



Case Western Reserve Law Review

Volume 60 | Issue 4

2010

The Child Exclusion in a Global Context

Martha F. Davis

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

Martha F. Davis, *The Child Exclusion in a Global Context*, 60 Case W. Res. L. Rev. 1183 (2010)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol60/iss4/9>

This Symposium is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

THE CHILD EXCLUSION IN A GLOBAL CONTEXT

Martha F. Davis[†]

I. INTRODUCTION AND BACKGROUND

Throughout its history, the United States' system for providing subsistence support to families with children has reflected mixed motives. Emerging from a patchwork of state "Mother's Pension" programs, the federal Aid to Families with Dependent Children (AFDC) program—part of the 1935 Social Security Act¹—was originally intended to support widowed mothers caring for children in their homes.² The program was established as a state-federal partnership.³ However, state implementation varied from the program's beginnings. In some states, the benefits were systematically adjusted to encourage (or coerce) welfare recipients to work in the fields during the harvest season.⁴ In other instances, the

[†] Martha F. Davis is Associate Dean for Clinical and Experiential Education and Professor of Law, Northeastern University School of Law. She thanks Liz Dedrick, Melissa Joyce, Ryan White and Noah Winkler for research assistance during the preparation of this Article.

¹ Act of Aug. 14, 1935, ch. 531, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 301–1397jj (2006)). The program was originally named "Aid to Dependent Children" under the 1935 Act, but it became "Aid to Families with Dependent Children" in 1962. *See* Pub. L. No. 87-543, § 104(a)(3), 76 Stat. 172, 185 (1962). The addition of the term "Families" to the program's name responded to concerns that the program discouraged marriage. Susan W. Blank & Barbara B. Blum, *A Brief History of Work Expectations for Welfare Mothers*, 7 *FUTURE CHILD.*, Spring 1997, at 28, 31.

² *See* *Burns v. Alcalá*, 420 U.S. 575, 582–83 (1975) (reviewing AFDC purposes); *see also* 42 U.S.C. § 601 (1994) (repealed 1996) (stating that AFDC provides financial assistance to needy families "for the purpose of encouraging the care of dependent children in their own homes"). *See generally* WINIFRED BELL, *AID TO FAMILIES WITH DEPENDENT CHILDREN* (1965) (providing an overview of the program).

³ *See* *King v. Smith*, 392 U.S. 309, 316 (1968) (noting that "[t]he AFDC program is based on a scheme of cooperative federalism"); *see also* *Heckler v. Turner*, 470 U.S. 184, 189 (1985) (describing the state-federal scheme of AFDC program).

⁴ *See* Joanne L. Goodwin, 'Employable Mothers' and 'Suitable Work': A Re-Evaluation

subsistence welfare benefits were cut off in order to influence mothers' choices about family structure, such as whether or not to marry.⁵ As early as 1970, the United States Supreme Court approved Maryland's program, which set an upper limit on welfare benefits regardless of family size with the express purpose of, among other things, "encouraging" low income people to engage in "family planning."⁶ The Maryland law—literally, a "family cap"—capped benefits at the per capita level set for a family of six.⁷ Under the previously accepted practice nationwide, even large families had been given an incremental benefit increase to reflect their greater subsistence needs as additional children were born.⁸

The use of welfare benefits to discourage childbearing by low-income women gained new steam in the 1990s with the introduction in Wisconsin of the "child exclusion," a variation on the earlier family cap policy.⁹ In contrast to the general cap based on family size, this scheme specifically targeted children born while their families were on welfare. Under the policy, a family's benefit levels were frozen based on its size at the time the household began receiving welfare; any additional children born while the household was receiving welfare benefits would not result in an incremental increase in benefits.¹⁰ In effect, those after-born children would be "excluded" from the calculation of household size. Like the earlier family cap—and citing many of the same precedents—state laws of this type were generally upheld by both state and federal courts.¹¹

The child exclusion was a key source of controversy during the debate leading to the enactment of the 1996 welfare reform law,¹² the

of Welfare and Wage-Earning for Women in the Twentieth-Century United States, 29 J. SOC. HIST. 253, 261 (1995) (explaining that some states provided that women could be denied benefits when field work was available).

⁵ See, e.g., *King*, 392 U.S. at 321–22 (describing "suitable home" provisions intended to exclude the "unworthy" poor from the AFDC).

⁶ *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (upholding a family cap that limited benefits available to large families, in part to encourage family planning).

⁷ *Id.* at 509–10 n.2 (Marshall, J., dissenting).

⁸ See *id.* at 491–94 (Douglas, J., dissenting) (discussing the congressional purpose evinced by the legislative history of the Social Security Act).

⁹ See Lucy A. Williams, Essay, *The Ideology of Division: Behavior Modification Welfare Proposals*, 102 YALE L.J. 719, 720 n.4 (1992) (discussing the Wisconsin "Family Cap demonstration project," which denied additional benefits to children born into families already participating in AFDC).

¹⁰ See Susan Bennett & Kathleen A. Sullivan, *Disentitling the Poor: Waivers and Welfare Reform*, 26 U. MICH. J.L. REFORM 741, 755 (1993) (describing the family cap program).

¹¹ See, e.g., *C.K. v. N.J. Dep't of Health & Human Servs.*, 92 F.3d 171, 194–95 (3d Cir. 1996); *N.B. v. Sybinski*, 724 N.E.2d 1103, 1110 (Ind. Ct. App. 2000); *Sojourner A. v. N.J. Dep't of Human Servs.*, 828 A.2d 306, 317 (N.J. 2003).

¹² See, e.g., David Steib, Note, *Can "Family Values" Lift Americans Out of Poverty?*, 9

Personal Responsibility and Work Opportunities Reconciliation Act.¹³ As finally adopted, the 1996 welfare reform law repealed the venerable Aid to Families with Dependent Children program, replacing it with a new program, Temporary Assistance to Needy Families (TANF).¹⁴ The new approach to family welfare came with a new set of statutory purposes that emphasized the role of welfare in encouraging work, with mandatory work participation requirements for welfare recipients.¹⁵ Yet even with these significant changes, the first-listed purpose of TANF remained providing support to children so that they could be raised in their own or a relative's home.¹⁶

In tension with this longstanding legislative goal, conservative proponents of the child exclusion argued that the child exclusion scheme should be a mandatory component of federal welfare policy, with states required to adopt the approach in order to access federal funds.¹⁷ An unlikely coalition of feminists and anti-choice religious groups succeeded in defeating that proposal; they united around a cluster of social justice issues, specifically their opposition to policies that would increase child poverty and their shared concern that the child exclusion scheme might unduly coerce low income women to have more abortions.¹⁸

GEO. J. GENDER & L. 447, 455 (2008) ("During the debates on welfare reform, the Christian Right and many right-wing think tanks lobbied for a federal family cap as a method of dissuading women on welfare from having additional children out of wedlock.").

¹³ Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended at 42 U.S.C. §§ 601-619 (2006)).

¹⁴ See *id.* The program was reauthorized, with some modifications, in 2005 with the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4.

¹⁵ See PRWORA, § 601(a) (stating that the purposes of TANF are to: "(1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families.").

¹⁶ *Id.*

¹⁷ See, e.g., Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151, 153 (2006) (discussing the House of Representatives' initial welfare reform bill, which mandated a family cap); Steib, *supra* note 12, at 455 (discussing the conservative proponents' arguments for the family cap, including "moral accountability" and "family values").

¹⁸ See William Claiborne, *Reluctant Allies Oppose Clinton 'Family Cap' Welfare Proposal*, WASH. POST, May 27, 1994, at A1 (discussing the plans of civil rights and religious organizations to fight the child exclusion policy in federal court). There is some data to support the predictions that brought this coalition together. See, e.g., MICHAEL J. CAMASSO, FAMILY CAPS, ABORTION, AND WOMEN OF COLOR 28-29 (2007) (finding a correlation between family cap and abortion in New Jersey). But see Ted Joyce et al., *Family Cap Provisions and Changes in Births and Abortions*, 23 POPULATION RES. & POL'Y REV. 475, 503-04 (2004) (concluding that there is little evidence of an independent effect of the family cap on childbirth and

However, this federal victory was only half of the battle. Because the federal welfare reform law was ultimately silent on the child exclusion question, state legislatures were left to consider the policy state by state as they implemented their new welfare reform laws. Currently, twenty states utilize the child exclusion approach, with some minor variations.¹⁹ In enacting these programs, state legislatures have consistently cited the desire to constrain welfare recipients' childbearing decisions.²⁰ For example, in support of the New Jersey child exclusion, chief sponsor Wayne Bryant stressed that by denying support, the measure "offer[s] parents a choice regarding their decision to have another child while receiving public assistance."²¹ However, two states that originally adopted child exclusion legislation—Illinois and Maryland—have since abandoned the approach, finding it to be ineffective in achieving their state's welfare policy goals.²²

Many authors, both social scientists and legal scholars, have examined the efficacy and legality of child exclusion policies.²³ Legal

abortion).

¹⁹ See Nat'l Conference of State Legislatures, *Welfare Reform: Family Cap Policies*, <http://www.ncsl.org/default.aspx?tabid=16306> (last visited Aug. 31, 2010). Twenty states have "child exclusion" programs that exclude children born to families while on welfare; two states administer flat grants, extending the same benefits to every low income family, regardless of size. *Id.*

²⁰ See, e.g., *Sneed v. Saenz*, 120 Cal. App. 4th 1220, 1230 (Ct. App. 2004) (noting that the California child exclusion statute was partly "intended to promote personal responsibility of welfare recipients by discouraging growth in family size while they received public assistance"); *N.B. v. Sybinski*, 724 N.E.2d 1103, 1106–07 (Ind. Ct. App. 2000) ("Indiana hypothesized that the family cap would lead to a reduced childbirth rate. Specifically, the State theorized that reduced fertility would lead to fewer children born into a dependent situation; an increase in work; and more parent time per child."); see also Kelly J. Gastley, Note, *Why Family Cap Laws Just Aren't Getting It Done*, 46 WM. & MARY L. REV. 373, 390 (2004) ("By discouraging women on TANF from having children they cannot financially support, the presumption is that family cap laws will thereby decrease the incidence of out-of-wedlock births among welfare recipients."); Stefanie Paige Underwood, Case Comment, *C.K. v. New Jersey Department of Health and Human Services: The War on Welfare Mothers*, 18 WOMEN'S RTS. L. REP. 343, 353 (1997) (noting that New Jersey's express purpose in enacting its child exclusion law was "to discourage AFDC recipients from having additional children during the period of their welfare dependence" (internal quotation marks omitted)).

²¹ CAMASSO, *supra* note 18, at 19.

²² See Nat'l Conference of State Legislatures, *supra* note 19.

²³ See, e.g., CAMASSO, *supra* note 18, at vii–viii (focusing research on the effect of the family cap in New Jersey, the first state to implement this type of provision); ANNA MARIE SMITH, *WELFARE REFORM AND SEXUAL REGULATION* 6 (2007) (arguing that family cap programs violate the traditional limits of state power); Susan Frelich Appleton, Essay, *When Welfare Reforms Promote Abortion: "Personal Responsibility," "Family Values," and the Right to Choose*, 85 GEO. L.J. 155, 158 (1996) (arguing that family caps not only impact procreative decisions of the poor, but also express a value judgment on these issues); Yvette Marie Barksdale, *And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries*, 14 LAW & INEQ. 1, 9 (1995) (questioning

challenges have raised questions about the laws' constitutionality under both state and federal constitutions, citing equal protection and due process provisions, but as noted above, these challenges have met with very limited success.²⁴ Most courts considering the issue have found the child exclusion policy to be constitutionally sound, holding that the burden on women's childbearing decisions is minimal and that the policy itself is rational.²⁵

As a supplement to their constitutional claims, the petitioners challenging the state's child exclusion law before a New Jersey state court also included assertions of international human rights law violations, presented in an amicus brief submitted by the Center for Economic and Social Rights and other international advocacy groups.²⁶ Among other things, the amici argued that the child exclusion policy discriminated against children on the basis of birth status, in violation of the United States' obligations as a State Party to the International Covenant on Civil and Political Rights as well as principles of customary law.²⁷ The New Jersey Supreme

whether a government that provides a subsistence welfare program can legally exclude families on the basis of their constitutionally protected procreative rights); Smith, *supra* note 17, at 152 (arguing family caps unconstitutionally coerce poor women into having abortions); Laura M. Friedman, Comment, *Family Cap and the Unconstitutional Conditions Doctrine: Scrutinizing a Welfare Woman's Right to Bear Children*, 56 OHIO ST. L.J. 637, 637–38 (1995) (arguing that family caps are unconstitutional because they violate the guaranteed fundamental right to reproduce); Christina E. Norland Audigier, Comment, *Starving Five to Prevent the Birth of One?: An International Human Rights Analysis of Child Exclusion Provisions and the Failure of Federal and State Constitutional Challenges*, 77 TEMP. L. REV. 781, 784 (2004) (arguing that the international human rights framework highlights flaws in child exclusion policies).

²⁴ See, e.g., *C.K. v. N.J. Dep't of Health & Human Servs.*, 92 F.3d 171, 194–95 (3d Cir. 1996) (upholding the validity of New Jersey's child exclusion law under due process and equal protection and affirming the district court's analysis of the law under a rational basis standard of review); *Sneed v. Saenz*, 120 Cal. App. 4th 1220, 1248–51, 1249 (Ct. App. 2004) (upholding California's child exclusion law on appeal using a rational basis test against arguments that it violated the Equal Protection Clause and the plaintiffs' rights to privacy under the federal Constitution, and noting that "[a]ny impact [of the law] on family living arrangements is unintended, indirect and attenuated"); *N.B. v. Sybinski*, 724 N.E.2d 1103, 1108–13 (Ind. Ct. App. 2000) (affirming summary judgment, upholding the constitutionality of Indiana's child exclusion law, and holding that: 1) the law had a rational basis, 2) the law did not impede on parents' fundamental right of family association, and 3) the law did violate the Equal Protection Clause or substantive due process under the federal and Indiana constitutions); *Gates v. Comm'r. of Transitional Assistance*, No. 999-J-218 (Mass. App. Ct., May 3, 1999) (Memorandum and Order), available at <http://www.povertylaw.org/poverty-law-library/case/52200/52294> (upholding the Massachusetts child exclusion law under a rational basis test).

²⁵ See cases cited *supra* note 24.

²⁶ See Amici Curiae Brief for the Center for Economic and Social Rights et al. in Support of Plaintiffs-Appellants, *Sojourner A. v. N.J. Dep't of Human Servs.*, 828 A.2d 306 (2003) (No. A-2787-OOT5), available at http://www.aclu.org/files/FilesPDFs/sojourner_amicus.pdf.

²⁷ See *id.* at 10–15.

Court, however, found that the child exclusion was consistent with both domestic and international legal standards.²⁸

This Article continues to mine this territory by putting the child exclusion, an American variation on population policies found around the world, into a broader comparative context. This preliminary survey indicates that while many nations, motivated by concerns about limited national resources, have population policies intended to support a woman's decision to forgo childbirth, a much smaller number of countries craft these policies to target a particular marginalized group.²⁹ Further, when identifiable groups are targeted, the programs are most often (though not always) shaped around incentives rather than punitive measures intended to influence behavior.³⁰ In those instances where disincentives are employed, the disincentives rarely, if ever, involve basic human needs such as food, clothing or shelter.³¹

The distinction between disincentives and incentives is a distinction with a difference. Many believe that mild incentives are less morally problematic than disincentives. For example, the authors of the popular book *Nudge* describe many small incentives that, they argue, encourage "good" behavior without undermining individual autonomy.³² Similarly, economists David Bloom and David Canning assert that while coercion should not be a part of a nation's family planning scheme, "[p]opulation policies that attempt to change fertility levels by *incentives* that affect desired fertility rather than

²⁸ See *Sojourner*, 828 A.2d at 316–17.

²⁹ See John A. Ross & Stephen L. Isaacs, *Costs, Payments, and Incentives in Family Planning Programs: A Review for Developing Countries*, 19 *STUD. FAM. PLAN.* 270, 271 (1988) (describing various policies offering incentives and disincentives to encourage use of contraceptives); see also Jane Gilbert Mauldon, *Providing Subsidies and Incentives for Norplant, Sterilization and Other Contraception: Allowing Economic Theory to Inform Ethical Analysis*, 31 *J.L. MED. & ETHICS* 351, 352 (2003) (pointing out the advantages of policies that broadly offer contraception subsidies over current U.S. policy, which primarily targets disadvantaged women).

³⁰ Ushma D. Upadhyay, *Informed Choice in Family Planning: Helping People Decide*, in *POPULATION REPORTS*, at 12–13 (Johns Hopkins Univ. Bloomberg Sch. of Pub. Health, Population Info. Program, Series J, No. 50, Spring 2001), available at <http://info.k4health.org/pr/online.shtml#j>.

³¹ See U.N. Secretariat, Dep't of Econ. and Soc. Affairs, *Views and Policies Concerning Population Growth and Fertility Among Governments in Intermediate Fertility Countries*, at 234 (2002), available at <http://www.un.org/esa/population/publications/completingfertility/RevisedPOPDIVPPSpaper.PDF> (noting that "many" countries use incentives and disincentives to influence fertility levels, including restrictions on maternity leaves, limits on tax and retirement benefits, and income-generating activities for those who accept family planning).

³² See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 236 (2008) (describing, for example, the "dollar a day" program in Greensboro, North Carolina that rewards teens for forgoing pregnancy). But see Stephen L. Isaacs, *Incentives, Population Policy, and Reproductive Rights: Ethical Issues*, 26 *STUD. FAM. PLAN.* 363, 365 (1995) (noting the coercive effect of incentives).

coercion of actual fertility or fixed family size targets allow families to still achieve their goal by forgoing the incentive.”³³

Significantly, an approach that rejects narrow programs in favor of policies with a population-wide impact is completely consistent with the underlying purposes of the international human rights regime. If nothing else, the modern human rights laws that emerged following World War II are intended to prevent a recurrence of the genocide of the Jews that marked the Nazi regime.³⁴ For that reason, international human rights law embodies a heightened concern regarding programs that single out identifiable subgroups for punitive population control measures.³⁵

Further, reflecting an emerging consensus concerning responsible population policies, in 1994 the nations attending the International Conference on Population and Development (ICPD) in Cairo explicitly condemned the reliance on incentives and disincentives to manipulate individual decisions concerning contraception and family planning.³⁶ According to the ICPD Programme of Action,

The principle of informed free choice is essential to the long-term success of family-planning programmes. Any form of coercion has no part to play. In every society there are many social and economic incentives and disincentives that affect individual decisions about child-bearing and family size. . . . Governmental goals for family planning should be defined in terms of unmet needs for information and services.³⁷

In other words, instead of incentives and disincentives, governments are encouraged to utilize proactive educational measures to promote broad-based engagement in family planning.³⁸

³³ David E. Bloom & David Canning, *Population, Poverty Reduction, and the Cairo Agenda*, in *REPRODUCTIVE HEALTH AND HUMAN RIGHTS: THE WAY FORWARD* 51, 57 (Laura Reichenbach & Mindy Jane Roseman eds., 2009) (emphasis added).

³⁴ See, e.g., Kenneth Cmiel, *The Recent History of Human Rights*, 109 *AM. HIST. REV.* 117, 128–29 (2004), (discussing the international focus on the prevention of genocide following World War II).

³⁵ See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, at 76, art. 25(2), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”).

³⁶ See Isaacs, *supra* note 32, at 364 (“The ICPD’s Programme of Action condemned coercion in family planning programs and lauded the principle of informed free choice.”).

³⁷ Int’l Conference on Population & Dev., Cairo, Egypt, Sept. 5–13, 1994, *Programme of Action*, ¶ 7.12, U.N. Doc. A/CONF.171/13/Rev.1 (1995).

³⁸ See *id.* ¶ 7.22 (encouraging governments to meet population objectives “through education and voluntary measures”).

When compared internationally with other population measures, the child exclusion is an outlier because of the combination of its narrow focus on a vulnerable population, its manipulation of subsistence benefits, and its use of disincentives rather than incentives.³⁹ Compounding this confluence of troubling factors, the child exclusion is a relatively ad-hoc, state-by-state program; it is not a measure that was debated and adopted in the context of the development of a more comprehensive national U.S. population policy, and, even at the state level, it has not been incorporated into a more general discussion of population policies.

Rather than allow the child exclusion to drift into an accepted status quo of domestic law and policy, this relatively recent innovation warrants continued skepticism and scrutiny as the United States increasingly moves to implement international human rights norms domestically. This Article first describes the U.S. child exclusion policies more thoroughly. It then offers some global analogues from other nations—China, India, and several African nations—that have used government resources to pursue specific national population goals. The third section sets out ethical principles that have been proposed to guide governments considering these policies, and examines a few of the existing policies from around the world, including the child exclusion, in light of these principles. The concluding section summarizes the serious questions about the child exclusion policies raised by this global perspective.

II. THE CHILD EXCLUSION IN U.S. CONTEXT

In the absence of any coherent U.S. population policy, domestic laws, policies, and programs intended to influence family size and childbearing decisions have been adopted on a piecemeal basis, some by the federal government and some by the states. The absence of an overall framework and the resulting patchwork of policies provide a haven for approaches of questionable moral underpinnings, sometimes fueled by class, race, and gender bias, and often lacking sound scientific basis.⁴⁰ The child exclusion is one such policy.

³⁹ According to some scholars, China is one of the very few nations that still pursues punitive measures as a method of promoting family planning, in violation of international human rights norms. See John Bongaarts & Stephen W. Sinding, Comment, *A Response to Critics of Family Planning Programs*, 35 INT'L PERSP. ON SEXUAL AND REPROD. HEALTH 39, 42 (2009) (recalling that human rights and women's health advocates were appalled by coercive population control programs that emerged in China in the 1970s and 1980s).

⁴⁰ For example, in 2004, California voters considered a statewide proposition to create a Comprehensive Population Policy of the State of California. See Letter from Elizabeth G. Hill & Donna Arduin, Cal. Legislative Analyst's Office, to Bill Lockyer, Attorney Gen., State of Cal. 2-3 (May 4, 2004), available at <http://www.lao.ca.gov/ballot/2004/040254.pdf>. Some

Child exclusion policies in the United States vary from state to state.⁴¹ For example, as a result of successful litigation in Nebraska, welfare recipient mothers who are deemed unemployable due to a lack of skills or disability are exempted from the program because they do not, as a practical matter, have the option of working to provide additional support for their additional children.⁴² In a few other states, the exclusion is only partial—for example, in Connecticut, excluded children born on welfare receive half of the per child benefit generally given to larger families entering the program.⁴³

In every state with such a program, however, the child exclusion targets only low income families receiving federal welfare benefits. Welfare recipients are, by definition, extremely poor.⁴⁴ As a matter of state policy reflected across the country, income eligibility for welfare support is pegged at a fraction of the federal poverty line, with some states more generous than others within this below-subsistence framework.⁴⁵ Thus, it is only the very low-income, most economically vulnerable families that are subject to the child exclusion program. Families with greater resources face an entirely different scheme. In contrast to the child exclusion's effort to use government funds to discourage low-income welfare recipients from childbirth, the

supporters of this measure were motivated by the desire to restrict immigration by denying basic services to undocumented aliens. *See id.* In earlier times, eugenics laws were common on the state level. *See* Michael G. Silver, Note, *Eugenics and Compulsory Sterilization Laws: Providing Redress for Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 863 (2004) (recounting that over 60,000 individuals were sterilized under various states' laws in the early twentieth century).

⁴¹ *See* Nat'l Conference of State Legislatures, *supra* note 19 (indicating states in which traditional cash increments for additional children have been denied).

⁴² *See* *Mason v. State*, 672 N.W.2d 28, 36 (Neb. 2003) (upholding the state's family cap exclusion of those who are "incapable of self-sufficiency" from the program).

⁴³ *See* State of Connecticut Department of Social Services, Welfare Reform – Family Cap, <http://www.ct.gov/dss/cwp/view.asp?a=2353&q=305274> (last visited Aug. 31, 2010) ("Only \$50 is added to the parent's cash assistance payment when a newborn child is added to the award. This is one-half the average of what a family received under previous policy.").

⁴⁴ For example, in Massachusetts, a family loses its eligibility for welfare when its total assets exceed \$2,500. *See* MassResources.org, TAFDC: Financial Eligibility, <http://www.massresources.org/pages.cfm?contentID=17&pageID=4&subpages=yes&dynamicID=349> (last visited Aug. 31, 2010).

⁴⁵ *See* COMM. ON WAYS & MEANS, U.S. HOUSE OF REP., 108TH CONG., 2004 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 7-48 (2004) [hereinafter 2004 GREEN BOOK], available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_green_book&docid=f:wm006_07.pdf (describing state phase-out points for welfare support); *see also* LEGAL MOMENTUM, THE BITTER FRUIT OF WELFARE REFORM: A SHARP DROP IN THE PERCENTAGE OF ELIGIBLE WOMEN AND CHILDREN RECEIVING WELFARE 2 (2009), <http://www.legalmomentum.org/assets/pdfs/lm-tanf-bitter-fruit.pdf> (noting that "the average state of financial eligibility standard has declined to [only] 29% of the official poverty level").

federal tax system provides incrementally increasing support to higher income families that choose to have additional children.⁴⁶ For example, those families may access the federal child care tax credit and take an additional child tax credit for each dependent child, as well as claim the child as a dependent and take advantage of any state level tax breaks.⁴⁷

Beyond the income-based targeting, however, there is also a race-based aspect to the child exclusion. Because African Americans are disproportionately poor, families and children affected by the child exclusion are disproportionately African American.⁴⁸ While this disparate impact may appear at first blush to be a byproduct of a neutral policy choice, there is some evidence that these families have been intentionally targeted. At least one study has demonstrated that states with higher African American populations were more likely to adopt the child exclusion policy, along with other limitations on cash assistance.⁴⁹ Statements of state legislators supporting the child exclusion policy also suggest that the policies have been adopted because of, not in spite of, their racial impacts.⁵⁰

This confluence of harsh policy impacts, with the denial of subsistence support falling hardest on low-income African-American children and their families, positions the child exclusion policies adopted by two-fifths of the states as a unique program globally—one that should trigger particular concern given the underlying principles of the international human rights regime.

⁴⁶ This has at times provoked some controversy, since it encourages taxpayers to have “as many [children] as possible.” Dalton Conley, *Two Is Enough*, SLATE, Mar. 29, 2004, <http://www.slate.com/id/2097913/> (arguing that subsidizing children through the tax system is an outdated policy reflecting industrial-age norms).

⁴⁷ See Elaine Maag, *Credits and Exemptions for Children*, TAX NOTES, Sept. 28, 2009, at 1, available at http://www.taxpolicycenter.org/UploadedPDF/1001331_credits_children.pdf (discussing tax credits and exemptions available for families with dependent children); see also Oregon Employment Department – Child Care Division, Tax Credits, <http://www.oregon.gov/EMPLOY/CCD/taxcredits.shtml> (last visited Aug. 31, 2010) (describing state level tax credits).

⁴⁸ See generally Joe Soss et al., *Setting the Terms of Relief: Explaining State Policy Choices in the Devolution Revolution*, 45 AM. J. POL. SCI. 378 (2001) (discussing the family cap, time limits, and work requirements for welfare recipients).

⁴⁹ Thomas Gais & R. Kent Weaver, *State Policy Choices Under Welfare Reform, in WELFARE REFORM & BEYOND POLICY BRIEF*, at 5–6 (Brookings Inst., Policy Brief No. 21, Apr. 2002) available at http://www.brookings.edu/~media/Files/rc/papers/2002/04welfare_gais/pb21.pdf

⁵⁰ See, e.g., CAMASSO, *supra* note 18, at 18 (citing a white New Jersey legislator who thanked Wayne Bryant, an African-American, for promoting this issue); see also Henry A. Freedman, *The Welfare Advocate's Challenge: Fighting Historic Racism in the New Welfare System*, 36 CLEARINGHOUSE REV. 31, 33 (2002) (noting that “[s]tates with larger minority populations [receiving benefits] tend to have harsher sanctions, time-limit, and family cap policies”).

III. THE CHILD EXCLUSION IN GLOBAL CONTEXT

Globally, many nations—though not the United States—have explicit population policies intended to rationalize their overall approach to population growth and to influence their general populations to make childbirth choices that will further national goals of conserving resources, managing infrastructure and, in some instances, promoting sustainability.⁵¹ Between 1960 and 1992, the number of countries adopting national population policies rose from 3 to 77; by the end of the 1990s, the number had increased to 114.⁵² In many instances, these national policies were developed in response to positions adopted by the United Nations and other international bodies linking reductions in fertility growth with economic development.⁵³

In countries with a federal structure, sub-national governments have also sometimes adopted initiatives intended to implement these policies on a regional or local level.⁵⁴ Indonesia's national population policy, for example, has been operationalized on a regional level.⁵⁵ Similarly, individual states in India have adopted their own comprehensive population policies, coordinating them with the country's overarching policy.⁵⁶

⁵¹ See U.N. Dep't of Econ. & Soc. Affairs, Population Div., *World Population Policies 2007*, at 12–14, U.N. Doc. ST/ESA/SER.A/272 (2008), available at http://www.un.org/esa/population/publications/wpp2007/Publication_introduction.pdf (discussing fertility and family planning policies in geographic regions including Africa, Eastern Europe and Western Europe). France, for example, has aggressively adopted pro-natalist policies to counteract a declining fertility rate. See, e.g., JONATHAN GRANT ET AL., *LOW FERTILITY AND POPULATION AGEING: CAUSES, CONSEQUENCES, AND POLICY OPTIONS* 70 (2004), available at http://www.rand.org/pubs/monographs/2004/RAND_MG206.pdf (discussing the policy steps taken by France to encourage immigration and increase fertility).

⁵² Deborah Barrett & Amy Ong Tsui, *Policy as Symbolic Statement: International Responses to National Population Policies*, 78 SOC. FORCES 213, 215 (1999).

⁵³ *Id.* at 214–15; see also Rachel Sullivan, *The Politics of Population Policy Adoption in Sub-Saharan Africa: Global Intersections with Demographic Localities* 6–7 (Jan. 18, 2006) (unpublished paper), available at http://www.allacademic.com/meta/p105081_index.html (discussing the role of international organizations in the adoption of population policies by individual nations).

⁵⁴ See, e.g., BADRI N. SAXENA, CHARAN D. WADHRA & O.P. SHARMA, *POPULATION POLICY OF INDIA: IMPLEMENTATION STRATEGIES AT NATIONAL AND STATE LEVELS* (2004) (describing population policies in four sub-national districts).

⁵⁵ See Gavin W. Jones, *Sub-National Population Policy: The Case of North Sulawesi*, 25 BULL. INDONESIAN ECON. STUD. 77 (1989) (examining Indonesia's population policy within a provincial context).

⁵⁶ See, e.g., GOV'T OF UTTAR PRADESH, *POPULATION POLICY OF UTTAR PRADESH* (2000), available at http://www.policyproject.com/pubs/countryreports/IND_UP_pp.pdf; Directorate of Health Services, Government of Goa, *Draft Population Policy* (March 2007), available at <http://goagovt.nic.in/GoaPPp.doc>; see also Asok Mitra, Note, *National Population Policy in Relation to National Planning in India*, 3 POPULATION & DEV. REV. 297, 297–99 (1977).

Finally, in more recent years, many countries have explicitly adopted approaches that conform to the terms of the 1995 Beijing Declaration and Platform for Action,⁵⁷ which reiterated that international human rights treaties recognize that fundamental human rights include the right of all couples and individuals

to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community. The promotion of the responsible exercise of these rights for all people should be the fundamental basis for government- and community-supported policies and programmes in the area of reproductive health, including family planning.⁵⁸

To further contextualize the child exclusion approach and to provide some comparative fodder, the discussion below reviews some other nations' policies—reflecting both national and local implementation efforts—that are relevant to this topic. It draws on case law, government data, and other contextual information to illuminate their purposes and effects.

A. India

India's National Commission on Population developed the nation's first National Population Policy in 2000, building on a series of earlier reports addressing the nation's population growth.⁵⁹ At the time of the 2000 policy, India's population was approaching one

⁵⁷ Fourth World Conference on Women, Beijing, P.R.C., Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995).

⁵⁸ *Id.* ¶ 95. Nearly identical language concerning the number, timing and spacing of children appears in Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women. See Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, art. 16(1)(e), 1249 U.N.T.S. 13, 20 (entered into force Sept. 3, 1981) [hereinafter CEDAW] (stating that all persons have equal rights “to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights”).

⁵⁹ See National Commission on Population, Government of India, National Population Policy 2000 – Introduction, ¶ 3, http://populationcommission.nic.in/npp_intro.htm.

billion, or sixteen percent of the world's people.⁶⁰ India has since grown to approximately 1.16 billion people.⁶¹

According to the Population Commission's report, the National Policy's objectives are:

to address the unmet needs for contraception, health care infrastructure, and health personnel, and to provide integrated service delivery for basic reproductive and child health care; . . . to bring the TFR [Total Fertility Rate] to replacement levels by 2010, through vigorous implementation of inter-sectoral operational strategies; [and] . . . to achieve a stable population by 2045, at a level consistent with the requirements of sustainable economic growth, social development, and environmental protection.⁶²

Consistent with these goals, India's Population Commission proposed adoption of a range of financial incentives for population control, including rewards for couples below the poverty line who agree to undergo sterilization, rewards for girls who delay childbirth until after age nineteen, and rewards for couples who have their first child after the mother turns twenty-one and who accept terminal birth control after their second child.⁶³

These measures were apparently recommended amid both controversy and substantial reflection. Indeed, the National Commission on Population prepared a special report, *Incentives and Disincentives to Promote the Small Family Norm*, discussing the "important ethical, administrative and political questions" raised by incentive and disincentive programs.⁶⁴ After reviewing these various questions, the Commission concluded:

⁶⁰ *Id.*

⁶¹ See CENT. INTELLIGENCE AGENCY, *India*, THE WORLD FACTBOOK (2010), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/in.html>.

⁶² National Commission on Population, Government of India, National Population Policy 2000 – Objectives, ¶ 1, http://populationcommission.nic.in/npp_obj.htm.

⁶³ See National Commission on Population, Government of India, National Population Policy 2000 – Funding, Promotional and Motivational Measures for Adoption of the Small Family Norm, http://populationcommission.nic.in/npp_fun.htm#prom.

⁶⁴ National Commission on Population, Government of India, *Incentives and Disincentives to Promote the Small Family Norm*, ¶ 6, <http://populationcommission.nic.in/incentive.htm> [hereinafter *Incentives and Disincentives*]. The report also lists the incentives and disincentives employed in a number of Indian states. See *id.*; see also Sandhya Srinivasan, Editorial, *National Population Policy*, INDIAN J. MED. ETHICS Apr.–June 2000, available at <http://www.issuesinmedicalethics.org/082ed039.html> (reviewing ethical issues for medical professionals posed by national population policy, including potential for coercion).

While drafting laws and regulations and policies and programmes relating to incentives and disincentives, above discussed implications of incentives/disincentives should be taken into consideration so as to make an appropriate balance between rights of people and national goals for achieving population stabilization.⁶⁵

Though federal leadership provided a critical framework, much of the policy's implementation has taken place on the local and state level. In *Javed v. State of Haryana*,⁶⁶ the Supreme Court of India considered the legal parameters governing such local implementation.⁶⁷

The case concerned a law adopted in the Indian state of Haryana that denied membership in local Panchayats—the elected village-level assemblies—to anyone having “more than two living children.”⁶⁸ The law was challenged as a violation of the Indian Constitution.⁶⁹ Citing specific provisions of the constitution, the petitioners argued that the law was arbitrary and discriminatory, violative of personal liberty and the freedom to have as many children as one chooses, and violative of the freedom of religion.⁷⁰

The Indian Supreme Court rejected these claims. Deferring to the legislature on the specifics of the law, the court observed that

[o]ne of the objects sought to be achieved by the legislation is popularizing the family welfare/family planning programme. . . . The classification does not suffer from any arbitrariness. The number of children, viz., two is based on legislative wisdom. It could have been more or less. The number is a matter of policy decision which is not open to judicial scrutiny.⁷¹

The court also situated the law in the context of more comprehensive “gradual progressive change.”⁷² Thus, while the law targeted one specific group of elected leaders, “[i]t would . . . [have been]

⁶⁵ Incentives and Disincentives, *supra* note 64, ¶ 9; see also Mohan Rao & Devaki Jain, *National Population Policy 2000: Re-examining Critical Issues*, 36 ECON. & POL. WKLY. 1299, 1301 (2001) (warning that the elements of coercion are creeping into state-level programs).

⁶⁶ A.I.R. 2003 S.C. 3057 (India).

⁶⁷ See *id.* at 3062.

⁶⁸ *Id.*

⁶⁹ See *id.* at 3063.

⁷⁰ See *id.*

⁷¹ *Id.* at 3064.

⁷² *Id.* at 3065.

inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go.”⁷³

On the question of whether the law violated the fundamental rights of Haryana’s citizens, the court again examined the question in the larger context of the nation’s population policy. Citing extensive data, the court concluded that “India is growing at [an] alarming rate.”⁷⁴ Looking to its Asian neighbor, the court criticized China’s response to its own population explosion, in which “drastic disincentives were cast on the couples breaching [the] ‘one-child norm’ which even included penal action.”⁷⁵ As the court observed approvingly, “India being a democratic country has so far not chosen to go beyond casting minimal disincentives and has not embarked upon penalizing procreation of children beyond a particular limit.”⁷⁶ But, stated the court, “[f]undamental rights are not to be read in isolation.”⁷⁷ Absent population control, the Indian government could not adequately fulfill its other obligations, including “promot[ing] the welfare of the people and developing a social order empowered at distributive justice—social, economic and political,” nor could it take effective steps to raise the nation’s nutritional standards.⁷⁸ Accordingly, because the law reflected a necessary balancing of collective public imperatives, the court concluded that the law did not violate any fundamental individual liberty interest.⁷⁹

The court similarly dealt with the claim based on religious freedom. After a detailed review of various Muslim and Hindu religious tenets, the court concluded that there was no fundamental conflict between the law and any religious command.⁸⁰

In sum, the Indian Supreme Court concluded that the state legislature could appropriately require that members of the Panchayats be examples for others in implementing the nation’s comprehensive family planning goals.⁸¹ Thus, the narrowly targeted law was constitutional. Simply put by the court:

If anyone chooses to have more living children than two, he is free to do so under the law as it stands now but then he should pay a little price and that is of depriving himself from

⁷³ *Id.*

⁷⁴ *Id.* at 3068.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 3069.

⁷⁸ *Id.* at 3070.

⁷⁹ *Id.*

⁸⁰ *See id.* at 3070–73.

⁸¹ *See id.* at 3074.

holding an office in panchayat in the State of Haryana. There is nothing illegal about it and certainly no unconstitutionality attaches to it.⁸²

In the wake of this decision, several other Indian districts have adopted similar bars on the family size of elected officials.⁸³ Other disincentives adopted by several Indian districts to discourage large families include the denial of maternity leave for local government employees after the second child.⁸⁴

B. China

China's one-child policy is well-known. Adopted in 1979, the policy was a response to the nation's population pressures as it entered the era of a new baby boom.⁸⁵ Though ostensibly a national policy, it was applied unevenly by local governments.⁸⁶ Strict enforcement has been limited to urban populations, with rural families sometimes permitted to have a second child five years after the first, or sooner if the first child is a girl.⁸⁷ Further, some ethnic minorities are specially permitted to have up to three children.⁸⁸

When strictly enforced, the one-child policy features a range of incentives and disincentives for compliance. Incentives include special educational benefits for only children.⁸⁹ Substantial fines and even dismissal from work are among the most serious penalties for failure to comply.⁹⁰ Many reports also indicate that forced abortion and sterilization were part of China's implementation of the policy, particularly in the 1980s.⁹¹

⁸² *Id.* at 3073.

⁸³ See Incentives and Disincentives, *supra* note 64.

⁸⁴ See *id.*

⁸⁵ See Therese Hesketh et al., *The Effect of China's One-Child Family Policy After 25 Years*, 353 NEW ENG. J. MED. 1171, 1171 (2005) (noting that the Chinese government saw the one-child policy as essential to relieving population pressures); see also Christie N. Love, *Not in Our Country? A Critique of the United States Welfare System Through the Lens of China's One-Child Law*, 14 COLUM. J. GENDER & L. 142, 149-52 (2005) (discussing the history of Chinese family planning laws).

⁸⁶ See Philip P. Pan, *China's One-Child Policy Now a Double Standard: Limits and Penalties Applied Unevenly*, WASH. POST, Aug. 20, 2002, at A01 (highlighting the differences between rural and urban areas in the implementation of China's one-child policy).

⁸⁷ Hesketh et al., *supra* note 85, at 1171.

⁸⁸ *Id.*

⁸⁹ Nancy E. Riley, *China's Population: New Trends and Challenges*, POPULATION BULL., June 2004, at 3, 12.

⁹⁰ Hesketh et al., *supra* note 85, at 1171.

⁹¹ David Eimer, *China Admits Women Were Forced to Have Abortions*, INDEPENDENT, Sept. 21, 2005, <http://www.independent.co.uk/news/world/asia/china-admits-women-were-forced-to-have-abortions-507688.html>.

While there is no Chinese case law reflecting an internal legal challenge to the one-child policy, the policy has played a central role in a number of political asylum claims raised by Chinese nationals seeking asylum in the United States and Canada. These judicial discussions of the policy, particularly its manifestation in the 1980s in allegations of forced abortions, give some insight into international perspectives on the policy's consistency with basic principles of human rights law. More direct criticism by international human rights bodies has often been muted, given the very real population challenges that face the Chinese government on the domestic front.⁹² Within the U.S., the "forces of America's abortion politics" tend to obscure more moderated views.⁹³ However, in addition to judicial opinions, these issues have received more measured treatment by domestic scholars writing in the United States.⁹⁴

1. Chinese Claims for Political Asylum in Canada

In a series of cases, Canadian courts have considered various fact patterns in which Chinese nationals relied on the Chinese government's one-child policy as a key component of their claim for political asylum in Canada. In order to obtain political asylum, claimants in Canada must establish a well-founded fear of persecution based on their membership in a particular social group.⁹⁵ The formulation of this standard, derived from the international law of political asylum, is common across many nations.⁹⁶ To meet this standard, claimants have argued—with considerable success—that the

⁹² See, e.g., Comm. on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of All Forms of Discrimination Against Women: China*, ¶ 32, U.N. Doc. CEDAW/C/CHN/CO/6 (Aug. 25, 2006) (noting the "negative consequences" of the one-child policy, including forced abortions and sterilization, as well as gender imbalance in the Chinese population).

⁹³ Ronald M. Green, *U.S. Defunding of UNFPA: A Moral Analysis*, 13 KENNEDY INST. ETHICS J. 393, 393 (2003).

⁹⁴ See, e.g., Love, *supra* note 85; Ying Chen, *China's One-Child Policy and Its Violations of Women's and Children's Rights*, 22 N.Y. INT'L L. REV. 1 (2009); Edwin A. Winckler, *Chinese Reproductive Policy at the Turn of the Millennium: Dynamic Stability*, 28 POPULATION & DEV. REV. 379 (2002).

⁹⁵ Under Canadian law, a refugee is any person who

by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or not having a country of nationality . . . is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country.

Immigration Act, R.S.C., ch. 28 (4th Supp.), § 2(a) (1988).

⁹⁶ See Convention Relating to the Status of Refugees, art. 1(A)(2), July 28, 1951, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152.

strictures of the one-child policy define such a social group and that when individuals are singled out for forced sterilization or abortion, such government actions constitute persecution. In contrast, courts have indicated that they would reject claims of persecution based on a law of general applicability, such as the one-child policy itself.

For example, in 1993, in *Cheung v. Canada*,⁹⁷ the Canadian Federal Court of Appeal considered an appeal from Ting Ting Cheung, a Chinese national seeking political asylum in Canada. While living in southern China in the 1980s, Cheung had one son followed by three abortions. When she became pregnant once again, she decided against an abortion and gave birth to a daughter. Facing discrimination against her daughter as a second child, unable to keep her family together as a unit because of China's restrictions, and confronting the possibility of forced sterilization, Cheung fled to Canada and claimed political asylum.⁹⁸

The Court of Appeal accepted Cheung's claim that "women in China who have more than one child and are faced with forced sterilization" constitute a particular social group for purposes of the asylum law.⁹⁹ Further, while the court acknowledged that the one-child policy is generally applicable in China and therefore could not be described as persecution, it determined that the forced sterilization faced by Cheung was not a law of general application.¹⁰⁰ Instead, wrote the court, "[t]his is a practice that affects a limited and well-defined group of people."¹⁰¹ Citing provisions of the Universal Declaration of Human Rights, the court further noted that the serious nature of forced sterilization would likely mean that it constitutes a ground for persecution even if it were couched in a law of general application.¹⁰² According to the court, "[t]he practice of forcing women to undergo sterilization is such an extreme violation of their basic human rights as to be persecutory, even though this was thought to advance the modernization of China."¹⁰³

More recent cases reach conclusions consistent with *Cheung*. For example, in *X (Re)*, the Canadian Immigration and Refugee Board again addressed a claim based on evidence of forced sterilization.¹⁰⁴ Discounting the credibility of the claimant's evidence of coerced

⁹⁷ [1993] 2 F.C. 314 (Can Fed. Ct.).

⁹⁸ *Id.* at 317-18.

⁹⁹ *Id.* at 320.

¹⁰⁰ *Id.* at 322.

¹⁰¹ *Id.*

¹⁰² *Id.* at 324.

¹⁰³ *Id.* at 325.

¹⁰⁴ *X (Re)*, 2006 Can. LII 76153 (I.R.B.) (Can.).

sterilization,¹⁰⁵ the Board went on to consider whether China's one-child policy itself might support a claim.¹⁰⁶ The Board concluded, however, that China's one-child policy would not sustain a grant of political asylum.¹⁰⁷ According to the Board, context matters: "[t]he denial of an absolute right in China to have as many children as one wishes can be described as reasonable social policy given the size of the population, the strain on resources and the continuing widespread poverty."¹⁰⁸ Rather than persecutorial, the Board described the policy as an "acceptable rights trade-off."¹⁰⁹

2. Chinese Claims for Political Asylum in the United States

The treatment of Chinese political asylum claimants by U.S. courts has not been as straightforward. As in Canada, an individual seeking political asylum in the United States must generally establish a "well-founded fear of persecution" based on political opinion, religion, or membership in a social group.¹¹⁰ However, U.S. law incorporates an additional provision to extend political asylum to individuals who can prove persecution under coercive family planning policies of their home countries.¹¹¹ This provision was added to the law in 1996 specifically to aid those subjected to the harsh practices surrounding China's one-child policy.¹¹² Since this change, courts have found that involuntary sterilization constitutes a ground for political asylum.¹¹³

The legislative history of this new provision reveals that it was intended by some to go far beyond forced sterilization and abortion; for example, during the congressional debate, Representative Chris Smith (R-NJ) remarked that the legislation would also protect victims of "other forms of persecution for resistance" to coercive family planning, including "forced labor, beatings and other harsh

¹⁰⁵ See *id.* at 4–6.

¹⁰⁶ See *id.* at 7.

¹⁰⁷ See *id.* at 8.

¹⁰⁸ *Id.* at 6.

¹⁰⁹ *Id.* at 7.

¹¹⁰ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987).

¹¹¹ See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, div. C, § 601(a)(1), 110 Stat. 3009-546, 3009-689 (codified as amended at 8 U.S.C. § 1101(a)(42)(B) (2006)).

¹¹² See Kyle R. Rabkin, Comment, *The Zero-Child Policy: How the Board of Immigration Appeals Discriminates Against Unmarried Asylum-Seekers Fleeing Coercive Family Planning Measures*, 101 NW. U. L. REV. 965, 967–68, 981–84 (2007) (discussing U.S. court decisions that have limited asylum only to those couples officially married under Chinese law).

¹¹³ See, e.g., *Lin v. Gonzales*, 216 F. App'x 719 (9th Cir. 2007) (holding that the applicant's resistance to birth control officials' efforts to confiscate and destroy family property qualified her for asylum).

treatment.”¹¹⁴ Nevertheless, courts have stopped short of permitting additional-child fines of “moderate impact” to serve as a ground for political asylum. For example, in *Lin v. Holder*,¹¹⁵ the court endorsed the Board of Immigration Appeals’ refusal to grant asylum when the fines levied on a larger family, while posing a hardship, would not rise to the level of persecution.¹¹⁶

Prior to this change in the law, U.S. immigration adjudicators had generally rejected claims based on China’s population control policies, viewing the policy as one of general applicability that would not support a persecution claim even when the measures taken in implementing it included forced abortion or sterilization.¹¹⁷ For example, in the 1989 case of *In Re Chang*,¹¹⁸ the Board of Immigration Appeals dismissed a claim for asylum from Mr. Chang, a 33-year-old Chinese citizen, who argued that he would be forcibly sterilized on return to China because he already had two children.¹¹⁹ Even without the change in U.S. asylum law, however, the Chang result might be different today because of changes in China. Now, forced sterilization and abortion are officially forbidden, making such punishments (when they occur) more like persecution that targets particular individuals or groups and less like an acceptable outgrowth of a law of general applicability.¹²⁰

C. African Countries

Faced with significant poverty, limited resources and unsustainable birthrates, a number of African nations have also adopted programs intended to limit childbirth and encourage family planning.¹²¹ Rather than focus exclusively or even primarily on targeted incentives or disincentives, however, most of these nations have effectively utilized educational initiatives to achieve their

¹¹⁴ Rabkin, *supra* note 112, at 987 (quoting 142 CONG. REC. H11, 067, 24,796–97 (daily ed. Sept. 25, 1996) (comments of Rep. Smith)).

¹¹⁵ 317 F. App’x 562 (7th Cir. 2009).

¹¹⁶ *See id.* at 563.

¹¹⁷ *See* Rabkin, *supra* note 112, at 972.

¹¹⁸ 20 I. & N. Dec. 38 (B.I.A. 1989).

¹¹⁹ *See id.* at 39, 44.

¹²⁰ *See, e.g.,* Louisa Lim, *Cases of Forced Abortions Surface in China*, NAT’L PUB. RADIO, Apr. 23, 2007, <http://www.npr.org/templates/story/story.php?storyId=9766870> (noting that forced abortion and sterilization were forbidden by law beginning in 2002).

¹²¹ *See generally* U.N. Econ. & Soc. Council [ECOSOC], Econ. Comm’n for Africa, Comm. on Sustainable Dev., *Sustainable Development Policy in Africa: Harmonizing Population and Economic Growth in the Process of Implementing the ICPD Programme of Action*, ECA/FSSDD/POP/CSD/01/06 (Aug. 27, 2001), available at <http://www.uneca.org/csd/Population.PDF> [hereinafter ECOSOC, *Policy in Africa*] (reviewing population effects on sustainability and assessing activities for the implementation of the ICPD Programme Action).

population goals.¹²² The disincentives they employ—such as denial of maternity leave for the *n*th pregnancy or denial of an additional family allowance—are imposed on larger families across the board, rather than targeted at particularly vulnerable sub-groups of the national population.

The primary focus on education as a vehicle for implementing population policy is consistent with the African Protocol on the Rights of Women, which follows CEDAW in protecting “the right to decide whether to have children, the number of children and the spacing of children.”¹²³ Significantly, the African Protocol goes further and specifically enshrines a human right to family planning education as well.¹²⁴ Some of the approaches taken by individual African nations to effectuate these rights are briefly summarized below.

1. Ghana

Population control is important in Ghana, as evidenced by the fact that its constitution requires the Ghanaian government to “maintain a population policy consistent with the aspirations and development needs and objectives of Ghana.”¹²⁵ Ghana’s population policy goals include significantly lowering birthrates: to five children per woman by year 2000, to four by 2010, and to three by 2020.¹²⁶ To achieve these goals, the nation focuses its efforts on family planning, birth control, educating the population on reproductive issues, and improving women’s rights and status in society.¹²⁷ Involvement of men is also an important part of the effort.¹²⁸

¹²² See Ross & Isaacs, *supra* note 29, at 272 (noting that African countries have eschewed incentives and simply make access to contraception free to all).

¹²³ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, art. 14(1)(b), Sept. 13, 2000, OAU Doc. CAB/LEG/66.6, available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf> [hereinafter African Protocol]; see also CEDAW, *supra* note 58, art. 16(e).

¹²⁴ See African Protocol, *supra* note 123, art. 14(g).

¹²⁵ CONSTITUTION OF THE REPUBLIC OF GHANA art. 37(4), available at http://www.parliament.gh/chapter_six_-_directive_principles_state_policy.html.

¹²⁶ See Nat’l Population Council, Gov’t of Ghana, *National Population Policy at a Glance*, at 3 (1994) [hereinafter Ghana, *National Population Policy*] available at <http://www.npc.gov.gh/assets/NationalPopulationPolicyataGlance.pdf>.

¹²⁷ See *id.* at 4–8; see also Chris Benjamin, *Planning Healthy Ghanaian People*, STATESMAN, Feb. 21, 2007, http://www.thestatesmanonline.com/pages/news_detail.php?newsid=2608§ion=9 (detailing the family planning strategies being implemented to achieve population goals).

¹²⁸ See Benjamin, *supra* note 127 (noting that “Ghanaian family planners have come to realise the importance of involving men in reproductive health” because “[m]en are still the main decision makers in most Ghanaian families and communities”).

In addition, however, Ghana has used policy changes and population-wide disincentives to influence individual decision making about reproduction. For example, the nation has raised its minimum age of marriage from 16 to 18¹²⁹ and, like a number of other nations, limits maternity leaves to a specified number of births.¹³⁰

2. Kenya

Kenya was the first sub-Saharan country to develop a National Family Planning Programme, launching its effort in 1967.¹³¹ A large part of Kenya's population control efforts are focused on young people, specifically educating them about sex and reproductive health and providing them with economic opportunities.¹³² However, the primary focus of Kenya's population control efforts is on providing its population with birth control.¹³³ Kenya has even developed a National Condom Policy and Strategy to complement its more general population policy.¹³⁴ At the same time, Kenya has also employed a financial disincentive structure alongside educational approaches to encourage family planning. In particular, Kenya permits tax deductions only for the first four children in a family.¹³⁵

3. Tunisia

Tunisia has been one of the more effective African countries at implementing a population control strategy, as millions of Tunisian

¹²⁹ *Id.*

¹³⁰ See Ross & Isaacs, *supra* note 29, at 271; see also Gov't of Ghana, *Official Policy Statement: Population Planning for National Progress and Prosperity*, art. 5.20(1), reprinted in *STUD. IN FAM. PLAN.*, Aug. 1969, at 1, 6 (older policy statement reflecting intention to limit maternity leave as a part of the nation's population policy).

¹³¹ See Population Reference Bureau & U.N. Population Fund, *Country Profiles for Population and Reproductive Health: Policy Developments and Indicators 2005*, at 58, available at http://www.prb.org/pdf06/2005UNFPA_CountryProfiles_SubSaharanAfrica.pdf; Robert A. Miller et al., *The Situation Analysis Study of the Family Planning Program in Kenya*, 22 *STUD. FAM. PLAN.* 131, 132 (1991).

¹³² See Republic of Kenya, Ministry of Health, Div. of Reprod. Health, *Adolescent Reproductive Health and Development Policy Plan of Action: 2005-2015*, at 7-14, available at http://www.policyproject.com/pubs/policyplan/KEN_ARH_POA%202005-15.pdf (discussing the implementation strategies for Kenya's national planning program).

¹³³ See Sarah A. Ramage, *Resisting the West: The Clinton Administration's Promotion of Abortion at the 1994 Cairo Conference and the Strength of the Islamic Response*, 27 *CAL. W. INT'L L.J.* 1, 79-80 (1996) (quoting a Kenyan pediatrician stating that "[w]e are running out of vaccine. We have no syringes, no needles, no sulfa drugs, no penicillin, yet our Family Welfare Centers never lack birth-control supplies" (internal quotation marks omitted)).

¹³⁴ See Republic of Kenya, Ministry of Health, *National Condom Policy and Strategy: 2001-2005*, available at http://www.policyproject.com/pubs/countryreports/Kenya_Condom_Policy.pdf (seeking to educate the Kenyan population on the risks of HIV/AIDS, as well as to develop an unambiguous condom policy).

¹³⁵ Ross & Isaacs, *supra* note 29, at 279.

women have been persuaded by family-planning campaigners to have fewer children. Specifically, the number of children per Tunisian woman has decreased from 7.2 in the 1960s to 2.08 in 2003.¹³⁶ In addition to family-planning education, which is largely directed at young people, Tunisia has also focused on advocating birth control and spends large sums of money every year to dispense birth-control devices to all parts of the country.¹³⁷ Further, Tunisia has raised the minimum age for marriage.¹³⁸ According to some experts, however, the most important factor in Tunisia's population control success has been its ability to implement social change by enabling its citizens to use the country's declining birth rate to gain personally and economically,¹³⁹ as illustrated by the increase in per capita annual income in Tunisia from \$1,430 in 1993 to \$2,070 in 2003, one of the highest in Africa at the time.¹⁴⁰ Tunisia has also had success in persuading its religious leaders to loosen their interpretation of the Koran so as to fit with population control efforts and in integrating women into the workforce and universities in large numbers.¹⁴¹

Tunisia's social policies implementing its population policy include generally applicable financial disincentives for childbearing as well. For example, Tunisia offers a family allowance to parents only for the first three children in a family.¹⁴²

IV. ETHICAL AND EFFICACIOUS STANDARDS FOR POPULATION POLICIES

As the range of national policy responses to population pressures indicates, population policies—from the ad-hoc child exclusion to the national one-child policy—often raise critical moral issues about competing rights and the proper role of government in influencing individual reproductive choices. Judges examining real-world issues in India, the U.S., and Canada have identified a constellation of factors relevant to assessing whether population policies cross the line into impermissible coercion or persecution. First, policies of general applicability—short of policies of forced abortion or sterilization for all—are viewed as less troubling than policies that target a particular

¹³⁶ Gautam Naik, *As Tunisia Wins Population Battle, Others See a Policy Model*, WALL ST. J., Aug. 8, 2003, at A1.

¹³⁷ *Id.*

¹³⁸ ECOSOC, *Policy in Africa*, *supra* note 121, ¶ 25.

¹³⁹ Naik, *supra* note 136.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Ross & Isaacs, *supra* note 29, at 279.

group for special hardship.¹⁴³ Second, relatively mild disincentives, such as having to give up a minor elective office or moderate fines, are viewed as less troubling than greater punishments, such as loss of all employment or physical violation.¹⁴⁴ Third, context matters. When a nation's population policy identifies population control as a concern of the highest order, more extreme approaches can be justified, whereas a nation without such immediate policy concerns may not be able to sustain the same justification.¹⁴⁵

In addition to the practical assessments offered by judges, philosophers and social scientists have also delved into these questions. In a 1988 article surveying the use of disincentives and incentives in family planning programs worldwide, Professors John Ross and Stephen Isaacs from the Columbia School of Public Health proposed three principles to guide nations considering implementing such measures.¹⁴⁶ First, they noted that "the right of couples and individuals to determine the number and spacing of their children"—the right set out in international human rights law—takes precedence.¹⁴⁷ In other words, governments seeking to infringe on that right have the burden of establishing that failure to take action will "threaten the well-being of the society with severe harm to present or succeeding generations."¹⁴⁸ The authors identify malnutrition and starvation as candidates for such harm.¹⁴⁹ Second, the article argues that measures relying on voluntary choice should be employed "before moving to more coercive measures."¹⁵⁰ Third, the authors stress that as a matter of ethics, "any measure that penalizes children for being the *n*th child should be avoided."¹⁵¹

Other experts in search of standards have combined assessments of efficacy with concerns about morality of coercive family planning. For example, authors David Bloom and David Canning assert that the link between population policy and poverty reduction is strong and

¹⁴³ See, e.g., *Cheung v. Canada*, [1993] 2 F.C. 314 (Can. Fed. Ct.); *In re Chang*, 20 I. & N. Dec. 38 (B.I.A. 1989).

¹⁴⁴ See, e.g., *Lin v. Holder*, 317 F. App'x 562 (7th Cir. 2009). Along the same lines, the 1974 United Nations Symposium on Law and Population in Tunis, Tunisia, concluded that governments should "ensure that any benefits or services withheld or withdrawn as disincentives in the context of family planning do not conflict with the enjoyment of basic human rights." Luke T. Lee, *Population: The Human Rights Approach*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 327, 337 (1995) (citing principles adopted by the Symposium).

¹⁴⁵ *Javed v. Haryana*, A.I.R. 2003 S.C. 3057 (India).

¹⁴⁶ See Ross & Isaacs, *supra* note 29, at 280.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

direct, and that approaches that emphasize empowerment and education of women maximize the benefits of both.¹⁵²

Applying this range of potential factors to the policies discussed above suggests some important conclusions. India and China are able to command considerable deference for their programs precisely because they have, as nations, been so direct and explicit in identifying and addressing their population challenges.¹⁵³ The African nations discussed above have also developed national population policies that provide a rationale for their population initiatives and that reflect some agreement as to how the burdens of population control should be shared among the residents of the country.¹⁵⁴ These countries have made the case that the well-being of the nation rests on controlling the country's population. In contrast, the U.S. has no coherent overriding population policy that might serve to justify the targeted effort reflected by the child exclusion.

Likewise, other nations have largely avoided policies that fall hardest on an identifiable subgroup of the population. China's one-child policy is a policy of general application, as are the maternity leave limits and similar efforts to discourage large families adopted in India and countries of Africa.¹⁵⁵ Haryana's limitation on family size for elected officials does exclude a particular group in a way that is ethically troubling given the importance of elections in a democracy, but unlike the child exclusion analogy, the excluded group in Haryana is not one that is associated with a particular race or caste.¹⁵⁶ Further, Haryana chose this subgroup specifically because they are role models for the rest of the state's citizens and may encourage more individuals to voluntarily limit their family size.¹⁵⁷

Promoting voluntary choices through increased access and education are the hallmark of efforts in Kenya, Tunisia and Ghana.¹⁵⁸ As was mentioned above, some economists argue that this approach is by far the most effective for achieving poverty reduction in conjunction with population control.¹⁵⁹ China, in contrast, has relied primarily on significant disincentives, and at times even force, to influence birthrates.¹⁶⁰ Likewise, while the means used do not include force, the disincentives to childbearing put forward in the child

¹⁵² See Bloom & Canning, *supra* note 33, at 57–59.

¹⁵³ See *supra* notes 59, 85 and accompanying text.

¹⁵⁴ See ECOSOC, *Policy in Africa*, *supra* note 121, ¶¶ 20–27.

¹⁵⁵ See *supra* notes 84–85, 130 and accompanying text.

¹⁵⁶ *Javed v. Haryana*, A.I.R. 2003 S.C. 3057 (India).

¹⁵⁷ *Id.*

¹⁵⁸ See *supra* notes 121–42 and accompanying text.

¹⁵⁹ See *supra* note 152 and accompanying text.

¹⁶⁰ See *supra* notes 85–120 and accompanying text.

exclusion context in the United States are significant in light of the overall income of welfare recipients, amounting to penalties between fifteen and twenty-five percent of a family's below-subsistence income.¹⁶¹

Finally, the Columbia School of Public Health authors cite ethical considerations to advocate against policies that exclude or target the *n*th child.¹⁶² Limitations on maternity leave such as those in India and Ghana certainly violate this principle, since they deny the *n*th child the significant and foundational benefit of bonding with its parents that was made available to earlier born children.¹⁶³ The child exclusion also particularly runs afoul of this principle, since excluded children cannot generally acquire eligibility for welfare benefits by going to live with another family, though they may qualify in some states if the family leaves welfare for a time and then reapplies.¹⁶⁴ Otherwise, they remain excluded until they attain majority, when they leave the family's household. Indeed, in many states these children are now simply called "cap babies"¹⁶⁵ as a shorthand to convey their limited rights within the income support system.

CONCLUSION

In the absence of a federal population policy for the United States, the child exclusion approach can only be seen as an ad-hoc response to concerns about child poverty, tainted by overtones of class, race and gender bias. Yet, while ad hoc, it is a response that has been adopted by twenty-two states, with tacit approval by a federal government that has done nothing to legislatively bar such programs even though federal money is supporting them.

This limited comparative review teases out the aspects of the child exclusion that are most objectionable from the perspective of

¹⁶¹ As of 2005, the monthly maximum benefit for a family of three in New Jersey was \$424. See National Center for Children in Poverty, Temporary Assistance for Needy Families (TANF) Cash Assistance: New Jersey, http://www.nccp.org/profiles/NJ_profile_36.html (last visited Aug. 31, 2010). The benefits denied amounted to \$102 for a second child and \$64 for a third child. *C.K. v. N.J. Dep't of Health & Human Servs.*, 92 F.3d 171, 179 (3d Cir. 1996).

¹⁶² See Ross & Isaacs, *supra* note 29, at 280.

¹⁶³ See *supra* notes 84, 130 and accompanying text.

¹⁶⁴ See Rebecca L. Hegar & Maria Scannapieco, *Grandma's Babies: The Problem of Welfare Eligibility for Children Raised by Relatives*, J. SOC. & SOC. WELFARE, Sept. 2000, at 153, 158-64 (discussing the historical limitations imposed on children receiving benefits who live outside of the family); Smith, *supra* note 17, at 166 (noting that some states will suspend cap policies for families that leave welfare for a period of time).

¹⁶⁵ LEGISLATIVE PROGRAM REV. & INVESTIGATION COMM., CONN. GEN. ASSEMBLY, STAFF BRIEFING: CONNECTICUT'S WELFARE REFORM INITIATIVE 40 (2006), available at http://www.cga.ct.gov/2006/pridata/Studies/PDF/Welfare_Reform_Briefing.PDF (referring to excluded children as "cap babies," and noting that over 1800 "cap babies" were born within the first year and a half of the program).

population policy and human rights: its focus on subsistence benefits, its use of disincentives rather than incentives, and its targeting of a marginalized, disproportionately minority population. As discussed above, other nations facing serious population issues have developed alternative approaches to influencing family decisions that avoid this confluence of suspect factors, that better respect individual autonomy, and that do not raise these human rights flags. The Chinese one-child policy, for example, is a policy of general application. Likewise, the policy of limiting childbirth of elected officials, adopted by the Indian state of Haryana, avoids targeting marginalized groups and does not cut off basic needs. And in African nations seeking to influence family size, policies of general applicability give priority to educational outreach as a means to influence population choices.

The child exclusion, in contrast, combines many of the most suspect elements of the population policies examined here. The United States' failure to take alternative steps to achieve its population goals in lieu of permitting state level child exclusion policies raises serious questions under international human rights law.

