

[This Page Intentionally Left Blank.]

## **China's Orphan Welfare System: Laws, Policies And Filled Gaps**

Anna Jane High\*

*This article presents a socio-legal analysis of the care of orphaned and other vulnerable children in China, reviewing law, policy and practice relating to state and non-state orphanages and foster homes. The analysis is first contextualized by an introduction to the demographics of children cared for in state and non-state welfare institutions; prevailing social and cultural attitudes to their rights and entitlements; and the complex nexus between the politically high-stake issue of birth planning and the arguably consequent vulnerability of such children. The article then introduces formal laws and policies relating to the care of orphans, including government duties and responsibilities towards this vulnerable population. The findings of empirical fieldwork carried out in China examining the role of “non-legal,” unregistered and*

---

\* Lecturer in Law, Marquette University Law School; B.A. (Chinese), LL.B. (Hons), B.C.L. (Oxon.), M.Phil. (Oxon.), D.Phil. (Oxon.). The Author would like to thank Drs. Fernanda Pirie and Rachel Murphy for their direction and guidance, Johnson Tan for his assistance in China, the EALR editorial board for their patience, and the many interviewees who gave of their time, and welcomed me into their homes, in support of this research.

*unrecognized non-state actors/NGOs in filling gaps left by the formal state orphan welfare system are then presented. Although the Chinese government claims to take responsibility for orphans, and ostensibly monopolizes the running of orphanages, it is failing to recognize, regulate or oversee the prolific number of private orphanages that have emerged in the last three decades in response to perceived gaps in state-provided services. The emergence of unregulated non-state orphanages, and the gap between child welfare laws and policies, on the one hand, and practice on the other, has resulted in lines of stratification being drawn among Chinese orphans in terms of their access to care and adoption prospects. The implementation of clearer policies, and improved access to formalized state support for the currently informal non-state sector, are needed to promote better outcomes for vulnerable children and caregivers alike, as well as to better guard against sub-standard practices and neglect of orphans.*

I. INTRODUCTION .....	128
II. DEMOGRAPHICS OF VULNERABILITY .....	131
III. ABANDONMENT IN CHINA: DISCOURSE AND ATTITUDES.....	133
A. <i>Abandonment as a Crime</i> .....	133
B. <i>Demographics of Abandonment</i> .....	135
C. <i>Kinship, Fostering and Adoption</i> .....	140
D. <i>Status of the (Chinese) Child</i> .....	143
IV. POLICY ON CARE OF ORPHANS .....	147
A. <i>Government Departments</i> .....	147
B. <i>Chinese Orphanages: The State Monopoly and Privately-filled Gaps</i> .....	149
C. <i>Orphanage Law and Policy</i> .....	151
V. STATE ORPHANAGES .....	156
VI. PRIVATE ORPHANAGES .....	159
A. <i>Grassroots Chinese-run Private Orphanages</i> .....	160
B. <i>Foreign-run Foster Homes</i> .....	166
CONCLUSION.....	172

## I. INTRODUCTION

My name is Rose, I am from Hubei\* and I am 18 years old. I lived in a village with my parents and older sister. We were very happy

children. Our parents cared for us. But one day, when I was four years old, my older sister accidentally poured boiling water over my head. I was in so much pain. Baba [my father] took me to the doctor, who said to put toothpaste over the burns. My sister helped me apply the toothpaste, but it only helped a little. I had terrible wounds. Baba was so angry with my sister that he beat her. Not only was I scarred, but my family was too poor to send me to school. So one day Baba brought me to the door of the local orphanage. A kind *ayi* [aunt] took me in, and I started my life there. My *ayi* was really very kind to me. The other children were also good. But they could be so strong-willed and sometimes rough, sometimes bossy. We often had our differences. My scalp was burned, and it left such a scar emotionally. I didn't like to talk. From the time I arrived, I stopped talking much. The children started bullying me. The *ayis* were really kind to me, so the other kids bullied me. My life there was the same every day. After each meal, we played ballgames together – but I was just no good at these, and they started excluding me. I started playing on my own. I would watch the workers in the vegetable garden. I would spend time on the roof. It was so high. I was scared. Every day, my life was like this.<sup>1</sup>

I met Rose<sup>2</sup> in 2010 in her home near Beijing. She lived in a private foster home run by an American couple, which cares for children with special medical needs coming from state-run orphanages. She is one of many children who have been fostered from state orphanages across China, or abandoned directly, into the informal care and guardianship of privately run orphanages and foster homes. These homes are, for the most part, unregistered, and are not recognized by formal law or policy. Rose's life story, including her disfigurement and subsequent abandonment, her childhood spent in a state orphanage, and her move as a teenager to a privately-run home, is emblematic of the complex intersection of social, cultural, and political factors pertaining to current laws and policies on the care of orphans in China. This article undertakes a socio-legal analysis of the care of orphaned and other vulnerable children in China by reviewing law, policy, and practice relating to state and non-state orphanages and foster homes.

The analysis begins with an introduction of the demographics of children cared for in state and non-state welfare institutions, prevailing social and cultural

---

<sup>1</sup> Testimony of a resident at Compassion Family Life House.

<sup>2</sup> Where referenced herein, people, organizations and place names are referred to by pseudonyms to preserve anonymity.

discourse and attitudes associated with abandonment and relating to the rights and entitlements of abandoned children, and the complex association between the politically high-stake issue of birth planning and the arguably consequent vulnerability of such children. The article then introduces the formal laws and policies relevant to the care of orphans, including government duties and responsibilities towards this population, before presenting the findings of empirical fieldwork carried out in China examining the role of “non-legal,” unregistered, and unrecognized non-state actors or non-government organizations (NGOs) in filling gaps left by the formal state orphan welfare system. I find that although the Chinese government claims to take responsibility for orphans, and ostensibly monopolizes the operation of welfare institutions, it is failing to recognize, regulate or oversee the prolific number of private orphanages and foster homes that have emerged in the last three decades in response to perceived gaps in state-provided services. The emergence of such homes and the gap between child welfare laws and policies on the one hand, and practice on the other, has resulted in lines of stratification being drawn among Chinese orphans in terms of their access to care and adoption prospects. The implementation of clearer policies, and improved access to formalized state support for the currently informal non-state sector, are needed to promote better outcomes for vulnerable children and caregivers alike.

This Article is the culmination of numerous trips to various foster homes and orphanages in China, carried out between 2005 and 2010. The subjects of this study were approached based on personal introductions and chain-referral sampling. This led to contacts with both state and non-state Chinese-run orphanages. This Article is primarily based on interviews conducted between July and October 2009 and between July and September 2010. Interviews were conducted with representatives of twenty-seven state and private orphanages and foster homes located in Hebei, Shandong, Henan, Shaanxi, Anhui, Zhejiang, and Jiangsu provinces, and the Beijing, Tianjin and Shanghai municipalities. In addition, interviews were conducted with a number of child-related NGOs, both foreign and Chinese, and a number of government and government-owned departments and entities.<sup>3</sup>

---

<sup>3</sup> Ministry of Civil Affairs China Charity and Donation Information Centre; Shandong Charity Federation Office; Ministry of Civil Affairs NGO Service Centre.

## II. DEMOGRAPHICS OF VULNERABILITY

Dr. Xiaoyuan Shang, the leading Chinese researcher on vulnerable children in China, categorizes children requiring welfare into three groups: orphaned or abandoned children, children of prisoners, and street children.<sup>4</sup> This study focuses on the provision of welfare services to the former two groups; the third group, which at times overlaps with the other two, includes victims of kidnapping and child trafficking.<sup>5</sup> Most orphaned and abandoned children live in rural areas and many are also disabled.<sup>6</sup> The term “orphan” is used loosely herein and by Shang to refer to children who are no longer cared for by their parents. Researchers believe the majority of children living in state and private orphanages do, in fact, have one or both parents living, but have been abandoned for reasons explored further below.<sup>7</sup> The Chinese term for orphan, *gu'er*—*gu* meaning “solitary,” “isolated,” or “alone,” and *er* meaning “child”—accommodates these various life circumstances more than the English translation.

According to the most recent government study on vulnerable children in China, carried out by Shang and commissioned by the Ministry of Civil Affairs (MCA), as of April 2005 there were 573,371 orphaned children in China,<sup>8</sup> although the number may be underreported.<sup>9</sup> The study ambiguously defines

<sup>4</sup> Xiaoyuan Shang et al., *Welfare Provision for Vulnerable Children: The Missing Role of the State*, 181 CHINA Q. 122, 124-25 (2005) [hereinafter Shang et al., *Welfare Provision*].

<sup>5</sup> *Id.* at 125.

<sup>6</sup> *Id.* at 124.

<sup>7</sup> *Id.* at 124 (noting that 95% of children in Chinese government care are abandoned); see generally CORRINA CSAKY, SAVE THE CHILDREN, KEEPING CHILDREN OUT OF HARMFUL INSTITUTIONS: WHY WE SHOULD BE INVESTING IN FAMILY-BASED CARE 1 (2009), available at [http://www.savethechildren.org.uk/sites/default/files/docs/Keeping\\_Children\\_Out\\_of\\_Harmful\\_Institutions\\_Final\\_20.11.09\\_1.pdf](http://www.savethechildren.org.uk/sites/default/files/docs/Keeping_Children_Out_of_Harmful_Institutions_Final_20.11.09_1.pdf) (noting that this is a feature of orphanages generally).

<sup>8</sup> XIAOYUAN SHANG, ZHONGGUO GUER ZHUANGKUANG YANJIU (中国孤儿状况研究) [SURVIVAL CHILDREN: A STUDY OF THE CONDITION OF ORPHANS IN CHINA] 10 (2008) [hereinafter SHANG, SURVIVAL CHILDREN].

<sup>9</sup> The total number of orphans may be under-reported by the study because many orphaned and abandoned children, including those living in many of the private orphanages interviewed, do not possess *hukou* [residency permits] and, thus, are unlikely to be included in official statistics. See Shang et al., *Welfare Provision*, *supra* note 4, at 129 n.28 (noting that the children in unregistered private orphanages “have no legal status”). *Hukou* refers to an individual’s residency permit under the Chinese Household Registration System. It primarily functions as a type of internal passport system: residents of China who are not registered under the *hukou* system do not possess legal personality and face grave

(continued next page)

orphans as young people who have lost their parents—it is unclear if this would include, for example, children whose guardians are in prison, or children who have been abandoned. The Joint Ministerial Opinion on Strengthening Orphan Relief puts the figure at 573,000, using the same definition.<sup>10</sup> Of these, around 66,000 are in the care of state welfare institutes, and 295,000 receive “state institutional aid” of some kind,<sup>11</sup> which means that approximately one third of China’s reported orphan population does not receive institutional aid relief, and less than twelve percent reside in state facilities, not all of which are exclusively for children.<sup>12</sup> More than eighty-six percent of the reported orphan population is registered as rural householders.<sup>13</sup> Less than 0.1% are residents of the three model urban orphanage centers of Beijing, Shanghai, and Tianjin.<sup>14</sup>

In addition, there are a large number of children whose primary caregivers are serving long-term or life sentences. Due to discrimination experienced by children of prisoners in society and the consequent dearth of community-based

---

difficulties in obtaining access to civic entitlements such as health care, education and employment. Tiejun Cheng & Mark Selden, *The Origins and Social Consequences of China’s Hukou System*, 139 CHINA Q. 644, 644 (1994) (noting that *hukou* registration provides the “principal basis for establishing identity, citizenship and proof of official status,” and is required to establish eligibility for social welfare, employment, education and marriage).

<sup>10</sup> MINZHENGBU (民政部) [MINISTRY OF CIVIL AFFAIRS], GUANYU JIAQIANG GU’ER JIUZHU GONGZUO DE YIJIAN (关于加强孤儿救助工作的意见) [JOINT MINISTERIAL OPINION ON STRENGTHENING ORPHAN RELIEF] (2006), *available at* [http://www.gov.cn/zwqk/2006-04/14/content\\_254233.htm](http://www.gov.cn/zwqk/2006-04/14/content_254233.htm) [hereinafter STRENGTHENING ORPHAN RELIEF].

<sup>11</sup> SHANG, SURVIVAL CHILDREN, *supra* note 8, at 10, 26 (reporting that of the orphans receiving state institutional aid, 53,073 receive city-level government support, 124,546 are supported through the *nongcun wubao* system, and 115,637 by the rural poverty household aid scheme). *Nongcun wubao* (literally, “Rural Five Guarantees”) is “a [rural] community-based welfare system that provides the five guarantees of free food, clothes, fuel, health services, and education or funeral arrangements as appropriate for the elderly, sick and disabled as well as for orphans who are not only unable to look after themselves but also have no one legally responsible for their welfare.” Xiaoyuan Shang, *Looking for a Better Way to Care for Children: Cooperation between the State and Civil Society in China*, 76 SOC. SERV. REV. 203, 206 (2002) [hereinafter Shang, *Better Way*]; *see also* CHAK KWAN CHAN ET AL., SOCIAL POLICY IN CHINA: DEVELOPMENT AND WELL-BEING 71-85 (2008) (outlining the development of the *nongcun wubao* program); LINDA WONG, MARGINALIZATION AND SOCIAL WELFARE IN CHINA 132 (1998) (“By 1958 . . . [i]ndigent and unattached persons could get help through the ‘five guarantees’ and communal relief schemes.”).

<sup>12</sup> SHANG, SURVIVAL CHILDREN, *supra* note 8, at 10, 26-27 (2008).

<sup>13</sup> *Id.* at 10.

<sup>14</sup> *Id.*

care and assistance, such children may face a greater risk of neglect than orphans.<sup>15</sup> Beijing Star Village is a non-government home that cares for such children, and Madam Leng, its founder and director, has opened other homes across six provinces that have this mission. She states that “[o]n their own, the children would be left without shelter . . . . They suffer like orphans, but are unqualified to be taken in by a charity,” and estimates that there are several hundred thousand children in similar situations across China, although many of these are cared for by extended family or neighbors.<sup>16</sup>

### III. ABANDONMENT IN CHINA: DISCOURSE AND ATTITUDES

#### A. *Abandonment as a Crime*

Several Chinese statutes list abandonment as a crime, including the Marriage Law,<sup>17</sup> the Adoption Law,<sup>18</sup> the Protection of Minors Law,<sup>19</sup> the

---

<sup>15</sup> Interviews with Madam Leng, Director, Star Village, in Beijing (Aug. 20, 2009 and Aug. 9, 2010); *see also* Shang et al., *Welfare Provision*, *supra* note 4, at 127 (“[T]he children of long-term prisoners are not entitled to any state welfare provision.”).

<sup>16</sup> Interviews with Madam Leng, Director, Star Village, *supra* note 15.

<sup>17</sup> Hunyin Fa (婚姻法) [Marriage Law], art. 3 (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 10, 1980, effective Jan. 1, 1981, amended Apr. 28, 2001) 2001 China Law LEXIS 2155 (“Maltreatment and desertion of one family member by another shall be prohibited.”); *see also id.* art. 21 (“Infanticide by drowning, abandonment of infants and all other acts causing serious harm to infants shall be prohibited.”); *id.* art. 45 (“The person who commits . . . maltreatment or abandonment of a family member, if it constitutes a crime, shall be investigated for criminal responsibility in accordance with the law.”). Other articles specify that in the case of an underage child whose parents are deceased or unable to care for them, the grandparents or siblings are obligated to bring up the child. *Id.* arts. 28-29.

<sup>18</sup> Shouyang Fa (收养法) [Adoption Law], art. 31 (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 29, 1991, amended Nov. 4, 1988) 1998 China Law LEXIS 990 (“Whoever abandons an infant shall be fined by a public security organ; if the act constitutes a crime, the offender shall be investigated for criminal responsibility in accordance with law.”).

<sup>19</sup> Weicheng Nianren Baohu Fa (未成年人保护法) [Law on the Protection of Minors], art. 10 (promulgated by the Standing Comm. Of the People’s Cong., Sept. 4, 1991, revised Dec. 29, 2006, effective June 1, 2007) 2006 China Law LEXIS 9895 (“It is prohibited to commit family violence against minors, or to maltreat or forsake minors. Infanticide and other acts of cruelly killing infants shall be prohibited. No one may discriminate against female or handicapped minors.”).



Protection of the Disabled Law,<sup>20</sup> and the Law Protecting the Rights and Interests of Women and Children.<sup>21</sup> However, prosecution for abandonment under such laws is, in general, rare because of the lack of adequate enforcement mechanisms.<sup>22</sup> Further, sanctions, when imposed, are normally lenient, which arguably renders the legislation largely ineffective.<sup>23</sup> Similarly, Johnson's study found that "most people who abandoned children were not punished, even though most were unable to keep the act a secret," and punishments, when imposed, consisted of fines, sometimes coupled with sterilization for the birth mother.<sup>24</sup> Punishments were almost always administered by birth planning authorities, rather than judicial institutions: "What has been at stake in the government's concern over abandonment is not protecting the interests or legal rights of the children involved but maintaining a firm grip on birth planning and population control."<sup>25</sup> However, several Chinese interviewees told me that one reason babies are commonly abandoned at private orphanages rather than state facilities is out of fear on the part of the abandoning parent of incurring state sanctions. Thus, while criminalization is not necessarily a sufficiently strong deterrent to prevent abandonment, it seems to be contributing to the abandonment of children into the care of non-state orphanages.

---

<sup>20</sup> Canjiren Baozhang Fa (残疾人保障法) [Law on the Protection of Disabled Persons], art. 9 (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 1990, effective May 15, 1991) 1990-1992 FALÜ QUANSHU 1268 (China), *translated in* 14 P.R.C. LAWS & REGS V-03-00-101 ("[M]altreatment and abandoning of disabled persons shall be prohibited.").

<sup>21</sup> Funü Quanyi Baozhang Fa (妇女权益保障法) [Law on the Protection of Rights and Interests of Women], art. 38 (promulgated by the Nat'l People's Cong., Apr. 3, 1992, revised Aug. 28, 2005) 1992 China Law LEXIS 455 ("Women's right of life and health shall be inviolable. It shall be prohibited to drown, abandon or cruelly injure or kill female babies.").

<sup>22</sup> Kay Johnson et al., *Infant Abandonment and Adoption in China*, 24 POPULATION & DEV. REV. 469, 479 (1998) ("Most commentators agree that there have been few prosecutions for the escalating crime of abandonment."); *see also* 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, 169 (1996) (noting that "legal instruments have rarely been utilized to render punishment or remedies" for violations of the rights and interests of children).

<sup>23</sup> Haiyan Li et al., *Beijingshi Gucan Ertong Bei Yiqide Yuanyin Fenxi* (北京市孤残儿童被遗弃的原因分析) [*An Analysis of Reasons Behind the Abandonment of Orphans and Disabled Children in Beijing*], 4(1) BEIJING SHEHUI KEXUE (北京社会科学) [BEIJING SOC. SCI.] 82, 87 (2004).

<sup>24</sup> Johnson et al., *supra* note 22, at 479-480.

<sup>25</sup> *Id.* at 480.

### *B. Demographics of Abandonment*

I have seen a lot of fathers and mothers come not for rehabilitation, but just to know where to leave their children. I am frequently able to convince them that it is not a good idea, but it is quite a common idea. They say, "Oh but it's better the child is taken in by a sister, because they know what to do, I don't know what to do with him". But he is your *child*!<sup>26</sup>

This baby girl was born on – 1992 at 5:30 A.M. and is now 100 days old . . . . She is in good health and has never suffered any illness. Because of the current political situation and heavy pressures that are too difficult to explain, we, who were her parents for these first days, cannot continue taking care of her. We can only hope that in this world there is a kind-hearted person who will care for her. Thank you. In regret and shame, your father and mother.<sup>27</sup>

Statistics on the rate of abandonment in China are scarce. There is arguably a connection between birth control policies and abandonment rates,<sup>28</sup> a connection that has, in some areas, been expressly acknowledged within the MCA.<sup>29</sup> For example, Kay Johnson reports that an investigative report of the

---

<sup>26</sup> Carlotta, an Italian nurse who works with Catholic private orphanages to improve medical standards, speaking with amazement of the numbers of Chinese parents bringing their disabled children to the Catholic rehabilitation center. Interview with Carlotta, nurse, in Guanghui, Hebei (Jul. 10, 2010).

<sup>27</sup> *Note accompanying an infant abandoned in Hunan province, reproduced in* KAY JOHNSON, *WANTING A DAUGHTER, NEEDING A SON: ABANDONMENT, ADOPTION, AND ORPHANAGE CARE IN CHINA* 75 (2004).

<sup>28</sup> *Id.* at 50 (referring to abandoned infant girls as "victims of [birth-planning] policies"); see also Kay Johnson, *The Politics of the Revival of Infant Abandonment in China, with Special Reference to Hunan*, 22 *POPULATION & DEV. R.* 77, 78 (1996) (discussing provincial statistics indicating a nexus between birth control policies and abandonment); Ming Tsui & Lynne Rich, *The Only Child and Educational Opportunity for Girls in Urban China*, 16 *GENDER & SOC.* 74, 74 (2002) (noting the abandonment of baby girls as a negative consequence of China's one-child policy). *Cf.* Therese Hesketh and Wei Xing Zhu, *Health in China: The One Child Family Policy: The Good, the Bad, and the Ugly*, 314 *BRIT. MED. J.* 1685, 1687 (1997) (arguing that abandonment is not attributable to birth planning policies, as it was "common long before the one child policy").

<sup>29</sup> The central MCA is the administrative authority responsible for social and administrative affairs, including welfare programs for marginal groups. MCA bureaus at (continued next page)

Hunan MCA “makes explicit the connection between abandonment and birth-planning campaigns [and] even regards the province’s welfare centers as barometers of birth-planning work in particular areas: when birth-planning work is “‘grasped tightly,’ more foundlings are received in local welfare facilities.”<sup>30</sup> As such, local and central “birth-planning officials have compelling reasons to obscure the problem [of abandonment].”<sup>31</sup> For example, “[d]rawing attention to abandonment is seen as an implicit criticism of birth-planning policies, and birth-planning officials complain that such efforts make their work more difficult.”<sup>32</sup> The incidence of abandonment is further obscured by informal adoptions, which mean that many abandoned children are unaccounted for in official statistics and estimates of orphan numbers.<sup>33</sup>

Julie Jimmerson cites a Chinese study conducted in Guangdong province, which estimates that infant abandonment for the entire province was approximately 10,000 per year between 1987 and 1989.<sup>34</sup> Ninety percent of those abandoned infants were female, and 22.6% were disabled or deformed.<sup>35</sup> Johnson notes a commonly cited figure of 160,000 abandoned children nation-wide,<sup>36</sup> but concedes that “‘hard data’ concerning abandonment are extremely difficult to obtain”.<sup>37</sup> A more recent study claims that more than 10,000 children are abandoned annually in China.<sup>38</sup> The United Nations Committee on the Rights of the Child’s most recent report on China expresses concern about “the significant number of children abandoned on the mainland and the large number of children living in institutions,” and the “lack of precise statistical data” relating to this population.<sup>39</sup>

---

both provincial and local level complement it. *See generally* MINISTRY OF CIVIL AFFAIRS, <http://mca.gov.cn>.

<sup>30</sup> JOHNSON, *supra* note 27, at 57.

<sup>31</sup> *Id.* at 50.

<sup>32</sup> *Id.* at 66.

<sup>33</sup> Johnson et al., *supra* note 22, at 502 (“[T]o a significant though unknown extent, adoptive parents have emerged spontaneously to handle the crisis of abandonment created by population control policies, many of them defying government adoption law and policy to do so.”).

<sup>34</sup> Julie Jimmerson, *Female Infanticide in China: An Examination of Cultural and Legal Norms*, 8 UCLA PAC. BASIN L.J. 47, 73 (1990).

<sup>35</sup> *Id.*

<sup>36</sup> Johnson, *supra* note 28, at 91.

<sup>37</sup> *Id.* at 77.

<sup>38</sup> Xiaoyuan Shang et al., *Discrimination Against Children with Disability in China*, 20 INT’L J. SOC. WELFARE 298, 299 (2011).

<sup>39</sup> Comm. on the Rights of the Child, Rep. on its 40th Sess., Sept. 19-Sept. 20, 2005, U.N. Doc. No. CRC/C/CHN/CO/2 (Nov. 24, 2005).

Rose's life story bears witness to the confluence of disadvantages and socio-economic factors that underlie the problem of abandonment in China today, including gender, disability, and poverty.<sup>40</sup> The issue of infant abandonment in China, and more particularly the impact of birth control policies and cultural constructions of gender on the demographics of de facto "orphans," has received much scholarly and media attention, with the most comprehensive study being that of Johnson, Huang Banghan and Wang Liyao. In *Infant Abandonment and Adoption in China*, Johnson and her colleagues present the results of a 1995–96 study of 392 families who had adopted children and 237 families who had abandoned children.<sup>41</sup> The study introduces China's long history of infanticide and abandonment of female children,<sup>42</sup> including how, despite improved rural living standards since the establishment of the PRC in 1949, "birth planning efforts in the 1980s appeared to revive the twin problems of infanticide and abandonment, particularly the latter."<sup>43</sup> Johnson found that gender, birth order, and the gender composition of siblings were the most important determinants of who was abandoned.<sup>44</sup> The vast majority of the cases of abandoning families were from agricultural—as opposed to urban—*hukou* families,<sup>45</sup> but they did not find a relationship between abandonment and relative impoverishment.

Other studies note the high incidence of disability among children who are residents of state orphanages: for example, Shang, Wu and Li's 2005 study puts the figure at 80.5%.<sup>46</sup> However, it may be that "disability" is at times defined

---

<sup>40</sup> HUMAN RIGHTS WATCH/ASIA, DEATH BY DEFAULT: A POLICY OF FATAL NEGLECT IN CHINA'S STATE ORPHANAGES 14 (1996) ("Rural poverty, prejudice against the disabled, traditional attitudes towards female children, and the pressures generated by the country's stringent population policy all contribute to the problem [of abandonment]."); see also Shang, *Better Way*, *supra* note 11, at 208 (discussing discrimination against women, rural poverty, social changes and family planning policies as factors behind abandonment in China).

<sup>41</sup> Johnson et al., *supra* note 22, at 483, 479.

<sup>42</sup> See also Li et al., *supra* note 23, at 85; Jimmerson, *supra* note 34, at 66 (providing statistics suggesting a disproportionate abandonment or infanticide of female babies). The phenomenon is not, of course, uniquely Chinese.

<sup>43</sup> Johnson et al., *supra* note 22, at 472 (stating that this may be the result of the strict penalties for over-quota births, combined with culturally and economically motivated preferences for healthy, male children).

<sup>44</sup> *Id.* at 475.

<sup>45</sup> For a description of the *hukou*, see *supra* note 9 and accompanying text.

<sup>46</sup> Xiaoyuan Shang, Xiaoming Wu & Haiyan Li, *Shehui Zhengce, Shehui Xinbie yu Zhongguo de Ertong Yiqi Wenti* (社会政策, 社会性别与中国的儿童遗弃问题) [*Social Policy, Social Gender and the Problem of Infant Abandonment in China*], 4 YOUTH STUDIES 1, 1 (2005).

broadly by orphanage and government officials to include, for example, relatively minor conditions such as cleft lips or birthmarks.<sup>47</sup> Johnson notes that the Chinese government, “defensive after attacks by Western human rights groups, often refers only to ‘abandoned disabled children and orphans’ when discussing its orphanage population, implying that healthy children are not abandoned in China today.”<sup>48</sup> Human Rights Watch likewise claims, “[U]nfounded diagnoses of mental retardation and other disorders . . . have helped to disseminate the widespread belief—which appears to be quite inaccurate—that virtually all of China’s abandoned children are physically or mentally handicapped.”<sup>49</sup> In any event, it would be problematic to speculate on the rate of disability among abandoned children based on purported disability incidences among institutionalized orphans because, according to Johnson’s empirical research, “[i]t appears that many healthy abandoned children are found and quickly adopted without ever coming to the attention of the authorities.”<sup>50</sup> Sick and disabled children, on the other hand, are unlikely to be informally adopted in this way, and thus are more likely to be put in state care.<sup>51</sup>

Almost all of the children living in the non-state orphanages and foster homes I visited were either disabled or in need of surgical intervention. Here, “disabled” is used narrowly: the most common conditions observed were cerebral palsy, Down syndrome, blindness, paraplegia, mental retardation, club feet or missing limbs, spina bifida, and congenital heart disorders. The intersection of disability and abandonment was a common thread in my interviews, with most informants focusing on socio-cultural attitudes to disability and a lack of state welfare support for parents of disabled children as primary motivators behind abandonment. This is consistent with studies by Chinese scholars that have emphasized disability as a crucial factor in determining whether to abandon a child.<sup>52</sup> The language often used by Chinese interviewees was that of such children being “thrown away” (*rengdiao*) rather than “abandoned or forsaken” (*yiqi*), which echoes the common colloquial term for social outcasts (including both orphans and

---

<sup>47</sup> Human Rights Watch, *supra* note 40, at 207-208 (discussing official orphanage and government records deeming a large proportion of the institutionalized orphan population disabled, and asserting a “widespread practice of false medical labelling”); *see also* Interview with Will Peters, founder and CEO, China Orphan Relief, in Beijing (Aug. 25, 2009).

<sup>48</sup> Johnson et al., *supra* note 22, at 500.

<sup>49</sup> HUMAN RIGHTS WATCH/ASIA, *supra* note 40, at 5-6.

<sup>50</sup> Johnson et al., *supra* note 22, at 500.

<sup>51</sup> *Id.* The intersection of disability and gender is important here: Johnson’s studies have also found that moderately disabled or critically ill boys were more likely to be adopted quickly than girls in similar conditions. *Id.* at 487.

<sup>52</sup> Shang, Wu & Li, *supra* note 46; Li et al., *supra* note 23, at 82.

disabled people), *feiren* (literally, “garbage people”). Most orphanage workers spoke with sympathy of the plight of rural farmers whose only child is born with grave special needs, and for whom access to state aid is difficult:

Why are they abandoned? The main thing is their bodily defects. Because you know, in the rural villages, if you have a disabled child like this, parents would have to spend a lot of money. And they're not able to go to work. So they have no choice. It's not that they are willing and content to throw their child away, that's not the mentality. It causes them great hardship, but they are compelled by their circumstances. You know very often, we have clothes and money left at our door—the parents know that their children are here, but they do not dare to come and visit, and see their child themselves. In their hearts they must suffer greatly. We have had mothers who came back because of the deep regret they have felt.<sup>53</sup>

Johnson argues that while policy changes may be ineffective in increasing the adoption rate of disabled children, abandonment, a “practice clearly associated with great personal pain and shrouded in shameful collective silence,”<sup>54</sup> could be reduced by supporting parents in their care of such children:

People who abandon disabled children usually say they have no means to treat or raise the child, that the burden is too great. Furthermore the parents usually cannot place disabled children in state institutions without having to bear the financial burden, a burden too onerous for most families. If the state attempted to assume this financial burden for those who cannot afford the cost without undue hardship, these parents could place their children in state institutions but maintain ties with them. In some cases, providing financial support directly to families of disabled children might allow them to remain at home. The development of this sort of welfare policy is expensive, but housing abandoned disabled children is too. It is also destructive to the moral fabric of a society to have ordinary people pushed into abandoning their children.<sup>55</sup>

---

<sup>53</sup> Interview with Sister Qin, founder and manager, Our Lady's Home for Handicapped Children, in Hebei (Jul. 21, 2010).

<sup>54</sup> JOHNSON, *supra* note 27, at 61.

<sup>55</sup> Johnson et al., *supra* note 22, at 504.

This view was repeatedly echoed by the interviewees in the current study. Similarly, in its latest report on China, the UN Committee on the Rights of the Child has recommended that the state “develop effective strategies to prevent the abandonment of children, which include early identification of families and children at risk and the possibility for social workers to intervene and help families directly.”<sup>56</sup>

### *C. Kinship, Fostering and Adoption*

To contextualize China’s orphan welfare system, it is necessary to explore cultural norms related to kinship, the child’s place in Chinese families, and adoption. Traditional Chinese law, predicated on Confucian norms of filial piety and the sanctity of filial bloodlines, prohibited adoption outside of one’s clan,<sup>57</sup> and traditional Chinese texts “argue against adoption.”<sup>58</sup> This view was echoed by some Chinese interviewees in the current study: “It’s harder to imagine taking in a stranger because family is so valued. It’s much easier to take in your sister’s child, or your brother’s child—that’s why adoption rates are very low in China.”<sup>59</sup> Guanghui Home has experienced many problems with using informal foster care arrangements to supplement the provision of care at their central orphanage, due to the way in which such foster children are regarded by their foster families:

They [foster children] are outsiders. They are not part of your family. This can be a problem, I think. Fostership is not considered permanent, because eventually everyone knows the family will get ill, or have family troubles, and the child will be returned [to the orphanage].<sup>60</sup>

---

<sup>56</sup> Comm. on the Rights of the Child, *supra* note 39, art. 51(b).

<sup>57</sup> GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* 87 (1996).

<sup>58</sup> Johnson et al., *supra* note 22, at 481. Cf. Nancy Riley, *American Adoptions of Chinese Girls: The Socio-Political Matrices of Individual Decisions*, 20 WOMEN’S STUD. INT’L. FORUM 87, 93 (1997) (“[M]otherhood and fatherhood—or their lack—play different roles in the identities and constructions of women and men in western society.”); Anne Thurston, *In a Chinese Orphanage*, 277 ATLANTIC MONTHLY 28 (1996), available at <http://www.theatlantic.com/past/docs/issues/96apr/orphan/orphan.htm> (noting the growing number of Americans who are adopting Chinese children).

<sup>59</sup> Interview with Chinese lawyer for New Grace Foundation, a foreign-run foster home outside of Beijing, in Beijing (Jul. 7, 2010).

<sup>60</sup> Interview with Charles Kramer, project manager, Guanghui, in Hebei (Jul. 9 2010); *see also* Interview with Lifei Chen, researcher, Beijing Normal University, in Beijing (Aug. 5, 2009) (referring to the “family idea” as “stubbornly rooted” in China, meaning that “many prefer to adopt children from their relatives and kin”).

However, Johnson argues that certain strains of both Confucianism and modern culture “support adoptive ties outside as well as inside bloodlines and support the adoption of both boys and girls to build family and kinship.”<sup>61</sup> This “competing ideology”<sup>62</sup> is most evident in the notion of *mingling zi* (“mulberry insect children”). This was a term used in imperial China to refer to children adopted outside of the patrilineal bloodline. A folk tale of the time told of wasps “[taking] the young of the mulberry insect and transform[ing] them into young wasps” by tapping on their nest and praying “[b]e like me, be like me.”<sup>63</sup> Thus a “mulberry insect child” was “one who becomes the child of someone other than his or her birthparents,” a metaphor which Johnson remarks is “remarkable in its near total denial of the significance of heredity in shaping the child.”<sup>64</sup> Rather than a denial of Confucian norms, the concept of an adopted child being transformed by adoption is, in fact, premised on a “Confucian emphasis on upbringing and cultivation as the key to character.”<sup>65</sup>

One of Johnson’s key findings was a pattern of informal adoption of abandoned children: “[P]eople expressed few qualms about adopting children of unknown parentage as long as they were basically healthy, that is, without congenital disabilities.”<sup>66</sup> Further, a prevalent assertion among Johnson’s sample of adoptive families was that feelings of love and obligation towards adopted children were at least as strong as those for birth-children, with the “low status and fragility of adoptive ties that seemed to have characterized adoption practices in the past” only reflected in a small number of cases.<sup>67</sup> Importantly, despite almost all adoptions being informal and occurring outside the government adoption channels, the adoptive parents in the sample viewed their new parental rights and duties as “complete and permanent.”<sup>68</sup> While this view contrasts with that of some interviewees in the current study, who spoke of extensive informal foster networks around the private orphanages in which bringing in an unrelated child is viewed differently, for other interviewees, the foster relationship is viewed similarly to the informal adoptive relationship studied by Johnson:

---

<sup>61</sup> JOHNSON, *supra* note 27, at 97-98.

<sup>62</sup> Johnson et al., *supra* note 22, at 483 (quoting ANN BETH WALTNER, GETTING AN HEIR: ADOPTION AND THE CONSTRUCTION OF KINSHIP IN LATE IMPERIAL CHINA 144 (1990)).

<sup>63</sup> *Id.* at 484.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 490.

<sup>67</sup> *Id.* at 495.

<sup>68</sup> *Id.* at 496.



They [local foster families] really love the kids. It's more than just the money. We've got a few families who don't want to do it again, because they fostered a child who was adopted and it just broke their hearts to say goodbye. It's nice in a way; it shows how much love was being poured out.<sup>69</sup>

Johnson concludes that, unlike in other cultures, such as Korea, where negative attitudes towards extra-familial adoption mean there are insufficient adoptive homes for homeless children, popular Chinese culture is supportive of the adoption of unrelated children, with government policy being the biggest obstacle to placing healthy abandoned children in homes.<sup>70</sup> The rules and conditions for domestic adoption are restrictive and in line with the population control objectives of China's One Child Policy. Until recently, the Adoption Law restricted domestic adoption (except in the case of disabled children and "true orphans") to parents who are childless and over the age of thirty-five.<sup>71</sup> In 1998, the Adoption Law was amended to allow "[o]rphans, disabled children, or abandoned infants and children whose parents cannot be ascertained or found and who are under the care of a social welfare institution" to be adopted irrespective of whether the adopter is childless,<sup>72</sup> although the adopter must have reached the age of 30.<sup>73</sup> People who adopt children without permission or in contravention of the Adoption Law (for

---

<sup>69</sup> Interview with founder and director of New Grace Foundation, a foreign-run foster home outside of Beijing, in Beijing municipality (Sept. 17, 2009).

<sup>70</sup> Johnson et al., *supra* note 22, at 503.

<sup>71</sup> Crystal J. Gates, *China's Newly Enacted Intercountry Adoption Law: Friend or Foe?*, 7 IND. J. GLOBAL LEGAL STUD. 369, 389 n.151 (1999) (noting that under the pre-1998 Adoption Law, "couples with children could only adopt orphans or children with special needs"); Robert Gordon, *The New Chinese Export: Orphaned Children – An Overview of Adopting Children from China*, 10 TRANSNAT'L LAW 121, 135 (1997) (noting, as of 1997, the requirement that parents wishing to adopt an abandoned child from China be age 35 or older, childless, and adopting only one child).

<sup>72</sup> Shouyang Fa (收养法) [Adoption Law], art. 8 (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1991, amended Nov. 4, 1988) 1998 China Law LEXIS 990; *see also* JOHNSON, *supra* note 27, at 69 ("Despite top-level support to improve conditions for 'orphans,' this major obstacle to bettering the care of foundlings [restrictive conditions for their adoption] was not addressed for years out of concern that changes would impinge on higher-priority family-planning efforts to bolster the 'one-child policy' by strictly limiting adoption to childless couples.").

<sup>73</sup> Adoption Law, *supra* note 72, art. 6 (stipulating that adopters shall have reached the age of 30).

example, people who already have a child), receive the same birth-planning penalties as if they had given birth to them.<sup>74</sup>

Johnson's study does not delve deeply into whether similar patterns of norms and cultural beliefs hold true for disabled children, given that most of the adopted children in her sample were healthy. The anecdotal evidence from the current study, which dealt primarily with non-governmental homes caring for disabled or severely sick children, was that informal adoption is rarely an avenue for non-healthy children, given the economic and cultural factors that contributed to their abandonment in the first place. Zhou Xun, in a comprehensive study on the lack of discourse on disability in modern China, notes that the low public visibility of the disabled "is in itself an indication of social prejudice."<sup>75</sup> Many Chinese interviewees with years of experience working with disabled children spoke of the ridicule, shame, and economic hardship experienced by families with special-needs children,<sup>76</sup> all of which reduce an abandoned disabled child's chances of finding a new home, either informally or through legal adoption channels. Thus, disability is a key indicator of both abandonment and institutionalization, with abandoned disabled children ending up, for the most part, in state institutions with high mortality rates or with grassroots private orphanages run without state support.

#### *D. Status of the (Chinese) Child*

*"Zhe shi zhongguo, haizi shi shehui de."*  
"This is China, children belong to society."<sup>77</sup>

They take an instrumental view of the value of a person. From a materialistic, family-centered social view, they lack this Christian perspective—that a person can have value beyond what he can do or has. You see this problem in families—if you are not male, or

---

<sup>74</sup> JOHNSON, *supra* note 27, at 164-67.

<sup>75</sup> Zhou Xun, *The Discourse of Disability in Modern China*, 36 PATTERNS OF PREJUDICE 105, 105 (2002).

<sup>76</sup> Interviews with Sister Qin, *supra* note 53; Interviews with Madam Leng, *supra* note 15; Interview with Deborah Moran, volunteer coordinator, Yellow Leaf State Welfare Institution, in Jiangsu (Oct. 9 2009); *see also id.* at 105.

<sup>77</sup> Interview with Lydia, Chinese manager, Friendship Outreach, a foreign-run foster home near Beijing, in Beijing municipality (Jul. 29, 2010).

not 100% normal, the family goes through a very tough period—they either fail and break up [the family], or reevaluate their life.<sup>78</sup>

Also relevant to a deeper understanding of formal and informal orphan-related policies are Chinese conceptions of human rights and equality, and how children are viewed therein. China engages extensively with the international human rights framework,<sup>79</sup> which is predicated on the rhetoric of every person's intrinsic, unassailable and equal right to dignity.<sup>80</sup> However, the Chinese human rights discourse remains bound up in a local culture and tradition which tends to view children as valuable, first and foremost, for their instrumental role in the family and social hierarchy, rather than viewing rights as contingent on one's intrinsic worth as an individual prior to society. Given the emphasis of both Confucian and Communist ideologies on duty to society and the goal of social harmony, it is unsurprising that the individualistic/atomistic framework of Western human rights discourse is not the framework underlying rights conceptualizations in China. The individual is, rather, conceptually embedded in, rather than prior to, society, with duties in turn emphasized prior to rights. Frederic Wakeman writes, "[M]ost Chinese citizens appear to conceive of social existence mainly in terms of obligation and interdependence rather than rights and responsibilities."<sup>81</sup> When one regards the "most basic level of Confucian morality," that is, the strictly hierarchical relationships between father and son, husband and wife, and older and younger siblings,<sup>82</sup> it is clear that equality of children with other members of

---

<sup>78</sup> Interview with Charles Kramer, project manager, Guanghui, in Hebei (Jul. 9 2010) (discussing his view of the Chinese basis of human rights and value).

<sup>79</sup> See, e.g., *U.S. – China Joint Statement*, OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE (Jan. 19, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/19/us-china-joint-statement> ("The United States and China reiterated their commitment to the promotion and protection of human rights, even as they continue to have significant differences on these issues."); see also *Ratification of International Human Rights Treaties – China*, U. MINN. HUM. RTS. LIBR., <http://www1.umn.edu/humanrts/research/ratification-china.html> (last accessed Apr. 5, 2013) (noting the extensive list of international human rights treaties signed and ratified by China).

<sup>80</sup> See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), pmbl. (Dec. 10, 1948) (referring, inter alia, to the "inherent dignity and [ ] the equal and inalienable rights of all members of the human family").

<sup>81</sup> Frederic Wakeman, Jr., *The Civil Society and Public Sphere Debate: Western Reflections on Chinese Political Culture*, 19 MOD. CHINA 108, 132-33 (1993); see also RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 43 (2002) ("Rights were typically conceived of as grants from the state rather than natural rights which individuals possessed by reason of birth.").

<sup>82</sup> HENRIETTA HARRISON, CHINA: INVENTING THE NATION 98, 172 (2001).

society is not a feature of the Confucian moral order. Rather, children are valued, above all, for their potential to fulfill familial and concomitantly social duties.

This duty-based human rights ideology impacts the treatment of disabled children in modern Chinese society. Studies focusing on gender as a cause of abandonment often point to China's patrilineal culture, in which women move from their descent line into that of their husband after marriage and, as a result, economically "females were seen as 'temporary' children who required a far greater investment of scarce resources than they would ever be able to return to their parents."<sup>83</sup> Analogous to this gender example is the disability example, in which a child's right to care and concern is outweighed by a discourse which emphasizes that child's inability to carry out his or her duties to family and society. This discourse is influenced not only by cultural attitudes towards girls and disabled children, but also by future social security needs of parents in a society, which still largely relies on child-provided care of the elderly—the phrase "filial piety" (*yang'er fanglao*) translates literally into "raising sons to prevent difficulties in old age."<sup>84</sup> As Biying Hu and Judith Szente write, "[i]t seems that the national emphasis on the Confucian acceptance of one's social role in a hierarchical society has placed people with disabilities on the bottom of that social hierarchy."<sup>85</sup>

Eleanor Holroyd explores the influence of Confucian cultural influences on care-giving obligations towards children with disabilities, noting, "The primary Confucian guidelines are a duty-bound set of obligations of what a 'right and proper' person should and should not do. Being proper is central to the social role within Confucian-based Chinese society."<sup>86</sup> Children, including disabled children, who are seen as unable to carry out their "right and proper" obligations are considered disturbances to family and, therefore, social harmony:

---

<sup>83</sup> Jimmerson, *supra* note 34, at 52; *see also* Johnson et al., *supra* note 22, at 475 ("The main problem with daughters is that they 'belong to other people.'").

<sup>84</sup> Leslie K. Wang, *Children on the Margins: The Global Politics of Orphanage Care in Contemporary China 19 (2010)* (unpublished D. Phil dissertation, University of California, Berkeley) (on file with the University of Pennsylvania East Asia Law Review).

<sup>85</sup> Biying Hu & Judith Szente, *The Care and Education of Orphan Children with Disabilities in China: Progress and Remaining Challenges*, 86 CHILDHOOD EDUC. 78, 79 (2009); *see also* Meng Deng et al., *The Development of Special Education in China: A Sociocultural Review*, 22 REMEDIAL & SPECIAL EDUC. 288, 289 (2001) (discussing the social status of people with disabilities in Confucianism); HUMAN RIGHTS WATCH/ASIA, *supra* note 40, at 6 ("Official press reports indicate that the Chinese government may also have given serious consideration to allowing euthanasia for handicapped children, but has declined to do so for fear of the international repercussions.").

<sup>86</sup> Eleanor Holroyd, *Chinese Cultural Influences on Parental Caregiving Obligations Toward Children With Disabilities*, 13 QUALITATIVE HEALTH RES. 4, 4 (2003).

[A]lthough a Confucian notion of a right and proper person is associated with taking a moral place in the world, it is also about how an imperfect or diseased body or mind is seen as incomplete and without moral standing. This has the effect of challenging foundational models of self and personhood and their translation into ancestry, on which obligations rest. These violations are most dramatically manifest in children with a handicap.<sup>87</sup>

Holroyd goes on to conclude:

Chinese children who have disabilities represent disruptions to the flow of exchanges, in that giving good things to ill children might not make life meaningful in the usual cultural sense understood by a Chinese parent. Thus the ‘natural’ progression of patterns of reciprocity that flow over into ancestry and birth is neither immediate, in the forms of gratitude, nor generalized, in the form of delayed care, with debts never able to be reclaimed.<sup>88</sup>

Matthew Kohrman moves beyond this instrumental connection between disability and familial duty to describe a deeper, more intrinsic nexus between disability and moral duty in traditional Chinese discourse.<sup>89</sup> In his ethnographic study of disability in modern China, he argues that the emphasis placed on visible difference in modern China “can no doubt be linked to the emphasis that China’s classical canon gives to the preservation of the human form”<sup>90</sup>:

Possibly the most oft-invoked example, in this regard, one which has served as a moral axiom for centuries, is found in the *Book of Filial Piety*. There, Confucius is described as teaching that all children have the filial duty to preserve the body given them by their ancestors and to not allow even their hair or skin to be injured.<sup>91</sup>

---

<sup>87</sup> *Id.* at 10–11.

<sup>88</sup> *Id.* at 18.

<sup>89</sup> MATTHEW KOHRMAN, BODIES OF DIFFERENCE: EXPERIENCES OF DISABILITY AND INSTITUTIONAL ADVOCACY IN THE MAKING OF MODERN CHINA 62 (2005).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (warning Chinese scholars against a simplistic vision of “‘Chinese culture’ as equivalent to statements attributed to a famous sage,” which should be borne in mind here and throughout).

Negative cultural beliefs about, and attitudes towards, disability remain evident in aspects of modern Chinese society—for example, in eugenics campaigns “stressing the need for ‘fewer but better’ children,”<sup>92</sup> and in the Law on Maternal and Infant Health Care which requires doctors to discuss the termination of fetuses found to have genetic diseases or defects of a “serious nature.”<sup>93</sup>

Leslie Wang argues that modern Chinese political discourse, with its emphasis on the overall mental, moral, and physical “quality” (*suzhi*) of the population, has resulted in “lines of stratification being drawn among offspring,”<sup>94</sup> with healthy children considered more worthy of state and parental investment. Sick or disabled children living in orphanages are considered “part of the ‘constitutive outside’ of state-sanctioned Chinese modernity, helping to define the center of social belonging through the qualities that they are perceived to lack.”<sup>95</sup> On the other hand, social and cultural attitudes towards, and meanings of, “disability” continue to evolve, and it is overly simplistic to characterize modern conceptions of disabled children as denigrative: “[c]anji [disability/disabled] has been emerging and metamorphosing in China as a social, political, and somatic sphere of existence in recent decades.”<sup>96</sup> While it is neither possible nor wise to speculate on the extent to which duty-based conceptualizations of children’s rights has impacted abandonment and the care of orphans in China today, an awareness of the different starting point to human rights discussions is necessary to consider the system of orphan care more generally.

#### IV. POLICY ON CARE OF ORPHANS

##### *A. Government Departments*

Before examining the various statutory instruments and policies relevant to orphanages, this article will outline the government structure and introduce the various state authorities that have an interest in this area of regulation. Party and government structures are organized in a roughly symmetrical fashion, under the National Party Congress and the National People’s Congress (NPC) respectively,

---

<sup>92</sup> JOHNSON, *supra* note 27, at 27.

<sup>93</sup> Muying Baojian Fa (母婴保健法) [Law on Maternal and Infant Health Care], art. 18 (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 27, 1994, effective June 1, 1995) 1994 China Law LEXIS 1118.

<sup>94</sup> Wang, *supra* note 84, at 1.

<sup>95</sup> *Id.* at 6.

<sup>96</sup> KOHRMAN, *supra* note 89, at xi.

with the NPC being China's "putative legislature."<sup>97</sup> Frequently, legislative functions and policy deliberations occur at the NPC Standing Committee and the State Council (*guowuyuan*), the chief administrative authority of the People's Republic of China (PRC), levels. The Ministry of Civil Affairs (*minzhengbu*) of the PRC is subordinate to the State Council, and is responsible for "social and administrative affairs,"<sup>98</sup> including welfare programs for marginal groups, and is complemented by MCA bureaus at both the provincial and local level. In addition to the regulations and policies promulgated by the central MCA, provincial and local MCA bureaus issue their own implementing regulations, which means that the applicable regulatory framework may differ depending on one's location. Linda Wong's study of the MCA, *Marginalization and Social Welfare in China*, provides an overview of the issues confronting the MCA in fulfilling its goals, the first of which is role ambiguity: "Its impossibly wide range of duties, their disparate nature, and lack of coherence are not conducive to the emergence of agency goals and mission."<sup>99</sup> She further argues that the local agency structure is inadequate because at the bureaucracy's weakest point, the township and village levels, "where the majority of the rural masses are administered . . . the whole range of civil affairs duty is usually handled by one to two civil affairs assistants," a manning structure Wong characterizes as "woefully deficient."<sup>100</sup> Furthermore, MCA bureaus face financial struggles that are "unbroken tales in the long saga of a half-starved organization."<sup>101</sup>

Within the MCA bureaucracy are several departments and sub-bureaus, the most relevant of which are the China Center of Adoption Affairs,<sup>102</sup> the exclusive governmental adoption agency, and the Social Welfare and Charity Promotion Division,<sup>103</sup> which oversees the Child Welfare Agency.<sup>104</sup> In addition to its responsibility for foreign adoption issues, the Center of Adoption Affairs oversees state orphanages. The Social Welfare and Charity Promotion Division is mandated to develop social welfare policies and standards for the protection of orphans, disabled children and other special groups.<sup>105</sup>

---

<sup>97</sup> KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 176 (2d ed.1992).

<sup>98</sup> MINISTRY OF CIVIL AFFAIRS (Sept. 15 2009), <http://www.mca.gov.cn>.

<sup>99</sup> WONG, *supra* note 11, at 153.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Zhongguo shouyang zhongxin* (中国收养中心).

<sup>103</sup> *Shehui fuli he cishan shiye cujin si* (社会福利和慈善事业促进司).

<sup>104</sup> *Ertong fuli chu* (儿童福利处).

<sup>105</sup> *Id.*

*B. Chinese Orphanages: The State Monopoly and Privately-filled Gaps*

Dr. Shang outlines the development of orphanages in China.<sup>106</sup> Before 1949, orphanages across China were established by a variety of operators, including local governments, individuals, churches, and charities. After the PRC was founded in 1949, a transitional period ensued, during which some orphanages were closed and some were “taken over by the new government and reorganized as state orphanages.”<sup>107</sup> Today, “the government continues to monopolize the operation of children’s welfare homes,” and the state system of orphan care is “characterized by its rural-urban duality.”<sup>108</sup> All orphaned and abandoned children in China’s urban areas are eligible to be cared for by state orphanages, while those in rural areas and children of long-term prisoners are not entitled to state welfare.<sup>109</sup> Further, due to increasing abandonment rates that are not matched by a concomitant expansion of state orphanage capacity, existing orphanages are overwhelmed and face heavy pressure in providing adequate care for urban orphans.<sup>110</sup> As a result, and because the government has a monopoly on the operation of children’s welfare homes, the vast majority of orphans (that is, those residing in rural areas) are looked after either by relatives, the customary practice of nongcun wubao, or in unregistered and unrecognized private orphanages.<sup>111</sup>

Johnson’s study on abandonment and adoption show that a large number of orphans and foundlings are being informally adopted without registration (and, therefore, usually without hukou),<sup>112</sup> a phenomenon that is closely related to the emergence of private and informal orphanages. As Human Rights Watch notes:

[T]he whereabouts of the great majority of China’s orphans [is] still [] a complete mystery, leaving crucial questions about the country’s child welfare system unanswered and suggesting that the real scope of the catastrophe that has befallen China’s

---

<sup>106</sup> Shang, *Better Way*, *supra* note 11, at 205-06.

<sup>107</sup> *Id.* at 205.

<sup>108</sup> *Id.*

<sup>109</sup> Shang et al., *Welfare Provision*, *supra* note 4, at 127.

<sup>110</sup> Shang, *Better Way*, *supra* note 11, at 208.

<sup>111</sup> *Id.* at 205-206; Shang, *Welfare Provision*, *supra* note 4, 124.

<sup>112</sup> Johnson et al., *supra* note 22, at 496-8 (on “Negative consequences of state laws and policies on abandoned adopted children,” noting difficulties faced by adoptive parents of abandoned children in registering those adoptions and attaining household registration or *hukou* for their adopted children, but noting that it was sometimes possible, depending on one’s location, to buy a *hukou* if one can afford it).



unwanted children may be far larger than the evidence . . . documents.<sup>113</sup>

Dr. Shang's survey found 66,000 of an estimated 573,000 orphans are in state welfare institutes.<sup>114</sup> The most recent government report puts the figure at 87,000;<sup>115</sup> however, only 70% of those children are in specialized child welfare institutes (ertong fuliyuan; as of 2011, there were 397 child welfare institutes in China).<sup>116</sup> The remaining 30% reside alongside disabled, elderly, and mentally disturbed adults in the more general social welfare institutes (shehui fuliyuan), but it is unclear what proportion of these children are themselves mentally or physically unwell.<sup>117</sup>

Orphanages and foster homes run by individuals and churches are an alternative, parallel, and often unacknowledged system of care to the state-operated welfare institutions. Although a small proportion of China's orphans and foundlings are cared for in state orphanages, there are no official statistics or estimates on the number of non-government orphanages in existence in China today, by whom they are run, or for how many children they care. Yet, these private orphanages are anecdotally prolific, and form an important aspect of orphan care to which little attention has been paid in existing scholarship.<sup>118</sup>

<sup>113</sup> HUMAN RIGHTS WATCH/ASIA, *supra* note 40, at 3.

<sup>114</sup> SHANG, SURVIVAL CHILDREN, *supra* note 8, at 27.

<sup>115</sup> Shehui Fuwuye Tongji Jibao (社会服务业统计季报) [Social Services Statistics Quarterly Report], 2012 Nian 4 Jidu (2012 年 4 季度) [2012 Fourth Quarter Statistics], MINISTRY OF CIVIL AFFAIRS (Jan. 28, 2013), available at <http://files2.mca.gov.cn/cws/201301/20130128174655179.htm> (listing the number of central state supported orphans as 87,000).

<sup>116</sup> 2011 Nian Shehui Fuwu Fazhan Tongji Gongbao (2011 年社会服务发展统计公报) [2011 Statistical Bulletin], MINISTRY OF CIVIL AFFAIRS (Jun. 21, 2012, 9:20 AM), available at <http://cws.mca.gov.cn/article/tjbg/201210/20121000362598.shtml> (reporting a total of 60,000 child welfare institution beds). The reliability of these government statistics is uncertain, in light of recent scandals wherein purported government orphanages have been found not, in fact, to exist. Tania Branigan, *Chinese Officials Ask to Borrow Orphans to Hide Child Welfare Failings*, GUARDIAN (Jan. 15, 2013, 12:21 PM), <http://www.guardian.co.uk/world/2013/jan/15/chinese-officials-borrow-orphans-failings> (reporting on a local government orphanage which was being used for office space, despite receiving state funding).

<sup>117</sup> HUMAN RIGHTS WATCH/ASIA, *supra* note 40, at 120 (“[T]he ‘segregated management’ orphan-care policy which the government has claimed to pursue since 1956 . . . has only rarely [been] achieved in practice.”).

<sup>118</sup> See also Anna Jane High, *Grassroots NGO Regulation and China's Local Legal Culture*, 9 SOCIO-LEGAL REV. (2013) (forthcoming) (discussing the state-society

(continued next page)

### *C. Orphanage Law and Policy*

When Alain and Brigitte established their foster home for blind and visually impaired orphans, they named it Good News Foster Home.<sup>119</sup> However, presumably uneasy at the attention that this name drew to Alain's vision and mission, various Chinese officials and authorities discouraged them from using the phrase "foster home" because "it's illegal for foreigners to foster Chinese children."<sup>120</sup> I asked Alain to explain this emphasis on appearances and names rather than on the actual work of Good News, of which authorities were already aware, and had allowed for many years:

When we speak to officials, they don't give you the feeling that you're doing something illegal—actually they're pretty encouraging at that central level. They're quite visionary people at the top. But they tell us we need to speak to the guy downstairs, and that's where the problems start. The middle guys are not in it for the kids. So the top guys tell us to take it slowly, that it takes time. They don't want to tell us what to do—they wouldn't tell us to do something illegal—rather they keep it blurry. It's not clear. They don't tell you to leave, but they don't tell you how to stay.

Good News' experience is typical of the private orphanages and foster homes interviewed, which find themselves working in a field the legality of which is ambiguous at best. Dr. Shang writes that, based on an interview with an official from the MCA, central policy stipulates that only state-run welfare institutions may lawfully care for orphaned and abandoned children in China.<sup>121</sup> However, making such a broad statement is problematic: "government" is a cumbersome entity in China that does not always present a unified front. Certainly, both the Chinese nationals and foreigners running the private orphanages interviewed stated that local and provincial level officials frequently refer to their operations as "illegal" or "not allowed," usually on the basis of an assertion that only the government can care for Chinese orphans. The one state orphanage director who

---

interaction between Chinese private orphanages and local authorities, and attendant local understandings of law and regulation).

<sup>119</sup> Interview with Alain & Brigitte, founders and directors of Good News Training Center (formerly Good News Foster Home), in Beijing (Aug. 20, 2010).

<sup>120</sup> *Id.*

<sup>121</sup> Shang et al., *Welfare Provision*, *supra* note 4, at 125.

was willing to be interviewed denied knowledge of any foreign-run foster homes, despite the fact that other foster homes interviewed were caring for dozens of children from his facility.<sup>122</sup>

The political engagement and sensitivity of both abandonment and child welfare are key issues in any discussion of orphanage policies. Shang argues that, due to the government's monopoly on residential orphan care, maintenance and development of the state's orphanage sector was dependent on government appropriation, which was in turn dependent on national financial and political considerations rather than the interests of orphans.<sup>123</sup> She explains:

During this time, the situation of orphans became a kind of political symbol: either it was regarded as a manifestation of so-called socialist advantages or as something that brought shame to the socialist society when things were going wrong. The interests of children themselves, however, were hidden from view by political considerations. Efforts to seek other financial resources, such as appealing to society for donations, were implicitly or explicitly banned for political reasons.<sup>124</sup>

The issue of state versus non-state orphan care is understandably a politically sensitive one, and the state is especially sensitive about foreign and church-affiliated service providers. Consequently, opacity, ambiguity, and inconsistency in relevant government policies and laws are expected and evident.

In central-level statutory and subordinate instruments, there is one reference to the care of orphans under Article 43 of the Law on the Protection of Minors,<sup>125</sup> which provides, *inter alia*, that orphaned and abandoned children shall be accepted by and cared for by orphanages established by MCA departments.<sup>126</sup> This is the only on-point legislative guidance, and it can be read as a duty exclusively bestowed upon the government. However, there are several policy-type instruments that exist in relation to orphan welfare, which, given the blurred

---

<sup>122</sup> Interview with Hedong City State Welfare Institute, in Shandong (Sep. 21, 2009).

<sup>123</sup> Shang, *Better Way*, *supra* note 11, at 206.

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

<sup>125</sup> Weicheng Nianren Baohu Fa (未成年人保护法) [Law on the Protection of Minors], art. 43 (promulgated by the Standing Comm. Of the People's Cong., Sept. 4, 1991, revised Dec. 29, 2006, effective June 1, 2007) 2006 China Law LEXIS 9895.

<sup>126</sup> The Law on the Protection of Minors also includes a general and idealized duty on the state and other citizens to protect minors. *Id.* art. 6 ("The State, society, schools and families shall teach and help minors to safeguard their legitimate rights and interests, enhance their consciousness and capacities of protecting themselves, and enhance their sense of social responsibility.").

boundaries in China between legislation (“hard” law) and policy (“soft” law), may bear significantly on the “legal” landscape. For example, the more recent Joint Ministerial Opinion on Strengthening Orphan Relief appears more open to collaborative efforts with civil society with respect to the care of orphans.<sup>127</sup> The Opinion is one of several policy documents that were issued in the flurry of bureaucratic activity that occurred between 2006 and 2007 in conjunction with the Blue Sky Implementation Plan.<sup>128</sup> Part 2.3 of the Opinion stipulates that orphans in the guardianship of the MCA may be placed in community orphan welfare homes, orphan schools, SOS Children’s Villages,<sup>129</sup> and other such organizations. In addition, the Opinion refers to the mobilization of social forces to assist orphans, and the need to encourage civil society and other social forces to support participation in child welfare and orphan assistance projects.<sup>130</sup> The express reference to SOS Children’s Villages by name, and the absence of any reference to other foreign foster homes, may be interpreted as meaning the Opinion only contemplates allowing this particular foreign-led effort to play a role in the sector.

More directly on point are the Interim Measures for the Management of Fostering Care by Families (Fostering Care Measures),<sup>131</sup> and the Interim Measures for the Administration of Social Welfare Institutions.<sup>132</sup> The former allow for orphaned children to be placed with foster families,<sup>133</sup> coordinated by

<sup>127</sup> STRENGTHENING ORPHAN RELIEF, *supra* note 10.

<sup>128</sup> See MINZHENGBU YINFA (民政部) [MINISTRY OF CIVIL AFFAIRS], MINZHENGBU YINFA 《“ERTONG FULI JIGOU JIANSHE LANTIAN JIHUA” SHISHI FANG’AN》 (民政部印发《“儿童福利机构建设蓝天计划”实施方案》) [CHILD WELFARE INSTITUTE BLUE SKY CONSTRUCTION PLAN IMPLEMENTATION PROGRAM] (Feb. 1, 2007), <http://fss.mca.gov.cn/article/gzdt/200711/20071100003905.shtml> (explaining the Blue Sky Implementation Plan); *see also infra* note 172.

<sup>129</sup> SOS Children’s Villages are set up under a long-term MCA project, in cooperation with an Austrian charity that establishes privately funded foster homes. For more information on SOS Children’s Villages, *see About our Charity*, SOS CHILDREN, <http://www.soschildrensvillages.org.uk/about-our-charity>.

<sup>130</sup> STRENGTHENING ORPHAN RELIEF, *supra* note 10, at 1, 5.

<sup>131</sup> Jiating Jiyang Guanli Zanxing Banfa (家庭寄养管理暂行办法) [Interim Measures for the Management of Fostering Care by Families], (adopted by the Ministry of Civil Affairs, Oct. 27, 2003, effective Jan. 1, 2004), *available at* <http://sxxincheng.mca.gov.cn/article/zcwj/201303/20130300430773.shtml>.

<sup>132</sup> Shehui Fuli Jigou Guanli Zanxing Banfa (社会福利机构管理暂行办法) [Interim Measures for the Administration of Social Welfare Institutions], art. 11 (adopted by the Ministry of Civil Affairs, Dec. 30, 1999), *available at* <http://sxxincheng.mca.gov.cn/article/zcwj/201303/20130300431147.shtml>.

<sup>133</sup> For a discussion of the increased focus of MCA policy on foster families to supplement institutional care, *see Shang, Better Way*, *supra* note 11.

provincial-level MCA bureaus in conjunction with approved social welfare institutions (*shehui fuli jigou*) and child welfare institutions (*ertong fuli jigou*). However, the Fostering Care Measures do not appear to contemplate moving children from state orphanages to private foster homes because they only refer to foster families; further, while foreigners are not *prima facie* precluded from fostering in their individual capacity, anecdotally this has not met with state approval.<sup>134</sup> A number of the private orphanages interviewed coordinate foster family programs under which healthier children are sent to live with preapproved local Chinese families. Chapter IV of the Fostering Care Measures refers to “social welfare institutions engaged in foster family work”;<sup>135</sup> however, county level or higher MCA bureaus must approve such institutions.

The Interim Measures for the Administration of Social Welfare Institutions (Social Welfare Measures) were promulgated by the central MCA in 1999 to “strengthen the management of social welfare organizations and thereby promote the healthy development of social welfare.”<sup>136</sup> “Social welfare organization” is defined to include groups organized by state welfare agencies, social organizations, and individuals that provide maintenance, rehabilitation and trustee-type services to orphans and abandoned children.<sup>137</sup> In theory, the Social Welfare Measures thus seem to allow private homes to care for children. However, to be lawfully established under these Measures, all homes (whether run by state welfare agencies, social organizations or individuals) must be granted a Social Welfare Institution Certificate of Approval in accordance with the Measures.<sup>138</sup> Importantly, the Social Welfare Measures reference foreigners applying for permission to establish such an organization.<sup>139</sup> These Measures also contain provisions relating to internal governance and MCA supervision of social welfare institutions,<sup>140</sup> and require local and provincial level governments to set and implement standards.<sup>141</sup> Of the private orphanages interviewed, only one was aware of any legislative or policy instruments allowing NGOs to obtain official

---

<sup>134</sup> Three of the interviewees, mainly volunteer coordinators working with state orphanages, have been able, after a number of years developing personal relationships with state orphanage directors, to foster babies or children in extenuating circumstances. These arrangements are always unofficial and “off the books.” Indeed this is usually how the larger, established foreign-run private orphanages begin operations (see below).

<sup>135</sup> Interim Measures for the Administration of Social Welfare Institutions, *supra* note 132, art. 11.

<sup>136</sup> *Id.* art. 1.

<sup>137</sup> *Id.* art. 2.

<sup>138</sup> *Id.* art. 11.

<sup>139</sup> *Id.* art. 8.

<sup>140</sup> *Id.* art. 5.

<sup>141</sup> *Id.* art. 9, s. 3.

permission to care for orphans; however, as the founder of Red Thread pointed out, the Social Welfare Measures are of little use for start-up foster homes because they require an applicant to demonstrate adequate funding, facilities, and premises, which impoverished, domestic-run, private orphanages are unable to do.<sup>142</sup> Further, because these Measures prohibit welfare organizations from operating without an approval certificate,<sup>143</sup> it may be risky for long-established, foreign-run, private orphanages to seek approval following years of unauthorized operations.

The state orphanage director interviewed did allude to a government policy enabling private citizens to apply for government permission to establish foster homes—most likely a reference to the Interim Measures for the Administration of Social Welfare Institutions. However, he was also clear that the government looks unfavorably on such enterprises, and the practice of caring for orphans outside the state orphanage system is not encouraged, at least in his province. In any case, the language in the Measures seems permissive rather than mandatory – there is no duty, on the MCA to approve applications for a Social Welfare Institution Certificate of Approval that meet the criteria.

The Adoption Law<sup>144</sup> and the Protection of Disabled Persons Law<sup>145</sup> are peripherally relevant to the care of orphans. Article 5 of the Adoption Law provides that the following citizens or institutions are entitled to place children into adoption: guardians of orphans, social welfare institutions, and parents who are unable to rear their children due to unusual circumstances.<sup>146</sup> “Social welfare institution” (*shehui fuli jigou*) is not defined, but generally is used by the MCA to refer only to state-run institutions.<sup>147</sup> Article 17 provides that relatives or friends of their parents may support orphans or children whose parents are unable to rear

---

<sup>142</sup> *Id.* art. 8; *see also* interview with retired MCA official, in Beijing (Aug. 12, 2010) (stating that private citizens can get approval to run an orphanage, but that the process is costly).

<sup>143</sup> *Shehui Fuli Jigou Guanli Zanxing Banfa* (社会福利机构管理暂行办法) [Interim Measures for the Administration of Social Welfare Institutions] art. 28 (adopted by the Ministry of Civil Affairs, Dec. 30, 1999).

<sup>144</sup> *Shouyang Fa* (收养法) [Adoption Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1991, amended Nov. 4, 1988) 1998 China Law LEXIS 990.

<sup>145</sup> *Canjiren Baozhang Fa* (残疾人保障法) [Law on the Protection of Disabled Persons] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 1990, effective May 15, 1991) 1990-1992 FALŪ QUANSHU 1268 (China), *translated in* 14 P.R.C. LAWS & REGS V-03-00-101 (“Maltreatment and abandoning of disabled persons shall be prohibited.”).

<sup>146</sup> Adoption Law, *supra* note 144, art. 5.

<sup>147</sup> *See, e.g.,* Social Services Statistics Quarterly Report, *supra* note 115, and 2011 Statistical Bulletin, *supra* note 116.

them, and the adoptive relationship shall not apply in this case.<sup>148</sup> Article 21 provides that foreigners may adopt a child in China only in accordance with the Adoption Law of the PRC.<sup>149</sup> Article 7 of the Protection of Disabled Persons Law provides that grassroots-level organizations (inter alia) “shall do their work for the disabled well, as is within their responsibility.”<sup>150</sup> Article 9 requires legal fosterers of disabled persons to fulfill their duties toward their charges.<sup>151</sup> Article 43 provides that governments at various levels and the society shall establish welfare centers and other placement and foster institutions for disabled persons.<sup>152</sup>

## V. STATE ORPHANAGES

In 1995, Britain’s Channel 4 broadcast a documentary on China’s orphanages titled *The Dying Rooms: China’s Darkest Secret*, which was shortly followed by publication of Human Rights Watch/Asia’s investigation, *Death by Default: A Policy of Fatal Neglect in China’s State Orphanages*.<sup>153</sup> The report was a stunning, albeit arguably sensationalized, indictment of the conditions in state orphanages across China, including what was, at the time, touted as the country’s model orphanage—the Shanghai Children’s Welfare Institute (CWI). Johnson states that orphanages are disadvantaged places in general, and that institutionalized care for infants is linked with high mortality rates in many countries.<sup>154</sup> However, the Human Rights Watch report went further. The report was based on documented evidence of systematic abuse in the Shanghai CWI and the 1989-1990 orphanage mortality rates published by Chinese MCA authorities for several provinces, which were between fifty and eighty percent.<sup>155</sup> It concludes that a “pattern of cruelty, abuse, and malign neglect [] has dominated child welfare work in China since the early 1950s, and [] now constitutes one of the country’s gravest human rights problems.”<sup>156</sup>

Based largely on official MCA documents, as well as reports from two whistleblowers (a former doctor and a former resident of the Shanghai CWI), *Death By Default* calculates that, for a newly admitted orphan in China’s welfare institutions nationwide, the likelihood of survival beyond one year was less than

---

<sup>148</sup> Adoption Law, *supra* note 144, art. 17.

<sup>149</sup> *Id.* art. 21.

<sup>150</sup> Law on the Protection of Disabled Persons, *supra* note 145, art. 7.

<sup>151</sup> *Id.* art. 9.

<sup>152</sup> *Id.* art. 43.

<sup>153</sup> HUMAN RIGHTS WATCH/ASIA, *supra* note 40, at 173.

<sup>154</sup> Johnson et al., *supra* note 22, 469.

<sup>155</sup> HUMAN RIGHTS WATCH/ASIA, *supra* note 40, at 2.

<sup>156</sup> *Id.* at 1.

fifty percent in 1989.<sup>157</sup> At the Shanghai CWI, the total mortality of orphans in the late 1980s and early 1990s was estimated at ninety percent.<sup>158</sup> The Human Rights Watch report also documents medical records and testimony, which evidence a pervasive practice of “summary resolution”—the selection of “unwanted infants and children for death by intentional deprivation of food and water.”<sup>159</sup>

On the basis of documents published by the Chinese authorities themselves, Human Rights Watch/Asia has established that the People's Republic has not, at any time since its foundation, attempted to provide adequate care for orphans and other dependent groups, such as the handicapped, the destitute elderly, and the mentally disabled. . . . For the majority of abandoned children in China today, the state's policy of malign neglect means an early and lingering death.<sup>160</sup>

The report goes on to explain:

China's urban orphanages and other institutions for children serve a largely symbolic function, representing the state's public commitment to the humane treatment of abandoned infants but in practice making almost no effort to keep them alive.<sup>161</sup>

International response to the Human Rights Watch report was immediate and grave. However, the report should be treated with caution, given that inferences about deliberate, policy-based abuse and “summary resolution” are drawn based on evidence from one orphanage. Johnson rejects the report's “sweeping thesis” of routine murder across China through deliberate starvation,<sup>162</sup> arguing that, while the high mortality rates in orphanages across China in the early 1990s were documented by local officials and Chinese government statistics,<sup>163</sup> the explanation for these alarming rates involves many factors, of which “most [were] beyond the control of the orphanage staff.”<sup>164</sup>

---

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

<sup>158</sup> *Id.* at 2.

<sup>159</sup> *Id.* at 5, 147-48.

<sup>160</sup> *Id.* at 15.

<sup>161</sup> *Id.* at 77.

<sup>162</sup> JOHNSON, *supra* note 27, at 41-48.

<sup>163</sup> Johnson et al., *supra* note 22, at 469.

<sup>164</sup> JOHNSON, *supra* note 27, at 43.



In the years since the publication of *Death by Default*, many scholars and researchers have reported excellent progress made in China's state orphanages, including increased funding from international NGOs and foreign adoption agencies.<sup>165</sup> Shang cites a number of MCA policies and documents promulgated since the 1990s, which demonstrate that "the Chinese government has been actively seeking proper ways to protect orphaned or abandoned children," a process that "has clearly accelerated since 1998."<sup>166</sup> Johnson's research suggests that, "By the end of the 1990s orphanage conditions had improved dramatically in many places thanks to increased government funding, funds generated by international adoption, and increasing participation by international charitable organizations."<sup>167</sup> However, comments the UN Committee on the Rights of the Child has made as recently as 2005 indicate that progress is still required to ensure that all deaths of children in state institutions are "properly documented and investigated, and that appropriate follow-up actions are taken when necessary,"<sup>168</sup> as well as ensuring that "all forms of alternative care meet quality standards in conformity with the Convention."<sup>169</sup>

Many interviewees with first-hand experience of conditions in state orphanages spoke of dire conditions, inadequate care and medical treatment, and, in some cases, the continuance of "summary resolution."<sup>170</sup> Others emphasized that the institutions with which they cooperate are making genuine efforts to help their wards, and that much progress has been made.<sup>171</sup> However, it is impossible to make generalizations about the conditions in China's state orphanages. At most, there appears to be a large disparity in the conditions and levels of care in orphanages across China, with much depending on the particular institution's director and financial position (most orphanage funding is local rather than central). Further, the legacy of Western "exposés" of Chinese orphanage conditions in the mid-1990s, such as *Death by Default*, has endured to the present day. Despite improvements across the various, diverse orphanages, "the shocking images of 'dying rooms' have not been replaced with more current representations

---

<sup>165</sup> Catherine Keyser, *The Role of the State and NGOs in Caring for At-risk Children: The Case of Orphan Care*, in *STATE AND SOCIETY: RESPONSES TO SOCIAL WELFARE NEEDS IN CHINA* 45, 60 (Jonathan Schwartz & Shawn Shieh eds., 2009).

<sup>166</sup> Shang, *Better Way*, *supra* note 11, at 211.

<sup>167</sup> JOHNSON, *supra* note 27, at 222 n.61.

<sup>168</sup> Comm. On the Rights of the Child, *supra* note 39, art. 51(e).

<sup>169</sup> *Id.* art. 51(d).

<sup>170</sup> See, e.g., Interview with David Dale, founder, New Grace Foundation, in Beijing municipality (Sep. 17, 2009); Lisa Murray, founder, Friendship Outreach, in Beijing (Aug. 24, 2009).

<sup>171</sup> See, e.g., Interview with Elisa Zhang, P.R. Officer, Mustard Seed Creations, in Beijing municipality (Aug. 21, 2009); Interview with Alain & Brigitte, *supra* note 119.

of Chinese institutional care and thus remain entrenched in the international social imaginary.”<sup>172</sup>

The Chinese government has not been unresponsive to the welfare needs of its orphaned and abandoned children. Johnson points to policy measures that were put in place before publication of the Human Rights Watch report to improve orphanage conditions, including increased recourse to international adoption and cooperation with international charities.<sup>173</sup> More recently, in June 2006, President Hu Jintao, during a visit to a state orphanage, called for all children to be able to develop equally under the same blue sky, with orphans benefiting from the same opportunities as other children.<sup>174</sup> In response, and as a means of implementing Hu's call, the MCA issued the Blue Sky Implementation Plan.<sup>175</sup> The five-year program, which commenced in 2006, aimed to invest central and local government funding in the construction of new state orphanages and in the improvement of existing state orphanages. The program set per capita construction targets, and provided for the corresponding government subsidization of state orphanages. The ministry allocated 200 million RMB annually to building welfare institutions in each prefecture-level city across China.<sup>176</sup> Four interviewees expressed skepticism about the value of the Blue Sky Plan, which was focused on institutional rather than family-based care, because some children reportedly were being removed from family-based foster care to fill the newly built orphanages. A similar orphan-targeted central policy was the Tomorrow Plan, launched in 2004, which was intended to benefit orphans with disabilities by providing free treatment or surgical rehabilitation to 35,000 children in state institutions.<sup>177</sup>

## VI. PRIVATE ORPHANAGES

The private orphanage sector includes both grassroots Chinese-run orphanages, which care for children surrendered directly into their care, and foster homes, which are run mostly by foreign mission workers and care for children fostered from state institutions for short- or long-term treatment and guardianship. These non-government homes are, for the most part, operating without formally

---

<sup>172</sup> Wang, *supra* note 84, at 9.

<sup>173</sup> JOHNSON, *supra* note 27, at 188.

<sup>174</sup> *Nationwide Plan for Better Care of Orphans*, CHINA DAILY (Dec. 29, 2006), [http://www.chinadaily.com.cn/china/2006-12/29/content\\_770291.htm](http://www.chinadaily.com.cn/china/2006-12/29/content_770291.htm).

<sup>175</sup> *Child Welfare Institute Blue Sky Construction Plan Implementation Program*, *supra* note 128.

<sup>176</sup> *Nationwide Plan for Better Care of Orphans*, *supra* note 174.

<sup>177</sup> Hu & Szente, *supra* note 85, at 83.

registering as charitable organizations or welfare homes, without legal standing, and without any kind of formal state regulation or oversight.

### A. Grassroots Chinese-run Private Orphanages

The situation of grassroots, unregistered, private Chinese orphanages has not been studied from a legal perspective: the most comprehensive English study is by Dr. Xiaoyuan Shang. In *Welfare Provision for Vulnerable Children: The Missing Role of the State*, Shang and her colleagues examine the situation of grassroots, non-state, Chinese-run orphanages based on field interviews in China, using Guanghui as a case study.<sup>178</sup> Such homes typically are established spontaneously and from necessity, and in rural areas, when children are abandoned into the care of known Christians or do-gooders due to the shortage of accessible state orphanages or other welfare initiatives. Gradual expansion occurs as these homes come to be viewed by local residents and police as *de facto* orphanages; however, according to Shang's study, such grassroots orphanages are routinely denied formal state recognition as welfare institutions.<sup>179</sup>

This article's survey of Chinese-run private orphanages included both unregistered organizations operating independently of state authorities, and previously independent orphanages that have secured working partnerships with government bureaus. In 2010, I spent several weeks at Guanghui and Our Lady's Home for the Handicapped, both of which are homes for orphans and foundlings run by nuns of the unofficial Catholic Church, in order to better understand the day-to-day life and experiences of resident children and sisters. In addition, I conducted in-depth interviews with representatives of five other private, Chinese-run orphanages. Four of these orphanages (including one that is no longer in operation) are or were associated with underground churches. The remaining surveyed homes are not connected with religious communities.

The fieldwork shows that informal orphanage operations are abundant in the provinces visited, and constitute grassroots efforts to fill actual or perceived gaps in the state's provision of welfare.<sup>180</sup> Each interviewee from the seven private

---

<sup>178</sup> *Id.* at 1.

<sup>179</sup> *Id.* at 130-131 (describing Guanghui's unsuccessful attempts to gain legal status), 132 ("It is beyond the power of the local authority to give a formal registration to any of the [non-governmental children's welfare institutions] in its province. According to the law, it is illegal for NGOs to run children's welfare homes.").

<sup>180</sup> Whether the existence of such open and accessible local initiatives is itself impacting on the incidence of abandonment in rural areas is an important question, beyond the scope of this study. Hu and Szente refer to the concern of state orphanage directors that increased media attention has led to an increased in instances of abandonment within her district, a

(continued next page)

orphanage case studies listed at least three other private orphanages in their respective provinces of which they were aware, despite the fact that networks of mutual support among the homes appeared weak to non-existent.<sup>181</sup> I also interviewed two Western individuals, Father Thomas and Charles Kramer, who are full-time advocates for the Catholic private orphanages, working to enhance their administrative capabilities and fundraising power. Both estimate that there are dozens of private homes in the northern provinces surrounding Beijing alone, and probably hundreds across China. A large number of such orphanages are operated by or in close affiliation with “underground” or unofficial churches.

Based on the grassroots orphanages observed and reported in the field, such homes tend to arise in response to local need and gaps in state-provided welfare. Where state orphanages admit their resident children through official channels, the private orphanages are often founded out of necessity, following the discovery of abandoned children in a particular region. This was the case for all three Catholic orphanages that were interviewed, and is typical of such homes. It is common for abandoning parents to leave their children near church buildings, or for children found in public spaces to be brought to known Christians in the area, in the absence of state-provided alternatives. Over time, large numbers of foundlings come to be cared for by overwhelmed parishioners, before they are brought together under the supervision of church leaders for central care.

Other orphanages are established as a planned response to a perceived need in a community, and become, over time and as word spreads, regular recipients of abandoned children or, in the case of Star Village, children of prisoners who have no other caregivers. Harriet Blake, a volunteer coordinator for one of the non-church orphanages, described the different motives behind the running of the Yangtze Orphanage, another case study. A Chinese man established the home, which currently cares for twenty-seven children. She related disturbing examples of his use of the children to fundraise from international donors, and the total lack of accountability and transparency regarding the use of such funds, which Harriet does not believe ever reach the children—she has since ended her

---

concern also reported by directors in Johnson's studies. Hu & Szente, *supra* note 85, at 13; JOHNSON, *supra* note 27, at 13; *see also* Holroyd, *supra* note 86, at 18 (discussing whether abandonment is more culturally acceptable in China where there exists “the social certainty that one's kin are likely to feel morally obliged to take up this care”). Sister Qin of Guanghui Catholic Orphanage reported lower abandonment rates once she had put posters up requesting no more children be brought to Guanghui. The fate of children who may otherwise have been abandoned at Guanghui is, of course, unknown. Interview with Sister Qin, *supra* note 53.

<sup>181</sup> It is possible that a high level of activity is observable in certain provinces due to a correspondingly high Catholic or Protestant population.

association with the orphanage.<sup>182</sup> Examples of such corrupt private orphanages raise worrying questions about the potential abuse and neglect of children occurring in the sector.

There are several reasons why children at private orphanages do not end up being cared for by the state welfare system. Many rural areas are prohibitively distant from the nearest state orphanage, most of which are in urban locations and theoretically only service urban populations. Children of prisoners are not eligible for care by welfare institutes. Shang notes that while “theoretically, the state is the sole welfare provider to vulnerable children in China,” at the same time state policy in rural areas is “not to take direct responsibility for supporting [vulnerable] children” where such children are theoretically cared for by “traditional family and kinship networks, and *wubao* [guaranteed food, clothing, fuel, healthcare, and education or funeral arrangements].”<sup>183</sup> However, reality in rural areas does not always reflect the theory of central policies. Shang explains that, while many rural orphaned children are protected by *wubao*, there are deficiencies that render the system ineffective and inadequate as a means of care. First, in a community-based social system, children who are moved away from their birthplace tend not to benefit from the networks necessary for access, and are disentitled to *wubao*. Affected by this are abandoned children of unknown parentage and, thus, unknown identity and birthplace. Second, children cared for by their grandparents are similarly disentitled. Due to the widespread impoverishment and attendant vulnerability of the rural elderly as a social group,<sup>184</sup> this lack of financial support for extended kinship networks caring for true orphans or abandoned children is problematic and contributes to the incidence of abandonment. Third, children of long-term prisoners are not entitled to *wubao*.<sup>185</sup> Finally, Shang notes:

[e]ven where the formal system is applicable, it may not work in poorer areas. Previous research suggests that the current system of child protection provided by the government has been placed under huge financial pressure during the economic reforms. The financial base of *wubao* has been weakened during the process of

---

<sup>182</sup> Interview with Harriet Blake, volunteer coordinator, Chen Anhui orphanage, in Shanghai (Oct. 4, 2009).

<sup>183</sup> Shang et al., *Welfare Provision*, *supra* note 4, at 126.

<sup>184</sup> Ce Shen & John Williamson, *Does a Universal Non-Contributory Pension Scheme Make Sense for Rural China?*, 22 J. OF COMP. SOCIAL WELFARE 143 (2006) (discussing the issue of welfare for the elderly); *see also* CHAN ET AL., *supra* note 11, at 78 (noting that the rural elderly are expected to rely on either farming income or support from their children, in the absence of a compulsory retirement scheme). Such traditional modes of old age protection are proving difficult to maintain.

<sup>185</sup> Shang et al., *Welfare Provision*, *supra* note 4, at 124.

de-collectivization and rural taxation reforms. The *wubao* system itself is becoming increasingly unreliable. Given the situation, even if children are entitled to social welfare benefits, they still may not be able to receive them owing to the financial difficulties facing local governments and communities.<sup>186</sup>

For these reasons, kinship and *wubao* networks are unable to protect vulnerable rural children. Therefore, and in the absence of rural state institutions, grassroots private orphanages have evolved to address such inadequacies.

Several sisters interviewed believe that, even when a state orphanage is within reach, some abandoning parents are reluctant to leave their children at such institutions out of fear of being caught and sanctioned for the crime of abandonment. Although, as noted above, punishment for the crime of abandonment is relatively rare, the fines potentially imposed in cases of prosecution are, at least anecdotally, high enough to deter many rural would-be abandoning parents. In addition, there is a perception among abandoning parents that children surrendered into the state's care will disappear into the system. In contrast, by leaving one's child at a local church or private orphanage, it is often possible for parents to watch from afar—most orphanages could relate incidences of parents who had a change of heart and came back for their child. Other abandoning parents will make a habit of leaving donations at the orphanage gates, even though they may be unwilling or unable to visit their children overtly.

My interviews with the case-study private orphanages included an analysis of the implications of the lack of state registration and formal oversight as they relate to the inadequacy of welfare protection for orphans. One of the case study homes, Rainbow House, after years of operating quasi-legally and without registration, was able to obtain MCA approval for its operations, and Star Village is registered as a commercial entity. The remaining homes all continue to operate unregistered. Shang's study of Guanghui and other grassroots Catholic orphanages also explored some of the implications of the lack of state registration, and her findings mirror those of this study. First, private orphanages generally are unable to obtain registration or legal standing, which means that, in addition to causing difficulties with banking, leasing and other operational matters, the children in their care often do not have a *hukou*. Without a *hukou*, one does not have legal status and, therefore, cannot access many basic rights of citizenship, such as state welfare (including *wubao*) or medical care. Government initiatives directed at orphans, such as The Tomorrow Plan,<sup>187</sup> have no way of reaching children with no

---

<sup>186</sup> *Id.* at 128.

<sup>187</sup> *Id.*

legal identity. Such children are also not able to be listed for international adoption with the China Center of Adoption Affairs. Although domestic adoptions for unregistered children have on occasion been arranged when a willing family has been located by the private orphanage itself, such arrangements are informal and not subject to state supervision, giving rise to the potential for misuse, and do not address the other problems stemming from a lack of *hukou*. A *hukou* is also in theory required to attend schools, although some interviewees reported that they were able, in relation to at least primary school-aged children, to negotiate their admission to local schools based on good relationships (*guanxi*) with local teachers. The problem of unregistered children is not an unfamiliar one in China: "In 1988 the Public Security Bureau estimated that there were approximately one million [such] children."<sup>188</sup> The UN Committee on the Rights of the Child has also expressed concern about the lack of registration of unknown numbers of Chinese children.<sup>189</sup> The lack of redress for non-registered children who are residents of unregistered orphanages results in a further stratification of orphans, analogous to the stratification of disabled persons discussed above, with *hukou*-less orphans subject to adoption, schooling, and medical care outcomes that are less favorable than those of registered orphans.

Second, orphanages housing unregistered children are not eligible for government fiscal assistance or other benefits. All Chinese private homes interviewed were frustrated by their inability to obtain official not-for-profit status, since most believed that having legal recognition as a child-related welfare institute would entitle them to government funding, or at least bolster the legitimacy of their repeated appeals to various departments for assistance. Further, as non-registered entities, the private orphanages are legally prohibited from publicly soliciting donations,<sup>190</sup> and are unable to issue official receipts (*fapiao*) to donors for tax deductions. On a related note, Ashley and He argue that a lack of registration as an NGO impacts on the ability of grassroots charities to fundraise internationally, because "foreign foundations often require that the programs to which they distribute funds be recognized as nonprofit organizations under their home country's domestic laws."<sup>191</sup> The situation means that local private orphanages must rely almost entirely on petty cash donations from the local community (which is inevitably very poor due to the mostly rural locations of

---

<sup>188</sup> JOHNSON, *supra* note 27, at 8.

<sup>189</sup> Comm. on the Rights of the Child, *supra* note 39, arts. 42, 52, 53(d), 63.

<sup>190</sup> Gongyi Shiye Juanzeng Fa (中华人民共和国公益事业捐赠法) [Law on Donations for Public Welfare], arts. 10-11 (promulgated by the Standing Comm. Nat'l People's Cong., June 28, 1999, effective Sept. 1, 1999) 1999 China Law LEXIS 1129.

<sup>191</sup> Jillian Ashley & Pengyu He, *Opening One Eye and Closing the Other: The Legal and Regulatory Environment for "Grassroots" NGOs in China Today*, 26 B.U. INT'L L.J. 29, 62 (2008).

these orphanages), and are unable to solicit corporate sponsorship directly. Moreover, lacking an official, not-for-profit status hinders their ability to solicit domestic donations because, in China, the social legitimacy of NGOs is partly a function of proximity to, and recognition by, the state.<sup>192</sup>

Third, as non-entities that operate outside the state system, private orphanages are not subject to the regulation and standardization of orphan services, nor are they provided with technical or policy support (other than by volunteers and NGOs). Safeguards against substandard provision of care for orphans are ineffective for unregistered grassroots orphanages, which operate outside of the formal legal framework for NGOs generally and child welfare institutions specifically. Accordingly, formal supervision of internal governance, financial management and care practices is lacking. Ashley and He make the same point about Chinese NGOs generally: “[the government’s approach to regulation] creates a supervision gap that could lead to messy accounting and internal governance, further undermining both governmental and public trust in these organizations.”<sup>193</sup> This supervision and policy gap was not a concern raised by any of the Chinese interviewees, except on occasion in relation to access to training, or in relation to other organizations. All in all, the Chinese orphanage operators seemed to regard self-regulation as optimal, and regulation as superfluous, given the perceived inscrutable motives of those involved in the sector. Of course, the presumption that those who are willing to take on the burdens and difficulties with establishing such homes are necessarily acting out of benevolence rather than self-interest is, anecdotally, fallible. Further, given the lack of expertise of even the most benevolent orphanage operators, on the one hand, and the unknown fate of children were such orphanages not in operation, on the other, it is difficult, with regards to much of the work taking place in the field, to know whether to characterize it as helpful or harmful. Nonetheless, most interviewees expressed

---

<sup>192</sup> While, in China, NGOs are socially legitimized by their proximity to the state, Western NGOs are legitimized by their independence from the state. Junkui Han, *International NGOs in China: Current Situation, Impacts and Response of the Chinese Government*, in *NGOS IN CHINA AND EUROPE* 23, 33 (Yuwen Li ed., 2011). This feature of Chinese civil society makes more sense when one considers that “[h]istorically, Chinese civil society organizations were very different from those in the West in that they never served as a check and balance to political power.” Jia Xijin, *The Development and Institutional Environment of Non-Governmental Think Tanks in China*, in *NGOS IN CHINA AND EUROPE* 53, 58 (Yuwen Li ed. 2011).

<sup>193</sup> Ashley & He, *supra* note 191, at 86.



concerns that increasing regulation of the industry would impinge on the scope of their work, it being “easier to do things if nobody knows you’re doing them.”<sup>194</sup>

### *B. Foreign-run Foster Homes*

The co-existence of state and private homes for orphans comes into sharper focus as the study turns now to the orphan services provided by foreign workers in China. After the PRC was founded, all foreign-run missionary orphanages across China were either closed or taken over as state orphanages.<sup>195</sup> Today, many foreigners have embraced a new, collaborative model of orphan care in response to personal callings to assist the Chinese government and society in their care of vulnerable children. The foster home model, first pioneered in the 1990s by the founders of Prince of Peace, has spread through major municipalities and their surrounding townships in the past decade. Under this model, government orphanages make arrangements to move children to more institutional-type foster homes, most of which are run by foreigners. The term “foster home” is used herein to describe organizations that provide family-style care to orphans who were previously residents of state orphanages on a temporary or long-term basis. The children are provided with medical intervention and rehabilitation, and then reside at the foster home, or with local foster families under the foster home’s supervision, until an adoption can be arranged through the central authorities. If an adoption match is not made, children often end up being cared for by the foster home on a permanent basis. As a result, a pressing issue faced by many of the homes is how to avoid becoming a hospice or an elderly home as their unadoptable children enter early adulthood. Such homes, almost exclusively located in urban areas, range from small-scale operations in which a small number of children are cared for by a “mother” and “father,” to large, institution-based foster care services provided for hundreds of children, with high caregiver to child ratios and an emphasis on emulating a family environment. Many homes have expertise in providing care for a particular condition or type of surgery.

While Chinese grassroots orphanages have received some attention in sociological studies, this is the first study to include an in-depth overview of foreign foster homes’ growth, development, and scope of operations. Two previous studies have touched upon the role of foreign NGOs in caring for orphaned and abandoned children, and provide important contextual information and ethnographic insights into the social sphere of the foreign foster homes. Catherine Keyser’s overview of state and non-state actors that care for Chinese

---

<sup>194</sup> Interview with co-managers of Good Shepherd Orphanage, a Catholic grassroots orphanage, in Beijing (Jul. 25, 2010).

<sup>195</sup> Shang, *Better Way*, *supra* note 11, at 205.

orphans introduces three high-profile foreign NGOs working closely with the MCA and state orphanages. Two of these are included in the current study. Keyser also references the lower-profile, unregistered foreign organizations providing foster care directly, which constitute the bulk of foreign charity organizations working with children in China.<sup>196</sup> Her work touches on the difficulties faced by lower-profile foster homes due to their lack of registration, and the ongoing political tension over how such foreign NGOs should be registered and monitored.

Leslie Wang's doctoral thesis, *The Global Politics of Orphanage Care in China*, is a comprehensive analysis of the treatment of children in the state orphanage system, and focuses on the process of "transnational negotiation" that occurs where foreigners seek to collaborate with state orphanages, including through in-house services and foster home arrangements. Wang argues that partnerships between foreigners and state orphanages are "taking place on constantly shifting political terrain and often move forward with unchecked momentum or run up against unforeseen difficulties and collapse altogether," rendering them highly unstable, and leading Wang to question the limits of such transnational collaboration as China continues to globalize.<sup>197</sup> This "shifting political terrain" is referred to also by Keyser, who argues that "political, bureaucratic, and financial constraints hamper the legalization of both [international] NGOs and domestic NGOs as full players in welfare provision for orphans," the political constraint being "tension over how, and under what circumstances, [international NGOs] can be registered."<sup>198</sup> Keyser also points out that, while the ambiguous legality of foreign NGOs causes difficulties, "the very vagueness in the law on the protection of children as well as the ability to operate at the local level has also created opportunities,"<sup>199</sup> apparently avoiding a law-centric presumption that an ambiguous regulatory environment is inherently problematic or unstable.

While foreign foster homes are less prolific than private orphanages, they are generally located in or near major municipalities, either in rented urban apartment complexes or more expansive properties in satellite villages and towns. Further, the histories of many of the homes are intertwined, with managers and staff commonly leaving one home to establish a foster home targeting a different and particular group of special needs children, which adds to the informal network of foreigners involved in orphan care in China and, especially, in the Beijing area. As a result, most home managers were contacted through introductions arranged by other foster homes, and it was possible to access more foster home case studies

---

<sup>196</sup> Keyser, *supra* note 165, at 55.

<sup>197</sup> Wang, *supra* note 84, at 210.

<sup>198</sup> Keyser, *supra* note 165, at 62.

<sup>199</sup> *Id.*

than Chinese private orphanage case studies. In-depth and follow-up interviews were conducted at sixteen foster homes during the summers of 2009 and 2010. I spent up to several weeks living at a Dongjian\* housing compound (where three homes are currently located and two more had their origins), and three of the foster homes—Good News, New Grace, and Red Thread. I contacted the majority of the foster homes in Beijing, Xi'an and Shanghai, and almost all agreed to be interviewed. However, given the lack of reliable data on the numbers of foreign foster homes in China, it is difficult to be more definitive on this point. Two Chinese homes were included in the study, both of which opened in the past three years, the founders of which are aware of other Chinese friends in the planning stages of copying the foster home model.

Of the sixteen foster homes interviewed, about half have investigated becoming registered as charities; two have succeeded in obtaining an official, formalized partnership with the central MCA after many years of operating quasi-legally; similarly, two have obtained unofficial recognition of their work through generalized contracts with nearby state-run orphanages. The remaining homes either are not legal entities, or have registered as commercial entities.<sup>200</sup> Accordingly, these homes care for children who officially remain under the guardianship of state orphanages, which means they have extensive interactions with these government institutions.

When striking up a relationship of trust with state orphanages, the foster homes follow a predictable pattern, which usually begins with a personal contact at a state orphanage or after a foreigner has volunteered at the orphanage for some time. As trust is built, often over many years, there may come a point where an individual feels confident enough to request to take one or more children home for prolonged, high quality, specialist medical treatment or care that the state orphanage is unable to provide. The state orphanage director must be convinced to release the child to the care of a foreigner and, in many cases, to allow the child to remain with the fosterer after treatment and until adoption. Over time, as trust develops and the foster home's capacity is expanded, more and more children come to be residents of the private home. Small, short-term operations can expand to the point where, as in the largest of the case studies, several hundred children are being cared for outside of the state orphanage, which continues to receive government funding for those children. It is not just a matter of relocating children to a nearby facility under the close supervision of the state orphanage. Most foster homes are caring for children from distant provinces, with little to no ongoing interaction with the home orphanage. Children frequently are taken overseas for surgeries, often for months or years at a time, or may receive surgery in Shanghai,

---

<sup>200</sup> Commercial registration is often more convenient than acting as a non-entity, particularly in relation to issuing visas, and at least provides a veneer of legitimacy to an organization by vesting it with legal personality.

Beijing, or the foster home itself. Given the extreme health issues experienced by most new arrivals, deaths are very common.

Often, the foster home will require a contract to be signed, which stipulates that the child will not be called back to the state orphanage at any time. Alternatively, the state orphanage director may require a contract stipulating that all living and treatment costs will be borne by the foster home. The binding nature of these contracts is questionable, given that they are often signed in the name of an organization that has no legal identity. Regardless, due to the sensitivity toward foreign foster care, interviewees do not consider recourse to state dispute resolution procedures in the event of a disagreement to be a realistic avenue.

The relationship with state orphanages largely depends on personal ties between directors and policy pressure on state orphanages, and is often unstable. In 2007, Tianjin Orphanage, which had children in the care of five of the interviewed organizations, abruptly and without warning, required all of those children to be returned to Tianjin. Reportedly, this was the result of a change in directorship, as well as a policy shift in Beijing towards improving institutional standards and away from Chinese and expatriate foster families. As Blue Sky Plan finances were distributed to state orphanages, directors with new but empty beds felt pressured to recall children who were residing with local foster families and foreign-run foster homes. This policy shift was more keenly felt by Tianjin Orphanage than by more rural orphanages, and Tianjin experienced more scrutiny than did more remote institutions because of the proliferation of foreign foster homes in the nearby Dongjian. Overall, the security of children who are residents of private foster homes is tenuous at best, and depends on the foster home maintaining rapport with the associated state orphanages: "The kids are not ours. At any moment, they can take the kids back, and they have done so in the past."<sup>201</sup>

The foster homes are careful to be, and to appear to be, uninvolved with adoption processes, although most aim to provide medical attention that allows a child to be moved from the special needs adoption register to the general adoption register, thus increasing their chances of placement. On occasion, some organizations will use personal contacts within the China Center of Adoption Affairs or a particularly foreigner-friendly state orphanage to match a difficult special needs case with a family willing to adopt that child; however, this special channel is used rarely to maintain its efficacy.

The foster home interviewees varied in the level of concern they expressed about the difficulties of operating orphanages without formal recognition and/or legal status. About half have investigated the possibility of formal registration as a

---

<sup>201</sup> Interview with director of BICR, a Beijing-based foster home, in Beijing (Aug. 27, 2009).

foreign NGO in China. Some interviewees, echoing many of the Chinese private orphanages, expressed concern that “legalization” and government oversight could, in fact, hinder their ability to carry out their work and choose their foster home’s direction. The practical issues raised by the foreign foster homes related, for the most part, to the impact of their lack of charitable or, in some cases, any, legal status in China. One interviewee also expressed concern about the lack of minimum care standards imposed on the activities of the foster homes.

One disadvantage of operating as a non-entity is that operators must transact leases, banking transactions, and employment contracts in their personal capacity, rather than in the name of the foster home. This practice results in sub-standard banking and employment practices, and exposes signatories to legal liability in relation to such contracts, a situation about which many interviewees expressed unease. Likewise, banking restrictions create obstacles for all of the foster homes interviewed. Those homes that operate as non-entities cannot open bank accounts in the foster home’s name, which means that they must use unrelated, personal bank accounts to receive donations. This can cause transparency issues for international donors.

The foster homes that are registered commercially (usually as a Representative Office of an overseas parent company) can open accounts, but these are of limited utility because RO bank accounts can only receive funds transferred from the bank account of the RO parent company.<sup>202</sup> Donations received domestically, or from a donor unable to donate to the jurisdiction of the parent company, must be channeled through a personal bank account, which raises the same issues as non-entities.<sup>203</sup> Further, the amount that can be withdrawn from a personal bank account is limited to \$50,000 per year,<sup>204</sup> which is far below the annual operating costs of all interviewed foster homes.

The lack of government funding is less important for foreign-run foster homes than it is for Chinese orphanages because operating costs largely are met by international donors. Of the interviewees, only two expressed a desire for government recognition as a means of securing financial support. Foreigners running orphanages in China usually set up charitable entities in their home jurisdictions to facilitate international donations and enhance their legitimacy in the eyes of donors. This option generally is not feasible for Chinese-run orphanages because of the expense and their geographical and technical isolation. Aside from the difficulty of channeling such donations into China, fundraising restrictions preclude attempts to increase the proportion of domestic donations. All

---

<sup>202</sup> Interview with Alain & Brigitte, *supra* note 119; Interview with David Dale, *supra* note 170; Interview with Will Peters, *supra* note 47.

<sup>203</sup> Interview with David Dale, *supra* note 170.

<sup>204</sup> Interview with Will Peters, *supra* note 47; Interview with Andrew Muller, legal advisor, Wish Project, a Beijing-based NGO, in Beijing (Aug. 25, 2009).

the foster homes interviewed, whether unregistered, commercially registered, or NGO-registered, face severe limitations in their fundraising efforts because of restrictions on the issuance of tax-deductible receipts. Many interviewees speculated that they have probably missed out on significant sources of funding from local corporations interested in their work, due to the inability to provide an official *fapiao*.<sup>205</sup> Will Peters states, “The government is creating a monopoly on charitable organizations,”<sup>206</sup> referring to the China Charity Federation. Tax deductibility is governed by the 1999 Public Welfare Donations Law,<sup>207</sup> which provides that companies or individuals who donate to NGOs in accordance with the Donations Law will enjoy preferential tax treatment.<sup>208</sup> However, such preferential treatment is only granted if the State Administration of Taxation approves the NGO in question as a tax-deductible donee. Currently, only the China Charity Federation and a select group of related government-organized NGOs<sup>209</sup> can issue tax-deductible *fapiao* for charitable donations.<sup>210</sup> Accordingly, other NGOs, whether registered or not, must partner with a GONGO if a donor requires a tax deduction. Many NGOs avoid such a partnership because of the large “administration fees,” usually between ten and twelve percent, charged by most GONGOs for this service. It can also be difficult for an unregistered charity to find a GONGO willing to provide administrative banking support.

---

<sup>205</sup> Interview with Eleanor Anders, Beijing International China Relief (foster home), in Beijing Aug. 27, 2009); Interview with Michael Victor, Prince of Peace Children's Village, in Beijing municipality (Sept. 1, 2009); Interview with Co-Founders/Directors, Loving Embrace Foundation, in Shanghai (Sept. 24, 2009); Interview with Harriet Blake, *supra* note 182.

<sup>206</sup> Interview with Will Peters, *supra* note 47.

<sup>207</sup> Note that a draft Charity Law, which would address the issue of tax deductibility of donations to NGOs, was circulated for comment in 2006 and is reportedly in the final stages of approval, anticipated to be promulgated sometime in 2012. Interview with MCA China Charity and Donation Information Centre, no. 39 (Sept. 8, 2009 [by email]).

<sup>208</sup> Gongyi Shiye Juanzeng Fa (中华人民共和国公益事业捐赠法) [Law on Donations for Public Welfare], arts. 24-25 (promulgated by the Standing Comm. Nat'l People's Cong., June 28, 1999, effective Sept. 1, 1999) 1999 China Law LEXIS 1129.

<sup>209</sup> Government-organized NGOs, also known as top-down NGOs, are “citizen-led efforts from organizations that are nominally independent, but in fact are often established by and retain close ties with the state.” Ashley & He, *supra* note 191, at 32. GONGOs are commonly referred to as a type of NGO, but may not meet Salamon's internationally accepted definition of an NGO, in particular the requirements of voluntariness and self-government. Lester Salamon & Helmut Anheir, *In Search of the Non-profit Sector. I: The Question of Definitions*, 3 VOLUNTAS 125, 135 (1992).

<sup>210</sup> Interview with Director, Shandong Charity Federation, in Jinan (Sept. 21, 2009); *see also* Ashley & He, *supra* note 191, at 51.

As was the case for the Chinese-run private orphanages, because almost all of the foreign foster homes interviewed do not have legal status, they are not subject to formal supervision of internal governance, financial management, and care practices. Like the Chinese interviewees, this was not a concern raised by most of the foreign interviewees, who believe “[i]f the Chinese government just gets out of our way, that’s a big help.” Generally, the foreigners had greater administrative capabilities than did the Chinese interviewees, and all were able to explain detailed good governance practices aimed at fulfilling a self-imposed and self-regulated duty of accountability to donors and supporters. Many expressed concern that changing the status quo would impinge on the freedom they experience by operating outside of the legal framework. However, David Dale of New Grace was an exception:

The danger is there’s no defined system or standard of care, even in the state orphanages. So you end up with everyone doing what everyone thinks is right or best. And you have to ask yourself – are we really caring for the children well enough? I think we are. But that’s just our judgment. That judgment should really be made by government, not us.<sup>211</sup>

### CONCLUSION

We hope the government will one day see the needs of these children, and see that we also, with sincere good faith, are sharing the government’s responsibility. This is our country’s issue. We are willing to sacrifice, in the spirit of our country, sacrifice our hearts, to build up China. We are willing to act in concert with them. We hope that one day what we are doing will be recognized by government. We have been doing this work for twenty-two years, the first child we took in is now thirty years old. Their law says this—that orphanages are a governmental responsibility. But we are the ones implementing orphan protection.<sup>212</sup>

This introduction to China’s orphan welfare sector shows the intersection of factors that impact potential outcomes for China’s vulnerable children. Abandonment, as in other countries, has a long history in China, and insufficient information is available on its current incidence, particularly in relation to disabled children and infants. Researchers agree that top-down policy changes are required

---

<sup>211</sup> Interview with David Dale, *supra* note 170.

<sup>212</sup> Interview with Sister Qin, *supra* note 53.

to support parents in fulfilling their parental duties and expand the scope and supervision of NGOs in providing child welfare.<sup>213</sup> However, it is apparent that bottom-up shifts in cultural discourse on child rights, disability, and adoption are both occurring and needed. Cultural norms influence notions of kinship, as well as formal and informal adoption patterns. This complex combination of norms and practices has created an equally complex web of state and non-state welfare providers, and insufficient attention has been paid to the possible influence of orphanages on cultural ideas about, and incidences of, abandonment.

These contextual factors shape the role of non-state institutional actors, both Chinese and foreign, in caring for China's "lonely children." The government continues to maintain an ostensible monopoly on the institutional and short-term foster care of orphans, consistent with its objectives of maintaining tight control over civic organizations and religious-based and foreign-led activities. On the other hand, the inadequacy of state provision is demonstrable in two ways. First, a lack of rural facilities has resulted in an unknown number of *de facto* unregistered orphanages arising in areas inadequately served by state orphanages, many of which are run by the underground church and care for unregistered children on an *ad hoc* basis. Second, the standard of care provided in urban welfare institutions is considered by many, especially foreigners importing their own standards and expectations of child care, to be inadequate or open to improvement, and this attitude has led to the rise in the number of foreign foster homes caring for registered welfare recipients in an informal, undocumented, and unrecognized manner. Government policy on non-state orphanages is ambiguous, inconsistent, and opaque, but as long as state institutions are overwhelmed by their duty to care for China's orphans, the non-state sector will grow organically in response to a demand for more accessible orphan care, and the gap between law and practice in the orphan welfare system, a gap so commonly observed in China, will endure.

As private orphanages persevere, the cautious evolution of a sector in which multiple politically sensitive aspects intersect is an example of the transition from "welfare statism" to "welfare pluralism,"<sup>214</sup> and the government's increasing

---

<sup>213</sup> See also UN Comm. on the Rights of the Child, *supra* note 39.

<sup>214</sup> Since the 1990s, the Chinese welfare system has been moving away from "a total state monopoly accompanied by a high degree of secrecy" towards "a somewhat more open, mixed system that, while dominated by the state, [seeks] support from a variety of private and charitable sources and encourage[s] greater local initiative and community involvement." JOHNSON, *supra* note 27, at 188. This policy shift is known in China as a strategy of "social welfare socialization." Shang describes the change as one from "welfare statism" to "welfare pluralism," referring to increasing interaction between state, civil society and citizens in the policy process, and more openness on the part of government to

(continued next page)



openness to allow non-state provision of services. Further, the spontaneous emergence of non-state actors to fill gaps in rural welfare provision is an important feature of the ongoing rural-urban divide that pervades modern Chinese welfare provision regimes. Beyond these implications for social policy research are broader social implications for outcomes of children who are residents of non-state institutions.

Wang describes the drawing of a line of stratification among Chinese children in terms of their health and *suzhi* (quality); similarly, the emergence of non-state orphanages, in which children generally lack *hukou*, has created a line of stratification among orphans in terms of their access to basic citizenship rights. The orphans and foundlings who are cared for by urban state institutions increasingly are likely to be cared for by foreign foster homes, which results in access to higher adoption prospects and standard of living in the interim, and compounds the rural-urban stratification among vulnerable children.

Madam Leng, the director and founder of Star Village, gives a monthly lecture to all the children in the care of Star Village's many homes around China entitled "*lǔ zai hefang?*" (where is the road that should be taken?). The children of Star Village are raised by loving caregivers, and are taught to hope for a better future and take steps to achieve independence and a fulfilling life. But the question, "Where is the way?," is asked by many observers about unregulated Chinese private orphanages: is the current approach to law, policy, order, and governance satisfactory? It is difficult to assess the impact on China's orphans, or the lack thereof, from regulation of the private orphan welfare sector. Adoption prospects and care standards are increased for those residing in foster homes or benefiting from collaborative projects with state institutions, which means many of the foster homes are saving and transforming significant numbers of lives by providing care that state orphanages may not be able to provide.

On the other hand, momentum in political or social advocacy for improved orphanage conditions by foreign workers is nonexistent due to the risk such advocacy would bring to their personal work in China. The sector's growth is soft and slow; relationships between foster homes and both government and state orphanages are built gradually and tentatively by players astute and sensitive to the different and often conflicting considerations at play. In some grassroots Chinese-run private orphanages the quality of care is high, although in many cases, economic backwardness is evident, children suffer the effects of the foster home lacking a legal status, and standards of care are set internally, with grave concerns expressed by observers about care practices. While increased regulation and oversight of the sector, done in a formal and standardized way, might not lead to

---

facilitating civic/private financial support of welfare programs and initiatives. Shang, *Better Way* *supra* note 11, at 204.

improved orphanage conditions (indeed, whether taking responsibility for the supervision and registration of the homes is a viable option politically or economically is questionable), Shang's calls for increased regulation of the sector are understandable given the Chinese government's claims about its responsibility for orphans, and given the nexus between birth planning policies, abandonment, and human rights obligations.<sup>215</sup>

Arguably, the Chinese government has a duty to allow private orphanages and foster homes to openly and freely engage in the welfare sector in order to improve the quality of life for Chinese abandoned children. However, due to a lack of formal oversight, this is not being done in a standardized or supervised manner. By keeping laws and policies that restrict orphanage operations to state actors while allowing unofficial policy to flourish as long as informal norms are followed, the government can maintain the fiction that only China cares for Chinese children and allow private organizations to assist overwhelmed local governments in orphan welfare. Further, such private charities can be unofficially but closely monitored, tightly controlled, and do not cause embarrassment by drawing attention to the disparity because they are aware of the shadow of state power and formal law. The lawyer for Shooting Star states, "The government wants to have its cake and eat it too—it wants to let NGOs function in China, without legitimizing them, but while keeping control over them. They are walking a tight-rope." Given the symbolic function of laws that restrict the care of orphans to Chinese institutions, an ideology reflective of cultural pride regarding foreign charity in China, the law/practice gap may be a means to maintain the fiction that "China looks after its own children" while allowing beneficent foreigners to quietly help China's orphanages provide better care for its children. Regulation of the sector, or reversion to formal laws and policies, could draw attention to the discrepancy between fact and fiction, a fiction in which much political and cultural pride seems to be invested, and result in more restrictions on foreign foster homes than are currently imposed. While there is flexibility associated with the current mode of governance and back turning, of which many workers are adept at taking advantage, this is not a satisfactory way to encourage growth in the charity sector or achieve better care outcomes for children. The personal moral codes of many individuals are sustaining them in their work, but are not always an adequate safeguard against abuse and death within the homes, especially given the lack of training and finances. For example, in Yangtze Orphanage, the slogan "it's for orphans" is being used for self-serving purposes to the disadvantage of resident children.

---

<sup>215</sup> Shang *et al.*, *Welfare Provision*, *supra* note 4, at 136.

Generally, the plight of orphans and vulnerable children in China has received increased attention in recent years, largely due to Hu Jintao's "blue sky" call and associated MCA activity. However, many workers remain convinced that a general apathy towards orphans persists in Chinese society, which relates to the conception of rights contingent on one's instrumental value to society rather than rights contingent on one's intrinsic worth as an individual. The traditional focus on duties over rights, and society over the individual, remains evident in the treatment of orphans and the policies and practices governing the institutions that care for these children. Madam Leng's question, therefore, seems pertinent: Where is the way forward? There is a pressing need to address the question of how the state, private orphanages and foster homes can co-exist in a mutually beneficial relationship, given how high the stakes are for China's orphans.