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BIOLOGY AND EQUALITY: CHALLENGE FOR FEMINISM IN THE SOCIALIST AND THE LIBERAL STATE

Margaret Y.K. Woo*

INTRODUCTION

“When will it no longer be necessary to attach special weight to the word ‘woman’ and raise it specially?”

Ding Ling1

In 1980, a novella entitled At Middle Age burst onto the scene in China and received national attention. At Middle Age is a story of a middle-aged woman doctor who collapses under the pressures of work and family. In the novella, the doctor confesses her guilt: “I’m a selfish woman, who thinks only about her work,” her voice quivering.2 She could not take her eyes away from her husband’s forehead. “I have a home but I’ve paid it little attention. Even when I’m not at work, my mind is preoccupied with my patients. I have not been a good wife or mother.”3

This refrain, familiar to many women in the West also burdened with family and work, resonates in the book The Second Shift, published in the United States a few years later. This book documents a “second shift” of

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* Associate Professor of Law, Northeastern University School of Law. The author began this Article while a fellow at the Bunting Institute of Radcliffe College. The author would like to thank the Bunting Institute, its 1990-91 fellows, members of the Women’s Study Group at Northeastern University School of Law, the Scholars of the East Asian Legal Studies Center at Harvard Law School, and the international participants in the “Engendering China” conference at Harvard University and Wellesley College for their thoughtful comments. Portions of this Article were presented at the “Engendering China” conference, the Fourth International Conference on China, and the East Asian Legal Studies Center. The author would like especially to thank Zhang Nongji and Larry Kuo for their research assistance, and Phyllis Baumann, Judy Brown, Naomi Cahn, Ann Goldstein, Gail Hershatter, Martha Minow, Wendy Parme, Andrew Rainer, Lisa Rofel, and Tyrene White for their comments on earlier drafts of this Article. Finally, the author would like to thank Northeastern University School of Law and Dean Daniel J. Givelber for the summer research grant that made possible some of the research on this article.

1 I Myself Am A Woman: Selected Writings of Ding Ling 1 (Tani E. Barlow & Gary J. Bjorge eds., 1989) [hereinafter I Myself Am A Woman].

2 Shen Rong, At Middle Age 45 (1987).

3 Id.
work awaiting American women at home after a full day on the job. Indeed, the issues faced by women workers in today's China and the United States are remarkably similar. In both countries women must balance their reproductive and productive roles in a social structure that has not considered the tension between the demands of family and work.

Employment issues, familiar to women in the West, have recently surfaced with a new prominence for Chinese women. Since 1978, China has embarked on a program of economic reform focusing on market forces, efficiency, and privatization. These reforms have resulted in the decentralization and autonomy of many state industries, the appearance of private enterprises for the first time since 1949, and the elimination of the "iron rice bowl" employment system.

Women workers have not fared well under the reforms. Overwhelmingly, they are the last to be hired and the first to be laid off. Even when hired, women are segregated into specific lower paid light industries. Furthermore, those who work, like the doctor in At Middle Age, bear the double burden of family and work. All of these limitations are imposed in the name of upholding the goals of nationalism and development.

How has Chinese society and its newly reinstituted legal system dealt with the issue of women in the workplace? In China, the path chosen to address problems facing women workers has some similarities as well as some differences from the path chosen in the United States. While the United States has focused on antidiscrimination legislation in the last thirty years, China has enacted legislation "protective" of women's rights and benefits. In particular, two regulations governing women and work were implemented during the height of the reforms. These regulations focus on the biological differences between men and women. Under the headings of health care and labor protection, the regulations are structured around a woman's reproductive cycles. They specify the limits of

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5 See notes 30-34 and accompanying text. In December 1978, the Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party considered economic reforms. The Party determined that the overconcentration of decision-making authority caused many economic management problems in China. Consequently, in July 1979, the State Council adopted regulations allowing experiments with self-management in a number of factories. The success of these experiments led the State Council to approve gradual expansion of self-management to all state-owned industrial enterprises beginning in January 1981.
work and the benefits a woman worker receives during periods of menstruation, pregnancy, post-pregnancy, and menopause. More importantly, the Chinese government passed a Women’s Rights Protection Law in 1992 that guarantees state protection of a “women’s special rights and interests . . . and [gradual perfection of] a social protection system for women.”

This Article examines these recent Chinese laws on the issue of women and work utilizing three levels of analysis. On the first level, the Chinese regulations regarding women and work can be viewed as simply a reflection of the latest state policy on economic development. On the second analytical level, the Chinese regulations can be viewed as an example of the familiar tension between standards that protect women and those that promote equality of opportunity. The third level explores the philosophical underpinnings of the change in Chinese regulations toward protection of women. In both tone and focus, the new Chinese regulations have origins in socialist ideals and Confucian traditions. They are Confucian in their focus on the importance of the collective and community and socialist in the domineering role they assign to the state in defining the role of women in the workforce. The latest reality in China is that women’s problems are no longer discussed as social problems but rather as a matter of biology.

While women face common functions and responsibilities in their biological and reproductive roles, third world feminists teach us that feminism is culturally dependent, “a historically and culturally specific set of practices in social situations where women have conflicting interests and diverse experiences.” Yet, the significance of the women and work issue is not limited to China. Understanding how the issue has developed in China can also provide a better understanding of the cultural and social values underlying the feminism debate in the United States. Indeed, there

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are interesting parallels and contrasts in the legal response to the challenges of women and work in the United States, an individualistic, liberal state in the West, and in the People’s Republic of China, a collectivist, socialist state in the East. While there may be no universal solution to the issues of women and work, consciously placing the issue in a needed cultural context can inform the debate in both countries.⁸

I. Overview of Women’s Entry into the Workforce

Much has already been written about the historical and current status of women in the American workforce. The number of American women who work in the paid workforce has grown dramatically since the beginning of the century and is well documented. Specifically, the percentage of women in the labor force grew from 20% in the 1920s, to 38% in the 1970s, to 44% in 1985, and to 56% in 1987.⁹ There were two periods of expansion for women’s employment in the United States. From the turn of the century to the 1920s, employment of single women grew. This growth declined from the 1920s to the 1940s. The second growth period began after 1940, when women’s participation in the workforce rose by 10%; that growth rate has been maintained in every decade since then.¹⁰ Of course, the biggest surge was during World War II when the number of women in the labor force jumped by one-third.¹¹

Despite this growth many obstacles remain. Occupational segregation remains substantial and gender differences in earnings have remained constant since 1955. Data from the 1980s showed that three-fifths of women workers were employed in occupations comprised of at least 75%

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⁸ Following the influential approach of Mary Ann Glendon, I will examine law as a story that is both reflective of and instrumental in shaping community and culture. I will ask whether the Chinese story is unique and what it says about the American story. MARY A. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 8-9 (1987). As the anthropologist Clifford Geertz noted, law is interpretive in converting social facts into legal data and language. Yet at the same time, as James Boyd White pointed out, law is constitutive in reshaping community and culture. Id.


¹⁰ See Blau & Ferber, supra note 9, at 33-34; Goldin, supra note 9, at 10.

women. Women still constitute only 20% of the skilled, blue-collar trade positions. Similarly, professional women face a widely perceived "glass ceiling" that restricts their advancement. The ratio of female to male full time, year-round earnings hovered around 0.60 from 1950 to 1980, although the earnings of young women almost reached parity with young men. However, the average female college graduate in the United States still earns significantly less than the average male high school graduate. The percentage of women in the United States holding jobs or actively seeking them has leveled off at 57.7%, apparently due to general economic conditions, higher birthrates, and the lack of childcare facilities.

Much less has been written about the entry and current status of women in the Chinese workforce, although the bottom line in both countries is very similar. Prior to 1949, women had no right to own property,

13 DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 163 (1989). Jobs are further stratified by race and ethnicity, with women of color remaining at the bottom of the occupational hierarchy. Id; see also NATIONAL RESEARCH COUNCIL OF THE NAT'L ACADEMY OF SCIENCES, WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB (Barbara F. Reskin & Heidi I. Hartmann eds., 1986). Around the turn of the century, women in the manufacturing sector worked in just two large industries—textile and apparel—while more than 60% of male operatives worked in industries that employed no women. GOLDIN, supra note 9, at 76.

14 RHODE, supra note 12, at 164. However, some male-dominated occupations have experienced a visible increase in female employees, such as bus driving (49%) and bartending (48%). Id.


16 GOLDIN, supra note 9, at 59. The ratio only began to increase in the 1980s. According to some studies, this pay gap is now narrowing, with data on weekly compensation evidencing a female to male ratio of 0.75. Possible explanations include: higher expectations by women as a result of the women's movement, landmark civil rights legislation, new educational choices, and growing work experience as fewer women choose to leave the workforce to raise children. See Sylvia Nasar, Women's Progress Stalled? Just Not So, N.Y. TIMES, Oct. 18, 1992, § 3 (Business), at 1, 10.

17 RHODE, supra note 12, at 163.

17 Louis Uchitelle, Women's Push into Work Force Seems To Have Reached Plateau, N.Y. TIMES (Saturday, Late Edition, Financial Desk), Nov. 24, 1990, at A1. Since 1986, working women in the two largest age groups—25 to 34 and 35 to 44—have entered the workforce at a much slower pace than in the previous 10 years. In Sweden, where childcare is publicly financed, 90% of women between the ages of 25 and 54 are in the labor force, compared with only 74% in the United States. Id. For a more optimistic prediction that women's status in the labor force will continue to grow, see Nasar, supra note 15, at 10.
to inherit, or to marry freely. Mao Zeding noted that in traditional China, men were dominated by three systems of authority—the political, the clan, and the religious—while women were dominated by these and one additional system of authority—the authority of the husband.

Around the turn of the century, women had already begun to migrate into the cities in search of work, but concentrated primarily around jobs in the low-paying textile industry and other light industries. Most women worked for low wages, while others were "sold" to factory owners to work for a number of years without pay. All of these women worked long hours under unhygienic and unsafe conditions. At that time, Chinese working women were said to occupy the status of a "broken shoe," a term shared with prostitutes and other disreputable women.

In 1949, when the new Communist government took control of China, it sought to liberate women by including them in its ideology of class struggle and social production. Under the slogan that "women hold up half the sky," the new government made extensive efforts to address the issue of equal status for women in Chinese society. Beginning in 1949, the government developed programs to pull women out of the home and to bring them into the labor force. Additionally, the government promulgated laws and regulations enunciating standards of equal rights for women in the labor force and in other spheres of life. From 1949 to 1953, the per-

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19 These four kinds of authority served as "the four thick ropes binding the Chinese people, particularly the peasants." Mao Tse-Tung, Report on an Investigation of the Peasant Movement in Hunan, in Selected Works of Mao Tse-Tung 23, 44 (1975).


21 Elisabeth Croll, Chinese Women Since Mao I (1983). Under the Maoist interpretation of Marxist theory, women’s liberation necessarily depended on women’s full and equal participation in social production. The underlying assumption was that entry into the wage labor force would improve women’s conditions and thus raise their confidence, power, and authority in both the public and domestic spheres. To address the inequality of women, the new government of the People’s Republic of China quickly adopted a four-pronged strategy to "legislate for equality, introduce women into social production, introduce a new ideology of equality, and organize women to both redefine and forward their economic, social, and political interests." Id.
percentage of females in the urban labor force increased from 7.5% (about 600,000) to 11% (about 2,132,000).\textsuperscript{22}

During the next twenty years, however, the pace of women’s entry into the workforce fluctuated with the economic and political campaigns of the period. The First Five Year Plan, from 1953 to 1957, emphasized heavy industry over agriculture and light industry and therefore militated against the recruitment of women into the labor force.\textsuperscript{23} During this period, urban unemployment was at a high level and women were encouraged to stay home and contribute to the socialist cause through their housework. Hence, the percentage of women in the labor force increased only marginally, from 11.7% to 13.4%.\textsuperscript{24} The Great Leap Forward, from 1958 to 1960, changed this trend by focusing on the mass mobilization of the Chinese workforce as the means to economic development.\textsuperscript{25} By 1959, women represented 15% of the national labor force; by 1963, their representation increased to 25%.\textsuperscript{26} During these years, the state devoted resources to establishing facilities, such as nurseries, collective dining rooms, and laundries, aimed at alleviating the domestic responsibilities of women.\textsuperscript{27}

The Cultural Revolution, which caused chaos throughout most of the 1960s and 1970s, also offered a window of opportunity for women. According to one study, women’s participation in the workforce by the end of 1976 reached as high as 48%.\textsuperscript{28} This statistic is important because, during the Mao period, full employment was regarded as an indicator of the su-

\textsuperscript{22} ANDORS, supra note 20, at 20.
\textsuperscript{23} Id. at 36. Hence, this period saw a slowdown in the percentage of women in the workforce. See id. at 29-46.
\textsuperscript{24} Id. at 36.
\textsuperscript{25} Id. at 47; see also ANDREW G. WALDER, COMMUNIST NEO-TRADITIONALISM: WORK AND AUTHORITY IN CHINESE INDUSTRY 36 (1986). From 1957 to 1958, the number of women in the workforce more than doubled, from 3 million to 7.5 million. ANDORS, supra note 20, at 63.
\textsuperscript{26} ANDORS, supra note 20, at 69.
\textsuperscript{27} Some studies revealed, however, that the provision of these resources fell short of the ideal. See Delia Davin, The Women’s Movement in the People’s Republic of China: A Survey, in WOMEN CROSS-CULTURALLY: CHANGE AND CHALLENGE 457 (Ruby Rohrlich-Leavitt ed., 1975). For a critical analysis of the progress of women’s liberation in China, see JUDITH STACEY, PATRIARCHY AND SOCIALIST REVOLUTION IN CHINA (1983) and MARGERY WOLF, REVOLUTION POSTPONED: WOMEN IN CONTEMPORARY CHINA (1985).
\textsuperscript{28} MARTIN K. WHYTE & WILLIAM L. PARISH, URBAN LIFE IN CONTEMPORARY CHINA 202 (1984). This figure was based on a limited study conducted from 1977 to 1978 and appears to be unusually high.
priority of socialism. Equality was the focus of this politicized model of
development, and so, as the differences between men and women were
ignored, women entered areas of employment previously closed to them.
Indeed, women were pictured as truck drivers, coal miners, and construc-
tion workers to promote the image of the “iron woman.” At the same
time, however, social services were diminished and replaced with “educa-
tion and consciousness raising.”

During the early years, these women who entered the workforce bene-
fitied from the structure of socialism. Women classified as permanent
workers benefited from the “iron rice bowl” system, a system in which
the state guaranteed every worker a job at a salary determined by the
state. The state also provided the permanent worker with a panoply of
benefits such as subsidized medical care, housing, education, and a pen-
sion upon retirement. While permanent workers, including women, had
little fear of termination, they expected no bonuses for showing
initiative.

On the negative side, under the permanent work system, the govern-
ment’s labor and education bureaus allocated jobs. Neither the employer

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80 Arguably, the lack of an established structure afforded some women the opportunity to be
leaders. See I Myself Am A Woman, supra note 1, at 34. However, for the majority of women, the
Cultural Revolution brought no systematic changes or guarantees of equal rights.

81 See HILARY K. JOSEPHS, LABOR LAW IN CHINA: CHOICE AND RESPONSIBILITY 21 (1990);
see also WALDER, supra note 25, at 40-43. Beginning in the 1950s, the labor force in China’s state
enterprises was divided into two groups: the permanent workforce and the temporary workforce. See
JOSEPHS, supra, at 11-12. In 1981, 42% of China’s industrial workforce consisted of state permanent
workers, 18% urban collective workers, and 5% urban temporary workers. See WALDER, supra note
25, at 41.

82 See JOSEPHS, supra note 30, at 12. Urban collective workers get full to partial benefits de-
pending on the size of the collective. Only the largest collectives are able to provide state kindergarten,
daycare, and housing services. Temporary workers get the fewest benefits of all; they must often rely
on limited neighborhood or village services instead. See WALDER, supra note 25, at 44-45.

83 See JOSEPHS, supra note 30, at 12; WALDER, supra note 25, at 42. By contrast, temporary
workers tended to receive lower wages, enjoyed less job security, and received fewer fringe benefits
(e.g., pensions) than permanent workers. Indeed, temporary workers often engaged in marginal occupa-
tions that were generally disdained by permanent workers. See JOSEPHS, supra note 30, at 12-13;
WALDER, supra note 25, at 48-54. However, a temporary worker could graduate into the permanent
work force if he or she exhibited special skills or good work performance.

84 See JOSEPHS, supra note 30, at 13; WALDER, supra note 25, at 58-59. In contrast to the job
allocation system was the “substitution” system, which returned some control over job allocation to the
worker. Under this system, a retiring worker could designate one of his or her children to succeed him
or her in the same enterprise, albeit not in the same post. JOSEPHS, supra note 30, at 15; see also
WALDER, supra note 25, at 58. However, this “substitution” system was largely abolished by the
nor the employee had much say in the process. While tight government control helped to control the flow of urban populations and allocated jobs between industries and geographic areas, the government allocation process failed to match jobs with worker’s interests, skills, and abilities.84

China’s economic policy changed dramatically in 1979. Under the leadership of Deng Xiaoping, China adopted new pragmatic economic policies termed “socialism with Chinese characteristics.”85 These policies revamped the nation’s centrally-planned economy by encouraging decentralization, private enterprise, and foreign investment. Deng’s new economic policies moved China away from the iron rice bowl employment system.

The iron rice bowl had been criticized for promoting inefficiency by failing to provide sufficient work incentives.86 Beginning in 1982, reforms providing for employment under labor contracts, hiring by open recruitment, and the right of factory managers to dismiss workers and staff members, were undertaken on a trial basis in a number of cities. By 1988, contract workers and staff in state enterprises comprised approximately 9.9% of the labor force.87

During this decade of reform, women constituted 38% of the country’s labor force.88 However, China’s policy of privatization and economic efficiency, rather than the prior policy of full employment, has made unem-

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Provisional Regulations on the Hiring of Workers in State Enterprises in 1986. JOSEPHS, supra note 30, at 19.

84 JOSEPHS, supra note 30, at 14.
86 Making a Dint, supra note 35, at 16-17; see also Staff Reporter, More Idle Laborers Worry State, CHINA DAILY, June 14, 1988, at 1 [hereinafter More Idle Laborers].
87 See JOSEPHS, supra note 30, at 139. By 1988, there were six million contract workers throughout the country. “15 Million” Figures, supra note 35, at 45. But see More Idle Laborers, supra note 36 (there were 7.5 million Chinese laborers working under the labor contract system).
ployment a major problem, high unemployment has led to a greater number of transient and unregistered persons, creating a "floating population" problem for urban areas. Some newspapers estimate the total floating population at 50 million. Liu Bingyi, Dangdai Dajilu—Zhongguo Liudong Ren Kou Toushi, [Flood of Modern Times—An Examination of China's Floating Population], 6 FAI FU YU SHENGHUO [LAW AND LIVING] 12 (1989) [hereinafter LAW AND LIVING]. Zhang Mianzhi, Jingdu, Biaiwu Liudong Renkou Dahuixuan, in 3 LAW AND LIVING, supra, at 12. The problem of high unemployment is exacerbated by the fact that the number of people reaching employment age has grown. See More Idle Laborers, supra note 36, at 1.


See Cong Xiang Tongji Shuzi kan Woguo Zaiye Nuxing De Xian Zhuang [A Statistical Assessment of Chinese Women Worker's Status], 1 ZHONGGUO FUNU 9 (1987). Occupational segregation was justified on the belief that women's special characteristics render them unsuitable for physically taxing jobs. HONIG & HERSHATTER, supra note 40, at 251.


See Yi, supra note 42, at 58.

Id. The ratio between men and women in science and technology is 2:1. The ratio between men and women who have acquired a title equivalent to engineer is 4:1, while the ratio between men and women who have acquired a title equivalent to senior engineer is 7:6.1. Qi Hui, De Women Hold Up "Half the Sky", 29 BEIJING REV., Mar. 3, 1986, at 4-5.

CPC Official Says Policy on Women Unchanged, F.B.I.S., DAILY REP.: CHINA, Jan. 12, 1988, at 7. In 1988, women constituted only 28.9% of party members, 6.7% of ministers, 6.3% of provincial governors and vice governors, and 4.1% of party secretaries and assistant secretaries. Guanyu Funu Can Zheng Gan Wenti de Tishi [About Women's Entry into Politics], 7 ZHONGGUO FUNU 4-8 (1990); see also Ma Lizhen & Long Yecun, Nuxing Yu Quanli [Women and Power], 3 ZHONGGUO FUNU 4-6 (1990).

The survey, jointly sponsored by the All-China's Women's Federation and the State Statistics
In part, these figures may be explained by disparate educational opportunities for women. The statistics also indicate, however, that greater educational levels have not led to greater employment opportunities for women in China. A disproportionate number of women are unemployed and are not well represented in the fields in which they work. Moreover, like their American counterparts, women in China bear the double burden of home and work. For example, in a recent survey by the Suizhou Women’s Federation in Hubei Province, all of the women surveyed noted that their after-work activities mainly consisted of performing household duties—washing clothes, cooking, and caring for children.

II. THE LEGAL CONTEXT

Although the issues faced by women workers in the United States and China are remarkably similar, there are parallels and contrasts in each country’s legal response. While the United States has in recent years followed a model of formal equality supported by antidiscrimination legislation prohibiting unequal treatment between men and women, recent Chinese legislation is characterized by a strong preference for protective legislation based on differentiations drawn between men and women.

The legal response in the People’s Republic of China can be traced to the 1950s, which saw the beginnings of a socialist legal system in China,

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Bureau, was distributed to over 40,000 men and women in 21 provinces from all walks of life and aged between 18 and 64. Wang Rong, Survey Analyzes Social Status of Chinese Women, F.B.I.S., DAILY REP.: CHINA, Oct. 2, 1991, at 29.

47 In 1991, the literacy rate for urban women was 78% while that for rural women was 48%. Wang Rong, Survey Analyzes Social Status of Chinese Women, F.B.I.S., DAILY REP.: CHINA, Oct. 2, 1991, at 19. In 1984, women constituted only 25.7% of the country’s population with higher education, 37.4% with secondary education, and 42.4% with primary education. Women constituted 69.2% of the country’s total illiterate population. Zhongguo Xinwen She [China News Service], Women’s Social Status Improved, 28 BEIJING REV., Sept. 16, 1985, at 28; Qi, supra note 44, at 4.

48 In the summer of 1987, many women college graduates and undergraduates were asked to return to their schools. Ran Maoying, Women’s Employment Challenge, 31 BEIJING REV., July 11-17, 1988, at 29.

49 Shehu Baozhang Bao, Urban Women’s Current Status, 31 BEIJING REV., Nov. 7-13, 1988, at 40. While 80% of the women said their husbands often helped them with domestic tasks, the survey revealed that more than 70% of these women cared for their children’s daily needs, in contrast to only 10% of the men. Furthermore, 60% of the women instruct their children in studies, in contrast to only 15% of the men. This was also true in Nanjing, where a survey revealed that 81% of the women perform the majority of the household chores after work. Xinhua Ribao, Working Women’s Burdens & Wants, 32 BEIJING REV., June 12-25, 1989, at 24-25.
including codification of a woman’s right to work. Article 91 of the Constitution passed in 1954 specifically guaranteed women equal rights with men in all spheres of political, economic, cultural, social, and domestic life.\textsuperscript{80} Women, as citizens of the state, therefore, were granted the right to work.\textsuperscript{81} During this early period of intense legislative activity, several major labor laws were passed including the Labor Insurance Law, the Trade Union Law, and the State Council Regulations Concerning Maternity Leave of Female Government Workers.\textsuperscript{82} As a result, women had access to the courts and to legal personnel as an alternative power base to that of kin elders.

Many of the rights accorded by these early laws were effectively abolished during the Cultural Revolution of the 1960s and 1970s. While the Cultural Revolution emphasized women’s active participation in the work force, it also dismantled China’s embryonic legal system. Indeed, for the vast majority of Chinese citizens, including women, the Cultural Revolution was an unfortunate period in which the law could be neither relied upon to guarantee rights nor utilized as a source of social change.

As part of its efforts to ensure a stable economic environment, the People’s Republic of China began to reestablish its legal system in 1979. Departing from the Cultural Revolution’s rejection of the law, the new regime viewed law and the “rule of law” as critical to economic reform and the establishment of a “socialism with Chinese characteristics.” In 1982, the People’s Republic of China passed a new Constitution and, from 1979 to 1985, promulgated over 400 new statutes and regulations, the vast majority of which were economic in nature.\textsuperscript{83} In the labor area, the govern-

\textsuperscript{80} The text of the 1954 Constitution may be found in 1 ZHONGHUA RENMIN GONGHEGUO FAGU HUIBIAN [COLLECTION OF LAWS AND REGULATIONS OF THE PEOPLE’S REPUBLIC OF CHINA] 4-31 (1956). See also SELECTED LEGAL DOCUMENTS OF THE PEOPLE’S REPUBLIC OF CHINA 311-31 (J. Wang ed., 1976).

\textsuperscript{81} XIANFA art. 10 (1954) (China). To guarantee the enjoyment of the right of women to work, the Chinese Constitution provided that the state would gradually create more employment, better working conditions, and higher wages. The Constitution also provided that the state prescribe working hours and holidays, expand facilities to enable working people to rest and build up their health, and guarantee the provision and gradual expansion of social insurance, social assistance, and public health services. See id arts. 48 \& 50.

\textsuperscript{82} From 1950 to 1963, approximately 1488 separate statutes, regulations or rulings were issued by the central government. See Henry R. Zheng, CHINA’S NEW CIVIL LAW, 34 AM. J. COMP. L. 669, 671 n.18 (1986).

\textsuperscript{83} Id. at 672.
ment revitalized the Trade Union Law and the Labor Insurance Law, enacted a series of regulations to replace the permanent employment system with the labor contract system, and proposed a system of new labor laws.

Many of the new laws related to women in the workplace. These laws included provisions prohibiting discrimination against women. Specifically, the current Constitution, adopted in 1982, offers a strong promise of equality to women. It not only guarantees that women enjoy “equal rights with men in all spheres of life,” it also promises that the state “protects the rights and interests of women, applies the principle of equal pay for equal work and trains and selects cadres from among women.” This promise of equality was recently given new force in 1992 by the adoption of a Women’s Rights Protection Law, which pledges to protect “women’s special rights and interests granted by law” and imposes specific bans on discrimination against women in hiring and compensation.

Despite the nod to antidiscrimination provisions, recent Chinese laws regarding women and work have emphasized the differences between men and women and have afforded women special protection. While prohibiting discriminatory hiring, the Women’s Rights Protection Law states that there are “certain work categories or positions that are unfit for

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84 They are (1) Provisional Regulations on the Implementation of the Contract Employment System in State Enterprises; (2) Provisional Regulations on the Hiring of Workers in State Enterprises; (3) Provisional Regulations on the Dismissal of Workers and Staff for Work Violations in State Enterprises; and (4) Provisional Regulations on Unemployment Insurance for Workers and Staff in State Enterprises. Josephs, supra note 30, at 33. The Contract Employment System Regulations apply to all unskilled laborers in state enterprises, except for workers in industries with serious recruitment problems and workers with special vocational training or university education. Such workers continue to be placed through permanent administrative assignments. Id. at 34-35.


86 Xianfa art. 48 (1982) (China).

87 Id.

88 The Women’s Rights Protection Law was promulgated on April 3, 1992, by the Fifth Session of the Seventh National People’s Congress. See supra note 6. A translation of this new law may be found in F.B.I.S., Daily Rep.: China, Apr. 14, 1992, at 17 (promulgated after 10 years of discussion and scheduled to go into effect October, 1992).
women.”  Similarly, while the statute prohibits discriminatory termination and guarantees equal pay and equal treatment in housing assignments and other material benefits, it also affirms women’s differences from men by requiring all “units to protect women’s safety and health at work in accordance with law.”

This protective theme also appears in the “contract labor” regulations adopted in 1983 and 1986, which contain provisions prohibiting the discriminatory termination of a woman worker when the woman is pregnant, on maternity leave, or nursing a child, and which require that enterprises hire women, but only where “suitable.” However, this term is so vague that it has allowed enterprises to define job requirements in a manner that will enable them to discriminate against women. Similarly, the Labor Insurance Regulations, re instituted in 1979, differentiate between men and women by requiring women workers to retire at age fifty as compared to age sixty for men.

Perhaps the clearest examples of the protective approach are two regulations promulgated in the late 1980s, which were aimed at “protecting” women laborers’ health and employment. The first, the Provisional Regulations for Health Care for Women Employees (Trial Implementing Draft) were issued on May 30, 1986 (“Health Care Regulations”). The second, Regulations Governing Labor Protection for Female Staff Mem-

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80 Women’s Rights Protection Law, supra note 6, art. 22, at 18.
81 Id. art. 25, at 18.
82 The contract employment regulations, as a whole, seek to ameliorate the disparity in benefits between permanent workers and contract workers and at the same time to open the labor process to a competitive market hiring and dismissal system. Although, for example, the regulations provide that a female contract worker is to receive the same maternity benefits as a permanent worker doing the same work, they are silent with respect to fringe benefits normally provided to permanent workers such as housing, health insurance, and schooling for dependents. Provisional Regulations on the Implementation of the Contract Employment System in State Enterprises arts. 18 & 20 (1986).
83 Provisional Regulations on the Hiring of Workers in State Enterprises art. 8.
85 See Labor Protection Regulations, supra note 63; Health Care Regulations, supra note 63.
bers and Workers, came into force on September 1, 1988 ("Labor Protection Regulations"). Both were the joint product of the Ministry of Public Health, the former Ministry of Labor and Personnel, the All-China Trade Union, and the All-China Women's Federation. While the Health Care Regulations focused primarily on the protection of a woman worker's health, the Labor Protection Regulations covered not only health, but also wages, benefits, and other labor issues.

Focusing on biological characteristics of men and women, these two regulations, under the headings of health care and labor protection, imposed a set of limits and rules explicitly structured around women's reproductive cycles. The stated purposes of both regulations were to protect women's health—meaning their reproductive capabilities—and to "enhance the quality of the nation." Stated another way, the regulations were designed "to reduce and solve special problems faced by women staff members and workers due to their physiological characteristics" and "to contribute to the building of socialist modernization."

The two regulations identify several periods in the life of a woman worker in which she must be accorded special treatment: menstruation, pregnancy, delivery, nursing, and in the case of the Health Care Regulations, menopause. For each of these periods, the regulations impose limits on the types of work women can perform and on working conditions. Thus, for example, during menstruation, women workers must not be as-

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68 Mass propaganda accompanied the publication of regulations. While some provinces distributed pamphlets summarizing the regulations, others used television and radio shows to disseminate the information; still others held discussion groups and classes on the contents of these regulations. FAZHI RIBAO [LEGAL NEWS DAILY], Mar. 9, 1990, at 3. Popular legal periodicals also began to publish answers to questions relating to these regulations in their legal advice columns. See, e.g., FAZHI RIBAO [LEGAL NEWS DAILY], Nov. 29, 1989, at 3 (woman worker writing to inquire about the legality of being dismissed after her pregnancy).


70 ZHONGGUO FAZHI BAO (CHINA LEGAL NEWS), Nov. 22, 1988.

66 Health Care Regulations, supra note 63, art. 3; Labor Protection Regulations, supra note 63, art. 1.


70 Interestingly, for no clear reason, the Labor Protection Regulations deleted menopause from the periods covered.
signed “to work at high altitudes,”71 “in places with low temperatures, or in cold water.”72 Women workers, during their pregnancy and nursing periods,73 cannot be assigned to overtime or night shifts74 or to work that will expose them to industrial poisons.75

Additionally, during menstruation,76 pregnancy,77 and post-pregnancy,78 female workers are restricted from performing work that requires a certain level of physical exertion. The Labor Protection Regulations define the amount of physical exertion that women may perform during these critical periods as labor of “third grade” intensity.79 Under the Labor Protection Regulations, women are barred from fourth grade labor at all times, regardless of whether they are in a critical period. Labor law textbooks in China defend these limitations on the grounds that lifting more than twenty-five kilograms, the level of fourth grade labor, may cause dislocation of the uterus in women workers. Significantly, however, fourth grade work is paid higher than work of lower grades.80

Both the Health Care Regulations and the Labor Protection Regulations provide for specific leave and rest time during each of the critical periods. For example, the Labor Protection Regulations provide for a paid maternity leave of ninety days, fifteen days of which may be taken prior to

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71 One source has defined high altitude as two meters and above, a seemingly low baseline. Zhongguo Fazhi Bao [China Legal News], Nov. 22, 1988, at 3.
72 Id.
73 Labor Protection Regulations, supra note 63, art. 10.
74 Id. art. 7.
75 Health Care Regulations, supra note 63, art. 10(7).
76 Labor Protection Regulations, supra note 63, art. 6; Health Care Regulations, supra note 63, art. 7(3).
77 Labor Protection Regulations, supra note 63, art. 7.
78 Id. art. 10.
79 Third grade labor intensity refers to work that requires the exertion of 1746 calories per eight hour day, or strenuous exertion for 350 minutes or 73% of an eight hour day. Fourth grade work refers to work requiring the exertion of 2700 calories per eight hour day, or strenuous exertion for 370 minutes or 77% of an eight hour day. Zhou Minlin & Xie Liusheng, Zhigong Quanyi Falu Guwen [Inquiries on Worker’s Legal Rights] 313-14 (1990).
80 There are eight grades of work in China: grade one garners the lowest wages and grade eight earns the highest wages. The classifications depend upon the complexity of the work, the role of the work in the economy, and the skill involved. Jobs requiring complicated skills can be classified as high as eighth grade work, while simpler work such as street cleaning is classified as first or second grade work. Shehui Jingji Tongji Congdian [Social and Economic Statistics Compilation] 736-37 (Tong Zehui ed., 1987); see also Xiandai Zhongguo Jingji Shidian [Compendium of Modern Chinese Materials] 522-25 (Ma Hong ed., 1982) [hereinafter Compendium].
Those women who experience difficulty during labor are given an additional fifteen days of leave, and those who give birth to more than one baby are given fifteen additional days of paid leave for each additional baby. Female workers who have a miscarriage are given leave according to a medical certificate. During the pregnancy period, both regulations mandate rest breaks, and during the nursing period, two thirty-minute nursing breaks are required per day.

Both regulations emphasize the importance of health education and prenatal and postnatal care. The Labor Protection Regulations also call for the provision of specified health care facilities during the designated periods, such as health clinics in units that employ over one hundred women, rest areas for pregnant women, nursing rooms, childcare centers, and kindergartens.

There are also a number of important provisions that apply to women workers that go beyond the limitations on types and conditions of work, mandated leave, and required health care facilities. For example, the Health Care Regulations require that employers maintain records of the menstruation cycles of their women employees. Married women employees are encouraged to request an examination if they have missed a period. Conversely, a pregnant worker may exercise her right to reduce her workload or voluntarily be assigned to other work with a certificate.

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81 Labor Protection Regulations, supra note 63, art. 8; Health Care Regulations, supra note 63, art. 10.
82 Labor Protection Regulations, supra note 63, art. 8.
83 Id.
84 Id. art. 7.
85 Health Care Regulations, supra note 63, art. 12. An appropriate extension may be considered. Labor Protection Regulations, supra note 63, art. 10 (granting an additional 30 minutes for each additional nursing baby).
86 Health Care Regulations, supra note 63, art. 7(1), 8. Premarital health care includes education, advice, and a health check exam prior to marriage.
87 Id. art. 10.
88 Smaller units are required to set up sanitary washing facilities. Health Care Regulations, supra note 63, art. 7(2).
89 Labor Protection Regulations, supra note 63, art. 11. The 1986 Health Care Regulations required units with five or more nursing mothers to set up a nursing room with hand-washing facilities. Health Care Regulations, supra note 63, art. 12(5).
90 Health Care Regulations, supra note 63, art. 7(1).
91 Id. art. 9.
from a medical department.\textsuperscript{92}

III. WOMEN WORKERS AND CHINESE STATE POLICY

What can account for the recent focus on women’s biology in Chinese legislation? At one level, the emphasis on women’s biology reflects the latest fluctuation in Chinese policy toward women.\textsuperscript{93} Since the establishment of the People’s Republic of China, governmental policy has alternatively focused on and ignored the differences between men and women, depending on the national policy at the time.

In the early years of the People’s Republic, the new socialist state assisted women in breaking away from the control of husbands and fathers by changing legally the nature of the family and by providing institutional support for women’s participation in society outside the home. These efforts were limited, however, and took a second seat to the task of eradicating class inequality. As the government adopted different policies to achieve class equality, the government’s policies toward women changed also.

Traditional socialism perceived that gender equality was to be accomplished through the broader task of class revolution. According to traditional Marxism, the bourgeois family was at the root of women’s oppression and private property lay at the root of the family.\textsuperscript{94} The abolition of private property, then, would lead to changes in the nature of the family. These changes would lead to the emergence of women from the confines of the domestic hearth, to their assumption of the full range of political, economic and social roles. The socialist revolution, then, will result in the eradication of sexual inequality and the exploitation of women by men, just as it will result in the elimination of class inequality and

\textsuperscript{92} Labor Protection Regulations, supra note 63, art. 7.

\textsuperscript{93} In assessing the laws and regulations of another country, there is a danger of imposing one’s own cultural values and biases on the foreign legal system. For a thoughtful discussion of some of the pitfalls of comparative legal studies, see William P. Alford, On the Limits of “Grand Theory” in Comparative Law, 61 Wash. L. Rev. 945 (1986).

\textsuperscript{94} FRIEDRICH ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE 129 (1972). The bourgeois family was said to have developed from the existence of private property. Specifically, private property led to man’s desire to transmit wealth to his genetic offspring, to the demise of the collective economic unit, and to the subsequent rise of the monogamous family.
the exploitation of workers by the owners of property.96

Thus, sexual equality was not seen as a separate goal of Marxism, with its own focus and agenda,96 prompting some feminists, such as Heidi Hartmann, to note, "marxism and feminism are one, and that one is marxism."97

The subordination of gender equality to the "greater" national interest of class equality was seen in practice as well as in theory. During the initial period of collectivization and surplus labor in the 1950s, the Chinese government unleashed the Five Goods Campaign, which encouraged women to become "socialist housewives" and devote themselves to domestic thrift, hygiene, and childcare, to support their husband's work, and to participate in neighborhood services.98 By contrast, during the Cultural Revolution in the 1960s and early 1970s, when there was a demand for labor, women were called back into the workforce under the banner of "anything a man can do, a woman can do also."99 At that time, women were portrayed as unisexual, and women's issues were viewed as societal rather than biological.

Since the declaration of the economic reforms in 1979, gender equality has again been asked to take a back seat, this time to the goal of economic development. While there has been a resurgence of laws and a proliferation of economic regulations, only limited attention has been given to the problems facing women in the workforce. Today, the government maintains that "women's liberation is both restricted by the level of economic development and closely related to non-economic factors," and that

97 See generally ANDORS, supra note 20, at 6. Although the Marxist theory recognized the role of women within the family as a crucial factor in sexual inequality, the theory never developed a coherent framework by which the family and the women's role in it could be transformed. Id. Thus, the status of women was a function of class relations and was dependent on the success and the direction of the socialist movement.
98 Heidi Hartmann, The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union, in WOMEN AND REVOLUTION: A DISCUSSION OF THE UNHAPPY MARRIAGE OF MARXISM AND FEMINISM 1, 2 (Lydia Sargent ed., 1981). Feminists have also contended that socialism has not provided a better answer to the issue of gender equality than has capitalism. See JUDITH STACEY, PATRIARCHY AND SOCIALIST REVOLUTION IN CHINA 266-67 (1983). Socialism has replaced traditional patriarchy with a new "public patriarch[y]." Id. at 193.
99 See generally HONIG & HERSHATTER, supra note 40, at 243 ("[W]omen were encouraged to leave their jobs and contribute to socialist construction by engaging in household.").
98 Song Dalei, Nuren de Chuntian [Women's Spring], 4 ZHONGGUO FUNU 7 (1988).
"women must work honestly with selfless devotion and unremittingly make new contributions towards . . . socialist modernization."\textsuperscript{100} One factory manager, reflecting official policy, was quoted as saying publicly, "we must not divorce ourselves from our nation's economic conditions to discuss sexual equality."\textsuperscript{101}

Viewed positively, the emphasis in recent legislation on the protection of women arguably benefits women by restructuring the workplace to accommodate their reproductive roles. On the other hand, the unusually detailed focus on women's reproductive functions may "biologize" the regulation of women, and may be used to push women out of the workforce during an era of surplus labor. This view is supported by a number of recent developments, perhaps the most obvious of which is an increase in official rhetoric on the "natural role" of women.

With the new economic policy of privatization and efficiency, unemployment of women has become a major problem. For example, at the end of 1986, among youth waiting for jobs, 61.5% were women, suggesting that women workers were less likely to be hired than men.\textsuperscript{102} In some cities this percentage was as high as 80%.\textsuperscript{103} In a worker exchange meeting held in April 1987 in Beijing, 80 to 90% of enterprises expressed a need for only male employees.\textsuperscript{104} Additionally, women have been laid off


\textsuperscript{101} Zhang Jun & Ma Wen Yong, \textit{Da Qiu Zhuang: Funu Hui Jia de SiSuo [Thoughts on Da Qiu Village's Return Home Policy]}, 1 ZHONGGUO FUNU 9 (1988) [hereinafter \textit{Return Home Policy}].


\textsuperscript{103} \textit{Women's Role in Workplace Being Examined}, F.B.I.S., DAILY REP.: CHINA, Sept. 7, 1988, at 31. In 1987, only 5.3% of the 660 enterprise leaders surveyed from 11 provinces, municipalities, and autonomous regions preferred to recruit women. Among 89 textile enterprises surveyed, traditionally a major employer of women, only 25% would prefer to employ women. Lu Yun, \textit{New Challenges to Women's Employment}, 31 BEIJING REV., Oct. 31-Nov. 6, 1988, at 18, 19. The commercial and financial enterprises surveyed showed that women applicants needed higher entrance exam scores than men to get hired. \textit{Women Meet Prejudice}, CHINA DAILY, Feb. 26, 1988; Zhang Defang, \textit{Women Are Equally Competitive}, CHINA DAILY, Apr. 8, 1988, at 1. Enterprise owners have explained their preference for male workers on the grounds that women are not as strong as men and thus not as well physically suited for work, \textit{HONIG & HERSHATTER, supra} note 40, at 245, and that women are also burdened with housework and childrearing and may take maternity leaves, Qi, \textit{supra} note 44, at 4.

\textsuperscript{104} Ran Maoying, \textit{Women's Employment Challenge}, 31 BEIJING REV., July 11-17, 1988, at 29.
in greater numbers than men.\(^{106}\) In 1988, a Shandong factory, in order to raise economic efficiency and remedy underemployment, categorized 120 of its 121 women workers as superfluous workers.\(^{106}\) In 1987, a survey of 660 enterprises indicated that 2\% of employees were classified as surplus; women accounted for 64\% of the surplusage.\(^{107}\)

Along with high unemployment, the most recent official rhetoric relating to women has been to promote their domestic role as “good, natural, inevitable,”\(^{108}\) and to encourage them to “return home” to serve socialism as mothers and housewives.\(^{109}\) Accordingly, Mao’s official line, “anything a man can do, a woman can do,” has been dismissed as “ultra-leftist extremism,”\(^{110}\) as well as disadvantageous to women because it pits women’s weak points against men’s strong ones.\(^{111}\)

In apparent support of the new rhetoric, some enterprises have implemented formal return home policies for women workers.\(^{112}\) Under these

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In the summer of 1987, many women college graduates and post-graduates were asked to return to their schools because employers were not interested in hiring them. \(\text{Id. For example, in 1984, a district labor bureau in Jiangsu Province posted a notice recruiting 351 workers. The notice specified that, even though many more women than men had taken the job examination, of the 351 people to be hired, 269 would be male and 82 female. HONIG & HERSHATTER, supra note 40, at 244. Similarly, in some districts in Shanghai, the ratio of men to women hired by the Post Office and Telegraph Bureau was 20:1. Id. at 245.}\)

\(^{106}\) Zhang, supra note 103, at 1.

\(^{107}\) Editorial, 1 Zhongguo Funu 4 (1988).

\(^{108}\) Lu Yun, New Challenges to Women’s Employment, 31 Bejing Rev., Oct. 31-Nov. 6, 1988, at 18-19 (the actual figure may be higher). In particular, women constituted 82\% of the surplus labor in the commerce and service trades; 60\% in machine building, metallurgy, petrochemicals, electronics, textiles, transportation, and communication industries; 35\% in electricity and power, post, and telecommunication industries. Id. at 19.

\(^{109}\) The argument given in support of this new policy is that there is a need for “women going home in the initial stage of socialism. Not giving the blessing to go home is a trend of women’s leftist women. Women engaged in home duties is a kind of division of labor in society . . . the participation of women in the building of modernization.” Wei Shiqing, Nuxing Chulu Yu Zhongguo de Weilai Ming Yun [Women’s Outlet and China’s Future, Part I], 5 Zhongguo Funu 4-9 (1988).


\(^{111}\) Song Dalei, Nuren de Chuntian [Women’s Spring], 4 Zhongguo Funu 7 (1988). Similarly, opposing the return home policy was also considered “ultra-leftist extremism.” Wei, supra note 108.

policies, women workers, especially older women and nursing mothers, are paid a percentage of their former earnings for returning home. Additionally, women workers have been offered maternity leave up to two years, while receiving 60% of their former salary. For some of the affected women, the reduction of income has caused a marked drop in their family and social status. The return home policy spurred a year-long debate among scholars and readers in the official women’s magazine Zhongguo Funu.

China’s protective regulations may be characterized as subordinating women to the State’s goal of economic development. This conclusion can be seen further in the fact that implementation of these protective regulations is very much subject to the economic condition of the factories and enterprises that are required to comply with them. Encouraged by the economic reforms to maximize profits, some factory managers simply re-

socialist construction by engaging in housework is a fallback to the policies popular during prior periods of high unemployment such as the mid-1950s and early 1960s. Honig & Hershatter, supra note 40, at 252.

113 4 Zhongguo Funu 10 (1988).


115 For one woman’s account of the difficulties faced as a result of reduced income and status due to the return home policy, see Li Jing, Wo de Chulu Zai Nali? [Where Is My Way Out], 1 Zhongguo Funu 6-7 (1988). The Shenyang Women’s Federation conducted a sample survey of approximately 18,400 women. The women who answered the survey noted their anxiety about the possible discriminatory effects of the recent labor reforms. With regard to the redeployment of redundant personnel, only 35.4% agreed with the way it was carried out, 25.3% held a contrary opinion, and 35.7% did not express any view. Ding, supra note 109, at 42.

116 In total, there were 38 articles and letters published through the year 1988 on the efficacy of the “return home” policy for women’s equality in China. The discussion began with the article by Zhang Jun & Ma Wenrong, Da Qiu Zhuang [Funu Huijia] de Siuqo [Some Thoughts About Da Wiu Village’s Return Home Policy], 1 Zhongguo Funu 8-9 (1988).

117 This conclusion was validated during visits to three factories in Wuhan in 1990. The three factories visited were selected for their variation in size (one large, one medium, and one small) and for their large number of women workers. Two of the factories were state enterprises, while the smaller factory was a collective enterprise. My assumption was that labor regulations were more likely to be fully implemented by state-owned or collective enterprises than by private enterprise. If these regulations were not implemented by state-owned or collective enterprises, then they were less likely to be implemented by private enterprises. In fact, the visits revealed that implementation of these regulations varied depending on the leadership and the economic condition of the individual factories. At every visit, I toured the facilities and met with the factory leaders, the women’s leaders, and individual women workers. See also Department of State Report, Country Reports on Human Rights Practices for 1989, at 820-21 (1990).
spond by not hiring women at all. The subordination of women’s interests is also evident in the “special economic zones” set up by the government to promote development. In the special economic zones, where the need for labor protection is the greatest and where China has placed the greatest hopes for dramatic economic development, problems for women workers remain unredressed by both the new and the existing regulations. The situation faced by women laborers in these zones suggests the extent to which economic considerations trump women’s concerns in China.

Specifically, women command the majority of the total labor force in the special economic zones and as much as 90% in some factories. As temporary or contract workers, these women are not accorded many of the benefits normally guaranteed by state enterprises, and their employers often ignore central guidelines on sex discrimination and labor protection. Thus, women workers in special economic zones endure sexual harassment, low pay, poor working conditions, long hours (including mandatory overtime of four to eight hours), and heavy workloads. Factories in special economic zones provide few of the benefits, such as hous-

118 These employers embraced the saying “ningyao shige Wu Dalang, buyao yige Mu Guiying,” literally translated as “better to have ten Wu Dalang than one Mu Guiying.” Dang Qiyuan & Ceng Mingchun, Ping Deng Jing Zheng—Nuxing de Hu Huan, [Struggle for Equality—Women’s Cry], 8 MINZHU YU FAZHI [DEMOCRACY AND LAW] 32-33 (1992). Both Wu Dalang and Mu Guiying are legendary figures. Wu Dalang traditionally symobilized a weak man who could not control the infidelity of his wife, while Mu Guiying was a strong woman who led her sisters to battle in place of her fallen husband.

119 There are five special economic zones: Shenzhen, Zhuhai, Shantou in Guangdong province; Xiamen in Fujian province; and Hinan Island province. There are 14 “open door cities” along the eastern coastline of China: Dalian, Qinhuangdao, Tianjin, Yantai, Qingdao, Lianyungang, Nantong, Shanghai, Ningbo, Yuzhou, Fuzhou, Guangzhou, Zhanjiang, and Beihai. There are five “special open areas”: Liaodong Peninsula, Shandong Peninsula, the Yangtze River Delta, the Minnan Delta in Fujian province, and the Zhujiang (Pearl River) Delta in Guangdong.

120 Liu, supra note 39, at 14-15.

121 Private enterprises in rural areas are equally deficient in providing benefits to women workers. The reach of the state is especially limited in the rural areas; many localities in these areas still hold fast to traditional values and central policies. See Vivienne Shui, THE REACH OF THE STATE: SKETCHES OF THE CHINESE BODY POLITIC 69-71 (1988). Because rural workers are cheaper than urban workers, rural women workers have little bargaining power. See Zhongguo Nungong Jiefang de Biao Xiang Yu Shiji [Appearance and Reality of Chinese Women Worker’s Liberation], 10 ZHONGGU FUNU 22-25 (1988).

122 Nicholas Kristof, Free Market “Dragon” Gains in the Fights for China’s Soul, N.Y. TIMES, Mar. 26, 1992, at A1. One woman tells of her escape back to Beijing, despite a monthly salary five times her salary in Beijing, in order to avoid advances made by her boss and the exhaustion resulting from long hours and heavy workloads. Id.
ing and meals, which are normally offered by state enterprises. Housing in the special economic zones can be ten to a room and dining facilities are nonexistent. In one joint venture factory in Shenzhen city, workers struck for 56 days because the factory, which employs 90% women, paid exceedingly low wages and forced employees to work four to eight hours of overtime or face dismissal.\textsuperscript{123} Strikes of this kind are not unusual and, from 1987 to 1989, there was a marked increase in the size and number of strikes despite the promulgation of protective regulations for women workers.\textsuperscript{124} In the Special Economic Zones, then, where the need for protection is great and where labor is needed, the return home policy is not promoted and protective regulations are ignored.\textsuperscript{125}

This is certainly not the first time that the Chinese state has defined the natural role of women in society. For example, women’s fertility has been shaped by China’s continuing policy of population control.\textsuperscript{126} In an attempt to hold its population growth to 1.2 billion until the turn of the century, China implemented in 1979 its fourth birth-planning campaign, more commonly known as the One-Child Campaign. The One-Child Campaign is a strict state-imposed family planning program with elaborate rewards and extremely coercive sanctions.\textsuperscript{127} In China, the ideal so-

\textsuperscript{123} See Liu, supra note 39, at 14-15. In the Shekuo district alone, between the years 1986 and 1987, there were at least 21 work stoppages due to illegal violations of workers’ contracts and rights. Id.

\textsuperscript{124} See id. The “floating population” (“liudong renkou”) of migrant workers is most vulnerable. Due to their poor living and working conditions, they are often referred to as third class citizens. The government has stepped up efforts to curb labor influx into urban areas and, in 1985, instituted regulations to require registration of residents. In 1989, after the Pro-Democracy movement, the state implemented the Interim Provision on the Administration of Temporary Identity Cards in an effort to step up this registration effort. See Interim Provisions on the Administration of Temporary Identity Cards, FAZHI RIBAO [DAILY LEGAL NEWS], Sept. 19, 1989, at 2.

\textsuperscript{125} Most Special Economic Zones have a broadly stated provision that requires enterprises to “implement special health protection for women workers in accordance with the provisions of the P.R.C.” See Management in Enterprises in the Special Economic Zones in Guangdong Province art. 13; Interim Regulations for Labor Management in the Economic and Technological Development Zone of Shandong Province art. 13; Regulations for Labor Management of the Tianjin Economic & Technological Development Zones art. 19. Provincial regulations may be found in Difang Xingfa Gui Xuanbian [Compilation of Local Law and Regulations] (1990).

\textsuperscript{126} China is expecting another baby boom as the children born after the famine of the early 1960s reach their reproductive years. China's total fertility rate is about 2.3 in women ages 15 to 49. See Nicholas Kristof, More in China Willingly Rear Just One Child, N.Y. TIMES, May 9, 1990, at A1. China’s population jumped from .6 billion in 1960 to 1.1 billion in 1990 and grows at an estimated 15 million each year.

\textsuperscript{127} In rural areas, China provides financial incentives of more land, better housing, a reduction
cialist family is the one-child family.\textsuperscript{128}

Interestingly, then, the regulations protecting women's reproductive health may be in tension with the state's goal of population control. While the state supports the return home policy and, at least facially, the protection of women workers' reproductive health, the state must, at the same time, emphasize the contrasting duty of women workers to practice family planning. Hence, the Health Care Regulations contain provisions that protect a woman's reproductive health, as well as provisions that establish a menstruation card system for women employees, presumably to keep track of pregnancies.

Even within this tension, it is evident that the goal of gender equality is subordinated to the higher national goal of the one-child family. Hence, a woman worker who has a second child outside the mandates of the population control policy is not accorded the benefits provided by the labor and health regulations. Rather, she is subject to the different regulations relating to family planning.\textsuperscript{129} The Labor Protection Regulations and the Health Care Regulations reflect the delicate balance the Chinese state is trying to maintain between women as workers and mothers, in so far as the workers are mothers of one-child families.\textsuperscript{130}

in grain taxes, and a $15 yearly subsidy for couples with only one child; couples who have children without permission may be fined as much as 5 to 10% of the family's income for 10 years. In urban areas, a family with a one-child certificate is rewarded with a monthly stipend of five to eight percent of the average worker's monthly wage or an annual stipend equivalent to one month's wages, until the child is 14 years of age. The one-child family also has priority in housing allocation and an only child will receive free or subsidized medical care and preferential treatment in admission to nurseries, kindergarten, schools, and job assignments. In rural areas, communes were called upon to build senior housing to provide for the childless aged person. For an excellent article on the latest development in China’s one-child policy, see Tyrene White, \textit{Post-Revolutionary Mobilization in China: The One-Child Policy Reconsidered}, \textit{World Politics}, Oct. 1990, at 53-75. For other readings, see Pi-Chao Chen, \textit{Birth Planning and Fertility Transition}, \textit{Annals Am. Acad. Pol. & Soc. Sci.} 128 (1984); Xiangming Chen, \textit{The One Child Population Policy, Modernization and the Extended Chinese Family}, 47 \textit{J. Marriage & Fam.} 193 (1985); Erika Flatte, \textit{China’s Fertility Transition: The One Child Campaign}, 57 \textit{Pac. Affairs} 646 (Winter 1984/85); Yuensheng Sun & Wei Zhangling, \textit{The One Child Policy in China Today}, 18 \textit{J. Comp. Fam. Stud.} 309 (Summer 1987).

\textsuperscript{128} China appears to be having success in implementing its one-child policy. Many couples interviewed in Sichuan, Hunan, and Gansu provinces as well as Beijing now express the view that they only want one or two children. The reason given is primarily one of finances. \textit{See} Kristof, \textit{ supra} note 126, at A1.

\textsuperscript{129} \textit{Zhou Minlin \& Xie Liusheng, Zhigong Quanyi Falu Guwen [Inquiries About Workers’ Legal Rights], Nanning: Guangxi Renmin Chubanshe} 315 (1990).

\textsuperscript{130} Thus, some critics have concluded that Communist laws have simply recast the traditional
The link between the goal of equality and national economic interests is certainly not unique to China. Some scholars have noted that women in the third world are often called upon to sacrifice on behalf of national interests and national movements. Because "the imagined community of nationalism is authorized as the most authentic unit or form of collectivity... the women's question is constrained to take on a nationalist expression as a prerequisite for being considered political." Accordingly, "Chinese women, like other women in the third world are asked to not be women when there is a political crisis, but when the crisis is over, they are asked to resume their traditional role as wives and mother to restore order and culture." In China, while the Women's Federation and Chinese women in general oppose the return home policy, women are


181 For articles questioning why nationalism invariably entails the subordination of women, see Hilary Charlesworth et al., Feminist Approaches to International Law, 85 Am. J. Int'l L. 613, 620 (1991); R. Radhakrishnan, Nationalism, Gender, and the Narrative of Identity, in Nationalism and Sexualities 77 (Andrew Parker et al. eds., 1992). Marxist feminists have long criticized capitalist countries for reducing women to a "reserve army" of workers who are called into the labor force during periods of expansion but rejected when circumstances change. Henrietta Moore, Feminism and Anthropology 113 (1988).


184 Rey Chow, Violence in the Other Country: China as Crisis, Spectacle, and Women, in Third World Women and the Politics of Feminism 88 (Chandra Mohanty et al. eds., 1991); see also Delia Davin, Chinese Models of Development and Their Implications for Women, in Women, Development and Survival in the Third World, supra note 132, at 30.

185 While in Da Qiu village 84% of the married women willingly went home, 90% of the women surveyed by the All-China Federation of Women "refuse to return to the kitchen." Zhou Hanru, Women's Role in the Society Debated, China Daily, Mar. 8, 1988, at 1. In a recent survey of 500 working women, 67% rejected the notion of "a return to the home" policy, while 53% said they would quit work if their husband's wage would support the family. See Discussion on Women and Work, 31
among those who accept the conclusion that the goal of equal employment is closely related to the development of socialist productive forces. This perception may be reflective of the approach of socialist feminists who fail to disentangle economics from gender issues.

In summary, China’s recent regulations regarding women and work depart from the policies of the Cultural Revolution, which emphasized that “women are the same as men,” and focus instead on women’s biological functions. The focus on women’s biology has justified subjecting women’s equality to other state goals. Most prominently, the new regulations reflect the tension in the post-Mao era between gender equality and the superceding national goal of economic development.

IV. TENSION BETWEEN BIOLOGY AND EQUALITY

On one level, Chinese laws on women and work can be seen as an instrument for advancing the nation’s current economic policies. On another level, the legislation, particularly the Health Care and Labor Protection Regulations, reflects a familiar tension between the goals of ensuring women equality of opportunity and treatment and protecting women’s reproductive biology. The tension is this: Legislation protective of women’s differences can undermine women’s equality of opportunity by categorizing and perpetuating specific roles for women, yet legislation ensuring equality of opportunity and treatment can fail to accommodate the different biological needs of women.

Hence, countries as diverse as the United States and the People’s Republic of China have looked to protective legislation. While the Chinese philosophical and historical tradition has led China to rely upon protective legislation, the United States’ philosophical tradition has led it to adopt equal rights legislation instead. In the legislation they have passed, the two countries have struck strikingly different balances between these di-

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Beijing Rev., Aug. 15-21, 1922, at 38; see also Cong Yi jia Gong chang Kang Nuxing de Chulu (Examinaing Women’s Outlet from One Factory), 8 Zhongguo Fundu 24 (1988).

The First Sino-American Conference on Women’s Issues, Beijing, People’s Republic of China (1990). A meeting of the Shanghai Women’s Society and Shanghai Research Institute on Marriage and Women concluded that the level of women’s emancipation and the development of social forces must be synchronized. The participants agreed that the targets of emancipation, including women’s rights, were restricted by the present level of productive forces. See Discussion on Women and Work, supra note 35, at 38.
chotomous approaches. Neither form of legislation, however, completely addresses the complex issues of women and work.

A. Equality Versus Biology in the United States

While it is beyond the scope of this Article to explore the depths of women and work issues in the United States, a short review of the history of women and work issues in the United States helps delineate the tension between equality of opportunity and treatment and protection of women’s biology. Specifically, there has been a debate, during the evolution of the issues of women and work in the United States, about which theory should be used to advance gender equality. Deborah Rhode identifies the debate as that between the “natural roles” model and the “natural rights” model.\textsuperscript{137} As Rhode puts it, “feminists [have] sometimes demanded equal status on the basis of natural rights but they also claimed it on the ground of natural roles.”\textsuperscript{138}

The natural rights argument has its basis in the ideals of individual liberty and autonomy. In the gender debate, the natural rights argument embraces the notion that women are created equal, are endowed with certain inalienable rights, and thus should be treated the same as men.\textsuperscript{139} The rhetoric of choice underlying this strategy is premised on a concept of individualism and self-centeredness, which is part and parcel of the American liberal tradition.\textsuperscript{140} The concept of natural roles focuses on gender differences to celebrate the special attributes of women.\textsuperscript{141} Natural rights focuses on individual choice and gender neutral legislation; natural roles focuses on biology, resulting in legislation that recognizes gender differences.

\textsuperscript{137} RHODE, supra note 12, at 11-12. There are, of course, other categorizations of this debate such as equal treatment/similar treatment, equal treatment/positive action, and assimilationist/acccommodationist. Ann Scales identifies the models as the liberal view, the assimilationist view, the bivalent view, and the incorporationist view. See Ann Scales, Towards a Feminist Jurisprudence, 56 IND. L. J. 375 (1980-81). Not to be excluded are the socialist feminists and the radical feminists. For a good discussion of the varying schools of western feminist thought, see MOORE, supra note 131.

\textsuperscript{138} RHODE, supra note 12, at 12.

\textsuperscript{139} Id.

\textsuperscript{140} Williams, supra note 132, at 1561. Yet this same liberal tradition “condemns mothers who pursue self-interest over their children’s needs as ‘selfish,’” thereby creating a gender war between those using the liberal “choice” rhetoric to demand equality and those holding fears “about selfish mothers destroying babies to pursue their own self interests.” Id. at 1562.

\textsuperscript{141} RHODE, supra note 12, at 12-14.
The first United States legislation on women and work was passed around the turn of the century; it followed the natural roles approach and was protective of women’s biology. From the turn of the century until the Civil Rights Movement of the 1960s, the United States saw a proliferation of state laws aimed specifically at protecting women workers; these laws ranged from limiting the hours and kinds of work to ensuring the minimum wages for women workers. Even when the United States Supreme Court struck down most worker protective legislation in the early part of the century on the ground that the legislation constituted an unreasonable restriction on an individual’s right to contract,142 protective legislation aimed specifically at protecting the health of women workers was generally upheld.143 Hence, the Supreme Court found a New York law limiting the hours of bakers to be unconstitutional, while upholding an Oregon law regulating the hours of laundresses.

In Muller v. Oregon,144 the United States Supreme Court upheld Oregon’s right to enact maximum hour laws for women workers as a valid expression of the state’s interest in protecting women’s health, in other words, their fitness to bear and raise children.145 In the now famous Brandeis brief, Oregon argued that the ten-hour work day law for laundresses was necessary because “long hours of labor are dangerous for women, primarily because of their special physical organization,” and that “the evil effects of overwork before as well as after marriage upon childbirth is marked and disastrous.”146 Justice Brewer, writing for the Muller majority, agreed noting “the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.”147

By 1937, after the Great Depression and Roosevelt’s court packing plan, the United States Supreme Court had become more receptive to protective labor legislation for both men and women. Nevertheless, over the next two decades, courts continued to uphold legislation that treated fe-

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144 Id.
145 Id.
146 The Supreme Court wrote, “The limitations which this statute places upon her contractual powers ... are not imposed solely for her benefit, but also largely for the benefit of all.” Id. at 422.
148 208 U.S. at 421.
male workers differently from male workers. These cases, couched in language of "protecting" women, upheld maximum hours,146 minimum wages,149 and occupational segregation150 for women workers. By the 1970s, all but about eight states had some sort of protective legislation for women.161

By the 1960s and 1970s, however, women recognized that this legislation impeded their employment opportunities.158 Protective laws of earlier years were broadly criticized for their effect of consigning women to jobs with regular hours but lower wages. The rise of the civil rights movement was accompanied by a resurgence of feminism and a demand for similar treatment of men and women. The United States Congress responded by promulgating a series of antidiscrimination laws that allowed women to demand equal treatment in the workplace by prohibiting discriminatory employment practices.158 One of those statutes, Title VII of the Civil Rights Act of 1964, expressly preempted inconsistant state law. This law was used to strike down most of the protective legislation of the early twentieth century.164

By and large, legislation of the 1960s and 1970s followed the natural rights concept of equality. The strategy of liberal feminists during those

146 See id.
147 See West Coast Hotel Co. v. Parrish, 300 U.S. 379, 575 (1937).
151 Larson & Larson, supra note 11, § 18. Alabama, Alaska, Delaware, Florida, Hawaii, Idaho, Iowa, and Virginia had no protective legislation for women. From the mid-1800s to 1919, all but five states (Alabama, Florida, Georgia, Indiana, Iowa, and West Virginia) had maximum hours laws exclusively for women at some point in their history. See Goldin, supra note 9, at 190-91. Most legislation mandated a 10-hour day, which was consistent with the average scheduled hours of manufacturing workers at the time. Id. at 189.
years predominantly focused on legislation that would create a gender-neutral workforce as the best method to ensure equality between men and women. The approach was predicated upon an individualistic construct of equality, which, as pointed out by Owen Fiss, has served as the “primary mediating principle” through which courts have framed constitutional and statutory protections of equality. In the context of gender, the underlying assumption was that there are no real differences between men and women, and thus, men and women would achieve equality through individual choice and competition once the shackles of discrimination were removed.

In recent years, feminists in the United States have continued the debate between protectionist and assimilationist strategies. The debate often centers on issues of leave and child care benefits, with some feminists supporting gender neutral parental and/or family leave legislation, while others argue for gender specific maternity leave legislation. The most recent form of this debate has focused on challenges to “fetal protection policies” adopted by some private companies. The stated purpose of these


189 Maternity leave poses an interesting question. In 1978, Congress amended Title VII to clarify the connection between pregnancy and gender. The Pregnancy Discrimination Act (PDA) specifies that sex discrimination includes discrimination on the basis of pregnancy. The PDA added subsection (K) to section 701, the definitional section of Title VII. Subsection (K) provides in relevant part, “the terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.” Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(K). However, it has also been held that state legislation that mandates leave on the basis of pregnancy does not conflict with Title VII, so long as the leave is tied to medical consequences of pregnancy and childbirth and not to stereotyped notions of women’s proper role in society. See California Fed. Sav. & Loan Ass’n v Guerra, 479 U.S. 272, 290 (1987). Some 20 states and Puerto Rico have some type of maternity or parental leave law. These laws vary, with some mandating six weeks leave and others one year. The coverage may include adoptions, disability, and pregnancy; it may apply to companies with only one employee, or to companies with more than 250 employees. All except Puerto Rico call for unpaid leave, with two-thirds of the states requiring a guarantee of reinstatement. See WOMEN’S BUREAU, U.S. DEPT. OF LABOR, NO. 90-1, FACTS ON WORKING WOMEN (June 1990); see also Dowd, Maternity Leave: Taking Differences into Account, 54 FORDHAM L. REV. 699, 720-31 (1986).
policies is the protection of fetuses, but the policies operate to exclude fertile women from certain jobs.\textsuperscript{159}

What seems clear is this: The American legal system can readily implement a formal equality model, but has great difficulty in incorporating difference theories. The lesson of the protective legislation era is that statutes recognizing difference often result in worse treatment for those people the laws sought to protect. Yet, laws that guarantee formal equality have failed to provide for American women workers the kinds of benefits and services that women workers need and that Chinese women workers have under Chinese laws.

B. Biology Versus Equality in China

In contrast to American legislation, which emphasizes formal equality, the Chinese legislation relating to women and work shows a clear preference for protecting women's biology. For example, China's Health Care and Labor Protection Regulations represent an advance in addressing the health needs of women—an approach that was actually resisted at one time in China.\textsuperscript{160} Indeed, the two regulations serve to safeguard the health and safety of working women by requiring paid leave, child care, equal pay, flexible hours, and rest periods. These regulations also advance the provision of supporting social services, such as day care facilities, nursing, and wash rooms. Their focus on health education as well as prenatal and postnatal care ensure that women workers in China receive the appropriate educational and medical attention necessary for a healthy, full-term pregnancy. In summary, these provisions accommodate the needs of women and restructure the workplace accordingly.\textsuperscript{161}


\textsuperscript{160} During the Great Leap Forward there was outright resistance to discussing the health needs of women. ANDORS, supra note 20, at 55.

In part, these regulations also recognize that the economic reforms of the 1980s have left a gap in needed social services. Certainly, future development will benefit women only if it addresses the double burdens of production and reproduction. Where central planning in the past had ensured security, such as employment and its attendant benefits, the new reforms have left workers, especially women workers, more vulnerable. Accordingly, the reinstated Chinese legal system attempted to address this gap with its guarantees of benefits and services.

Yet as demonstrated by the history of American legislation on women and work, protective legislation may also diminish equality of opportunity for women. Indeed, the regulations do not sufficiently address the problems of discriminatory hiring and occupational segregation, and may actually aggravate these problems. For example, the protective restrictions on the hours and times women may work, the lifting restrictions, the restrictions on working in cold water and at certain heights, and the restrictions on contact with industrial chemicals apply to a wide variety of jobs. While theoretically women are prohibited from these categories only during four critical periods (menstruation, pregnancy, post-pregnancy, and menopause), in reality these restrictions may deter employers from hiring women at all.

Similarly, the cost of providing the benefits required by the regulations may deter employers from hiring women or encourage employers to lay off female employees. Prior to the reforms, the state was responsible for every aspect of the operation of enterprises, including the provision of social welfare such as housing and maternity benefits. After the reforms,

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182 Three battles have been identified for women in labor market policy: (1) the battle against unemployment and sex discrimination in access to employment; (2) the battle against male/female earnings differentials; and (3) the battle for an adequate social infrastructure to enable both male and female workers to cope with their family responsibilities. Marion Janjic, Women’s Work in Industrial Countries: An Overview from the Perspective of the International Labour Organizations, in 11 Industrial and Labor Relations Report, Women Workers in Fifteen Countries 3 (Jennifer Farley ed., 1985).

183 Lu, supra note 107, at 18-21.

184 Zhang Yigong, Wei Shenmo Qiye Buyuan Yao Nugong [Why Are Businesses Reluctant to Hire Women?], 2 Zhongguo Fundu 6 (1988). Some factory managers have insisted women take prolonged maternity leave to save on the operational costs of running nurseries and to reduce the inefficiencies caused by nursing mothers. However, other factory managers have actually increased factory income by transforming welfare facilities into profit-making ventures. Honig & Hershatter, supra note 40, at 253-54.
enterprises had to bear their own expenses. Thus, enterprises employing numerous women have complained that they bear a much greater financial burden than enterprises largely employing male workers. New smaller enterprises and private businesses, meanwhile, have complained that they may not even be financially strong enough to set up a benefits system.

While the Labor Protection Regulations do provide that an employer may not reject applications on gender grounds and the Health Care Regulations require that enterprises hire women where "suitable," both regulations by their vagueness allow enterprises to define job requirements to discriminate against women. Absent implementing detailed regulations to prohibit discriminatory conduct, enterprises may continue to hire men over women. Furthermore, while enterprises are prohibited from firing a woman because of her pregnancy, they are not prohibited from firing women workers because they are women. This is precisely what some enterprises have done by implementing return home policies. Similarly, the regulations contribute to the problem of occupational segregation by keeping women out of certain categories of work, based on the ostensible need to protect them.

Finally, because these regulations are primarily directed to and structured around women's reproductive functions, they do not consider individual differences between women. For example, the regulations do not exempt women who choose not to have children or who have already had their children. The focus on childbirth reinforces the stereotype that the primary role of a woman is her reproductive function.

165 Liu Ping, manager of Guangzhou Automobile Corporation, said women’s physiology and childbearing responsibilities cause many troubles that affect the economic benefits of a company. She stated, “Unless women can get compensation and the state can reduce the tax on women workers, we heavy industrial factories prefer male workers.” A Woman’s Place Is Certainly Not in the Kitchen, F.B.I.S., DAILY REP.: CHINA, Sept. 7, 1988, at 28.

166 Lu, supra note 107, at 14-17. A worker at the Beijing General Automobile Replacements Plant earns an average of 20,000 yuan of profits a year. The figure for a pregnant woman or nursing mother is 6600 yuan less because she enjoys longer breaks, maternity leave, and breast-feeding hours. Id; see also Ran, supra note 104, at 25-26.

167 For example, the 1988 Labor Regulations bar a woman from performing third grade labor during her four critical periods and fourth grade labor at all times. This is particularly problematic since higher grade work generally receives higher pay. See SHEHUI JINGJI TONJI CONGDIAN [SOCIAL AND ECONOMIC STATISTICS COMPILATION] 736-37 (Tong Zhehui ed., 1987); see also COMPENDIUM, supra note 80, at 522-25.
V. PHILOSOPHICAL UNDERPINNINGS OF THE CHINESE APPROACH

Both Chinese and American regulation of women in the workplace reflect the tension between protecting women's reproductive role and ensuring equality of opportunity for women. While American law embraces formal equality, China favors protection. The third and final level of analysis examines the cultural and philosophical underpinnings of the protectionist tilt of China's regulations and asks which of those concepts are useful when applied to the very different system of the United States.

Obviously, the focus of China's Health Care Regulations and Labor Protection Regulations on conferring special benefits to and limitations on women reflects a strong tilt towards a "natural roles" model. The explanation for this tilt can be traced both to the socialist philosophy of the People's Republic of China and to traditional Confucian philosophy. A strong undercurrent of Confucianism exists in regulations that carve out a "natural role" for women, based on their reproductive capacities. By the same token, there also exists a strong undercurrent of socialist philosophy in these laws. Socialist laws in general have a protective or parental flavor because of the dominant role of the state. This is particularly true for labor laws, which exemplify the socialist ideal of protecting against "exploitations" of the working class.

A. Confucian Origins

Traditional Chinese attitudes toward the law have always fluctuated between two schools of legal thought—the Legalist School and the Con-

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106 See HAROLD J. BERMAN, JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW 363-84 (rev. ed. 1963) (noting that Socialist law is "parental" in treating the individual as one in need of moral guidance from the state rather than one in need of protection from state and community); ANDREW G. WALDER, COMMUNIST NEO-TRADITIONALISM: WORK AND AUTHORITY IN CHINESE INDUSTRY 227 (1986) (concluding that there has been a post-Mao shift to paternalistic managerial ideology on the part of Chinese enterprises, which stresses education and persuasion and has led to increased provision of collective services and benefits).

107 Shi Tanjing, Lun Laodong Li fa Yu Renquan Baozhang [Labor Law and Protection of Rights], 5 FAXUE [STUDIES IN LAW] 7 (1991); Tang Min, Zhongguo Nugong jie Fang de Biao Xiang Yu Shizhi [The Image and Reality of Chinese Women Worker's Liberation], 10 ZHONGGUO FUNU 22 (1988) (China's protective regulations are a reaction to the horrible conditions to which women workers are subjected by today's profit-minded investors. These conditions are reminiscent of those existing at the turn of the century.).
fucian School. While the Legalists advocated a system of written law that relied on government enforcement, the Confucian school emphasized compliance through the internalization of li (rules of conduct), which embodied accepted values and norms. The Legalist School rose to prominence with the unification of China into the Qin Empire around the third century B.C., but Confucianism did not vanish completely. Confucianism reigned in the private sphere while the Legalist's formal law reigned in the public sphere. Even in the public sphere, however, Confucian values infiltrated and were codified into law, through a process known as the "Confucianization of law." For example, a crime by a younger family member against an older member would merit a more severe punishment than a crime by an older family member against a younger member.

The Confucian definition of the self was primarily contextual, dependent on one's relationship to another. Similarly, male and female, as Confucian concepts, "always appeared as part of something else, defined not by essence but by context, marked by interdependency and reciprocal obligation rather than by autonomy and contradiction." Confucian values projected all social life as a series of relationships (lun), with the five prominent lun being father to son, monarch to subject, husband to wife, older to younger brother, and older to younger friend.

Chinese social theory thus contrasts with liberal Western notions that communities are composed of autonomous individuals who act out of self-interest, and that the desires of individuals inevitably clash with the needs of society. In the Confucian view, each person is defined by his or her experience as a person, but more importantly, as a member of his or her family and a broader community group. A model woman in feudal China, therefore, was one educated about her role, her duties, and her obligations in society. In the patriarchal and hierarchical Confucian society, a woman's primary obligation was to produce and wisely raise a male descendant, thereby perpetuating the family's future.

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170 Derek Bodde & Clarence Morris, Law in Imperial China 17-27 (1967).
171 Tani E. Barlow, Introduction to I Myself Am a Woman, supra note 1, at 1, 10.
172 Traditional moral instructions for women argue that "wise mothers rear wise sons and grandsons. The process of kingly transformation [literally, *wang-hua*, the transformative influence of the ruler on his subjects] therefore begins in the women's department and a family's future advantage is tied to the purity and the education of its women." Susan Mann, Grooming a Daughter for Marriage: Brides and Wives in the Mid-Ch'ing Period, in Marriage and Inequality in Chinese Society 204, 214 (Rubie S. Watson & Patricia B. Ebrey eds., 1991).
With the adoption of Marxist-Leninism, the Chinese quickly expanded their legal system to cover both the private and public spheres. Socialist legal systems included the state as the regulator of virtually every aspect of a person’s daily life. While Communism rejected feudal Confucianism in theory, Chinese society appears to have retained Confucian conventions. Confucian values have been integrated into the laws that presently govern the formerly private spheres, including the female reproductive function. Today, with the repudiation of Communist Party doctrine by much of the former Communist world, Confucianism may actually be on the rise, as pragmatic Chinese leaders look to China’s traditional culture in building a “new socialist culture.”

The Constitution of the People’s Republic of China, for example, reflects Confucian principles by placing reciprocal duties and obligations on its citizens, such as a duty on the young to take care of the old. In a similar vein, the Constitution treats women, along with the elderly and the young, as a class of people meritng special protection. Women hold a special status in the labor force because of their special reproductive responsibilities. The new Women’s Rights Protection Law, in particular, emphasizes the responsibility of the whole society in “protecting women’s legitimate rights and interests.” Women, meanwhile, have the reciprocal duty to “observe state laws, respect social ethics, and fulfill obligations prescribed by law.” In a particularly moralistic tone, Chinese regulations also assume that a woman will be married prior to pregnancy and childbirth. Special protection for women workers, therefore, has

173 According to William de Bary, “Beijing’s pragmatic leaders will be disposed increasingly to lean on a conservative version of Chinese tradition as the best guarantor of the status quo... [and] look... now to a pseudo-Confucian tradition as its link to a new East Asian community.” WILLIAM T. DE BARY, THE TROUBLE WITH CONFUCIANISM 109 (1991); see also Wei Liming, Confucianism: Still a Subject of Interest, 32 BEIJING REV., Dec. 18-24, 1989, at 21-25 (In October 1989, an international conference was held in Beijing to discuss the role of Confucian ideas in history and modern society.).


176 Women’s Rights Protection Law, supra note 58, art. 3.

177 Id. art. 6.

178 Unmarried women with children are entitled only to maternity leave, and not to other child care benefits provided under these regulations. ZHIGONG QUANYI FALU GUWEN [INQUIRIES REGARDING LABOR RIGHTS] 52 (Zhou Minlin ed., 1990).
support in the traditional ideological constructs of the role of women as "mothers and wives."\textsuperscript{179}

The special protection of women found in the current regulations is rooted in the traditional medical belief that a woman is weakened by her reproductive responsibility. According to a study by Charlotte Furth and Ch’en Shu-Yueh, in traditional Chinese medicine, menstruation was viewed as analogous to childbirth, creating an imbalance in the body that weakened a woman.\textsuperscript{180} In traditional medical texts devoted to women, "menstrual regulation" comprised the longest section. During menstruation, pregnancy, and the period after childbirth, women were subject to certain restrictions, such as the avoidance of baths, cold water, and heavy lifting. Furthermore, women were advised to eat particular foods to renew their energy. These restrictions are remarkably similar to those found in the Health Care Regulations and the Labor Protection Regulations, which were not limited to pregnancy and post-pregnancy but extended to menstrual periods and menopause.\textsuperscript{181}

Because of these traditional beliefs, many Chinese women accept the importance of special protections for women. In general, there has been little discussion in China challenging the protective nature of the Health Care and Labor Protection Regulations. In a 1990 conference on women in China, many of the participants justified the protections offered by the labor regulations as important and necessary in safeguarding the legal

\textsuperscript{179} Of course, the traditional feudal family values accorded virtually no personal rights to Chinese women. All rights belonged not to the woman, but to her natal family, and later to her husband upon payment of the betrothal gift. See Ocko, supra note 130, at 313. The recent growing revival of Confucian values has been accompanied by disturbing reports of women being sold for marriage. See, e.g., Sheryl Wu Dunn, Feudal China’s Evil Revived: Wives for Sale, N.Y. TIMES, Aug. 4, 1991, at L11; Wang Dao, When Will Women Cease to be a Commodity, 5 MINZHU YU FAZHI [DEMOCRACY AND LAW] 11 (1990). Reports of female infanticide have also grown. Sharon K. Hom, Female Infanticide in China: The Human Rights Specter and Thoughts Towards (An)other Vision, 23 COLUM. HUM. RTS. L. REV. 249 (1992). Nicholas Kristof, A Mystery From China’s Census: Where Have all the Young Girls Gone?, N.Y. TIMES, June 17, 1991, at A1.

\textsuperscript{180} Charlotte Furth & Ch’en Shu-Yueh, Chinese Medicine and the Anthropology of Menstruation in Contemporary Taiwan, MED. ANTHROPOLOGY Q., Mar. 1992, at 27. In Taiwan, traditional medical beliefs exist side-by-side with western medical technology.

\textsuperscript{181} Thus, for example, the 90-day maternity leave (two weeks of which is to be taken prior to delivery) is based in part on the belief that a woman needs 50 days to recuperate from the delivery, traditionally called "zuo yuezi." Wang Yuchen & Zhao Yufeng, LAODONG BAOHU GONGZUO WENDA [QUESTIONS AND ANSWERS RELATING TO LABOR PROTECTION] 55 (1984). Weight restrictions are based on the belief that the physical lifting of more than 25 kilograms may cause dislocation of the uterus; exposing menstruating women to cold water could cause irregular cycles. Id. at 52-53.
rights of women because "women have their own physiological features and have the task of bearing children so as to carry on the race." Thus, protection of women’s health is not merely for their benefit but also for the benefit of future generations.

In summary, the detailed regulation of women’s reproductive cycles reflects Confucian traditions in the Chinese legal system. The regulations are Confucian in their emphasis on the reciprocal obligations of women and society, resulting in wide support for the special protection of women. The regulations are also quite clearly socialist in the intrusive and directive presence of the state in defining the proper role of women.

B. Positive Versus Negative Rights

The socialist conception of rights and laws also emphasizes the imposition of duties on the individual citizen. In this view, law is designed not simply to protect individual interests, but rather to enable the individual to meet his or her duties to the state. Particularly, since the student protests in Tiananmen Square, the government has made a point of emphasizing the dualities of "democracy and law, freedom and discipline, rights and duties." The imposition of reciprocal duties, however, also means that the individual in Chinese society receives certain protections.

In contrast to the United States Constitution, the rights guaranteed by the Chinese Constitution concern the state’s responsibility to liberate the working class. China’s Constitution, like most socialist constitutions, contains a litany of positive social and economic rights guarantees.

182 Bao Yushu, Health Care and Labor Protection for Working Women in China, The First Sino-American Conference on Women’s Issues (June 25-28, 1990) (Beijing, China). Professor Yushu is with the School of Public Health at Beijing Medical University and is the Vice Director of the National Center for Research and Training in Maternity and Health Care. According to Professor Yushu, the physical makeup of women predetermines that they have less physical strength than men, are more sensitive to toxic and harmful substances, and retain such substances longer than men. Professor Yushu states further that when a pregnant woman works, growth of the embryo is impaired.


186 See id. Socialist countries are often the proponents for including social and economic rights at
contrast, the United States Constitution guarantees individual inalienable rights that the state cannot easily override. Thus, the essential freedom preserved by the United States Constitution is freedom from governmental impingement of the rights of individuals. As Louis Henkin explained, "Rights theory, in the United States, supports rights deriving from, and vindicating, individual freedom and autonomy, but not claims upon society to do for the individual what he cannot do for himself. It tells the government only what not to do, not what it must do." The "negative rights" tradition stands in stark contrast to the concept of "positive rights" where one is entitled to specific benefits of those rights.

This difference in traditions helps to explain the differences in the legislative approaches toward gender equality taken by China and the United States. In the United States, negative legislation prohibiting certain conduct, such as treating women differently from men, has been better received than affirmative protective legislation mandating conduct and guaranteeing benefits, such as leaves (maternal or parental) and childcare benefits. In contrast, Chinese labor regulations, consistent with the idea


Influenced by English liberal theorists such as John Locke and Thomas Hobbes, the founders of the United States Constitution conceived of the individual as existing prior to, and as the primary constituent of, the state. See THOMAS HOBBES, LEVIATHAN (C.B. Macpherson ed., Penguin Books 1951) (1951); LIFE, LIBERTY AND PROPERTY: ESSAYS ON LOCKE'S POLITICAL IDEAS 1 (Gordon J. Schochet ed., 1971).


While there are state provisions, the United States Congress is still struggling with bills that provide minimal childcare and parental leave protections. For example, in 1990, Congress passed the Family and Medical Leave Act, which required companies with more than 50 employees to grant workers unpaid leave when they are ill or need to care for infants or sick relatives. See Steven A. Holmes, Worker Leave Bill Sent to the House, N.Y. TIMES, May 9, 1990, at A19. President Bush vetoed this bill and thereafter vetoed another family leave bill that had been approved by both houses. Adam Clymer, House Votes To Sustain President's Veto of the Family-Leave Bill, N.Y. TIMES, Oct. 1, 1992, at D24. It was not until the new Clinton-Gore administration took office that the national family and medical leave act was enacted in 1993. Family and Medical Leave Act of 1993, Pub. L. No. 103-3 (Jan. 4, 1993).
of the socialist state’s guarantee of positive rights, affirmatively specify what an enterprise must do to protect a woman’s reproductive health, in addition to specifying what a woman cannot do in the workplace. Labor regulations specify what benefits and entitlements a women worker should receive. This role of the socialist state has led some to characterize socialist law as serving “the parental role,”\textsuperscript{100} while leading others to query whether, in China, the patriarchy of the traditional family has been replaced by the public patriarchy of the state.\textsuperscript{101}

C. Individual Versus Collective Rights

The socialist conception of collective rights is also quite different from the familiar notions of individual rights in the United States. The legal philosophy of the People’s Republic of China defines law as the state’s will and rights as the state’s creation.\textsuperscript{102} Rights may be expanded and contracted at will by the state based on the needs of the collective. Under this view of law and rights, the Chinese people have true freedom because their laws represent the will of the proletariat, as represented by the Chinese Communist Party. In contrast, capitalist laws reflect only the will of the ruling class—the owners of production. In the words of Peng Zhen, former Director of the Legal Affairs Committee of the National Communist Party, “we must uphold the rule of law and oppose the arbitrary will of individuals.”

This concept of rights is based on a combination of the traditional Confucian ethic of selflessness as well as the Marxist concept of law as an instrument of the ruling class.\textsuperscript{103} The Confucian ethic emphasized private

\textsuperscript{100} See Berman, supra note 168, at 363-84.


\textsuperscript{102} See Andrew Nathan, Sources of Chinese Rights Thinking, in HUMAN RIGHTS IN CONTEMPORARY CHINA 125, 130 (R. Randle Edwards et al. eds., 1986).

\textsuperscript{103} See Louis Henkin, The Human Rights Idea in China, in HUMAN RIGHTS IN CONTEMPORARY CHINA 20-26 (R. Randle Edwards et al. eds., 1986). This concept of rights was also prevalent during the brief Guomindang Period, when the influence of legal positivism via Japan and Germany was strong. Hence, an accepted view of law and rights during the Guomindang period was that “constitutional rights should not be based on the theory of natural rights.” Nathan, supra note 192, at 129. It was viewed as “beyond controversy that any enforceable right is the creation of the law,” and that “only when the law recognizes a certain right is such a right legally protected. It naturally follows that the law may make the right and also may unmake it. Constitutional right as a form of
interests as belonging to a group such as a family, lineage, or community. Similar, “Chinese Marxism accepts the legitimacy of individual interests, but only in a limited sense, it argues that this interest both is, and should be, subordinated to the higher interests of party, class and nation.” Hence, Mao wrote, “The individual is an element of the collective. When collective interests are increased, personal interests will subsequently be improved.” Thus, the Chinese legal system intricately ties individual rights to collective rights, with collective rights taking precedence over individual rights.

Gender equality in China must be viewed against this background of collective rights. Rather than viewing gender equality as an inalienable natural right to be protected from infringement of the collective, the Chinese socialist state has regarded gender equality as an instrument of political movements for the greater collective good of national advancement. The Chinese socialist state defines women’s role in society and the appropriate conceptions of equality for women based on what the state perceives to be the needs of the collective.

Thus, Chinese women’s strategy has primarily focused on group rights, and achievement of equality through women’s organizations (notably the women’s federations) that cut across household and class lines. Yet, the Women’s Federation, as an officially endorsed organization in China, is an arm of the government and a wing of the Party. Even as they work on behalf of working women, women’s organizations accept both the primacy of collective rights (as they are defined by the state) and the primacy of economic development.

In a recent joint discussion held by the Shanghai Women’s Society and the Shanghai Marriage and Family Research Institute on the various issues facing women and work in Shanghai, members at the meeting agreed that “the level of women’s emancipation and the development of social

legal right is no exception.” Id.

See Nathan, supra note 192, at 138 (Even during the revolutionary period when Confucian social bounds and duties were challenged, there were no consistent defenders of self-interested individualism.).

Id. at 141.

Recent publications reaffirm this conception of rights in China. See, e.g., Yu Ping, Law is Freedom’s Boundaries, Zhongguo Fazhi Bao [China Legal News], Nov. 8, 1989, at 1 (defining freedom as the freedom to act only within the bounds of the law).
productive forces must be synchronized.”\textsuperscript{196} While denouncing the idea of recalling all women from work as being “divorced from reality,” the meeting concluded that women must become a strong force in production. The meeting cautioned, however, that “the targets of women’s emancipation, including women’s rights, must be restricted by the present level of development of the productive forces.”\textsuperscript{199}

In summary, the tilt toward special protection for women in China’s labor regulations reflects Confucian notions of the natural role for women, the socialist ideal of positive rights, the reciprocal obligations between the state and the individual, and the current notion of collective interests in economic development.

VI. Future Strategy

Without question, there have been many issues raised about the individual rights/gender neutral approach followed in the United States.\textsuperscript{200} Many feminists have pointed out that this approach has devalued women’s experience and subjected them to gender-related disabilities leading to victimization and impoverishment.\textsuperscript{201} In particular, these feminists have noted that legislation designed “to secure similar treatment for those similarly situated” has failed to ensure true equality for women because it has failed to remedy “the structural factors that contribute to women’s dissimilar and disadvantaged status,”\textsuperscript{202} and thus, has led to equality in form but not in fact for women workers.\textsuperscript{203} They have argued for a strat-

\begin{itemize}
\item \textsuperscript{196} Discussion on Women and Work, supra note 111, at 38.
\item \textsuperscript{199} Id.
\item \textsuperscript{200} A detailed analysis of the growing jurisprudence on gender issues in the United States is beyond the scope of this Article. Rather, this Article seeks to draw some interlineation between China and the United States. A more detailed comparative study is in progress.
\item \textsuperscript{201} For example, some feminist scholars have argued that the similarities or “assimilationist” approach, in insisting on the essential biological similarity of men and women, fails because it 1) does not address women’s concerns in cases of real biological differences and 2) uses as a standard of comparison the white, male structure and thus requires women to assimilate into this structure. See Judith O. Brown et al., The Failure of Gender Equality: An Essay in Constitutional Dissonance, 36 Buff. L. Rev. 573 (1987).
\item \textsuperscript{202} Rhode, supra note 12, at 162. Some scholars thus argue, “Achieving sex-based equality requires social movement for transformation of the family, child-rearing arrangements, the economy, the wage labor market, and the human consciousness.” Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 956 (1984).
\item \textsuperscript{203} See Krieger & Cooney, supra note 157, at 515.
\end{itemize}
ergy of recognizing differences between men and women and of empowering the female voice, pointing out that the individual rights and “similar treatment” strategy has failed “to restructure its baseline norms and expectations to accept and make room for the life experiences of women.”

Other feminists have suggested a disadvantaged approach to ensure gender equality. Scholars such as Deborah Rhode propose to focus the analysis not on “whether the sexes are differently situated . . . . Rather, analysis turns on whether legal recognition of gender distinctions is more likely to reduce or to reinforce gender disparities in political power, social status, and economic security.” Still others seek to separate “social” gender differences from “biological” sex differences. These scholars argue for legislation that assists people (regardless of biology) victimized by social gender differentiation. In this view, laws that regulate biological differences must meet the higher standard of “compelling state interests if they perpetuate the inequality of women.”

There are ideas from the Chinese system that are relevant to this de-
bate, primarily the notion of positive rights and reciprocal duties between citizens and the state. As its reciprocal obligation, the state may be fairly expected to guarantee certain benefits to promote the family, such as the guarantee of family leave, protection of reproductive health, and childcare benefits. These are obligations the Chinese state has been more willing to embrace than the United States. The Chinese picture tells of the importance of the individual in a community and of reciprocal duties that are not evident, or at least not prominent in the United States today.

The United States needs a greater recognition of the value of collective interests and relational principles, an ideal already comfortably embraced by China. This proposition has found support in recent critiques that fault traditional American liberalism for limiting the state to the neutral role of protecting individual political and civil rights that “devalue[,] neglect[], or undermine[] the community” as a “fundamental and irreplaceable ingredient in the good life for human beings.”

Even though welfare state liberalism recognizes a redistributive role for the state, traditional liberalism fails to “account for obligations and commitments that are not chosen or explicitly undertaken through contracting or promising,” but rather arise from special relationships such as family and citizenship. Like Chinese confucian philosophy, this communitarian approach recognizes the self as being embedded in a particular social circumstance bearing a particular social identity. It recognizes the validity of nonvoluntary obligations that are “features of the social relations that constitute our community,” rather than voluntarily assumed obligations.

Of course, while recognizing the importance of community, it is important to note the limits of community power. China demonstrates the danger of the power of the collective. Excessive emphasis on the community

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211 Thus, MacIntyre writes, “I am someone’s son or daughter, someone else’s cousin or uncle; I am a citizen of this or that city, a member of this or that guild or profession; I belong to this clan, that tribe, this nation. Hence what is good for me has to be good for one who inhabits these roles.” *MACINTYRE, supra* note 209, at 204-05. The question, “What I should do?” depends on the prior question, “Of what story or stories do I find myself a part?” *Id.* at 201.
can lead to an identity for women that others historically define. While not suggesting that the United States reject the liberal framework, the existing liberal framework should take communitarian or collective values more seriously and take account of nonvoluntary obligations. This is a position proposed by Allen Buchanan, who points out that the liberal framework does not preclude an adequate account of the normative force of special, nonvoluntary obligations, which can help women and other disadvantaged groups achieve a better life. Indeed, “advocate[s] of the liberal thesis can embrace an expanded psychology and a richer theory of the good and can admit that not only autonomy but also community is of fundamental importance.”

The critique of individualism underlying traditional liberal thought is applicable to the gender debate and has been extended to feminism, most notably to conventional liberal feminism. As noted by Elizabeth Fox-Genovese, “individualism remains fully ingrained in most feminist thought.” This is evident in both the language and goals pursued by feminists: in analyzing the choice rhetoric in the family/work context, Joan Williams has pointed out that feminists “in their demands for liberation use the standard legal language of autonomous individuals with rights making choices in their own self interest.” Deriving from a historical and cultural tradition of individualism, the focus of American feminists continues to be on achieving women’s selfhood and the liberty to shape their own lives. Even the difference school feminists, who come closest to a critique of individualism in focusing on the importance of relationships in constituting the self, are rightly criticized as developing a

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213 Elizabeth M. Sneider, The Dialectics of Rights and Politics, in AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY, supra note 206, at 303 (suggesting that a radical social theory must transcend the traditional dichotomies of liberal thought, “law and politics, individual and community, and ultimately, rights and politics”).

214 Buchanan, supra note 208, at 878.

215 ELIZABETH FOX-GENOVESE, FEMINISM WITHOUT ILLUSIONS: A CRITIQUE OF INDIVIDUALISM 52 (1991); see also EISENSTEIN, supra note 205. Current liberal feminists do take social construction of gender into account, but for an ardent defense of conventional liberal feminism, see DAVID L. KARP ET AL., GENDER JUSTICE (1986) (defending justice as “enhancing choice for individuals, securing fair process, rather than particular outcomes for community”).

216 Williams, supra note 132, at 1564. Williams argues that the “choice” rhetoric “deflects our attention away from the constraints within which they operate” and tends to divide women. Id. at 1615.

217 See, e.g., Robin West, The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, in AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY,
theory of female individualism or "individualism with a human face."^{217} The issue for communitarians and feminists alike, then, is how to reconcile "claims of constitutiveness of social relations with values of self-determination."^{218}

On that issue, Jennifer Nedelsky has proposed a new model of autonomy that will "involve a far greater role for collective power and responsibility than does our current system" and language that "reflect[s] both the individual and the social dimensions of human beings."^{219} Additionally, while recognizing that some feminist strategies such as affirmative action and comparable worth do take into account collectivist goals, some have proposed that feminists need to rethink the basic premises and reimagine the collective in a way that takes into account women's legitimate needs. "Justice," notes Elizabeth Fox-Genovese, "must derive from a collective that grounds its deepest principles of individual rights in the collectivity's commitment to honor and protect difference."^{220}

One American feminist scholar, Lucinda Findley, places some of these ideas in a more practical framework in her article, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate.^{221} She suggests that the root of the problem may not be the failure to treat women similarly to men in the public sphere or the failure to make accommodating adjustments in the public sphere. She argues for a relational approach to differences that "accepts them in a nonhierarchical and

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supra note 206, at 130-32.

^{217} FOX-GENOVESE, supra note 214, at 52. The counter argument is, of course, that feminists have pursued collectivist strategies. Indeed, there are two competing theories of equality read into Title VII—equal treatment that focuses on individual remedies and equal opportunities which focuses on group remedies. See Robert B. Belton, Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and Weber, 59 N.C. L. REV. 531 (1981); Nancy S. Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 YALE L.J. 117 (1990) (arguing for a "pluralist view of discrimination," and for a society that preserves the diversity of social groups).


^{219} Id. at 36. Similarly, Williams argues that the rhetoric of choice traps women into "choosing" between selfless mother and self-interested ambition. Women, then, must be freed from the ideology of choice and "self-interest should include more attention to affiliative and communal needs than the traditional liberal model suggests." Williams, supra note 132, at 1634.

^{220} FOX-GENOVESE, supra note 214, at 241.

nonpejorative way.”222 She emphasizes the need to focus on “the falsity of the public-private dichotomy and the need to integrate values and structures of both the public and home worlds accordingly.”223 There also should be a “supplement to existing notions of rights as zones of non-interference” to take into consideration responsibilities as well as rights.224

By contrast, as a society with a strong recognition of relational differences and collective rights, and an intrusive state, China’s future strategy is likely to be somewhat different. In particular, China needs to supplement existing notions of rights as “zones of interference” and not as “zones of non-interference.” China needs to develop a heightened sense of individual rights apart from the collective. On an individual level, this would mean a greater development of a sense of self with rights, in addition to the responsibilities to state and society. Some Chinese women scholars have already identified this need of women to develop their sense of self-worth.225 On a broader level, this means that what constitutes gender equality must be taken away from state control. The goal of women’s equality in China must stand apart from the state’s goal of economic development. Women’s equality must be important because women have worth apart from their roles as mothers or wives and irrespective of the social and economic development priorities of the state.

The development of a heightened sense of individual rights is likely to be a significant challenge in China. For one commentator, many women in China remain convinced of the “natural roles” concept and the desirability of protective legislation.226 Furthermore, challenges to the authority

222 Ultimately, as Martha Minow suggests, we need heightened awareness of the difference dilemma and its implications, including self-conscious reflections concerning the ways we think about the problem of differences. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 373-90 (1990).


225 There was language urging Chinese women to rely on themselves, and not on the Party, to raise their social status. Women must have “self-respect, self-confidence, self-reliance, and [the desire for] self-improvement.” He Zhengshi, Funu Xue Lilun Tishi de Guoxiang [Fundamental Principles of Women’s Studies], 3 ZHONGGUO FUNU 19 (1987); see also Lu Xiufen, Women Still Face a Fight for Equality, CHINA DAILY, Feb. 10, 1988, at 4; Mi Puohua, Nuo Nan de Xunze: Miandui Nuren de Chushu de Chenshi [What a Difficult Choice: Thoughts About Women’s Outlet], 3 ZHONGGUO FUNU 12 (1988).

226 See, e.g., Tang Min, Zhongguo Nugong Jie Fang de Biaoxiang Yu Shizhi [The Appearance
of the state have been met continuously with brute force, justified by the state as necessary for the protection of the collective, social order. Yet, Chinese scholars are in the process of exploring a distinctly Chinese concept of rights and the shape of a new social order, which will square China's emphasis on collectivism with a burgeoning sense of individualism. Furthermore, women in China are beginning conversations that challenge the priority of economic development and the requirement of self-sacrifice for women. Yet, the ultimate direction of these developments remains to be seen.

As a society based on relational concepts, China is likely to continue to recognize differences (and strategies that recognize differences) between men and women. According to some Chinese women, arguing for women's equality by arguing that women are the same as men is simply taking on a male-centered manner of thinking. There is also one other important statistic: 30% of Chinese women in one nationwide survey believe that men are born more capable than women. Hence, one approach for China is to develop a defined appreciation of gender differences and to accept the differences in a nonhierarchical manner.

China has already taken some steps in this direction. Recently, for ex-
ample, the Department of Women Workers of the All-China Federation of Trade Unions, the Workers Daily, and the local workers newspapers held a six-month debate on the correct understanding of women workers and childbearing values in the development of a “commodity economy.”

This discussion educated many people to recognize the public and social values of childbearing and maternity.

Another approach is to build on, and seek implementation of, antidiscrimination regulations already on the books. Regulations that provide benefits for women, but do not prohibit discrimination against them, can only be detrimental to women in the long run. Indeed, some factories and enterprise owners have already refused to hire women because they believe women workers are more costly than their male counterparts. China has addressed this problem by seeking better implementation of protections, and by exploring ways in which the cost of benefits can be spread more broadly rather than resting on individual enterprises. Yet an additional approach is to adopt more vigorous prohibitions against discriminatory conduct. The current national Women’s Rights Protection Law needs to be supplemented by regulations requiring vigorous enforcement against discrimination in hiring, promotions, and pay.

To the extent that recent laws protect women, women must have the right to choose how and whether they want to be protected. While the protectionism of these regulations may be explained in the context of Chinese socialist culture, that explanation does not justify imposition of stan-

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233 For example, the City of Nantong in Jiangsu is experimenting with a municipal women workers’ maternity fund to relieve individual enterprises of this burden. In Nantong, every working employee must pay 20 yuan annually into a special fund that will be used to compensate enterprises for the subsidies they give women workers on leave. At present, about eight other cities and seven counties have adopted this idea. See Lu, *supra* note 103, at 20-21. Another suggestion that has been raised, though not tried, is that tax rates for enterprises be adjusted according to the proportion of women employed (i.e., a reduced tax for more women workers). *Sixth National Women’s Congress Continues: Discusses Women’s Place*, F.B.I.S. Daily Rep.: China, Sept. 7, 1988, at 28, 31-32; Li Yuxing, Xiang Xiang Women Ziji Shi Zenyiang Lai Dao Renshi De [Think About How We Came to the World], 11 ZHONGGUO FENU 19 (1988) (suggesting that enterprises without women workers be taxed at a greater rate). A final suggestion, helpful only to married women, is to divide the cost of women’s childcare and maternity benefits evenly between the husband’s and wife’s employer. See Zhang Yigong, Wei Shenmo Qjie Bu Yunyao, Nuge? [Why Do Enterprises Not Want To Hire Women?], 2 ZHONGGUO FENU 6 (1988).
dards on those minority members who do not want them. Thus, by analogy, in the area of human rights, it has been noted that to avoid the oppression of cultural relativism, differences in treatment must be based on "strong, authentic cultural basis, as well as the presence of alternative mechanisms guaranteeing basic human dignity." It has also been suggested that a member of a minority group should be able to opt out of traditional culture, and, in effect, choose the terms on which he or she will participate in that culture. Accordingly, Chinese women should be able to opt out of the protections and restrictions contained in the Health Care and Labor Protection Regulations.

As to the inevitable role of the collective in China, there is a need to redefine collective goals to emphasize the interests of families and not simply economic development. For example, China is considering the idea of adjusting work days and hours in consideration of the family. At present, the People's Republic of China employs a system of long working hours, which consists of a yearly minimum work time of 2448 hours—600 to 800 hours a year more than many developed nations. In some small towns, work periods often extend to 4000 hours yearly, a figure that is two to three times the world average. However, a recent study by the China Science and Technology Development and Research Center found the work efficiency among industrial and commercial laborers in China to be only 40 to 60%. Recent experiments to improve efficiency, however, have obtained favorable results. For example, trials shortening the work week have resulted in both improved efficiency and increased family time.

Ultimately, gender equality in China is likely to require the development of an independent women's movement, apart from state and party control. The All-China Women's Federation, which has been deeply in-

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volved in the development of recent legislation on women and work, theoretically represents the interests of women in China and has offices and representatives at nearly every level of society. Yet, as is true of the Trade Unions, including the Women Worker’s Committee of the All-China Trade Union, the Women’s Federation is very much limited by the dictates of the state. As arms of the state, these organizations are limited to accepting policies that place economics over gender equality and that focus on the traditional role of women. Absent an independent women’s movement, there has been no critical examination of the historical strategy used to remedy the inequality of women in China, and only a limited debate about alternative strategies; this trend is likely to continue.

Since the late 1980s, more women’s studies programs, as well as international conferences to discuss the issue of women’s equality, have been established. This development will assist in promoting gender equality as a separate goal, apart from its role as an instrument of social change and political campaigns. It will also assist in the development of women’s awareness of choices and eliminate the sense of hierarchical differences.

VII. CONCLUSION

The choice between protective legislation and equality legislation originated in different concepts of rights and law in the traditions of East and West, socialist and capitalist. Protective regulations are consistent with the Chinese socialist preference for collective over individual rights and positive over negative rights. By contrast, equality legislation is more indicative of a Western liberal tradition that places primacy on individual rather than collective and economic rights, and negative over positive rights.

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228 While the All-China Trade Union had offices representing women workers for several years, the Women Worker’s Committee of the All-China Trade Union was not formally established until February 5, 1991. See National Women Worker’s Committee of the All-China Trade Union Established in Beijing, Fazhi ribao [Legal News Daily], Feb. 8, 1991, at 1. The Communist Central Party reasserted its leadership over mass organizations after the Pro-Democracy Movement of 1989. Circular of the C.C.P. Central Committee on Strengthening and Improving Party Leadership over the Work of Trade Unions, Communist Youth League, and Women’s Federations, Fazhi ribao [Legal News Daily], Feb. 1, 1990, at 1.

229 For example, Li Xiaojiang, one of China’s foremost experts on women’s studies, has established The Center for Women Studies for Zhengzhou University in Henan Province.
Indeed, while the Health Care Regulations and the Labor Protection Regulations are indicative of the Chinese socialist attitudes toward gender equality, they are also more broadly indicative of the concept of individual rights in the Chinese socialist legal system. Because of the difference in the concept of individual rights, the debate on gender equality in China may well continue to take a different form and direction than the debate that has been taking place in western industrial nations, particularly the United States.

Ultimately, comparison of the Chinese approach to women and work with the approach followed in the West suggests ways in which both approaches may be improved. In the United States, the emphasis on individual autonomy and freedom has denigrated societally necessary tasks such as childrearing and caretaking, and has resulted in a decreased social status for women who traditionally perform these tasks. In China, meanwhile, the emphasis on society and on serving societal goals has relegated women to a second class status for the benefit of the more important societal goal of economic development. Women in both countries continue to face the conflict between their role as mothers and their role as workers.

Indeed, what is needed for both societies is a recognition of the limitations of both approaches and an amalgamation of the two. Chinese women must recognize that categorization and gender roles can perpetuate social inequality. Chinese protective legislation based on differences between men and women can subordinate women absent a simultaneous focus on antidiscrimination provisions. The new Women’s Rights Protection Law is a step in the right direction in providing for more comprehensive legislation for the protection of women’s rights in the areas of politics, employment, education, and personal rights. Yet women in China need to break away from the strategy they have pursued in the past and embrace one more grounded in concepts of antidiscrimination.

By the same token, the United States should recognize that an antidiscrimination strategy alone may be inadequate. In part, the recent rise of feminists arguing for recognition of women’s differences may be a response to and a step towards amending the antidiscrimination strategy. Indeed, equality requires the workplace to recognize and accommodate women’s reproductive role. Equality also means that the state must take more of a role in ensuring equality. This means something beyond the mere promulgation of more antidiscrimination legislation to protect nega-
tive rights; it requires affirmative legislation to ensure the delivery of social benefits such as healthcare for pregnant women, family leave, and the like. The United States must recognize the social welfare needs of women.

Finally, for both societies, there should be a movement away from the debate of similarities and differences to a recognition of the importance of family and childrearing as goals for society. Chinese women have taken a step toward that approach, but this focus has been undercut by an emphasis on the importance of childrearing for women as opposed to the importance of childrearing for society as a whole. China must learn assimilationist equality theory from the United States by recognizing that men as well as women can take on tasks of childrearing. The United States, on the other hand, must give more attention to the interests of the community and the way that societal goals for the family can serve the community.

While the United States may benefit from merging public and private spheres, and from more affirmative state action to balance the tensions posed by the private sphere, it must be wary of the potential effect on individual liberties and the definition of women. Similarly, while China may need to delineate the public and private spheres and to protect individual women from the reach of the state, it must be careful of the precarious position in which women can be left absent state protection. Ultimately, both systems need to learn the importance of women’s voices; any effective solution must be structured by and formulated with the full participation of women.