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## United States Domestic Policies and Chinese Immigrants: Where Should Judges Draw the Lines When Granting Political Asylum

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# UNITED STATES DOMESTIC POLICIES AND CHINESE IMMIGRANTS: WHERE SHOULD JUDGES DRAW THE LINE WHEN GRANTING POLITICAL ASYLUM?

Karen Y. Crabbs

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The United States, a land first settled by immigrants, has long been a friend to aliens who seek asylum due to threat of persecution.<sup>1</sup>

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1. Carol Wilson, Note, *Well-Founded Fear of Persecution—The Standard of Proof in Political Asylum Resolved, or Is It?: INS v. Cardoza-Fonseca*, 22 U.S.F. L. REV. 385 (1988). The United States accepts more immigrants than any other country in the world. During the 1980s, approximately 6.3 million immigrants were accepted. The number has risen steadily each year and reached 1.1 million in 1989. Peter H. Schuck, *The Emerging Political Consensus on Immigration Law*, 5 GEO. IMMIGR. L.J. 1, 4 (1991). There is every sign that these numbers will continue to grow, particularly in light of the U.S. government's spending on immigrants. In 1991, for example, the budget for immigrants rose by \$90 million over 1990's budget. *Refugee Program Consultations: Hearings of the Immigration and Refugee Subcommittee of the Senate Banking Committee*, Fed. News Service, Sept. 24, 1991, available in LEXIS, Nexis Library, FedNew File (statement of Lawrence Eagleburger, Deputy Secretary of State). But see Mark Gibney, *United States Immigration Policy and the "Huddled Masses" Myth*, 36 GEO. IMMIGR. L.J. 361 (1989), who argues that the number of immigrants to the United States, especially those from Asia, is steadily decreasing.

Many Americans see asylum as a necessary safeguard to protect international human rights.<sup>2</sup> However, for federal immigration judges to allow all applicants for asylum to remain in the United States would be politically and economically impossible.<sup>3</sup> Therefore, there must be priorities and guidelines established by the legislative and executive branches in order for the judiciary to determine who may stay.<sup>4</sup> In this respect, Congress has determined that an applicant must establish "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>5</sup>

Notwithstanding the new standard,<sup>6</sup> it must be kept in mind that any definition given to the word "persecution" will depend on current U.S. domestic and international policy. A recent example of this is China.<sup>7</sup> Prior to 1989, Chinese immigrants claiming persecution on the grounds that they would be forced to have an abortion or be sterilized

2. Leonard B. Sutton, *Political Asylum and Other Concerns: Some Reflections on the World, Yesterday and Today*, 19 DENV. J. INT'L L. & POL'Y 475, 479 (1991).

3. Schuck, *supra* note 1, at 2. For political reasons, a country which grants foreigners asylum must be careful that such action does not appear too judgmental and thus undermine international relations with the country from which the applicants are fleeing. Richard Falk, *Accountability, Asylum, and Sanctuary: Challenging Our Political and Legal Imagination*, 16 DENV. J. INT'L L. & POL'Y 199, 205 (1988). A country must be careful when granting immigrants asylum for economic reasons as well. Many American economists advocate an extremely selective policy of asylum determination. They view incoming immigrants simply as possible moneymakers or moneytakers. If we take the former, we will enrich our country; but if we choose the latter, we end up a poorer nation because the immigrant will subtract value from our country. Schuck, *supra* note 1, at 3. Other arguments for limiting immigration into the United States include the effect the additional population would have on the environment or on unemployment and other social problems. At the current rate of birth but *without* large-scale immigration, the United States could maintain a stable population. Richard J. Higgins, *Keep Sentiment Out of Immigration Policy*, LEGAL TIMES, Sept. 11, 1989, at 26.

4. Schuck, *supra* note 1, at 2.

5. 8 U.S.C. § 101(a)(42)(A) (1988) (defining refugee). This standard was first made applicable to asylum seekers in the case of *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

6. For a history of the standard of proof used prior to this determination, see Elaine Moyer Whitford, *Immigration and Naturalization Service v. Cardoza-Fonseca: The Last Word on the Standard of Proof for Asylum Proceedings?*, 13 N.C.J. INT'L & COM. REG. 171 (1988).

7. See *infra* notes 117-32 and accompanying text. In 1989, the top ten countries whose nationals were given asylum by the United States were Mexico, El Salvador, The Philippines, Vietnam, Korea, China, India, the Dominican Republic, Jamaica, and Iran. Schuck, *supra* note 1, at 6. Aliens coming from communist countries need show much less proof of persecution in order to be granted asylum than persons from non-communist countries, with which the United States maintains friendly contacts. Wilson, *supra* note 1, at 423. In addition to international political ties with the alien's country, another factor affecting grants of asylum is the United States government's domestic policy on abortion. The Bush Administration, which advocated the right-to-life, opposed China's coercive family-planning policy, and, even were the latter not coercive, it would be opposed to the wide-spread use of abortion as a birth control device.

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

were not automatically granted protection.<sup>8</sup> However, the massacre in Tiananmen Square (June 1989) brought China's coercive methods to the United States' attention.<sup>9</sup> As a result of this heightened awareness, President George Bush signed an executive order on April 11, 1990, which provided "for 'enhanced consideration'. . . for individuals from any country who express a fear of persecution upon returning to their country related to its policy of forced abortion or coerced sterilization."<sup>10</sup>

The Bush administration unfortunately did not establish specific guidelines for the definition of "enhanced consideration." Following President Bush's order, however, the Office of the General Council of the INS issued a memorandum on asylum requests from parties claiming persecution based upon coercive family planning policies.<sup>11</sup> This

8. See *Matter of Chang*, Interim Dec. No. 3107 (BIA 1989), reported in 66 Interp. Rel. 751 (July 10, 1989). In May 1989, Chang, a Chinese citizen, pleaded not to be deported on the grounds that the Chinese government would force him to undergo sterilization upon his return to China. The Board of Immigration Appeals denied his request because he did not meet his burden of proof of establishing a "well-founded fear of persecution" on the basis of race, religion, national origin, political opinion, or membership in a particular social group. The court stated that the Chinese government "used only economic incentives and birth control education but forbids coercive techniques." These types of "nondiscriminatory" birth control methods did not constitute persecution. E. Tobin Shiers, *Coercive Population Control Policies: An Illustration of the Need for a Conscientious Objector Provision for Asylum Seekers*, 13 IMMIGR. & NATIONALITY L. REV. 476, 476-77 (1991).

9. Shiers, *supra* note 8, at 478.

10. Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 84 AM. J. INT'L L. 724, 724-25 (1990). In response to President Bush's executive order, the INS amended its regulations in January of 1990 to include President Bush's order, although the overall revision of asylum laws, effective October 1, 1990, does not include this new rule. This would mean that *Matter of Chang*, 66 Interp. Rel. at 751, is still good law. It has been argued, however, that the exclusion of the new rule in the October revisions, along with "the intent of the President's directive," requires federal immigration judges to grant asylum in cases of parties who face forced sterilization or abortion in China. 6 IMMIGRATION LAW AND PROCEDURE § 138.05[1] (Gittel Gordon & Charles Gordon eds., 1992).

11. Memorandum from Grover Joseph Rees III, Office of the General Council of the INS, to Regional Counsel and District Counsel on "Asylum requests based upon coercive family planning policies" 1 (Nov. 7, 1991) [hereinafter Memorandum]. The second paragraph of the memorandum states:

Pursuant to this Department and INS policy, the INS will regard an applicant for asylum (and the applicant's spouse, if also an applicant) to have established presumptive eligibility for asylum on the basis of past persecution on account of political opinion if the applicant establishes that, pursuant to the implementation by the country of the applicant's nationality of a family planning policy that includes forced abortion or coerced sterilization, the applicant has been forced to abort a pregnancy or to undergo involuntary sterilization or has been persecuted for failure or refusal to do so.

article does provide some guidelines by which to determine whether an asylum applicant has a legitimate fear of persecution,<sup>12</sup> but many judges are still unsure how to determine an applicant's credibility<sup>13</sup> and what questions to ask in order to elicit pertinent information.<sup>14</sup> The problem is exacerbated by the fact that the Chinese family-planning policy of one child per family is not uniformly applied, with noticeable differences in rural versus urban settings and in its application to men versus women.<sup>15</sup>

This article will discuss the history of China's family planning policy, including an analysis of the present rewards and penalties used to implement that policy. Following will be a section on United States immigration policy and which domestic and international issues influence it. Finally, the problems faced by U.S. immigration judges in implementing the government's newly promulgated policies will be reviewed, with special attention to the factors which judges may look at when attempting to make a fair and rational decision in asylum cases.

## I. CHINA'S FAMILY PLANNING POLICY

With the largest population of any country in the world since the third century B.C., China recently became the first country to reach the 1 billion mark in population.<sup>16</sup> This is due mainly to a decrease in the mortality rate coupled with a high fertility rate, both of which emerged in the 1950s and 1960s.<sup>17</sup> The average birthrate per woman

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12. See discussion *infra* part II.

13. An applicant for political asylum often has only his or her own testimony to offer as evidence of persecution, and for this reason his or her credibility is of the essence in determining whether to grant asylum. Wilson, *supra* note 1, at 420.

14. At the time of this writing, I was working as a law clerk for the Federal Department of Immigration in Los Angeles. I was assigned this research project by all of the judges in the department.

15. See discussion *infra* Part I.

16. Erika Platte, *China's Fertility Transition: The One-Child Campaign*, 57 PAC. AFF. 646 (1984). In 1982, China's population, excluding Taiwan, Hong Kong and Macao, was reported in a national census to be 1,008,175,288. *Id.* Since then, it has continued to grow. The country coming closest to China's record is India, which may displace China as the world's most populous country by the beginning of the next century, according to a new study by the Population Crisis Committee. Like China, India actively promotes sterilization as a method of birth control but, in contrast to China, it does not promote any other forms of contraception nor does it provide the same incentives to use them. In fact, only 45% of Indian couples use contraception. *World News*, STAR TRIB., Sept. 14, 1992, at 4A.

17. Judith Banister, *Population Policy and Trends in China, 1978-83*, 100 CHINA Q. 717 (1984). The low mortality rate can be attributed to "cessation of warfare, more equitable distri-

was 5.87 during the 1950s and 5.68 in the 1960s.<sup>18</sup> Faced with possible starvation as well as lack of social<sup>19</sup> and economic growth, the Chinese government implemented a strict family planning policy in January of 1979, which (1) limited each couple, with some exceptions,<sup>20</sup> to one child and (2) asked that couples marry later.<sup>21</sup> The government con-

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tribution of land and food, programmes of epidemic disease control, and the retraining of most midwives in sterile childbirth methods." *Id.* The high fertility rate is due to a baby boom that followed the war and famine of the 1950s and 1960s. Related to these factors is a lower rate of widowhood and more stable economic conditions. *Id.* at 718.

18. Platte, *supra* note 16, at 647.

19. While the "quantitative reason" for limiting China's population has received world-wide attention, there is also a "qualitative reason" which has received less attention. Wong Siu-Iun, *Consequences of China's New Population Policy*, 98 CHINA Q. 220, 223 (1984). A policy of having "healthy" children only or eugenics was also instigated by the government along with the one-child policy. *Id.* The government's goal was to decrease the number of people in China who have congenital defects including "schizophrenics, 'idiots,' and the physically deformed." *Id.* In 1981, it was estimated that there were over 10 million children in China having such defects. *Id.* To prevent any further "burden" by these people on Chinese society, various prohibitive measures were adopted in a marriage law enacted on January 1, 1981. *Id.* at 223-24. For example, "lineal relatives and collateral relatives within the third degree of relationship (i.e., persons with common paternal or maternal grandparents) [were] prohibited from marrying each other, presumably because of the possible harmful genetic effects." *Id.* at 224. Those who suffered from mental retardation were not allowed to have children at all. *Id.* In its attempt to rectify the growing problem of disabled people, the Chinese government, in effect, may have only increased other problems in China such as racial prejudice and discrimination against the disabled, which has long been a problem anyway. Furthermore, the laws make no mention of what constitutes an "idiot" or where the dividing line should be. *Id.* at 230. Since there is little literature on this subject, it is difficult to gauge the outcome of such laws and practices. *Id.* at 230-31.

20. Platte, *supra* note 16, at 650; see *infra* notes 101-05 and accompanying text.

21. Susan Greenhalgh, *The Evolution of the One-Child Policy in Shaanxi, 1979-88*, 122 CHINA Q. 191, 211 (1990). China's family-planning slogan in 1981 was "wanhun, wanyu, shaosheng, yousheng" or "late marriage, late childbearing, few births and eugenic births." *Id.* The main reason for this policy is that China was facing a serious shortage of grain which could result in starvation of millions. Sue Bigelow, *Agriculture Reaching Crisis Point*, CHINA REV., Aug. 1989, at 20, 23. According to Vice Premier Tian Jiyun, China's population grows approximately 4 to 5 million but the amount of arable land decreases by an average of 300,000-400,000 ha each year (1 hectare is approximately equal to 2.47 acres). *Concern Grows as Population Reaches 1.1 Billion*, CHINA REV., Mar. 1989, at 19. This is due in large part to new homes being built, rural industry, and cemeteries which have been built on farmland. In addition, grain production declined by 2.2% in 1989 due to natural disasters, poor conservation, and pests. Bigelow, *supra*. The population boom in rural areas is a result of the government's early solution to the population explosion, which consisted of simply moving urban families into the country in an attempt to spread the population out. Banister, *supra* note 17, at 718.

The shortage of grain coupled with the threat of starvation has not, however, stopped the Chinese from using billions of kilograms of grain to make alcohol. Despite federal government attempts to curtail production by raising taxes on distilleries by 50%, over 50 billion liters of

tinues to maintain that the policy is a temporary one<sup>22</sup> and, while never repealing the rule, enforcement of the policy by the government has been desultory.<sup>23</sup> The policy is maintained through a system of

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alcohol were produced in 1989. It is estimated that the Chinese consume an average of 10 kg of alcohol per year, which makes China the world's top alcohol-consuming country, exceeding even Russia. Distilleries refuse to use non-grain alcohol producing methods because of the tremendous profits which can be made. They actually encounter very little governmental interference other than the tax hikes, since the local governments, which enjoy the increased revenue which the taxes bring in, tend to encourage the distilleries. *China Goes on Booze*, CHINA REV., Mar. 1989, at 25.

Another consequence of the grain shortage is that many Chinese men are temporarily moving to Russia, where work is plentiful and the wages are double what the Chinese would earn in China. In Russia, there are many job openings for unskilled workers, which the Chinese are only too eager to take. In September of this year, there were already 13,000 Chinese laborers in Russia, and the number is growing. David Holley, *In Russia's Far East, Chinese Are Building on Cooperation*, L.A. TIMES, Nov. 24, 1992, at 1, 4.

22. Platte, *supra* note 16, at 648.

23. Wong, *supra* note 19, at 220. Many modern Chinese historians have characterized China's family planning policy as "cyclical" in nature, due to the highs and lows it has experienced in enforcement by the government. Shiers, *supra* note 8, at 484; see also Greenhalgh, *supra* note 21, at 193-94. This was a result of who was in power at the time and also of the advances or setbacks in population control which had been made in the directly preceding years. The cyclical theory argues that the national government puts pressure on the local cadres to enforce its unpopular birth control policy until opposition becomes extreme. The government then eases enforcement until the population relaxes, only to begin to tighten the reigns once again when there is an increase in births. Greenhalgh, *supra* note 21, at 193. The first two birth control campaigns during the years of 1956-58 and 1962-66 were largely unsuccessful. This was because the leaders, in particular Mao, did not view high population as a real problem. In fact, the main justification given for family planning at that time was not population control but rather concern for the mother's and unborn child's health. Emphasis was placed primarily on promoting late marriages. 1 INTERNATIONAL ENCYCLOPEDIA OF POPULATION 91 (John A. Ross ed. 1982). Even the third, more vigorously waged campaign which began in the early 1970s was not fought with the intensity of the "fourth campaign" which began in the 1980s and which has increased in intensity off and on since then. Wong, *supra* note 19, at 220. The main reason for the government's new and more vigorous attack was its increasing awareness of a severe grain shortage. INTERNATIONAL ENCYCLOPEDIA OF POPULATION, *supra*, at 91. For example, 1979 was the first year that the government announced its goal of disallowing the population growth which had been the basic assumption of previous regimes. Wong, *supra* note 19, at 220. The program now became much more compulsory. Banister, *supra* note 17. The vice-governor of Guangdong province was questioned in 1983 on implementation of the new policy and responded as follows:

The technical policy on birth control was formulated by the State Family Planning Commission with the approval of the leadership of the Party Central. Its principal content is: "Those women who have already given birth to one child must be fitted with IUDs, and couples who already have two children *must* undergo sterilization by either the husband or the wife. Women pregnant outside the plan *must* adopt remedial measures [induced abortion] as soon as possible." This is based on the directives of the CCP Central Committee and the State Council and on the summation of family planning practice for many years. . . . The State stipulates that *under no circumstances* may a third child be born. *Sterilization for either party*,

penalties and rewards, some mandatory and some not, which have changed over the years.<sup>24</sup>

Of the penalties used, Chinese immigrants have increasingly cited forced abortion and sterilization when arguing their case for asylum.<sup>25</sup> While the central government of China states that it does not condone the use of coercive methods of birth control and has a respect for human rights in general,<sup>26</sup> there is evidence that local governments

*husband or wife, of those couples with two children is the most effective measure to eliminate excessive numbers of births.*

*Id.* at 727-28 (emphasis added). This "stepped-up" policy had profound effects. In the first month of 1983 alone, there were over 3.58 million sterilizations nationwide in China. *Id.* at 728. There were also over 3.25 million IUD insertions and over 1.7 million abortions. *Id.* The ultimate objective of the government was to limit the total population to less than 1.2 billion by the year 2000. INTERNATIONAL ENCYCLOPEDIA OF POPULATION, *supra*, at 91.

Since 1983, the cyclical aspect of China's birth control methods has continued. From 1984 to 1986, the policy was relaxed, but was again tightened in 1987, 1988 and early 1989. In Guangdong province, Vice Governor Ling Botang announced certain additional family planning policies for 1987. This included the statement that "[t]hose who violate the stipulations on family planning, no matter who and how high their official ranks are, will be seriously dealt with." 14 ANNUAL REVIEW OF POPULATION LAW, 1987, at 11 (Reed Boland & Jan Stepan eds., 1990). The stringency of the policy has continued into 1991 and possibly 1992, due to ongoing population growth. David R. Schweisberg, Proprietary to the United Press International, Dec. 8, 1991, available in LEXIS, Nexis Library, Omni File.

24. Greenhalgh, *supra* note 21, at 214.

25. Ninety percent of all Chinese immigrants in Los Angeles are requesting asylum based on China's coercive family planning tactics. Interview with Judge Bruce Einhorn, Federal Immigration Judge, in Los Angeles, California (Sept. 22, 1992). Approximately 25,000 Asians have entered the United States in the past few years. One way in which they get here is by paying large amounts of money to Chinese-American gangs, who make arrangements for them to be picked up in Hong Kong. They are then transported in commercial ships, usually Taiwanese fishing boats, to Central America, and from there, they eventually obtain passage to the United States. Barbara Crossette, *Vessel Puts 150 Asian Migrants Ashore in Haiti*, N.Y. TIMES, Aug. 18, 1992, at A3. The Chinese government naturally seeks to prevent immigration of Chinese who are fleeing the one-child policy and thus has restricted contacts between residents and foreigners temporarily living in China. The compounds where foreign diplomats, business people, and journalists live are heavily monitored with cameras, which are conspicuously placed in elevators and other areas. HOUSE COMM. ON FOREIGN AFFAIRS & SENATE COMM. ON FOREIGN RELATIONS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991, 102d Cong., 2d Sess. 809, 817 (1992) [hereinafter COUNTRY REPORTS].

26. COUNTRY REPORTS, *supra* note 25, at 810. There is very little evidence available on recent human rights violations in China. There were no documented political killings or cases of disappearance in 1991. However, the Chinese government has yet to account for demonstrators in the Tiananmen Square uprising of 1989. In addition, there is evidence that people who have been imprisoned or detained, especially those held in the "shelter and investigation centers" have been tortured and continue to be abused. The government has not released any information on its investigation of these incidents but the Chief Procurator revealed that 472 cases of confession obtained by torture were reported in 1990. This does not, of course, provide any idea of how many cases of abuse went unreported, and there is little evidence that any of the abusers were ever punished for their use of illegal power. *Id.*

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practice coercive birth control techniques with different degrees and frequency.<sup>27</sup> Whether a person is subjected only to minor forms of coercion (i.e., economic penalties) or to more "persuasive" techniques and is thus a victim of persecution and eligible for asylum will depend on a host of factors discussed below.

### A. Government Methods of Enforcement

The Chinese Communist Party (CCP), the only political party in China, maintains its political control in two ways: (1) through its "nationwide security network"<sup>28</sup> and (2) through China's "traditional social pressure."<sup>29</sup> The former, which will be discussed first, includes a State Family Planning Commission (est. 1981) which sets out national standards and goals for birth control.<sup>30</sup> On the other hand, the actual hands-on implementation of these standards is carried out by local governments, which accounts for the inconsistency both in violations of the policy by Chinese citizens and in the type of enforcement, i.e., persuasion versus coercion, used by the cadres in charge of the local population.<sup>31</sup>

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27. Jim Mann, *Ruling Could Allow More Chinese to Enter U.S.*, L.A. TIMES, Feb. 4, 1989, at 18. According to the congressional report on human rights practices for 1991, Chinese officials admit in private that some forced abortions and sterilizations still do occur in "remote, rural areas" but that the number of such occurrences has dropped significantly since the 1980s, when the practice was more prevalent. COUNTRY REPORTS, *supra* note 25, at 818. Despite its assertions that it is against such coercive practices, the Chinese government also does nothing to prevent local officials from engaging in such practices. *Id.* at 819. Its reasoning is "a bureaucratic disinclination to punish those doing the difficult, socially unpopular but economically necessary task of enforcing national population policy." *Id.* at 818-19.

28. This network includes "the People's Liberation Army; the Ministry of State Security; the Ministry of Public Security; the People's Armed Police; and the state judicial, procuratorial, and penal systems." COUNTRY REPORTS, *supra* note 25, at 809.

29. *Id.*; see *infra* notes 106-16 and accompanying text.

30. INTERNATIONAL ENCYCLOPEDIA OF POPULATION, *supra* note 23, at 91.

31. COUNTRY REPORTS, *supra* note 25, at 818-19. Local authorities keep records on all of the comings and goings of their constituents. In fact, newcomers to a village or town are required to go to their local police department to register their residency. Dorothy J. Solinger, "Temporary Residence Certificate" Regulations in Wuhan, May 1983, 101 CHINA Q. 98, 99 (1985). Each household is also responsible for a "huji bu" or household registration book. Although the format varies, each book typically contains one page for each family member containing the "person's name, any alias, the birth date, occupation, place of work, family background, individual status, level of education, marital status, religion if any, and ancestral place of origin." The head of the household must keep this book up-to-date and also report any changes (i.e., deaths, births, etc.) to the local police station so that their records are also up-to-date. Any visitor to a local area must either register or stand the chance of being reported to the local police department. In this way, local officials can better prevent crime as well as keep track of women who are avoiding pregnancy termination. These books act as much more than a deterrent to criminal

## 1. Penalties and Rewards

The various types of penalties and rewards used by the Chinese government range from alleged physical force to simple persuasion and economic penalties. This range will be broken down into three levels with level one encompassing the most coercive methods, level two a middle-ground, and level three as the least coercive methods of enforcement.

### a. "Level One Coercion"

Each province in China is required to set regulations to meet the one-child goal set by the national government.<sup>32</sup> If, however, local officials show a serious pattern of high birth rate, the national government will step in. Thus how stringently the one-child goal is in fact carried out often depends on the individual province's past success.<sup>33</sup>

behavior, however. "Valid household registration is necessary for any urban resident who wishes to obtain a regular job, school admission at any level, housing, or rationed food and clothing." DEVIANCE AND SOCIAL CONTROL IN CHINESE SOCIETY 155 (Amy Auerbacher Wilson et al. eds., 1977).

32. Robert Pear, *Chinese Foes of One-Child Plan Get U.S. Asylum*, N.Y. TIMES, Aug. 6, 1988, at § 1, 5. Cadres, the local officials in charge of implementing the national family planning policy, are left mainly to their own discretion in determining what economic or disciplinary sanctions with which to enforce the policy. Greenhalgh, *supra* note 21, at 222-23. These officials are also required to act as an example to their local constituencies. *Id.* at 223. Rewards for proper behavior on the part of the cadres include promotions in "status," along with material rewards. *Id.* Likewise, officials are demoted and/or penalized economically when their areas do not meet national standards for birth control. *Id.* They also can be monetarily penalized for having a rate of abortion which is too high. *Id.* Thus, cadres must monitor both excess births and excess abortions in order to remain in favor with the UCP. COUNTRY REPORTS, *supra* note 25, at 819.

33. Sichuan and Shandong are examples of provinces which have met the national goals for birth control in the past. Whether this is a result of stricter measures employed by local officials or just a higher social conscience and/or stricter economic sanctions is not known. It would seem likely though that according to the cyclical theory (*see supra* note 23) any harsh measures used to achieve this success would thus cease. Likewise, in provinces like Guangdong, which did not meet their quota and which were targeted by the central government as problem areas, it would seem plausible that birth control methods would be "stepped-up." Platte, *supra* note 16, at 656. Thus in 1983, Guangdong's birth control laws were amended as follows:

[A] woman of childbearing age who has given birth to one child *must* take measures to use an intrauterine device, that a woman who has given birth to two children *must* take the sterilization measure, that a woman who is pregnant beyond the plan *must* take remedial measures and that many births are to be *resolutely* curbed.

*Id.* at 658 (emphasis added). As recent as 1990, evidence of forced abortions in Guangdong has been reported. *U.S.-Chinese Relations: Hearings Before the Subcomm. on East Asia of the Senate Comm. on Foreign Relations*, Fed. News Service, June 6, 1990, available in LEXIS, Nexis Library, FedNew File (statement of Steven Mosher, Director of the Asian Studies Center of the Claremont Institute).

For exactly this reason, wide discrepancies exist between the different provinces particularly in cases involving "level one coercion,"<sup>34</sup> namely forced abortions and sterilization,<sup>35</sup> and in some rare cases physical beating.<sup>36</sup>

The central government, while perhaps not condoning such measures, usually does not punish local officials who carry out such harsh penalties.<sup>37</sup> There are also no published statistics or reliable information on how often or where exactly such practices are carried out. But there do exist numerous *undocumented* horror stories of abortion methods used by Chinese doctors in order to prevent a woman from having a second or third child.<sup>38</sup> So-called midnight "abortion roundups" have been reported whereby sleeping Chinese women were rounded up to go to 24-hour abortion clinics.<sup>39</sup> Once there, doctors do whatever is necessary, no matter which stage of pregnancy, to terminate the fetus.<sup>40</sup> Women are then fitted with intrauterine devices (IUDs) as

34. This type of coercion is sometimes known as "mobilization." A woman who is forced to abort a child is thus "mobilized" to undergo an abortion. Wong, *supra* note 19, at 230.

35. Shiers, *supra* note 8, at 483. Tibet is an example of strict implementation of the family planning policy. One Tibetan doctor described "birth control teams" whose job included making trips to neighboring villages and performing abortions right there on the spot. The teams used lethal injections to kill the babies and then subsequently would sterilize the mothers. *Id.* Such "abortion excursions" have been reported as recently as last year. For example, in the southeastern Hunan province in Shaodong county, it was reported that family planning officials forced 21 village women to have an abortion. *Forced Abortions Used in China, Newspaper Says*, ATLANTA CONST., Nov. 14, 1991, at A13.

36. Melinda Jordan, *China's Open Abortion Policy*, TORONTO STAR, Oct. 17, 1991, at A27. Ningxia Legal News reported that ten couples in Jinshan village in the province of Sichuan were "ordered to strip bare and lie prone on the floor while beaten on the buttocks with a stick as many times as the number of days their wives had been pregnant." Eventually, the men surrendered to the government's "request" that they be sterilized. *Id.*

37. COUNTRY REPORTS, *supra* note 25, at 818-19.

38. Shiers, *supra* note 8, at 481. For an argument that China's birth control policy is fair, see *China Has Humane and Fair Birth Policy*, N.Y. TIMES, Sept. 15, 1988, at A34.

39. Shiers, *supra* note 8, at 481. The door of the clinic is apparently sometimes adorned with a red slip of paper with the words "yinchan sushe," or "abortion dormitory," on it. This is a somewhat macabre imitation of the Chinese New Year tradition of sticking red pieces of paper on the door with happy sayings on them. STEVEN W. MOSHER, *BROKEN EARTH: THE RURAL CHINESE* 224, 255 (1983).

40. Shiers, *supra* note 8, at 481. There have been reports that doctors use methods designed to kill babies during the actual birthing process. Doctors have been heard to say "the second child *cannot* come out alive." *Id.* (emphasis added). Steven Mosher, an expert on China who has lived there for many years, described the procedures at an abortion clinic as follows:

When a woman comes into the delivery room in labor, a doctor will wait until the child begins to descend in the birth canal [and] the cervix is fully dilated. . . .

[T]he child usually descends head first. [At this point, the doctor] will . . . take a

required by national regulations.<sup>41</sup> Once a woman is fitted with the IUD, she is neither told of the insertion nor allowed to remove the device.<sup>42</sup> Should a woman attempt to remove the device, it is likely that the Communist Youth League and Women's Federation, a national agency which requires information to be submitted on everyone's contraceptive practices, will discover such an attempt.<sup>43</sup> Once the Federation finds out that a woman has removed the IUD or is carrying an "unauthorized pregnancy," it dispatches party officials to "persuade" the woman either to reinsert the IUD or to abort the pregnancy, whatever the situation may require.<sup>44</sup> It has even been reported that

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hypodermic, . . . fill it with either alcohol or formaldehyde, and . . . inject that into the soft spot, the fontanelle, of the child's skull and that causes instantaneous death.

Jordan, *supra* note 36.

Dr. Lu Qi Chang, a doctor at a hospital run by Guangzhou military personnel, said: "An abortion can be done at any time from conception . . . . It can be done whatever the term of the pregnancy . . . . We permit it on demand." *Id.* The question is, of course, on demand from whom? Dr. Chang went on to describe the details of abortion procedures at his hospital which to Americans would probably, at a minimum, seem "unethical." For example, the aborted fetuses are first wrapped in newspaper and stored in a refrigerator. After several have been accumulated, they are buried. Dr. Chang explained that it would be too time-consuming if burial had to be arranged each time one fetus was aborted. *Id.*

A popular method used to abort fetuses in China is to inject a drug (which Dr. Chang refused to name) into a woman's amniotic fluid. The result is that the woman who has been injected goes through the normal child-birthing process, but her child is born dead. Dr. Chang admits that in rare cases the child is still alive but because its central nervous system has already been affected (i.e., the child is born mentally retarded), the family no longer wants it. This is particularly true if the family will only be allowed to have one child. *Id.* Another popular method of inducing abortion is by taking the drug RU486, the marketing of which was approved by the Chinese government in 1988. 15 ANNUAL REVIEW OF POPULATION LAW, 1988, at 30 (Reed Boland & Jan Stepan eds., 1991). RU486 causes the embryo to dislodge from the uterine wall and, when taken in conjunction with another drug, produces "uterine contractions," which eventually abort the embryo. Anne McIlroy, *Women Find 'In Control' Aspect a Big Plus for Abortion Pill*, VANCOUVER SUN, Nov. 20, 1992, at C2.

Abortions carried out during the final two trimesters of pregnancy are often highly sought after in the medical field. The fetuses are sometimes given to doctors "who [prize] them for their curative properties and [use] them as medicine." In fact, abortive methods which do not "poison the baby's entire system" are especially valuable since these fetus' are valued for the organs they provide. The truly horrific side of these cases, again by American standards, is that these fetus' must be born alive in order to be of value to the doctors. Thus the mother is given a laxative or a soap enema to induce premature contraction of the uterus. Jordan, *supra* note 36.

41. Shiers, *supra* note 8, at 481.

42. *Id.*

43. *Id.*

44. *Id.* at 481-82; see *infra* notes 58-77 and accompanying text (discussing persuasion (i.e., level 2 coercion)).

women have in some cases been imprisoned for the crime of "illegal IUD removal."<sup>45</sup> Even if the claims of the Chinese government are not valid, forced abortion and sterilization are not just things of the past; they still do occur.

A specific example of China's coercive family policy is the case of Li Jin Lin and his wife, Sai Zhen Wang, a couple from the rural town of Fuzhou.<sup>46</sup> Both Lin and his wife sought protection from past abuses due to China's family planning policies and were eventually granted political asylum in the United States. Currently, Li's wife is pregnant with her second child and fears that the Chinese government would force her to abort if she returned to China.<sup>47</sup> The couple stated that in the ten years since their first child, Li's wife has been forced to undergo four abortions.<sup>48</sup>

Su Xi Tu, a Chinese immigrant from rural Hua county in Canton, claims to be another victim of China's alleged coercive family planning practices.<sup>49</sup> Su and his wife, who is still in China, had two sons in the early 1970s.<sup>50</sup> In 1980, when local authorities began strictly enforcing the one-child rule, Su's wife was forced to abort their child and was ordered to wear an IUD.<sup>51</sup> This device made her ill, and authorities removed it, giving her birth control pills instead.<sup>52</sup> To avoid officials who came to abort the child, Su's wife "shimmied down bamboo poles and fled, waiting out her pregnancy in the safety of an aunt's village."<sup>53</sup> Su was demoted to a job as a farmer and had his salary withheld by the local authorities.<sup>54</sup> In addition, his electricity was cut off.<sup>55</sup> Unfor-

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45. Jordan, *supra* note 36. Many Chinese women attempt to keep their pregnancies a secret by telling only their families and avoiding the local midwife, who is sure to tell the local officials with whom she works. The women continue to work in the fields while wearing baggy clothing and binding up their stomachs so that their condition will not show. Those who are found out in their last months of pregnancy are still persuaded to have the abortion, particularly as most of them cannot afford the economic sanctions which will be levied against them if they go through with the pregnancy. MOSHER, *supra* note 39, at 259-60.

46. *Asylum for Chinese*, NEWSDAY, May 13, 1990, at 14.

47. Dick Usiak, *Asylum Granted in Forced Abortion Case*, Proprietary to the United Press International, May 31, 1990, available in LEXIS, Nexis Library, Omni File.

48. Dick Usiak, *Interview Held in Immigration Case on Forced Abortion*, Proprietary to the United Press International, May 22, 1990, available in LEXIS, Nexis Library, Omni File.

49. Alvarez, *supra* note 7.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

tunately, Su's wife snuck back into their village during the fourth month of her pregnancy for a Chinese holiday.<sup>56</sup> She was greeted by authorities who forced her to have an abortion.<sup>57</sup>

It is impossible to know the extent to which such acts of "level one coercion" occur in China; and while it is likely that others in China experience exactly the type of abuse described by Li and Su, there are probably even more who experience only the next two milder levels of coercion.

b. "Level Two Coercion"

Level two coercion could just as aptly be called "persuasion-turned-dirty." For this reason it is somewhat of a hybrid between level one and level three. While it is meant to persuade the people of China to comply with the one-child policy through use of economic and social sanctions and rewards (i.e., "level three coercion"), level two coercion can easily cross the line into true coercion (i.e., "level one coercion"). For example, Shen Guixiang, local director of publicity at the State Family Planning Commission, has stated that most women are *willing* to abort and, if they are not, "the local cadres come round to persuade them a little."<sup>58</sup> He continued, "Stubborn women who resisted the persuasion *had* to have the fetus removed at a later stage."<sup>59</sup> Once again, there are no statistics on how often this type of "cross-over coercion" occurs.

The case of Yun Pan Lee is an example where authorities did not cross the line into actual coercion but threatened to do so.<sup>60</sup> Lee testified at his asylum hearing that he was fined \$500 and was *asked* to have a vasectomy after his wife had their second child.<sup>61</sup> He was able to avoid the vasectomy by signing a letter stating that he would not have any more children.<sup>62</sup>

Probably the most vivid description of a level two type of coercion comes from Steven Mosher, author of "Broken Earth: The Rural Chinese."<sup>63</sup> Mosher was able to live for some time in Guangdong pro-

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56. *Id.*

57. *Id.*

58. Jordan, *supra* note 36.

59. *Id.* (emphasis added).

60. Mann, *supra* note 27, at 18.

61. *Id.*

62. *Id.*

63. MOSHER, *supra* note 39, at 224. Steven Mosher, an anthropologist and Sinologist, was able to study in Guangdong in 1979 and 1980. Due to his revelations about China, he was condemned and denounced by the Beijing government as a "foreign spy."

vince. While there, he attended a "family planning meeting" for all women who were pregnant with their third child or who had their first child within the last four years.<sup>64</sup> He describes how eighteen women, red-eyed from lack of sleep and crying, were at first lectured about the importance of family planning in China and then were "reasoned with" by a party official.<sup>65</sup> When one of the women mentioned the Communist Party to her neighbor, the official became hostile and said, "None of you has any choice in this matter . . . . The two of you who are eight or nine months pregnant will have a caesarean; the rest of you will have a shot which will cause you to abort."<sup>66</sup>

This statement affected several of the women, who started crying again.<sup>67</sup> The officials allowed the women to mull this over for about half an hour and then began to "reason" with the women again, this time using a different official with a different style of persuasion. This style could be labeled a "good-guy/bad-guy" approach, sometimes used by American policemen.<sup>68</sup> Unfortunately, there are no "Miranda warnings" or protections for these women as there are for American defendants.<sup>69</sup> The "good-guy" official told the women that they were not forced to abort but were simply asked to make a decision which would benefit the country as a whole.<sup>70</sup> One woman asked whether they would be allowed to go home that day.<sup>71</sup> The official answered that "not everyone has to stay" but made it clear that in order to leave, a woman must agree to an abortion and demonstrate that she was only going home to convince her family that an abortion would be best.<sup>72</sup> Once again the women were left to mull over what he had said.<sup>73</sup> This procedure went on throughout the entire day with alternating "Mutt and Jeff" officials until finally almost half of the women agreed to have an abortion.<sup>74</sup> The other half who had not yet agreed as well as the women who had not attended the meeting were to be

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64. *Id.* at 224.

65. *Id.* at 225.

66. *Id.* at 226.

67. *Id.*

68. *Id.*

69. *Miranda v. Arizona*, 384 U.S. 436 (1966), developed what is known as the "Miranda warnings" which are given prior to custodial interrogation and are designed to prevent pre-*Miranda* types of coercive confessions. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.9 n.8 (4th ed. 1991).

70. MOSHER, *supra* note 39, at 227.

71. *Id.* at 228.

72. *Id.*

73. *Id.*

74. *Id.* at 229.

continuously fined until they complied.<sup>75</sup> Noting the inferior social status and lack of education<sup>76</sup> of the women, Mosher labeled the entire process brainwashing.<sup>77</sup> Mosher, in effect called a spade a spade.

c. "Level Three Coercion"

As the most widespread type of coercion, level three coercion involves mainly economic sanctions, propaganda, and education.<sup>78</sup> Of the three, economic sanctions can be the harshest, particularly when several are applied at once. For having a second child, couples can be forced to pay "an annual fee of approximately one-tenth of the family income until the second child reaches sixteen years of age," be fired from their jobs, or have difficulty buying fuel, seed, and other necessities.<sup>79</sup> The socialist structure of China makes such sanctions especially effective since people are dependent on the state for many items.<sup>80</sup> In addition, there are wide disparities of wealth among the Chinese people, with some residents having a living standard that parallels people living in a developing nation.<sup>81</sup>

A rather creative example of an economic sanction can be found in the Haidian District of Beijing, where the government gave landlords the right to refuse to rent to any migrants who were expecting a child, and did not have a family planning certificate allowing them to do so.<sup>82</sup> The new tenant also had to sign a contract agreeing not to have another child and was subject to fines of 10,000-20,000 yuan if he or she disobeyed.<sup>83</sup> Likewise, the landlord was subject to a fine of 1,500-2,000 yuan for not enforcing the rules.<sup>84</sup> Two other recent measures, also in the Beijing area, were used to insure compliance with the one-child rule. First, migrants were not permitted to obtain a business license unless they agreed to marry later and defer

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75. *Id.*

76. In China, women are historically considered to be on a lower social scale than men. MARION J. LEVY, JR., *THE FAMILY REVOLUTION IN MODERN CHINA* 147 (1949).

77. MOSHER, *supra* note 39, at 230.

78. COUNTRY REPORTS, *supra* note 25, at 818. Level three coercion can be quite subtle. For example, in 1989 the Chinese government began a "drink-more-milk" drive, aimed at persuading Chinese couples to have *one healthy* child by having a diet that includes a regular intake of milk. Kevin Sinclair, *China Turning to Milk*, CHINA REV., Aug. 1989, at 29.

79. Shiers, *supra* note 8, at 482.

80. *Id.*

81. COUNTRY REPORTS, *supra* note 25, at 809.

82. 16 ANNUAL REVIEW OF POPULATION LAW, 1989, at 8 (Reed Boland & Jan Stepan eds., 1992).

83. *Id.*

84. *Id.*



childbirth.<sup>85</sup> Secondly, self-employed families who violated the policy were deprived of various benefits.<sup>86</sup>

Other penalties include punishing the "additional child" by depriving it "of such rights as attending school, working, travelling, owning property, and obtaining a ration card."<sup>87</sup> Penalties can also include lack of additional housing space for larger families and refusal to permit enlargement of the family's private plot.<sup>88</sup>

The other side of the economic incentive/disincentive system employed by the CCP is a series of rewards for compliance. These include both economic and noneconomic benefits. For example, couples who either marry later or agree to wait to have a child may receive an additional week of marriage leave;<sup>89</sup> a woman who gives birth at a "mature age" may receive either one month's salary as a bonus or an extra thirty days of maternity leave.<sup>90</sup> The state may also establish a life insurance policy for an only child.<sup>91</sup>

Despite these rewards and penalties, many Chinese ignore, or think they can avoid, the consequences and have additional children. Officials see the most resistance to these rewards and penalties in rural areas where traditions of early marriage and early childbirth remain deeply imbedded.<sup>92</sup> The rationale for early pregnancy in Chinese families is mainly to ensure old-age security, since in China a son is required to take care of his family.<sup>93</sup> Other considerations include continuance of the family name and increased output since most of the rural Chinese

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85. *Id.*

86. *Id.*

87. Shiers, *supra* note 8, at 483. These types of non-economic sanctions which punish the child for his parents' decision are prevalent in the more "hard-core" provinces like Tibet. *Id.*

88. Banister, *supra* note 17, at 723.

89. Platte, *supra* note 16, at 660-61.

90. ANNUAL REVIEW OF POPULATION LAW, 1988, *supra* note 40, at 8. A "mature age" is generally 22 for males and 20 for females. Wong, *supra* note 19, at 226. In many cities, couples are encouraged to wait even longer. Platte, *supra* note 16, at 660-61.

91. ANNUAL REVIEW OF POPULATION LAW, 1988, *supra* note 40, at 7. This type of reward was used in Fujian province. *Id.*

92. *Concern Grows as Population Reaches 1.1 Billion*, *supra* note 21, at 19. In areas of Xinjiang and Guanxi, the tradition has been for women to marry as early as 15 or 16. Likewise, among certain ethnic groups in Yunnan province, women marry at the age of 12 or 13. Platte, *supra* note 16, at 655.

93. Platte, *supra* note 16, at 655.

are farmers.<sup>94</sup> These traditions have remained strong despite the Chinese government's one-child campaign.<sup>95</sup>

In contrast, children in urban settings are considered a burden on their parents because they cannot enter the work-force until they reach sixteen years of age.<sup>96</sup> Additionally, urban parents are not dependent on their children for assistance during their old age;<sup>97</sup> rather, they receive pensions.<sup>98</sup> Thus, rural Chinese, who fear poverty and lack of government or employer aid during the latter part of their lives, may view economic sanctions and other hardships as a penalty worth paying for bearing more children, particularly a son.<sup>99</sup> This action in turn may inspire rural Chinese officials to use more coercive methods of implementing family planning policy rather than risking punishment by the central government. Even coercion, however, might not alter the Chinese peasant's resolve to have more children, since his unsympathetic government has only promised but has not yet delivered any old-age benefits.<sup>100</sup>

### B. *Exceptions to China's One-Child Policy*

There are some exceptions to China's family planning policy. These are directed mainly at minorities who are either exempt or subject to less stringent penalties.<sup>101</sup> For example, fifty-four of the fifty-five minorities in China may have more than one child per couple.<sup>102</sup> The reason for allowing these minorities to have more children is that their populations are declining.<sup>103</sup> Exceptions are also sometimes, although

94. *Id.*

95. *Id.*

96. *Id.* at 659. The cost of raising a child in the city is estimated to be four times as high as in the country. Additionally, living conditions are extremely cramped in the city and long waiting lists exist for bigger housing quarters. *Id.*

97. *Id.* at 660.

98. *Id.*

99. *See infra* notes 110-16 and accompanying text.

100. Platte, *supra* note 16, at 656.

101. COUNTRY REPORTS, *supra* note 25, at 817. The largest group of people in China is the Han and it is at this group, particularly in the urban areas, that the one-child policy is in large part directed. In 1987, the Han Chinese consisted of about 94% of the total population. *Background Notes*, U.S. DEPT OF ST., BUREAU OF PUB. AFF., Oct. 1987, at 4.

102. Zhang Zeyu, *Population Policy for Minorities*, 29 *BEIJING REV.* 15 (1986). Only the Zhuang nationality is not allowed an exemption from China's policy because its population numbers 10 million. *Id.*

103. *Id.* at 15-16.

rarely, made for women living in rural, sparsely populated areas.<sup>104</sup> The majority of Chinese, however, do not fit under any exemption or exception and must conform to the government's official family planning policy. In addition, the government may in the future completely do away with the exceptions due to the seriousness of China's population problem.<sup>105</sup>

Of the Chinese who are forced to deal with the family planning policy, the type and severity of coercion used by the government plays a significant role in determining whether or not a person complies with the policy. But there are other factors which enter into the equation, including moral and familial pressure. These are long-standing traditions in China.

### C. *Traditional Social Pressure as a Method of Enforcement*

#### 1. Moral Behavior in China

In a manner foreign to most Americans, the Chinese have a long-standing tradition of group-orientedness and "social order for its own sake."<sup>106</sup> From the beginning of their education, Chinese adolescents

104. For example, Shandong province allows women over the age of thirty who have only one female child to have a second child. ANNUAL REVIEW OF POPULATION LAW, 1988, *supra* note 40, at 7. And in 1989, Hainan began to allow the following categories of people with only one daughter to have an additional child: (1) forest workers in the profession for over five years, (2) "only children of revolutionary martyrs, soldiers disabled at the Second Class, First Grade, or above, or disabled at Second Class, First Grade, or above in the course of carrying out official duties" and (3) "only children of Overseas Chinese and compatriots from the Territory of Hong Kong, Macao, and Taiwan who have settled in Hainan." ANNUAL REVIEW OF POPULATION LAW, 1989, *supra* note 82, at 8.

Finally, in 1986, Guangdong had the following exemptions:

[A] couple may have a second child when a) the first child is deformed with a non-hereditary disease that prevents the child from growing up to be an able-bodied worker; b) when one spouse of a remarried couple has had only one child and the other spouse has had none, or when both have had a child, but the children have been placed by court order in the custody of the ex-spouses; c) when the wife becomes pregnant and the couple has already adopted a child because either one or both spouses was medically determined to be sterile; d) when a couple's only child has married . . . . In addition, a [rural] couple may have a second child if [its] first child [has been] a girl. The interval between the birth of the two children [in any case] must be no less than four years.

ANNUAL REVIEW OF POPULATION LAW, 1987, *supra* note 23, at 10.

105. Platte, *supra* note 16, at 663.

106. MORAL BEHAVIOR IN CHINESE SOCIETY 7 (Richard W. Wilson et al. eds., 1981). In a survey done on the importance of rules and the maintenance of social order, 60% of 16-year-old

are taught to identify with groups, beginning with their families and later with the commune and finally with society as a whole.<sup>107</sup> To act in a deviant manner in Chinese society may bring shame and loss of face upon one's family and country — an attitude that the CCP leadership finds extremely congenial.<sup>108</sup> The local officials who act as an example for successful birth control set the tone for "proper behavior" and compliance with the one-child policy. Noncompliance can involve, at a minimum, shame, ridicule and scorn and, at a maximum, "ostracism or expulsion" from the "group."<sup>109</sup> Seen in this context, one would think that the Chinese would be more than willing to comply with the one-child policy. There is, however, an even stronger yet related factor affecting a woman's decision to abort: familial pressure.

## 2. Familial Pressure and Its Consequences

Probably the single largest deterrent to the family planning policy is a traditional sense in China that a family is incomplete without a son.<sup>110</sup> Sons are to the rural Chinese what the social security system represents to Americans. A son is required to stay with his family and care for the elder members until they pass away.<sup>111</sup> In contrast, a daughter is expected to and usually does marry out of the family

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Chinese youths felt that it was important, whereas only 35% of 16-year-old Americans asked felt the same way. *Id.* Although a sense of individualism is sometimes stressed in Chinese classrooms, it is usually promoted as a way of enhancing group efficiency. *Id.* at 15.

107. *Id.* at 11.

108. *Id.* at 12-13. The CCP uses the people's sense of honor to aid in compliance with their family planning policy. For example, in 1987, the Family Planning Commission issued a family planning circular which, after emphasizing the serious nature of overpopulation and the food shortage, stated: "We must deem it an honor that we get married and have [a] child at a mature age and that a couple has only one child." ANNUAL REVIEW OF POPULATION LAW, 1987, *supra* note 23, at 13 (emphasis added).

109. MORAL BEHAVIOR IN CHINESE SOCIETY, *supra* note 106, at 13.

110. MOSHER, *supra* note 39, at 236-37.

111. LLOYD E. EASTMAN, FAMILY, FIELDS AND ANCESTORS 16 (1988). The ideal family would have five generations under one roof at all times. *Id.* One of the major consequences of China's one-child policy is the growing number of elderly. In 1989, there were over 90 million people over the age of 60, which accounts for 8.4% of the country's total population. 90 Million Aged Over 60, CHINA REV., May 1989, at 57. It will thus become more and more difficult for an only child to care for the many "old people" in his family. Some provinces do provide support for the elderly, but it is not a large amount of aid; many people do not wish to accept it because they feel shame or because they will lose the right to bequeath their property. EDWIN LIM, CHINA: LONG-TERM DEVELOPMENT ISSUES AND OPTIONS 141 (1985).

and is then required to live with her husband's family.<sup>112</sup> Until she marries, the daughter is considered a burden who must be fed and clothed without being able to work the fields as well as the male child.<sup>113</sup> This attitude can only reinforce the already inferior social status of women in Chinese society. In fact, a woman who does not produce a male child may be beaten by her husband, abused by her family and scorned by her neighbors.<sup>114</sup>

One of the primary goals, therefore, of married women in general, and especially of women who live in rural areas, is to produce a male child.<sup>115</sup> To force a woman to have only one or no sons in the name of social good could spell derision and even physical abuse. As a result of (1) China's family planning policies, (2) the social and spousal pressures to have a son, and (3) a woman's own desire for more children, some women have resorted to the extreme measure of female infan-

112. LEVY, *supra* note 76, at 179. One of the most painful experiences that a young woman in China had to go through was the process of "footbinding," or the "golden lotus." This process, done in the hopes of attracting men, consists of using a bandage, 2 inches wide and 10 feet long, to first force the four small toes down against the sole of the foot and then to bring the bandage back around the heel, pulled so tightly that the front and back of the foot are brought against each other. This causes the instep of the foot to arch upward and is excruciatingly painful. As time goes on, the flesh will atrophy and peel off. Blood and pus will soak the bandage but it will be tightened continuously until the arches break. If done properly, the golden lotus will measure only 3 inches from the heel to the big toe and men, who apparently become sexually aroused by the woman's feet, swaying walk and lifted buttocks, will swarm around the woman. EASTMAN, *supra* note 111, at 22-23. The more sinister reason for Chinese men to prefer women with bound feet is that they were in effect crippled for life and thus kept confined within the family plot. This kept women ignorant of other men and emphasized their inferiority in China's male-dominated society. *Id.* at 24. This practice, done mainly in urban areas, was discontinued in the early twentieth century. 1 JOHN P. MCKAY ET AL., A HISTORY OF WORLD SOCIETIES 315 (3d ed. 1992).

113. EASTMAN, *supra* note 111, at 20-21. There are some exceptions where a girl child will be viewed as a blessing by the family. For instance, in a large family, a girl would be a big help to the mother in caring for the family. However, if more than one girl was born, then subsequent daughters, if allowed to live, would be constantly reminded of their burdensomeness. In fact, mere survival was not always easy for daughters. If a child became sick, parents often delayed calling a doctor unless it was a male child. *Id.* at 21. Even when a female child married, she remained inferior not only to her husband and other males in the family but also to the elder females in her new family. This is especially true of the mother-in-law, who could enforce discipline on her daughter-in-law with the help of her own husband and her son. C. K. YANG, CHINESE COMMUNIST SOCIETY: THE FAMILY AND THE VILLAGE 107 (1966). Some local governments have attempted to change this century-old inferior status of women by making daughters legally responsible for their parent's old-age support and allowing them to inherit their father's factories. Shiers, *supra* note 8, at 483 n.52.

114. *The Baby Makers*, ASIaweek, Sept. 11, 1992, at 31-32.

115. See LEVY, *supra* note 76, at 175.

ticide<sup>116</sup> or have at the very least attempted to have more children in violation of the one-child rule. Women and their spouses who have chosen the latter course of action often choose to immigrate to the United States in order to avoid China's penalties. Once in the United States, however, they must be able to prove they are entitled to asylum under federal immigration law.

## II. U.S. IMMIGRATION LAW AND POLICY TOWARD CHINA

Following the Tiananmen Square massacre, Congress enacted the "Emergency Chinese Immigration Relief Act of 1989," designed to give protection to Chinese nationals.<sup>117</sup> Although the act did not contain any provision specifically protecting immigrants who opposed the one-child policy, a Senate amendment to the original bill required "all adjudicators" to give the fullest possible consideration to such applicants.<sup>118</sup> The bill, which passed both in the Senate and the House by an overwhelming majority, was vetoed by President Bush.<sup>119</sup> The President did, however, issue an executive order binding on the Immigration Department which required that "enhanced consideration" be given to applicants who claimed persecution because of China's family planning policy.<sup>120</sup> The official standard which an applicant for asylum

116. Increased cases of female infanticide and abortion of female fetuses are one rather brutal result of China's one-child policy. By 1983, the government felt that this problem had gotten so far out of hand that the CCP's Department of Propaganda specifically called for the protection of newborn females and the mothers who bore them from violence at the hands of husbands or other relatives. However, it is hard to protect the newborn when it is the mother herself who is killing the child. H. Yuan Tien, *Induced Fertility Transition: Impact of Population Planning and Socio-Economic Change in the People's Republic of China*, 38 POPULATIONS STUDIES 385, 398 (1984). The new regulations have apparently done little to stem the tide of female infanticide, and government officials recently issued a new circular which prohibits medical personnel from disclosing the sex of the fetus with ultrasound equipment. COUNTRY REPORTS, *supra* note 25, at 819. The circular states "that determining the sex of a fetus violates medical ethics, aggravates the imbalance in the number of boys and girls, and poses a threat to the country's family planning policies." ANNUAL REVIEW OF POPULATION LAW, 1989, *supra* note 82, at 28.

117. Shiers, *supra* note 8, at 485-86. The fact that Congress approved this act is in itself noteworthy, since it has not been known for taking positive steps to help Chinese immigrants. Rather, all initiatives have usually come from the executive branch. Richard Bush, *America's China Policy and the Role of the Congress, the Press, and the Private Sector*, HERITAGE FOUND., July 9, 1991.

118. Shiers, *supra* note 8, at 486.

119. *Id.* President Bush claimed he vetoed the bill because he wanted to continue student exchanges between China and the United States. *Id.*

120. *Id.* at 486-87; Exec. Order No. 12,711, § 4, 55 Fed. Reg. 13987 (1990); *cf.* Memorandum, *supra* note 11.

must meet, however, is still "a well-founded fear of persecution." This standard is more easily met than the "clear probability" standard used in withholding of deportation hearings.<sup>121</sup> In fact, the applicant does not even have to establish that persecution is more likely than not, so long as a reasonable person in the applicant's shoes would have the same fears of persecution.<sup>122</sup> No other "supporting circumstances" are necessary for the grant of asylum.<sup>123</sup> The end result is that there is no clear definition of what constitutes a well-founded fear and, since a judge's decision to grant asylum is discretionary, immigration judges are forced on a daily basis to grapple with this question.<sup>124</sup>

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121. IMMIGRATION LAW AND PROCEDURE, *supra* note 10, § 13.3(b). The memorandum which follows President Bush's executive order and which is in line with the President's stance on Chinese immigrants, is clearly pro-asylum. It instructs INS prosecutors to be "as diligent in searching for indications that the applicant or the applicant's evidence may be credible as for indications that it may not be." Memorandum, *supra* note 11, at 2. "[I]t is especially important in these cases that the attorney be engaged in a genuine search for truth." *Id.* This is somewhat contrary to the typical prosecutor's role, which is simply to prosecute. The memorandum goes on to state:

At the hearing, if the Service trial attorney determines that the criteria have been met, the trial attorney should recommend a grant of asylum and/or withholding of deportation. If the Immigration Judge should nevertheless deny the claim(s), the Service will not oppose an appeal from such denial. In such cases the INS will move the BIA [Board of Immigration Appeals] to terminate the proceeding. When the BIA issues an order terminating a proceeding, the alien, or his or her counsel, should be instructed to reapply for asylum with the Service.

*Id.* at 3. Again, the INS, pursuant to President Bush's order, seems to lean towards granting asylum by telling prosecuting attorneys to take the applicant's side if he or she has established a reasonable fear of persecution.

122. Memorandum, *supra* note 11, at 2. The Ninth Circuit Court requires only a demonstration that an applicant's "fear is 'genuine' and that persecution is a 'reasonable possibility.'" Theodosia Gavatides, *Immigration-Asylum-Deportation-Standards to Be Met by Illegal Aliens Applying for Withholding of Deportation and Political Asylum: Mendoza Perez v. INS*, 902 F.2d 760 (9th Cir. 1990), 21 GA. J. INT'L & COMP. L. 165, 169 (1991). In writing his majority opinion in *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987), Justice Stevens said that although there is both an objective and subjective component when analyzing whether an alien has a fear of discrimination, great weight must be given to the subjective component. IMMIGRATION LAW AND PROCEDURE, *supra* note 10, § 13.3(b) (citing *Cardoza-Fonseca*, 107 S. Ct. at 1213). He went on to state that even if the alien only had a 10% chance of being persecuted, to demonstrate this 10% in a believable and plausible manner would constitute proof of persecution. *Id.* Often, the applicant's verbal account of the alleged persecution is not merely the strongest but also the only evidence available. Wilson, *supra* note 1, at 420.

123. Memorandum, *supra* note 11, at 3. This is also the approach followed by the Ninth Circuit Court which requires no corroborating evidence other than the applicant's own testimony to establish persecution. In contrast, all other circuit courts require some "external corroborating evidence." Gavatides, *supra* note 122, at 172-73.

124. Whitford, *supra* note 6, at 171-72.

It is clear that if the applicant can establish a level one type of coercion or, in other words, that he or she “*has been forced . . . or will be forced to undergo abortion or sterilization,*” this constitutes persecution and entitles him or her to asylum.<sup>125</sup> The problems for immigration judges are when the only evidence offered by the applicant is his or her own testimony and where the level of coercion does not quite reach the level one type.<sup>126</sup>

President Bush’s order seems to imply that levels of coercion other than level one can also constitute persecution sufficient for a grant of asylum. Naturally, level two coercion crossing over into level one coercion would be sufficient persecution. The executive order, however, also requires special attention or “enhanced consideration” to be given for sanctions (i.e., levels two and three coercion) imposed because the applicant refused to abort or be sterilized.<sup>127</sup> In clarifying this, the INS’s memorandum states that “INS attorneys should . . . *not argue that sanctions imposed in the enforcement of coercive family planning polices constitute ‘prosecution [and] not persecution’ because they are widely imposed or because they might not constitute persecution if imposed for a nonpolitical offense.*”<sup>128</sup> This is in marked contrast to previous court rulings that the persecution must be aimed at the individual and cannot simply be an allegation of general violence in his or her country.<sup>129</sup> This is also an extreme departure from past immigration policy which required more than economic sanctions or hardship in order to be granted asylum.<sup>130</sup>

Although not all economic sanctions or penalties imposed by the Chinese government may reach to the level of persecution, there is a good chance, under the present administration’s immigration policy

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125. Memorandum, *supra* note 11.

126. An immigration official who was recently questioned about Chinese asylum cases stated that he knew of no Chinese who had been deported since Tiananmen Square. *Q & A on the News*, ATLANTA CONST., Sept. 17, 1992, at A2.

127. Memorandum, *supra* note 11, at 2.

128. *Id.* at 2-3 (emphasis added).

129. Gavattides, *supra* note 122, at 169. The rationale for not granting political asylum based on allegations of general violence in the alien’s country is that where the needs of an entire population are being addressed, political solutions will be more effective than individual grants of asylum. Asylum may, however, be fitting where the individual is being persecuted for opposing his or her government’s policies. Shiers, *supra* note 8, at 492.

130. *See supra* note 8.



and probably also under any future administration,<sup>131</sup> that they will constitute persecution if issued to punish the applicant for refusing to have an abortion or be sterilized. For instance, Duke Austin, Senior Press Officer for the Federal Immigration Department, has stated that wage cuts or other economic penalties imposed because an immigrant refuses to abort or be sterilized *can* be the equivalent of persecution, but such "self-serving statements" must be backed up with evidence and be based on reality (i.e., the persecution is aimed at the immigrant himself).<sup>132</sup> Thus two basic requirements which must be met in order for economic sanctions to equal persecution are (1) an "individualized threat" must be shown that stems directly from the alien's having opposed China's family planning policy and (2) the sanction or penalty must be "illegitimate" (as opposed to a government's "legitimate" right to rule its subjects and therefore make and enforce its own laws).<sup>133</sup> Although this narrows down the necessary requirements for judges when analyzing level two and three coercion, they still must be able to discern whether an alien is credible to determine whether such coercion actually took place. While there is no sure-fire way to accomplish this, there are some questions (discussed in the next section) which judges can ask of the alien in order to assess his or her credibility better.

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131. Although President Bill Clinton has not yet promulgated an immigration policy towards China, it is more than likely that his government will construe persecution and asylum requirements liberally and thus in keeping with President Bush's policies. In fact, Clinton has made certain comments indicating he may be even more liberal than the Bush administration, since he has publicly condemned China's human rights violations. *Clinton Signals Tough China Policy*, Japan Economic Newswire, Nov. 20, 1992, available in LEXIS, Nexis Library, Omni File. During his campaign, he has even suggested that China's trade status as a most favored nation should be revoked until it "cleans up" its record of human rights abuse. *China Says It's Willing to Work with Clinton*, Reuter, Nov. 5, 1992, available in LEXIS, Nexis Library, Reuter File. Since his election victory, however, Clinton has not formulated a definite policy towards China and despite his pro-human rights stance, he will no doubt have to be careful for economic reasons not to create too much distance between the United States and China. The United States is second only to Hong Kong in investments made in China. United States firms have, in fact, made investments totalling over \$5.5 billion in China. *China Stresses Sino-US Trade to Clinton*, Proprietary to the United Press International, Nov. 22, 1992, available in LEXIS, Nexis Library, UPI File. This will be a significant factor for Clinton to keep in mind when formulating his policy, particularly since his main campaign promise guarantees positive changes in the economy. Salil Tripath, *Clinton Must Decide Role US Wants to Play in the World*, BUS. TIMES, Nov. 9, 1992, at 2.

132. Telephone interview with Mr. Duke Austin, Senior Press Officer of the Federal Immigration Department (Oct. 2, 1992).

133. Shiers, *supra* note 8, at 492-93.

### III. QUESTIONS JUDGES CAN ASK

The first determination which must be made when deciding whether to grant a Chinese immigrant asylum based on political persecution is what level of coercion is being used. If it is level one, that is, forced abortion or sterilization, then barring proof problems, the immigrant should be granted asylum. If, on the other hand, there is (1) insufficient evidence of level one coercion, (2) questionable testimony from the applicant, or (3) level two or three coercion which may or may not reach the level of persecution necessary under U.S. immigration law, then the judge may wish to ask the following questions.

First, the alien should reveal how many children he or she already has. If none, it is unlikely, without any other additional proof, that any type of sanction is being levied on him or her, since China's policy is not aimed at childless couples. Most aliens will not claim to be childless though. For those who do claim to have children, they should be asked about both the quantity and gender of the children. The more children the applicant has, the more likely the Chinese government will be "tough" on him or her, especially if the alien already has a son.<sup>134</sup> If the applicant is attempting merely to have a second child, it is unlikely that the government is penalizing him or her in any way other than economically or socially.<sup>135</sup>

However, if the alien is from an area, particularly a rural area, which has been targeted by the central government as a problem area, there is a greater probability that he or she is experiencing real coercion. The alien should then be asked if he or she knows what the policy of his or her particular village or town is and whether it is stricter than surrounding areas. In order for judges to "weed out" inconsistencies and possible deception, they should keep records of what villages are claimed to be especially coercive or, as the case may be, especially lenient in observing the federal government's policy. Along these same lines, it would be helpful to know what types of birth control are mandated by each village or province. An area which is known to force women to have IUDs inserted without their consent probably engages in more coercive techniques, if its strictures are not followed.

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134. See *supra* notes 110-16 and accompanying text.

135. See *supra* note 106-16 and accompanying text. Although there are some cases where a woman is indeed allowed to have a second child, she may be penalized for having this child, without a sufficient amount of time having elapsed. In some parts of China, this time period has been set at a minimum of four years. MOSHER, *supra* note 39, at 224.

Another piece of information which should be elicited from the alien is his race. If the alien is a member of a minority in China, then it is very likely that there is some legal exception applicable to him or her which would allow either to have a greater number of children. Then any testimony on the alien's part that he or she is being prevented from having more than one child would be open to question. If, however, he or she is Han or a member of the Zhuang minority, then there are no exceptions, and China's family planning policy is, in fact, being implemented in full. Finally, if the alien is an only child and is also married to an only child, then it is likely that this couple will be allowed to have more than one child.<sup>136</sup>

As previously stated, an alien must only feel a *threat* of persecution to be granted asylum.<sup>137</sup> This makes it fairly easy for an applicant to meet the standard for political asylum. But a particular problem emerges with men who do not allege any threat of physical persecution or who admit only to a fear of very limited economic sanctions but who claim that, once granted asylum, they will try to "save" their wives (who are still in China) from being forced to abort or sterilize by sending for them later on. In these cases, the applicant is not actually faced with present or future persecution. Instead, the grant of asylum may *prevent* another human being (i.e., the alien's wife) from being coerced; by allowing the alien to stay in the United States, his wife will no longer be threatened with persecution for not following family planning policies.<sup>138</sup> The reason for this is that the Chinese government ceases to view couples who have been separated or widowed as threats. Should the judge reach the conclusion that prevention of persecution, alone or coupled with more minor types of penalties levelled at the actual applicant, is equivalent to persecution, then once again the judge will have to determine whether the alien is being truthful. The same questions which are used to determine whether an alien is being truthful about past or future persecution can also be used to determine honesty with regard to prevention of coercion.<sup>139</sup>

#### IV. CONCLUSION

All of the previously mentioned factors can serve as an aid to judges who must, in all likelihood, rely on an alien's own testimony

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136. ANNUAL REVIEW OF POPULATION LAW, 1980, at 11-12 (1982).

137. See *supra* discussion part II.

138. The majority of Chinese immigrants making this argument are men. Interview with Judge Bruce Einhorn, Federal Immigration Judge, in Los Angeles, California (Sept. 22, 1992).

139. See discussion *supra* pp.19-20.

and credibility when determining whether to grant or deny asylum. However, the current administration and, with a fair degree of certainty, the new administration under Bill Clinton, seem to skew review of asylum cases in favor of the alien who alleges any form of persecution due to China's family planning policy. The INS, in turn, has instructed its attorneys and judges to decide cases with this "favoritism" in mind. The "bottom line" then for federal immigration judges is that they should lean towards granting asylum in any case which alleges past *or future* level one types of coercion and probably also any level two types of extreme brainwashing which could give rise to a "reasonable fear" of persecution. In addition, where economic sanctions are severe enough and are aimed specifically at the applicant (i.e., are not uniformly applied), a judge should rule this adequate evidence of persecution to grant asylum. To do otherwise would invite reversal of the judge's findings on appeal, a prospect most judges try to avoid.

