

Washington International Law Journal

Volume 5 | Number 3

7-1-1996

China's Eugenics Law as Grounds for Granting Asylum

Graciela Gómez

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wilj>



Part of the [Comparative and Foreign Law Commons](#), and the [Family Law Commons](#)

Recommended Citation

Graciela Gómez, Comment, *China's Eugenics Law as Grounds for Granting Asylum*, 5 Pac. Rim L & Pol'y J. 563 (1996).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol5/iss3/5>

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

CHINA'S EUGENICS LAW AS GROUNDS FOR GRANTING ASYLUM

Graciela Gómez

Abstract: China has instituted two controversial population control programs. First instituted in 1979, the One Child Policy seeks to control population growth by limiting the number of children born to married couples. The Maternal and Infant Health Care Law ("Eugenics Law"), effective June of 1995, has a stated purpose of improving the quality of the population by mandating sterilization for people with serious genetic defects. Implementation of the One Child Policy has led to forced abortion and involuntary sterilization. The Eugenics Law is likely to engender similar types of human rights abuses. Since 1989, the U.S. Board of Immigration Appeals has refused to give asylum to Chinese nationals fleeing persecution because of reproductive rights violations. This Comment analyzes the developments associated with denying asylum based on the implementation of the One Child Policy and attempts to extrapolate the reasoning to future claims based on the implementation of the Eugenics Law.

I. INTRODUCTION

Unrestrained population growth in the People's Republic of China ("PRC" or "China") presents potentially devastating economic and ecological consequences.¹ In an effort to decrease the growth rate of its population, China has implemented two controversial programs. The One Child Policy, one of the first of its type in the world, seeks to limit population growth by allowing married couples to have only one child.² The Eugenics Law strives to reduce and perfect the Chinese population.³

¹ See, e.g., Robert S. McNamara, *Time Bomb or Myth: The Population Problem*, 62 FOREIGN AFF. 1107, 1108 (1984); see also JOHN KING FAIRBANK, *THE UNITED STATES AND CHINA* 21 (1980).

² See Jennie A. Clarke, Note, *The Chinese Population Policy: A Necessary Evil?*, 20 N.Y.U. J. INT'L L. & POL. 321, 322 (1987). The first One Child Policy was espoused by Deng Xiaoping in 1978 with the implementation of the "Four Modernizations" campaign. *Id.* at 329. The Four Modernizations were agriculture, industry, national defense, and science and technology. *Id.* at 329 n.59. See discussion *infra* part II.A of the One Child Policy.

³ Daniel S. Gewirtz, *Toward a Quality Population: China's Eugenic Sterilization of the Mentally Retarded*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 139 (1994). While the concept of eugenics has fallen into disrepute in the West, eugenics has gained credit in the People's Republic of China. Increasing population quality appeals to the Chinese government because it supplements the government's current controls on population quantity. See discussion *infra* part II.B of the newly implemented Maternal and Infant Health Care Law [hereinafter Eugenics Law].

The implementation of the One Child Policy has led to human rights abuses, including forced abortion and involuntary sterilization.⁴ The Eugenics Law is likely to produce similar types of trespasses by the Chinese government. Chinese fleeing these coercive practices have sought asylum in the United States. Even though the United States has publicly denounced China's population control policies and several administrations have attempted to offer permanent refuge to its victims, asylum claims based on China's One Child Policy have generally been denied.⁵ As one of the world's leading nations, the United States must publicly and powerfully disassociate itself from the wholesale practice of forced abortion and involuntary sterilization in China. It is vital that the United States take an authoritative role in creating international pressure on China's government to exhibit greater respect for the inalienable human right to protect and control one's own body.⁶

This Comment examines Chinese asylum claims based on China's population control policies. It focuses particularly on asylum claims based on China's One Child Policy and extrapolates the reasoning to future claims based on the Eugenics Law. The first part of this Comment explores the development of Chinese population control laws and their effect on international relations with the United States. In addition, a brief regulatory history of the various legislative and executive pronouncements concerning asylum claims based on the One Child Policy is provided. The second part of this Comment analyzes the pertinent case law, particularly the Board of Immigration Appeal's ("BIA") precedential *Matter of Chang*⁷ decision. The BIA's reasoning in *Matter of Chang* is scrutinized with an eye towards future asylum claims based on the Eugenics Law. This Comment concludes

⁴ Criticism of the One Child Policy has focused on reported forced abortion, involuntary sterilization, the coercive community pressures to persuade pregnant women to abort pregnancies, and implantation of intra-uterine devices after abortions or births without the woman's consent. STEVEN MOSHER, *A MOTHER'S ORDEAL* x (1994). See discussion *infra* part II.C on the effect of China's population control policies on Sino-American relations.

⁵ See, e.g., *Matter of Chang*, Int. Dec. 3107 (BIA 1989); *Xin-Chang Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331 (4th Cir. 1995); *Guo Chun Di v. Moscato*, 1995 U.S. App. LEXIS 25964 (4th Cir. 1995). To date there have been no asylum claims based on the Eugenics Law.

⁶ Berta Hernandez, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309, 357 (1991) (quoting *Mogenthaler, Smoling and Scott v. The Queen*, 44 D.L.R. 4th 385 (Can. 1988)).

⁷ *Matter of Chang*, Int. Dec. 3107 (BIA 1989). The Board of Immigration Appeals found that implementation of the China's One Child Policy was not persecutory even to the extent that forced abortion and involuntary sterilization may occur.

that the United States should create decisive legislation to recognize valid asylum claims based on the coercive Chinese population control policies, particularly the Eugenics Law.

II. BACKGROUND

A. *Towards Slowing Population Growth: The One Child Policy*

With a fifth of the world's people and only seven percent of the world's arable land, population control has been of central concern to the Chinese government since the 1970s.⁸ In the early years following the founding of the PRC, population played a different role in Communist ideology. Under the leadership of Chairman Mao Zedong,⁹ Chinese were encouraged to have children as part of their civic duty.¹⁰ Chairman Mao did not believe the economy's growth would be impaired by the availability of land, raw materials, or investment.¹¹ Under Mao's rule, population growth soared from 1.6 percent in 1949 to 2.8 percent in 1965.¹² In 1979, the Chinese leadership, faced with demographic data supporting the contention that rapid population growth would slow economic growth,¹³ revised their strategy and launched the PRC's One Child Policy.¹⁴ The One Child Policy imposes upon its citizens a limit of one child per couple.¹⁵

The motives behind China's One Child Policy have changed greatly. At one extreme is the belief that a socialist economic system could benefit from and accommodate a growing population; at the other is a fear that

⁸ Steven Mufson, *Population Curbs Slip in China, 1.2 Billion Reached Five Years Early*, WASH. POST, Feb. 14, 1995, at A17; JUDITH BANISTER, *CHINA'S CHANGING POPULATION* 165 (1987); BETSY HARTMANN, *REPRODUCTIVE RIGHTS AND WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL AND CONTRACEPTIVE CHOICE* 159 (1987).

⁹ Chairman Mao Zedong was the leader of the Communist Party of China in 1949 when the post-revolution People's Republic of China was founded and ruled China until his death in 1976. BANISTER, *supra* note 8, at 18.

¹⁰ Chairman Mao's policy, based on the Marxist theory that a person could produce more than he could consume, was to encourage population growth by instituting a system of incentives for government workers to bear more children. Mao thus regarded each newborn Chinese as a set of productive hands waiting to work. Mufson, *supra* note 8; BANISTER, *supra* note 8, at 17.

¹¹ BANISTER, *supra* note 8, at 17.

¹² Mufson, *supra* note 8.

¹³ See BANISTER, *supra* note 8, at 183-84.

¹⁴ Mufson, *supra* note 8.

¹⁵ BANISTER, *supra* note 8, at 183-226.

rapid population growth could slow and imperil the socialist transformation of the economy.¹⁶ The One Child Policy was introduced after extensive discussions concerning the need to control population growth if China was to achieve its modernization goals.¹⁷ Because of a lack of consensus among the leadership, the National People's Congress ("NPC") did not pass a national law regarding incentives and penalties, rather, it outlined a "family planning" policy¹⁸ of limited births. The principle of and duty to practice family planning is set forth in the 1980 Marriage Law¹⁹ and in the 1982 Constitution.²⁰

While the PRC has no national law on population control per se, the Constitution does provide that the state shall carry out family planning to control the size of the population and that spouses have a duty to follow the state's policy.²¹ The Marriage Law of 1980 sets the minimum marriage age and places responsibility for birth control on both spouses.²² The provinces

¹⁶ See HARTMANN, *supra* note 8, at 159.

¹⁷ Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Towards (An)Other Vision*, 23 COLUM. HUM. RTS. L. REV. 264-65 (1991-1992). "Every year in China some 10 million couples of young men and women will reach marriageable age and they will marry and have children. At the existing rate of population growth, China will have a population of 1,300 million by the end of the century. If the population is to grow to such a size, we will be compelled to devote a considerable amount of financial and material resources to feeding the newly increased populace. That will inevitably slow down the four modernizations. We plan to lower the country's natural rate of population growth to around 5 per thousand by 1985 . . . This means that on the average each couple as of now can have only one child." BANISTER, *supra* note 8, at 184 (quoting Deputy Qian Xinzong, Chinese Minister of Public Health when the One Child Policy was introduced in 1979).

¹⁸ The family planning policy fixes a general population growth target. The policy strives not only to encourage delayed marriages, but also to push the population towards giving birth to fewer, but healthier, children. Exceptions to the one child limit are allowed in geographical areas made up primarily of minority groups. Since 1979, there has been a relaxation in the implementation of the One Child Policy in rural areas to allow a second child if the first child is a girl or is handicapped because of beliefs of widespread infanticide. Additionally, "Document No. 7," issued in 1984 by the Central Party Committee advised a flexible approach to the One Child Policy in certain circumstances, including exceptions where a parent or the first child was handicapped, for overseas Chinese, national minorities, those in hazardous occupations, and for couples who both were only children or for men whose brothers were all infertile. Hom, *supra* note 17, at 263-69.

¹⁹ Marriage Law of the People's Republic of China ch. I, art. 2 (1980), translated in RALPH H. FOLSOM ET AL., LAW AND POLITICS IN THE PEOPLE'S REPUBLIC OF CHINA 261 (1992) [hereinafter PRC LAWS].

²⁰ The CONSTITUTION (PRC), article XXV, provides: "[t]he state promotes family planning so that population growth may fit the plans for economic and social development." See also PRC LAWS, *supra* note 19, at 98-103.

²¹ PRC LAWS, *supra* note 19, at 261.

²² Article 5 of the Marriage Law provides that no marriage shall be contracted before the man has reached 22 years of age and the woman 20 years of age. A marriage is not permitted even with parental

and the cities are free to enact their own regulations on population control, but the population control program is guided by a February 1982 joint directive of the Chinese Communist Party and the central government entitled "On the Further Implementation of Family Planning Work."²³

The implementation of the policy is left to local and provincial officials responsible for ensuring compliance through economic sanctions, peer pressure, and propaganda.²⁴ Every unit²⁵ has a birth control committee headed by Party officials. These Party officials keep records of births, marriages, and menstrual cycles of every woman of child-bearing age.²⁶ The date and sex of every birth is recorded and posted.²⁷ Compliance with family planning policies is tied to citizens' salaries, their eligibility to occupy housing space and to grow crops, and their educational opportunities, as well as their ability to marry and have children.²⁸ Local officials receive cash bonuses, recognition, and promotions only if their units meet the birth control limits.²⁹ More importantly, cadres who are unwilling to compel people to practice birth control face public reprimands from the central government and Chinese Communist Party ("CCP"), and face economic sanctions from all levels of the administrative hierarchy above them.³⁰ Of primary importance is securing compliance by all couples of childbearing age in their work unit. Couples who continue pregnancies which are not allowed may suffer the suspension of wages, fines, and loss of seniority for promotions.³¹ The means of attaining the one child goal is

consent if one party is below the legal age. Marriage Law, art. 5, translated in PRC LAWS, *supra* note 19, at 263.

²³ The One Child Policy provides that state cadres and urban residents are allowed one child per couple, with exceptions when special permission is granted. Matter of Chang, Int. Dec. 3107 at 5-6 (BIA 1989) (citing Letter from Library of Congress to Immigration and Naturalization Service dated Nov. 23, 1987). See also BANISTER, *supra* note 8.

²⁴ Matter of Chang, Int. Dec. 3107 (BIA 1989).

²⁵ A unit is a workplace group or a rural governing body. PRC LAWS, *supra* note 19, at 78.

²⁶ Mufson, *supra* note 8.

²⁷ Mufson, *supra* note 8.

²⁸ BANISTER, *supra* note 8, at 184-85.

²⁹ BANISTER, *supra* note 8, at 197-200. See also Michael Weisskopf, *One Couple, One Child: Abortion Policy Tears at China's Society*, WASH. POST., Jan. 7, 1985, at A1.

³⁰ BANISTER, *supra* note 8, at 197.

³¹ Matter of Chang, Int. Dec. 3107 (BIA 1989); PRC LAWS, *supra* note 19, at 267.

allowed to vary depending on local conditions as long as the desired result is achieved.³²

The One Child Policy has been plagued by inconsistent regional implementation and a strong peasant resistance.³³ Several factors contribute to the varying degrees of implementation. The incentives of housing, better schooling, or health and medical benefits may mean more in the urban areas because of the availability of different quality levels of service.³⁴ In some instances, inadequate funding for the incentives offered, and the flexibility granted to the local cadres faced with enforcing an unpopular policy, has led many cadres to essentially revise the policy to allow for more children.³⁵ Ironically, the improvement in living standards obtained through population control has helped farmers, who view large families as a means of getting additional field hands and old age insurance, to pay the fines imposed for having more than one child.³⁶

The PRC government claims not to support or encourage forced sterilization or abortions, but does concede that they occur, albeit unauthorized, at the hands of local officials.³⁷ PRC officials claim that when abusive practices are discovered, the local officials are retrained or disciplined.³⁸ The government admits that stronger punishment is rare and no documented cases of punishment exist.³⁹

The abuses reported are disturbing. Claims of forced abortions occurring only weeks or days from birth, of aborted late-term babies allowed to cry until dead in trash cans, of doctors injecting infants' heads with formaldehyde, and of doctors crushing their skulls with forceps, are not uncommon.⁴⁰ Others report that women are sometimes snatched from

³² BANISTER, *supra* note 8, at 197.

³³ Hom, *supra* note 17, at 265.

³⁴ Hom, *supra* note 17, at 265.

³⁵ BANISTER, *supra* note 8, at 199-202.

³⁶ Mufson, *supra* note 8.

³⁷ DEPARTMENT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1994, report submitted to the Committee on Foreign Affairs, United States House of Representatives and the Committee on Foreign Relations, United States Senate, 103d Cong. 2d Sess. 561 (1994) [hereinafter Country Reports on Human Rights]. For a list of official and semiofficial statements from the PRC proclaiming the family planning program as entirely voluntary, see BANISTER, *supra* note 8, at 192-95.

³⁸ Country Reports on Human Rights, *supra* note 37, at 561.

³⁹ Country Reports on Human Rights, *supra* note 37, at 561.

⁴⁰ MOSHER, *supra* note 4, at 254-55 (recounting the story of a 38-year-old Chinese mother who became pregnant with her second child while in the United States with her husband, was threatened by the

their beds late at night and brought to 24-hour sterilization clinics,⁴¹ that intra-uterine devices are inserted immediately after giving birth without the woman's knowledge, as national regulations require the insertion of an intra-uterine device and forbid its removal after a woman's first child.⁴² Additionally, powerful social coercion and stiff economic sanctions may be employed.⁴³

B. Towards Improving the Quality of the Population: The Eugenics Law

While China's existing One Child Policy is an attempt at limiting population growth, the recently enacted Eugenics Law⁴⁴ attempts to improve the quality of the newborn population⁴⁵ and to reduce the perceived burden of disability to Chinese society.⁴⁶ The overall goal is not only fewer, but also healthier, babies. Because the government allows married couples only one child, it is important that this one child be healthy and without any physical or mental defects of hereditary or environmental origin⁴⁷ that may trigger a relaxation of the One Child Policy allowing a couple a second child. If a couple's first child has a genetic defect or is sickly, the couple may apply for an exception to the one child limit, which is supposed to be granted if their political unit has been allocated a large

PRC government to get rid of the child or face the consequences, and was ultimately granted political asylum in the United States).

⁴¹ Bai Fangdai was granted asylum in 1994 after testifying that when she was eight months pregnant with her second child, she was dragged from her home after midnight and brought to a clinic, where she suffered induced labor and her newborn was strangled. Matt Miller, *Harsh China Policy Works to Break 1 Family-1 Child Rule Is to Be an Enemy of the State*, SAN DIEGO UNION-TRIB., Aug. 29, 1994, at A14.

⁴² BANISTER, *supra* note 8, at 205-07. See also MOSHER, *supra* note 4, at 249.

⁴³ Country Reports on Human Rights, *supra* note 37, at 561.

⁴⁴ First introduced as "On Population Health and Eugenics" in December 1993. Due to international criticism, China modified the language used in its marriage law, deleting the words "eugenic" and "sterilization." *China-Human Rights: Beijing Waters Down Eugenics Law*, INTER PRESS SERVICE, Feb. 7, 1994, available in LEXIS, NEWS Library, INPRES File. For a discussion of mental retardation in China and the Chinese government's postulation of eugenics laws designed to enhance the population quality, see Gewirtz, *supra* note 3.

⁴⁵ *Chinese Minister Defends New Eugenics Law*, AGENCE FRANCE PRESSE, June 1, 1995, available in LEXIS, NEWS Library, CURNWS File.

⁴⁶ *Western Eyes on China's Eugenics Law*, THE LANCET, July 15, 1995, at 131, available in LEXIS, NEWS Library, CURNWS File.

⁴⁷ BANISTER, *supra* note 8, at 222.

enough quota of births in its birth plan.⁴⁸ Therefore, the birth of handicapped children works against the government's stated goal of limiting population growth by allowing only one child per couple.⁴⁹

In addition, the government desires to distribute the scarce governmental resources to those productive members of society who are capable of caring for themselves.⁵⁰ Once a child is born "inferior," there is little guarantee of the quality of care and services that the child will receive.⁵¹ Hospital administrators typically treat only those with at least a moderate IQ,⁵² excluding those persons with severe retardation whose treatment would not be considered worthwhile.⁵³ Those chosen for treatment receive some form of education until their late teens, and are then placed in a job where they receive room and board along with a modest income.⁵⁴ These minimal services are almost nonexistent in the rural areas.⁵⁵ Moreover, disabled infants who would not be able to work when they come of age are considered shameful and are often abandoned or killed.⁵⁶

⁴⁸ "If it's a genetic defect and there's a likelihood of a second retarded child, then the couple is discouraged from having another one. But if not—if it's a birth trauma or a post-natal trauma, for example—then they're encouraged to have the second child." Lennie Magida, *Population Pressures, Cultural Stigma Limit Lives of Mentally Retarded People*, HARTFORD COURANT, June 14, 1995, at A1 (quoting Dr. Zhang Jingqing, pediatrician and director of the Shanghai Hongkou District Children's Welfare Institution, a worn and cramped facility that serves about 90 students with retardation).

⁴⁹ "The advocacy of eugenics plays an important role in the control of population. If a couple gives birth to a deformed or retarded child, they are bound to demand a second child. This would not only increase the proportion of the population who are of inferior quality, but it would also increase the birth rate." BANISTER, *supra* note 8, at 222.

⁵⁰ Total spending in 1993 by China's government and by collectives for orphans, disabled, elderly, and young persons in society—of whom people with retardation are but a small part—was roughly \$138 million. By comparison the budget for Connecticut's Department of Mental Retardation for fiscal year 1995 is \$545 million. Connecticut has 3.2 million people. Magida, *supra* note 48.

⁵¹ The large numbers of disabled Chinese children overwhelm the limited number of physical and occupational therapists available. *Id.*

⁵² A moderate IQ is one of 40 or above. *Id.*

⁵³ *Id.*

⁵⁴ Several Special Olympics athletes from Shanghai graduated from the Shanghai Children's Welfare Institution. They now do packaging work at an appliance factory, working alongside employees of normal intelligence and living in the company dormitory. They earn about \$35 a month, the average salary for packaging work. *Id.*

⁵⁵ A retarded person living in the countryside is not necessarily doomed. "Every village seems to have at least one retarded person that everyone looks out for. They're literally like the village idiots, but at least they're not condemned or put away." *Id.* (quoting Anne Thurston, author and China specialist).

⁵⁶ *Id.* Chinese society has traditionally favored sons over daughters. A consequence of the One Child Policy has been an increase in the number of female babies killed and abandoned: if families will be

The Eugenics Law makes compulsory for everyone a premarital medical examination for serious genetic diseases, some infectious diseases, and relevant mental disorders.⁵⁷ If the disorder is serious enough, long-term contraception or tubal ligation is to be used to enforce childlessness; otherwise, the couple will not be allowed to marry.⁵⁸ During pregnancy, prenatal testing will also be compulsory, followed by termination if the fetus has a serious genetic or somatic disorder.⁵⁹ Voluntary termination remains an option, but compulsory termination seems to occur at the discretion of the doctor.⁶⁰ Finally, the law bans fetal sex identification to combat a deeply ingrained traditional preference for sons that prompt many families to abort female fetuses.⁶¹

Particularly troubling are several ambiguous articles in the Eugenics Law that describe pre-marital checkups and health care during a woman's child-bearing years. Article 10 states that doctors carrying out the premarital checkup "shall explain and give medical advice to both the male and the female who have been diagnosed with certain genetic diseases of a serious nature which is considered to be inappropriate for child-bearing from a medical point of view."⁶² The problem is that the statute fails to define which genetic diseases are of a "serious nature."⁶³ Article 16 states that if a doctor suspects that a married person has a genetic disease of a

allowed only one child, they would prefer a son over a daughter. There is hardly any doubt that female babies who suffer from handicaps are killed and abandoned at a higher rate than are healthy female babies. See generally Hom, *supra* note 17 (in depth analysis of female infanticide in China).

⁵⁷ The Eugenics Law does not define which mental disorders would be considered serious enough for the law to be implemented. *Western Eyes on China's Eugenics Law*, *supra* note 46. Tom Wilkie, *Abortion forced on "defective families,"* THE INDEPENDENT, Sept. 2, 1995, at 10, available in LEXIS, NEWS Library, CURNWS File.

⁵⁸ Nigel Hawkes, *Scientists Attack China Over Selective Breeding*, THE TIMES (London), June 5, 1995.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Sun Nianfu, a senior obstetrician at Beijing's Capitol Hospital, noted that the sex of the fetus would be disclosed, however, in those instances where it is medically necessary, for example, when there is the possibility of sex-linked diseases. Admittedly, it would be difficult to safeguard against sex selection in a country with a population of 1.2 billion. *China: Mother and Child Health Care Law Takes Effect*, AMERICAN POLITICAL NETWORK, Abortion Report, June 1, 1995. See Hom, *supra* note 17, at 251.

⁶² Hawkes, *supra* note 58.

⁶³ The Eugenics Law is designed to target genetic diseases that may totally or partially prevent the victim from living independently. Some analysts are concerned that this might include conditions as common as a harelip and cleft palate, which often go uncorrected because the parents of affected children cannot afford the operation. Hawkes, *supra* note 58 (quoting Chen Minzhang, Chinese Health Minister).

serious nature, that person or their partner "shall take measures in accordance with the physician's medical advice."⁶⁴ Taken in conjunction with Article 10, this implies an obligation to make a prenatal diagnosis and possibly terminate the pregnancy. In addition, Article 9 stipulates that people affected by "specified" infectious diseases and mental illness should postpone their marriages.⁶⁵ Many "specified" diseases, however, are curable even during pregnancy and do not harm the fetus.⁶⁶

Critics charge that the Chinese government's goal of reducing the birth rate of disabled children is untenable.⁶⁷ Many defects arise spontaneously, and all humans carry hidden genetic defects that have no effect unless they have a child with someone carrying the same genetic defect.⁶⁸ Having one disabled child in such circumstances does not mean that the next child will also be disabled.⁶⁹ Furthermore, because many birth defects have no known cause, preventing them remains impossible.⁷⁰

Moreover, critics have argued that the Eugenics Law will disproportionately affect ethnic minorities, frontier peoples, and the poor, because of the perception that the problem of inferior births is most acute amongst these groups.⁷¹ To them, the Eugenics Law represents an abuse of private genetic information and a violation of human rights.⁷² Aside from moral arguments,⁷³ commentators suggest that the new measures will not be

⁶⁴ Hawkes, *supra* note 58.

⁶⁵ Specified infectious diseases include AIDS, gonorrhea, syphilis, leprosy, and all other infectious diseases considered to affect pregnancy. Chan Wai-Fong, *Law Bans Pregnancy by "Unfit" Mothers*, S. CHINA MORNING POST, Nov. 8, 1994, at 7.

⁶⁶ *Id.*

⁶⁷ Hawkes, *supra* note 58.

⁶⁸ Hawkes, *supra* note 58.

⁶⁹ Hawkes, *supra* note 58.

⁷⁰ BANISTER, *supra* note 8, at 225.

⁷¹ Anthony O'Brien, *China's Genetics Law*, THE TIMES (London), June 13, 1995, available in LEXIS, NEWS Library, CURNWS File (responding to Nigel Hawkes' report on Eugenics Law, *supra* note 58) (quoting Health Minister Cheng Minzhang who first proposed the Eugenics Law to the NPC in 1993). Additionally, Chinese academic Deng Bihai has described Chinese minority groups as "low in population quality" a term that he explained included not just hereditary diseases, but also mental retardation, illiteracy, and physical deformities such as low stature. Critics believe that the Eugenics Law is ethically suspect at the best of times, but from the perspective of Tibetans and other non-Chinese peoples under Chinese rule, it looks like another facet of the "final solution." *Id.*

⁷² Wilkie, *supra* note 57.

⁷³ Moral grounds for objecting to the Eugenics Law have been described by British commentators as arrogant and ethnocentrist given the inconceivable scale of China's population problems. These commentators recommend that instead of any type of boycott of Chinese goods because of the Eugenics

effective because implementation will be discretionary and sporadic, and the population will find ways to circumvent the law.⁷⁴ Finally, it is expected that the law will carry immense service costs and require highly specialized caregivers.⁷⁵ Such elaborate screening before marriage is not likely to become commonplace for some time, especially in rural areas, because it is expensive, time-consuming, and requires medical expertise to detect potential hereditary defects or incurable infectious diseases.⁷⁶

C. *Chinese Population Control Policies: Their Impact on Sino-American Relations*

The coercive nature of China's population control policies has had a chilling impact on Sino-American relations. While the world encouraged China to control its population growth in the mid 1970s,⁷⁷ the U.S. government has been outraged by China's implementation of the One Child Policy, particularly the reports of forced abortion and involuntary sterilization.⁷⁸ The United States has reacted to these human rights violations by condemning the Chinese government,⁷⁹ demanding human rights improvements,⁸⁰ and threatening economic sanctions.⁸¹

Law, Western doctors and scientists cooperate with Chinese colleagues to develop effective ways to limit the growth of China's population. *Western Eyes on China's Eugenics Law*, *supra* note 46.

⁷⁴ *Western Eyes on China's Eugenics Law*, *supra* note 46.

⁷⁵ *Western Eyes on China's Eugenics Law*, *supra* note 46; see also BANISTER, *supra* note 8, at 225.

⁷⁶ *Western Eyes on China's Eugenics Law*, *supra* note 46.

⁷⁷ See Matter of Chang, Int. Dec. 3107 (BIA 1989).

⁷⁸ In addition to the practice of forced abortion and involuntary sterilization, the United States government has condemned China for the inhumane treatment of prisoners, the use of prison labor to manufacture exported goods, the restrictions on emigration, the proliferation of nuclear weapons, the imprisonment of political and religious dissidents, and the lack of protection to Tibet's distinctive religious and cultural heritage. Christian Sornson, *U.S. Report Card Cites China Failure*, THE DAILY YOMIURI, Oct. 23, 1993, at 5, available in LEXIS, NEWS Library, CURNWS File.

⁷⁹ "Civilizations can be judged by how they treat women, children, old people, and strangers. Vulnerable people bring out the kindness in every society, and also the cruelty. Every so often they become the object of practices so vile that they will cause people to recoil in horror across the centuries. One such practice is forced abortion. The government of China now routinely compels women to abort their 'unauthorized' unborn children." Testimony of Congressman Christopher H. Smith, Chairman, Subcommittee on International Operations and Human Rights, Capitol Hill Hearing Testimony, May 17, 1995.

⁸⁰ While forced abortion was considered a crime in the Nuremberg War Crimes Trials, today it is "employed regularly, with chilling effectiveness and unbearable pain, upon women in the People's Republic of China. Women in China are required to obtain a birth coupon before conceiving a child. Chinese women are hounded by the population control police, and even their menstrual cycles are publicly

The Chinese government has denied that forced abortion and involuntary sterilization are part of the official policy.⁸² The implementation of the policy by local officials or cadres involves, according to government officials, persuasion and education until the woman agrees.⁸³ However, high officials have recognized that in some cases, cadres have been excessively brutal in forcing women to cooperate.⁸⁴ These cadres are dealt with through education in a "good style of work."⁸⁵

The United States has remained suspicious of the Chinese central government, applying diplomatic and economic pressure in an effort to curb human rights violations. Since 1985, the United States has stopped contributing to the United Nations Fund for Population Activities ("UNFPA"), which funds Chinese population control programs.⁸⁶ Critics believe that the UNFPA legitimizes and demonstrates tacit approval of China's coercive population control policies by providing capital.⁸⁷ The Clinton Administration's efforts in 1993 to restore funding to the UNFPA,

monitored as one means of ensuring compliance." Congressman Smith pointed to a New York Times expose asserting that when "[the Chinese authorities] discover an unauthorized pregnancy, an illegal child, [they] normally apply a daily dose of threats and browbeating. They wear the women down. Eventually, if the women does not succumb to the abortion, she is physically forced to submit." Moreover, Congressman Smith described the Chinese government's issuance of the Eugenics Law as "eerily reminiscent of Nazi Germany." *Id.*

⁸¹ Testimony of Congressman Gerald B. Solomon, to the Subcommittee on Trade, Capitol Hill Hearing Testimony, May 23, 1995 [hereinafter Solomon Testimony].

⁸² See Peter Seidlitz, *The Mother of Four Who Controls China's One-Child Family Planning Policy*, S. CHINA MORNING POST, June 27, 1993, at 8.

⁸³ "Emphasis is laid on the combination of state guidance with people's willingness. The control effort has been accepted by the people through persuasion and education. For example, in order to have a woman agree to birth control, persuasion may have to be applied many times. Some foreign people regard it as an act of forcing her to do something. We in China consider it to be persuasion and reasoning until she agrees. It may take quite some persuasion work on a farmer before she can accept an idea." *Id.* (quoting Chinese Health Minister Peng answering the question whether the government's crackdown was hard and inhumane in order to reach the aggressive population goals).

⁸⁴ Minister Peng admitted that there are some cadres whose work is "not entirely satisfactory." *Id.*

⁸⁵ *Id.*

⁸⁶ The United Nations Fund for Population Activities [hereinafter UNFPA] provides about \$10 million a year for population control programs. China spends about \$1.2 billion on population control. AMERICAN POLITICAL NETWORK ABORTION REPORT, Nov. 11, 1993.

⁸⁷ U.S. Rep. Chris Smith has denounced the UNFPA's complicity in China's practices of forced abortion and involuntary sterilization. *Id.*

under the condition that no U.S. funds could go to China, were blocked by pro-life groups.⁸⁸

The 1995 United Nations Women's Conference provided a forum to expose Chinese abuses to the international community and caused further deterioration in relations between the United States and China.⁸⁹ Some commentators had been optimistic that Hillary Clinton's⁹⁰ visit to Beijing could be a diplomatic ice-breaker with the Chinese government.⁹¹ However, just before the Conference, Sino-American relations "soured badly,"⁹² and although the First Lady did attend the Conference, she did so in a non-diplomatic capacity.⁹³ While in China, the U.S. delegation took the opportunity to publicly denounce China's use of coercive population control practices,⁹⁴ further straining Sino-American relations.⁹⁵

China's human rights abuses have also figured prominently in the debate surrounding U.S. renewal of China's Most Favored Nation ("MFN") status. In June of 1993, the Clinton Administration extended MFN⁹⁶ status

⁸⁸ U.S. Rep. Chris Smith and two Chinese nationals filed suit to forbid the Agency for International Development ("AID") from funding the UNFPA on the ground that the UNFPA does not meet the eligibility requirements for funding under U.S. law. *Id.*

⁸⁹ International relations between the United States and China had deteriorated because of many factors, including the U.S. issuance of a visa to Taiwanese President Lee Teng-hui in direct defiance of the Chinese leadership's wishes, China's missile sales transgressions, the U.S. involvement in blocking China's entrance into the World Trade Organization, China's unresponsiveness to software piracy issues, and the U.S. \$30 billion trade imbalance. Simon Beck, *Hillary on Alert for Diplomatic Mission*, S. CHINA MORNING POST, June 30, 1995, at 26.

⁹⁰ The First Lady, Mrs. Hillary Rodham Clinton, had expressed a desire to head the U.S. delegation to the United Nations Women's Conference in Beijing, China. *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Dede Nickerson, *Rights Attack "Mars" Meeting*, S. CHINA MORNING POST, Sept. 7, 1995, at 8 (quoting Madeleine Albright, U.S. Ambassador to the United Nations, "At the heart of the Universal Declaration [on Human Rights] is a fundamental distinction between coercion and choice. No woman—whether in Birmingham, Bombay, Beirut, or Beijing—should be forcibly sterilized or forced to have an abortion."). See also *U.S. Congressman Condemns Chinese Right's Abuse, Surveillance*, AGENCE FRANCE PRESSE, Sept. 4, 1995, available in LEXIS, NEWS Library, CURNWS File (U.S. Rep. Chris Smith urged the U.S. delegation to condemn China's draconian family planning policy, including forced abortion and involuntary sterilization, limiting urban couples to one child as well as severely restricting the number permitted to rural families).

⁹⁵ China's displeasure over Mrs. Clinton's comments was reflected by her treatment as a non-person by the domestic media. There was limited mention of Mrs. Clinton in the official newspapers and Mrs. Clinton did not appear on television. Nickerson, *supra* note 94.

⁹⁶ China has had 14 years of Most Favored Nation ("MFN") status in the United States. Solomon Testimony, *supra* note 81.

to China for another year, but made the 1994 renewal conditional on Beijing meeting President Clinton's demands for human rights improvements, including ensuring that forced abortion and involuntary sterilization were not part of China's rigid family planning policy.⁹⁷ In 1994, MFN status was again extended by the Administration even though China had done little to improve its human rights record.⁹⁸

Critics charge that MFN status should not be granted until China makes significant improvements in human rights.⁹⁹ Proponents of granting MFN status argue that opening up the avenues of commerce with China will create a natural flow of human rights improvements by bettering the socio-economic status of Chinese citizens.¹⁰⁰ What is certainly true is that MFN status means big business to China: Chinese exports to the United States rose by 223% between 1989 and 1994, while the United States exports to China rose by only 60%.¹⁰¹ China will likely continue to defy international pressure¹⁰² as long as it receives the benefits that keep its economy strong and growing, and perceives Western threats as meaningless.

D. *Regulatory History of Asylum Claims Based on the One Child Policy*

Because of its rather recent enactment, there have been no asylum claims based on the Eugenics Law. However, it is clear that if forced abortion and involuntary sterilization are used as a means of

⁹⁷ *U.S. Warns China to Improve Human Rights as Dialogue Resumes*, AGENCE FRANCE PRESSE, Oct. 12, 1993, available in LEXIS, NEWS Library, CURNWS File (John Shattuck, Assistant Secretary of State for Human Rights and Humanitarian Affairs, met with and made clear to Chinese officials that without "significant overall progress" in human rights, MFN status would not be extended in June 1994. The Clinton Administration demanded improvements in the following areas: the release and accounting of political and religious prisoners, the humane treatment of prisoners, the freedom of emigration, the implementation of the 1992 agreement banning the export of goods made by prison labor, the protection of Tibet's religious and cultural heritage, and the start of a meaningful dialogue with Tibet's exiled religious leader, the Dalai Lama. Additionally, the President urged China to take steps to ensure that forced abortion and involuntary sterilization are not part of China's rigid family planning policy.)

⁹⁸ Extending MFN status in 1994 definitely de-link trade and human rights concerns. Solomon Testimony, *supra* note 81.

⁹⁹ Solomon Testimony, *supra* note 81.

¹⁰⁰ Solomon Testimony, *supra* note 81.

¹⁰¹ In 1989, about 23% of China's exports came to the United States. In 1994, that figure rose to nearly 37%, creating a trade deficit of \$29.5 billion. Solomon Testimony, *supra* note 81.

¹⁰² England has demanded that the Chinese government desist from practicing compulsory abortions and forced sterilization. David Wallen, *British MPs Call for UN Venue to Change*, S. CHINA MORNING POST, June 21, 1995, at 9.

implementation, the Eugenics Law is likely to produce asylum claims similar to those under the One Child Policy. As such, the legal analysis and background history of asylum claims based on the One Child Policy might have implications for future asylum claims based on the Eugenics Law.

1. *The Refugee Act of 1980*

The Refugee Act of 1980¹⁰³ ("Refugee Act") governs asylum procedures for refugees in the United States and establishes an overseas refugee admissions program.¹⁰⁴ The Refugee Act incorporates the international definition of "refugee" from the United Nations Convention Relating to the Status of Refugees.¹⁰⁵ By adopting a universal approach to refugee admissions consistent with international standards and norms, the Refugee Act emphasizes "special humanitarian concerns."¹⁰⁶

An alien seeking asylum must demonstrate that he or she is a "refugee" within the meaning of the Immigration and Naturalization Act ("INA"). To establish eligibility for asylum, an alien bears the burden of demonstrating that he or she meets the four separate elements required by section 101(a)(42)(A) of the INA: (1) the alien must have a "fear of persecution;" (2) the fear must be "well-founded;"¹⁰⁷ (3) the persecution must be "on account of race, religion, nationality, membership in a particular social group, or political opinion;" and (4) the alien must be "unable or unwilling to return" to his country of nationality because of his well-founded fear of persecution.¹⁰⁸

¹⁰³ Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C. and 22 U.S.C.) [hereinafter Refugee Act].

¹⁰⁴ There are two different ways for a refugee to obtain asylum: political asylum and overseas refugee programs. Each program has its own distinctive procedures, constraints, and legal and policy dilemmas. This Comment primarily discusses political asylum claims. Issues relating to overseas refugee programs are outside the scope of this Comment. See generally 8 U.S.C. § 208(a).

¹⁰⁵ Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 11 (1981) (citing United Nations Convention Relating to the Status of Refugees (1951) as incorporated into U.S. law by the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577 (1967)). By assenting to the Protocol, the United States intended to set an example for other nations and promote humanitarian concerns. David T. Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980; Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 925-26 (1992).

¹⁰⁶ Anker & Posner, *supra* note 105, at 11.

¹⁰⁷ To show a well-founded fear of persecution, the applicant must show that his fear is both subjectively genuine and objectively reasonable. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

¹⁰⁸ INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42).

2. *Regulatory History*

The regulatory history of asylum claims based on Chinese population control policies is fraught with inconsistencies. The general confusion and lack of a coherent policy for adjudicating asylum claims based on reproductive rights violations stems from a conflict between executive and legislative action and the administrative rulings of various agencies.¹⁰⁹ In spite of the rather purposeful efforts by the executive branch and the Houses of Congress to achieve the opposite outcome, the federal courts have upheld asylum denials based on China's One Child Policy. The courts reviewing these decisions have found that under established administrative law, none of these legislative pronouncements have displaced or overruled the BIA's decision in *Matter of Chang*.¹¹⁰

In August 1988, Attorney General Edwin Meese issued guidelines to the Immigration and Naturalization Service ("INS") stating that asylum could be granted to applicants alleging a well-founded fear of persecution based on China's coercive family planning programs.¹¹¹ In 1989, the BIA considered China's One Child Policy in its precedential case, *Matter of Chang*.¹¹² The BIA found that Attorney General Meese's guidelines did not control their analysis because it was directed to the INS rather than to the Immigration Judges and the BIA.¹¹³ In concluding that China's One Child

¹⁰⁹ *Matter of Chang*, Int. Dec. 3107 (BIA 1989).

¹¹⁰ *Xin-Chang Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995).

¹¹¹ *Id.* at 738 (citing Memo from the Office of Attorney General Edwin Meese to Immigration and Naturalization Service Commissioner Alan Nelson, Aug. 5, 1988, at 1). Attorney General Meese's Memo stated in pertinent part:

All INS [Immigration and Naturalization Service] asylum adjudicators are to give careful consideration to applications from nationals of the People's Republic of China [PRC] who express a fear of persecution upon return to the PRC because they refuse to abort a pregnancy or resist sterilization after the birth of a second or subsequent child in violation of Chinese Communist Party directives on population. If such refusal is undertaken as an act of conscience with full awareness of the urgent priority assigned to that policy by high level PRC officials and local party cadres at all levels as well as of the severe consequences which may be imposed for violation of the policy, it may be appropriate to view such refusal as an act of political defiance sufficient to establish refugee status under 8 U.S.C. § 1101(a)(42)(A).

¹¹² *Matter of Chang*, Int. Dec. 3107 (BIA 1989).

¹¹³ *Id.*

Policy was not persecutory on its face, the BIA denied the petitioner's asylum request.¹¹⁴

In July 1989, Congress considered the Emergency Chinese Immigration Relief Act of 1989¹¹⁵ in reaction to *Matter of Chang* and the contemporaneous events of Tiananmen Square.¹¹⁶ The proposed legislation would have effectively overruled *Matter of Chang* and allowed refugee status to be conferred on the basis of China's family planning policies. President Bush, however, vetoed the Act after it was passed by Congress because statutory codification of such measures would interfere with ongoing diplomatic initiatives.¹¹⁷

To mollify opposition, President Bush implemented all of the bill's provisions concerning Chinese nationals opposing the PRC's One Child Policy.¹¹⁸ He directed the Attorney General to give enhanced consideration to asylum seekers fleeing any country's policy of forced abortion or coerced sterilization.¹¹⁹ In January 1990, Attorney General Dick Thornburgh promulgated an interim rule ("January 1990 Interim Rule") consistent with

¹¹⁴ The BIA found that the One Child Policy was not subterfuge for persecuting any portion of the Chinese citizenry. The BIA concluded that China's government is concerned not only with the ability of its citizens to survive, but also with their housing, education, medical services, and other benefits of life that persons in many other societies take for granted. The One Child Policy, the BIA resolved, has the legitimate goal of controlling population growth, even to the extent that forced abortion and involuntary sterilization may occur, and it is applied generally to the entire population. *Id.*

¹¹⁵ *Xin-Chang Zhang v. Slattery*, 55 F.3d 732, 739 (2d Cir. 1995) (citing the Emergency Chinese Immigration Relief Act of 1989, § 3(a), H.R. 2712, 101st Cong., 1st Sess. (1989)). The Emergency Chinese Immigration Relief Act of 1989 provided standards to be applied in adjudicating applications for asylum, among other things, from Chinese fleeing coercive population control policies. Specifically China's One Child Policy: "If the applicant establishes that such applicant has refused to abort or be sterilized, such applicant shall be considered to have established a well-founded fear of persecution, if returned to China, on the basis of political opinion consistent with paragraph (42)(A) of section 101(a) of the Immigration and Nationality Act (8 U.S.C. § 1101(a))." *Id.*

¹¹⁶ On June 4, 1989, the Chinese Communist Central Party crushed the pro-democracy movement in Beijing. The world watched as the People's Liberation Army killed over 1000 civilians with the use of military power. LAWRENCE R. SULLIVAN, *CHINA SINCE TIANANMEN, POLITICAL, ECONOMIC, AND SOCIAL CONFLICTS I* (1995).

¹¹⁷ Mem. of Disapproval for the Emergency Chinese Relief Act of 1989, 25 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1853-54 (1989). See also 66 Interp. Rel. 1331 (1989). Although the House of Representatives mustered the two-thirds vote required to override the Presidential veto, the Senate fell short by five votes and the bill never became law. 135 Cong. Rec. S. Doc. No. 8241-2 (July 19, 1989).

¹¹⁸ *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1336 (4th Cir. 1995).

¹¹⁹ *Xin-Chang Zhang v. Slattery*, 55 F.3d at 739; see also Robert Suro, *Chinese Join Haitians in Special "Relief" Status*, WASH. POST, Aug. 7, 1995, at A10.

President Bush's directive.¹²⁰ The January 1990 Interim Rule was duly published in the Federal Register for comments.¹²¹

In April 1990, President Bush issued an executive order directing the Attorney General to implement the January 1990 Interim Rule.¹²² Mysteriously, however, in July 1990, the Attorney General published a final rule outlining comprehensive procedures to be used in determining asylum under INA section 208 that did not mention the January 1990 Interim Rule.¹²³

Attorney General William P. Barr sought to end the confusion generated by the omission of the January 1990 Interim Rule by signing a final rule in January 1993 ("January 1993 Final Rule") that would grant asylum to aliens who were victims of their country's population control policies.¹²⁴ One effect of the January 1993 Final Rule was to overrule

¹²⁰ The January 1990 Interim Rule provided that:

(1) Aliens who have a well-founded fear that they will be required to abort a pregnancy or to be sterilized because of their country's family planning policies may be granted asylum on the ground of persecution on account of political opinion; (2) An applicant who establishes that the applicant (or the applicant's spouse) has refused to abort a pregnancy or to be sterilized in violation of a country's family planning policy, and who has a well-founded fear that he or she will be required to abort a pregnancy or to be sterilized or otherwise persecuted if the applicant were returned to such country may be granted asylum.

Xin-Chang Zhang v. Slattery, 55 F.3d at 739 (citing 8 C.F.R. § 208.5, 55 Fed. Reg. 2803, 2805).

¹²¹ *Id.*

¹²² On April 11, 1990, President Bush directed the Secretary of State and the Attorney General to "provide for enhanced consideration under the immigration laws for individuals . . . who express a fear of persecution . . . related to [the country of origin's] policy of forced abortion or coerced sterilization, as implemented by the Attorney General's regulation effective January 29, 1990." *Id.* at 739 (citing Exec. Order No. 12,711, § 4, 55 Fed. Reg. 13,897 (1990)). See also Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1337 (4th Cir. 1995).

¹²³ Xin-Chang Zhang v. Slattery, 55 F.3d at 739 (citing 55 Fed. Reg. 30674). The final rule published in July 1990 did not mention forced abortion or involuntary sterilization, the One Child Policy, or the PRC. No explanation for this omission was offered by the Attorney General and none can be deduced from the July 1990 Rule. *Id.* The Fourth Circuit speculated that the January 1990 Rule did not appear in the annual codification because it did not survive the comprehensive revision of the asylum and withholding regulations. Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1337 (4th Cir. 1995).

¹²⁴ On January 15, 1993, Attorney General William P. Barr signed a final rule which provided in part:

[A]pplicant (and the applicant's spouse, if also an applicant) shall be found to be a refugee on the basis of *past persecution* on account of political opinion if the applicant establishes that, pursuant to the implementation . . . of a family planning policy that involves or results in forced abortion or coerced sterilization, the applicant has been forced to abort a pregnancy or to undergo sterilization or has been persecuted for failure or refusal to do so, and that the applicant is unable or unwilling to return to, or to avail himself or herself of the protection of, that country because of such persecution. An applicant (and the applicant's spouse, if also an applicant) shall

Matter of Chang.¹²⁵ The January 1993 Final Rule also differed from other administrative actions in that it mandated, rather than suggested, that refugee status be granted to individuals facing forced abortion or sterilization in China upon the proper showing of persecution on account of political opinion.¹²⁶ Moreover, the January 1993 Final Rule was not specific to China's One Child Policy, but encompassed coercive population control acts—forced abortion or involuntary sterilization—of any country.¹²⁷

Consistent with administrative procedures, the January 1993 Final Rule was sent to the Federal Register where it was made available for public inspection. Unfortunately, the January 1993 Rule was never published.¹²⁸ In February 1993, the Clinton Administration published new regulations concerning asylum application; no mention was made of the January 1993 Final Rule.¹²⁹ The reason for this omission is unknown.

In an attempt to clarify the Administration's position on this policy, the BIA referred two cases to Attorney General Janet Reno asking her to resolve the apparent conflict between *Matter of Chang* and President Bush's Executive Order.¹³⁰ In December 1993, she formally declined to resolve the conflict. The Attorney General stated only that the resolution of the two cases presented did not "require a determination that one or the other of these standards is lawful and binding."¹³¹

be found to be a refugee on the basis of a *well-founded fear of persecution on account of political opinion* if the applicant establishes a well-founded fear that, pursuant to the implementation . . . of a family planning policy that involves or results in forced abortion or coerced sterilization, the applicant will be forced to abort a pregnancy or to undergo sterilization or will be persecuted for failure or refusal to do so, and that the applicant is unable or unwilling to return to, or to avail himself or herself of the protection of, that country because of such fear."

Xin-Chang Zhang v. Slattery, 55 F.3d at 740 (emphasis added) (citing January 1993 Rule, § 208.13(2)(ii), Att'y Gen. Order No. 1659-93, JA 1652, 1664-65) [hereinafter January 1993 Final Rule].

¹²⁵ *Id.* (citing *Matter of Chang*, Int. Dec. 3107 (BIA 1989)).

¹²⁶ Asylum was granted on the basis of persecution on account of political opinion. *Id.* at 740.

¹²⁷ *Id.*

¹²⁸ The January 1993 Final Rule was scheduled for publication on January 25, 1993. On January 22, 1993, the recently appointed Director of the Office of Management and Budget issued a directive prohibiting the publication of new regulations until they were approved by an appropriate agency head appointed by the Clinton Administration. *Id.* at 741 (citing 58 Fed. Reg. 6074 (1993)).

¹²⁹ *Id.* (citing 8 C.F.R. §§ 103, 208, 236, 253 (1993)).

¹³⁰ *Id.* at 741 (citing Executive Order 12,711 (1993)).

¹³¹ *Id.* (quoting Att'y Gen. Order No. 1756-93; JA at 1650).

Against the background to these legal devices was a sudden increase in alien smuggling by organized crime gangs in China.¹³² After being apprehended, many of these aliens sought asylum in the United States based on the One Child Policy.¹³³ Many of these claims are still pending review in the federal courts.

III. ANALYSIS

A. *Asylum Claims Based on the One Child Policy*

1. *Judicial Deference Is Due to the BIA's Decision in Matter Of Chang*

Appeals courts have asserted that the BIA has not forfeited its claim to judicial deference on the issue of asylum claims based on coercive Chinese population control policies.¹³⁴ In spite of the various policies¹³⁵ expressed by the President, the Attorney Generals, and the INS, the BIA has consistently applied *Matter of Chang* to asylum claims based on the One Child Policy. The Second Circuit in *Chen Zhou Chai*¹³⁶ concluded that:

The BIA has consistently applied *Matter of Chang* to claims for asylum based on the PRC's coercive population control practices. Although Congress tried to overrule *Chang* by statute, and several former Attorney Generals by regulation, these attempts have all failed. Thus, we conclude that the Board's interpretation of the asylum statute in *Matter of Chang* is entitled to deference.¹³⁷

¹³² See, e.g., *Matter of G*, Int. Dec. 3215 (BIA 1993). The *Golden Venture* was a cargo freighter piloted during its three month voyage by a crew of thirteen Indonesian nationals. The vessel ran aground off the coast of New York. Pandemonium erupted on board when the ship grounded. Many of the ship's passengers jumped off the ship and attempted to swim ashore. *Id.*

¹³³ *Id.*

¹³⁴ See, e.g., *Chen Zhou Chai v. Carroll*, 48 F.3d 1331 (4th Cir. 1995); *Chang Lian Zheng v. Carroll*, 44 F.3d 379 (5th Cir. 1995); *Xin-Chang Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995).

¹³⁵ The various policies over the past six years have been described as "an administrative cacophony undeserving of judicial deference." *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 867 (E.D. Va. 1994) (Ellis, J.) (subsequently reversed in a brief per curiam opinion).

¹³⁶ *Chen Zhou Chai v. Carroll*, 48 F.3d at 1342.

¹³⁷ *Id.*

The Fourth Circuit in *Xin-Chang Zhang*¹³⁸ concurred, stating: "The [BIA] has repeatedly been on the verge of receiving a new policy; but throughout the BIA has followed its holding in *Matter of Chang* every time it has been asked to consider the PRC 'one child' issue. We therefore conclude that deference is justified."¹³⁹

Arguably, the BIA could not have applied *Matter of Chang* if any of the legislative or executive actions became effective. Unfortunately, there is substantial doubt as to whether any of these actions have ever had legal validity.¹⁴⁰ Thus, the several disparate pronouncements have not affected the BIA's consistent application of *Matter of Chang* and its claim to judicial deference.¹⁴¹

2. *Refusing to Follow a Governmental Policy Is an Act of Political Dissidence*

Federal Courts of Appeals evaluating asylum claims based on the One Child Policy have universally upheld the *Matter of Chang* decision based on principles of judicial deference.¹⁴² In particular, these courts have found that the BIA's interpretation of the asylum statutes is not unreasonable¹⁴³ and is consistent with the Supreme Court's ruling in *INS v. Elias-Zacarias*.¹⁴⁴

In *Elias-Zacarias*, the Supreme Court denied asylum to a Guatemalan native who fled his country after a guerrilla organization attempted to conscript him into military service.¹⁴⁵ The Court construed the statute's requirement of persecution on account of political opinion¹⁴⁶ as referring to persecution on account of the victim's political opinion, not persecution on

¹³⁸ *Xin-Chang Zhang v. Slattery*, 55 F.3d at 750.

¹³⁹ *Id.*; *Si v. Slattery*, 864 F. Supp. 397, 405 (S.D.N.Y. 1994).

¹⁴⁰ See *supra* part II.D.2 for a regulatory history of asylum claims based on the One Child Policy. See also *infra* part III.A.3 concluding that the various pronouncements of the legislative and executive branch are inconsistently evaluated by the federal courts of appeals.

¹⁴¹ *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1342 (4th Cir. 1995); *Xin-Chang Zhang v. Slattery*, 55 F.3d 732, 750 (2d Cir. 1995).

¹⁴² See *Xin-Chang Zhang v. Slattery*, 55 F.3d at 751; *Chen Zhou Chai v. Carroll*, 48 F.3d at 1342.

¹⁴³ *Xin-Chang Zhang v. Slattery*, 55 F.3d at 751.

¹⁴⁴ *INS v. Elias-Zacarias*, 502 U.S. 478, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992).

¹⁴⁵ *Id.* at 480.

¹⁴⁶ 8 U.S.C. § 1101(a)(42)(A).

account of the persecutor's opinion.¹⁴⁷ The Court required that Elias-Zacarias' resistance to join the guerrillas was an expression of his political opinion, and further, that he had a well-grounded fear that the guerrillas would have persecuted him "because of that political opinion, rather than because of his refusal to fight with them."¹⁴⁸

Federal courts have found *Matter of Chang* consistent with *Elias-Zacarias*. In *Matter of Chang*, the BIA similarly held that severe government sanctions for an asylum applicant's violations of its population control policy do not necessarily constitute persecution on account of political opinion.¹⁴⁹ Even if the applicant can characterize his failure to comply with the population control policy as a political opinion, the applicant must still demonstrate that the government's actions against the applicant, even to the extent those actions or threats involve forced abortion or involuntary sterilization, were taken for a reason other than to enforce the population control policy.¹⁵⁰ Since the statute makes the persecutor's motive critical,¹⁵¹ applicants must supply proof¹⁵² that they were persecuted for their political opinion.

Within the context of the One Child Policy, the BIA has determined that China is merely carrying out a legitimate population control policy and applying it generally to its citizens. In *Matter of Chang*, the BIA found that China's attempt at controlling population growth was an objectively legitimate and nonpolitical goal.¹⁵³ Additionally, the BIA found that opposition to the One Child Policy, manifested by a desire to have more

¹⁴⁷ The "mere existence of a generalized 'political' motive underlying the guerrillas' forced recruitment is inadequate to establish (and, indeed goes far to refute) the proposition that Elias-Zacarias fears persecution on account of political opinion" as § 1101(a)(42)(A) requires. *INS v. Elias-Zacarias*, 502 U.S. at 482.

¹⁴⁸ *Id.*

¹⁴⁹ *Matter of Chang*, Int. Dec. 3107 (BIA 1989).

¹⁵⁰ *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1342 (4th Cir. 1995); *Xin-Chang Zhang v. Slattery*, 55 F.3d 732, 751 (2d Cir. 1995) (*INS v. Elias-Zacarias* teaches "that an applicant for refugee status must establish a fear of reprisal that is different in kind from a desire to avoid exactions (however harsh) that a foreign government may place upon its citizens.").

¹⁵¹ *INS v. Elias-Zacarias*, 502 U.S. at 482.

¹⁵² The Court noted that applicants do not need to supply direct proof of the persecutor's motives, but that they must provide some evidence of them, either direct or circumstantial. *INS v. Elias-Zacarias*, 502 U.S. at 483.

¹⁵³ *Matter of Chang*, Int. Dec. 3107 (BIA 1989). The Board did not find the Chinese One Child Policy persecutory on its face. The Chinese government, the Board noted, is "faced with the difficulty of providing for China's vast population in good years and in bad." *Id.*

children, was not a political opinion.¹⁵⁴ The courts have thus concluded that the BIA's interpretation in *Matter of Chang* is consistent with the teachings of *Elias-Zacarias* and with the statute because it focuses upon the political belief of the victim and the motivation of the alleged persecutor.

The BIA and the reviewing courts unfortunately ignore the difference between a legitimate goal and the means by which these goals are implemented. Given the size of the Chinese population, it is not difficult to conclude that controlling population growth is a legitimate goal. However, a policy that uses forced abortion and involuntary sterilization as a means of achieving its goal ceases to be legitimate.¹⁵⁵ The very purpose of asylum is to provide a refuge for victims of governmental policies that violate human rights.¹⁵⁶

Moreover, the BIA's reasoning that a desire to have more children is not a political opinion is flawed.¹⁵⁷ Refusing to follow an official policy in an authoritarian country is tantamount to political dissidence.¹⁵⁸ This assertion is reinforced by the urgent priority assigned to that policy by high level PRC officials and the local party cadres, and the severe consequences which may be imposed for a violation of that policy.¹⁵⁹ In addition, the CCP monopolizes decision-making authority.¹⁶⁰ The Chinese Constitution

¹⁵⁴ *Id.*

¹⁵⁵ See *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988) (holding that while a government has the right to prosecute individuals accused of criminal activity, such as supporting a guerrilla faction, when violence or threats of violence usurp legal procedure, then persecution on the basis of political opinion exists).

¹⁵⁶ Anker & Posner, *supra* note 105, at 55 (emphasizing that human rights violations in the country of origin is the primary factor in evaluating asylum claims).

¹⁵⁷ But see Rebecca O. Bresnick, *Reproductive Ability as a Sixth Ground of Persecution Under the Domestic and International Definitions of Refugee*, 21 SYRACUSE J. INT'L L. & COM. 121, 137-43 (1995) (concluding that asylum claims based on reproductive rights violations do not fall under persecution on account of political opinion because the persecution is based on ability to reproduce).

¹⁵⁸ MOSHER, *supra* note 4, at 328. Chinese immigrant, who after enforcing the One Child Policy for the Chinese Communist Party in China, found herself pregnant for a second time while on leave in the United States. She sought asylum in the United States on the basis of both political opinion and membership in a particular social group. She expressed her view that the Immigration and Naturalization Service's description of the One Child Policy as merely a social policy uniformly applied throughout China as "naive, if not downright disingenuous. In China, any dissent from any official policy was an act of political rebellion." *Id.* (emphasis in original). MOSHER, *supra* note 4, at 328-32 (reprinting Attorney General Meese's Memorandum to the Immigration and Naturalization Service stating that the PRC views violations of the One Child Policy as an act of political dissidence).

¹⁵⁹ MOSHER, *supra* note 4, at 328-32. See also discussion *supra* part II.A of the historical development of the One Child Policy.

¹⁶⁰ Country Reports on Human Rights, *supra* note 37, at 561.

protects human rights, but they are frequently ignored in practice, and challenges to the CCP's political authority are often dealt with harshly and arbitrarily.¹⁶¹ Moreover, the regulations governing family planning treat those individuals interfering with the implementation of the law as "counterrevolutionaries."¹⁶²

3. *The Several Executive and Legislative Pronouncements Are Inconsistently Evaluated*

Courts of Appeals reviewing asylum claims based on the One Child Policy have found that none of the legislative and executive actions have successfully overruled *Matter of Chang*. Importantly, the validity of the several pronouncements have a bearing on whether the BIA has preserved its claim to judicial deference by consistently applying *Matter of Chang*.¹⁶³ The Administrative Procedure Act ("APA") empowers federal courts to set aside any agency action found to be without observance of required procedures.¹⁶⁴ Therefore, if a rule is not subjected to a notice and comment period before taking effect, the agency runs the risk of having the rule declared invalid by a reviewing court.

Both the Second and Fourth Circuits have reviewed the legal validity of the January 1990 Interim Rule.¹⁶⁵ Both Circuit Courts agreed that even if the January 1990 Interim Rule was properly promulgated as a legislative rule, it would have been repealed by publication of the July 1990 Final Rule.¹⁶⁶ However, the Fourth Circuit disagreed with the Second Circuit

¹⁶¹ Country Reports on Human Rights, *supra* note 37, at 561.

¹⁶² MOSHER, *supra* note 4, at 315.

¹⁶³ For example, if the January 1990 Interim Rule was legally valid from January 1990 until July 1990, then the BIA could not have applied *Matter of Chang* during that period.

¹⁶⁴ *Xin-Chang Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995) (citing 5 U.S.C. § 706(2)). A properly promulgated legislative rule is subject to the notice and comment requirements of the Administrative Procedure Act [hereinafter APA]. If legislative rules are not subjected to a notice and comment period, they may be invalidated by the federal courts. Importantly, rules may be excepted from the notice and comment requirements if they fall into one of the narrowly construed categories of § 553 of the APA. Three exceptions potentially apply to the January 1990 Interim Rule: (i) foreign affairs; (ii) interpretative rules; and (iii) good cause. *Id.* at 744 (citing *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1236 (D.C. Cir. 1994)).

¹⁶⁵ See discussion *supra* part II.D.2 for a regulatory history of the One Child Policy.

¹⁶⁶ The Second Circuit found that the January 1990 Interim Rule had not been subjected to the notice and comment requirements of the APA. In addition, the court noted that the January 1990 Interim Rule did not fall under any of the statutory exceptions to notice and comment provided by 5 U.S.C. § 553

declaring the January 1990 Interim Rule "interpretive" and thus excepted from the notice and comment requirements of the APA.¹⁶⁷ If the Fourth Circuit's reasoning is correct, then the January 1990 Interim Rule was properly promulgated and valid for seven months until the publication of the July 1990 Final Rule.¹⁶⁸ During those seven months, the BIA could not have applied *Matter of Chang*. This assertion casts doubt on the courts' determination that the BIA is due judicial deference because it consistently applied its decision and that the several pronouncements were never legally effective.¹⁶⁹

Other executive and legislative attempts to overrule *Matter of Chang* have also been found unsuccessful. The Courts have denied asylum based on the application of Executive Order 12,711 for two reasons. First, as a general rule, "there is no private right of action to enforce obligations imposed on the executive branch officials by executive orders."¹⁷⁰ The source of authority for Executive Order 12,711 is the President's general constitutional powers to direct the exercise of powers statutorily delegated to executive branch officials.¹⁷¹ Because Congress did not specifically delegate this authority to the President, Executive Order 12,711 does not have a specific foundation in legislative action.¹⁷² Second, an executive order is privately enforceable only if it was intended to create a private

(foreign affairs, interpretive rulings, and good cause). Agency actions that fail to observe the proper procedures are unlawful under 5 U.S.C. § 706(2). *Xin-Chang Zhang v. Slattery*, 55 F.3d at 744.

¹⁶⁷ The Second Circuit was responding to appellant's argument that the January 1990 Interim Rule was never properly revoked. The APA requires an agency revoking an existing rule to afford notice and an opportunity for public comment. 5 U.S.C. §§ 551 et seq. The Fourth Circuit, by contrast, found the January 1990 Interim Rule interpretative in that it merely stated what the Immigration and Naturalization Service believed the statute to mean. *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1340-41 (4th Cir. 1995) (citing *Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 207 (4th Cir. 1989); *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987)).

¹⁶⁸ The Fourth Circuit did not address this issue in *Chen Zhou Chai v. Carroll*, 48 F.3d 1331 (4th Cir. 1995).

¹⁶⁹ See discussion *supra* part III.A.1 of the court's deference to *Matter of Chang*.

¹⁷⁰ An executive order is privately enforceable only if it is issued pursuant to a statutory mandate or delegation of congressional authority. *Chen Zhou Chai v. Carroll*, 48 F.3d at 1338 (citing *Facchiano Constr. Co. v. U.S. Dep't of Labor*, 987 F.2d 206, 210 (3d Cir. 1992), *cert. denied*, 126 L. Ed. 2d 48, 114 S. Ct. 80 (1993)); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88, 96 L. Ed. 1153, 72 S. Ct. 863 (1952).

¹⁷¹ *Chen Zhou Chai v. Carroll*, 48 F.3d at 1338 (citing *Myers v. United States*, 272 U.S. 52, 135, 71 L. Ed. 160, 47 S. Ct. 21 (1926) ("The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of statutes under which they act").

¹⁷² *Id.*

cause of action.¹⁷³ By its own express terms, Executive Order 12,711 indicates that it was an internal directive from the President to his Attorney General, instructing him to exercise his statutory authority to provide for enhanced consideration of certain asylum claims.¹⁷⁴

Finally, federal courts evaluating the January 1993 Final Rule have generally found it unenforceable.¹⁷⁵ A rule is presumed ineffective until published.¹⁷⁶ In order for a rule to be binding it must be effective.¹⁷⁷ Since the January 1993 Final Rule was never published, it remained ineffective, and thus, unenforceable.¹⁷⁸

In summary, the various legislative and executive attempts at overruling *Matter of Chang* have been unsuccessful. The only exception is the January 1990 Interim Rule. The Circuit Courts' analyses of the rule appear more driven by a desire to uphold the BIA's decision than by a desire to seriously scrutinize the rule's procedural history.¹⁷⁹ In any event, even if the January 1990 Interim Rule had been valid, it is unclear whether that would lead to the conclusion that the BIA forfeited its claim to judicial deference or that *Matter of Chang* was permanently overruled.

¹⁷³ *Id.* (citing *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975), *cert. denied*, 426 U.S. 966, (1976)).

¹⁷⁴ *Id.* (citing 55 Fed. Reg. 13897 (Apr. 11, 1990)).

¹⁷⁵ *Id.* at 1341 (listing the district court cases which considered whether to enforce the January 1993 Final Rule even though it was not published; all but one found the rule unenforceable). *Xin-Chang Zhang v. Slattery*, 55 F.3d 732, 748 (2d Cir. 1995) (finding that the January 1993 Final Rule was never successfully promulgated because the rule never became effective by its own terms).

¹⁷⁶ *Xin-Chang Zhang v. Slattery*, 55 F.3d at 748; *cf.* *United Technologies Corp. v. OSHA*, 836 F.2d 52, 54 (2d Cir. 1987) ("The amendments . . . were promulgated when they were published in the Federal Register.").

¹⁷⁷ *Id.*

¹⁷⁸ Additionally, the January 1993 Final Rule suffered from another defect. It could not have been effective, even if published, because its effective date was never filled in. *Id.*

¹⁷⁹ See *Xin-Chang Zhang v. Slattery*, 55 F.3d at 744; *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1340 (4th Cir. 1995).

B. *Analysis of Future Asylum Claims Based on The Eugenics Law*

1. *A Particular Social Group Can Be Found*

Chinese victims of the One Child Policy have asserted their asylum claims based on persecution on account of membership in a particular social group and on account of political opinion.¹⁸⁰ Both bases for asylum have been largely unsuccessful.¹⁸¹ Asylum claims based on the Eugenics Law are likely to involve similar claims.¹⁸² However, application of either social group or political opinion theories to persecution on account of the Eugenics Law may yield different results.

The application of "particular social group" is problematic for two reasons. First, the legislative history is uninformative and sparse.¹⁸³ The 1951 Geneva Convention Relating to the Status of Refugees¹⁸⁴ was the first international compact to adopt a universal refugee definition, rather than one tied to a particular national or ethnic group.¹⁸⁵ The Convention defines refugees as those who face a well-founded fear of persecution on account of one of the five enumerated statutory grounds.¹⁸⁶ This refugee definition is broader than the prior practice because it links refugee status to fear of

¹⁸⁰ See, e.g., *Matter of Chang*, Int. Dec. 3107 (BIA 1989); *Xin-Chang Zhang v. Slattery*, 55 F.3d 732; *Chen Zhou Chai v. Carroll*, 48 F.3d 1331.

¹⁸¹ See, e.g., *Matter of Chang*, Int. Dec. 3107 (BIA 1989); *Xin-Chang Zhang v. Slattery* 55 F.3d 732; *Chen Zhou Chai v. Carroll*, 48 F.3d 1331.

¹⁸² Since the One Child Policy and the Eugenics Law are both population control policies applied generally to the Chinese population independent of race, religion, or nationality, the two bases for asylum available to applicants forced to undergo forced abortion and involuntary sterilization are membership in a particular social group and political opinion. See INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

¹⁸³ When Congress incorporated the U.N. Protocol into U.S. immigration law through the 1980 Refugee Act, it adopted the Protocol's definition of "refugee" without many substantive changes. Neither the legislative history of the Refugee Act, nor the U.N. Convention drafters' intent provides guidance in interpreting the social group term. Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L. J. 505, 509 (1993).

¹⁸⁴ Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6260, T.I.A.S. No. 6577, 189 U.N.T.S. 137.

¹⁸⁵ *Id.*

¹⁸⁶ Article I of the Convention Relating to the Status of Refugees provides: "A. For the purposes of the present Convention, the term "refugee" shall apply to any person who: (2) [As a result of events occurring before 1 January 1951] and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." *Id.*

persecution rather than to a specific crisis or nationality group and it expands the reasons that warrant refugee status.¹⁸⁷ The fourth ground—membership in a particular social group—was introduced by the Swedish representative to the Convention without much explanation¹⁸⁸ and adopted by the Convention without recorded comment.¹⁸⁹ It appears that the delegates were far more concerned with restricting the geographical and time limits of the refugee definition than with discussing the categories of persecution.¹⁹⁰

The Refugee Act of 1980 adopted the Convention's definition of "refugee."¹⁹¹ Unfortunately, the legislative history on the social group aspect sheds little light on its intended scope.¹⁹² Congress gave no explicit indication of its understanding of the purpose or meaning of this term.¹⁹³

Second, developed case law indicates vague judicial standards applied inconsistently.¹⁹⁴ The lack of a uniform approach towards asylum claims based on membership in a particular social group has led to the

¹⁸⁷ Fullerton, *supra* note 183, at 509.

¹⁸⁸ In support of his amendment, the Swedish representative stated that "experience ha[s] shown that certain refugees ha[ve] been persecuted because they belonged to particular social groups. The draft [c]onvention [makes] no provision for such cases, and one designed to cover them should be accordingly included." A/CONF.2/SR.3 at 14 (1951). Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 41 n.15 (1983); see also Daniel Compton, *Asylum for Persecuted Social Groups: a Closed Door Left Slightly Ajar*, 62 WASH. L. REV. 913, 925 (1987).

¹⁸⁹ The amendment was adopted by a vote of fourteen to zero with eight abstentions. There were no negative votes cast. The record does not disclose which delegations favored the amendment and which delegations abstained. Article I of the draft convention, as amended to include the persecution based on social group, then passed by a vote of twenty-two to zero with one abstention. Fullerton, *supra* note 183, at 510 (citing A/CONF.2/SR.23 at 8).

¹⁹⁰ Fullerton, *supra* note 183, at 510 (citing A/CONF.2/SR.23 at 19-24).

¹⁹¹ The Conference Committee Report stated that the Refugee Act's definition of "refugee" was accepted "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." Fullerton, *supra* note 183, at 513 (citing S. Rep. No. 590, 96th Cong., 2d Sess., at 20 (1980)).

¹⁹² See S. Rep. No. 590, 96th Cong., 2d Sess., at 20 (1980).

¹⁹³ The only direct comment was made in 1968 by President Johnson, when he sent the 1967 Protocol to the Senate for ratification: "The Protocol constitutes a comprehensive Bill of Rights for refugees fleeing their country because of persecution on account of their political views, race, religion, nationality, or social ties." The Senate ratified the Protocol, which contained the Geneva Convention refugee definition, in 1968. Congress later enacted the Refugee Act of 1980, which was intended, in part, to implement the Protocol by expressly conforming the statutory definition to the Convention/Protocol definition. Fullerton, *supra* note 183, at n.44 (citing 114 Cong. Rec. 24,628 (1968)).

¹⁹⁴ See, e.g., *Matter of Acosta*, Int. Dec. 2986 (BIA 1985); *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985); *Sanchez-Trujillo v. INS*, 909 F.2d 1 (9th Cir. 1990).

recognition of previously unrecognized groups, such as families,¹⁹⁵ gay men and lesbian women,¹⁹⁶ the educated elite in Ghana,¹⁹⁷ and former members of the national police of El Salvador.¹⁹⁸ Yet, it has not been extended to others such as Chinese victims of the One Child Policy,¹⁹⁹ women previously raped and beaten by guerrilla forces,²⁰⁰ members of a taxi drivers' cooperative in El Salvador,²⁰¹ and urban draft-age men not in the Salvadoran army,²⁰² among others.²⁰³ Examination of the decisions struggling to define "social group" reveals incongruencies in U.S. jurisprudence.

In *Matter of Acosta*,²⁰⁴ the BIA concluded that a "particular social group" is a group of individuals who share a "common immutable characteristic."²⁰⁵ Analyzing the four specific bases of persecution²⁰⁶—race, religion, nationality, and political opinion—the BIA concluded that each of them describes persecution targeted at a characteristic that "either is beyond the power of an individual to change or is so fundamental to

¹⁹⁵ See *Sanchez-Trujillo v. INS*, 909 F.2d at 1 (rejecting young urban working-class males of military age as a cognizable social group and describing a family as the quintessential social group); but see *Estrada-Posadas v. INS*, 924 F.2d 916 (9th Cir. 1991) (A Guatemalan woman's claim of persecution due to family membership where her cousin had been kidnapped and her uncle killed was rejected. The court held that Congress did not intend to grant refugee status based on family membership).

¹⁹⁶ *Matter of Toboso-Alfonso*, A23 220 644 (BIA 1990).

¹⁹⁷ *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985).

¹⁹⁸ *Matter of Fuentes*, 19 I. & N. Dec. 658 (BIA 1988).

¹⁹⁹ *Matter of Chang*, Int. Dec. 3107 (BIA 1989) (Chinese citizens opposed to One Child Policy not a particular social group).

²⁰⁰ *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (women who have previously been raped and beaten by guerrillas do not constitute a social group because they are not a recognizable and discrete group).

²⁰¹ *Matter of Acosta*, Int. Dec. 2986 (BIA 1985).

²⁰² *Matter of Vigil*, 19 I. & N. Dec. 572 (BIA 1988).

²⁰³ Parish, *supra* note 105, at 923.

²⁰⁴ Mr. Acosta claimed to be part of a cooperative of taxi drivers in San Salvador who had not participated in a guerrilla-led work stoppage. The BIA rejected Mr. Acosta's asylum claim finding that a voluntary association of taxi drivers was not a social group within the meaning of the statute. *Matter of Acosta*, Int. Dec. 2986 (BIA 1985).

²⁰⁵ *Id.*

²⁰⁶ To interpret the term "social group," the BIA turned to canons of statutory construction that direct that general words included in a list of more specific words be construed in a manner consistent with the more specific words. *Id.*

individual identity or conscience that it ought not be required to be changed.”²⁰⁷

Other courts have given the term “social group” a slightly different, if not broader, interpretation. In *Ananeh-Firempong v. INS*,²⁰⁸ the First Circuit defined “social group” with the guidance of the *Handbook on Procedures and Criteria for Determining Refugee Status* (“UNHCR Handbook”).²⁰⁹ The court emphasized that Ananeh-Firempong had described persecution of people who shared her background and social status.²¹⁰ The court expressly noted that the fears of persecution voiced by Ananeh-Firempong arose from characteristics beyond her power to change.²¹¹ In terms of the *Matter of Acosta* test for social group, Ananeh-Firempong faced danger due to immutable characteristics.²¹²

In *Sanchez-Trujillo v. INS*,²¹³ the Ninth Circuit addressed the definition of “particular social group.” Finding that the legislative history, U.S. case law, and the UNHCR Handbook were unhelpful, the Ninth Circuit embarked on its own statutory construction of the term.²¹⁴ The court concluded that a “social group” required a “voluntary associational

²⁰⁷ *Id.*

²⁰⁸ *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985).

²⁰⁹ The UNHCR Handbook states in relevant part: “A ‘particular social group’ normally comprises persons of similar background, habits, or social status Membership of [sic] such a particular social group may be at the root of persecution because there is no confidence in the group’s loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government’s policies.” OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. Doc. HCR/PRO/4, paras. 77-78(1979) [hereinafter UNHCR Handbook].

²¹⁰ Based on the elements set forth in the UNHCR Handbook, the court concluded that Ananeh-Firempong had adequately alleged a fear of persecution due to her membership in several particular social groups from Ghana: the Ashanti tribe, the educated class of professionals and business people, and those associated with the recently overthrown government. *Ananeh-Firempong v. INS*, 766 F.2d at 622-23.

²¹¹ *Id.*

²¹² *Id.*

²¹³ The two claimants sought asylum in the United States alleging persecution as members of the particular social group comprised of “young, urban, working-class males of military age who had never served in the military or otherwise expressed support for the government of El Salvador.” *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1573 (9th Cir. 1986).

²¹⁴ The court described the legislative history as “generally uninformative on this point.” *Id.* at 1575. Additionally, the court characterized the UNHCR Handbook as a “significant source of guidance.” However, it found the UNHCR Handbook as providing little assistance at a workable definition of particular social group. *Id.* at 1576.

relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group."²¹⁵ Applying this test, the court found that the claimants did not constitute a particular social group; rather than being a small, readily identifiable group, they are a "major segment of the population of an embattled nation."²¹⁶

Under its narrow interpretation, the BIA has firmly rejected the argument that people who oppose the PRC's coercive One Child Policy comprise a particular social group.²¹⁷ The BIA claims that opposition to the policy is not an immutable characteristic even to the extent that involuntary sterilization may occur, and thus policy opponents do not rise to the level of a particular social group.²¹⁸

However, where the asylum claim is based on the Eugenics Law, a different result may be obtained. If the asylum seeker can make out a claim based on persecution due to a serious genetic defect, the claimant may be able to establish his or her membership in a particular social group because a genetic defect is an immutable characteristic.²¹⁹

Under a test emphasizing a group's background and social status, a claimant persecuted by the Eugenics Law could also establish a particular social group.²²⁰ Evidence suggests that Chinese with mental deficiencies, for example, are considered a burden because they are typically not productive members of society.²²¹ In addition, the birth of handicapped children undermines the government's stated goal of limiting population growth by allowing only one child per couple.²²² Handicapped Chinese are on the lowest rung of Chinese society, generally the victims of prejudice. Even when handicapped Chinese are not abandoned, they lack the necessary

²¹⁵ *Id.* See also Fullerton, *supra* note 183, at 555 (identifying three elements in the Ninth Circuit's Sanchez-Trujillo v. INS definition of "social group:" (1) voluntary associational relationship; (2) common characteristic (or impulse interest); and (3) a characteristic fundamental to their group identity).

²¹⁶ Sanchez-Trujillo v. INS, 801 F.2d at 1577.

²¹⁷ Matter of Chang, Int. Dec. 3107 (BIA 1989).

²¹⁸ *Id.*

²¹⁹ An immutable characteristic is a characteristic that is not capable of, or susceptible to, change.

WEBSTER'S COLLEGIATE DICTIONARY 602 (9th ed., 1989).

²²⁰ Ananeh-Firempong v. INS, 766 F.2d 621, 623 (1st Cir. 1985).

²²¹ *Supra* discussion part II.B.

²²² *Supra* discussion part II.B.

services for a quality life.²²³ Thus, the common background and social status shared by individuals afflicted with serious genetic diseases and mental deficiencies may likely be found to form a social group under a background and social status test.

Finally, under the Ninth Circuit's test,²²⁴ the claimant faces the obstacle of proving that a group is a voluntary association of people. Indeed, the absence of any voluntary association amongst people afflicted with a serious genetic defect or mental disorder makes this group seem like the group claimed in *Sanchez-Trujillo*. It is a group existing in society, but not a "particular social group."²²⁵ However, critics have argued that a voluntary association factor should not be a prerequisite to finding persecution based on a social group.²²⁶ The Ninth Circuit appears disturbed by the size and the heterogeneity of the asserted group if this factor is eliminated.²²⁷ Thus, a refugee seeking asylum based on the Eugenics Law is likely to successfully demonstrate the existence of a particular social group no matter which judicial formulation is applied.

2. *The Eugenics Law Persecutes Only a Segment of the Population*

In *Matter of Chang*, the BIA buttressed its holding that the One Child Policy was not a grounds for asylum, in part, on the legitimacy of the policy.²²⁸ Population control, the BIA found, was a proper concern of the Chinese government.²²⁹ The Eugenics Law, on the other hand, has the questionable goal of improving the quality of the population.²³⁰ In addition, the BIA found that the One Child Policy was applied generally and was not subterfuge for persecuting a portion of society.²³¹ The Eugenics Law, by

²²³ *Supra* discussion part II.B.

²²⁴ *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986).

²²⁵ Rather than a cohesive or homogenous group, they are a group of disparate individuals with "different lifestyles, varying interests, diverse cultures, and contrary political leanings." *Id.* at 1577.

²²⁶ Fullerton, *supra* note 183, at 556. The author notes that the Ninth Circuit's decision is internally inconsistent. The Ninth Circuit characterizes a family as the quintessential social group. However, family members may choose not to associate, precluding the voluntary associational factor, and still be a social group within the Ninth Circuit's test.

²²⁷ *Sanchez-Trujillo v. INS*, 801 F.2d at 1577; *see* Fullerton, *supra* note 183, at 556.

²²⁸ *Matter of Chang*, Int. Dec. 3107 (BIA 1989).

²²⁹ *Id.*

²³⁰ *See* discussion *supra* part II.B of the Eugenics Law.

²³¹ *Matter of Chang*, Int. Dec. 3107 (BIA 1989).

contrast, applies only to that portion of the Chinese citizenry with genetic defects. This difference may result in tipping the balance in favor of granting asylum to victims of the Eugenics Law.

C. *Definitive Legislative Action Is Necessary*

Even though the analysis employed by the BIA in *Matter of Chang* may not apply to an asylum claim based on the Eugenics Law, definitive legislation is necessary to overrule *Matter of Chang*. By granting asylum to victims of forced abortion and involuntary sterilization, the United States recognizes these practices as violations of basic human rights.²³² Reproductive freedom is fundamental to one's identity.²³³ Notably, legislation designed to protect against such atrocities is consistent with the Refugee Act's humanitarian goals.²³⁴

Moreover, legislation effectively overruling *Matter of Chang* can be redacted to preserve the requirements inherent in the Act, including the Attorney General's discretionary power.²³⁵ For example, the January 1993 Final Rule, if it had been promulgated effectively, would have recognized persecution on account of Chinese population control policies as persecution on account of political opinion. Under a rule similar to the January 1993 Final Rule, an asylum seeker would still need to prove that his fear of persecution is well-founded by supplying objective evidence.

1. *Temporary Protected Status Inadequate*

Additionally, legislative action is necessary because the existing remedies for refugees fleeing reproductive rights violations is inadequate. Affording Temporary Protected Status²³⁶ ("TPS") to refugees fleeing

²³² See REPORT OF THE UNITED NATIONS WORLD POPULATION CONFERENCE, 1974, at § 14(f), U.N. Sales No. E. 75 XII.3 (Aug. 19-30, 1974) (describing reproductive rights as a basic right of all couples and individuals).

²³³ See Nickerson, *supra* note 94.

²³⁴ See generally Anker & Posner, *supra* note 105, at 55.

²³⁵ See, e.g., Bresnick, *supra* note 157 (arguing that a sixth ground based on reproductive ability should be added to the existing five grounds enumerated under 8 U.S.C. § 1101(a)(42)(A)).

²³⁶ In 1987, Congressman Mazzoli, then chair of the House Subcommittee on immigration matters, proposed an alternative to the country-specific relief of previous legislation, instead establishing a general statutory framework for what would remain discretionary executive-branch decisions to grant temporary safe haven. Adopting Congressman Mazzoli's proposal in 1990, Congress added § 244A to the INA,

persecution due to Chinese population control policies is insufficient. TPS is an inadequate response because it is a temporary solution to a problem that is long-standing and unlikely to change. Furthermore, TPS is subject to foreign policy considerations since the executive branch denies or grants status depending upon U.S. diplomatic relations with China.²³⁷

2. *Floodgates Will Not Open*

A likely argument against granting permanent asylum to Chinese fleeing persecutory population control policies is that it will open up the floodgates for the immigration of 1.2 billion Chinese. This fear is exaggerated. Refugees seeking asylum based on a fear of being sterilized or forced to abort will still need to meet the several requirements of section 101 of the INA, including supplying objective evidence of their fear of persecution.²³⁸ From the refugee's point of view, many Chinese will not be willing to leave behind family and friends.²³⁹ Although many Chinese will take the risk of immigration for a better life, many cannot afford the steep cost of departure.²⁴⁰ Finally, many Chinese will not be willing to undertake the harsh voyage to a new country.²⁴¹

which authorizes the Attorney General to grant Temporary Protected Status [hereinafter TPS] to nationals of foreign states in which armed conflict, natural disaster, or other circumstances pose a serious threat to personal safety or the ability to handle the return of aliens. TPS may be granted for up to 18 months, and may be extended if the Attorney General finds that the reasons for the initial granting of the status continue. Work authorization accompanies TPS status. 8 U.S.C. § 244A.

²³⁷ See 8 U.S.C. § 244A.

²³⁸ See discussion *supra* part II.D.1.

²³⁹ See, e.g., Linda Cipriani, *Gender and Persecution: Protecting Women Under the International Refugee Law*, 7 GEO. IMMIG. L.J. 511, 545 (1993).

²⁴⁰ Cable News Network, Inc., *Inside Business*, Oct. 17, 1993 (It reported that a trip to the United States may cost an alien up to \$30,000. Many aliens take jobs in restaurants, garment factories, and other Chinese sweatshops in big cities such as Los Angeles and New York. Aliens work long hours under harsh conditions to pay their debts to relatives, employers, and smugglers. Most aliens are able to pay their debts within two years.).

²⁴¹ See Yang You Yi, et al. v. Maugans, 24 F.3d 500, 502 (3rd Cir. 1994) (The dangerous journey undertaken by the passengers of the *Golden Venture* on their flight out of China was described as follows: "Chinese nationals . . . made a dangerous journey from the People's Republic of China (PRC) across the mountains and borders of Burma into Thailand. There, they embarked aboard the *Golden Venture*. After more than one hundred days at sea, the ship, within sight of its final destination, ran aground off the New York harbor."). See also National Public Radio, *All Things Considered*, Oct. 10, 1993 (In an interview with a Chinese asylum seeker who was aboard the ill-fated *Golden Venture* when it ran aground, Mrs. Wong called the journey the worst time of her life. She describes being in the ship for four months without knowing if it was day or night.).

IV. CONCLUSION

Effective legislative action that will grant asylum to refugees fleeing China's coercive population control policies is necessary. It is clear that past executive and legislative actions have demonstrated an intent to provide asylum to individuals who claim persecution on account of reproductive rights violations. For a variety of procedural, and at times unexplained reasons, these actions have been ineffective. The result has been that the BIA's decision in *Matter of Chang* continues to control asylum claims based on China's One Child Policy. Asylum claims based on the Eugenics Law, however, can be distinguished from claims based on the One Child Policy. As such, analysis of these claims under *Matter of Chang* should lead to a grant of asylum. This disparate result should be avoided by appropriate definite legislation that covers any kind of reproductive rights violations, including the types of abuses found in the implementation of the One Child Policy and the Eugenics Law.

For seventeen years, China has implemented its One Child Policy with little regard for or recognition of human rights abuses. Today, China un-apologetically implements a Eugenics Law aimed at reducing the birth of "defective" children. Legislation designed to provide enhanced consideration of asylum claims based on China's population control policies would be consistent with the humanitarian intent of the Refugee Act, and would not equate to opening the floodgates to millions of Chinese seeking refuge. Congress should act to amend the INA and provide victims of reproductive rights violations what the Refugee Act was meant to give: protection.

