CHINA'S EUGENICS LAW AS GROUNDS FOR GRANTING ASYLUM

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

I. INTRODUCTION

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

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1 See, e.g., Robert S. McNamara, Time Bomb or Myth: The Population Problem, 62 FOREIGN AFF. 1107, 1108 (1984); see also John King Fairbank, The United States and China 21 (1980).
2 See Jennie A. Clarke, Note, The Chinese Population Policy: A Necessary Evil?, 20 N.Y.U. J. INT'L L. & POL. 321, 322 (1987). The first One Child Policy was espoused by Deng Xiaoping in 1978 with the implementation of the "Four Modernizations" campaign. Id. at 329. The Four Modernizations were agriculture, industry, national defense, and science and technology. Id. at 329 n.59. See discussion infra part II.A of the One Child Policy.
The implementation of the One Child Policy has led to human rights abuses, including forced abortion and involuntary sterilization. The Eugenics Law is likely to produce similar types of trespasses by the Chinese government. Chinese fleeing these coercive practices have sought asylum in the United States. Even though the United States has publicly denounced China’s population control policies and several administrations have attempted to offer permanent refuge to its victims, asylum claims based on China’s One Child Policy have generally been denied. As one of the world’s leading nations, the United States must publicly and powerfully disassociate itself from the wholesale practice of forced abortion and involuntary sterilization in China. It is vital that the United States take an authoritative role in creating international pressure on China’s government to exhibit greater respect for the inalienable human right to protect and control one’s own body.

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

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


7 Matter of Chang, Int. Dec. 3107 (BIA 1989). The Board of Immigration Appeals found that implementation of the China’s One Child Policy was not persecutory even to the extent that forced abortion and involuntary sterilization may occur.
that the United States should create decisive legislation to recognize valid asylum claims based on the coercive Chinese population control policies, particularly the Eugenics Law.

II. BACKGROUND

A. Towards Slowing Population Growth: The One Child Policy

With a fifth of the world’s people and only seven percent of the world’s arable land, population control has been of central concern to the Chinese government since the 1970s. In the early years following the founding of the PRC, population played a different role in Communist ideology. Under the leadership of Chairman Mao Zedong, Chinese were encouraged to have children as part of their civic duty. Chairman Mao did not believe the economy’s growth would be impaired by the availability of land, raw materials, or investment. Under Mao’s rule, population growth soared from 1.6 percent in 1949 to 2.8 percent in 1965. In 1979, the Chinese leadership, faced with demographic data supporting the contention that rapid population growth would slow economic growth, revised their strategy and launched the PRC’s One Child Policy. The One Child Policy imposes upon its citizens a limit of one child per couple.

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

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

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

11 BANISTER, supra note 8, at 17.

12 Mufson, supra note 8.

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

14 Mufson, supra note 8.

15 BANISTER, supra note 8, at 183-226.
rapid population growth could slow and imperil the socialist transformation of the economy.\textsuperscript{16} The One Child Policy was introduced after extensive discussions concerning the need to control population growth if China was to achieve its modernization goals.\textsuperscript{17} Because of a lack of consensus among the leadership, the National People’s Congress (“NPC”) did not pass a national law regarding incentives and penalties, rather, it outlined a “family planning” policy\textsuperscript{18} of limited births. The principle of and duty to practice family planning is set forth in the 1980 Marriage Law\textsuperscript{19} and in the 1982 Constitution.\textsuperscript{20}

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

\textsuperscript{16} See Hartmann, supra note 8, at 159.

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

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


\textsuperscript{20} The Constitution (PRC), article XXV, provides: “[t]he state promotes family planning so that population growth may fit the plans for economic and social development.” See also PRC Laws, supra note 19, at 98-103.

\textsuperscript{21} PRC Laws, supra note 19, at 261.

\textsuperscript{22} Article 5 of the Marriage Law provides that no marriage shall be contracted before the man has reached 22 years of age and the woman 20 years of age. A marriage is not permitted even with parental
and the cities are free to enact their own regulations on population control, but the population control program is guided by a February 1982 joint directive of the Chinese Communist Party and the central government entitled "On the Further Implementation of Family Planning Work."\(^{23}\)

The implementation of the policy is left to local and provincial officials responsible for ensuring compliance through economic sanctions, peer pressure, and propaganda.\(^{24}\) Every unit\(^ {25}\) has a birth control committee headed by Party officials. These Party officials keep records of births, marriages, and menstrual cycles of every woman of child-bearing age.\(^ {26}\) The date and sex of every birth is recorded and posted.\(^ {27}\) Compliance with family planning policies is tied to citizens’ salaries, their eligibility to occupy housing space and to grow crops, and their educational opportunities, as well as their ability to marry and have children.\(^ {28}\) Local officials receive cash bonuses, recognition, and promotions only if their units meet the birth control limits.\(^ {29}\) More importantly, cadres who are unwilling to compel people to practice birth control face public reprimands from the central government and Chinese Communist Party ("CCP"), and face economic sanctions from all levels of the administrative hierarchy above them.\(^ {30}\) Of primary importance is securing compliance by all couples of childbearing age in their work unit. Couples who continue pregnancies which are not allowed may suffer the suspension of wages, fines, and loss of seniority for promotions.\(^ {31}\) The means of attaining the one child goal is

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


\(^{25}\) A unit is a workplace group or a rural governing body. PRC LAWS, supra note 19, at 78.

\(^{26}\) Mufson, supra note 8.

\(^{27}\) Mufson, supra note 8.

\(^{28}\) BANISTER, supra note 8, at 184-85.

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

\(^{30}\) BANISTER, supra note 8, at 197.

\(^{31}\) Matter of Chang, Int. Dec. 3107 (BIA 1989); PRC LAWS, supra note 19, at 267.
allowed to vary depending on local conditions as long as the desired result is achieved.\textsuperscript{32}

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

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

The abuses reported are disturbing. Claims of forced abortions occurring only weeks or days from birth, of aborted late-term babies allowed to cry until dead in trash cans, of doctors injecting infants' heads with formaldehyde, and of doctors crushing their skulls with forceps, are not uncommon.\textsuperscript{40} Others report that women are sometimes snatched from...
their beds late at night and brought to 24-hour sterilization clinics,\textsuperscript{41} that intra-uterine devices are inserted immediately after giving birth without the woman's knowledge, as national regulations require the insertion of an intra-uterine device and forbid its removal after a woman's first child.\textsuperscript{42} Additionally, powerful social coercion and stiff economic sanctions may be employed.\textsuperscript{43}

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

While China's existing One Child Policy is an attempt at limiting population growth, the recently enacted Eugenics Law\textsuperscript{44} attempts to improve the quality of the newborn population\textsuperscript{45} and to reduce the perceived burden of disability to Chinese society.\textsuperscript{46} The overall goal is not only fewer, but also healthier, babies. Because the government allows married couples only one child, it is important that this one child be healthy and without any physical or mental defects of hereditary or environmental origin\textsuperscript{47} that may trigger a relaxation of the One Child Policy allowing a couple a second child. If a couple's first child has a genetic defect or is sickly, the couple may apply for an exception to the one child limit, which is supposed to be granted if their political unit has been allocated a large

\textsuperscript{41} Bai Fangdai was granted asylum in 1994 after testifying that when she was eight months pregnant with her second child, she was dragged from her home after midnight and brought to a clinic, where she suffered induced labor and her newborn was strangled. Matt Miller, \textit{Harsh China Policy Works to Break 1 Child Rule Is to Be an Enemy of the State}, \textit{San Diego Union-Trib.}, Aug. 29, 1994, at A14.

\textsuperscript{42} BANISTER, \textit{supra} note 8, at 205-07. See also MOSHER, \textit{supra} note 4, at 249.

\textsuperscript{43} Country Reports on Human Rights, \textit{supra} note 37, at 561.


\textsuperscript{47} BANISTER, \textit{supra} note 8, at 222.
enough quota of births in its birth plan. Therefore, the birth of handicapped children works against the government’s stated goal of limiting population growth by allowing only one child per couple.

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

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

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

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

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

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

53 Id.

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

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

56 Id. Chinese society has traditionally favored sons over daughters. A consequence of the One Child Policy has been an increase in the number of female babies killed and abandoned: if families will be
The Eugenics Law makes compulsory for everyone a premarital medical examination for serious genetic diseases, some infectious diseases, and relevant mental disorders. If the disorder is serious enough, long-term contraception or tubal ligation is to be used to enforce childlessness; otherwise, the couple will not be allowed to marry. During pregnancy, prenatal testing will also be compulsory, followed by termination if the fetus has a serious genetic or somatic disorder. Voluntary termination remains an option, but compulsory termination seems to occur at the discretion of the doctor. Finally, the law bans fetal sex identification to combat a deeply ingrained traditional preference for sons that prompt many families to abort female fetuses.

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

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


59 Id.

60 Id.

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

62 Hawkes, supra note 58.

63 The Eugenics Law is designed to target genetic diseases that may totally or partially prevent the victim from living independently. Some analysts are concerned that this might include conditions as common as a harelip and cleft palate, which often go uncorrected because the parents of affected children cannot afford the operation. Hawkes, supra note 58 (quoting Chen Minzhang, Chinese Health Minister).
serious nature, that person or their partner "shall take measures in accordance with the physician's medical advice."\(^{64}\) Taken in conjunction with Article 10, this implies an obligation to make a prenatal diagnosis and possibly terminate the pregnancy. In addition, Article 9 stipulates that people affected by "specified" infectious diseases and mental illness should postpone their marriages.\(^{65}\) Many "specified" diseases, however, are curable even during pregnancy and do not harm the fetus.\(^{66}\)

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

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

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\(^{64}\) Hawkes, \textit{supra} note 58.

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

\(^{66}\) \textit{Id.}

\(^{67}\) Hawkes, \textit{supra} note 58.

\(^{68}\) Hawkes, \textit{supra} note 58.

\(^{69}\) Hawkes, \textit{supra} note 58.

\(^{70}\) BANISTER, \textit{supra} note 8, at 225.

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

\(^{72}\) Wilkie, \textit{supra} note 57.

\(^{73}\) Moral grounds for objecting to the Eugenics Law have been described by British commentators as arrogant and ethnocentrist given the inconceivable scale of China's population problems. These commentators recommend that instead of any type of boycott of Chinese goods because of the Eugenics
effective because implementation will be discretionary and sporadic, and the population will find ways to circumvent the law. Finally, it is expected that the law will carry immense service costs and require highly specialized caregivers. Such elaborate screening before marriage is not likely to become commonplace for some time, especially in rural areas, because it is expensive, time-consuming, and requires medical expertise to detect potential hereditary defects or incurable infectious diseases.

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

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

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

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

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

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


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

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

80 While forced abortion was considered a crime in the Nuremberg War Crimes Trials, today it is “employed regularly, with chilling effectiveness and unbearable pain, upon women in the People’s Republic of China. Women in China are required to obtain a birth coupon before conceiving a child. Chinese women are hounded by the population control police, and even their menstrual cycles are publicly
The Chinese government has denied that forced abortion and involuntary sterilization are part of the official policy.\textsuperscript{82} The implementation of the policy by local officials or cadres involves, according to government officials, persuasion and education until the woman agrees.\textsuperscript{83} However, high officials have recognized that in some cases, cadres have been excessively brutal in forcing women to cooperate.\textsuperscript{84} These cadres are dealt with through education in a "good style of work."\textsuperscript{85}

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

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

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

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

\textsuperscript{84} Minister Peng admitted that there are some cadres whose work is "not entirely satisfactory." Id.

\textsuperscript{85} Id.

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

\textsuperscript{87} U.S. Rep. Chris Smith has denounced the UNFPA's complicity in China's practices of forced abortion and involuntary sterilization. Id.
under the condition that no U.S. funds could go to China, were blocked by pro-life groups.  

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

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

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

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

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

91 Id.

92 Id.

93 Id.

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

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

96 China has had 14 years of Most Favored Nation ("MFN") status in the United States. Solomon Testimony, supra note 81.
to China for another year, but made the 1994 renewal conditional on Beijing meeting President Clinton’s demands for human rights improvements, including ensuring that forced abortion and involuntary sterilization were not part of China’s rigid family planning policy. In 1994, MFN status was again extended by the Administration even though China had done little to improve its human rights record.

Critics charge that MFN status should not be granted until China makes significant improvements in human rights. Proponents of granting MFN status argue that opening up the avenues of commerce with China will create a natural flow of human rights improvements by bettering the socio-economic status of Chinese citizens. What is certainly true is that MFN status means big business to China: Chinese exports to the United States rose by 223% between 1989 and 1994, while the United States exports to China rose by only 60%.

China will likely continue to defy international pressure as long as it receives the benefits that keep its economy strong and growing, and perceives Western threats as meaningless.

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

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

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

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

99 Solomon Testimony, supra note 81.

100 Solomon Testimony, supra note 81.

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

102 England has demanded that the Chinese government desist from practicing compulsory abortions and forced sterilization. David Wallen, British MPs Call for UN Venue to Change, S. CHINA MORNING POST, June 21, 1995, at 9.
implementation, the Eugenics Law is likely to produce asylum claims similar to those under the One Child Policy. As such, the legal analysis and background history of asylum claims based on the One Child Policy might have implications for future asylum claims based on the Eugenics Law.

1. The Refugee Act of 1980

The Refugee Act of 1980\(^\text{103}\) ("Refugee Act") governs asylum procedures for refugees in the United States and establishes an overseas refugee admissions program.\(^\text{104}\) The Refugee Act incorporates the international definition of "refugee" from the United Nations Convention Relating to the Status of Refugees.\(^\text{105}\) By adopting a universal approach to refugee admissions consistent with international standards and norms, the Refugee Act emphasizes "special humanitarian concerns."\(^\text{106}\)

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


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


\(^{106}\) Anker & Posner, supra note 105, at 11.

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

2. Regulatory History

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

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

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110 Xin-Chang Zhang v. Slattery, 55 F.3d 732, 737 (2d Cir. 1995).
111 Id. at 738 (citing Memo from the Office of Attorney General Edwin Meese to Immigration and Naturalization Service Commissioner Alan Nelson, Aug. 5, 1988, at 1). Attorney General Meese's Memo stated in pertinent part:

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

113 Id.
Policy was not persecutory on its face, the BIA denied the petitioner's asylum request.\textsuperscript{114}

In July 1989, Congress considered the Emergency Chinese Immigration Relief Act of 1989\textsuperscript{115} in reaction to Matter of Chang and the contemporaneous events of Tiananmen Square.\textsuperscript{116} The proposed legislation would have effectively overruled Matter of Chang and allowed refugee status to be conferred on the basis of China's family planning policies. President Bush, however, vetoed the Act after it was passed by Congress because statutory codification of such measures would interfere with ongoing diplomatic initiatives.\textsuperscript{117}

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

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

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

\textsuperscript{116} On June 4, 1989, the Chinese Communist Central Party crushed the pro-democracy movement in Beijing. The world watched as the People's Liberation Army killed over 1000 civilians with the use of military power. \textsc{Lawrence R. Sullivan, China Since Tiananmen, Political, Economic, and Social Conflicts 1} (1995).


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

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

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

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

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120 The January 1990 Interim Rule provided that:

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


121 Id.

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

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

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

[A]pplicant (and the applicant's spouse, if also an applicant) shall be found to be a refugee on the basis of past persecution on account of political opinion if the applicant establishes that, pursuant to the implementation . . . of a family planning policy that involves or results in forced abortion or coerced sterilization, the applicant has been forced to abort a pregnancy or to undergo sterilization or has been persecuted for failure or refusal to do so, and that the applicant is unable or unwilling to return to, or to avail himself or herself of the protection of, that country because of such persecution. An applicant (and the applicant's spouse, if also an applicant) shall
Matter of Chang. The January 1993 Final Rule also differed from other administrative actions in that it mandated, rather than suggested, that refugee status be granted to individuals facing forced abortion or sterilization in China upon the proper showing of persecution on account of political opinion. Moreover, the January 1993 Final Rule was not specific to China’s One Child Policy, but encompassed coercive population control acts—forced abortion or involuntary sterilization—of any country.

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

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

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


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

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

127 Id.

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

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

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

131 Id. (quoting Att’y Gen. Order No. 1756-93; JA at 1650).
Against the background to these legal devices was a sudden increase in alien smuggling by organized crime gangs in China. After being apprehended, many of these aliens sought asylum in the United States based on the One Child Policy. Many of these claims are still pending review in the federal courts.

III. ANALYSIS

A. Asylum Claims Based on the One Child Policy

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

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

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

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

133 Id.

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

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

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

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

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

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

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

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

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138 Xin-Chang Zhang v. Slattery, 55 F.3d at 750.
140 See supra part II.D.2 for a regulatory history of asylum claims based on the One Child Policy. See also infra part III.A.3 concluding that the various pronouncements of the legislative and executive branch are inconsistently evaluated by the federal courts of appeals.
141 Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1342 (4th Cir. 1995); Xin-Chang Zhang v. Slattery, 55 F.3d 732, 750 (2d Cir. 1995).
142 See Xin-Chang Zhang v. Slattery, 55 F.3d at 751; Chen Zhou Chai v. Carroll, 48 F.3d at 1342.
143 Xin-Chang Zhang v. Slattery, 55 F.3d at 751.
145 Id. at 480.
account of the persecutor’s opinion. The Court required that Elias-Zacarias’ resistance to join the guerrillas was an expression of his political opinion, and further, that he had a well-grounded fear that the guerrillas would have persecuted him “because of that political opinion, rather than because of his refusal to fight with them.”

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

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

147 The “mere existence of a generalized ‘political’ motive underlying the guerrillas’ forced recruitment is inadequate to establish (and, indeed goes far to refute) the proposition that Elias-Zacarias fears persecution on account of political opinion” as § 1101(a)(42)(A) requires. INS v. Elias-Zacarias, 502 U.S. at 482.
148 Id.
150 Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1342 (4th Cir. 1995); Xin-Chang Zhang v. Slattery, 55 F.3d 732, 751 (2d Cir. 1995) (INS v. Elias-Zacarias teaches “that an applicant for refugee status must establish a fear of reprisal that is different in kind from a desire to avoid exactions (however harsh) that a foreign government may place upon its citizens.”).
151 INS v. Elias-Zacarias, 502 U.S. at 482.
152 The Court noted that applicants do not need to supply direct proof of the persecutor’s motives, but that they must provide some evidence of them, either direct or circumstantial. INS v. Elias-Zacarias, 502 U.S. at 483.
153 Matter of Chang, Int. Dec. 3107 (BIA 1989). The Board did not find the Chinese One Child Policy persecutory on its face. The Chinese government, the Board noted, is “faced with the difficulty of providing for China’s vast population in good years and in bad.” Id.
children, was not a political opinion. The courts have thus concluded that
the BIA’s interpretation in Matter of Chang is consistent with the teachings
of Elias-Zacarias and with the statute because it focuses upon the political
belief of the victim and the motivation of the alleged persecutor.

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

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

154 Id.
155 See Blanco-Lopez v. INS, 858 F.2d 531, 534 (9th Cir. 1988) (holding that while a government
has the right to prosecute individuals accused of criminal activity, such as supporting a guerrilla faction,
when violence or threats of violence usurp legal procedure, then persecution on the basis of political
opinion exists).
156 Anker & Posner, supra note 105, at 55 (emphasizing that human rights violations in the country
of origin is the primary factor in evaluating asylum claims).
157 But see Rebecca O. Bresnick, Reproductive Ability as a Sixth Ground of Persecution Under the
(concluding that asylum claims based on reproductive rights violations do not fall under persecution on
account of political opinion because the persecution is based on ability to reproduce).
158 MOSHER, supra note 4, at 328. Chinese immigrant, who after enforcing the One Child Policy
for the Chinese Communist Party in China, found herself pregnant for a second time while on leave in the
United States. She sought asylum in the United States on the basis of both political opinion and
membership in a particular social group. She expressed her view that the Immigration and Naturalization
Service’s description of the One Child Policy as merely a social policy uniformly applied throughout China
as “naive, if not down right disingenuous. In China, any dissent from any official policy was an act of
political rebellion.” Id. (emphasis in original). MOSHER, supra note 4, at 328-32 (reprinting Attorney
General Meese’s Memorandum to the Immigration and Naturalization Service stating that the PRC views
violations of the One Child Policy as an act of political dissidence).
159 MOSHER, supra note 4, at 328-32. See also discussion supra part II.A of the historical
development of the One Child Policy.
160 Country Reports on Human Rights, supra note 37, at 561.
protects human rights, but they are frequently ignored in practice, and challenges to the CCP’s political authority are often dealt with harshly and arbitrarily.\textsuperscript{161} Moreover, the regulations governing family planning treat those individuals interfering with the implementation of the law as "counterrevolutionaries."\textsuperscript{162}

3. \textit{The Several Executive and Legislative Pronouncements Are Inconsistently Evaluated}

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

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

\begin{itemize}
\item \textsuperscript{161} Country Reports on Human Rights, \textit{supra} note 37, at 561.
\item \textsuperscript{162} MOSHER, \textit{supra} note 4, at 315.
\item \textsuperscript{163} For example, if the January 1990 Interim Rule was legally valid from January 1990 until July 1990, then the BIA could not have applied \textit{Matter of Chang} during that period.
\item \textsuperscript{164} Xin-Chang Zhang \textit{v. Slattery}, 55 F.3d 732, 744 (2d Cir. 1995) (citing 5 U.S.C. § 706(2)). A properly promulgated legislative rule is subject to the notice and comment requirements of the Administrative Procedure Act [hereinafter APA]. If legislative rules are not subjected to a notice and comment period, they may be invalidated by the federal courts. Importantly, rules may be excepted from the notice and comment requirements if they fall into one of the narrowly construed categories of § 553 of the APA. Three exceptions potentially apply to the January 1990 Interim Rule: (i) foreign affairs; (ii) interpretative rules; and (iii) good cause. \textit{Id.} at 744 (citing \textit{Methodist Hosp. of Sacramento v. Shalala}, 38 F.3d 1225, 1236 (D.C. Cir. 1994)).
\item \textsuperscript{165} See discussion \textit{supra} part II.D.2 for a regulatory history of the One Child Policy.
\item \textsuperscript{166} The Second Circuit found that the January 1990 Interim Rule had not been subjected to the notice and comment requirements of the APA. In addition, the court noted that the January 1990 Interim Rule did not fall under any of the statutory exceptions to notice and comment provided by 5 U.S.C. § 553.
\end{itemize}
declaring the January 1990 Interim Rule "interpretive" and thus excepted from the notice and comment requirements of the APA.\(^{167}\) If the Fourth Circuit's reasoning is correct, then the January 1990 Interim Rule was properly promulgated and valid for seven months until the publication of the July 1990 Final Rule.\(^{168}\) During those seven months, the BIA could not have applied *Matter of Chang*. This assertion casts doubt on the courts' determination that the BIA is due judicial deference because it consistently applied its decision and that the several pronouncements were never legally effective.\(^{169}\)

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

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\(^{167}\) Xin-Chang Zhang v. Slattery, 55 F.3d at 744.

\(^{168}\) The Second Circuit was responding to appellant's argument that the January 1990 Interim Rule was never properly revoked. The APA requires an agency revoking an existing rule to afford notice and an opportunity for public comment. 5 U.S.C. §§ 551 et seq. The Fourth Circuit, by contrast, found the January 1990 Interim Rule interpretive in that it merely stated what the Immigration and Naturalization Service believed the statute to mean. Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1340-41 (4th Cir. 1995) (citing Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n, 874 F.2d 205, 207 (4th Cir. 1989); American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1046 (D.C. Cir. 1987)).

\(^{169}\) The Fourth Circuit did not address this issue in Chen Zhou Chai v. Carroll, 48 F.3d 1331 (4th Cir. 1995).

\(^{170}\) See discussion supra part III.A.1 of the court's deference to *Matter of Chang*.

\(^{171}\) An executive order is privately enforceable only if it is issued pursuant to a statutory mandate or delegation of congressional authority. Chen Zhou Chai v. Carroll, 48 F.3d at 1338 (citing Facchiano Constr. Co. v. U.S. Dep't of Labor, 987 F.2d 206, 210 (3d Cir. 1992), cert. denied, 126 L. Ed. 2d 48, 114 S. Ct. 80 (1993)); see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-88, 96 L. Ed. 1153, 72 S. Ct. 863 (1952).

\(^{172}\) Id.
cause of action.\textsuperscript{173} By its own express terms, Executive Order 12,711 indicates that it was an internal directive from the President to his Attorney General, instructing him to exercise his statutory authority to provide for enhanced consideration of certain asylum claims.\textsuperscript{174}

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

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

\textsuperscript{173} Id. (citing Independent Meat Packers Ass’n v. Butz, 526 F.2d 228, 236 (8th Cir. 1975), cert. denied, 426 U.S. 966, (1976)).
\textsuperscript{174} Id. (citing 55 Fed. Reg. 13897 (Apr. 11, 1990)).
\textsuperscript{175} Id. at 1341 (listing the district court cases which considered whether to enforce the January 1993 Final Rule even though it was not published; all but one found the rule unenforceable). Xin-Chang Zhang v. Slattery, 55 F.3d 732, 748 (2d Cir. 1995) (finding that the January 1993 Final Rule was never successfully promulgated because the rule never became effective by its own terms).
\textsuperscript{176} Xin-Chang Zhang v. Slattery, 55 F.3d at 748; cf. United Technologies Corp. v. OSHA, 836 F.2d 52, 54 (2d Cir. 1987) (“The amendments . . . were promulgated when they were published in the Federal Register.”).
\textsuperscript{177} Id.
\textsuperscript{178} Additionally, the January 1993 Final Rule suffered from another defect. It could not have been effective, even if published, because its effective date was never filled in. Id.
\textsuperscript{179} See Xin-Chang Zhang v. Slattery, 55 F.3d at 744; Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1340 (4th Cir. 1995).
B. Analysis of Future Asylum Claims Based on The Eugenics Law

1. A Particular Social Group Can Be Found

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

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

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


185 Id.

186 Article I of the Convention Relating to the Status of Refugees provides: "A. For the purposes of the present Convention, the term "refugee" shall apply to any person who: (2) [As a result of events occurring before 1 January 1951] and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." Id.
persecution rather than to a specific crisis or nationality group and it expands the reasons that warrant refugee status. The fourth ground—membership in a particular social group—was introduced by the Swedish representative to the Convention without much explanation and adopted by the Convention without recorded comment. It appears that the delegates were far more concerned with restricting the geographical and time limits of the refugee definition than with discussing the categories of persecution.

The Refugee Act of 1980 adopted the Convention's definition of "refugee." Unfortunately, the legislative history on the social group aspect sheds little light on its intended scope. Congress gave no explicit indication of its understanding of the purpose or meaning of this term. Second, developed case law indicates vague judicial standards applied inconsistently. The lack of a uniform approach towards asylum claims based on membership in a particular social group has led to the

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187 Fullerton, supra note 183, at 509.
188 In support of his amendment, the Swedish representative stated that "experience ha[s] shown that certain refugees ha[ve] been persecuted because they belonged to particular social groups. The draft convention [makes] no provision for such cases, and one designed to cover them should be accordingly included." A/CONF.2/SR.3 at 14 (1951). Arthur C. Helton, Persecution on Account of Membership in a Social Group as a Basis for Refugee Status, 15 COLUM. HUM. RTS. L. REV. 39, 41 n.15 (1983); see also Daniel Compton, Asylum for Persecuted Social Groups: a Closed Door Left Slightly Ajar, 62 WASH. L. REV. 913, 925 (1987).
189 The amendment was adopted by a vote of fourteen to zero with eight abstentions. There were no negative votes cast. The record does not disclose which delegations favored the amendment and which delegations abstained. Article I of the draft convention, as amended to include the persecution based on social group, then passed by a vote of twenty-two to zero with one abstention. Fullerton, supra note 183, at 510 (citing A/CONF.2/SR.23 at 8).
190 Fullerton, supra note 183, at 510 (citing A/CONF.2/SR.23 at 19-24).
191 The Conference Committee Report stated that the Refugee Act's definition of "refugee" was accepted "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." Fullerton, supra note 183, at 513 (citing S. Rep. No. 590, 96th Cong., 2d Sess., at 20 (1980)).
193 The only direct comment was made in 1968 by President Johnson, when he sent the 1967 Protocol to the Senate for ratification: "The Protocol constitutes a comprehensive Bill of Rights for refugees fleeing their country because of persecution on account of their political views, race, religion, nationality, or social ties." The Senate ratified the Protocol, which contained the Geneva Convention refugee definition, in 1968. Congress later enacted the Refugee Act of 1980, which was intended, in part, to implement the Protocol by expressly conforming the statutory definition to the Convention/Protocol definition. Fullerton, supra note 183, at n.44 (citing 114 Cong. Rec. 24,628 (1968)).
194 See, e.g., Matter of Acosta, Int. Dec. 2986 (BIA 1985); Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985); Sanchez-Trujillo v. INS, 909 F.2d 1 (9th Cir. 1990).
recognition of previously unrecognized groups, such as families, gay men and lesbian women, the educated elite in Ghana, and former members of the national police of El Salvador. Yet, it has not been extended to others such as Chinese victims of the One Child Policy, women previously raped and beaten by guerrilla forces, members of a taxi drivers' cooperative in El Salvador, and urban draft-age men not in the Salvadoran army, among others. Examination of the decisions struggling to define "social group" reveals incongruencies in U.S. jurisprudence.

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

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

197 Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985).
200 Gomez v. INS, 947 F.2d 660 (2d Cir. 1991) (women who have previously been raped and beaten by guerrillas do not constitute a social group because they are not a recognizable and discrete group).
203 Parish, supra note 105, at 923.
204 Mr. Acosta claimed to be part of a cooperative of taxi drivers in San Salvador who had not participated in a guerrilla-led work stoppage. The BIA rejected Mr. Acosta's asylum claim finding that a voluntary association of taxi drivers was not a social group within the meaning of the statute. Matter of Acosta, Int. Dec. 2986 (BIA 1985).
205 Id.
206 To interpret the term "social group," the BIA turned to canons of statutory construction that direct that general words included in a list of more specific words be construed in a manner consistent with the more specific words. Id.
individual identity or conscience that it ought not be required to be changed."\(^{207}\)

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

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

\(^{207}\) Id.

\(^{208}\) Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985).

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

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

\(^{211}\) Id.

\(^{212}\) Id.

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

\(^{214}\) The court described the legislative history as "generally uninformative on this point." Id. at 1575. Additionally, the court characterized the UNHCR Handbook as a "significant source of guidance." However, it found the UNHCR Handbook as providing little assistance at a workable definition of particular social group. Id. at 1576.
relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.”215 Applying this test, the court found that the claimants did not constitute a particular social group; rather than being a small, readily identifiable group, they are a “major segment of the population of an embattled nation.”216

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

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

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

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215 Id. See also Fullerton, supra note 183, at 555 (identifying three elements in the Ninth Circuit’s Sanchez-Trujillo v. INS definition of “social group:” (1) voluntary associational relationship; (2) common characteristic (or impulse interest); and (3) a characteristic fundamental to their group identity).
216 Sanchez-Trujillo v. INS, 801 F.2d at 1577.
218 Id.
219 An immutable characteristic is a characteristic that is not capable of, or susceptible to, change.
220 Ananeh-Firempong v. INS, 766 F.2d 621, 623 (1st Cir. 1985).
221 Supra discussion part II.B.
222 Supra discussion part II.B.
services for a quality life. Thus, the common background and social status shared by individuals afflicted with serious genetic diseases and mental deficiencies may likely be found to form a social group under a background and social status test.

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

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

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

223 Supra discussion part II.B.
224 Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986).
225 Rather than a cohesive or homogenous group, they are a group of disparate individuals with "different lifestyles, varying interests, diverse cultures, and contrary political leanings." Id. at 1577.
226 Fullerton, supra note 183, at 556. The author notes that the Ninth Circuit's decision is internally inconsistent. The Ninth Circuit characterizes a family as the quintessential social group. However, family members may choose not to associate, precluding the voluntary associational factor, and still be a social group within the Ninth Circuit's test.
227 Sanchez-Trujillo v. INS, 801 F.2d at 1577; see Fullerton, supra note 183, at 556.
229 Id.
230 See discussion supra part II.B of the Eugenics Law.
contrast, applies only to that portion of the Chinese citizenry with genetic defects. This difference may result in tipping the balance in favor of granting asylum to victims of the Eugenics Law.

C. **Definitive Legislative Action Is Necessary**

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

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

1. **Temporary Protected Status Inadequate**

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

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233 See Nickerson, supra note 94.

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

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

236 In 1987, Congressman Mazzoli, then chair of the House Subcommittee on immigration matters, proposed an alternative to the country-specific relief of previous legislation, instead establishing a general statutory framework for what would remain discretionary executive-branch decisions to grant temporary safe haven. Adopting Congressman Mazzoli's proposal in 1990, Congress added § 244A to the INA,
persecution due to Chinese population control policies is insufficient. TPS is an inadequate response because it is a temporary solution to a problem that is long-standing and unlikely to change. Furthermore, TPS is subject to foreign policy considerations since the executive branch denies or grants status depending upon U.S. diplomatic relations with China.237

2. Floodgates Will Not Open

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

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

237 See 8 U.S.C. § 244A.

238 See discussion supra part II.D.1.


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

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

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

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