

NOT IN OUR COUNTRY? A CRITIQUE OF THE UNITED STATES WELFARE SYSTEM THROUGH THE LENS OF CHINA'S ONE-CHILD LAW

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I. INTRODUCTION

The United States has not shied away from speaking out about human right abuses that take place across the globe.¹ However, in assuming the role of human rights crusader globally, the United States has neglected human rights violations that take place in its own backyard. Women and the poor have a long history of having their rights violated in this country. This violation is starkest at the intersection of the two groups, which can be seen in the development of welfare law. Racial stereotypes, traditional notions about gender roles and the role of the family, and political aspirations have

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¹ President Bush's statement commemorating Human Rights Week in 2002 demonstrates the role that the United States envisions itself playing as a defender of human rights:

Today, countless people around the world cannot exercise their basic human rights Our fight against oppression demonstrates our Nation's dedication to a future of hope and understanding for all people. One year after the liberation of Afghanistan from the clutches of terror and tyranny, we are helping the Afghan people build institutions of democracy and tolerance that are essential to the country's future stability, security, and prosperity.

Press Release, Office of the Press Secretary, Human Rights Day, Bill of Rights Day, and Human Rights Week, 2002, (Dec. 9, 2002) at <http://www.whitehouse.gov/news/releases/2002/12/20021209-10.html>. This point was further echoed by Senator Thomas Lantos, who stated, "And there is really no country which has the responsibility as fully on its shoulders than ours to fight all forms of human rights abuses wherever they appear. We have made human rights a global issue And it is because our voice so often has been a lonely voice, we have been so much less successful than we would have liked to be in dealing with human rights abuses." Forced Abortion and Sterilization in China: The View from the Inside: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the House Comm. on Int'l Relations, 105th Cong. 5 (2001) [hereinafter The View from the Inside] (statement of Senator Tom Lantos, Member, Subcomm. on Int'l Operations and Human Rights).

shaped the development of welfare law in the past and continue to have a strong influence in the current law. United States welfare policy arguably is not in alignment with current human rights instruments² or constitutional law regarding privacy.³

The United States considers itself a human rights defender abroad, but the manner in which the United States has dealt with China in the context of human rights is enlightening. The United States has criticized China's one-child law for resulting in coerced abortions and forced sterilizations, and as a result of these findings the United States has pulled much-needed funding from the United Nations Family Population Fund (UNFPA), which supports the family planning endeavors of the Chinese government.⁴ However, despite the disapproval that the United States has

² See generally Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) (providing in article 16(e) that women and men shall enjoy "the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education, and means to enable them to exercise these rights"); Convention on the Rights of the Child, Nov. 20, 1989, art. 2(2), 1577 U.N.T.S. 3, 46 (entered into force Sept. 2, 1990) (providing in Article 2(2) that state parties must "take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities . . . of the child's parents, legal guardians, or family members"); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 23, 999 U.N.T.S. 171, 179 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (providing in article 23 that "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized"). A General Comment issued by the Commissioner on Human Rights supports a reading of the ICCPR that respects reproductive rights. See International Covenant on Civil and Political Rights, General Comment 19, art. 23, Protection of the family, the right to marriage and equality of the spouses, *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6f97648603f69bcd12563ed004c3881?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6f97648603f69bcd12563ed004c3881?OpenDocument) (July 27, 1990).

³ See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (stating that a woman has a right to "bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings"); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 536 (1973) (observing that "it was doubtful, at best, whether Congress, 'in the name of morality,' could 'infringe the rights to privacy and freedom of association in the home'"); *Eisenstadt v. Baird*, 405 U.S. 438, 452 (1972) (stating that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

⁴ "[The] United States, expressing concern over the reported use of forced abortions as a means of population control in China, today withheld \$10 million earmarked for a United Nations agency that operates in China." *U.S. is Withholding Aid Fund for China*, N.Y. Times, Mar. 31, 1985, at 19. The United States began denying funds to programs associated with China in 1985 with the passage of the Kemp-Kasten amendment. "The Congress passed the Kemp-Kasten amendment, which prohibited funds for any program or organization that 'supports or participates in management of a program of coercive abortion or involuntary sterilization.'" *Clinton Seeks to Restore Aid For Family Planning Abroad*, N.Y. Times, Apr. 1, 1993, at A1. During the Clinton administration, aid was restored to China. However, on July 22, 2002 President Bush decided to pull \$34 million from the United Nations Population Fund because of the belief that it funds coerced

exhibited toward Chinese law, current American welfare law uses similar methods and has effects similar to those occurring in China. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996⁵ is credited with overhauling the welfare system, and, although it fell short of President Clinton's promise to end "welfare as we know it," it did radically change welfare as we knew it.⁶

PRWORA replaced the welfare assistance program, Aid to Families and Dependent Children, with the Temporary Aid to Needy Families Program (TANF).⁷ Women comprise ninety percent of the TANF adult caseload,⁸ which means that women bear the brunt of having their family planning choices influenced and scrutinized by the new welfare laws. The United States has not taken the drastic measures sometimes used in China, such as forcibly requiring sterilization or abortion,⁹ but the fact that human rights violations within United States borders are less conspicuous does not mean that they are less serious. The vigor with which the United States criticizes China's policy should not be any less vigorous when evaluating policies inside the United States.¹⁰

abortions in China, despite the fact that the United Nations Population Fund itself does not participate in such activities. See Bush's Secret War: Chronology of events since reintroduction of the Global Gag Rule, at http://new.ippf.org/UnmanagedFrame.aspx?ID=4138&ifHeight=1500&srcIF=http://ippfnet.ippf.org/pub/IPPF_News/Classic/Default.asp (Jan. 22, 2003); see also Population-Control Politics, N.Y. Times, July 23, 2002, at A18 (discussing how "12.5 percent of the agency's budget is now wiped out" and "vital and worthy programs like midwife training in Algeria and a new AIDS center in Haiti are suddenly without funding they need").

⁵ Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

⁶ Steven G. Livingston, Student's Guide to Landmark Congressional Laws on Social Security and Welfare 223 (2002).

⁷ The development and impact of this change will be discussed in Part II, *infra*.

⁸ Admin. for Children and Families, U.S. Dep't of Health and Human Svcs., TANF Sixth Annual Report to Congress: FY 2002 Characteristics and Financial Circumstances of TANF Recipients, [hereinafter TANF Report], at <http://www.acf.hhs.gov/programs/ofa/annualreport6/chapter10/chap10.doc> (last visited February 15, 2005).

⁹ See *infra* Part III.C.

¹⁰ This vigor is unrelenting, as demonstrated at a hearing before the House of Representatives Committee on International Relations. The chairman of the committee, Honorable Henry J. Hyde, described how coercive policies had been going on in China for over 20 years and the presence of the UNFPA in 32 counties in China had not changed that fact. A committee determined from investigations that "the new arrangement is not working The evidence suggests that the same harsh reality still prevails in the so-called model county that has long prevailed throughout China The only difference appears that coercion is now cloaked behind the rhetoric of voluntarism, shield[ed] from criticism" Coercive Population Control in China: New Evidence of Forced Abortion and Forced Sterilization: Hearing Before the House Comm. on Int'l Relations, 107th Cong. 1-2 (2001)

This Article will argue that the structure and effects of United States welfare law and China's Family Planning Law are similar; that the United States needs to be as responsible as it demands China to be; and that the United States must remedy the injustices that are present in its own system. Part II of the Article will provide a summary of the historical development of welfare law in the United States and of family planning law in China, and offer a comparison of the two histories. Part III will examine specifically how the laws of the two countries are similar, looking in particular at three general areas: the methods used to implement and enforce policies, the groups harmed by the policies, and the effects of the policies. The final Part will conclude by suggesting that the welfare system needs to be re-evaluated to incorporate more fully the needs of women and that this incorporation must extend beyond their reproductive capabilities. The incorporation of women's rights would require the government to adopt a "rights-conscious" anti-natalist population policy which would allow for women's reproductive rights to be respected.¹¹

II. TWO HISTORIES, A SINGULAR TALE

A. History of the United States Welfare State

Welfare in the United States grew out of the desperate circumstances that were produced by the Great Depression precipitated by the stock market crash of 1929. "Poverty, unemployment and the dire circumstances of the time" made it abundantly clear that government assistance was needed to help people get through these turbulent times.¹² Six years later, the Social Security Act of 1935 was enacted under President Roosevelt.¹³ The Social Security Act initially established the Aid to Dependent Children (ADC) program, which provided cash assistance to families with children under sixteen years of age and focused on helping children whose parents were "deceased, disabled, or absent."¹⁴ ADC

[hereinafter 2001 Coercive Population Control Hearing] (statement of Hon. Henry J. Hyde, Chairman, H.R. Comm. Int'l Relations).

¹¹ Ruth Dixon-Mueller, Population Policy & Women's Rights: Transforming Reproductive Choice 5 (1993). "[A] 'rights-conscious' antinatalist population policy should be twofold: (1) to challenge patriarchal family and community controls that limit women's freedom; and (2) to extend to all women those social and economic entitlements and reproductive health services that are preconditions for genuine reproductive choice." *Id.* at 5-6.

¹² Livingston, *supra* note 6, at 38.

¹³ *Id.* at 48-49.

¹⁴ "The term dependent child means a child under the age of sixteen who has been deprived of parental support or care by reason of the death, continued absence from the

excluded children whose parents were unemployed. Despite congressional hope that "Social Security would take the place of most of the welfare,"¹⁵ ADC continued to grow. By 1960, over 2 million children and 795,000 families were enrolled in the program.¹⁶ As the program grew, the characteristics of the average beneficiary changed. In 1935, eight out of ten ADC recipients were widows. In 1960, the vast majority of women receiving welfare were those who were divorced or who had never married, and over half of the children who benefited were the result of illegitimate births.¹⁷

The changing demographics helped to politicize the program, and they continue to do so today.¹⁸ Representative Barry's remarks in 1960 capture what would be the basis for the new rhetoric of welfare: "I do not believe that the mere fact of having little money entitles everybody, regardless of circumstance, to be permanently maintained by the taxpayers at an average or comfortable standard of living."¹⁹ This period marked the welfare system's first exploration of restrictions on reproductive freedom and attempts to make recipients adhere to traditional notions of what a family ought to be. Louisiana had a "suitable home" requirement that "denied aid to mothers who had given birth out of wedlock . . . [and] some 23,000 children, most of them African-American[,] were removed from the program."²⁰ In 1961, ADC recipients in the Newburgh jurisdiction of New York had their aid curtailed if they had additional illegitimate children while receiving aid.²¹

The changing demographics and growing rolls of the ADC led to the "key moment in creating the modern American welfare system," the passage of the Public Welfare Amendments of 1962.²² These amendments

home, or physical or mental incapacity of a parent." Social Security Act of 1935, Tit. IV, § 406(a) (amended 1962, 1996).

¹⁵ Livingston, *supra* note 6, at 104.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ If one looks at the current goals of the successor to AFDC, the Temporary Assistance to Needy Families (TANF) program, one will see that the concerns expressed in 1960 are just as relevant in 2005. The stated goals include ending "the dependence of needy parents on government benefits by promoting job preparation, work and marriage," preventing and reducing out-of-wedlock pregnancies, and encouraging the formation of two-parent families. See 42 U.S.C. § 601(a) (2003).

¹⁹ Livingston, *supra* note 6, at 104.

²⁰ *Id.* at 105.

²¹ *Id.* at 104-05.

²² *Id.* at 103.

revamped ADC and renamed it Aid to Families and Dependent Children (AFDC).²³ After the Public Welfare Amendments, nearly one million cases were added to AFDC, and the caseload rose to fourteen million by the mid-1990s.²⁴ Eight years prior to the passing of PRWORA, the Family Support Act (FSA) of 1988 was signed into law by President Reagan.²⁵ Reagan wanted to revise the welfare program because he believed that it degraded the moral worth of work, encouraged family break-ups, and drove communities into dependency—the same themes that had prompted the development of AFDC over two decades earlier and continue to fuel the current debate.²⁶ Liberals and conservatives agreed that there was a need to end welfare dependence but disagreed over how to do it. It was during this period that welfare changed into “a contract, [and] not a check.”²⁷ This contract was between the individual and the state welfare agency and provided that recipients “would promise to engage in the education or job training needed to obtain a job, and the state would give them the support and resources they needed to move into the workforce.”²⁸ The FSA recognized the importance of education, training, and employment if welfare recipients were to attain long-term success.²⁹ However, the politicians involved failed to take into consideration the social context in which welfare recipients lived,³⁰ and these ideals could not be easily realized.

Poverty could not be eradicated by one bill and neither could the systems and institutions that maintained it be destroyed by a single bill. This did not stop politicians from trying. In 1992, a familiar campaign

²³ *Id.* at 106-07.

²⁴ *Id.* at 108.

²⁵ Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988).

²⁶ Livingston, *supra* note 6, at 209.

²⁷ *Id.* at 210.

²⁸ *Id.*

²⁹ The Family Support Act “established the Job Opportunities and Basic Skills (JOBS) Training Program, which also includes supportive services. JOBS was a new employment, education, and training program for AFDC recipients. JOBS was an effort to ensure that AFDC families had education, training, and employment opportunities that would assist them in avoiding long-term welfare enrollment.” Mary Ellen Hombs, *Welfare Reform* 55 (1996).

³⁰ Like most laws, the FSA fell short of the words it embodied on paper when it came time to implement them in practice. “Less than 10 percent of welfare recipients actually participated in the work programs by the 1990s, very few two-parent families qualified for aid, and only a small proportion of welfare clients actually received any child support.” Sharon Hays, *Flat Broke With Children* 15 (2003).

promise was made to “fix” the welfare system, as President William Clinton promised to “end welfare as we know it.”³¹ On August 22, 1996, President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) into law.³² Initial drafts of the bill included a lifetime limit on public assistance, allowing no one to draw benefits for more than five years of his or her entire life; restrictions on non-citizens’ ability to receive aid; the exclusion of children born to unwed teenage mothers; and the federal government’s transfer of power to the states in a block grant, called Temporary Assistance to Needy Families (TANF),³³ allowing the states the freedom to structure their own individualized welfare programs.³⁴ Many of these provisions were retained in the final version of the act, with the exception of the exclusion of children born to unwed teenage mothers. In the final draft, teenage mothers were allowed to receive benefits as long as they met certain living and educational requirements.³⁵ The eligibility exclusion limits, which would exclude children born to women already on AFDC, were a hotly debated topic and were taken in and out of drafts of the bill and, in the final product, made optional at the states’ choice.³⁶

The debate about how this country will address poverty has not lessened, and in the last two years the reauthorization of the TANF block grants has been temporarily extended seven times (the current welfare law expired in 2002).³⁷ Recently, a short-term extension was passed to extend TANF through June 30, 2005.³⁸ Welfare regulations have proven true the old adage that the only constant is change. The changes that will come in

³¹ Hombs, *supra* note 29, at 82.

³² Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

³³ Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended at 42 U.S.C. §§ 602 – 619 (2003)).

³⁴ Livingston, *supra* note 6, at 226-27.

³⁵ See A Brief Summary of Key Provisions of the Temporary Assistance for Needy Families Block Grant of H.R. 3734 (The Personal Responsibility and Work Opportunity Reconciliation Act of 1996), at <http://www.clasp.org/publications/clbskp.html#prohibitions> (last visited April 30, 2005) (summarizing key provisions of the 1996 bill).

³⁶ Livingston, *supra* note 6, at 228-29.

³⁷ The Nation’s Network of Child Care Resource and Referral (NACCRRA), Congress Extends the Current Welfare Reform Law for Six More Months and Pushes Final Work on 2005 Child Care Spending Till After Elections, at <http://www.naccrra.org/policy/?id=40> (last visited February 14, 2005) [hereinafter NACCRRA].

³⁸ See Congressional Research Service, TANF Reauthorization: Side-by-Side Comparison of Current Law, S.667, and H.R. 240 (TANF Provisions), April 21, 2005, available at <http://www.cbpp.org/4-21-05tanf.pdf>.

the near future may reflect yet another chapter in an increasingly restrictive story of welfare that stresses work and so-called traditional family values.³⁹

B. History of the Family Planning Law in China

The history of population control in China is one of fluctuation between actively encouraging births at some times and actively prohibiting births at others. In 1949, when the People's Republic of China (PRC) came into being, the new regime began to aggressively pursue a policy of encouraging births.⁴⁰ "The Chinese government urged more births in order to increase the rate of socioeconomic development and to strengthen the country."⁴¹ Mao Zedong, leader of the Chinese Revolution, is quoted as saying: "It is a very good thing that China has a big population Of all the things in the world, people are the most precious."⁴² This attitude would slowly begin to erode, beginning with the results of the first census taken in 1953. The census counted a population one hundred million times larger

³⁹ The TANF reauthorization discussion is being shaped by bills proposed by the Senate Finance Committee and the House. Significant changes have been proposed. Both bills seek to increase work participation standards and contain provisions concerning the ability of states to obtain waivers of federal laws and rules governing TANF and other programs. For a discussion and comparison of the proposed bills to the current law, see Congressional Research Service, TANF Reauthorization: Side-by-Side Comparison of Current Law, S.667, and H.R. 240 (TANF Provisions), *supra* note 38. See also Center for Law and Social Policy, Key Provisions in TANF Reauthorization Bills Passed by the Senate Finance Committee and the House (Sept. 2004), available at http://www.clasp.org/publications/Summary_SBS.pdf (chart comparing the current law and Senate Finance Committee and House bills).

⁴⁰ John S. Aird, Slaughter of the Innocents: Coercive Birth Control in China 20 (1990).

⁴¹ Reed Boland, The Environment, Population, and Women's Human Rights, 27 *Envtl. L.* 1137, 1143 (1997).

⁴² Aird, *supra* note 40, at 22. As a comparison, it is interesting to note that President Bush declared January 18, 2004 National Sanctity of Human Life Day, proclaiming:

As Americans, we are led by the power of our conscience and the history of our country to defend and promote the dignity and rights of all people. Each person, however frail or defenseless, has a place and a purpose in this world. On National Sanctity of Human Life Day, we celebrate the gift of life and our commitment to building a society of compassion and humanity.

Presidential Proclamation, National Sanctity of Human Life Day, 2004, (January 18, 2004), at <http://www.whitehouse.gov/news/releases/2004/01/20040116-2.html> (last visited February 15, 2005). Both countries' leaders view human life as "precious" and as a "gift" but these views, as this Article shall demonstrate, do not take priority over the political goals of either leader.

than the official figure used previously.⁴³ The resistance to birth control began to wane as the PRC realized the economic implications of the growing population. Liu Shaoqi, Mao's second-in-command, "convened a symposium in Beijing in 1954, to discuss 'the problem of birth control' at which he affirmed that the Party was in favor of birth control . . . but that propaganda should be carried out only by word of mouth and not in rural areas."⁴⁴ At this point, forced sterilization and coerced abortion did not play a major role in the family planning program.⁴⁵

China did not stay with the anti-natalist policy for long—Mao decided to return to a pro-natalist policy in 1958.⁴⁶ Believing that it would be possible for China to produce more than it consumed, Mao welcomed a larger population and called for three years of intense efforts to produce a "Great Leap Forward."⁴⁷ This was short-lived, as widespread famine ensued, but promotion of birth control began again with a second campaign. The second campaign was more successful than the first because of better organization and access to more effective contraceptive devices. It was during this period that intrauterine devices (IUD) were first introduced; birth control measures aimed at men were also promoted.⁴⁸ Internal strife halted the campaign, but it was resumed in 1969. Within two years, the number of IUD insertions more than doubled, rising from six million in 1971 to fourteen million in 1973. It was during this time that the State Council began promoting its slogan, "late, spacing, and few."⁴⁹ The "cadres," family planning officials in local areas, were encouraged to achieve low birth rates in their provinces, and, although coercion tactics were warned against, the results demanded by the program could not have been achieved by a voluntary birth control program.⁵⁰ At the end of the 1970s, the government became alarmed at predictions that China's population would exceed 1.2 billion and proceeded to make its family

⁴³ Aird, *supra* 40, at 21.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*; see also Laogai Research Foundation, Better Ten Graves Than One Extra Birth 14 (2004) (stating that the "Great Leap Forward . . . [was an] ambitious project to match the industrial output of Britain in 20 years through mass collectivization and mobilization").

⁴⁸ Aird, *supra* note 40, at 26.

⁴⁹ *Id.* at 27. The slogan referred to having children later in life, spacing pregnancies farther apart, and having fewer children over the course of one's life.

⁵⁰ *Id.*

planning policies even stricter by implementing a policy of one child per couple and “a series of strict measures to enforce it.”⁵¹

The intensive efforts to control the growing population reached a significant point on December 6, 1982, when a circular was issued by the State Family Planning Commission and other central organizations announcing that “propaganda month would require sterilization of one partner of every couple that had two or more children and the prompt abortion of all unauthorized pregnancies.”⁵² The statistics show that sterilizations in China increased to nearly three times the number performed in the previous peak year. In 1983, 20.8 million sterilizations occurred, almost eighty percent on females.⁵³ The population policies of China were subjected to scrutiny and criticism as early as 1984 at the Mexico City World Population Conference, where discussion about the rumored coerced abortions took place.⁵⁴ The measures taken in 1983 continued over the next decade with varying implementation, and “[p]olicy reviews became increasingly linked to decennial censuses and five-year economic-and-social development plans. Policy rationale was elaborated to connect the national goal of coordinated development of population, resources, and environment with the international slogan of ‘sustainable development.’”⁵⁵

The family planning policy continued to evolve in 2000 and 2001, when the PRC issued a “once-in-a-decade central Decision on future program direction” and passed the national law on state planning of

⁵¹ Boland, *supra* note 41, at 1143. “In 1978, the First Session of the Fifth National People’s Congress added the concept of family planning into the PRC Constitution In January 1979, the State Council approved the one-child policy, or, to be more precise, a ‘one is best, two at most, never a third’ population control policy.” Laogai Research Foundation, *supra* note 46, at 18.

⁵² Aird, *supra* note 40, at 32.

⁵³ *Id.*

⁵⁴ Diana D. M. Babor, Population Growth and Reproductive Rights in International Human Rights Law, 14 Conn. J. Int’l L. 83, 90-91 (1999). Babor further recounts how

[t]he United States adopted the position that population growth was a “neutral phenomenon” A neutral stance was not taken, however, when the Reagan administration forged an alliance with the Catholic Church to withdraw funding from both the United Nations Population Fund and the International Planned Parenthood Federation The denial of funding, which was perpetuated by the Bush administration, is likely to have precipitated an increase in unsafe abortions as well as maternal injury and deaths in underprivileged communities.

Id. at 91.

⁵⁵ Edwin A. Winckler, Chinese Reproductive Policy at the Turn of the Millennium: Dynamic Stability, 28 Population and Dev. Rev. 379, 381-82 (2002).

population and births.⁵⁶ The 2000 Decision was drafted concurrently with the 2001 law and described how the government sought to improve its family planning efforts by improving population quality, "downplaying any 'eugenic' element . . . [and including] better maternal and child health care."⁵⁷ The Population and Family Planning Law of the People's Republic of China went into effect on September 1, 2002.⁵⁸ This law possesses components not present before, such as social compensation fees,⁵⁹ but it also remains silent on significant issues. For example, the law fails to provide legal enforcement mechanisms to protect citizens from potential abuses of power by local cadres or other officials.⁶⁰ Tensions between individual freedoms and state regulations that infringe on those freedoms, intentionally or unintentionally, exist in every society, and the development of the Family Planning Law in China is an extreme example of such a tension.

⁵⁶ *Id.* at 379. "These two policy documents and accompanying regulations culminated demographic and regulatory developments during the last several decades of the twentieth century and set the framework for any remaining struggle over reproductive policy." *Id.*

⁵⁷ *Id.* at 390.

⁵⁸ Law of the People's Republic of China on the Population and Family Planning, Order No. 63 of Chairman of the People's Republic of China (Dec. 29, 2001), at http://www.isinolaw.com/jsp/law/LAW_Chapters.jsp?CatID=275&LangID=0&StatutesID=2002834 [hereinafter Family Planning Law]. Reference to family planning is also made in the Marriage Law. See Marriage Law of the People's Republic of China, Ch.1, art. 2; Ch.2, art. 6; Ch.3, art. 16 (Jan. 1, 1981) (amended Apr. 28, 2001), at http://www.isinolaw.com/jsp/law/LAW_Articles.jsp?CatID=277&LangID=0&StatutesID=2001982&ChapterID=-1. The requirement for family planning is also incorporated in the Constitution. See Const. of the People's Republic of China, Ch.1, art. 25; Ch.2, art. 49 (Dec. 4, 1982) (amended Mar. 23, 1993), at http://www.isinolaw.com/jsp/law/LAW_Chapters.jsp?CatID=232&LangID=0&StatutesID=11502.

⁵⁹ Social upbringing fees, also known as social compensation fees, are essentially fines for having a child out of plan. The Family Planning Law provides:

Citizens that do not satisfy the provisions of Article 18 herein and give birth to children shall pay the social upbringing charges according to law.

Anyone who fails to pay the social upbringing charges payable in full within the specified time limit shall be imposed an overdue fine as of the commencement date of arrearage according to the relevant provisions of the State. If he still does not pay such charges, the administrative department in charge of family planning making the decision on imposing a overdue fine may apply to the people's court for compulsory execution according to law.

Family Planning Law, *supra* note 58, at art. 41.

For further discussion of social compensation fees, see Winckler, *supra* note 55, at 395; see also *infra* Part III.A.2.

⁶⁰ Winckler, *supra* note 55, at 397-98.

C. What Do the Two Histories Tell Us?

The histories of welfare law in the United States and family planning law in China demonstrate how a country's priorities, values, and biases can and do influence policy decisions. These histories are not dissimilar, and both reflect a less than favorable attitude toward women. Both histories demonstrate how political concerns trump human rights concerns and how each country found the solution to its crisis in the regulation of reproduction and concentrated its efforts on women's bodies. In China, the restrictions on reproductive freedom were made in the name of development.⁶¹ In the United States, the restrictions on reproductive freedom were made to save the dying nuclear family, which was being threatened by the rise of immoral single mothers who were having illegitimate children.⁶² The goals and values that the United States and China identified as important took precedence over the rights and choices of their citizens.

The similar voices in the history and debate about the welfare policies in the United States and the one-child policy in China are important because the beliefs of the policymakers ultimately shape the laws that are imposed on individuals. Statements made by leaders and other commentators in both countries in support of the more coercive policies also are illustrative. For example, in 1987, Senator Daniel Patrick Moynihan stated: "If you can't support your kids, don't have them."⁶³ Similar language was articulated by the UNFPA Director, Dr. Sadiq, in support of the one-child policy in China: "There is no such thing as, you know, a license to have a birth."⁶⁴ The rights of citizens in both countries have been trampled as the countries move toward the goals they have deemed important. A State Council Paper released in China in 1991 supporting the government's decisions observed that: "China has only two alternatives in handling its population problem—to implement the family

⁶¹ "The Chinese government implements a family planning policy in the light of the Constitution, with the aim of promoting economic and social development, raising people's living standards, enhancing the quality of its population, and safeguarding the people's rights to enjoy a better life." State Council White Paper on Human Rights, The British Broadcasting Corporation, Nov. 8, 1991, at 21, available at LEXIS, News Library, All News (English, full text).

⁶² See Hays, *supra* note 30, at 17 (discussing how "Congress emphasizes the close connection between the rising number of births to unmarried women and the growing number of people receiving welfare benefits").

⁶³ See Livingston, *supra* note 6, at 212.

⁶⁴ The View from the Inside, *supra* note 1, at 3 (statement of Congressman Christopher Smith, Chairman, H.R. Subcomm. on Int'l Operations and Human Rights).

planning policy or to allow blind growth in births Which of the two ways pays more attention to human rights and is more humane? The answer is obvious.”⁶⁵ President Bush also resorted to oversimplified reasoning in a speech to a group of Welfare-to-Work graduates when he remarked that the current welfare law has been a success because it has ended the “culture of dependency” and instilled “personal responsibility” in individuals.⁶⁶ Both countries have reduced enormous social and economic problems to simple dichotomies that completely obscure the multitude of factors which contribute to their problems. The dichotomy for China is overpopulation/family planning, while the dichotomy for the United States is dependency/responsibility. The revealing language of the two countries and the perceptions that they reflect demonstrate that the views they hold are not as different as the United States would like to believe.

The following Part will explore in further detail how welfare policy in the United States infringes on the basic human rights of welfare recipients in ways very similar to China’s Family Planning Law’s infringement on its citizens’ rights.

III. HUMAN RIGHTS VIOLATION AT HOME

The similarities between human rights violations in the United States and China do not end with the histories of their two policies, but are further reflected in three key ways: (1) the implementation of the policies; (2) the groups harmed by the policies; and (3) the policies’ effects on the populations they seek to control. Congressman Christopher Smith has referred to China’s family planning program as “draconian,” because of its use of “crippling fines” and coercion.⁶⁷ The same terms that Congressman

⁶⁵ State Council White Paper on Human Rights, *supra* note 61, at 33.

⁶⁶ President George W. Bush, Remarks to Welfare-to-Work Graduates, at <http://www.whitehouse.gov/news/releases/2003/01/20030114-6.html> (Jan. 14, 2003) (remarking that “Congress realize[d] that [the] welfare system as we knew it sapped the soul and drained the spirit from our citizens [T]he people of both parties . . . [sought to] put an end to the culture of dependency that welfare had created [The welfare law] is a success because it puts government on the side of personal responsibility”).

⁶⁷ Press Release, House Passes Smith Amendment to Prohibit U.S. from Funding Organizations, like UNFPA, that Support or Comanage Coercive Population Control Program, at <http://www.house.gov/chris-smith/news/press2003/prunfpa2.htm> (last visited Feb. 15, 2005) [hereinafter Smith Press Release]. The Press Release stated:

[t]en months ago, on September 1, 2002, a sweeping, comprehensive reiteration of China’s draconian population control program went into effect in all of China Lest anyone be deceived that Beijing is somehow easing up on coercive population control—it’s all there in the new law, the infamous one child per couple policy, the crippling fines on those women who attempt to resist, and severe punishment to those women who have a child without explicit government permission.

Smith uses to describe China's one-child law can be applied to the welfare reform law that exists in the United States today. The similarities between the two laws will be explored in the following sections.

A. Implementation of Policy

1. State Discretion

As a result of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the federal government gave states near-complete control of the welfare program through a block grant called Temporary Assistance to Needy Families (TANF).⁶⁸ The latitude states now have in structuring their welfare programs was thought to be a beneficial development because it would permit states to be flexible in their response to the needs of their citizens and allow them to be faster and more innovative than the federal government.⁶⁹ Some of these innovations have included creating links between welfare and education systems to increase welfare recipients's access to education;⁷⁰ allowing counties to have greater flexibility in determining the design of programs and other goals;⁷¹ and implementing child exclusion, or family cap, provisions.

The drawback to discretion is that there is no real floor set by the federal government determining the level of services to be offered, and

Id. It should be noted that Congressman Smith has been equally vehement about states that use family caps as part of their welfare policies and has argued for an amendment to TANF that would ban federal funds to states that had such policies in place. See H.R. 4066, 105th Cong. (1998) (proposing a bill "[t]o prohibit States from imposing a family cap under the program of temporary assistance to needy families").

⁶⁸ The new law confers power to the states in section 603 of Title IV of the Social Security Act. See 42 U.S.C. § 603 (2003) (provides the details of the federal grants to states for Temporary Assistance for Needy Families). See also Hombs, *supra* note 29, at 99 (discussing the details of the federal block grant).

⁶⁹ See Sheryll D. Cashin, *Federalism, Welfare Reform, And The Minority Poor: Accounting For The Tyranny Of State Majorities*, 99 Colum. L. Rev. 552, 553 (1999) (discussing how TANF "gives broad discretion to the states to design and administer welfare programs" and how the stated purpose of the act is "to increase the flexibility of States in operating [TANF]"). A state's program "need not be uniform across the state [T]here is no specific requirement that families be given cash assistance. States could provide vouchers or services. Programs can be administered by private charities, religious organizations, or other private entities." Hombs, *supra* note 29, at 98.

⁷⁰ Courtney Smith et al., *The Evolving Nature of Welfare Reform: Where We Stand on the Eve of Reauthorization* 12, at http://www.nga.org/cda/files/072001WELFARE_REFORM.pdf (July 2001).

⁷¹ *Id.* at 10 (discussing how a "second-order devolution is occurring in many states . . . [such as] California, Colorado, New York, North Carolina, and Ohio, [where] counties are effectively given 'block grants' to implement TANF").

states are on their own to create programs that are sensitive to the needs of their citizens. This flexibility has resulted in some positive developments—for instance, some states used their newfound flexibility to eliminate AFDC rules, which had strict eligibility requirements for two-parent families. Alabama, New York, and Maryland, for example, eliminated a rule that required the primary wage earner to work fewer than one hundred hours in two-parent families where one parent was not incapacitated.⁷² In addition, the same states, along with others, eliminated the work history test that was required under AFDC.⁷³ However, along with the positive developments, there are the negative ones. Another “innovation” implemented by twenty-three states has been the family cap provision,⁷⁴ which denies up to \$120 of benefits per month to families who violate the family cap.⁷⁵ The ways in which various states implement the family cap policies are inconsistent, as some states have a full cap policy that denies any additional assistance or services to the family, whereas other states have a partial cap that provides certain benefits to children, such as Medicaid and other services, while denying family assistance.⁷⁶ The discretion given to states by TANF leads to ostensibly innovative programs that conflict with the original purpose of the welfare system to help individuals become self-sufficient.

The practically unfettered discretion that the federal government has given to the states is similar to the discretion that the Chinese government has given to family planning officers, who are left to implement the government’s one-child policy with little guidance outside of the family planning law.⁷⁷ “[T]he one-child policy is anything but uniform

⁷² Center for Law and Social Policy, Marriage and the TANF Rules: A Discussion Paper 6, 8, at http://www.clasp.org/publications/2_parent_tanf_rules.pdf (Feb. 2005) [hereinafter Marriage and the TANF Rules].

⁷³ *Id.* at 8. The work history test required the primary wage earner work in at least six of the previous 13 calendar quarters to be eligible to receive assistance. *Id.* at 6.

⁷⁴ United States General Accounting Office, Report to Congressional Requesters, State TANF Family Cap Policies 2 (GAO-01-924) (Sept. 2001) [hereinafter 2001 GAO Report]. It should be noted that the federal law is silent on family caps, and individual states ultimately make the decision to implement family cap provisions. However, there has been a push for a ban on permitting family caps to be made at the federal level, thereby taking this flexibility away from states. Congress has not acted on implementing this ban. See generally H.R. 4066, 105th Cong. (1998) (proposing a bill banning family caps).

⁷⁵ *Id.* at 3.

⁷⁶ *Id.* at 7.

⁷⁷ The Family Planning Law, *supra* note 58, art. 29, states that “[t]he People’s Congress and their standing committees in provinces, autonomous regions, municipalities and larger cities, or local people’s governments shall devise detailed implementation procedures for the incentives stipulated in this chapter.” It further dictates, “People’s governments at all levels shall take steps to assure all citizens access to family planning technical services in order to enhance their reproductive health.” *Id.* at art. 31. These vague

[and] . . . implementation of the . . . policy has varied greatly year-by-year and province-by-province [D]epending on adjustments in quotas, the actual policy, *e.g.* varying allowances for couples to have a second child, will change to allow for fewer or more births.”⁷⁸ This structure, or lack thereof, has allowed family planning officials to take drastic measures to meet the demands of their governments. Although both the United States and China deny that there is any coercion in their systems, the structure of both systems has led to results that indicate otherwise. The discretion afforded to states can be a double-edged sword and is further affected by the incentives that the federal government offers to states in attempting to reach the goals it has set out under TANF. These incentives will be explored in the following section.

2. Incentive & Sanction Structures

The incentive and sanction structures present in both the Chinese and American systems create an environment that is unfair to the individuals subject to their laws. In 1993, an allegedly classified report was released that pointed to coercive techniques used by Chinese family planning officials to crack down in their townships. Some officials in the United States saw the existence of targets that provinces and townships were required to meet as a major contributing force to this crackdown, because these targets provided local governments with an incentive to act in a coercive way.⁷⁹ These incentives included awards and certificates for couples who complied with the law, as well as bonuses to local officials for meeting their local targets or sanctions for failing to do so.⁸⁰ The national

guidelines, although providing some general sketch as to what is expected of the officials, leave much to officials’ independent determination. *See also* Winckler, *supra* note 55, at 398 (discussing how the “new Law still leaves local program representatives with the contradictory jobs of trying to secure compliance on behalf of the state while trying to deliver services in the interest of the client”).

⁷⁸ Laogai Research Foundation, *supra* note 47, at 24-25.

⁷⁹ Nicholas D. Kristof, China’s Crackdown on Births: A Stunning, and Harsh, Success, N.Y. Times, Apr. 15, 1993 at 1 (“Some district and township officials feared that they would be fined for not meeting the family planning targets, or would not receive their bonuses.”).

⁸⁰ Article 21 of the Regulation of Beijing Municipality on Population and Family Planning provides that “A couple who have a child already . . . shall not bear child [sic] anymore [A]n Honor certificate for Parents With One Child shall be issued to them, and they shall be entitled to receive the following awards and preferential treatment upon the strength of the Certificate.” Regulation of Beijing Municipality on Population and Family Planning, art.14, July 18, 2003, *available at* <http://www.lawinfochina.com/display.asp?db=1&id=2987> [hereinafter Beijing Family Planning Regulation] (last visited Feb. 15, 2005).

family planning law provides that “[o]rganizations and individuals who make remarkable achievements for the work of population and family shall be rewarded.”⁸¹ Like China, the United States provides incentives in its welfare system to discourage out-of-wedlock births and encourage marriage.⁸² The PRWORA offers a bonus to the five states with the greatest decrease in the number of out-of-wedlock births in their state, giving the states a shared one hundred million dollars for reaching this goal.⁸³ This decrease is supposed to occur without an increase in abortions, but, as will be explored *infra* in Part III.C, this is not necessarily the case. In attempting to qualify for the bonus, states may choose to offer incentives to recipients to undergo sterilization procedures or receive Norplant injections.⁸⁴

The incentives imposed under the welfare law have been criticized by groups such as the National Association for Social Workers (NASW) and others who believe that these incentives operate to defeat the true goal of welfare—to help individuals become self-sufficient—and focus instead on decreasing welfare rolls.⁸⁵ Instead of using illegitimacy-reduction bonuses, the NASW argues that a bonus should be given to states that decrease the number of individuals in poverty, which would provide an incentive for states to create more educational programs, provide better

⁸¹ Family Planning Law, *supra* note 58, at art. 8.

⁸² See 42 U.S.C. § 601(a)(2003), which provides that the purpose of TANF is “end[ing] the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; prevent[ing] and reduc[ing] the incidence of out-of-wedlock pregnancies and establish[ing] annual numerical goals for preventing and reducing the incidence of these pregnancies; and encourag[ing] the formation and maintenance of two-parent families.” 42 U.S.C. § 601(a) (2003). States, like Chinese family planning officials, feel pressure to perform because not meeting “performance goals can always lead to a program losing its federal funding,” which “may put pressure on program operators to coerce participants into marriage.” Looking for Love in all the Wrong Places: The Case Against Government Marriage Promotions, at <http://www.legalmomentum.org/issues/wel/lookingforlove.pdf> (last visited Feb. 17, 2005) [hereinafter The Case Against Government Marriage Promotions]. Such pressure likely will not cease, because the proposed reauthorization bills from the Senate Finance Committee and House both dedicate five hundred million and six hundred million dollars, respectively, for marriage promotion programs. See Key Provisions in TANF Reauthorization Bills Passed by the Senate Finance Committee and the House, *supra* note 39, at 8 (comparing the marriage promotion provisions in the current law, Senate Finance bill, and House bill).

⁸³ See 42 U.S.C. § 603(a)(2) (2003) (providing how the bonus will be determined).

⁸⁴ Gwendolyn Mink, Violating Women: Rights Abuses in the Welfare Police State, in Lost Ground 95, 103 (Randy Albelda & Ann Withorn eds., 2002).

⁸⁵ National Association of Social Workers, Recommendations for the Reauthorization of the Personal Responsibility and Work Opportunity Reconciliation Act 3 [hereinafter NASW Reauthorization Recommendations] (Nov. 30, 2001), at <http://www.naswdc.org/advocacy/welfare/legislation/recommend.pdf> (last visited Feb. 15, 2005).

health care and benefits, and improve working conditions for those who are on the rolls.⁸⁶ NASW believes that such changes would truly achieve the goal of welfare reform.⁸⁷ Though it does not specify a target number, the current bonus system present in the United States is another species of the quota system that is in place in China. Quota systems are labeled coercive by the United States and by international organizations such as the UNFPA, which abolished the quota system when it implemented its trial family planning policy in thirty-two provinces in China.⁸⁸ Despite the United States government's ability to recognize that quota systems help create a system of coercion, it has not abolished the incentive system present in current welfare law.

In response to the incentive system developed by the welfare system, states have developed varying ways to achieve results, most of which take the form of sanctions. For example, both federal and state welfare laws impose sanctions in the form of family caps, lifetime limits on receiving welfare,⁸⁹ loss of benefits for failure to adhere to work requirements, and loss of benefits for being a teenage parent who is unmarried and not in school.⁹⁰

These sanctions are similar to the Chinese family planning law's social compensation fees, which Congressman Smith referred to as "crippling" to individuals.⁹¹ The social compensation fees are a new

⁸⁶ *Id.* at 3

⁸⁷ *Id.* at 3.

⁸⁸ Executive Board of the U.N. Dev. Programme and of the U.N. Population Fund, Country Programme Outline for China, 2-3, at <http://www.unfpa.org/exbrd/2002/second-session/dpfpacpocgns.pdf> (July 12, 2002) (providing that "targets and quotas were lifted in the 32 countries supported, and information, education and communication (IEC) materials stipulating adherence to ICPD principles were distributed to all households and service delivery points").

⁸⁹ The federal law imposes a five-year lifetime limit on benefits, but some states have reduced this limit to as low as two years. See Karen Seccombe et al., "Welfare Mothers' Welcome Reform, Urge Compassion," 48 *Family Relations* 197, 198 (1999) (noting that forty-five states have set time limits for terminating assistance, and "[n]ineteen of these states have established shorter time limits on welfare than those proposed by the federal government For example, Oregon and Idaho appear to have similar time limit policies—24 months.").

⁹⁰ See generally 42 U.S.C. 608 (2003) (detailing what circumstances prohibit receipt of benefits). See also Kenneth J. Neubeck & Noel A. Cazenave, Welfare Racism 184 (2001) (discussing race-based sanctions and family cap policies). Between October 2000 and September 2001, of 2,120,500 families receiving TANF, 6.3 percent were subject to some type of sanction. Office of Family Assistance, FY 2001 Characteristics and Financial Circumstances of TANF Recipients, table 15, at <http://www.acf.dhhs.gov/programs/ofa/character/FY2001/characteristics.htm> (last visited Feb. 15, 2005).

⁹¹ See Smith Press Release, *supra* note 67.

invention contained in the law that went into effect in 2002, and they require that “[c]itizens that do not satisfy the provisions of Article 18” and “give birth to children [out-of-plan] shall pay the social upbringing charges according to law.”⁹² These fees can amount to several times a couple’s annual income but are viewed as a way to secure compliance and to compensate society for the extra burden of raising an additional child.⁹³ The “penalties escalate as citizens go from merely having an extra child to actively resisting the program . . . [and those] who persist in nonpayment can be taken to court.”⁹⁴ Just as China’s social compensation fee seeks to regulate the choices of its citizens, so do the sanctions present in the welfare laws of various states. The sanctions in the welfare law go even further than imposing a financial burden, seeking also to regulate the private choices that welfare recipients, specifically women, have to make with regard to marriage and family make-up. This combination of incentives and sanctions has undesirable effects on the populations that are being regulated by the laws.

B. Populations Affected by the Policies

I. Women

Welfare reform in the United States and the Family Planning Law in China have infringed on the human rights of both countries’ citizens, and some of the most devastating effects fall on women. In 1998, the House of Representatives Subcommittee on International Operations and Human Rights held hearings on the subject of forced abortion and sterilization in China, entitled “Forced Abortion and Sterilization in China: The View from the Inside.”⁹⁵ During the hearing, Congressman Christopher Smith commented that the UNFPA’s support of the Chinese government’s family planning program had put the UNFPA in “partnerships with thugs, criminals, and women-abusers.”⁹⁶ A former family planning worker under the Chinese regime and a victim of a forced abortion spoke compellingly and graphically about their experiences with the family planning policy. Ms. Gao, a former family planning officer, testified that she had witnessed a woman who was nine months pregnant undergo an induced abortion

⁹² Family Planning Law, *supra* note 58, at art. 41.

⁹³ Winckler, *supra* note 55, at 395.

⁹⁴ *Id.*

⁹⁵ The View from the Inside, *supra* note 1.

⁹⁶ *Id.* at 3.

because she did not possess a birth permit.⁹⁷ Ms. Gao described what she witnessed in the operating room and stated that “the child’s lips were moving and [described] how its arms and legs were also moving, [and the] doctor injected poison into its skull, and the child died, and it was thrown into the trash can.”⁹⁸ Such cases are tragic and reprehensible. Although the United States has not endorsed such extreme actions to accomplish the goals of welfare reform, it has nevertheless severely impacted the reproductive rights of women.

What if China held a hearing on American welfare policy, similar to the one that the Subcommittee on International Operations and Human Rights held on China’s family planning policy? What would they find? Would the women who receive welfare speak about the way in which the system is improving their status, teaching them responsibility, and providing them with opportunities that were not known to them before? Probably not. Chinese representatives would hear stories like that of Joanne, who received a sanction for refusing to work when her child was an infant because she feared for his safety in daycare; she chose to discontinue her benefits rather than place her child in daycare.⁹⁹ There would be stories recounted about women who felt that they had no choice but to stay with an abusive partner because there were no options that would allow for them to gain their independence.¹⁰⁰ The stories may not have the dramatic effect that the testimonies in the United States hearing did, but they would evoke devastating images about women whose choices are affected by this policy.

The implicit message . . . would simply state this: individual mothers are solely responsible for the health, education, and welfare of their children; all women without the financial resources, marketable skills, and stamina necessary to raise children alone should be assigned a life of celibacy. If these edicts were all we had to show as a representation of the family values we wish to champion, our nation and our

⁹⁷ *Id.* at 12 (testimony of Gao Xiao Duan, former administrator, Planned Birth Control Office, People’s Republic of China).

⁹⁸ *Id.*

⁹⁹ Hays, *supra* note 30, at 69.

¹⁰⁰ See The Case Against Government Marriage Promotions, *supra* note 82 (discussing how marriage promotion provisions take away money that could be used toward initiatives to allow recipients to become self-sufficient and instead focuses on marriage, sometimes resulting in women remaining in abusive relationships). Sixty percent of “women welfare recipients are survivors of domestic violence[.]” yet both the Senate and House bills include provisions requiring states to promote marriage without providing for any measures explaining how to screen potential clients who are in abusive relationships. *Id.* at 2.

families might well seem . . . cruel, unjust, or at least grossly underdeveloped.¹⁰¹

Feminist theorists argue that welfare reforms are based upon patriarchal understandings of women and their roles within the family and the economy.¹⁰² This understanding of PRWORA does not seem to be too far off, as the language of the law makes it clear that "the intent of the lawmakers was to champion family values above all else."¹⁰³ Congress emphasizes the "connection between the rising number of births to unmarried women and the growing number of people receiving welfare benefits, [and we] are told that these single-parent homes not only create dependence on welfare . . . but are responsible for 'a crisis in our nation.'"¹⁰⁴ As a result of the perceived connection between illegitimate births and dependence on welfare, Congress focused its efforts on

¹⁰¹ Hays, *supra* note 30, at 71.

¹⁰² Secombe et al. argue that this patriarchal oppression is visible in four ways: (1) "reforms continue to concern themselves with the perceived threats to the 'family ethic,'" (2) reforms reproduce gender inequalities because "efforts are not designed to upgrade women's job skills," (3) "reforms imply that single mothers' priorities should now be in the economic realm," and (4) reforms assume "that recipients do not want significant changes made in the structure of the welfare system, and therefore, we must force these changes upon them." *Supra* note 89, at 198; *see also* Mink, *supra* note 84, at 95 ("TANF recipients must surrender vocational freedom, sexual privacy, and reproductive choice, as well as the right to make intimate decisions about how to be and raise a family. Ordinarily, these rights are strongly guarded by constitutional doctrine . . . Not so for a mother who needs welfare."); Mimi Abramovitz, *Learning from the History of Poor and Working-Class Women's Activism, in Lost Ground*, *supra* note 84 at 175, 163 (discussing how welfare reform has directed activists' attention to "the point of reproduction" and how, in its "effort to promote marriage as the foundation of a successful society, welfare stigmatizes single mothers and unduly controls the marital, childbearing, and child-rearing choices of poor and working-class women").

¹⁰³ Hays, *supra* note 30, at 17.

¹⁰⁴ *Id.* Congress's findings include the following:

(9) Currently 35 percent of children in single-parent homes were born out-of-wedlock, nearly the same percentage as that of children in single-parent homes whose parents are divorced (37 percent) . . . [T]he negative consequences of raising children in single-parent homes are well documented as follows:

(A) Only 9 percent of married-couple families with children under 18 years of age have income below the national poverty level. In contrast, 46 percent of female-headed households with children under 18 years of age are below the national poverty level.

(10) Therefore, in light of this demonstration of the crisis in our Nation, it is the sense of the Congress that prevention of out-of-wedlock pregnancy and reduction in out-of-wedlock birth are very important Government interests.

regulating the private choices of individuals, and this burden disproportionately falls on women. Just as China imposed its solution to its development problems on women's bodies, the United States finds the solution to poverty and the demise of the "traditional" family in women's bodies. There are built-in rewards for those recipients who marry; for example, in some states the benefits will not be lost or reduced for two-parent families.¹⁰⁵ The emphasis on marriage devalues single-parent homes, which are predominantly headed by women; also, since women comprise ninety percent of the welfare rolls,¹⁰⁶ these policies essentially tell them that they are not worthy. While both countries recognize that women are a key component to achieving their goals of development and decreasing poverty, both limit the way women participate in the system to a reproductive function, instead of looking for other ways to increase their involvement in the process and uplift their status.¹⁰⁷ In both China and the United States, the status of women is linked to males.¹⁰⁸ However, the United States government criticizes the Chinese government for overvaluing males in its policy, even though the PRWORA overvalues males through its focus on the traditional family and marriage, through its stigmatization of illegitimate births, and through its emphasis on working in the marketplace.

As demonstrated above, the United States' current welfare law emphasizes the "traditional" two-parent family and encourages marriage to

¹⁰⁵ Mink, *supra* note 84, at 101-02 (providing that the United States Department of Health and Human Services guidelines point out that TANF block grants can allow states to "change eligibility rules to provide incentives for single parents to marry or for two-parent families to stay together"; incentives can include cash payments to TANF mothers who marry").

¹⁰⁶ TANF Report, *supra* note 8.

¹⁰⁷ See generally Naila Kabeer, Gender, Demographic Transition and the Economics of Family Size: Population Policy for a Human-Centered Development 11, Occasional Paper, United Nations Research Institute for Social Development (1996), at [http://www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=A3C36A448455838C80256B67005B6B77&parentdoctype=paper&netitpath=80256B3C005BCCF9/\(httpAuxPages\)/A3C36A448455838C80256B67005B6B77/\\$file/opb7.pdf](http://www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=A3C36A448455838C80256B67005B6B77&parentdoctype=paper&netitpath=80256B3C005BCCF9/(httpAuxPages)/A3C36A448455838C80256B67005B6B77/$file/opb7.pdf) (last visited Feb. 15, 2005) (stating that "[w]omen know that child bearing is a social, and not purely personal phenomenon But [women's] bodies have become pawns in the struggles among states, religions, heads of households and corporations").

¹⁰⁸ In the United States, this is accomplished by the focus on marriage and the need to identify "deadbeat dads." As Mink describes,

TANF provisions promote marriage and paternal headship while frustrating childbearing and child-raising rights outside of marriage. TANF impositions on poor mothers' right to form and sustain their own families—as well as to avoid or exit untenable relationships with men—proceed from stiff paternity establishment and child support enforcement rules.

Supra note 84, at 95-96. In China, the focus on male children works to the detriment of females. See *infra* Part III.B.2 and note 125.

a fault by creating an incentive for women to become or remain dependent on men.¹⁰⁹ For example, the opening statement of Congress's findings for TANF emphasizes the importance the law places on marriage, stating that "marriage is the foundation of a successful society."¹¹⁰ The focus of the PRWORA in reducing out-of-wedlock births also negatively impacts the reproductive rights of women. Despite studies that have demonstrated that families on welfare are generally smaller than those in the general population and that fertility rates decrease the longer one is on welfare,¹¹¹ Congress still made marriage a high priority in the welfare reform.¹¹²

¹⁰⁹ See Secombe et al., *supra* note 89, at 197 (arguing that "[w]elfare, then, is stigmatized and devalued because it allows women to live outside the family structure deemed normative: a family which contains a husband as primary breadwinner, and a wife who is primarily responsible for social reproduction Welfare benefits are kept, artificially low, to control these 'manless women' so that they are not a threat to our patriarchal norms").

¹¹⁰ 42 U.S.C. § 601, at § 601, note. The idea that marriage is the necessary foundation for a stable society has been questioned by certain members of Congress, as findings have shown that there is no correlation between decreasing poverty and increasing marriage. These findings led to a House proposal aimed to "protect private decisions about marriage":

Whereas no research exists to indicate that marriage promotion helps raise poor people out of poverty, while ample evidence indicates that better health care, child care, and job training services do help raise poor families out of poverty . . . it is the sense of the Congress that government should not be used to influence, promote, or coerce individuals' private decisions regarding marriage.

H.R. Con. Res. 392, 107th Cong. (2002).

¹¹¹ Karen Secombe, *So You Think I Drive a Cadillac?* 156 (1999). Secombe further argues that "[a] woman's proper role, according to societal expectations, is to marry and have children while being supported by and subordinate to a male breadwinner. Poor women on welfare flagrantly violate this ethic, and therefore must be controlled and punished They are suspect, and as such, their children do not deserve to be supported." *Id.* at 157; see also Elizabeth Spahn, *Feeling Grounded: A Gendered View of Population Control*, 27 *Env'tl. L.* 1295, 1301 (1997) (stating that "[c]onsumerism in industrialized economies and its devastating impact on the environment, while occasionally included in the debates, is not seriously targeted for re-education campaigns. Yet 'controlling' female fertility . . . continues to carry influence in modern population policy debates."). Spahn further states that it is believed if a female's fertility is not controlled, then her "sexuality will run rampant." *Id.* at 1311.

¹¹² Recent studies have pointed to the fact that access to TANF benefits can have a positive effect on low-income couples' stability, and while "access to benefits does not necessarily lead to marriage, it does appear to increase the likelihood that a child will live with both parents [In addition], welfare benefits per se are not going to lead to marriage. Other services such as employment and training and alcohol/drug abuse counseling are needed." See *Marriage and the TANF Rules*, *supra* note 72, at 14. Incorporating other services is key to realizing any positive and lasting change and this is where the welfare law has failed in the past and continues to do so today.

While the government tells women that they should be married and take care of their families, it also tells them child-rearing is not a worthwhile job, at least for women who are poor, and that they need to concentrate their efforts on obtaining employment.¹¹³ There are competing values present in the welfare law, and this tension between work and family makes the welfare law schizophrenic in its effect.¹¹⁴ On one hand, the focus on work is a way to enforce family values “through [the welfare provision’s] deterrent effect—as measures meant to discourage women from choosing divorce or single-parenthood Hence, removing the safety net and forcing welfare mothers to work is actually a way to reinforce all women’s proper commitment to marriage and family.”¹¹⁵ The other side focuses on family values and is seen in the regulation of reproductive choices and requirements that paternity be established in order to receive welfare benefits.¹¹⁶ These two competing tensions combine to restrict women’s rights on welfare, leaving them with no better way to address the true problems that prevent them from leaving the welfare rolls.¹¹⁷

¹¹³ “Our society discredits the caretaking of children, despite pronatalist values that pressure couples to have them. We assume that it is better for strangers to care for children at minimum wage, while their mothers work at other minimum wage jobs, than it is for mothers to take care of their children themselves.” See Seccombe, *supra* note 111, at 209.

¹¹⁴ See Hays, *supra* note 30, at 18 (stating that “two distinct (and contradictory) visions of work and family life [are] embedded in this legislation”).

¹¹⁵ *Id.* This focus on work is proclaimed by some to be a way of recognizing that women and men are equals, but that is not necessarily the case upon closer investigation. “Depending upon one’s angle of vision, welfare reform can be seen as valorization of independence . . . as well as the promotion of a certain form of gender equality. On the other hand, it can serve as a condemnation of single parenting . . . and a reaffirmation that women’s place is in the home.” *Id.* at 20.

¹¹⁶ See 42 U.S.C. § 608(a)(2) (2003) (providing that a state may deny family assistance “for non-cooperation in establishing paternity or obtaining child support”).

¹¹⁷ As one Congressman commented,

If we are going to end welfare as we know it, does this bill help to accomplish those things? The answer is definitely no. Providing jobs and job security will change this type of system to promote one that encourages self-sufficiency However, without the adequate support in places, opportunity for employment, opportunity for day care . . . taking this punitive approach to drop people from the welfare rolls will certainly do more harm.

142 Cong. Rec. H7750 (daily ed. July 17, 1996) (statement of Rep. Payne). Another observer has noted that

reducing welfare dependency in a manner that actually increases employment among the welfare population—as opposed to merely kicking people off the rolls—may require more investment than many state political majorities would countenance [M]any states appear to be relying on negative incentives—such as stringent work rules and sanctions—rather than positive supports to achieve caseload reduction.

The next group that is harmed by the policies of both countries is children. Their rights are intimately tied with that of women and will be explored in the next section.

2. Children

The needs of children are routinely jeopardized, discarded, and overlooked despite the fact that children are the group with the weakest voice but strongest interest. Children are the largest beneficiary of welfare, making up 4.4 million of the caseload¹¹⁸ and therefore have the most to lose by unfavorable policies. Once again, there are parallels between the abuses of children's rights in the United States and China. This section will examine two key similarities in these systems. First, under both systems, children who do not meet the systems' regulations risk having no identity and are punished for their parents' decisions. Second, the structure of each system ensures that the cycle of dependency within the family will continue until the laws are reformed.

In some provinces of China, a child born without a birth permit is not entitled to receive benefits that other children receive and therefore has no legal identity under the system.¹¹⁹ For instance, in Beijing, not only will an out-of-plan child not receive benefits, but the rewards that the parents received for their in-plan child will be terminated, and they will be forced to reimburse the state for the money they have received until that point.¹²⁰ The differential treatment between out-of-plan and in-plan children is unwarranted and punishes the children simply for being born. It also treats them differently based on their birth order. This same problem was recently

Cashin, *supra* note 69, at 565.

¹¹⁸ Issue Brief, Welfare, Women, and Health: The Role of Temporary Assistance for Needy Families 1 (2003), at http://www.clasp.org/publications/Women_TANF.pdf (last visited Feb. 15, 2005).

¹¹⁹ "Children born out-of-plan who have not been registered have no legal identity." Report on Implementation of CEDAW in the People's Republic of China: Human Rights in China, 85 (1998); *see also* 2001 Coercive Population Control Hearing, *supra* note 10, at 30 (stating that Uyghur children in East Turkestan "who are born without state authorization can be denied residency, food, health care, and even schooling") (statement of Yemlibike Fatkulin, asylum seeker from East Turkestan); Xiaorong Li, License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family Planning Program, 8 Yale J.L. & Feminism 145, 157 (1996) ("[C]hildren born out-of-plan are not entitled to state subsidies, admission to public day care and schools, and access to public health care.").

¹²⁰ Beijing Family Planning Regulation, *supra* note 80, at art. 39 (specifying that "[w]here a couple, who have enjoyed all the awards and preferential treatments as provided for in Articles 21 and 22, have given birth to a second child, the awards and preferential treatment shall be stopped, the awards shall be reimbursed and the Honor Certificate for the Parents With One Child shall be withdrawn").

posed in the case made against United States welfare policy in Sojourner v. New Jersey Dep't of Human Services.¹²¹ The plaintiffs were denied additional cash assistance when they gave birth to a child while receiving welfare; they argued that the family cap policy "violates the equal protection rights of certain classes of poor children 'based on their parents' reproductive choices and the timing of [their] birth.'"¹²² Just as out-of-plan children in China have no identity, a "capped child" is invisible under welfare policy and can cause recipients to lose benefits such as exemptions from work requirements.¹²³ However, unlike China, the United States still allows children to retain some degree of recognition under the law; in New Jersey, for example, the "capped child" is still able to receive benefits such as Medicaid and food stamps.¹²⁴ Officials and groups in the United States have consistently criticized China for jeopardizing the lives of female children through female infanticide, self-selective abortions, and disappearances of girl-children.¹²⁵ A recent report from the UNFPA on current conditions in China reveals that there are one hundred ten male births for every one hundred female births.¹²⁶ This lack of regard for female children in China is comparable to the lack of concern the United States has for *all* children born to welfare recipients. Such treatment under the welfare system does not help these children, who must face the system's effects on their identity in a concrete and harsh way.

¹²¹ Sojourner v. New Jersey Dep't of Human Serv., 177 N.J. 318 (2003).

¹²² *Id.* at 323.

¹²³ Hays, *supra* note 30, at 69 (describing how a welfare mother whose child was a "capped child" was unable to benefit from the 18-month exemption from work that generally applies to new mothers).

¹²⁴ Sojourner, 177 N.J. at 325. See 2001 GAO Report, *supra* note 74, at 11 (stating that all twenty-three states with the family cap policy allow eligible children to enroll in Medicaid and food stamps programs).

¹²⁵ See Smith Press Release, *supra* note 67 (stating that "another awful consequence of China's policy is the disproportionate number of girl murders"); Coercive Population Control in China: Hearings Before the Subcomm. on Int'l Relations, 104th Cong. [hereinafter 1996 Coercive Population Control Hearings] (1996) ("The one-child policy imposes serious hardship on parents whose only child is a girl, and this is one of the major reasons why rural couples sometimes resort to infanticide if their first child is a daughter" or "abort the pregnancy if it's a female.") (statement of John S. Aird); 2001 Coercive Population Control Hearing, *supra* note 10, at 35-36 ("The chief victims of China's one-child policy have been little girls That means that sex-selective abortion has become very common Little girl fetuses are aborted. Female infanticide . . . has become very common [L]ittle girls are abandoned in large, large numbers") (statement of Stephen W. Mosher, President, Population Research Institute); see also Li, *supra* note 119, at 8-14 (discussing discrimination against female children, infanticide, and the disappearance of baby girls).

¹²⁶ Country Profiles for Population and Reproductive Health, United Nations Population Fund (2003), at www.unfpa.org/profile/china.cfm (last visited Feb. 15, 2005).

Finally, both policies perpetuate the problems they seek to address. By targeting female reproduction as a main focus, the policies fail to identify the multitude of factors that contribute to poverty¹²⁷ and instead focus on only one factor. Instead of investing in education, health, and family planning resources—investments that will ultimately elevate the status of women and help the countries achieve their goals¹²⁸—they place a mere band-aid on a larger problem. In the United States, investing in child care services would especially benefit children by enabling their families to leave the welfare rolls.¹²⁹ Yet, President Bush's newly proposed budget would freeze child care funding for 2006, and it is projected "that child care funding would remain frozen for the next five years, through 2010."¹³⁰ As a result, an estimated 300,000 fewer low-income children will receive child care assistance.¹³¹ As TANF itself notes, children who live in families that are currently on welfare are likely to grow up to be on welfare themselves.¹³² What opportunity is TANF providing to welfare recipients and the 4.4 million children on its rolls? Not a meaningful one. It is creating and perpetuating the cycle of poverty through its narrow, work-centered focus.

C. The Policies' Effects on Abortion

The most common critique of the Chinese policy is that it uses coercive and forced abortions to achieve its goals. The United States and

¹²⁷ See Mink, *supra* note 84, at 105-10 (arguing that the limited time and disciplinary terms of cash assistance enforces inequality and suggesting that a caregiver's income should be provided); Neubeck & Cazenave, *supra* note 90, at 217 (arguing that it is necessary to recognize how racism has shaped welfare reform and influenced the American response to poverty); Seccombe, *supra* note 111, at 186-87 ("[C]urrent reforms place a small emphasis on education, skill empowerment, job training, and general efforts to increase the level of human capital that women on welfare can offer to potential employers.").

¹²⁸ For example, women who have higher education are more likely to move off the welfare rolls and out of poverty. "National survey data show that 40 percent to 50 percent of women who exited welfare returned within two years. Five years after leaving welfare, nearly 80 percent of women remained poor or near poor. However, women who had more postsecondary education were more likely to escape poverty." NASW Reauthorization Recommendations, *supra* note 85, at 2.

¹²⁹ Center for Law and Social Policy, President's Budget Projects 300,000 Low-Income Children to Lose Child Care by 2010 (February 7, 2005), at http://www.clasp.org/publications/cc_2006_budget.pdf (last visited Feb. 15, 2005).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² 42 U.S.C. § 601, note, (9)(c) (stating that "[c]hildren born into families receiving welfare assistance are 3 times more likely to be on welfare when they reach adulthood than children not born into families receiving welfare").

human rights groups fervently argue that the United States cannot support a policy or practice that leads to coerced abortions.¹³³ Yet abortion, although not directly a part of the United States welfare plan, has been found to be a possible side-effect. The concern that an increase in abortions would result from welfare's push to eliminate single-parent families by imposing provisions such as the family cap was voiced early on in the welfare debate. In 1992, a Democratic African-American Representative introduced a controversial family cap policy for New Jersey and successfully fought for its passage.¹³⁴ Opponents to the bill came out in full force, critiquing the family cap policies. The National Organization for Women Legal Defense and Education Fund (NOWLDEF) and right-to-life groups were very visible on the front.¹³⁵ The unusual uniting of the two groups occurred because they felt that the reproductive freedom of women was threatened, with feminists fearing this proposal would force women to become dependent on men and with right-to-lifers fearing that the policy would result in coerced abortions.¹³⁶

A study performed at Rutgers University in 1997 provided some proof that the advocates' fears regarding the effect of family caps were justified; the study found that although the family cap did lessen the number of illegitimate births, this decrease was accompanied by an increase in

¹³³ The United States has pulled funding from China under the Reagan Administration and the current Bush Administration because of the reports of forced abortions and sterilizations taking place. See *supra* note 4. Several hearings regarding the existence of coercive population control in China have been held, at which United States government officials have spoken out about their views. See generally 2001 Coercive Population Control Hearing, *supra* note 10 (concerning the existence of forced abortion and forced sterilization in China's one-child policy); The View from the Inside, *supra* note 1 (discussing the continued practice of coercion in China's family planning practices); 1996 Coercive Population Control Hearings, *supra* note 125 (considering "what role human rights should play in [American] foreign relations"). See also Amnesty International, Women in China: Imprisoned & Abused for Dissent 23 (1995) (discussing human rights violations resulting from coercive birth control practices in China); Human Rights in China: Hearing Before the House Comm. on Int'l Relations, 106th Cong. 42, app. at 112 (1999) (stating that China's human rights violations should be cause for concern in the United States); Betsy Hartmann, Reproductive Rights and Wrongs 168-69 (discussing the criticism of China's one-child policy).

¹³⁴ Ted George Goertzel & John Hart, New Jersey's \$64 Question: Legislative Entrepreneurship and the Family Cap, in The Politics of Welfare Reform 109, 109-10, 120 (Donald F. Norris & Lyke Thompson eds., 1995). Provisions in the current welfare law also suggest that there were concerns about abortion becoming a negative side effect of certain policies, as seen by the fact that a state cannot receive a bonus for decreasing illegitimate births if that state's abortion rate has increased. See 42 U.S.C. § 603(2)(C)(i)(I)(bb) (2003) (providing that the "rate of induced pregnancy terminations" cannot increase).

¹³⁵ Goertzel & Hart, *supra* note 134, at 118. NOWLDEF has since changed its name to Legal Momentum.

¹³⁶ *Id.* at 111.

abortions.¹³⁷ The government, understandably, is not jumping to accept this finding, and a report by the United States General Accounting Office examining the effects of the family cap policies stresses that "other studies we reviewed were not conducted in a way that would permit us to draw firm conclusions about the effect of the family caps on abortions."¹³⁸ However, the same report also concluded that the evidence available does not support a finding that family cap policies do or do not help in achieving the goal of reducing out-of-wedlock pregnancies,¹³⁹ which suggests that other less coercive means could be implemented to achieve the purposes of TANF. Only one of the five states that received illegitimacy bonuses in 2002 had family cap policies,¹⁴⁰ further indicating that less coercive measures could better achieve the goals desired by the state.

The United States legislature has been unresponsive to the cries of those who say policies such as the family cap do more harm than good, and the judiciary has also been less than sympathetic to the reproductive rights of welfare recipients. The New Jersey Supreme Court ruled in 2003 that the family cap provision in New Jersey's welfare law did not violate equal protection rights or the right to privacy under the New Jersey State Constitution, stating that "[t]his case is not about a woman's right to choose whether and when to bear children, but rather, about whether the State must subsidize that choice We hold today that the State is not required to provide additional cash assistance when a woman chooses to bear a

¹³⁷ NOW Legal Defense and Education Fund, Welfare & Poverty: Update on Recent Child Exclusion Developments, at <http://www.legalmomentum.org/html/issues/wel/chexdv.shtml> (last visited June 6, 2005) ("The study estimated that the Child Exclusion policy increases abortion rates and states that the policy results in approximately 240 more abortions per year among women on welfare than would be expected without the Child Exclusion."). State officials caution that the results are just preliminary and that it is too early to determine if this is the result of the family cap. *Id.*; see also Patricia Donovan, The 'Family Cap': A Popular but Unproven Method of Welfare Reform, 27 *Family Planning Perspectives* 166, 167 (1995).

¹³⁸ 2001 GAO Report, *supra* note 74, at 22.

¹³⁹ *Id.* at 25.

¹⁴⁰ See National Center for Health Statistics, Data for 1996 Welfare Reform Law Bonus to Reward Declines in Nonmarital Births: Change in Nonmarital Birth Ratios by State 1999-2000 to 2001-2002, at <http://www.cdc.gov/nchs/data/welfare/bonint04.pdf> (last visited Feb. 15, 2005). The largest reductions occurred in the District of Columbia, New York, Maryland, New Hampshire, and Connecticut. Only Connecticut has a family cap policy in place. See Center for Law and Social Policy, Lifting the Lid Off the Family Cap: States Revisit Problematic Policy for Welfare Mothers 3, at http://www.clasp.org/publications/family_cap_brf.pdf (December 2003) (listing the states that have family cap policies in place and noting that Maryland has discontinued its family cap since every county opted out of implementing the cap since October 2002).

child.”¹⁴¹ The limitations on reproductive choice imposed through welfare policies such as the family cap, which arguably provide incentives for abortion, further demonstrate that the systems of the United States and China are not different from each other in substance or form.

IV. CONCLUSION

China’s Family Planning Law and United States welfare laws aim to eradicate poverty and increase the development of their societies. The policies that the United States and China have pursued, although successful on some levels, have achieved this success by violating the human rights of women and children. Both governments’ proclamations of the success of their programs need to be understood in a larger context. In the United States, the welfare rolls have decreased by more than fifty percent, but this does not mean that more individuals are now self-sufficient. In 2000, nearly forty percent of former welfare recipients lived below the federal poverty line, and “the percentage of families living in deep poverty, defined as income below fifty percent of the poverty level has been growing—from 4.9 percent in 1989 to 5.1 percent in 1998.”¹⁴² Despite the fact that improving the educational status of individuals will aid in their productivity and ability to become self-sufficient,¹⁴³ the United States has opted for a policy that provides minimal and temporary monetary assistance and then, after it expires, throws families out to assume “responsibility” and fend for themselves.

The solutions that the United States and China chose were not the only options. Less coercive policies are available. In 1999, India’s population reached one billion, making it the second largest country after China, so comparing the success of the family planning programs in each

¹⁴¹ *Sojourner v. New Jersey Dep’t of Human Serv.*, 177 N.J. 318, 337 (2003). The court further stated: “The interest here of the Legislature . . . in promoting self-sufficient citizens, diminishing the dependency upon welfare and creating [parity] between welfare recipients and working people . . . greatly outweighs any slight imposition or mere burden on . . . the plaintiffs’ right to privacy.” *Id.* at 324.

¹⁴² *NASW Reauthorization Recommendations*, *supra* note 85, at 2. *See also* Hays, *supra* note 30, at 222 (stating that the average hourly wages were seven dollars an hour and average annual earnings between \$8,000 and \$10,800 for welfare recipients who had exited the rolls). Hays further argues that the decrease in rolls can be attributed to sanctioning, below-poverty wages, and other practices, demonstrating that “a substantial portion of desperately poor mothers and children are being punished, worn down, or frightened off the welfare rolls” and suggesting that, at best, only thirty percent of the former welfare recipients represent a “successful” escape from poverty. *Id.* at 224.

¹⁴³ *See supra* note 127.

country is instructive.¹⁴⁴ The state of Kerala is located in the Southern Peninsula of India and was the first socialist state in India. In 1987-88, despite national poverty figures of 29.2 percent, Kerala had only 16.9 percent living below the poverty line. Kerala's efforts to provide its population with universal access to education and a strong health care program raised the status of women, thus producing an "enabling environment" for the success of the family planning program in Kerala.¹⁴⁵ "It may, therefore, be said that it is not economic but political factors, which have lead to the high level of social development in Kerala."¹⁴⁶ The success of Kerala's family planning policies demonstrates that the coercive laws of China are not necessarily the only means by which China can achieve its goals. The same argument applies to the welfare situation in the United States. The family cap policy that exists in some states is by no means the only way to accomplish the goals that TANF seeks to achieve. In the twenty-seven states that do not have the policy, there is not a surge in births; in fact, studies show that there is no difference in fertility rates and illegitimate births between states that have the policy and states that do not.¹⁴⁷ The inconclusive results of the family cap policies suggest that a less coercive policy could be implemented in the twenty-three states that currently have the policy, thus allowing for the rights of women and children to be respected.

It is necessary that in its dealings with welfare recipients the United States adopts the rights-consciousness that it demands of China.¹⁴⁸ True

¹⁴⁴ United Nations Population Division, *India Becomes a Billionaire*, available at <http://www.un.org/esa/population/pubsarchive/india/ind1bil.htm> (last visited Feb. 15, 2005).

¹⁴⁵ "[M]ost significantly, women who have had access to education are more likely to practice family planning than those who have not . . . [Kerala] has achieved the greatest reduction in fertility rates in all of India." *Family Planning Success Based on Equity: Human Development, Health and Governance in the Indian State of Kerala*, 25 *Health for the Millions* 2 (1999), available at <http://www.hsph.harvard.edu/Organizations/healthnet/ASia/suchana/1299/h027.html> (last visited Feb. 25, 2005).

¹⁴⁶ *Id.*

¹⁴⁷ See Seccombe, *supra* note 111, at 157 (discussing research findings that states with family cap policies had no difference in their fertility rates as compared to states without caps); Donovan, *supra* note 135, at 166 (discussing how the evidence of the positive impact of family caps on fertility is inconclusive and calls for fuller evaluations of its effects on welfare recipients); 2001 GAO Report, *supra* note 74, at 3 (stating that "[d]ue to limitations of the existing research, we cannot conclude that family cap policies reduce the incidence of out-of-wedlock births, affect the number of abortions, or change the size of the TANF caseload").

¹⁴⁸ See Dixon-Mueller, *supra* note 11, at 27 (arguing that "[l]aws and policies can be directed toward undermining . . . patriarchal controls and advancing the equal rights of women and men. The challenge of reproductive policy is to ensure that the abstract principle of reproductive rights becomes a reality in women's lives").

reform will occur only when the United States moves away from a system that restricts women's reproductive choices based on antiquated notions of how a family should look and moves toward a system that respects and fosters different family environments that enhance the lives of women and children.¹⁴⁹

As this Article has demonstrated, the policies of the two countries are not that different. Their parallels extend beyond their similar histories and can be seen in the unfettered discretion given to the local governments, the use of an incentive and sanction structure, the unwanted consequences produced by the policy, such as increased abortions, and the harmful effects on women and children. China put its development needs ahead of the human rights of women and children. The United States put its values at the center of welfare reform and attempted to make recipients conform to norms derived from a history and culture full of sexism, racism, and elitism. This punishes and stigmatizes the choices of women who do not conform to the values that the United States deems important.¹⁵⁰

The United States should direct its concern with China's alleged violations of human rights and international standards towards its own policies.¹⁵¹ The United States has recently been a champion of human rights abroad, but it has failed to examine the status of human rights within its own borders. After engaging in such self-reflection, the United States may be able to gain the insight it gleans from its own abuses to shape and inform its efforts abroad. A former Chinese leader once said, "before beginning any undertaking one ought to 'start from reality.'"¹⁵² This advice is instructive in its simplicity, and as Congress approaches the reauthorization of TANF in this current term, one can only hope that they "start from reality."

¹⁴⁹ See generally *id.* at 191-219 (proposing a policy agenda that would respect women's rights and reproductive health).

¹⁵⁰ See Hays, *supra* note 30, at 13 (describing how the welfare policy in the United States traces its roots to the nineteenth-century poor laws, which established a moral distinction between the "deserving" and "undeserving" poor).

¹⁵¹ International law is a potential starting point in addressing the concerns of welfare recipients. An amicus brief filed in the *Sojourner* case took this approach, arguing that the child exclusion provisions violated various international law provisions. Amicus Brief for the Center for Economic and Social Rights, The International Women's Human Rights Law Clinic, and the Center for Constitutional Rights In Support of Plaintiffs-Appellants, *Sojourner v. New Jersey Dep't of Human Serv.*, 177 N.J. 318 (2003) (on file with author).

¹⁵² Aird, *supra* note 40, at v.

