THE GRANT OF POLITICAL ASYLUM
BASED ON CHINA'S POPULATION CONTROL POLICY

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I. INTRODUCTION

The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.

- - U. S. Supreme Court Justice Douglas

In 1979, the People’s Republic of China (“PRC”) implemented a “one couple – one child” population control policy. In order to enforce this policy, many Chinese citizens are forced to submit to forcible sterilization or abortion. Since the inception of the policy, many Chinese citizens faced with being subjected to these measures have fled to the United States seeking political asylum. In order to qualify for asylum in the U.S., an applicant must first meet the statutory definition of “refugee.” The statute defines a refugee as “any person who is outside any country of such person’s nationality . . . . who is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” Most Chinese petitioners seeking asylum base their claims on the allegation that they are being

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3 Id. at 746.
4 Id.
persecuted or fear persecution based on their political opinion. This article will explore the extent to which Chinese citizens fleeing PRC’s “one couple – one child” policy are eligible for asylum under U.S. refugee law.

Section II of this article provides an historical analysis of PRC’s population control policy. This section addresses the reasoning behind the policy. It also discusses the enforcement mechanisms PRC has implemented to enforce this policy. It focuses on the types of punishment imposed on those who violate the policy. It also discusses what protections, if any, PRC offers to those who object to the policy.

Section III analyzes PRC’s “one couple – one child” policy with respect to U.S. asylum law. It explores the issue of whether implementation of PRC’s “one couple – one child” policy amounts to persecution. It then analyzes the question of whether a person’s opposition to this governmental policy amounts to an expression of a political opinion for purposes of qualifying as a refugee. This section also discusses whether claims based on this type of persecution meet the nexus requirement of U.S. refugee law. After analyzing relevant case law, it concludes that certain Chinese aliens fleeing PRC’s

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6 See Chen v. I.N.S., 95 F.3d 801, 802 (9th Cir. 1996).
7 Although this article focuses on political opinion as a ground for asylum in cases involving coercive population control measures, it is also possible to base these claims on other grounds such as social group or religion. However, prior to the 1996 Amendment to the definition of refugee, in those cases in which asylum was granted, the courts found political opinion as the ground for the persecution. Due to the narrow interpretation courts have given to the term “social group,” (see Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) – interpreting social group as a “voluntary association or relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group”), and the fact that China’s Population Control Policy is a national policy that is supposed to apply to every national citizen, it is extremely difficult to base these claims on social group. However, it might be possible to narrow down the social group to Chinese residents of a particular town who oppose the population control policy. In addition, if the coercive population control measures, such as forcible abortions, violate the principles of a person’s religion, the claim may also be based on religion.
8 Under current U.S. refugee law, there is a statutory requirement that the persecution be linked to at least one of the five enumerated grounds. This requirement of a link between the harm and the basis for its infliction is commonly referred to as the "nexus" requirement. In 1992 the U.S.
population control policy, to the extent that they have a well-founded fear of persecution on account of political opinion, should be eligible for asylum.

In 1996 §601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act amended the refugee definition of §101(a)(42) of the Refugee Act. The refugee definition now includes involuntary sterilization or abortion as a form of persecution. Therefore, the nexus requirement no longer applies to claims based on coercive population control measures. Section IV of this article analyzes the regulatory and legislative history of this amendment. It also discusses the effects this amendment has had on refugee policy and analyzes what new issues now arise as a result of the change in the definition of refugee.

Section V concludes with a discussion of international human rights law with respect to the right to found a family. It analyzes whether current U.S. refugee law in regard to PRC’s population control policy is consistent with the humanitarian concerns and purposes of the 1967 Protocol Relating to the Status of Refugees.

II. CHINA’S “ONE COUPLE – ONE CHILD” POLICY

Faced with a fifth of the world’s human population and only 7% of the world’s arable land, population control has been a main concern of the Chinese government since the 1970s. Following China’s Cultural Revolution (1966 – 1976), the Chinese government implemented a “socialist modernization” policy intended to transform China

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Supreme Court held in I.N.S. v. Zacarias, 502 U.S. 478 (1992) that all applicants must provide evidence of the persecutor’s intent. Failure to prove the intent results in a denial of asylum.

9 See In Re C-Y-Z-, Interim Decision 3319 (BIA 1997).
11 See footnote 8.
into a powerful and modern socialist society. The government thought it was necessary to reduce China's population in order to achieve its objectives of rapid economic development. The government's main concerns included its ability to feed, house and educate its rapidly increasing population. Therefore, as part of the economic reform campaign, lowering the birth rate drastically and rapidly was made a basic national policy.

In 1979 China launched its One Child Policy. The One Child Policy imposes upon Chinese citizens a limit of one child per couple. The government's goal was for China's maximum population to be 1.2 billion by the year 2000. In 1980 the Chinese Communist Party (CCP) issued an Open Letter requiring radical curtailing of population control by imposing the One Child Policy. Population control is considered a basic national policy. In particular, Article 25 of China's Constitution states that "the state promotes family planning so that population growth may fit the government's plans for economic and social development." Moreover, articles two and twelve of the Marriage

15 Id. at 206.
16 Id.
18 China's Eugenics, supra note 12, at 565.
19 Id.
20 Christine C. Antoun, Chen Zou Chai v. Carroll, 3 Race & Ethnicity Ancestry L. Dig. 48 (1997) [hereinafter Chen Zou].
21 Caught Between, supra note 16, at 295.
22 Id.
Law of 1980 require family planning to be practiced. In addition, these articles impose a duty on both husband and wife to practice birth control.

China has no national law on population control per se. The Constitution and the Marriage Law simply outline a family planning policy. The CCP did not devise specific methods for implementing the policy. Therefore, local provinces and cities may enact their own regulations. Local officials are responsible for ensuring that citizens are complying with the policy. Due to the lack of an official national policy outlining specific implementation measures, local officials are impliedly authorized to use any possible means to achieve the central government’s policy. Although the population control policy ostensibly is to be implemented through societal pressure and economic incentives, local officials use more coercive measures. As a result, implementation of the One Child Policy has led to involuntary sterilization and forced abortions.

The policy generally encourages one child per family. However, due to the lack of a national enforcement mechanism, severe inconsistencies in the policy’s implementation have occurred in urban and rural areas. For example, in rural areas, often the policy is not as rigorously enforced as in urban areas and therefore, couples in

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24 Id. at 791.
25 Id.
26 China’s Eugenics, supra note 12, at 566.
27 Id.
28 Id.
29 Id. at 567.
30 Id.
31 Id. at 567, 568.
32 Forced Abortions and Involuntary Sterilization in China, supra note 2, at 751.
33 China’s Eugenics, supra note 12, at 568.
34 Caught Between, supra note 16, at 295.
35 Population Control Through the One-Child Policy, supra note 13, at 207.
rural areas tend to have two or more children. This is due not only to the fact that population control authorities tend to lose some control over the peripheries of their townships, but also to the strong resistance from peasants to the population control measures. In addition, other factors have contributed to the inconsistent regional implementation. One such factor is the fact that due to the availability of different quality levels of service, many residents of urban areas place more value than peasants on certain population control incentives such as housing, better schooling, or health benefits. Also, the flexibility available to the local cadres enforcing the policy has resulted in many cadres revising the policy to allow for more than one child.

However, in general the policy allows only one child. Moreover, in many localities couples have to apply for a birth permit before actually getting pregnant. After having the number of children allowed, women must wear an intrauterine device (IUD). Women must be x-rayed up to four times a year to make sure the IUD is still in place. Women who get pregnant after already having the number of children permitted, must undergo an abortion. For example, a Chinese gynecologist recalls having to perform abortions: "...women who are 7, 8, or 9 months pregnant with their 2nd or 3rd baby are taken to the hospital by regional population control officials for induced abortion..." Doctors and nurses in the delivery section are told that when a woman is sent in by officials for induced abortion, her baby should not be let out alive. Otherwise...

36 China's Eugenics, supra note 12, at 568.
37 Id.
38 Id.
39 Id.
40 Caught Between, supra note 16, at 295.
41 Id.
42 Id.
43 Fear of Persecution, supra note 22, at 792.
44 Caught Between, supra note 16, at 295.
doctors or nurses will face administrative discipline.\textsuperscript{45} After having an unauthorized birth, one spouse must be sterilized.\textsuperscript{46} Local authorities have the power to have the county police hunt down women who have refused to undergo an abortion or be sterilized.\textsuperscript{47} Moreover, the government may also destroy a couple’s home as a form of punishment for violating the policy.\textsuperscript{48}

Monetary sanctions are also imposed by some localities on couples who violate the policy.\textsuperscript{49} In some provinces, couples who have a second child are required to pay a fine of 10 to 20\% of their salary for the next three to fourteen years.\textsuperscript{50} Workers who have three children lose employment benefits.\textsuperscript{51} State employees may face administrative punishments such as demotion and deprivation of entitlement to public housing.\textsuperscript{52} Moreover, according to some documented practices, children born in violation of the planning policy cannot be registered as legal residents of China nor obtain birth certificates.\textsuperscript{53} Therefore, they cannot claim state subsidies for admission to day care and schools nor are they eligible for health care.\textsuperscript{54}

All of these sanctions are stricter than those envisioned by the national government.\textsuperscript{55} However, local officials tend to resort to coercive measures due to the pressure imposed on them by the national government to achieve birth quotas.\textsuperscript{56} As incentives, officials receive cash bonuses, recognition, and promotions if their units meet

\begin{thebibliography}{56}
\bibitem{45} Id.
\bibitem{46} Id.
\bibitem{47} Id. at 296.
\bibitem{48} Fear of Persecution, supra note 22, at 792.
\bibitem{49} Caught Between, supra note 16, at 297.
\bibitem{50} Id.
\bibitem{51} Id.
\bibitem{52} Id.
\bibitem{53} Id.
\bibitem{54} Id.
\bibitem{55} Id. at 295.
\bibitem{56} Id.
\end{thebibliography}
the birth control quotas.57 In addition, officials who refuse to force people to comply with birth limits may be publicly reprimanded by the CCP and sanctioned economically.58 As a result of these pressures, local officials are more likely to resort to expeditious measures to meet government quotas.59 These measures often include coercion and force.60 Although the central Chinese government condemns coercion as a population control measure, it refuses to punish local officials who use it.61 Therefore, it is inevitable that local officials will continue using coercive measures to implement the policy.

China offers no protection to couples who have been victims of these coercive measures. Although the Chinese government denies that forced abortions and involuntary sterilizations are part of its official population control policy, no documented cases of punishment of officials who use these measures exist.62 This is despite the fact that high government officials of the central government have acknowledged that in some cases, local officials have been excessively brutal in forcing women to cooperate with implementation measures.63 There have been very few, if any, prosecutions of local officials who use violence against citizens as a means of implementing the One Child Policy.64 Moreover, victims of violence at the hands of local officials are not afforded the opportunity to file a lawsuit against the perpetrators because local courts do not accept any lawsuits regarding population control policy disputes.65

57 China's Eugenics, supra note 12, at 567.
58 Id.
59 Population Control Through the One Child Policy, supra note 13, at 209.
60 Id.
61 Forced Abortions and Involuntary Sterilization in China, supra note 2, at 753.
62 China's Eugenics, supra note 12, at 568.
63 Id.
64 Caught Between, supra note 16, at 295.
65 Id. at 296.
Currently China’s national government is requesting local birth control cadres to cease using coercive population control measures as a means of implementing the policy.Officials state that they seek to achieve population control not by coerced measures but through a women’s health system that discourages large families. Some of the measures it now encourages include patient education, contraceptive choice, and heavy taxes for couples who choose to have more than one child. This change is due to the fact that the average number of children has dropped from about six to two per woman of childbearing age since 1970. However, there are still many obstacles to the complete abolition of the use of coercive population control measures. There is still much dissent among high officials with respect to the enforcement of the policy. Moreover, many local family planning officials are accustomed to using coercive measures. In addition, women are still very suspicious of this new system because they have long regarded the One Child policy as “brutish” and “capricious.” Therefore, much remains to be done in order to bring about the end of forcible abortions and involuntary sterilizations.

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67 Id.
68 Id.
69 Id.
70 Id.
71 Id.
72 Id.
III. U.S. ASYLUM LAW

A. DEFINITION OF "REFUGEE"

In 1951 the Convention Relating to the Status of Refugees established an international definition of refugee. However, this definition included temporal and geographical limitations. Therefore, the 1967 Protocol Relating to the Status of Refugees was passed in order to amend the definition of refugee and to delete the temporal and geographical limitations. The 1967 Protocol definition has become the internationally recognized definition of refugee. Signatory countries to the Protocol are not required to grant asylum to all individuals who meet this definition. However, they are required to observe the norm of "non-refoulement" which explicitly prohibits a country from expulsing or returning a "refugee whose life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion."

In 1968, the U.S. ratified the 1967 Refugee Protocol. Therefore, in 1980, in order to harmonize U.S. domestic law with its international obligations under the

74 Id. (The definition included a requirement that the refugee claim relate to a pre-1951 event in Europe.)
75 Under Article I of the 1967 Protocol a refugee is an individual who "owing to a 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. 1967 Refugee Protocol, Art. I. The 1951 Convention, Article 1 definition of refugee was identical to this definition, except that it included the temporal and geographical limits.
77 Id. at 31.

Asylum and restriction on removal are the two remedies available to refugees seeking protection in the U.S. A grant of asylum results in the refugee obtaining permanent legal status in the U.S. By comparison, restriction on removal simply prevents the return of the applicant to a country where his or her freedom is at risk. The applicant may therefore be returned to any other country which will accept him or her.

In order to be eligible for asylum or restriction on removal, the petitioner must prove that he classifies as a "refugee" within the meaning of the Refugee Act. The Act defines refugee as "any person who is outside any country of such person's nationality, . . ., and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." The burden of proof rests on the petitioner. The U.S. Supreme Court has interpreted the "well-founded fear" statutory requirement to require

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80 Id.
81 China's Eugenics, supra note 12, at 577.
83 Prior to the 1996 Amendments to the INA, restriction on removal was called withholding of deportation.
84 INA § 241(b)(3), 8 U.S.C. § 1251(b)(3)
86 INA § 101(a)(42)
an analysis of the subjective mental state of the petitioner as well as an objective analysis of the reasons for the fear.\textsuperscript{88} Once the petitioner demonstrates that he classifies as a refugee, the Attorney General has discretion to grant or deny asylum.\textsuperscript{89}

However, even if the Attorney General decides not to grant asylum, the refugee may nonetheless be entitled to restriction on removal. Under INA § 241(b)(3), the Attorney General "may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."\textsuperscript{90} An alien seeking restriction on removal must prove that it is more likely than not that he or she would be persecuted if returned to his own country.\textsuperscript{91} This "more likely than not" standard is a tougher standard to meet than the "well-founded fear" standard which applies to asylum.\textsuperscript{92}

The following subsections will analyze whether aliens fleeing China’s One-Child Policy may qualify for asylum or restriction on removal. Although the 1996 Amendment to the definition of refugee circumvents some of the following analysis, this article attempts to provide the full jurisprudential development of U.S. refugee law with respect to China’s Population Control Policy. In particular, the article will analyze whether the measures implemented by Chinese officials to enforce the policy constitute "persecution" as required by the Refugee Act. In addition, if the measures do constitute persecution, is this persecution on account of one of the five enumerated categories?

\textsuperscript{89} INA § 208.
\textsuperscript{90} INA § 241(b)(3).
\textsuperscript{91} INS v. Stevic, 467 U.S. 407 (1984) (Stevic was decided prior to the 1996 Amendment to the Immigration and Nationality Act. It dealt with withholding of deportation. However, the 1996 Amendments renamed withholding of deportation as restriction on removal).
\textsuperscript{92} Id.; Cardoza-Fonseca, 480 U.S. 421.
B. THE MEANING OF "PERSECUTION" WITH RESPECT TO CHINA'S "ONE COUPLE – ONE CHILD" POLICY IMPLEMENTATION MEASURES

In order to qualify for asylum or restriction on removal, petitioners must prove that they have either suffered the requisite harm or fear the infliction of that harm. Eligibility for restriction on removal requires the individual to establish a threat to life or freedom, while an individual seeking asylum must show a well-founded fear of persecution. The necessary harm must amount to persecution. Unfortunately the Refugee Act does not define the meaning of "persecution." Although the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook) states that "serious violations of human rights could constitute persecution, it also acknowledges that "there is no universally accepted definition of persecution and various attempts to formulate such a definition have met with little success." Consequently, courts and the BIA sometimes interpret this statutory requirement differently. However, it is clear that when defining "persecution", both the nature of the persecution and the motive for the persecution must be considered.

Until 1965, a showing of physical persecution was required before an individual could be granted asylum. For example, the Third Circuit in Blazina v. Bouchard held that "before the Attorney General may grant relief under §243(h) it must be shown to his satisfaction that, if deported, the alien would be subject not only to persecution, but to

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92 INA § 241(b)(3)
93 INA § 208
96 INA § 243(h), § 243(h) required physical persecution on account of race, religion, or political opinion. H.R. 2580 deleted the word "physical."
The court interpreted physical persecution as meaning confinement, torture, or death. However, in 1965 Congress amended § 243(h) by deleting the word physical and leaving the statute to read “persecution on account of race, religion, or political opinion.”

Since the abolition of the requirement that the persecution be physical, several U.S. courts have attempted to define the meaning of “persecution.” The Ninth Circuit first defined persecution in Kovac v. INS as “the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.” In that case, the petitioner was asked by the Yugoslavian secret police to spy among the Hungarian refugees and inform the police of the activities of the Hungarian underground. Because he refused to do so, the Yugoslavian secret police contacted his employers and caused him to lose his job. He was unable to obtain employment in his country as a result of his refusal to aid the secret police. The Ninth Circuit held that the deliberate imposition of a substantial economic disadvantage may constitute persecution.

In Fatin v. I.N.S. the Third Circuit held that the term “persecution” denotes extreme conduct. In that case, the court stated that “governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual’s deepest beliefs” might constitute extreme conduct, and

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99 Id. at 511 (§ 243(h) is the withholding of deportation statute – it is now called restriction on removal).
100 Id.
101 Kovac v. I.N.S., 407 F.2d 102, 105 (9th Cir. 1969). The 1965 definition of refugee did not include persecution based on social group or nationality as grounds for relief. H.R. 2580.
102 Id. at 107.
103 Id. at 103.
104 Id.
105 Id. at 107.
106 Fatin v. I.N.S., 12 F.3d 1233, 1240 (3d Cir. 1993).
therefore meet the definition of persecution. However, the court went on to add that persecution does not include all treatment that American society regards as unfair, unjust, unlawful, or unconstitutional.

The Board of Immigration Affairs (BIA) has also developed its own guidelines to define persecution. The BIA has interpreted persecution to include torture, confinement, and economic restrictions so severe that they constitute a threat to life or freedom. In addition, the BIA has acknowledged that the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim constitutes persecution. A subjective “punitive” or “malignant intent by the persecutor to punish his victims is not required for harm to constitute persecution. However, “generally harsh conditions shared by many other persons do not amount to persecution.”

The BIA’s position with respect to China’s One Child Policy has been that it is not on its face persecutory. In Matter of Chang, the BIA denied an application for asylum to a Chinese petitioner fleeing China because he opposed the One Child Policy. In that case, the petitioner and his wife had been ordered to submit to sterilization after the birth of their second child. Chang’s wife had been able to avoid sterilization because she had been sick. However, since Chang had no choice but to submit, he fled

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107 Id. at 1241
108 Id. at 1240
110 In re Kasinga, Interim Dec. 3278 (BIA 1996) (publication page references are not available for this document).
111 Id.
112 Acosta, 19 I & N. Dec. at 222.
115 Id. at 47
116 Id. at 39
117 Id.
to the United States.\textsuperscript{118} The BIA held that “implementation of the one couple, one child policy in and of itself, even to the extent that involuntary sterilization may occur” is not persecution.\textsuperscript{119}

Although there is a lack of uniformity among the American judiciary on the issue of persecution regarding coercive population control measures, under several U.S. judicial interpretations of the definition of “persecution”, China’s implementation measures of its One Child Policy might constitute persecution. As previously discussed, Chinese citizens who violate the policy are punished through forced abortions, involuntary sterilization, the imposition of monetary fines, and at times, through the destruction of their homes. This might meet both the “extreme conduct” requirement under \textit{Fatin}\textsuperscript{120} and the “the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive” under \textit{Kovac}\textsuperscript{121}. Involuntary sterilization has been recognized as an egregious infringement on the fundamental right to procreate.\textsuperscript{122} This type of violation of a person’s bodily integrity might constitute extreme conduct. In addition, if the monetary fines imposed on individuals who violate the policy are so excessive that they result in a substantial economic disadvantage, they might amount to persecution under \textit{Kovac}. Moreover, it is also possible that being forced to comply with the coercive measures violate a person’s deepest beliefs. If an individual finds these measures profoundly abhorrent, a forcible submission to them might constitute persecution under \textit{Fatin}.

\textsuperscript{118} Id.
\textsuperscript{119} Id. at 44
\textsuperscript{120} See footnote 106.
\textsuperscript{121} See footnote 101.
In addition, even under the BIA's interpretation of persecution, the measures used to implement China's one child policy might constitute persecution. Forced abortions and involuntary sterilizations amount to infliction of suffering by the Chinese government in order to overcome a characteristic of the victim. In this case, it can be argued that the characteristic the Chinese government is trying to overcome is opposition to the One Child Policy. Therefore, the punishment imposed on Chinese citizens who violate the policy might amount to persecution.

Moreover, a showing of past persecution is a basis for qualification for asylum under the Refugee Act. Under 8 C.F.R. 208.13 asylum may be granted upon a "showing of compelling reasons . . . arising out of the severity of the past persecution." However, even though past persecution alone may be sufficient to establish eligibility, an individual basing his or her claim on past persecution alone must be able to prove that the persecution was of a more profound nature. For example, in Matter of Chen, the BIA held that past persecution alone may be a basis for refugee status. However, the likelihood of present or future persecution then becomes relevant as to the exercise of discretion. The Attorney General, under his discretionary power, may deny asylum if there is little likelihood of present persecution. Nevertheless, the BIA went on to state that "there may be cases where the favorable exercise of discretion is warranted for humanitarian reasons even if there is little likelihood of future persecution." Therefore, provided the petitioner has proved severe past persecution,

124 8 C.F. R. 208.13
126 Id. at 18.
127 Id.
128 Id.
129 Id.
asylum may be granted in some situations where there is little threat of future persecution.\textsuperscript{130}

With respect to China's Population Control Policy, individuals who have already been forced to undergo an abortion or have been forcibly sterilized might establish that this is past persecution and be eligible for relief even though they have already suffered the harm and there might be little likelihood of future persecution. It might be argued that involuntary sterilizations and forcible abortions is persecution of a very profound nature. Given that the right to found a family is recognized as an international human right, a favorable exercise of discretion might be warranted for humanitarian reasons.\textsuperscript{131}

However, Chinese individuals fleeing China's Population Control Policy must still establish that the harm that they are fleeing is not a legitimate governmental prosecution for violation of the policy, but rather that the harm is in fact persecution. The UNHCR Handbook provides some guidelines for distinguishing between prosecution and persecution. For example, the Handbook provides that persons fleeing from prosecution for a common law offense are not normally refugees.\textsuperscript{132} However, excessive punishment may amount to persecution.\textsuperscript{133} The Handbook suggests that in evaluating whether a particular punishment is excessive, a country should refer to its own "national legislation as a yardstick."\textsuperscript{134} Moreover, the Handbook recognizes that it is possible for a law not to be in conformity with accepted human rights standards and therefore amount to persecution.\textsuperscript{135}

\textsuperscript{130} Id.
\textsuperscript{131} The international human right to found a family will be discussed in Section V.
\textsuperscript{132} Handbook, supra note 94, at para. 56.
\textsuperscript{133} Id. at para. 57.
\textsuperscript{134} Id. at para. 60.
\textsuperscript{135} Id. Art. 59.
In *Bastanipour v. I.N.S.*[^36] the Seventh Circuit dealt with the issue of excessive punishment. In that case, the petitioner, an Iranian, had converted to Christianity while living in the U.S. In remanding the case, the court found that Iranian citizens receive corporal punishment, including death, for violating Islamic law.[^137] Moreover, the court found that apostasy from Islam is considered grounds for capital punishment[^138]. The court considered these forms of punishment as excessive and that they might therefore constitute persecution.[^139]

Given that China is faced with limited resources, controlling population growth is a legitimate government objective.[^140] However, there is a difference between a legitimate government goal and the means by which these goals are implemented.[^141] A policy that allows forced abortions and involuntary sterilizations as measures to achieve its goals loses its legitimacy in light of the fact that the right to found a family is recognized as an international human right.[^142] Moreover, forcible abortions, like the death penalty for apostasy from Islam, might be deemed to constitute excessive punishment. Given that the U.S. places great importance on an individual’s right to make his or her own reproductive choices,[^143] U.S. courts are likely to view involuntary abortion and forcible sterilization as excessive punishment.

The coercive measures employed by Chinese officials to enforce China’s Population Control Policy might constitute persecution under current judicial

[^36]: *Bastanipour v. I.N.S.*, 980 F.2d 1129 (7th Cir. 1992).
[^137]: Id. at 1134
[^138]: Id.
[^139]: Id.
[^140]: China’s Eugenics, supra note 12, at 584.
[^141]: Id.
[^142]: See footnote 127.
interpretations of the term “persecution.” Additionally, these measures might also be viewed as persecution under current international standards.

C. OPPOSITION TO CHINA’S POPULATION CONTROL POLICY AS A MANIFESTATION OF A “POLITICAL OPINION”

In addition to persecution, individuals seeking asylum or restriction on removal must also establish that their claim is based on one of the five enumerated grounds: race, nationality, religion, membership in a particular social group, or political opinion. No matter how egregious the persecution is, an individual is not entitled to relief unless he proves that the persecution is based on one of the five grounds. Petitioners fleeing China’s Population Control Policy most often rely on political opinion as the ground for persecution.\(^{144}\) However, the Refugee Act does not define the term “political opinion.” Therefore, petitioners seeking asylum must resort to judicial and administrative interpretations of the term to determine its meaning. However, with respect to the Chinese population control program, courts and the BIA have disagreed as to whether opposition to coercive family planning constitutes a “political opinion.”

The BIA has held time and time again that opposition to the One Child Policy, manifested by a desire to have more children, was not a political opinion.\(^{145}\) The BIA’s position was that even if the Chinese government established rules limiting family size and used coercive punishment to enforce those rules, the desire to have more than one child was not a political opinion.\(^{146}\) The BIA argued that opposition to the policy did not constitute persecution on account of political opinion unless the petitioner could prove

\(^{143}\) See Roe v. Wade, 410 U.S. 113, 152 (1973) (holding that the right to privacy includes a woman’s decision to have an abortion under certain conditions); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that the right of privacy includes all person’s access to contraception).

\(^{144}\) See footnote 7.
that the policy was selectively imposed upon him or her for reasons other than the enforcement of a uniformly applied population control policy.\textsuperscript{147}

However, officials who use coercive measures to implement the policy usually apply them uniformly to all families within their region who desire to have more than one child.\textsuperscript{148} Therefore, in essence, it is impossible for Chinese fleeing the policy to prove that they have been singled out for persecution since their peers who attempt to have more than one child are also victims of these coercive measures.\textsuperscript{149} For example, in \textit{Chang} the BIA stated that China’s population control policy was a legitimate government goal of controlling population growth.\textsuperscript{150} The court found that “all who show that they opposed the policy, but were subjected to it anyway,” have not necessarily “demonstrated that they are being ‘punished’ for their opinions.”\textsuperscript{151} The court went on to hold that “there must be evidence that the governmental actions arise for a reason other than general population control.”\textsuperscript{152}

Many courts have followed the BIA’s position. Several courts have held that the BIA’s interpretation of the refugee statute in \textit{Chang} is not unreasonable and at odds with the plain meaning of the statute.\textsuperscript{153} As a consequence of this level of deference given to BIA decisions, many courts have rejected asylum claims based on opposition to China’s population control policy.

\begin{itemize}
\item \textsuperscript{145} \textit{See Matter of Chang}, 20 I & N Dec. 38 (BIA 1989); \textit{In re G}_\text{A}, Int. Dec. 3215 (BIA 1993).
\item \textsuperscript{146} \textit{Chang}, 20 I & N Dec. at 44.
\item \textsuperscript{147} \textit{Id.} at 44 – 45.
\item \textsuperscript{148} Forced Abortions and Involuntary Sterilization in China, supra note 2, at 760.
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{Chang}, 20 I. & N. Dec. 38, 44 (BIA 1989).
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} \textit{Gao}, 869 F. Supp. at 1481.
\end{itemize}
For example, in *Chen v. I.N.S.*, the Ninth Circuit held that a refusal to comply with China’s population control policy is not an expression of political opinion. In that case, petitioner and his wife had three children. After the birth of their second daughter, the authorities fined the couple 2,000 RMB (China’s currency) for having a second child within four years of the first. The authorities also implanted an IUD in the wife. However, since the couple wanted a boy, they had the IUD removed illegally. The wife became pregnant with a third child. Chinese authorities threatened to destroy the couple’s home if they did not have an abortion. The couple managed to flee and the third child was born. However, after the birth of the child, the authorities scheduled the wife for a sterilization operation, imposed a fine of 10,000 RMB, and barred all three children from attending school. The wife was too ill for surgery, therefore, the husband, Chen, was to be sterilized instead. Chen fled to the U.S. to avoid sterilization. He applied for asylum arguing that he was persecuted because of his political opposition to China’s birth control policy. The court denied asylum due to the fact that Chen’s “only” relevant acts had been to violate the birth control policies.
because he wanted a son. According to the court, these acts did not constitute political expression for asylum purposes.

The District Court for the Southern District of New York also held that opposition to China's population control policy does not constitute persecution on account of political opinion unless the alien can prove that the policy was selectively applied to him for reasons other than the enforcement of a uniformly applied birth control policy. In *Dong Jia-Ging v. Slattery*, the court denied asylum to a petitioner who fled from Chinese family planning authorities. After the birth of Dong's second child, the authorities ordered his wife to have an IUD inserted. However, she became pregnant with a third child. When the authorities found out about the pregnancy, they ordered her to abort the pregnancy. Dong and his wife fled from their home in order to avoid the abortion. The authorities beat Dong's father because he refused to inform them of the couple's whereabouts. Moreover, the authorities went into Dong's home and destroyed some of its contents. Dong was threatened with physical harm by the authorities. Dong fled China on the Golden Venture. He later found out that his wife had been forced to abort the pregnancy when she was 4½ months pregnant. However, despite this evidence, the court refused to grant him asylum. The court held

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167 Id. at 806.
168 Id.
170 Id. at 53.
171 Id.
172 Id.
173 Id.
174 Id.
175 Id.
176 Id.
177 Id.
178 Id.
179 Id.
180 Id.
that "conception and the desire to bear children is not the inherently political activity whose general prohibition can reasonably be construed as veiled persecution of political opinion."\(^{181}\)

Despite these holdings, other courts have interpreted the term "political opinion" to include opposition to a government's population control policy. In *Guo Chun Di v. Carroll*,\(^{182}\) the court held that for purposes of determining eligibility of alien for asylum, the expression of one's views regarding issues related to the right to procreate is political.\(^{183}\) In that case, after the birth of Guo Chun Di's first child, local authorities ordered his wife to undergo sterilization. She was strongly opposed to the involuntary sterilization.\(^{184}\) Therefore, she fled from the village to relatives in a distant city.\(^{185}\)

However, local officials then sent a notice to Guo Chun Di to report to a local hospital for a sterilization operation.\(^{186}\) Guo Chun Di also fled his village and joined his wife.\(^{187}\) In the meantime, officials not only had visited Guo Chun Di's home and confiscated his personal property, but they had also destroyed the house in which the couple lived.\(^{188}\) Guo Chun Di sought asylum in the U.S. arguing that his opposition to China's population control policy constitutes a political opinion.\(^{189}\)

The Court for the Eastern District of Virginia began its analysis of what constitutes political opinion by resorting to the dictionary definition of political

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\(^{181}\) Id. at 58.
\(^{183}\) Id. at 872.
\(^{184}\) Id. at 862.
\(^{185}\) Id.
\(^{186}\) Id.
\(^{187}\) Id.
\(^{188}\) Id.
\(^{189}\) Id.
opinion. The court found that the term “political” is commonly defined as “pertaining to exercise of rights and privileges...” The court stated that the right to bear children is one of the basic civil rights of man. The court found that involuntary sterilization is “an egregious infringement on the fundamental right to procreate.” Since the right to have children is a fundamental human right, the court held that it is therefore analogous to other fundamental rights that are considered legitimate grounds for asylum, such as the freedom of religion or freedom of speech. Based on this, the court stated that “there can be little doubt that the phrase ‘political opinion’ encompasses an individual’s views regarding procreation.”

In certain situations, it might be an expression of political opinion simply to oppose governmental norms. The failure to obey a government policy in an authoritarian nation might amount to political dissidence. The UNHCR Handbook provides support for this position. The Handbook recognizes “a mere act or refusal to act..., as an expression of a political opinion.” Although the UNHCR Handbook is not binding authority on the signatory states, the U.S. Supreme Court has recognized that the Handbook “provides significant guidance in construing the Protocol, to which Congress sought to conform” when enacting the Refugee Act of 1980. The refusal to follow a governmental policy might be viewed by the government as political opposition. Therefore, the punishment imposed on those who violate the policy constitutes

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190 Id. at 872.
191 Id. at 872 (citing BLACK'S LAW DICTIONARY, 1158 (6th Ed. 1991)).
192 Id. at 872.
193 Id.
194 Id.
195 Id.
196 China's Eugenics Law, supra note 12, at 585.
persecution on account of political opinion. Consequently, if opposition to China’s Population Control Policy constitutes political opinion, individuals fleeing China’s coercive population control measures might be eligible for asylum assuming they meet the other statutory requirements.

Moreover, the right to bear children and the right to unfettered reproductive choices are recognized as fundamental human rights both domestically and internationally. A person who opposes government infringement of these rights holds a political opinion. Therefore, any punishment imposed on them due to their opposition to intrusive and coercive government policies might qualify as persecution on account of political opinion for purposes of determining refugee status.

However, identifying the harm as rising to the level of persecution and finding that opposition to China’s Population Control Policy constitutes a political opinion does not necessarily result in refugee protection. The definition of refugee requires that the persecution be inflicted “on account of” the political opinion. This link between the harm and the ground is referred to as the “nexus” requirement.

D. THE “NEXUS” REQUIREMENT – ARE CHINESE CITIZENS FLEEING CHINA’S ONE COUPLE – ONE CHILD” POLICY BEING PERSECUTED ON ACCOUNT OF THEIR POLITICAL OPINIONS?

A petitioner for asylum must prove that he or she has been persecuted or that he or she has a well-founded fear of persecution “on account” of his or her race, religion,
nationality, membership in a particular social group, or political opinion.²⁰¹ It is not enough for a petitioner to prove that he or she has been persecuted and that he or she holds a certain belief or status. Rather, the petitioner must prove that there is a relationship between the harm and one of the five enumerated grounds. There must be a "nexus" between the persecution and the political opinion. The U.S. Supreme Court has set a very strict standard for meeting this nexus requirement. In *I.N.S. v. Zacarias*,²⁰² the Ninth Circuit held that all aliens seeking asylum must provide evidence of the persecutor's intent in order to meet the nexus requirement of the refugee definition.²⁰³ This decision set a framework for determining the existence of a nexus by focusing exclusively on the alleged persecutor's intent.²⁰⁴ After *Zacarias*, courts will only find persecution "on account" of a petitioner's status or belief if the persecutor is motivated to inflict the harm because of the victim's actual or imputed status or belief.²⁰⁵

In *Zacarias*, the petitioner sought asylum because he feared persecution by Guatemalan guerrillas.²⁰⁶ In that case, guerrillas had attempted to persuade the petitioner to join them.²⁰⁷ Petitioner refused to join them.²⁰⁸ The guerrillas advised him to think it over and that they would be back.²⁰⁹ The petitioner fled the country and sought asylum in the U.S.²¹⁰ The Court stated that a victim's refusal to cooperate with a potential persecutor does not necessarily constitute expressive conduct of a political opinion.²¹¹ In

²⁰¹ *INA § 101(a)(42)*
²⁰³ *Id.* at 483.
²⁰⁴ *Id.*
²⁰⁶ *Zacarias*, 502 U.S. at 479-480.
²⁰⁷ *Id.* at 479.
²⁰⁸ *Id.*
²⁰⁹ *Id.*
²¹⁰ *Id.* at 480.
²¹¹ *Id.* at 481-482.
order for the persecution to be considered "on account of" political opinion, the persecution must be inflicted as a result of the victim’s political opinion and not simply because of the victim’s refusal to act. The Court refused to grant asylum to Zacarias because it found that his refusal to join the guerrillas was not an expression of political opinion. Moreover, the Court found that the guerrillas did not persecute Zacarias out of a mistaken belief that his refusal was politically motivated.

In the context of China’s population control policy, the alien must prove that the persecution he suffered was “on account of” his political opinion. It is not sufficient for an alien merely to hold a political opinion. Even if petitioners can show that their failure to comply with the population control policy constitutes a political opinion, they must still prove that the enforcement measures used against them were imposed on them due to that political opinion. They must be punished because of that opinion.

Courts have relied on Zacarias to follow the BIA’s decision in Chang and deny asylum to Chinese applicants fleeing China’s population control policy. Several decisions have held that involuntary sterilization or forced abortions is not persecution “on account of” political opinion because these measures were imposed on the applicants as part of a universal population control policy. Under this interpretation, the government accepts China’s argument that it is only trying to remedy the problem of its increasing population growth and not trying to punish violators because of their opposition to the policy.

\[212\text{Id. at 483.}\]
\[213\text{Id.}\]
\[214\text{Id. at 482.}\]
\[215\text{Id. at 483.}\]
In *Gao v. Waters*, the District Court for the Northern District of California held that in order for the persecution to be on account of political opinion, there must be evidence that the government action has some reason other than general population control. In that case, Gao’s wife was ordered to undergo an abortion. The couple fled their home to avoid the procedure. As a consequence, Gao was fired from his job and was arrested by family planning officials. He was threatened with sterilization, but he managed to escape. In denying Gao’s petition, the court reiterated the holding in *Chang* that “an individual claiming asylum for reasons related to this policy must establish, . . . , that the application of the policy to him was in fact persecutive or that he had a well-founded fear that it would be persecutive on account of one of the reasons enumerated in § 101(a)(42).” The government’s persecutory actions must be for a reason other than population control, such as evidence of disparate treatment or more severe treatment for those who publicly oppose the policy.

Therefore, under these standards, an applicant for asylum must show that he or she was treated differently than other members of the population with respect to the application of the policy. The BIA’s position is that regardless of a policy’s harshness or persecutory nature, asylum should not be granted to victims of a countrywide policy because they have not been singled out for persecution on account of one of the five

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217 *Id.* at 1482.
218 *Id.* at 1479.
219 *Id.*
220 *Id.*
221 *Id.*
222 *Id.* at 1482.
223 *Id.*
Therefore, if the applicant simply proves that he or she was subject to the same policy as every other Chinese citizen, his or her claim will likely fail.

Due to the nature of the population control policy, it is impossible for most Chinese applicants to meet this requirement. China’s central government does not punish local officials who use coercive measures. Therefore, local officials often apply them uniformly to all families within their designated regions who refuse to comply with birth quotas. For this reason, it is difficult for an applicant to prove that he or she has been singled out for persecution.

Moreover, courts have held that to establish eligibility for asylum, the applicant must have expressed an “overt manifestation of a political opinion.” This overt manifestation of a political opinion standard does not require that the petitioner have engaged in demonstrations or political marches, or have made political speeches. Rather, an applicant may prove persecution on account of political opinion by showing that: (1) there is a significant relationship between the victim and the persecutor; and (2) that the applicant has engaged in sufficiently conscious and deliberate decisions or acts which attribute certain political opinions to the applicant. For example, in *Guo Chun Di v. Carroll*, the court found an overt manifestation of a Chinese couple’s opposition to China’s population control policy through their refusal to comply with sterilization

226 Id.
227 Forced Abortions and Involuntary Sterilization in China, supra note 2, at 755.
229 Id. at 873.
230 Id.
231 Id.
orders and by fleeing from their home after receiving government sterilization notices.\(^{232}\) The court found that these actions were sufficiently conscious and deliberate resulting in the government attributing a political opinion to Guo Chun Di.\(^{233}\)

The most common manifestation of Chinese opposing the birth control policy is an attempt to have more than one child\(^{234}\). Other than their belief in reproductive freedom, many times there is no other public manifestation of their opposition. They oppose the policy because they want to have more children.\(^{235}\) Violators of the one child policy do not necessarily disagree with the government politically or disagree with population control in general.\(^{236}\) Nevertheless, under Zacarias, imputed political opinion is sufficient to prove the nexus requirement.\(^{237}\) Therefore, petitioners might attempt to prove that they are being persecuted because of an imputed political opinion rather than a manifested political opinion. Even if couples do not verbally express their opposition to the policy, the government might believe that couples who violate the One-Child Policy are its political opponents.\(^{238}\) Therefore, it might be argued that the Chinese government is imputing a political opinion on violators of the policy and might punish them for their opposition.\(^{239}\) Therefore, petitioners fleeing China’s population control methods might qualify for asylum.

Prior to the 1996 Amendment to the definition of refugee, the nexus requirement was a very difficult hurdle to overcome by petitioners basing their claims on persecution due to a country’s coercive population control measures. Given the strict holding in

\(^{232}\) Id.
\(^{233}\) Id.
\(^{234}\) Forced Abortions and Involuntary Sterilization in China, supra note 2, at 766.
\(^{235}\) Id.
\(^{236}\) Id.
\(^{237}\) Zacarias, 502 U.S. at 482.
\(^{238}\) Forced Abortions and Involuntary Sterilization in China, supra note 2, at 766.
Zacarias requiring specific proof of the persecutor’s intent, without evidence of an imputed political opinion, these type of claims were not very successful. Due to the fact that the alleged persecution was actually based on a national policy carried out for population control objectives, petitioners had difficulty establishing the nexus requirement.240

IV. 1996 AMENDMENT TO THE DEFINITION OF REFUGEE

In 1996 Congress amended the refugee definition to define forcible sterilization or abortion, or the punishment for refusal to submit to these practices, as persecution “on account of political opinion.” Opposition to China’s coercive population control measures is now expressly considered a “political opinion” under INA § 1101(a)(42)(A). As a result, Chinese citizens fleeing China’s population control policy may now be eligible for asylum. However, this explicit amendment to the Refugee Act was a result of many years of controversy and conflict between the Executive and Judicial branches. Moreover, this amendment does not guarantee, as matter of right, asylum or restriction on removal to opponents of population control measures. The BIA has attempted to impose new challenges to petitions for asylum based on China’s population control policy.

A. REGULATORY AND LEGISLATIVE HISTORY

There have been many inconsistencies throughout the regulatory and legislative history of U.S. treatment of asylum claims based on China’s Population Control Policy. The reason for these inconsistencies has been a direct conflict between the executive approach taken in reference to this type of asylum claims and administrative rulings of

239 Id. at 767.
the BIA. This failure to reach a consensus among the BIA and the executive branch resulted in a lack of a coherent and comprehensive policy for adjudicating claims based on coercive population control measures.

In 1988, Attorney General Edwin Meese issued a set of guidelines to the Immigration and Naturalization Service (INS) allowing the Department to grant asylum to petitioners who had a well-founded fear of persecution based on China's Population Control Policy. However, in 1989, when considering China's Population Control Policy in Matter of Chang, the BIA found that Meese's guidelines did not apply to decisions by immigration judges and the BIA. The BIA felt that these guidelines were directed to the INS rather than to immigration judges and the Board. Therefore, the BIA denied the petitioner's claim for asylum.

In 1989 Congress passed the Armstrong-DeConcini Amendment to the Emergency Chinese Adjustment of Status Facilitation Act in reaction to Chang and the current events of Tiananmen Square. The direct objective of the Amendment was to overrule Chang. However, although President Bush supported the Amendment, he vetoed the Act because he believed the Act in its entirety interfered with ongoing diplomatic initiatives. Nevertheless, President Bush instructed the Attorney General to give enhanced consideration to petitioners fleeing a country's coercive population control

242 Id.
244 Chang, 20 I. & N. Dec. at 43.
245 Id.
246 Id. at 47.
248 Id.
249 China's Eugenics, supra note 12, at 579.
250 Id.
In response, in January 1990 Attorney General Dick Thornburgh promulgated a 1990 Interim Rule permitting asylum to be granted to petitioners who would be forced to abort a pregnancy or undergo involuntary sterilization if returned to their country. In April of that same year, President Bush issued Executive Order 12,711 instructing the Attorney General to implement the Interim Rule. In July 1990, the Attorney General published a final rule significantly altering many of the asylum regulations. However, for some unknown reason, the final rule was silent as to China's Population Control Policy. It did not mention the Interim Rule.

Moreover, courts and the BIA failed to give effect to the Executive Order. According to their interpretation of the Executive Order, it did not have the force and effect of law because it was not grounded in a statutory mandate or congressional delegation of authority to the President. According to the court, the Attorney General, and not the President, has general authority over immigration affairs. As a result, the Executive Order was deemed not effective because President Bush lacked authority to promulgate it.

In January 1993, Attorney General William Barr tried to end controversy over whether opposition to coercive population control measures constituted grounds for

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251 Id.
253 China's Eugenics, supra note 12, at 580 (citing Exec. Order No. 12,711, s 4, 55 Fed. Reg. 13,897 (1990)).
254 Id. This final rule was silent with regard to forced abortions or involuntary sterilizations. The Attorney General offered no explanation for these omissions. 55 Fed. Reg. 30674.
255 Id.
256 Id.
257 Chen v. I.N.S., 95 F.3d 801, 805 (9th Cir. 1996).
258 Id.
259 Id.
asylum. Attorneys General Barr issued a final rule with the explicit purpose to overrule *Chang*. Under the rule, petitioners who were fleeing their country’s population control measures would be granted asylum. The 1993 Rule required the granting of asylum to petitioners facing forced abortion or involuntary sterilization upon the proper showing of persecution on account of political opinion. The rule applied to petitioners of any country, not simply China. The January 1993 Rule was to become effective upon publication. However, when President Clinton was inaugurated, he stopped all publication of the former administration’s regulations. Therefore, this rule was never published. Moreover, in February 1993, Clinton’s Administration published new regulations concerning asylum. These new regulations did not cover population control measures.

As a result, courts disagreed as to whether the 1993 Final Rule was effective.

According to some courts, the fact that the rule was withdrawn from publication was an

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260 *China’s Eugenics*, supra note 12, at 580.
261 Id. at 580 – 581. The January 1993 final rule provided that: “[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 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.” January 1993 Rule, s 208.13(2)(ii), Att’y Gen. Order No. 1659-93, JA 1652, 1664-65.
262 Id.
263 Id.
264 Id.
265 Id.
266 *Fear of Persecution*, supra note 22, at 802.
267 Id.
268 *China’s Eugenics*, supra note 12, at 581.
269 Id.
indication that the administration decided not to adopt it. Moreover, some courts felt that “because the final rule was never published, and the agency has never before followed a similar rule, the rule never became effective.” However, another court held that even though the rule was not published, it was nonetheless binding upon the BIA.

In an attempt to clarify the controversy between Chang and President Bush’s Executive Order, in December 1993, two cases regarding asylum based on China’s population control measures were referred to Attorney General Reno. However, she declined to resolve the conflict by stating after review that, “it is apparent that the BIA’s decisions in these cases do not require a determination that one or the other of these standards is lawful and binding.”

As a result of this instability in the law regarding asylum based on opposition to coercive population control measures, Congress in 1996 amended the definition of refugee. Section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 expressly amended the definition of refugee to state that “a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion.” Therefore, under the current law, petitioners seeking asylum based on China’s coercive population control measures may qualify for asylum.

\[271\] See, e.g., Shan Ming Wang, 877 F. Supp at 138-140.
\[275\] INA § 101(a)(42).
B. CURRENT BIA INTERPRETATIONS OF THE 1996 AMENDMENT

Section 601(a) of the IIRIRA was enacted in September 30, 1996. This section amended the refugee definition of § 101(a)(42) by adding the following provision: “For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.” The language of this amendment expressly makes resistance to coercive population control measures persecution “on account of” political opinion. Therefore, as a result, the nexus requirement of Zacarias is declared to have been satisfied in cases of this type. In effect, the provision satisfies the persecution and nexus facets of the definition of refugee. The amendment itself makes this type of persecution automatically “on account of” political opinion. However, even though the nexus requirement is no longer an issue in petitions for asylum based on a country’s coercive population control measures, conflict has arisen with respect to other aspects of the asylum procedures and requirements. Issues have arisen with respect to numerical limitations on the number of refugees granted asylum under this provision and the type of persecution that must be established.

276 In Re C-Y-Z-, Interim Decision 3119 (BIA 1997) (publication page references are not available for this document).
277 INA § 101(a)(42).
Since the passage of the 1996 Amendment, the BIA has handed down several decisions interpreting the effect of the Amendment on asylum claims based on China’s Population Control Policy. The BIA has been consistent in holding that a petitioner who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for resistance to a coercive population control measure, has suffered past persecution on account of political opinion and qualifies as a refugee within § 101(a)(42) of the INA.278

In In Re X-P-T-, the BIA held that the 1996 amendment to the definition of refugee supersedes Chang.279 In X-P-T-, the petitioner and her husband had violated China’s one-child policy by having three children.280 As a result, the petitioner had been forcibly sterilized.281 The BIA held that under the amended definition of refugee, the petitioner qualified for asylum.282 Moreover, the BIA went on to find that the amendment applies not only to asylum, but also to withholding of deportation (currently restriction on removal).283

However, meeting the statutory definition is not sufficient for establishing eligibility for asylum. The BIA in In Re X-P-T-, stated that § 207(a)(5) of the INA limits the number of refugees that may be granted asylum pursuant to the provisions of § 101(a)(42) regarding persecution based on resistance to coercive population control measures.284 Section 207(a)(5) limits the number of refugees who may be granted

278 See In Re X-P-T-, Interim Decision 3299 (BIA 1996) (publication page references are not available for this document).
279 In Re X-P-T-, Interim Decision 3299 (BIA 1996) (publication page references are not available for this document).
280 Id.
281 Id.
282 Id.
283 Id.
284 Id.
asylum due to persecution for resistance to coercive population control methods to a total of 1,000 people per fiscal year.\textsuperscript{285} Therefore, a petitioner seeking asylum due to forcible sterilization or abortion is granted asylum only upon a determination that a number is available for such a grant. However, this numerical limitation does not apply to restriction on removal.\textsuperscript{286} There is no limit on the number of refugees who may be granted restriction on removal pursuant to a finding of persecution based on a country’s coercive population control methods.

The INS has tried limiting the application of the 1996 Amendment to justify denials of asylum claims based on China’s Population Control Policy. For example, in \textit{In Re C-Y-Z-},\textsuperscript{287} an applicant sought asylum claiming that he was persecuted in China due to his opposition to China’s One-Child Policy.\textsuperscript{288} After the birth of his first child, the petitioner’s wife had been forced to wear an IUD.\textsuperscript{289} The petitioner was arrested and detained for one day for protesting this practice.\textsuperscript{290} His wife became pregnant a second time after the IUD was removed.\textsuperscript{291} She had to flee her home and hide with relatives after she was ordered to undergo an abortion.\textsuperscript{292} After the birth of their second child, the couple returned to their home.\textsuperscript{293} However, they were fined 2,000 yuan.\textsuperscript{294} They had to pay the fine or else their home would have been destroyed by birth control cadres.\textsuperscript{295} His

\textsuperscript{285} INA § 207(a)(5).
\textsuperscript{286} \textit{In Re X-P-T-}, Interim Decision 3299 (publication page references are not available for this document).
\textsuperscript{287} \textit{In Re C-Y-Z-}, Interim Decision 3319 (BIA 1997) (publication page references are not available for this document).
\textsuperscript{288} \textit{Id}.
\textsuperscript{289} \textit{Id}.
\textsuperscript{290} \textit{Id}.
\textsuperscript{291} \textit{Id}.
\textsuperscript{292} \textit{Id}.
\textsuperscript{293} \textit{Id}.
\textsuperscript{294} \textit{Id}.
\textsuperscript{295} \textit{Id}.
wife later became pregnant with a third child because they wanted a son.\footnote{296} Once again the couple had to flee their home.\footnote{297} However, after the birth of the third child, petitioner’s wife was sterilized against her will.\footnote{298}

In that case, the INS argued that an alien who has established past persecution has the additional burden of proving a well-founded fear of future persecution by showing that the involuntary sterilization was carried out in such a way as to amount to an “atrocious” form of persecution.\footnote{299} However, the BIA rejected this argument. The BIA found that there was no additional burden such as that required by the INS, either by regulation or by statute.\footnote{300} The BIA found that if a petitioner proves that he has suffered past persecution, there is a regulatory presumption that he has a well-founded fear of future persecution under 8 C.F.R. § 208.13(b)(1).\footnote{301} 8 C.F.R. § 208.13(b)(1)(i.) states that “if it is determined that the applicant has established past persecution, he or she shall be presumed also to have a well-founded fear of persecution.”\footnote{302} The BIA held that a petitioner does not need to show compelling reasons for being unwilling to return to his country resulting from the severity of the past persecution unless the presumption under 8 C.F.R. § 208.13(b)(1) has been rebutted by the INS.\footnote{303} This presumption may be rebutted only by a showing, by a preponderance of the evidence, “that since the time the persecution occurred conditions in the applicant’s country . . . . have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or
she were to return." Moreover, in *In Re C-Y-Z*-, the BIA went on to hold that forced sterilization of one spouse pursuant to a country’s coercive population control measures is an act of persecution against the other spouse. In essence, the husband of a sterilized wife stands in her shoes for asylum purposes.

Although the 1996 Amendment to the definition of refugee makes asylum claims based on China’s coercive population control measures easier to prove, new challenges have arisen for petitioners seeking protection. The Amendment does not automatically grant asylum to refugees fleeing a country’s coercive population control measures. Asylum claims are subject to numerical limitations. However, the new definition of refugee does aid these individuals.

**V. THE INTERNATIONAL HUMAN RIGHT TO FOUND A FAMILY**

United States recognition of opposition to coercive population control measures as a form of persecution on account of political opinion, and the protection current U.S. refugee law offers to victims of these practices, brings this country into compliance with international norms and treaties regarding the right to found a family. In the international community, reproductive rights are generally considered as part of a person’s basic human rights.

The international human right to found a family was first formally recognized by the international community in 1948 with the promulgation of the Universal Declaration of Human Rights. Article 16 of the Declaration specifically states that “men and

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304 8 C.F.R. § 208.13(b)(1)(i).
305 *In Re C-Y-Z*-, Interim Decision 3319 (publication page references are not available for this document).
306 Id.
307 *Caught between*, supra note 16, at 298.
308 *Fear of Persecution*, supra note 22, at 792-793.
women of full age . . . . have the right to . . . . found a family."309 The Declaration further states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State."310 Although the Declaration itself is not a treaty, in 1948 it was adopted without objection by the United Nations membership, including the U.S.311

Since the promulgation of the Universal Declaration of Human Rights, other international instruments have recognized the importance of the right to found a family. For example, Article 23 of the International Covenant on Civil and Political Rights states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State."312 It also dictates that "the right of men and women of marriageable age . . . . to found a family shall be recognized."313 The United States is a party to this Covenant.314 Furthermore, Article 10 of the International Covenant on Economic, Social and Cultural Rights also recognizes that "the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment."315 Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women also emphasizes the importance of the right to found a family.316 Article 16 states that "states parties . . . . shall ensure . . . . the right to decide freely and responsibly on the number and spacing of

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310 Id.
311 Fear of Persecution, supra note 22, at 793.
313 Id.
316 The United States has not ratified the Convention on the Elimination of All Forms of Discrimination Against Women.
their children.”  Finally, and most recently, in the 1994 International Conference on Population and Development, the international community agreed that “demographic targets should not be used to control individual behavior, that choice and information should be provided to individuals and that the development of the human person should be at the center of family planning policies.”

VI. CONCLUSION

Many times a country’s implementation of a legitimate governmental objective may result in extensive human rights violations. Countries facing overpopulation and a scarcity of resources should be able to undertake measures to control their population growth. However, they should not be able to abuse their population in furtherance of this goal.

Involuntary sterilizations and forcible abortions run counter to the international human right to found a family, and on this basis appear to constitute persecution. The U.S. passed the Refugee Act of 1980 in order to protect individuals facing persecution. Chinese individuals fleeing China’s coercive population control measures should be eligible for asylum because they are being persecuted on account of their political opinion. Although prior to the 1996 Amendment to the definition of refugee, the statutory requirements for asylum and restriction on removal were difficult to meet, the Amendment makes it easier for petitioners to establish their eligibility.

318 Caught Between, supra note 16, at 298.
319 INA § 101(a)(42).
320 IIRIRA, § 601(a).
Petitioners in this type of claims now find some solace on the 1996 Amendment. However, were it not for the Amendment, many of them might not have been eligible for relief due to the fact that they might not have been able to meet the technical requirement of "nexus" no matter how atrocious their persecution was. This emphasis on technicalities runs afoul to the humanitarian purposes behind refugee law. Persecution is persecution no matter what the reason for its infliction. Perhaps the 1996 Amendment to the definition of refugee is an indication that Congress has realized that U.S. refugee law should be guided by fundamental notions of human rights.

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