

# Forced Abortions and Involuntary Sterilization in China: Are The Victims of Coercive Population Control Measures Eligible For Asylum in the United States?\*

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*This Article discusses the propriety of granting political asylum to Chinese citizens fleeing China's coercive population control policy. It argues that China is persecuting some of its citizens through its population control policy and that the United States should grant asylum to those who have been persecuted or who have a genuine fear of future persecution.*

## INTRODUCTION

In 1979, The People's Republic of China ("China") initiated a "one couple, one child" policy designed to limit population growth within China.<sup>1</sup> The population control program ostensibly uses societal

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1. David K. Willis, *Population Growth: A Critical North-South Issue?*, CHRISTIAN SCI. MONITOR, Mar. 5, 1985, at 20.

pressure and economic incentives to ensure that families have only one child.<sup>2</sup> However, local officials also use more coercive measures, such as involuntary sterilization, forced abortions, and substantial fines, to prohibit families from having more than one child.<sup>3</sup> The central authorities publicly condemn these coercive practices, but they do not punish the local officials responsible for imposing them.<sup>4</sup> In fact, the central government essentially mandates coercive enforcement measures by setting strict regional birth quotas and holding local officials personally responsible for meeting them.<sup>5</sup>

Each year, a small number of Chinese citizens who have been threatened with or subjected to these coercive measures flee China and seek political asylum in the United States.<sup>6</sup> These Chinese aliens claim that they are entitled to asylum in the United States because of their opposition to China's population control policy.<sup>7</sup> They argue that the Chinese government's coercive population control policies violate their fundamental right to bodily integrity.<sup>8</sup> They also contend that the government is targeting them for political persecution because of their desire to have more than one child.<sup>9</sup>

These asylum applications implicate four contentious issues. First, granting asylum to these applicants would condemn China's relatively successful population control methods at a time when the United States strongly advocates international population control<sup>10</sup> and the international community is attempting to develop strategies to curtail world population growth.<sup>11</sup> Second, granting asylum to these aliens would condemn China for human rights violations while the Clinton Administration is in the midst of reducing U.S. pressure on China to improve its

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2. Steve Bates & Bill Miller, *Ruling Could Boost Chinese Immigration*, L.A. TIMES, Feb. 13, 1994, at A22.

3. Steven W. Mosher, *In Human Rights, China Remains in the Maoist Era*, Heritage Foundation Reports, June 19 1985; Michael Weisskopf, *One Couple, One Child: Abortion Policy Tears at China's Society*, WASH. POST, Jan. 7, 1985, at A1.

4. Weisskopf, *supra* note 3, at A20.

5. *Id.*

6. See, e.g., Marcus Stern, *Anti-abortion Politics Blamed for Easy Entry*, SAN DIEGO UNION-TRIB., June 9, 1993, at A1.

7. Brief of Appellant, *Guo Chun Di in Guo Chun Di v. Carroll*, 842 F. Supp. 858 (E.D. Va. 1994).

8. *Id.*

9. *Id.*

10. Gail Quinn, *Not with our Tax Dollars*, USA TODAY, June 6, 1994, at 14A; Anne Reifenberg, *Foreign Aid Prescription: Clinton Links U.S. Assistance to Population Control*, DALLAS MORNING NEWS, Mar. 20, 1994, at 1J.

11. Quinn, *supra* note 10.

human rights record.<sup>12</sup> Third, these asylum applications raise the emotional issue of forced abortion at a time when the Constitutional right to a voluntary abortion is hotly contested within the United States.<sup>13</sup> Finally, granting asylum to these applicants would entitle thousand of aliens to enter the United States when the United States is actively trying to limit the number of refugees eligible to enter the United States.<sup>14</sup> Neither pro- nor anti-asylum advocates raise these issues directly during asylum hearings, but the issues influence many of the arguments, both pro and con, regarding asylum eligibility for Chinese fleeing coercive population control.

In part due to the aforementioned reasons, the Board of Immigration Appeals<sup>15</sup> ("BIA") consistently denies asylum to aliens opposed to China's coercive population control policies.<sup>16</sup> The BIA contends that U.S. immigration law does not grant asylum to the victims of a country-wide policy, regardless of that policy's harshness, because these victims have not been singled out for persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion.<sup>17</sup> Furthermore, the BIA argues that the desire to have more than one child is not a political opinion,<sup>18</sup> even if a government establishes rules limiting family size and uses coercive punishments to enforce those rules.<sup>19</sup>

Pro-asylum advocates strongly oppose the BIA's position. They contend that the Chinese government views opposition to its population

12. In May 1994, President Clinton ended the linkage between China's "most favored nation" trading status with the United States and China's human rights record. Special to the New York Times, *Clinton and China: How Promises Self-destructed*, N.Y. TIMES, May 29, 1994, at 1.

13. See Stephen Labaton, *Law on Abortion Protesters Gets First Test*, N.Y. TIMES, June 7, 1994, at A14.

14. In June 1994, the Clinton Administration considered invading Haiti partly because they did not want to permit thousands of Haitians to enter the United States as political refugees. *Hearing of the House Foreign Affairs Committee: U.S. Policy Towards Haiti*, FED. NEWS SERV., June 8, 1994 [hereinafter *Policy Towards Haiti*].

15. The body responsible for reviewing asylum applications.

16. *In re G*\_, Interim Dec. 3215 (BIA 1993).

17. *Id.*

18. The BIA rejects the argument that the Chinese government imputes a political opinion to violators of the population control policy and persecutes them for it. *Id.*

19. *In re Chang*, Interim Dec. 3107 (BIA 1989).

control policy as a political opinion.<sup>20</sup> They further maintain that local Chinese officials persecute policy opponents because the central Chinese government views opposition to the "one couple, one child" policy as political opposition.<sup>21</sup> Therefore, pro-asylum advocates contend that the United States should grant asylum to aliens fleeing persecution based on choices considered by the Chinese government to be political expression.<sup>22</sup>

In January 1994, a federal district court held that the right to unrestricted procreation is a fundamental right and that anyone who is forcibly prevented from having children is being persecuted because of a political opinion.<sup>23</sup> Under this court's holding, any Chinese citizen who reasonably believes that they or their spouse will be sterilized or forced to undergo an abortion if they return to China is entitled to asylum in the United States.<sup>24</sup> The court held that the Chinese government specifically targeted the petitioner in the case before it for punishment and that he was therefore eligible for asylum in the United States.<sup>25</sup> The court explicitly rejected the BIA's argument that the Chinese government punished this alien in the same way it would punish anyone who attempted to have more than one child.<sup>26</sup>

As a matter of law, this decision will have little impact on Chinese aliens seeking asylum in the United States, because the BIA has held that district court decisions do not control in other cases.<sup>27</sup> However,

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20. Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion, INS General Counsel, Jan. 19, 1993 [hereinafter Legal Opinion]. An interesting mix of people support asylum for Chinese aliens. They include conservative anti-abortion politicians, liberal pro-immigration lobbyists, a former General Counsel of the Immigration and Naturalization Service ("INS") and many officials from the Bush and Reagan administrations.

21. Interview with Grover Joseph Rees III, former INS General Counsel (Mar. 16, 1994) [hereinafter Interview].

22. Legal Opinion, *supra* note 20.

23. *Guo Chun Di v. Carroll*, 842 F. Supp. 858 (E.D. Va. 1994); *see also* *Xin-Chang v. Slatery*, 859 F. Supp. 708 (S.D.N.Y. 1994) (unpublished final rule signed in 1993 supersedes *In re Chang*).

24. *See Guo Chun Di*, 842 F. Supp. at 858. Mr. Rees would extend asylum eligibility even further than Judge Ellis. He would grant asylum to any Chinese citizen who was punished with severe economic penalties for attempting to have more than one child, in addition to those who were threatened with forced abortions or involuntary sterilization. Interview, *supra* note 21. This Article contends that Mr. Rees' interpretation of asylum eligibility is too broad.

25. *Guo Chun Di*, 842 F. Supp. at 873-74.

26. *Id.*

27. *See In re K-S-*, Interim Dec. 3209 (BIA 1993) (holding that district court rulings control only in a particular case, but that appellate court rulings control all relevant cases within a circuit). *But see* *Yang Cheng Huan v. Carroll*, 852 F. Supp. 460, 463 (E.D. Va. 1994) (where Judge Ellis indicated that he would have followed his ruling in *Guo Chun Di* if it had been on point). Three circuit court decisions deferring to *In*

this decision is important because it is the first time that a court has overturned a BIA decision in this area and because it could affect the outcome of similar pending cases.<sup>28</sup> Moreover, if the Fourth Circuit Court of Appeal upholds this decision, the BIA would be compelled to grant asylum to Chinese citizens fleeing coercive population control measures in any cases brought within the Fourth Circuit.<sup>29</sup>

This Article first briefly reviews China's population control policy, then discusses the traditional grounds for granting asylum in the United States. Section three of this Article contrasts the two primary approaches to asylum applications from aliens fleeing China's coercive population control policies. In section four, this Article argues that aliens fleeing extreme coercive population control measures meet the statutory definition of "refugee" and are eligible for asylum in the United States.<sup>30</sup>

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*re Chang* will have a much greater short term impact because district courts in those circuits must reject asylum appeals brought by Chinese fleeing coercive population control. See *Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995) (courts must defer to BIA's interpretation of immigration law as embodied in *In re Chang* and *In re G*.); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331 (4th Cir. 1995) (same); *Zheng v. INS*, 44 F.3d 379 (5th Cir. 1995) (must defer to *In re Chang* because "neither arbitrary nor capricious").

28. While the decision does not legally control other cases, pro-asylum advocates can and have cited it as persuasive authority in similar cases. See, e.g., Robert D. McFadden, *Three Smuggled Refugees are Granted Asylum*, N.Y. TIMES, May 29, 1994, at 27 (noting that *Guo Chun Di* had been cited in a related case before Immigration Judge Alan Vomaka).

29. *In re K-S-*, Interim Dec. 3209. The government has appealed the decision in *Guo Chun Di*, but the outcome is still pending. Conversation with Laura Reiff, Associate, Baker & McKenzie, in Washington, D.C., (June 20, 1994). Appeal docketed, No. 94-1416 (4th Cir. Mar. 31, 1994). The Fourth Circuit will probably overturn *Guo Chun Di* on procedural grounds when it reviews it. See discussion of *Chen Zhou Chai*, 48 F.3d 1331, *supra* note 27. If this happens, it will not detract from the soundness of Judge Ellis' substantive reasons for awarding asylum in *Guo Chun Di*.

30. Immigration judges must still examine an alien's story to ensure that it is genuine. James P. Morris, *My Views on Asylum*, 71 INTERPRETER RELEASES 309, 309-11, (Mar. 7, 1994). Advocating refugee status for victims of specific types of punishment is not an endorsement of mass immigration by opportunistic Chinese seeking to use China's coercive population control policies as a vehicle for entering the United States. Granting asylum to the small number of Chinese aliens who can demonstrate that they are subject to forced abortions or involuntary sterilization will not open the "floodgates" of asylum.

## I. POPULATION CONTROL IN CHINA: IS IT COERCIVE?

China has too many people.<sup>31</sup> Nearly one quarter of the world's population lives in China, supported by only seven percent of the world's agricultural land.<sup>32</sup> Historically, frequent famines resulted from the disparity between the number of hungry people and the amount of productive land. For example, as many as 30 million people died of starvation in 1960-61 alone.<sup>33</sup> In fact, famines were a common problem in rural China as recently as the late 1970's.<sup>34</sup> Today, domestic food production is sufficient to feed China's population. However, Chinese government officials believe that they must curtail China's population growth or else risk widespread famine by the end of this decade.<sup>35</sup>

Most international observers agree that China, like other third world countries, must limit its population growth.<sup>36</sup> These observers advocate some form of population control in China, but they cannot agree on an effective and efficient method.<sup>37</sup> China's problem, shared with most overpopulated third world countries, is how to implement unpopular population control policies that force behavior contrary to centuries of tradition.<sup>38</sup>

Three factors affect China's population control measures: first, the male bias of Chinese culture; second, the desire for a large family; and

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31. E.g., Michael Weisskopf, *Shanghai's Curse: Too Many People Fight for Too Little; Tough Birth Control Policy Shakes Chinese Society*, WASH. POST, Jan. 6, 1985, at A1.

32. Michael Weisskopf, *China's Birth Control Policy Drives Some to Kill Baby Girls*, WASH. POST, Jan. 8, 1985, at A1.

33. Karl Zinsmeister, *Let a Dozen Flowers Bloom: Capitalism in China is Only for the Favored Few*, 50 POL'Y REV. 30 (1989).

34. *Id.*

35. Weisskopf, *supra* note 31.

36. Willis, *supra* note 1; Reifenberg, *supra* note 10. In September, 1994, the United Nations held a conference in Cairo on curtailing world population growth. Alan Cowell, *Vatican Fights Plan to Bolster Role of Women*, N.Y. TIMES, June 15, 1994, at 1.

37. Willis, *supra* note 1; Reifenberg, *supra* note 10. The difficulty of formulating internationally acceptable forms of population control is highlighted by the controversy regarding the proposals for the United Nations population control conference held in Cairo in September, 1994. See, e.g., Cowell, *supra* note 36.

38. The problem is not insurmountable however. Several states in India have dramatically cut population growth without resorting to coercive measures. See, e.g., Amartya Sen, *Indian State Cuts Population Without Coercion*, N.Y. TIMES, Jan. 4, 1994, at A14, col. 4 (discussing successful population control in the Indian state of Kerala through educating women). Similarly, Bangladesh has cut birth rates by promoting the use of contraceptives. William K. Stevens, *Poor Lands' Success in Cutting Birth Rate Upsets Old Theories*, N.Y. TIMES, Jan. 2, 1994, at 1.

third, China's group-oriented culture. The first two factors force the Chinese government to impose harsh punishments to compel compliance with family size limits. The third factor governs the way in which the Chinese government enforces its "one couple, one child" policy.

First, virtually all Chinese families want a son because sons carry on the family name.<sup>39</sup> More importantly, sons are responsible for the care of their elderly parents, whereas daughters care for their husband's elderly parents.<sup>40</sup> A couple who has no sons has no one to care for them once they become too old to support themselves.<sup>41</sup> Therefore, if a family's first child is a daughter, the natural incentive is to keep having children until a son is born.<sup>42</sup> One unfortunate result of this male bias is that when Chinese families are effectively limited to one child, many couples opt to kill female children rather than forgo the opportunity to have a son.<sup>43</sup>

Second, China's pro-male bias is augmented by a strong desire for a large family, especially in rural areas.<sup>44</sup> As in most primitive farming cultures, Chinese farming methods are highly labor intensive.<sup>45</sup> Consequently, peasant farmers desire large families because they need people to work in their fields.<sup>46</sup> Small families are less productive than larger families, and correspondingly less able to take advantage of the new market-oriented economic reforms in China. Therefore, despite China's recent attempts to modernize its economy, most rural couples

39. See Michael Weisskopf, "Little Treasure" Exacts a Price; Couple Faces Pressure After Adding a Son, WASH. POST, Jan. 8, 1985, at A10.

40. Weisskopf, *supra* note 32.

41. The Chinese government is attempting to combat this problem by rewarding couples who live with the wife's parents and by establishing constitutional requirements that daughters support their parents. However, these changes have had very little effect on the traditional Chinese preference for sons over daughters. *Id.*

42. *Id.*

43. *Id.* Female infanticide is a problem throughout much of the third world. In India, like China, female children are considered a burden, whereas male children are considered an asset. The desire for male children leads poor families to murder female babies so that they can afford to have a male child. See, e.g., *Prime Time Live: "Let Her Die"—Female Infanticide in India* (ABC television broadcast, Jan. 6, 1994).

44. Zinsmeister, *supra* note 33.

45. Personal observation of Chinese rural farming methods (Oct. 1990). See also John Stackhouse, *India Losing Numbers Game; Population Control Schemes Failing to Slow Down Birth Rate*, HOUS. CHRON., Mar. 13, 1994, at A23 (discussing primitive farming methods in rural India).

46. Weisskopf, *supra* note 3, at A1.

will endure immense pressure before limiting the size of their family to one child.<sup>47</sup>

Third, China's group-oriented culture influences the character and implementation of China's population control policies. China is a one-party state with a history of bureaucratic domination.<sup>48</sup> Chinese society is geared towards the good of the group rather than the good of the individual; individuals are expected to sacrifice for the good of the community.<sup>49</sup> If an individual is not willing to make the necessary sacrifice, it is in the community's interest to force him or her do so.<sup>50</sup>

Thus, once the central government determines that family size must be limited, it can apply immense pressure through local officials to ensure that couples do not have more than one child.<sup>51</sup> Normally, this pressure is economic.<sup>52</sup> Couples with only one child receive child support and free education. Those with more than one child are given no support and are frequently required to pay for services that families with one child receive free.<sup>53</sup> Another common pressure tactic is the demotion or reassignment of parents who insist on having more than one child.<sup>54</sup> If, however, economic pressure is unsuccessful, local officials employ other coercive measures.<sup>55</sup>

Moreover, China's centralized governmental structure ensures enforcement of population control policies by setting area birth quotas and punishing local officials whose regions exceed their quotas.<sup>56</sup> Because of their personal responsibility for birth quotas, local officials resort to forced abortions and involuntary sterilization when other, less severe, methods fail.<sup>57</sup> The central government admits that coercion occurs and condemns it.<sup>58</sup> However, the current system virtually guarantees that local officials will use coercive measures because the government refuses to alter the population control quotas or to release

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47. Weisskopf, *supra* note 39.

48. U.S. Dep't Of State, *China Human Rights Practices, 1993, 1994* [hereinafter *1993 Report*]; David K. Willis, *Chinese Fight Accusations of Forced Abortion*, CHRISTIAN SCI. MONITOR, Dec. 17, 1985, at 7.

49. NICHOLAS D. KRISTOF & SHERYL WUDUNN, CHINA WAKES: THE STRUGGLE FOR THE SOUL OF A RISING POWER 47-55 (1994).

50. *Id.*

51. Weisskopf, *supra* note 3, at A20.

52. *1993 Report, supra* note 48.

53. Mosher, *supra* note 3.

54. See, e.g., Weisskopf, *supra* note 39.

55. Weisskopf, *supra* note 3, at A1.

56. Mosher, *supra* note 3.

57. Lizette Alvarez, *China's 'One-Couple, One-Child'*, CHI. TRIB., June 1, 1992, at 8.

58. *1993 Report, supra* note 48.



local officials from personal responsibility for meeting these quotas.<sup>59</sup> Furthermore, the central government refuses to punish local officials who use coercion.<sup>60</sup>

Local officials who practice coercive policies usually apply them uniformly to all families within a region who seek to have more than one child.<sup>61</sup> Therefore, even though coercion is not used at a national level, it is virtually impossible for a victim of persecution to demonstrate that they have been singled out for persecution since their friends and neighbors who attempt to have more than one child are also coerced.<sup>62</sup> They can only show that they have been severely punished for having more than one child.

While most U.S. observers acknowledge that China needs to limit its population, they condemn the enforcement aspects of China's population control policy because these policies violate American notions of fundamental rights.<sup>63</sup> Frequently, observers from the United States consider a policy coercive while Chinese officials view the same policy as encouraging voluntary sacrifice for the good of the community.<sup>64</sup> The Chinese reject the U.S. conception of human rights and refuse to allow the United States to "meddle" in China's internal affairs.<sup>65</sup>

There is no question that some aspects of China's population control policies offend Western notions of personal liberty and freedom of action. However, there is substantial debate within the United States over how the United States should respond to these policies. The following sections discuss whether opposition to China's birth control policies is or should be sufficient to justify a grant of asylum under U.S. law.

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59. Weisskopf, *supra* note 3, at A20.

60. *Id.*

61. *See id.*

62. The BIA argues that aliens are not eligible for asylum unless they can show that they have been singled out for persecution. Oral Argument Transcripts at 29-30, *Guo Chun Di v. Carroll*, 842 F. Supp. 858 (E.D. Va. 1994) (No. CV 93-1377-A) [hereinafter Transcript].

63. *See Hearing Before the Subcommittee on International Operations and Human Rights*, 104th Cong., 1st Sess. (May 17, 1995) (statement of John S. Aird, former senior research specialist on China at the U.S. Bureau of the Census).

64. *See, e.g., Willis, supra* note 48, in which reporter from Christian Science Monitor questions the coerciveness of policies which Chinese officials view as beneficial to the community.

65. *Chinese Premier Hopes for Improved U.S. Relations*, UPI, Apr. 2, 1994, at International, available in LEXIS, Nexis Library, UPI file.

## II. LEGAL STANDARDS FOR GRANTING ASYLUM IN THE UNITED STATES

The United States cannot grant asylum to all those who would like to receive it.<sup>66</sup> In fact, it is impractical for the United States to grant asylum to all aliens who may have a legitimate fear of returning to their home country. Therefore, Congress established legislative guidelines to differentiate between meritorious asylum applications and those that should be rejected. Unfortunately, these guidelines are very broad and general. Consequently, courts, the BIA, and the executive branch sometimes interpret the statutory requirements for asylum differently, especially in cases that implicate numerous contentious issues. This section provides a general overview of the basic requirements for gaining asylum within the United States.

The Refugee Act of 1980<sup>67</sup> created the first formal statutory provisions for granting "asylum" to aliens in the United States.<sup>68</sup> Under the 1980 Act, an alien is eligible for asylum in the United States once they demonstrate that they are a "refugee."<sup>69</sup> The Immigration and Nationality Act ("INA")<sup>70</sup> defines a "refugee" as a person: 1) outside their own country; 2) who has been persecuted or who has a "well-founded fear of persecution" in that country; 3) on account of their race, religion, nationality, membership in a particular social group, or political opinion.<sup>71</sup> Once an alien is classified as a refugee, the Attorney General retains the discretion to grant or deny them asylum.<sup>72</sup>

To show that they have been persecuted or that they have a well-founded fear of persecution, an asylum applicant must prove several things. First, they must demonstrate that they have been singled out for persecution,<sup>73</sup> i.e., that due to their political opinion, the government has punished them more harshly than others who have committed the

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66. *Policy Towards Haiti*, *supra* note 14.

67. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

68. THOMAS A. ALENIKOFF AND DAVID A. MARTIN, *IMMIGRATION PROCESS AND POLICY* 734 (2d ed. 1991).

69. 8 U.S.C. § 1158(a) (1988).

70. Immigration and Nationality Act, 8 U.S.C. §§ 1101-1525 (1988).

71. 8 U.S.C. § 1101(a)(42) (1988).

72. *Id.* The grant of asylum is purely discretionary. Even if the alien meets all the statutory criteria for asylum, the alien is not entitled to asylum. The Attorney General is never required to grant asylum. *Sale v. Haitian Refugee Centers Council*, 113 S.Ct. 2549, 2553 (1993).

73. Transcript, *supra* note 62, at 29-30.

same crime.<sup>74</sup> According to the BIA, “[g]eneralized oppression by a government of virtually the entire populace” is not persecution.<sup>75</sup> The BIA’s position denies asylum to aliens who are afraid to return to their home country because of widespread anarchy or random violence. It also denies asylum to victims of widespread persecution if that persecution is conducted under color of law.<sup>76</sup>

Second, an asylum applicant must show that the government is not “persecuting” them through legitimate sanctions imposed through proper legal channels.<sup>77</sup> This requirement is frequently cited to prevent a grant of asylum to a conscientious objector seeking to avoid compulsory military service.<sup>78</sup> As long as the punishment imposed on the objector is legally authorized and not disproportionately severe, they are ineligible for asylum.<sup>79</sup>

Finally, an asylum applicant must show that the “persecution” or “well-founded fear of persecution” is on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.<sup>80</sup> Even if an alien demonstrates a legitimate fear of persecution, such individuals are ineligible for asylum unless they can show that their persecution is engendered by one of the five enumerated grounds.<sup>81</sup>

74. *In re K-S-*, Interim Dec. 3209 (BIA 1993).

75. E. Tobin Shiers, *Coercive Population Control Policies: An Illustration of the Need for a Conscientious Objector Provision for Asylum Seekers*, 30 VA. J. INT’L L. 1007, 1023 (1990), citing *In re Sibrun*, 18 I. & N. Dec. 354, 359 (BIA 1983). See also *Yang Cheng Huan v. Carroll*, 852 F. Supp. 460 (1994).

76. *El Balguiti v. INS*, 5 F.3d 1135, 1136 (8th Cir. 1993).

77. *Saball-Cortez v. INS*, 761 F.2d 1259 (9th Cir. 1985).

78. See, e.g., *Khalaf v. INS*, 909 F.2d 589, 591-92 (1st Cir. 1990). The fact that compulsory military service is not considered a violation of a fundamental right affects decisions regarding conscientious objectors.

79. *Id.* This rule should apply to Chinese aliens seeking asylum when the punishment imposed by the Chinese government is minor; a small fine or termination of child support benefits, for example. Because the government is not persecuting the alien, the motivation for the punishment need not be examined; whether or not the punishment is on account of a political opinion becomes irrelevant. However, if the Chinese government involuntarily sterilizes or forces an abortion on a person because of their attempts to have more than one child, the Chinese government is persecuting that person. Therefore, that alien is eligible for asylum in the United States if the persecution is on account of their political opinion. See *infra* Section IV for a discussion of why Chinese aliens fleeing coercive population control policies are eligible for asylum.

80. 8 U.S.C. § 1101(a)(42) (1988).

81. *Id.*

Race, religion, and nationality do not apply to Chinese citizens fleeing coercive population control measures and are not discussed here. Membership in a particular social group could theoretically apply to these cases, but is not discussed in this Article.<sup>82</sup> Advocates of granting asylum to Chinese aliens primarily argue that an alien's opposition to government-mandated birth control policies is a "political opinion."<sup>83</sup> Therefore, the parameters of this term are discussed below.

Like most other asylum terms, "political opinion" is not statutorily defined. Therefore, applicants must consult judicial and administrative interpretations of the term to determine its meaning. Unfortunately, these interpretations are not very helpful. In its most recent asylum decision dealing with persecution, the Supreme Court conducted a narrow fact-specific analysis and declined to clarify the meaning of "persecution on account of political opinion."<sup>84</sup> In *INS v. Elias-Zacarias*, Justice Antonin Scalia indicated simply that Elias-Zacarias had not shown that he was eligible for asylum.<sup>85</sup> The Court provided virtually no guidance for future applicants attempting to show that they fear "persecution on account of political opinion."<sup>86</sup>

This left lower courts with the unenviable task of crafting a working definition for this key term.<sup>87</sup> Consequently, the definition of political opinion can vary dramatically from circuit to circuit. For example, the

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82. Canada grants asylum to women fleeing forced sterilization on the ground that they are being persecuted because of their membership within a particular social group. See Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 656-57 (1993), citing *Cheung v. M.E.I.*, 102 D.L.R. 4th 214 (1993). However, the BIA specifically rejected the argument that opponents to China's "one couple, one child" policy form a particular social group (*In re Chang*, Interim Dec. 3107, 12 (BIA 1989)) and pro-asylum advocates in the United States contend primarily that asylum is justified in these cases because of persecution on account of the alien's political opinion. *But see Yang Cheng Huan v. Carroll*, 852 F. Supp. 460 (1994), where Judge Ellis intimates that he might be receptive to a persecution on account of membership within a particular social group argument; *In re Pan*, File # A72 761 990 - York (BIA Oct. 15, 1993) (where the applicant argued that he was being persecuted on account of membership within a particular social group).

83. Legal Opinion, *supra* note 20.

84. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). See also Deborah A. Anker et al., *The Supreme Court's Decision in INS v. Elias-Zacarias: Is There Any "There" There?*, 69 INTERPRETER RELEASES 285 (Mar. 9, 1992) (discussing and analyzing *Elias-Zacarias*).

85. 502 U.S. at 482.

86. 502 U.S. at 478.

87. Anker et al., *supra* note 84, at 293. If anything, *Elias-Zacarias* further confuses the issue of the meaning of "persecution" because of the different approach taken by the Court in *Elias-Zacarias* and *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). *Cardoza-Fonseca* interpreted the asylum statutory language quite broadly, whereas *Elias-Zacarias* interpreted the statute very grudgingly. Anker et al., *supra* note 84, at 292.

Ninth Circuit considers neutrality a political opinion,<sup>88</sup> while the First and Eleventh Circuits do not.<sup>89</sup>

This uncertainty provides the BIA and reviewing courts with immense latitude in individual cases. The next section discusses the different applications of these basic requirements to Chinese asylum cases.

### III. TWO CONFLICTING APPROACHES TO ASYLUM APPLICATIONS BY CHINESE ALIENS FLEEING COERCIVE POPULATION CONTROL MEASURES

There are two opposing views on the appropriateness of granting asylum to Chinese fleeing coercive population control measures. The BIA argues that these aliens do not qualify for asylum because the punishment imposed by the Chinese government is not on account of one of the five statutory grounds for asylum. Conversely, pro-asylum advocates argue that these Chinese are eligible for asylum because they are being persecuted on account of a political opinion. Determining which of these two interpretations is correct is difficult because of uncertainty about the controlling law in this area. This section reviews the different legal interpretations that may control these cases and then discusses the two opposing positions before examining their strengths and weaknesses.

The Reagan and Bush administrations strongly advocated granting asylum to aliens fleeing China's coercive population control measures (largely because forced abortions are used to enforce birth quotas) and attempted to ensure that asylum would be given to these aliens. First, in August 1988, then-Attorney General Edwin Meese III issued "policy guidelines" for immigration judges deciding cases in this area.<sup>90</sup> These guidelines indicated that China's punishment of opponents to its population control measures was persecution on account of a political opinion because the Chinese government viewed opposition to its

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88. *Arriaga-Barrientos v. INS*, 925 F.2d 1177 (9th Cir. 1991); *Maldonado-Cruz v. INS*, 883 F.2d 788 (9th Cir. 1989).

89. *See, e.g., Alvarez-Flores v. INS*, 909 F.2d 1 (1st Cir. 1990); *Perlera-Escobar v. Executive Office for Immigration*, 894 F.2d 1292 (11th Cir. 1990). Additionally, the Fourth Circuit has refused to express an opinion as to whether neutrality is a political opinion. *Cruz-Lopez v. INS*, 802 F.2d 1518, 1520 n.3 (4th Cir. 1986).

90. Policy Guidelines issued by Attorney General Edwin Meese (Aug. 5, 1988).

population control policy as political dissent.<sup>91</sup> Second, in November 1989, then-President George Bush commented that asylum applicants fleeing coercive population control measures should receive “enhanced consideration.”<sup>92</sup> Third, then-Attorney General Richard Thornburgh clarified and formalized these directives in an interim rule issued in January 1990.<sup>93</sup> This interim rule, binding on the INS while it was in force, indicated that forced abortions or involuntary sterilization was persecution on account of a political opinion.<sup>94</sup>

Fourth, then-President George Bush reaffirmed and expanded his pro-asylum position through Executive Order 12711, formally ordering the Secretary of State and the Attorney General to “provide for enhanced consideration” for all asylum applicants fleeing coercive population control policies.<sup>95</sup> Unfortunately, the provisions of the interim rule and President George Bush’s Executive Order were inexplicably excluded from and superseded by a final rule on asylum regulations published in the Federal Register in July 1990.<sup>96</sup>

Finally in January 1993, then-Attorney General William Barr issued a final rule specifically overruling *Matter of Chang*<sup>97</sup> “to the extent that it held that the threat of forced abortion or involuntary sterilization pursuant to a government family planning policy does not give rise to a well-founded fear of persecution on account of political opinion. . . .”<sup>98</sup> This rule was submitted to the Federal Register and scheduled for publication.<sup>99</sup> However, when President Clinton entered office, he ordered the temporary suspension of all unpublished rules and, as a

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91. *Id.* The BIA refused to follow these guidelines because they were directed at the INS, rather than the BIA. *In re Chang*, Interim Dec. 3107 (BIA 1989).

92. Memorandum of Disapproval (Nov. 30, 1989) (explaining President Bush’s veto of H.R. 2712, the “Emergency Chinese Immigration Relief Act of 1989”).

93. Interim rule, 55 Fed. Reg. 2803-04 (1990).

94. *Id.*

95. Executive Order No. 12,711, 55 Fed. Reg. 13897-98 (1990).

96. See Final Asylum Rules, 55 Fed. Reg. 30674-88 (1990); *INS Asylum Regulations Mistakenly Supersede Regulations on PRC “One Couple, One Child” Policy*, 67 INTERPRETER RELEASES 1222 (Oct. 29, 1990). The final asylum rules were initially proposed on August 28, 1987, but were not finalized until July of 1990. Because of this long gestation period, the rules did not include the intervening directives on Chinese fleeing coercive population control measures. However, the rules superseded all interim rules in force in July 1990 because they were “final rules.” Arthur C. Helton, *Final Asylum Rules: Finally*, 67 INTERPRETER RELEASES 789 (July 23, 1990).

97. The BIA case denying asylum to Chinese fleeing coercive population control measures. Interim Dec. 3107 (BIA 1989).

98. Final Rule: Claims for Asylum or Withholding of Deportation Made by Aliens Fleeing Coercive Family Planning Policies, AG Order No. 1659-93, INS No. J-90, (Jan. 15 1993), at 4.

99. *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 864 (E.D. Va. 1994).

result, this rule was never published in the Federal Register.<sup>100</sup> To date, the Clinton Administration has neither approved nor rejected this rule. Therefore, whether the attempts by the Reagan and Bush Administrations to overturn the BIA's position on Chinese asylum cases were successful is still very unclear.

Pro-asylum advocates claim that the final rule issued by Attorney General Barr controls even though it is unpublished.<sup>101</sup> However, the BIA rejects this contention and claims that its decision in *Matter of Chang* is still good law.<sup>102</sup> The BIA asked Attorney General Janet Reno to resolve the confusion engendered by this conflict,<sup>103</sup> but she declined to do so.<sup>104</sup> Therefore, Chinese aliens must contend with conflicting interpretations of the asylum provisions when they seek asylum.

The BIA's position is very clear. They consistently deny asylum to Chinese citizens fleeing coercive population control measures.<sup>105</sup> The BIA justifies this position on three grounds.

First, the BIA contends that China's "one couple, one child" policy is not "on its face persecutive."<sup>106</sup> The BIA acknowledges that this policy may be harsh and cruel, especially if it involves forced abortions or mandatory sterilization.<sup>107</sup> However, they maintain that punishment for violation of the policy does not provide grounds for asylum as long as China's primary motivation for implementing the policy is to limit population growth.<sup>108</sup>

100. Memorandum from Daniel L. Koffsky, Acting Assistant Attorney General to Martha Girard, Office of the Federal Register, re: Withdrawal of Regulations from Publication in the Federal Register (Jan. 22, 1993).

101. Appellant's Brief at 14, *Guo Chun Di* (No. 93-1377-A).

102. *In re G*, Interim Dec. 3215 (BIA 1993).

103. *Attorney General to Decide Validity of Chinese Family Planning Asylum Claims*, 70 INTERPRETER RELEASES 1558 (Nov. 22, 1993).

104. *Attorney General Fails to Decide Chinese Family Planning Asylum Cases*, 70 INTERPRETER RELEASES 1631 (Dec. 13, 1993).

105. See *In re G*, Interim Dec. 3215; *In re Chang*, Interim Dec. 3107 (BIA 1989).

106. *In re Chang*, Interim Dec. 3107 at 12.

107. *In re G*, Interim Dec. 3215.

108. *In re Chang*, Interim Dec. 3107 at 13. It would be interesting to see how the BIA would react to asylum applications from aliens who claimed that they were sterilized because they were likely to have a retarded child. The Chinese government recently announced a policy intended to promote racial purity through abortions and sterilization of handicapped and retarded individuals, so this issue may arise soon. Steven Mufson, *China Plans to Restrict 'Inferior' Births—Compulsory Abortions, Sterilization Aim at 'Heightening Standards'*, WASH. POST, Dec. 22, 1993, at A1.

Second, the BIA argues that because the Chinese government applies the population control policy uniformly throughout China, people who are forced to have abortions or undergo sterilization are not being singled out for persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>109</sup> Additionally, according to the BIA, an alien is not eligible for asylum unless they can show that the coercive population control policy was applied to them with persecutory intent<sup>110</sup> or that they have been treated more severely than other policy violators.<sup>111</sup> Due to the nature of China's population control policy, it is impossible for most Chinese asylum applicants to meet this stringent requirement.<sup>112</sup>

Third, the BIA contends that the Chinese government is not punishing the asylum applicant on account of his or her political opinion because the applicant cannot prove that the government is motivated by a desire to quash his or her political opinion.<sup>113</sup> Under the BIA's view, an alien must publicly manifest his or her political opinion and then be punished because they hold that opinion.<sup>114</sup> It is not sufficient for an alien to merely hold the opinion.<sup>115</sup>

Usually, the only manifestation of opposition to the one-child policy is an attempt to have a second or third child, rather than overt or public opposition.<sup>116</sup> This means that most asylum applicants must argue that they are being persecuted because of an imputed, as opposed to a manifested, political opinion. The BIA argues that the Supreme Court's decision in *Elias-Zacarias* precludes Chinese aliens from using imputed political opinion as the basis for their asylum claims.<sup>117</sup> The BIA contends that, under *Elias-Zacarias*, the motive for the persecution is critical.<sup>118</sup> "[A]n alien must show not only that he possesses a political opinion . . . but that the government seeks to persecute [or] harm that

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109. *In re Chang*, Interim Dec. 3107 at 14-15. The BIA applies the same rationale for denying applications based on persecution on a province-wide or district-wide scale.

110. *In re G*\_, Interim Dec. 3215.

111. *In re Chang*, Interim Dec. 3107 at 17.

112. When local officials utilize forced abortions and involuntary sterilization to limit population growth, they usually use it extensively in the areas they control. Therefore, most victims of coercion can not show that they were treated more severely than other policy violators within a particular region.

113. *In re G*\_, Interim Dec. 3215. Aliens bear the burden of proof in asylum cases, so their inability to prove government motive is usually fatal to their application. *In re Acosta*, 19 I. & N. Dec. 211 (BIA 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

114. *In re G*\_, Interim Dec. 3215.

115. *Id.*

116. Weisskopf, *supra* note 39.

117. *In re G*\_, Interim Dec. 3215 at n.21.

118. Transcript, *supra* note 62, at 31.



individual specifically because of that political opinion."<sup>119</sup> The BIA refuses to apply the doctrine of imputed political opinion in this area because it accepts the Chinese government's contention that it is merely seeking to curtail population growth, not to punish offenders because of their opposition to this policy.<sup>120</sup>

Proponents of granting asylum to Chinese aliens fleeing coercive population control measures argue that these aliens qualify for asylum under current law.<sup>121</sup> They disagree with the BIA's contrary position and contend that the BIA is misapplying the law.<sup>122</sup>

One of the most outspoken advocates of granting asylum to these Chinese is Grover Joseph Rees III, Immigration and Naturalization Service General Counsel during the Bush administration. He contends that the application of "coercive [family planning] policies does constitute persecution on account of political opinion."<sup>123</sup> Furthermore, he argues that this is persecution on account of a political opinion because the Chinese government believes that people who violate the population control policy are its political opponents, even if these people do not verbally express their political opposition.<sup>124</sup> He believes that the Chinese government imputes a political opinion to population control policy violators and persecutes them for it.<sup>125</sup> In support of this position he cites the severity of the punishment imposed on violators of the population control targets and statements made by Chinese officials condemning violators of the policy as ideological traitors.<sup>126</sup>

119. *Id.*

120. *In re G*\_, Interim Dec. 3215.

121. Some legislators who concur have attempted to overcome the BIA's refusal to grant asylum to these Chinese through legislation. For example, Senator Helms (R-NC) proposed legislation that would have granted asylum to 2,000 Chinese fleeing coercive population control measures each year, even if the BIA determined that they did not otherwise qualify for asylum. Amendment No. 1290, as modified, to H.R. 2333, adopted by Senate, Jan. 31, 1994, 139 CONG. REC. S520 (1994); H.R. 2333, the Foreign Relations Authorization Act for (FY) 1994 and 1995, adopted by Senate, Feb. 2, 1994, 140 CONG. REC. S560-61 (Feb. 2, 1994). The House of Representatives rejected this amendment and dropped it from the final bill. 103 H.R. REP. No. 482 (Apr. 25, 1994).

122. Interview, *supra* note 21.

123. INS General Counsel Memorandum: *Asylum Requests Based upon Coercive Family Planning Policies* (Nov. 7, 1991).

124. Legal Opinion, *supra* note 20.

125. Interview, *supra* note 21.

126. *Id.*

Mr. Rees disagrees with the BIA's interpretation of *Elias-Zacarias*.<sup>127</sup> He considers *Elias-Zacarias* a narrow, fact-specific opinion that does not preclude granting asylum because of persecution based on imputed political opinion.<sup>128</sup> In fact, he notes that, in *Elias-Zacarias*, the Supreme Court "explicitly recognized that it was not dealing with a case of 'imputed' political opinion."<sup>129</sup>

The first federal court case to consider the merits of the Chinese asylum issue adopted the pro-asylum view that opposition to coercive family planning is a political opinion.<sup>130</sup> In *Guo Chun Di v. Carroll*, Federal District Court Judge Thomas S. Ellis III acknowledged that normally a court should defer to an agency's interpretation of a statute that it is empowered to administer.<sup>131</sup> But, because of the "cacophony of administrative voices" in this area he refused to accept the BIA's view of asylum eligibility.<sup>132</sup> He held that the petitioner was statutorily eligible for asylum because he had a reasonable fear of persecution on account of a political opinion.<sup>133</sup>

Judge Ellis noted that the right to unhindered procreation is a fundamental human right, akin to freedom of religion and freedom of speech.<sup>134</sup> He based this determination on the "'penumbras' emanating from the Bill of Rights."<sup>135</sup> Judge Ellis reasoned that because the right to procreate is a fundamental right similar to other fundamental rights

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127. The BIA contends that Chinese asylum applicants cannot use the doctrine of imputed political opinion. *In re G*\_, Interim Dec. 3215 (BIA 1993); see also *supra* notes 117-20 and accompanying text.

128. *In re G*\_, Interim Dec. 3215.

129. *Id.* Mr. Rees' interpretation of *Elias-Zacarias* seems more accurate than the BIA's because of the narrowness of the Court's opinion. Other commentators have also noted that *Elias-Zacarias* is an extremely narrow opinion applicable only to the facts of that case. Anker et al., *supra* note 84, at 292; Andrew Pau & Nathan J. Diament, *Narrowing "Political Opinion" as Grounds for Asylum—I.N.S. v. Elias-Zacarias*, 112 *S.Ct.* 812 (1992), 33 *HARV. INT'L L.J.* 610 (1992); see also *Canas-Segovia v. INS*, 970 F.2d 599 (9th Cir. 1992). The Supreme Court remanded *Canas-Segovia* to the Ninth Circuit after it decided *Elias-Zacarias*. On remand, the Ninth Circuit held that persecution or a reasonable fear of persecution on account of an imputed political opinion is still grounds for asylum. *Id.* at 602.

130. *Guo Chun Di v. Carroll*, 842 F. Supp. 858 (E.D. Va. 1994).

131. *Id.* at 863.

132. *Id.* at 866. More recent circuit court cases have deferred to the BIA's view on procedural grounds. *Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995); *Chen Zhou Chai v. Carrol*, 48 F.3d 1331 (4th Cir. 1995); *Zheng v. INS*, 44 F.3d 379 (5th Cir. 1995).

133. *Guo Chen Di*, 842 F.Supp. at 870.

134. *Id.* at 867-68; see also Joan Treadway, *Chinese Refugee Heard In N.O. Court One of Lucky Few*, *TIMES-PIYAYUNE*, Nov. 6, 1993, at A1 (noting that an immigration judge in New Orleans has indicated that the right to unhindered procreation is a fundamental right).

135. *Guo Chun Di*, 842 F. Supp. at 867 (citing *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Roe v. Wade*, 410 U.S. 113, 154 (1973)).

that justify asylum claims, "petitioner's opposition to [China's] population control policies constitutes a 'political opinion' within the meaning of [the asylum provisions]." <sup>136</sup> Subsequent courts have not rejected Judge Ellis' substantive arguments; they have deferred for procedural reasons to the BIA's interpretation of the asylum provisions as embodied in *Matter of Chang*. <sup>137</sup>

The pro-asylum arguments are more consistent with the rationale underlying the statutory asylum provisions than the BIA's arguments. <sup>138</sup> As explained in the next section, the BIA's interpretation undercuts the statute's rationale because it denies asylum to aliens who have shown that they will be persecuted on account of a political opinion if they are forced to return to China.

#### IV. CHINESE FLEEING COERCIVE POPULATION CONTROL MEASURES ARE ELIGIBLE FOR ASYLUM IN THE UNITED STATES

Chinese fleeing coercive population control measures are eligible for asylum in the United States because: (1) the Chinese government is persecuting them, and (2) this persecution is based on an imputed political opinion. First, this section contends that Chinese fleeing coercive population control policies are eligible for asylum in the United States. Then it discusses standards that an immigration judge can use to assess a particular applicant's eligibility for asylum.

As a threshold matter, opponents of granting asylum to Chinese aliens fleeing coercive population control measures oppose asylum eligibility for two reasons. First, they argue that China must impose harsh

136. *Id.* at 868.

137. *Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995); *Chen Zhou Chai v. Carrol*, 48 F.3d 1331 (4th Cir. 1995); *Zheng v. INS*, 44 F.3d 379 (5th Cir. 1995).

138. Congress apparently believes that the asylum provisions should apply to Chinese aliens fleeing coercive population control measures. *See, e.g.*, The "Emergency Chinese Immigration Relief Act of 1989," H.R. Res. 2712, 101st Cong, 1st sess. § 3(a), 135 CONG. REC. S7692 (indicating that Chinese fleeing coercive population control measures qualified for asylum because they had been persecuted on account of a political opinion). President Bush pocket vetoed this bill, but issued an Executive Order implementing most of its provisions. *President Vetoes Chinese Student Bill, Offers Administrative Relief Instead*, 66 INTERPRETER RELEASES 1313 (Dec. 4, 1989). *But see supra* note 121 (noting that the House of Representatives rejected an amendment which would have granted asylum to Chinese aliens).

population control measures in order to prevent a population explosion.<sup>139</sup> They think it is ridiculous for the United States to condemn a successful population control policy while simultaneously advocating international population control.<sup>140</sup> They contend that the United States should not impose its notion of fundamental rights on China and condemn China's population control methods through grants of asylum to population control policy opponents.<sup>141</sup>

This argument ignores the nature and purpose of asylum. Asylum is intended to protect aliens from persecution.<sup>142</sup> Whenever the United States grants asylum to an alien, it is condemning another country's actions. In essence, by granting asylum, the United States is saying that a government is persecuting its citizen for one of five unacceptable grounds,<sup>143</sup> and that therefore an otherwise deportable alien can remain in the United States.

The United States, not China, must determine when asylum is appropriate. The United States should base this decision on international norms and U.S. views of the nature and scope of fundamental rights. If asylum opponents were to prevail and the country from which an asylum applicant fled were permitted to define "persecution", asylum would become meaningless. The United States would have to reject every asylum application unless a government acknowledged that it was persecuting its citizens.

Second, opponents to granting asylum to Chinese aliens argue that the Chinese government imposes extremely harsh punishments for all types of offenses. They contend that, under Chinese law, forced abortion and involuntary sterilization are no more severe than punishments imposed for other "crimes"<sup>144</sup> and that therefore they should not be grounds for asylum. This argument is disingenuous. The fact that China treats many criminals severely does not reduce the harshness of the punishment

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139. Paul R. Ehrlich, *Overpopulating The Planet Isn't a Human Right*, NEWSDAY, Jan. 25, 1994, at 40.

140. *Id.*

141. *Id.* This position is also supported by pro-trade interests who believe that China's Most Favored Nation trading status should not be tied to its human rights record.

142. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (1988).

143. *Id.* These five grounds are race, religion, nationality, membership in a particular social group, and political opinion.

144. Punishments imposed by Chinese law are generally much more severe than those imposed in the United States. See, e.g., Lena H. Sun, *China's Executioners: A Punishing Schedule; Four Killings a Day, on Average, Set a Quick Pace for Death Row*, WASH. POST, Mar. 27, 1994, at A1 (noting that China executes criminals when other countries would merely fine or imprison them).

imposed on violators of the population control policy.<sup>145</sup> Few in the United States would contend that a forced abortion or involuntary sterilization is not a severe form of punishment, or that this type of punishment would be acceptable in the United States.

The United States should examine the punishments China imposes for violation of the population control policy to determine if they are persecutive. This examination should be governed by U.S. norms and international standards, rather than the punishments that China imposes for other offenses.<sup>146</sup> The United States should not condemn China's attempts to limit its population through a general indictment of China's population control policy.<sup>147</sup> But the United States should condemn those specific coercive population control measures used by China to enforce its population quotas which violate a person's fundamental rights.<sup>148</sup> The most effective way to condemn these measures is to grant asylum to victims of coercion.

For example, Chinese officials impose various sanctions upon violators of the population control policy. These sanctions range from minor fines and reduced benefits to involuntary sterilization and forced abortions.<sup>149</sup> Under U.S. conceptions of fundamental rights, forced abortions and involuntary sterilization are persecution,<sup>150</sup> while fines<sup>151</sup> and the denial of benefits are not.

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145. In fact, this argument supports granting asylum to victims of coercive population control because it demonstrates China's willingness to mistreat its citizens.

146. Otherwise, China could prevent asylum eligibility within the United States by increasing punishment imposed for other crimes. In effect the punishment for violating population control policy would then seem minor in comparison.

147. In fact, the Clinton Administration is attempting to link foreign aid to population control measures. Reifenberg, *supra* note 10, at 1J.

148. This paper does not condemn the use of abortions as a birth control technique. It simply argues that *forced* abortions are not an acceptable means of population control and should be condemned by the United States.

149. Weisskopf, *supra* note 3, at A1.

150. Both forced abortions and involuntary sterilization violate U.S. notions of fundamental rights, hence they are persecution for purposes of U.S. asylum law. *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Roe v. Wade, 410 U.S. 113, 154 (1973); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

151. This Article disagrees with Mr. Rees on this point. Mr. Rees contends that substantial fines can be persecutive and that they should be grounds for asylum in some cases. Interview, *supra* note 21. However, this Article argues that fines are not persecution, even if they are severe. Persecution should be defined with reference to international norms and U.S. conceptions of fundamental rights. In the United States fines are not considered a violation of a person's liberty whereas forced abortions or involuntary sterilization do constitute such a violation.

Therefore, where local Chinese officials use coercive punishment to compel compliance with the “one couple, one child” policy, asylum applicants from those regions should be eligible for asylum.<sup>152</sup> If different provinces within China apply different population control methods, credible applicants from one province may be entitled to asylum while those from another province might not.<sup>153</sup> The use of different policies in different regions enables the United States to condemn specific coercive population control techniques without condemning China’s entire population control policy. This allows the United States to grant asylum to persecuted Chinese and argue for world population control without appearing hypocritical.

Additionally, Chinese citizens fleeing coercive population control measures should be eligible for asylum in the United States because they flee from persecution based on political opinion. According to asylum law, applicants must show that the Chinese government has persecuted them and that this persecution was on account of a political opinion. Most violators of the population control policy oppose the policy because they want to have more than one child, not because they disagree with the government politically or with population control in general.<sup>154</sup> However, these applicants can still demonstrate that they are being persecuted on account of a political opinion by showing that the Chinese government imputed a political opinion to them.<sup>155</sup>

In China, forced abortions and involuntary sterilization are imposed by the government when a family attempts to have more than one child, regardless of whether members of that family have publicly condemned the policy.<sup>156</sup> The Chinese government views opposition to their population control policy as political sedition.<sup>157</sup> They consider all

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152. In a centralized state like China, ideological guidance frequently comes from the central authorities while implementation of a policy occurs on a local level. *1993 Report, supra* note 48. This leads to a situation where the same ideological policy can be implemented differently in different areas. For that reason, some regions of China persecute violators of the population control policy while other areas do not.

153. The BIA requires an applicant to show that they face country-wide, rather than localized persecution. *In re R-*, Interim Dec. 3195 (BIA 1992). Therefore, the BIA might respond to the fact that different provinces use different population control methods by applying this rule and denying asylum to all Chinese applicants.

154. Weisskopf, *supra* note 3, at A1.

155. This Article contends that the doctrine of imputed political opinion is still a valid basis for asylum even after the Supreme Court’s decision in *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). See, e.g., Craig A. Fielden, *Persecution on Account of Political Opinion: “Refugee” Status After INS v. Elias-Zacarias*, 112 S.Ct. 812 (1992), 67 WASH. L. REV. 959 (arguing that imputed political opinion is still a valid basis for asylum).

156. Weisskopf, *supra* note 3, at A20.

157. See, e.g., Legal Opinion, *supra* note 20; *Resistance to the PRC Population Control Policy as Political Dissent*, read into Congressional record at Senator Helms’

opposition to this policy seditious, even if it is merely an attempt to have more than one child.<sup>158</sup>

Therefore, the Chinese government is essentially imputing a political opinion to violators of the population control policy and persecuting them for this opinion. Consequently, aliens fleeing China's coercive population control policy qualify for asylum in the United States. This does not mean that all Chinese who wish to have more than one child are entitled to asylum in the United States. In each case, the immigration judge must assess an alien's background and any corroborating evidence to determine if a particular applicant is eligible for asylum.

When the Chinese government has already forced an asylum applicant or their spouse to undergo sterilization or an abortion, an applicant can show that they have been persecuted and the immigration judge's job of determining asylum eligibility is relatively easy.<sup>159</sup> However, when an applicant bases their asylum claim on a reasonable fear of persecution, rather than actual past persecution, the immigration judge's job becomes more difficult. If the judge believes that the applicant's story is credible and their fear of persecution is reasonable,<sup>160</sup> the applicant should be eligible for asylum.<sup>161</sup>

request, 140 Cong. Rec. S492-01 (Feb. 1, 1994) (daily ed. Feb. 1, 1994) (statement of Sen. Helms). Both documents quote statements by Chinese officials indicating that violation of the population control policy is considered political opposition.

158. Legal Opinion, *supra* note 20. By contrast, if another country adopted a coercive population control policy, but did not consider opposition to its policy a political opinion, victims of that country's persecution would not be eligible for asylum in the United States because they would not be able to meet the statutory definition of refugee. However, to date, China is the only country that systematically uses involuntary sterilization and forced abortions to limit its population growth.

159. *In re Chen*, Interim Dec. 3104 (BIA 1989) (noting that asylum applicants who can prove past persecution are statutorily eligible for asylum and that past persecution creates a rebuttable assumption of future persecution). *But see In re H-M*, Interim Dec. 3204 (BIA 1993) (if an asylum application is based on past persecution and the BIA can demonstrate that there is little likelihood of future persecution, the applicant is not eligible for asylum).

160. An alien has a well founded fear of persecution if a reasonable person in the same circumstances would have such a fear. *Sotelo-Aquije v. Slattery*, 17 F.3d 33 (2d Cir. 1994). The asylum applicant bears the burden of proving that they are eligible for asylum. *Matter of Dass*, Interim Dec. 3122 (BIA 1989). Therefore, if the applicant's story and the corroborating evidence he or she presents convince the immigration judge that the applicant's fear is reasonable, they are eligible for asylum.

161. *In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). One immigration judge has granted asylum to Chinese fleeing coercive population control measures. *See McFadden*, *supra* note 28.

However, careful attention must be paid to the applicant's credibility. In each case, the immigration judge must establish that the applicant is credible.<sup>162</sup> In this regard, the judge must consider the veracity of the applicant's story.<sup>163</sup> Because many of these aliens tell similar or even identical uncorroborated stories,<sup>164</sup> opponents to granting asylum to Chinese aliens contend that these stories are fabricated to fit within U.S. asylum law.<sup>165</sup>

Fabrication undoubtedly occurs in some cases, but occasional abuse of the system does not justify denying asylum to applicants with credible stories who otherwise meet the criteria for asylum. Nor does it justify rejecting a credible applicant's claim merely because the only external support for their claims are general information about China's population control practices.<sup>166</sup>

Therefore, when assessing an applicant's credibility, the immigration judge should consider the applicant's testimony and any evidence which supports this testimony.<sup>167</sup> If the alien is from a province with a history of persecution, then more supporting evidence will probably be available.<sup>168</sup> If they are from a province where forced abortions or involuntary sterilization are unusual, then it may be more difficult for them to offer evidence supporting their story.

In every case, the immigration judge should ask: has an asylum applicant shown that they have been persecuted or do they reasonably believe that the government will subject them to involuntary sterilization

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162. *In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). Here again, the alien bears the burden of proof. *In re Acosta*, 19 I. & N. Dec. 211 (BIA 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

163. *Huaman-Cornelio v. BIA*, 979 F.2d 995 (4th Cir. 1992).

164. Seth Faison, *U.S. Tightens Asylum Rules For Chinese*, N.Y. TIMES, September 5, 1993, at 45.

165. Marcus Stern, *Disparities on Chinese Asylum Arise*, SAN DIEGO UNION TRIB., Jan. 7, 1994, at A1.

166. *In re Chang*, Interim Dec. 3107, 15-16 (BIA 1989).

167. *Id.*

168. In the abstract, it is difficult to quantify exactly how much evidence of local persecution an alien must produce before they are eligible for asylum. The immigration judge must consider the alien's story and any corroborating evidence the alien produces before deciding whether the alien has a reasonable fear of persecution. In some cases, the alien's testimony alone will convince the immigration judge that the alien is eligible for asylum. *See, e.g., Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984). In other cases, especially when the alien's claims are fairly general, corroborating evidence may be required. *In re Dass*, Interim Dec. 3122 (BIA 1989).

If an asylum applicant can show that local officials regularly impose abortions and sterilization, then their fear of persecution would probably be reasonable. Conversely, if external evidence shows that local officials in one area rarely utilize coercive population control measures, the asylum applicant would have to show particular reasons why their fear of persecution was reasonable.



or force them to have an abortion? If the answer is yes, the alien should be statutorily eligible for asylum.

#### CONCLUSION

The asylum provisions established by the Refugee Act of 1980 are intended to provide protection to aliens who have been persecuted or who will be persecuted on account of one of five statutory grounds.<sup>169</sup> "Persecution" for purposes of U.S. asylum law is, and should be, defined according to international norms and U.S. notions of fundamental rights and freedoms. According to both of these sources, the right to bodily integrity is a fundamental right.

Overpopulated countries like China need to control their population growth, but they should not abuse their population while doing so. Forcing abortions and involuntary sterilization on people because they want to have more than one child is persecution. Furthermore, since the Chinese government imputes a political opinion to violators of China's population control policy, these individuals are suffering persecution based on their political opinions. Aliens who flee China's coercive population control policy are therefore eligible for asylum under current U.S. law. Thus, once the alien has cleared the "credibility" hurdle, the United States should grant asylum to those Chinese citizens fleeing China because of a reasonable fear of forced abortion or involuntary sterilization.

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169. See *supra* note 71 and accompanying text. Again, these five grounds are race, religion, nationality, membership in a particular social group, or political opinion.

