gender roles being carried into modernity. Females in rural China were viewed as a large investment of scarce resources compared to what they would be able to return to their parents.<sup>37</sup> "In rural society, the gender distinction was crucial: girls needed care and nourishment throughout early childhood, but unlike boys, they could not perform the heavy labor required in most agricultural work."<sup>38</sup> Yet it seems reasonable to assume that if a family were allowed to have more than one child, this would at least lessen an issue of abandonment.<sup>39</sup> This is where the second prong occupied by the former one-child policy enters the discussion.

Although the rural population has been reputed for generally being the most significant offender of abandonment, the one-child policy gave those rural families a "second chance"<sup>40</sup> by allowing them to have a second child if their first child was a girl.<sup>41</sup> Despite this "second chance," the one-child policy was the "most significant cause of child abandonment in the 1990s."<sup>42</sup> Couples who had a second girl may still have chosen to abandon her to try again for another son. While the policy attempted to accommodate the traditional implications of gender in Chinese society, which may have had the effect of reducing abandonment rates from what they otherwise would have been, it was still not

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 621.

<sup>35</sup> *Id.*; see also Meng & Kai, *supra* note 2. "Auxiliary help" suggests a less labor-intensive household help that is not in as high of demand in a rural setting as the ability to labor in fields.

<sup>36</sup> Julie Jimmerson, *Female Infanticide in China: An Examination of Cultural and Legal Norms*, 8 UCLA PAC. BASIN L.J. 47, 52 (1990).

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

<sup>38</sup> *Id.*

<sup>39</sup> Of course, the economic and financial difficulties of rural Chinese families would have to be weighed against the benefits of having a child to conclude on this issue.

<sup>40</sup> It is noted that there are significant gender equality issues that the legislation attempts to accommodate; however, while noting that, the discussion will persist in identifying this as a cause of abandonment, while letting other academic discussions on equality and human rights concerns address the gender equality implications.

<sup>41</sup> Meng & Kai, *supra* note 2.

<sup>42</sup> *Id.*

enough to account for all situations—specifically, rural families that had two girls.<sup>43</sup> For further evidence of gender being a prominent reason for child abandonment in China, one need only look to the ratio of abandoned girls to boys, where in 1989, a survey conducted suggested that ninety percent of the abandoned children for that year alone were female.<sup>44</sup> More recently, numbers have begun to even out quite a bit, with some studies measuring only twenty percent more girls than boys occupying child-welfare institutions.<sup>45</sup> The difference has been reduced in recent years, as “the impact of a traditional preference for boys was declining as a reason for abandoning a child,” but is, nonetheless, still a cause.<sup>46</sup>

Instances of abandonment tend to be most prevalent in rural families.<sup>47</sup> So, although it is primarily a specific portion of the population that generates the quantity of abandoned children, that portion still makes up a substantial 44.38%<sup>48</sup> of the population.<sup>49</sup> With a current population of 1.371 billion people, the rural population will make up approximately 608 million persons.<sup>50</sup> Even if it is not the sole contributor, it will ultimately be a large contributor to the orphan and abandonment numbers.

## 2. *Children with Disabilities*

By the end of 1999, most infants abandoned in China were either girls or infants with disabilities.<sup>51</sup> There are likely several reasons a child with disabilities might be abandoned, but two of the more prominent reasons will be discussed here. First, a family may not have the resources to care for a disabled child,<sup>52</sup> even if it wanted to. Families in China often are unable to get the State welfare support that would be warranted for parents to care for a child with a

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<sup>43</sup> *See id.*

<sup>44</sup> Jimmerson, *supra* note 36, at 73.

<sup>45</sup> *See* SHANG & FISHER, *supra* note 1, at 106.

<sup>46</sup> *See id.*

<sup>47</sup> *See* WANG, *supra* note 17, at 7.

<sup>48</sup> Despite being roughly eighty-two percent in 1976, this is still a substantial portion of the population. *Rural Population (% of Total Population)*, WORLD BANK, [http://data.worldbank.org/indicator/SP.RUR.TOTL.ZS?locations=CN&year\\_high\\_desc=false](http://data.worldbank.org/indicator/SP.RUR.TOTL.ZS?locations=CN&year_high_desc=false) (last visited Mar. 6, 2018).

<sup>49</sup> *Id.*

<sup>50</sup> *Population, Total*, WORLD BANK, <http://data.worldbank.org/indicator/SP.POP.TOTL?locations=CN> (last visited Mar. 6, 2018).

<sup>51</sup> Meng & Kai, *supra* note 2, at 3.

<sup>52</sup> Moreover, in some instances, a family may not have the resources to care for another child regardless of whether the child is disabled.

disability.<sup>53</sup> When a child is born with a disability, a family too poor to provide medical care or treatment for the child's disability will abandon him or her in a hospital or a foster care home with the hope that someone will find and care for him or her.<sup>54</sup>

The second prominent reason for abandonment of disabled children in China is a notion that underlies many of its causes—specifically, the traditional cultural stigmas against the disabled that have also been brought into modernity. Families who have a child with a disability or special needs often receive “ridicule, shame, and economic hardship” because of it.<sup>55</sup> Not only does this create another reason for these families to abandon their disabled children, but the reality of the shame and ridicule associated with a family that has a disabled or special needs child will also reduce a disabled child's chances of getting adopted, for adopting parents would also want to avoid the stigma.<sup>56</sup> This, paired with the costs required to care for a disabled child, puts the child in the predicament of being abandoned and then stuck in the care system indefinitely without hope for adoption.<sup>57</sup>

Regardless of the reason behind the abandonment, the 1989 survey projected around 10,000 children were abandoned each year in the Guangdong Province alone, and that 22.6% of those children were deformed or handicapped.<sup>58</sup> Another more recent study from 2005 rated the incidence of disability even higher among orphaned children at 80.5%.<sup>59</sup> However, this extraordinary difference in percentages *may* be attributable to the 2005 survey's method.<sup>60</sup> For example, the 2005 figure was not restricted to a single province, and the definition of what it meant to have a disability had been broadened by 2005 to include more “minor” conditions.<sup>61</sup>

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<sup>53</sup> Anna Jane High, *China's Orphan Welfare System: Laws, Policies, and Filled Gaps*, U. PA. EAST ASIA L.R. 126, 143 (2013).

<sup>54</sup> Meng & Kai, *supra* note 2, at 3.

<sup>55</sup> See High, *supra* note 53, at 143.

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> Jimmerson, *supra* note 36, at 73.

<sup>59</sup> High, *supra* note 53, at 137 (citing Xiaoyuan Shang, Xiaoming Wu & Haiyan Li, *Shehui Zhengce, Shehui Xinxie yu Zhongguo de Ertong Yiqi Wenti* (社会政策, 社会性别与中国的儿童遗弃问题) [Social Policy, Social Gender and the Problem of Infant Abandonment in China], 4 YOUTH STUD. 1, 1 (2005)).

<sup>60</sup> *But cf.* WANG, *supra* note 17, at 6 (citing Barbara Demick, *China Blames Pollution for Surge in Birth Defects*, L.A. TIMES (Feb. 2, 2009), <http://articles.latimes.com/2009/feb/02/world/fg-china-birth-defects2>) (“Between 2001 and 2006 birth defects jumped by nearly 40 percent, an increase that many have attributed to environmental pollutants, particularly in coal-producing regions.”).

<sup>61</sup> High, *supra* note 53, at 137–38. Minor conditions might include cleft lips or birth marks. *Id.*

Another reason might be that healthier children are found and quickly adopted;<sup>62</sup> thus, the children remaining in orphanages are largely those with disabilities.<sup>63</sup> The errors that could be present in any given figure consist primarily of not knowing how many abandoned children go unaccounted for.<sup>64</sup> Abandonment is just one method families use to avoid being legally associated with the child.<sup>65</sup> There undoubtedly are others, though, such as infanticide and sex-selective abortion. Furthermore, the only numbers that can really be known are based on foster children in government-run or authorized-care institutions or homes.<sup>66</sup> It is impossible to know exactly how many children have been abandoned, because if those children were not picked up by an entity that would be able to include them in the census,<sup>67</sup> then they would not be counted.<sup>68</sup> Nonetheless, studies have concluded that disabilities are a main reason for abandonment.<sup>69</sup>

### 3. *Rural Poverty*

Rural poverty is a factor many would believe to be a large contributor to the quantity of abandoned children.<sup>70</sup> However, it must be noted that some studies have found no connection between abandonment and impoverishment.<sup>71</sup> There are also scholars who would say that, at least in traditional China, poverty was a factor in infanticide, which for our purposes has foundational causes akin to abandonment.<sup>72</sup> It would seem logical that poverty might play some role in rural

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<sup>62</sup> It is acknowledged that there is a tense controversy over the abundant number of Western families that have adopted Chinese baby girls, and this is a subject that will not be touched upon here beyond acknowledging that adoption rates of Chinese girls from Western families has indeed been quite high in recent years, and that this has had an effect on the number of orphans in China. See WANG, *supra* note 17, at 13–15.

<sup>63</sup> High, *supra* note 53, at 138 n.47.

<sup>64</sup> See David M. Smolin, *The Missing Girls of China: Population, Policy, Culture, Gender, Abortion, Abandonment, and Adoption in East-Asian Perspective*, 41 CUMB. L.R. 1, 7–8 (2010).

<sup>65</sup> See *id.* at 8.

<sup>66</sup> Many orphans go unaccounted for, and uninformed abandonment rates prevent realistic numbers from being available.

<sup>67</sup> Children who do not go into the government's care but still survive—or are picked up by a family—presumably also go unaccounted for. However, if this situation occurs, then perhaps these children are classified as being unofficially adopted rather than “orphaned” or “abandoned.” See *id.*

<sup>68</sup> See *id.*

<sup>69</sup> SHANG & FISHER, *supra* note 1, at 106. One study reached the conclusion by viewing data collected that indicated a large gender disparity between boys and girls without disabilities (specifically, a ratio of boys to girls of 4:5), while disabled children had a more even gender ratio. See *id.*

<sup>70</sup> See, e.g., SHANG & FISHER, *supra* note 1, at 112.

<sup>71</sup> Kay Johnson, Huang Banghan & Wang Liyao, *Infant Abandonment and Adoption in China*, 24 POPULATION & DEV. R. 469, 474 (1998).

<sup>72</sup> See Smolin, *supra* note 64, at 7–8; see also SHANG & FISHER, *supra* note 1, at 9 (analyzing abandonment and infanticide together).

abandonment rates because low agricultural production has been found to be “directly influenced by the number of children families had.”<sup>73</sup> One might argue that the more labor-able children that a family has, the more it will generate production; thus, infanticide—or in our case, abandonment—of female children would boost production rates if the family could have another boy, as mentioned above. Further, one can see that if those are female children, whom traditional society sees as unfit to contribute to the laborious work of rural China, then she is both seen as not producing *and* solely consuming what the family produces. However, there are many dissenters who would argue that in the countryside, women are just as labor-able as men.<sup>74</sup> Thus, while some would argue that there is no connection, others would deem the strong correlation between orphans and rural society as an indication that rural poverty is a contributor.<sup>75</sup>

### *B. China’s Regulatory Scheme Seeks Quality of Care*

These causes of abandonment have contributed to a rising quantity of orphaned children, which has been addressed by the Chinese government in recent decades.<sup>76</sup> Since 2004, the Chinese government has promulgated regulations to crack down on the unsafe environments that many foster children inhabit.<sup>77</sup> In promulgating these regulations, the Ministry of Civil Affairs sought to bolster the requirements for foster care homes, which has perhaps expanded the scope of foster care to span beyond what Mao’s Communist state may have done.<sup>78</sup> The goal of these new regulations was to promote the rights<sup>79</sup> of abandoned children and help them reintegrate into society.<sup>80</sup> Although there was potentially more care available to orphans because the State expanded foster care to the private sphere and included individual families in their efforts to combat

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<sup>73</sup> Jimmerson, *supra* note 36, at 52.

<sup>74</sup> See, e.g., *Why Girls are Abandoned in China*, RESEARCH-CHINA (Oct. 5, 2005), <http://research-china.blogspot.com/2005/10/why-girls-are-abandoned-in-china.html>.

<sup>75</sup> See WANG, *supra* note 17, at 8.

<sup>76</sup> See Jiating Jiyang Guanli Banfa (家庭寄养管理办法) [Measures for the Administration of Family Foster Care] (promulgated by the Ministry of Civ. Aff., Sep. 9, 2014, effective Jan. 12, 2015), MINISTRY OF CIVIL AFFAIRS, Sept. 26, 2014, <http://www.mca.gov.cn/article/zwgk/fvfg/shflhshsw/201409/20140900706005.shtml> (China).

<sup>77</sup> See *id.*

<sup>78</sup> But it is also a necessary component of affording care in a market economy where the state may no longer be able to fund universal institutional care.

<sup>79</sup> It ought to be noted that the previous Chinese conception of duty has gone by the wayside since China’s Opening-Up period, and in recent years we have seen a growing conception of human rights in China rather than solely duties owed to the State, but not without contention. See, e.g., *China: Events of 2016*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2017/country-chapters/china-and-tibet> (2016).

<sup>80</sup> Zeldin, *supra* note 12; *Ministry Sets Stricter Rules on Foster Care*, *supra* note 12.

abandonment rates, for a time there was a lack of regulation to control the independent caretakers and set a minimum care requirement.

These 2004 interim regulations have since been modified and put into force as ordinary regulations by the Ministry of Civil Affairs.<sup>81</sup> This section discusses three of the most striking or impactful provisions: a financial status requirement, a family-child limitation, and an age requirement paired with an education requirement.<sup>82</sup> These may seem like worthy—and even necessary—provisions to put in place. However, because there is already a surplus of orphans who do not receive care, the State should acknowledge that tighter provisions, while good for the orphans receiving care, will inevitably leave more orphans without care. Article VIII of the Measures for the Administration of Family Foster Care regulation sets out several requirements that foster families should meet to be licensed by the State.<sup>83</sup> Some of these provisions will be different than the interim regulations, but they are largely similar.<sup>84</sup>

*1. Article VIII(a) & (b): The Family Must Maintain at Least Average Living Standards and Income*

Article VIII(a) of the regulation states that a foster family should maintain living standards that are not less than the local average, per capita.<sup>85</sup> Additionally, the family's income must be at least average for that region. This provision eliminates foster families; not only does it eliminate families who would otherwise be eligible to take care of foster children, but it also discriminates on the basis of economic status against families who want to take care of foster children. There may be instances where economic status does negatively affect a developing child; however, when it comes down to a choice between a child not having any caretaker or a child receiving care from a poor family, the optimal choice is likely the latter.

*2. Article VIII(e): Caregiver Age and Education Requirement*

The regulation also prescribes an age range (both minimum and maximum age) for a caregiver as well as an education requirement.<sup>86</sup> It requires the “main caregiver[’s]” age to be between thirty and sixty-five years old.<sup>87</sup> This may do a

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<sup>81</sup> Jiating Jiyang Guanli Banfa (家庭寄养管理办法), *supra* note 76.

<sup>82</sup> *See id.*

<sup>83</sup> *See id.*

<sup>84</sup> Zeldin, *supra* note 12.

<sup>85</sup> *See* Jiating Jiyang Guanli Banfa (家庭寄养管理办法), *supra* note 76.

<sup>86</sup> *See id.*

<sup>87</sup> *Id.*

lot to reduce the number of available caregivers, especially on the latter end of the spectrum. This would suggest that the effect of this part of the regulation is negligible; however, with a substantial portion of the Chinese populace aging, the number of Chinese within that age range will begin to deplete relative to the number of caregivers currently within that range.

The education requirement seems to be less of an issue. It merely requires that the caretakers have at least finished nine years of formal education.<sup>88</sup> In China, as this education is already provided by the government, this should hardly be an issue unless potential foster families have avoided education entirely. However, it is worth noting that all of the conditions in the statute are necessary, and a foster family must meet all of them. This raises the question of what the purpose of the education requirement is. Whether education serves to instill responsibility in the caretaker and ensure the wellbeing of the child, or, instead, if the purpose is to ensure the caretaker has been influenced by party doctrine to some degree and increase the chance that the foster child will be influenced in turn. This seems a valid question, as other safeguards such as income requirements, relational harmony requirements, and behavioral requirements would perhaps suffice absent nine years of introductory education. The written rationale for each requirement seems to be absent; however, perhaps both party influence and theoretically instilled common sense in caregivers would be contributing reasons.

### 3. *Article VIII(f): Maximum Number of Children*

The regulation also mandates that a foster family cannot have more than two foster children if the family has any children under the age of six.<sup>89</sup> This replaces the previous limit of three foster children for any foster family.<sup>90</sup> This provision constitutes one of the major differences between the interim regulations and the newly enacted regulations, as it was previously absent.<sup>91</sup>

Reducing the maximum limit of children that a foster family can take care of will presumably lessen the total number of foster children being taken care of by foster families. The goal of such a provision would be to forcefully reduce the number of children a family can take care of to increase the wellbeing of the

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Joanna Chiu, *China Changes Foster Parenting Rules to Improve Quality of Care*, JOANNACHIU.COM (Dec. 1, 2014), <https://joannachiu.com/2014/12/01/china-changes-foster-parenting-rules-to-improve-quality-of-care/>.

<sup>91</sup> Zeldin, *supra* note 12.

children who can be cared for. Again, we see the State prioritizing quality over quantity of care, and perhaps this is in response to inadequate foster care circumstances—and rightfully so. It is difficult to assess exactly what this means numerically, as such a nuanced matter tends to be absent from publicized statistics. However, one can infer that if having a three-child limit was not an issue with respect to quality of care, the MCA would not have changed the interim regulations by adding this provision. One can also infer that this provision will have a positive effect on the quality of care at the expense of the quantity of care.

### *C. Initial Common Criticisms of the Provisions*

There are some criticisms that can be made against the regulations. One argument targets the average income and living space provisions.<sup>92</sup> The argument is that because average income and living space means average for a *particular region*, this standard can have very disparate results from region to region.<sup>93</sup> This is to say, for instance, that the average income in Zhejiang Province will be greater than that in Yunnan Province, and so the standard of living for orphans in Zhejiang Province will generally be better than those in Yunnan Province. Not only does this provision discriminate against families wanting to foster children, but it also creates a disparity in care among children, depending on which province they are in.

As mentioned above, others argue that these regulations disqualify families who would otherwise be able caretakers. This is different than saying that the discrimination itself is a fundamental problem; rather, these critics argue that there are available families with incomes that would qualify in poorer provinces who could foster children and that average income for a particular region is therefore not a useful qualifier.<sup>94</sup>

Despite the criticisms, at a minimum, the regulation facially aims to improve the care provided. Although short in length, the regulation includes substantial provisions affecting foster care in China, and while three of such substantial provisions are listed above, they are by no means the limits of the regulation in trending towards a more positive quality of care for foster children. For instance, another provision provides that foster families who discriminate or abuse foster children will face criminal penalties, and still more, threatens sanctions on

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<sup>92</sup> Chiu, *supra* note 90.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

families that do not cooperate with protective provisions.<sup>95</sup> It is evident that with this regulation, the MCA is acknowledging that a large proportion of foster children have disabilities<sup>96</sup> and is addressing issues that frequent them. Thus, not every provision of the regulation will necessarily be expected to affect the quantity of children being cared for; some provisions will solely improve the quality of care given and keep children safer. Laying out these provisions should also dispel any myth that China has no laws on the issue.

## V. CHARACTERIZING FOSTER CARE

The relative lack of recent scholarship may seem to suggest the foster care issue has subsided to some degree. However, deeper analysis will reveal that the MCA is still grappling with ways to solve the issue. The 2004 interim regulations are the first meaningful laws we have seen ensuring the quality of the care providers. As of 2014, there were only about 30,000 children officially living with foster families in China.<sup>97</sup> While the 2010 UNICEF estimate claims that there were approximately 712,000 orphans at that time,<sup>98</sup> the implication would be that foster families themselves are not operating as a viable solution to the problem of orphan care.

Although it seems that the portion of children being taken care of by foster families is very small compared to the total approximation of abandoned children in China, the Chinese government does pay ¥1,100 per child that these families take in.<sup>99</sup> This is not a meager stipend for many Chinese families and could thus serve as an incentive.<sup>100</sup> However, it would make sense that families in need of such a stipend the most would be those who are least likely to meet

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<sup>95</sup> Jiating Jiyang Guanli Banfa (家庭寄养管理办法), *supra* note 76.

<sup>96</sup> High, *supra* note 53, at 137.

<sup>97</sup> Chiu, *supra* note 90. It may be appropriate to acknowledge that approximately 46,000 Chinese-born children were adopted by parents in the United States between 2004 and 2014. See *Adoption Statistics*, U.S. STATE DEP'T, [https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt\\_ref/adoption-statistics.html](https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-statistics.html) (last visited Mar. 6, 2018). Some sources even put the number as being "slightly over 100,000 children abroad for intercountry adoption since the intercountry adoption program was started in the warily 1990s." See Smolin, *supra* note 64. This Comment will not discuss the cultural and social implications of this but cannot ignore it completely. It has thus been acknowledged and is defined as outside of the scope.

<sup>98</sup> Chiu, *supra* note 90. This is a rise from 573,000 in 2005. *China Has 573,000 Orphans*, XINHUA ONLINE, [http://www.chinadaily.com.cn/english/doc/2006-01/05/content\\_509595.htm](http://www.chinadaily.com.cn/english/doc/2006-01/05/content_509595.htm) (last visited Feb. 13, 2018).

<sup>99</sup> Chiu, *supra* note 90.

<sup>100</sup> In the last three years, the RMB has been as low as approximately ¥6.04 per dollar, and as high as approximately ¥6.78 per dollar (as of October 28, 2016). *USD to CNY Chart*, XE CURRENCY CHARTS, <http://www.xe.com/currencycharts/?from=USD&to=CNY&view=5Y> (last visited Mar. 6, 2018). Using the lowest exchange rate, ¥1,100 would be approximately \$182.11. This may seem to be a small stipend, but it would nonetheless be some incentive, especially for poorer families.

all the requirements—particularly the average income requirement. Granted, some of the poorest provinces may have families above average income for their province, for whom this would still constitute a viable incentive. Yet in the richer provinces, there may be families who are below average income for whom this would not constitute an adequate incentive to take on the duty and responsibility of caring for an abandoned child—at least in the absence of some other desire to do so.

While government regulations afford incentives to foster families, they also provide deterrent features to take preemptive steps to decrease or eliminate instances of abandonment. Abandonment is penalized under the law, but a lack of adequate enforcement mechanisms render such threats of penalization largely ineffective.<sup>101</sup> Even if these provisions were enforced, it would seem exceedingly difficult and expensive to locate the parents of the abandoned child, and even if that could be done, the child would still need care.

## VI. ONE GLARING CRITIQUE: LACK OF ENFORCEMENT

The regulations implemented in 2004 were interim regulations quite similar to the regulations promulgated in 2014. In fact, there are only a few select differences.<sup>102</sup> Some would argue that enforcement is the major issue today, which is why quality of care is not up to par.<sup>103</sup> But with greater public attention being paid to the lack of enforcement, it seems that authorities have at least provided some response. In 2013, a fire in an informal foster home that was not in compliance with state regulations killed seven of the thirty-four children residing there.<sup>104</sup> The following year, the interim regulations were modified and the additions were promulgated into law.<sup>105</sup> Regardless of whether these new actions were a direct response to the publicized incident,<sup>106</sup> evidently the MCA is paying greater attention to the issue at hand. Promulgating regulations and enforcing them seem to both be necessary for a solution if foster care is the route that the PRC decides to take. If the MCA has a reputation for non-enforcement, then it seems that these regulations will do little to reduce abandonment rates. At the very least, having these regulations in place shows there is a procedure

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<sup>101</sup> High, *supra* note 53, at 134.

<sup>102</sup> Zeldin, *supra* note 12.

<sup>103</sup> High, *supra* note 53, at 134.

<sup>104</sup> Chiu, *supra* note 90; *see also China's Faltering Steps on Family Foster Care*, CHINA DAILY (Dec. 1, 2014), [http://m.chinadaily.com.cn/en/2014-12/01/content\\_19001572.htm](http://m.chinadaily.com.cn/en/2014-12/01/content_19001572.htm).

<sup>105</sup> Jiating Jiyang Guanli Banfa (家庭寄养管理办法), *supra* note 76. The regulations were promulgated in 2014. *Id.*

<sup>106</sup> *See, e.g.*, Chiu, *supra* note 90.

and even a formal ministerial response to what they could have simply ignored.<sup>107</sup>

## VII. FOSTER CARE LAW AND NORMS IN CHINESE HISTORY

The complexities of the issue will become apparent in the following discussion. The discussion will ensue in reverse chronological order in an attempt to backtrack from the most familiar version of China (the quasi-Communist, post-Mao PRC) to what is perhaps the least familiar. Thus, the discussion will begin with the post-1949 period, going back to the Maoist period between 1949 and 1976, and then to the post-revolution period and end of the Qing Dynasty, also known as the semi-colonial period, and finally to traditional China. Understanding the changes undergone during these periods is a necessary component of understanding why modern China's foster care regulations look as they do, why the PRC has a dilemma with respect to orphan care, and why the solution is not as simple as copying Western approaches.

### A. *Transition from the Communist Welfare State to a Privatized Economy*

China's post-Mao economic reforms began shortly after the death of Mao Zedong.<sup>108</sup> Although the factors that directly caused China's economic success remain contested, some scholars argue that China's economic growth modeled the development of previously successful "backwards" economies in East Asia such as Japan, South Korea, and Taiwan.<sup>109</sup> These scholars claim that China's economic growth was specifically driven by the transfer and growth of labor and the accumulation of capital—or a high savings rate.<sup>110</sup> Other scholars contend that capital and labor accumulation were only causes inasmuch as they promoted economic growth through technological progress.<sup>111</sup> Another approach says that capital and labor affected efficiency, and efficiency change—along with technological progress—was the source of the most significant period of

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<sup>107</sup> Some would say that there is no problem at all and that the quality of China's foster care system is actually higher than that of the United States. Yujia Feng, *Foster Care: A Solution to Child Abuse and Neglect in China?*, YALE GLOBALIST (Dec. 19, 2013), <http://tyglobalist.org/in-the-magazine/roots/foster-care-a-solution-to-child-abuse-and-neglect-in-china>. Further, Feng would argue that the real problem is, in China, abused or neglected children are not taken from their parents and put into temporary foster care until a proper custodian can be found. *Id.*

<sup>108</sup> Elizabeth Economy, *Don't Break the Engagement*, 83 FOREIGN AFF. 96, 101 (2004).

<sup>109</sup> See Ligang Song & Yu Sheng, *The Impact of Reform on Economic Growth in China: A Principal Component Analysis 1* (United Nations Univ., Working Paper No. 2008/12, 2008), <http://www.ciaonet.org.proxy.library.emory.edu/record/1933?search=1>.

<sup>110</sup> *Id.*

<sup>111</sup> *See id.* at 1–2.

production in 1993–2002.<sup>112</sup> All of these scholars agree that capital accumulation and labor surplus promoted China’s economic growth, regardless of whether they differ on specifically how capital and labor did so.

One way to realize higher savings is to cut spending. Cutting more programs results in fewer costs borne by the State if spending for other programs is not raised. Cutting or reducing foster care programs funded by the State may have a negative impact unless the State could somehow develop a market or culture that benefited from or valued eradication of child abandonment practices and causes.

Prior to the post-Mao reforms, the Communist state dealt with orphans in a wildly different manner. After the civil war ended, the *Guo Min Dang* (GMD), the former ruling Nationalist party in the Republic of China, retreated to Taiwan, and the Communist party aimed to eradicate the underclass that had resulted from GMD policies because that underclass was a major source of hardship and a threat to the Communist party’s authority.<sup>113</sup> The civil affairs branches of the Internal Ministry catalyzed the campaign by arresting urban social deviants, members of the “old society,” for the purpose of rehabilitating these “conflicts” to conform with the Maoist ideal and to be productive members of society.<sup>114</sup> All major cities established *jiaoyangyuan*—rehabilitation institutes to rehabilitate society’s deviants—but these deviants were joined by the disabled, the elderly, and children; thus, the institutes were instead called *shengchan jiaoyang jigou*—production-and-rehabilitation organs.<sup>115</sup> The early period of Mao’s Communist state is marked by a lack of law.<sup>116</sup> These objectives and the means used to attain them were not codified or voted on, but rather authoritative decisions made by the central government at will.<sup>117</sup> Nonetheless, it seems the State had the utmost interest in accounting for all orphans, even if it did group them with people from other categories of the reform process—namely, “delinquents.” This policy seems to have been merely due to convenience, considering that the State had recently overtaken many private religious and charitable institutions previously sheltering orphans.<sup>118</sup> New centers were indeed established for deviants after 1949, and the older charitable facilities were also

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<sup>112</sup> *Id.* at 2.

<sup>113</sup> *See* MUNRO, *supra* note 13.

<sup>114</sup> *See id.* The arrests were made, in part, for the purpose of law enforcement, but they also were meant for the further goal of rehabilitation; thus, welfare and punitive functions were combined. *Id.*

<sup>115</sup> *Id.* at 24.

<sup>116</sup> RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 6 (2002) (“Given the heavy reliance on Party policies rather than law during the Mao period, China lacked even the most basic laws . . .”).

<sup>117</sup> *See id.*

<sup>118</sup> *See* MUNRO, *supra* note 13, at 24.

used for the same purpose.<sup>119</sup> The destruction of the old charities was part of the Communist state's need for ideological self-legitimation backed by its hostility to Christian missions, along with Western intervention in Chinese society.<sup>120</sup> Ultimately, the production-and-rehabilitation institutes, also known as Social Welfare Institutes, were the new medium for orphan care.<sup>121</sup>

Before Mao's communist victory over the GMD, the GMD and, previously, the Ming and Qing dynasties relied on municipal authorities and charitable groups to manage orphaned infants and children, which they did by establishing foundling homes (*yuyingtang*) and child-rearing centers (*yuyousuo*).<sup>122</sup> The nongovernmental sector of the late nineteenth and early twentieth centuries was an essential part of providing shelter and services to orphans in China.<sup>123</sup> Private individuals, churches, and charities ran private orphanages until the establishment of the PRC in 1949 (previously the Republic of China while controlled by the GMD).<sup>124</sup> The new Communist regime took pride in putting an end to "alleged Christian atrocities against Chinese children" by ending the old system, but some would criticize that the new government was actually indifferent to orphan welfare<sup>125</sup> and that combining orphans and others into the same institutes was actually so grave an imperfection that recent issues pale by comparison. Regardless of the imperfections of the system, though, it seems the State's incentive for orphan care was maximized, even if the method of doing so<sup>126</sup> was imperfect.<sup>127</sup> The incentive came in the form of establishing political legitimacy.<sup>128</sup> One proclaimed imperfection of the communist orphan care system began when it closed down or took over the private orphanages and took full responsibility for financing and operating them.<sup>129</sup> The new approach prioritized the collective interest over that of the individual and resolved that

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<sup>119</sup> *Id.*

<sup>120</sup> *See id.*

<sup>121</sup> *See id.* at 25.

<sup>122</sup> *See id.*

<sup>123</sup> WANG, *supra* note 17, at 15.

<sup>124</sup> *Id.*

<sup>125</sup> *See* MUNRO, *supra* note 13, at 26.

<sup>126</sup> The method used was to mix orphans in with "deviants" from other categories who required rehabilitation, specifically by confining children together with adults and even criminals. *Id.*

<sup>127</sup> Four years after the civil war, Beijing authorities proclaimed this universal confinement of orphans, the elderly, and the ill with anti-social deviants was indeed intentional. *Id.* The Third National Conference on Urban Relief in 1953 said relief and welfare for orphans and others along with "labor reform" which in Mandarin, *laodong gaizao*, bears a punitive connotation, insinuating that vagrants were included. *Id.*

<sup>128</sup> WANG, *supra* note 17, at 15.

<sup>129</sup> *Id.*

orphans would be best cared for in institutional settings.<sup>130</sup> This imperfection was reduced in the early 1950s when the State halted surplus countryside labor from migrating to the cities, largely eliminating urban unemployment.<sup>131</sup> In turn, the production-and-rehabilitation institutes gradually became focused less on punishment and more on expanding services to orphans, the elderly, and the disabled.<sup>132</sup> However, some argue that this institutional system, which had been taken over and reorganized by the communists, resulted in a massive downsizing and reduction of care being afforded to children overall by 1985.<sup>133</sup> Although it appears as if the Communist party has failed on orphan care, history indicates that in 1978, not long after Mao's death, when the *gaige kaifang* ("reform and opening-up") period began, the quantity cared for only continued to decrease.<sup>134</sup> The reform and opening-up period marked what Western scholars would consider the beginning of a transition to marketization and joining of the global economy.<sup>135</sup> Mao had roughly twenty-seven years to create his modified socialist society and bring it up to working standards, and one might say he failed to improve the State in accordance with his ideals.

After Mao's death, the high pressure for change had economic, political, and ideological foundations: agricultural stagnancy and the financial strain within state-owned enterprises generated economic tension, the aftermath of the Cultural Revolution and the weakening of the government bureaucracy that followed created political tension, and private ideological doubts about the efficacy of communism based on "backwards" economic development and the in-fighting within the Communist party.<sup>136</sup> Based on these factors and the globalization of the world economy, the Communist party decided to institute economic reforms to "rejuvenate the country's economy and to restore the masses' confidence in the Communist party as well as the government."<sup>137</sup>

The economic and cultural transition after Mao's death marks the beginning of modern China and its joining of the West. Although communist in name,

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<sup>130</sup> *Id.* at 16. However, this was not the case throughout the entire State, as state-run orphanages were only located in urban centers. *Id.* Families and agricultural collectives were responsible for orphan cases in rural areas. *Id.* ("Today, the government continues to maintain separate rural and urban child welfare provisions. Orphaned and abandoned children in cities are cared for in state-run institutions . . . whereas those in the countryside are expected to receive care from informal kin networks.")

<sup>131</sup> MUNRO, *supra* note 13, at 27.

<sup>132</sup> *Id.*

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

<sup>134</sup> *See id.*

<sup>135</sup> *TIMELINE: China Milestones Since 1978*, REUTERS (Dec. 8, 2008), <https://www.reuters.com/article/us-china-reforms-chronology-sb/timeline-china-milestones-since-1978-idUKTRE4B711V20081208>.

<sup>136</sup> *See* MUNRO, *supra* note 13, at 27.

<sup>137</sup> *Id.* at 140.

China's joining of the Western international order—especially the WTO—was not received with a free, uncontrolled welcome but, rather, was stamped with conditions and requirements that far exceeded those imposed on the average joiner.<sup>138</sup> Thus, the context and circumstances of this “transition” suggest that China is on its way to conformity and assimilation with Western institutions,<sup>139</sup> and that with such conformity, once the transformation is complete, the Chinese people will realize the democratic civil and political rights that the Western model claims to best uphold. Yet, despite relative conformity with Western legal institutions, China still has not achieved success in orphan care. One may speculate that this is because of China's incomplete transition into a duplicate of the Western model or perhaps the opposite: that the Western model is not conducive for China's. Indeed, the post-1978 “reform” era continues to the present day, longer than the entire pre-reform history,<sup>140</sup> and it seems the PRC has still not made substantial progress in this area.

### *B. Alternative Care in the “Old Society”*

Many fail to realize that the reform of legal institutions in China does not erase its legal history nor its cultural, social, and political underpinnings. This is to say that China's coerced conformance with Western standards will not eliminate its thousands of years of development. While it is true that modern-day China and its people have changed dramatically and that changing legal institutions, government control, and Western influence have undoubtedly taken their toll on China's natural development, China's foundations have not been entirely changed because of that. It is indeed possible to change the mindset of the masses through implementation of, or change to, legal institutions, but changing that mindset does not erase the past.

One might make the argument that prior to the communist defeat of Jiang Jieshi<sup>141</sup> and the GMD, the Nationalist Party had been managing the orphan population more adequately than any time after, and, before that, society in the Qing Dynasty had managed it equally well.<sup>142</sup> While there were issues previously mentioned with the “old society's” care of orphans, one absent criticism was accounting for orphans. Another argument that might be made

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<sup>138</sup> RUSKOLA, *supra* note 20, at 206.

<sup>139</sup> *Id.* at 206–07.

<sup>140</sup> *Id.*

<sup>141</sup> Commonly spelled Chiang Kai-shek, Jiang Jieshi was the leader of the Nationalist government (the *Guo Min Dang*) during and before the Chinese civil war. *Chiang Kai-Shek: Chinese Statesmen*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/biography/Chiang-Kai-shek> (last updated Mar. 29, 2018).

<sup>142</sup> *See* MUNRO, *supra* note 13, at 25–26.

from the Western perspective is that Western influence was so pervasive at the end of the Qing Dynasty—and through the entire ROC period—that any successes that the Qing Dynasty or Nationalist government did have regarding orphan care, social welfare, and charity law were at least due to Western influence in these areas. This assumes two things: first, that Western culture and legal theory had valued orphans and others falling under the category of society's disadvantaged; and second, that Chinese society lost its autonomy and was well on the path towards a full-blown westernized state during these periods, only to be interrupted by Mao's unexpected victory. Neither is very likely.

With modern discussion conclusively asserting how “westernized” and assimilated China has become, this discussion ignores that China has had 5,000 years of history and civilization that cannot be forgotten in a mere several decades.<sup>143</sup> All of the late imperial dynasties, which governed “China” as it approached the end of its feudal period, accepted the teachings of Confucianism.<sup>144</sup> One may go further to say that, “Confucian ideas have had the greatest and longest-lasting influence on Chinese culture and society from the time of Confucius himself up until the present day.”<sup>145</sup> Despite the common “Far Eastern” stereotypes generated by Western culture, Confucian moral philosophy is not the mystical concept that it is portrayed to be and has been lauded as more rational than even Western philosophy.<sup>146</sup> Furthermore, some have pointed out that Confucian moral teaching is, at times, similar to Western philosophy and theology, having similarities that align with Kantian thought and some that align with traditional Christianity.<sup>147</sup> Confucianism is neither an alien concept, nor is it Western-made. Confucianism's fundamental virtue, 仁 (*ren*), is translated as “benevolence,” but also can be translated as charity, humanity, love, and kindness.<sup>148</sup> The Analects seem to demand that the dynastic ruler adhere to virtue and exercise a benevolent rule; indeed, Confucius says that a legalistic approach to governance—namely, by written law with prescriptions of physical punishment—will teach the people nothing, but a virtuous rule will teach the people to govern themselves.<sup>149</sup> Ideas of benevolence are thus not foreign to Chinese culture and the previous dynastic rule. This Confucian philosophy led

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<sup>143</sup> Elizabeth Z. Lang, *Some Reflections on “Charity Law” in the People's Republic of China*, 15 BOND L. REV. 358, 359 (2003).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 360.

<sup>147</sup> *See id.* at 359.

<sup>148</sup> *Id.* at 360.

<sup>149</sup> *See* CONFUCIUS, THE ANALECTS (LUN YU), II:3.

the dynastic subjects to grow accustomed to dependence on their ruler to solve societal and social problems.<sup>150</sup>

As suggested previously, this culture did not disappear with the rise of China's Communist Party (CCP) and its breakdown of the ROC system, or "old system." Even the CCP's new official Marxist-Leninist ideology<sup>151</sup>—with Mao's own twist—did not annihilate China's unique cultural and social tendencies.<sup>152</sup> In other words, "although modern China is regarded as radically different in its nature from pre-1949 China, being 'Communist', the 53 year Communist history has not vanquished much of the prior traditional philosophy, including Confucianism."<sup>153</sup> The CCP undoubtedly tried to break down those traditional ideas while also relinquishing Western democratic ideas in pursuit of a class struggle and Communist state, especially during the Cultural Revolution, but indispensable ideas within Chinese culture of charity or benevolence lasted despite years of communist attempts to silence traditional ideas.<sup>154</sup> This is all to say that charity itself is not a Western concept, and that the PRC is fully capable of realizing and generating its own vision of what foster care ought to look like—a vision that may include charity and benevolence without the West saying it should be so.

#### VIII. ARE WESTERN MODELS PERHAPS UNSUITABLE FOR CHINA'S CONUNDRUM?

As was previously shown, there are generally considered to be two separate types of alternative care to support orphans in China.<sup>155</sup> The first is informal support from the community (foster care), and the second is institutionalized support from the government (institutional care).<sup>156</sup> Prior to the 1990s, institutionalized care based on collective values and lifestyle was the primary method for alternative care.<sup>157</sup> Institutionalized care was regarded as the better option because it "was easier for children to be accepted by the community organized according to the same ideological principles under which they grew up."<sup>158</sup> In other words, institutional care is ideologically more in line with the

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<sup>150</sup> Lang, *supra* note 143, at 361.

<sup>151</sup> *See id.*

<sup>152</sup> *Id.* at 362.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> SHANG & FISHER, *supra* note 1, at 230.

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

<sup>157</sup> *Id.* at 113.

<sup>158</sup> *Id.*

Communist state. Today, alternative care in the PRC takes a mixed form, which took shape after the PRC de-institutionalized orphan care in the 1990s as a response to high abandonment rates.<sup>159</sup> In other words, part of the PRC's orphan care system involves an informal kinship system for orphans who have some form of extended family or a foster care system (as defined by the regulations above) for those who do not, and the other part consists of a state-monopolized system designed to care for or support orphans who do not have families or cannot locate their families.

There are several conventional paths that the PRC can take. First, it could revert to and try to perfect the Mao-era alternative care system.<sup>160</sup> Under this line of thinking, perhaps institutional, centralized care<sup>161</sup> would be more conducive to the utilitarian idea of the greatest care for the greatest number, but only if China could curb the financial implications of institutional care. However, states in the United Nations have generated Guidelines for the Alternative Care of Children<sup>162</sup> that are meant to complement the Convention on the Rights of the Child (CRC), which the PRC ratified in 1992.<sup>163</sup> The Guidelines stipulate that a state should have a system in place that puts children into foster care (as opposed to institutional care).<sup>164</sup> This leaves the PRC to pursue a second path; namely, the PRC could continue towards the realization of mirroring the Western model. To that end, it could eliminate institutional care altogether and try to continue towards achieving that which “developed” Western nations already have. Third, China could continue trying to strike a balance between institutional care and foster care, teetering between the typical care system of a Western developing and developed nation, respectively. But that is precisely the condition that has created the current dilemma.

The former options are fairly limiting and stiflingly non-innovative. If the PRC was not under constant scrutiny and pressured to conform to international standards,<sup>165</sup> such as the Guidelines,<sup>166</sup> then perhaps it would step outside the

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<sup>159</sup> *Id.* at 112.

<sup>160</sup> *See, e.g.*, MUNRO, *supra* note 13, at 23–50.

<sup>161</sup> *Id.*

<sup>162</sup> G.A. Res. 64/142, *supra* note 14, annex.

<sup>163</sup> *Convention on the Rights of the Child (CRC)*, HUMAN RIGHTS IN CHINA, <http://www.hrchina.org/en/convention-rights-child-crc> (last visited Mar. 6, 2018).

<sup>164</sup> G.A. Res. 64/142, *supra* note 14.

<sup>165</sup> Since ratifying the Convention on the Rights of the Child, China has been reviewed three times by the Committee on the Rights of the Child, as established by the CRC, and is scheduled again for review in 2019. *Convention on the Rights of the Child (CRC)*, HUMAN RIGHTS IN CHINA, <https://www.hrchina.org/en/convention-rights-child-crc> (last visited Mar. 6, 2018).

<sup>166</sup> G.A. Res. 64/142, *supra* note 14.

bounds of convention to develop its own way of dealing with its own problem.<sup>167</sup> For instance, perhaps the PRC would opt for an approach that strips choice away from citizens and places children in their care, along with providing a larger stipend to care for them. Such an approach would be wildly unpopular in the West for forcing involuntary burdens on citizens, but would nonetheless be a way of solving the issue based on collective values.<sup>168</sup> On the other hand, the PRC could embrace the creation of a foster care market and decide to give more than minute stipends to foster care families, incentivizing families—especially rural families—with government funded housing<sup>169</sup> or a program that would place rural caretakers into urban government work programs as a benefit for fostering a child.

The regulations that were analyzed above represent the PRC's attempt to increase the quality of care and tighten the qualifications of foster caregivers, which is in line with the Guidelines.<sup>170</sup> Regardless of the effect they have on the quantity of care (although that is very important), the PRC is clearly achieving greater conformity with the specifications of the CRC and the Guidelines provided for it. Yet the number of orphans is still on the rise.<sup>171</sup>

Regardless of which plan the PRC chooses, if any, there are some certainties that can be gleaned from this Comment. It should be certain that from the previous historical explanation of China (including traditional and dynastic China, the ROC and Western interventionism, the PRC, and modern China) that the PRC, not having suddenly forgotten its past, is in a somewhat awkward position with Western impositions, a Communist legacy, and a tradition that has not been left behind. Further, a Western-like regulatory scheme suggests China's desire to conform with the explicit and implied requirements<sup>172</sup> that a state ought to adopt to become part of the globalized world. The PRC has assimilated its regulations only to see orphan numbers rise.

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<sup>167</sup> This is *not* to say the Convention is not an essential part of protecting children internationally, just that it perhaps does not account for the circumstances that all nations find themselves in. There should be a way to accomplish both ends.

<sup>168</sup> It would also likely present other problems, but it serves as a quick example of a method that, with some tuning, theoretically could work but cannot be implemented because of current international law and policy.

<sup>169</sup> The PRC has started to do a similar program but only in wealthier areas and only subsidizing housing for family members that take an orphan in. See SHANG & FISHER, *supra* note 1, at 231.

<sup>170</sup> G.A. Res. 64/142, *supra* note 14, ¶¶ 118–27.

<sup>171</sup> See Nathan Vanderklippe, *The Tragic Tale of China's Orphanages: 98% of Abandoned Children Have Disabilities*, GLOBE & MAIL (Mar. 21, 2014), <https://www.theglobeandmail.com/news/world/the-tragic-tale-of-chinas-orphanages-98-of-abandoned-children-have-disabilities/article17625887>.

<sup>172</sup> An example of these requirements are those listed in the Guidelines for Alternative Care of Children. See G.A. Res. 64/142, *supra* note 14, ¶¶ 118–27.

## CONCLUSION

Even if the PRC suddenly sought to exploit its own autonomy, such that it ignored the watchful eye of the West, would that benefit the orphan populations and fix the problem at hand? It is hard to say for many reasons. If the PRC moved away from global capitalism and back towards strict Maoism, perhaps it could theoretically achieve more success in providing for its orphan population than a developing market economy would allow for—but at the expense of economic prosperity. If the PRC continues towards the Western economic and regulatory model (as it has by promulgating the regulations initially discussed), perhaps it will also find success on the alternative care front, as we know “developed” Western models certainly have. Then again, if the PRC was given leeway to define its own policies, or even if international agreements took into consideration the social, political, cultural, and historical circumstances of its members in crafting agreements, perhaps the PRC would have more success by crafting its own solutions. The lattermost is the solution that this Comment advocates for.

The West tends to box China into a Western projection of stereotypes, where everything wrong with China can be reduced to its traditionalism, communism, or even simply its lack of success in mirroring Western institutions. As far as orphan care goes, it seems difficult to make a claim that cultural, historical, social, political, and economic implications are not the crux of the issue. One can acknowledge that modern China has dilemmas, including orphan care, that it needs to improve to meet its own standards while also acknowledging that China may not require a Western antidote. Further, one can acknowledge that a Western antidote is not the correct remedy for China’s uniquely complex issues involving orphan care.

Despite how Western models purport to be universally applicable—and Western criteria serve as the modern medium for alternative care—there are in fact states that merit their own tailored model or structure of laws and regulations—specifically, in this case, for orphan care.<sup>173</sup> China is one of them.

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<sup>173</sup> For an insightful discussion on one such theory of a modern Chinese political system grounded in traditional Chinese thought, see, e.g., *The Way of Humane Authority: The Theoretical Basis for Confucian Constitutionalism and a Tricameral Parliament*, in JIANG QING, A CONFUCIAN CONSTITUTIONAL ORDER: HOW CHINA’S ANCIENT PAST CAN SHAPE ITS POLITICAL FUTURE (2013).

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