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## Generational Genocide: Coercive Population Control as a Basis for Asylum in the United States

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## Generational Genocide: Coercive Population Control as a Basis for Asylum in the United States

### Cover Page Footnote

Juris Doctor Candidate, May 2006, Florida State University College of Law. The author wishes to acknowledge Professor Terrence Coonan's guidance with this topic. Additionally, the author expresses his heartfelt thanks to his family for their love and support, as well as the Almighty for providing the inspiration.

**GENERATIONAL GENOCIDE: COERCIVE POPULATION  
CONTROL AS A BASIS FOR ASYLUM IN THE UNITED  
STATES**

THOMAS L. HUNKER\*

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I. INTRODUCTION

Imagine a society that criminalizes the choice to have more than one child, where the government forces women to abort their babies and become sterilized after giving birth, and where sibling relationships no longer exist. As morbid as this idea may seem, it has become reality for many families throughout China and elsewhere. The purposes of this article are twofold: (1) to inform the reader of the horrors that ensue when an entire country embraces a culture of death in the name of population control; and (2) to discuss the United States’ response to the granting of asylum to victims of coercive population control (“CPC”) policies.

Based on research of recent historical and political events and the various policy arguments in favor of and against population control, this article reaches several conclusions. First and foremost, population control efforts that incorporate and promote abortion, contraception, and sterilization fail to meet their stated objectives of improving people’s standard of living and actually exacerbate the poverty problem while harming the social vitality of women and minorities. In addition, forced abortion, sterilization, and contraception violates basic human rights to life and procreation. In short, coercive population control constitutes a

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direct assault on the generation of children born during its implementation.

Assuredly, population growth presents some inherent difficulties. As the world's human population continues to grow,<sup>1</sup> commentators express concern that it will one day reach a level that the earth's resources cannot support.<sup>2</sup> Particularly in the last century, governments, as well as intergovernmental and nongovernmental organizations, have responded to the perceived threat of overpopulation in various ways. The regular gathering and publishing of census data in an effort to monitor population growth has become a regular practice in most industrialized countries.<sup>3</sup> Reliable population data enables policymakers, businesses, non-profit organizations, and the public to maintain efficient and effective governments and economies.<sup>4</sup>

Unfortunately, some methods of dealing with increasing populations have led to grave human rights abuses involving forced abortions and sterilizations, as well as mandatory insertion of intrauterine devices ("IUDs") to prevent births.<sup>5</sup> At the forefront of the controversy stands China's so-called "one child" policy, which the communist regime first implemented during the

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1. The U.S. Census Bureau estimates world population for Aug. 31, 2005 at 6,463,645,246. U.S. Census Bureau, World Population Clock, <http://www.census.gov/main/www/popclock.html> (last visited Aug. 31, 2005).

2. See generally CHARLES DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION (John Murray ed., W. Clowes and Sons 6th ed. 1859), available at [http://embryology.med.unsw.edu.au/pdf/Origin\\_of\\_Species.pdf](http://embryology.med.unsw.edu.au/pdf/Origin_of_Species.pdf); THOMAS MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION, AS IT AFFECTS THE FUTURE IMPROVEMENT OF SOCIETY (J. Johnson 1798), available at <http://www.esp.org/books/malthus/population/malthus.pdf>. "Malthus concluded that unless family size was regulated [by the government], man's misery of famine would become globally epidemic and eventually consume Man [sic]." Univ. of Cal., Berkeley Museum of Paleontology, Thomas Malthus (1766-1834), <http://www.ucmp.berkeley.edu/history/malthus.html>. Malthus, a political economist, "believed that such natural outcomes were God's way of preventing man from being lazy." *Id.* Darwin, a naturalist, incorporated Malthus' work into his theory of natural selection, reasoning that "producing more offspring than can survive establishes a competitive environment among siblings, and that the variation among siblings would produce some individuals with a slightly greater chance of survival." *Id.*

3. See, e.g., Office for National Statistics, United Kingdom, available at [http://www.statistics.gov.uk/census2001/cb\\_8.asp](http://www.statistics.gov.uk/census2001/cb_8.asp) (last visited Aug. 31, 2005); U.S. Census Bureau, United States Census, available at <http://www.census.gov/main/www/cen2000.html> (last visited Aug. 31, 2005).

4. See U.S. DEP'T OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, U.S. CENSUS BUREAU STRATEGIC PLAN, FY 2004-2008 (Sept. 2003), <http://www.census.gov/main/www/strategicplan/strategic03.pdf>.

5. U.S. DEP'T OF STATE, 108TH CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003 725 (Joint Comm. Print 2004). See generally Planned Parenthood, *Understanding IUDs*, <http://www.plannedparenthood.org/pp2/portal/> (follow "health info"; then follow "IUDs") (last visited Apr. 1, 2005). A version of the IUD well-known in the United States is the "Dalkon Shield." Planned Parenthood, *IUDs Make a Comeback*, <http://www.plannedparenthood.org/pp2/portal/> (follow "choice magazine"; then follow "sexual health & sexuality"; then follow "January 2005-June 2005"; then follow "IUDs Make a Comeback").

1970s.<sup>6</sup> The U.S. Department of State reports numerous instances of local “family planning” officials forcing women to undergo abortions or sterilizations, as well as fining, imprisoning, or destroying the homes and property of those who resist.<sup>7</sup> China’s policy exemplifies the extent to which disrespect for human life can lead to government policies which harm women, persecute minorities, and destroy families.

Tragically, until 1996, asylum seekers fleeing countries with such policies, as for example China’s, found no refuge under United States law. Courts did not view forced abortion or sterilization policies as persecution because the desire to control population, rather than the suppression of political, religious, or ethnic dissidents, motivated governments to implement these policies.<sup>8</sup> Finally, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”).<sup>9</sup> Section 601 of IIRIRA explicitly grants refugee status to victims of coercive population control policies.<sup>10</sup>

The following sections of this article explore the nature of China’s one-child policy, and examine the history and politics that led to the passage of section 601. Part II discusses China’s one-child policy and the disastrous effects it has wrought on China’s people. Part III explains section 601 and its effect on United States asylum law as it relates to applicants fleeing the enforcement of coercive population control policies. Part III also describes the administrative history and motivations which led to the enactment of section 601. Part IV evaluates the arguments for and against section 601, and examines whether it remains an effective means of protecting refugees. Part V concludes.

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6. *Id.* at 10-11, 16 (statements of Rep. Pitts, Member, Comm. on Int’l Relations, and Stephen W. Mosher, President of the Population Research Institute); *Coercive Population Control in China: New Evidence of Forced Abortion and Forced Sterilization: Hearing Before the Comm. on Int’l Relations*, 107th Cong. 2-3 (2001) (statement of Rep. Henry J. Hyde, Chairman, Comm. on Int’l Relations) [hereinafter *Coercive Population Control in China*].

7. See U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, CHINA (INCLUDES HONG KONG AND MACAU) § 1(f) (MAR. 4, 2002), <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8289.htm> (last visited Apr. 1, 2005).

8. See *Matter of Chang*, 20 I. & N. Dec. 38 (B.I.A. 1989), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1101(a)(42) (2000), Pub. L. No. 104-208, § 601, 110 Stat. 3009-689.

9. *Id.*

10. *Id.*

## II. CHINA'S HOLOCAUST: ONE-CHILD PER FAMILY

Exactly when China began its policy of one-child per family remains unclear. Some cite as far back as Mao Tse-tung's family-planning policies in 1955 as the starting point.<sup>11</sup> Others look to a 1979 speech by Deng Xiaoping calling for stricter limitations on childbirths.<sup>12</sup> Nevertheless, "the policy was in place nationwide by 1981" and "[b]y the mid-1980s, abortions, sterilisations and IUD insertions averaged some 30 million a year."<sup>13</sup> Today, under China's Population and Family Planning Law, entered into force in 2002, "[t]he National Population and Family Planning Commission (NPFPC) enforces the law and implements policies with assistance from the Birth Planning Association, which had 1 million branches nationwide."<sup>14</sup> "The law grants married couples the right to have a single child and allows eligible couples to apply for permission to have a second child if they meet conditions stipulated in local and provincial regulations."<sup>15</sup> Most local requirements state that women must wait at least four years to have a second child.<sup>16</sup> Enforcers issue fines (euphemistically named *social compensation fees*) for illegal births.<sup>17</sup> Officials also levy fines on those who help couples evade the birth limitations.<sup>18</sup> Of China's 2800 counties, 1900 set birth control targets and quotas.<sup>19</sup> Propaganda campaigns describe the choice to abort or to become sterilized as honorable in order to create psychological pressure for those contemplating the decision to have another child.<sup>20</sup> Enforcers use economic rewards for compliance, as well as penalties such as loss of job or demotion for deviance from the laws.<sup>21</sup> Women who do not qualify to have another child must undergo IUD implantation, including quarterly exams to make sure the device remains in place.<sup>22</sup> The minimum age for women to marry is twenty, twenty-

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11. See Andrew Brick, *Bookshelf: Cruel Reality of China's Population Policy*, WALL ST. J., July 28, 1993, at A12.

12. See Trish Saywell, *Abortions for the Masses*, FAR E. ECON. REV., June 9, 1994, at 54.

13. *Id.*

14. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003, *supra* note 5, at 706-07.

15. *Id.* at 707.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003, *supra* note 5, at 707.

21. *Id.*

22. *Id.* at 707-08.

two for men, and laws make it illegal for single women to bear children.<sup>23</sup>

The Chinese position on physically coerced abortion and sterilization consists of the Central Government formally forbidding the practices,<sup>24</sup> while local cadres, under pressure to meet strict quotas and targets, administer forced abortions and sterilizations with near impunity.<sup>25</sup> For example, under Tianjin Municipality Regulations of Planned Birth Policy, "Tianjin carries out a system that holds the CEOs of the work units accountable for population quotas."<sup>26</sup> CEOs at all levels are bound to hamper population growth from surpassing fixed quotas, and "[i]f they fail to do so, they will lose their promotions and lose their job and also face [other] punishment."<sup>27</sup> For this reason, "Communist cadres . . . resort to . . . barbaric practices of forcing . . . abortion and sterilizations," and even infanticide.<sup>28</sup> Women seeking asylum in the United States have reported instances where local enforcers come to their homes in the middle of the night seeking to force them to abort their babies.<sup>29</sup> One woman who recently spoke before Congress related a heart-rending tale of being physically escorted to a hospital where nurses prevented her from leaving. Then, an abortionist forced a ten centimeter needle into the victim's abdomen, injecting 100 ml of Rufenol into the body of the fetus, killing it.<sup>30</sup> Independent investigations completed in China reveal a method of public example-making known as "killing the chicken to scare the monkey" in which "homes that housed families with more than one child had been razed to the ground by bulldozers."<sup>31</sup> As a means of intimidation, local planned birth officials "brought all child-bearing-age women to the homes" in order to observe the destruction.<sup>32</sup>

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23. *Id.* at 708.

24. *Coercive Population Control in China*, *supra* note 6, at 18-19 (statement of Stephen W. Mosher, President, Population Research Institute).

25. *Id.* at 20-21 (statement of Harry Wu, Director, Laogai Research Foundation).

26. *Id.* at 20.

27. *Id.*

28. *Id.* at 20-21.

29. *Id.* at 5 (statement of Rep. Christopher Smith, Vice Chairman, Comm. on Int'l Relations).

30. *Coercive Population Control in China*, *supra* note 6, at 26-28 (statement of Mahire Omerjan). Ms. Omerjan, an Uzbek minority, described how, after the abortionists killed her seven-month old fetus in her womb, they began pressing on her abdomen to force the lifeless body out. Ms. Omerjan, a Muslim, expressed deepest sorrow at the violation of the tenets of her faith caused by the abortion. This was only her second child. *Id.*

31. *Id.* at 25 (Tianjin Investigation Report, Attachment II, statement of Harry Wu, Director, Laogai Research Foundation).

32. *Id.*

China's population control measures hearken back to Europe during the World War II era where the Germans perpetrated forced sterilization through the collaboration of "the science and medical communities, the judiciary, and the Nazi regime."<sup>33</sup> In 1935, Germany amended its laws "to allow women deemed 'hereditarily ill' to undergo abortion within the first six months of pregnancy."<sup>34</sup> In the name of racial and genetic purity, German authorities sterilized approximately 350,000 to 400,000 people, and some dissatisfied racial hygienists argued that "[ten to fifteen] percent of the entire population should be sterilized."<sup>35</sup> These acts, regarded as crimes against humanity at the Nuremberg Trials, pale in comparison to the numbers boasted by the Chinese government as the great victory of its Planned Birth Policy. "According to a recent report issued by the Chinese authorities, as the result of implementing the Planned Birth Policy over the last twenty years," the Chinese have reduced population growth by 330 million people.<sup>36</sup>

### III. SECTION 601 OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

Prior to 1996, courts refused to include aliens fleeing coercive population control within the refugee definition by adhering to strict requirements created under the United Nations Convention on the Status of Refugees and defined under U.S. law.<sup>37</sup> Then in

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33. See Michael J. Malinowski, *Choosing The Genetic Makeup of Children: Our Eugenics Past-Present, and Future?*, 36 CONN. L. REV. 125, 143-44 (2003-2004) (citing DIANE B. PAUL, *CONTROLLING HUMAN HEREDITY: 1865 TO THE PRESENT* 87 (1995), and Robert N. Proctor, *Nazi Doctors, Racial Medicine, and Human Experimentation, in THE NAZI DOCTORS AND THE NUREMBERG CODE* 21 (George J. Annas & Michael A. Grodin eds., 1992)).

34. *Id.* at 144.

35. *Id.* at 145.

36. *Coercive Population Control in China*, *supra* note 6, at 24 (statement of Harry Wu, Director, Laogai Research Foundation).

37. Responding to the atrocities inflicted on Jews during World War II, member nations signed the United Nations Convention on the Status of Refugees in 1951, defining the term "refugee," and prohibiting the return of refugees to countries where they would face persecution. Convention Relating to the Status of Refugees art.1, July 28, 1951, 189 U.N.T.S. 150 (1951). Member nations later expanded the definition of "refugee" in 1967 with the promulgation of the United Nations Multilateral Protocol Relating to the Status of Refugees. Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6223 (1967). The basic thrust of these agreements reflected an international policy of *nonrefoulement*, which essentially means the "non-return" of refugees to the place where they would be persecuted. See generally *id.* art. 33 (impliedly defining "refouler" as "return"). But see *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 180 (1993) (holding that the French word "*refouler*" is not an exact synonym for the English word "return," and therefore, the refugee definition does not prohibit the return of Haitian refugees interdicted on the high seas).

In the United States, Congress amended the Immigration and Nationality Act ("INA") to conform to the Protocol through the Refugee Act of 1980. See Brief for Respondents at 1,



1996, Congress passed IIRIRA, including section 601 which essentially eliminates the nexus requirement<sup>38</sup> for three classes of

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McNary v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993), (citing Refugee Act of 1980 § 107, 8 U.S.C. § 1253 (1988)). In its current form, United States asylum law defines a “refugee” as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, 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.

8 U.S.C. § 1101(a)(42)(A) (2000).

As a prerequisite to qualify for asylum, “the . . . [alien] must be outside of the country of his or her nationality or, if stateless, the country of last habitual residence.” AUSTIN T. FRAGOMEN & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE § 6.2(a) (4th ed. 1996). After meeting this geographic requirement, the applicant must show that he or she possesses a well-founded fear of persecution in that country. *Id.* In *INS v. Cardoza-Fonseca*, the United States Supreme Court held that standard is less burdensome than the standard applied in claims for withholding of deportation (“clear probability” or “more likely than not”), and a one-in-ten possibility of persecution may suffice. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987) (citing *INS v. Stevic*, 467 U.S. 407, 429-30 (1984)); *Id.* at 431 (citing ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966)). This standard includes both subjective and objective components. *Id.* at 450 (Blackmun, J., concurring). In *Matter of Acosta*, the Board of Immigration appeals adopted a four-part test for establishing these components:

(1) [T]he alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.

19 I. & N. Dec. 211, 226 (B.I.A. 1985), *overruled on other grounds by Cardoza-Fonseca*, 480 U.S. at 446-47 & n.30 (1987).

To meet the evidentiary burden, the alien can, if necessary, rely solely on his or her own uncorroborated testimony, provided that it is “credible, persuasive, and points to specific facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution on one of the specified grounds.” *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984). Due to the nature of asylum cases, an alien who has fled persecution may not have access to objective evidence to corroborate his or her testimony. For this reason, Immigration Judges will permit the alien to rely solely on uncorroborated testimony, and will decide how much weight to give it based on the alien’s credibility. In cases of past persecution, Immigration and Naturalization Service (“INS”), (now the United States Citizenship and Immigration Service (“USCIS”)), regulations presume a well-founded fear of future persecution.

Even if an alien proves all of the elements, including the nexus requirement, *see infra* note 38, and the definition of “persecution,” *see infra* note 40, the Attorney General has broad discretionary powers to deny asylum based on a finding of either: (1) “a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant’s country of nationality;” or (2) a possibility of relocation within another part of the country from which the alien is fleeing. 8 C.F.R. § 208.13(b)(1)(i)(A)-(B) (2005).

38. Nexus refers to the phrase “on account of” which appears in the refugee definition, and means that the persecutor’s motive in harming the alien must have a close relation to one of five enumerated grounds: “race, religion, nationality, membership in a particular social group, or political opinion.” *See* 8 U.S.C. § 1101(a)(42)(B)(2000). According the United States Supreme Court, “persecution on account of . . . ‘political opinion’” refers to “the victim’s political opinion, not the persecutor’s,” and harm inflicted on a person who chooses to remain neutral does not always establish persecution on this ground. *INS v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992). However, courts may make a finding of imputed

aliens: (1) those who have "been forced to abort a pregnancy or to undergo involuntary sterilization"; (2) those who have "been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program"; and (3) those who have a "well founded fear that [they] will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance".<sup>39</sup> The law presumes that any applicant for asylum who fits into one of these three categories has been persecuted or has "a well founded fear of persecution on account of political opinion."<sup>40</sup> The statute also provides a cap by declaring

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political opinion where the circumstances suggest that the persecutor attributed a particular opinion to the victim, despite the lack of evidence that the victim actually possessed any particular political opinion. *See, e.g.,* *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1985). In defining "particular social groups," courts determine whether group members share an "immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." *Matter of Acosta*, 19 I. & N. Dec. at 233 (citing *ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 217 (1966)). Some courts also look to important voluntary associational relations or former associations when defining social groups. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092-93 (9th Cir. 2000). One court suggests that the family may be a "prototypical example of a particular social group." *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (defining the term "particular social group" in 8 U.S.C. §1101(a)(42)(A)).

39. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009-689; *see* Jerome B. Ingber, *New INS Policy for Chinese Asylum Seekers*, 6 *ASIAN PAGES*, Aug. 1-14, 1996, at 14.

40. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1101(a)(42) (2000), Pub. L. No. 104-208, § 601, 110 Stat. 3009-689. Building an asylum case ordinarily requires aliens seeking asylum to show that they either were victims of persecution before fleeing their country, or that the harm they fear upon return meets the definition of "persecution." *Pitcherskaia v. INS*, 118 F.3d 641, 645 (9th Cir. 1997) (citing *Lopez-Galarza v. INS*, 99 F.3d 954, 958 (9th Cir. 1996)). Courts typically define "persecution" as "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive." *Id.* at 647 (quoting *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997)). "This definition . . . turns not on the subjective intent of the persecutor but rather on what a reasonable person would deem 'offensive.'" *Id.* For example, where the persecutor "inflicts the suffering or harm in an attempt to elicit information, . . . for his own sadistic pleasure, . . . to 'cure' his victim, or to 'save his soul' is irrelevant." *Id.* (citing *Nasseri v. Moschorak*, 34 F.3d 723, 724-25 (9th Cir. 1994); *see also* *Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996); *LAROUSSE DICTIONARY OF BELIEFS AND RELIGIONS* 243 (Rosemary Goring ed., 1994) (defining "inquisition"). Courts have found persecution in cases of "substantial economic disadvantage." *See Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969). Moreover, confinement in a mental institution and administration of electric shock treatment to cure lesbianism has also been held to constitute persecution. *See Pitcherskaia*, 118 F.3d at 644. As well, "cumulative, specific instances of violence and harassment toward an individual and her family." *See Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998). In addition, in cases of extreme, "atrocious" persecution, courts will not usually force the applicant to return, even where country conditions have substantially changed, or the possibility of internal relocation exists. *See Matter of Chen*, 20 I. & N. Dec. 16, 19 (B.I.A. 1989) (citing *OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES* § 136 (Geneva, 1988)). One other aspect of persecution that frequently arises in asylum cases involves the distinction between "persecution" and "prosecution." Courts hold that "[p]rosecution for illegal activities 'is a legitimate government act and not persecution.'" *Sadeghi v. INS*, 40 F.3d 1139, 1142 (10th Cir. 1994) (quoting *Kapcia v. INS*, 944 F.2d 702,

that “[f]or any fiscal year, not more than a total of 1,000 refugees may be . . . granted asylum . . . pursuant to a determination under [section 601].”<sup>41</sup> The following subsections describe the major events leading up to section 601’s passage, as well as some of the possible motivations for it.

### A. *Administrative History of Section 601*

Over eight years before the passage of section 601, Attorney General Edwin Meese promulgated guidelines permitting asylum for aliens fleeing coercive population control.<sup>42</sup> This marked the first of a litany of “botched efforts . . . to protect Chinese fleeing from their country’s one-child policy.”<sup>43</sup> The following year, in *Matter of Chang*, the Board of Immigration Appeals (“BIA”) dismissed the Meese guidelines as applicable only to the Immigration and Naturalization Service (“INS”), (now the United States Citizenship and Immigration Service (“USCIS”)).<sup>44</sup> Chang, a Chinese national, sought asylum based on (among other things) a well-founded fear of persecution on account of opposition to China’s one couple, one child policy.<sup>45</sup> The BIA denied Chang asylum, holding that general population control policies do not necessarily amount to persecution.<sup>46</sup> Because the Chinese government merely desired to prevent apparent problems resulting from overpopulation, the BIA determined that no nexus to any of the five enumerated grounds for asylum existed.<sup>47</sup>

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708 (10th Cir. 1991)). For example, since “a sovereign nation . . . [possesses] the right to enforce its laws of conscription . . . penalties for evasion are not considered persecution.” *Id.* (citing *M.A. v. United States INS*, 899 F.2d 304, 312 (4th Cir. 1990)).

41. 8 U.S.C. § 1157(a)(5) (2000).

42. See 135 CONG. REC. S8244 (daily ed. July 19, 1989); see also Rebecca O. Bresnick, *Reproductive Ability as a Sixth Ground of Persecution Under the Domestic and International Definitions of Refugee*, 21 SYRACUSE J. INT’L L. & COM. 121, 137 (1995) (citing *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 862-63 (E.D. Va. 1994)).

43. See Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881, 882 (2000). The phrase “botched efforts” refers to a series of administrative and legislative blunders preceding the passage of section 601 which intended, but failed to supply courts with a legislative basis for including victims of coercive population control within the refugee definition. *Id.*

44. *Matter of Chang*, 20 I. & N. Dec. 38, 43 (B.I.A. 1989), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1101(a)(42) (2000). The B.I.A. accepted the INS’s position that the Attorney General did not direct the guidelines to immigration judges and the B.I.A., and that the guidelines applied only to the INS “in considering asylum requests from individuals who cite a fear of persecution upon return to . . . [China] for having violated that country’s ‘one couple, one child’ . . . policy.” *Id.* (paraphrasing the INS’s position).

45. *Id.* at 39.

46. *Id.* at 43.

47. *Id.* at 43-44.

Efforts to overrule *Chang* began immediately. First, Congress passed the Armstrong-DeConcini Amendment to the Emergency Chinese Immigration Relief Act of 1989, expressly overruling *Chang*.<sup>48</sup> However, President George Bush vetoed the bill, pledging instead to overrule *Chang* administratively.<sup>49</sup> In January of 1990, Attorney General Richard Thornburgh promulgated an Interim Rule permitting asylum based on CPC.<sup>50</sup> President Bush supported the rule by issuing Executive Order No. 12,711, underscoring the substance of the rule.<sup>51</sup> Unfortunately, when the final rule was published in July 1990, it made no mention of asylum based on CPC.<sup>52</sup> In the waning days of the Bush administration, Attorney General William Barr signed another final rule permitting asylum based on CPC and overruling *Chang*.<sup>53</sup> The Bush administration scheduled this rule for publication on January 25, 1993, but immediately after President Clinton's inauguration on January 22, a directive was issued, "prohibiting publication of any new regulations not approved by [a Clinton] agency head."<sup>54</sup> As a result of all this confusion, courts continued to rely on the reasoning of *Chang* in denying asylum to refugees fleeing CPC in China into the mid-1990s.<sup>55</sup>

### B. Motivations Behind Section 601

As one might gather from the foregoing discussion, the impetus behind section 601's passage focused almost exclusively on China. Note also that, intuitively, whenever one country grants asylum to refugees fleeing from another country, it necessarily expresses disapproval of human rights practices in that country. This poses an important question: was the passage of section 601 the result of strong Cold War, anti-communist sentiments, the product of

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48. 135 CONG. REC. H6731-32 (daily ed. Oct. 5, 1989); *Chen v. I.N.S.* 93, F. 3d 801, 803 (9th Cir. 1996).

49. Memorandum of Disapproval for the Emergency Chinese Immigration Relief Act of 1989, 25 WEEKLY COMP. PRES. DOC. 1853-54 (Dec. 4, 1989); *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 863 (E.D. Va. 1994), *overruled on other grounds by* *Chen Zhou Chai v. Carroll*, 48 F.3d 1331 (4th Cir. 1995).

50. Refugee Status, Withholding of Deportation, and Asylum; Burden of Proof, 55 Fed. Reg. 2803, 2803-04 (Jan. 29, 1990) (to be codified at 8 C.F.R. pts. 298 and 242).

51. EXEC. ORDER NO. 12,711, 55 Fed. Reg. 13,897 (Apr. 13, 1990); Bresnick, *supra* note 42, at 139.

52. *Guo Chun Di*, 842 F. Supp. at 863 (referring to 55 Fed. Reg. 30,674 (July 27, 1990) (to be codified at 8 C.F.R. pts. 3, 103, 208, 236, 242, and 253)).

53. *Id.* at 864; *see also* Bresnick, *supra* note 42.

54. *Guo Chun Di*, 842 F. Supp. at 864.

55. *See* Abrams, *supra* note 43, at 887 & n.32 (citing *Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995); *Chen v. INS*, 95 F.3d 801 (9th Cir. 1996); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331 (4th Cir. 1995)).

unique bilateral relations between China and the United States, or some other factor? This subsection examines these possibilities.

### 1. *Anti-Communism and U.S. Immigration Policy*

In the latter part of the 20<sup>th</sup> Century, the push to topple communism resulted in the fall of the Berlin Wall in 1989, and the subsequent demise of the Soviet Union.<sup>56</sup> In addition, much of United States foreign policy reflected opposition to other major Marxist regimes, particularly China and Cuba. During the 1960s, the United States permitted an estimated 340,000 Cuban immigrants to enter the country by way of “freedom flights.”<sup>57</sup> In addition, Congress passed the Cuban Adjustment Act of 1966 (CAA) enabling Cuban immigrants to claim political asylum without establishing nexus.<sup>58</sup> Later, the Carter administration adopted an “open hearts and open arms” policy, resulting in a mass exodus from the Cuban port of El Mariel, emptying Castro’s prisons, and allowing over 125,000 Cuban nationals to flood the shores of the United States.<sup>59</sup> During the 1990s, after the fall of the Soviet Union, the Clinton administration notably limited Cuban immigration through a “Wet-Foot/Dry-Foot Policy.”<sup>60</sup> This tightening of Cuban immigration after the failure of communism in Russia suggests that U.S. policymakers felt less pressure to demonstrate to the world the superior compassion and humaneness of democracy over communism.

Nevertheless, the liberalized asylum policies adopted in favor of Cuban immigrants stand in stark contrast to those adopted in the United States with regard to Cuba’s Caribbean neighbor, Haiti. Despite decades of political turmoil similar to the brutal Castro regime, Haitian asylum-seekers must individually prove that they qualify for asylum based on one of the five enumerated grounds.<sup>61</sup> The disparity in treatment of Cuban and Haitian

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56. U.S. DEPT OF STATE, FALL OF COMMUNISM, <http://www.state.gov/r/pa/ho/time/dr/17672.htm>.

57. Alberto J. Perez, *Wet Foot, Dry Foot, No Foot: The Recurring Controversy Between Cubans, Haitians, and the United States Immigration Policy*, 28 NOVA L. REV. 437, 443 (2003).

58. See Cuban Adjustment Act, Pub. L. No. 89-732, § 1, 80 Stat. 1161 (codified at 8 U.S.C. § 1255).

59. Perez, *supra* note 57, at 445.

60. *Id.* “Wet-Foot/Dry-Foot” refers to the practice of distinguishing between Cuban immigrants the Coast Guard intercepted at sea (wet-foots), and those who made it to U.S. soil (dry-foots). The Coast Guard returned the wet-foots to Cuba, and permitted the dry-foots to stay in the United States. See *id.*

61. See *id.* at 46-53 (detailing the plight of Haitian immigrants seeking asylum in U.S. courts).

asylum-seekers clearly demonstrates that anti-communism influences United States asylum policies.<sup>62</sup>

## 2. *United States Relations With China*

While anti-communist sentiments persisted throughout the years leading up to the passage of section 601, elements of the unique, and often contradictory, relationship between the United States and China may have contributed more significantly. "On January 1, [1979] the United States and . . . [China] formally establish[ed] diplomatic relations."<sup>63</sup> Throughout the 1980s, college students in China initiated several pro-democracy demonstrations, demanding political and economic reforms.<sup>64</sup> Beginning in April of 1989, thousands of student protesters began to gather in Tiananmen Square in Beijing.<sup>65</sup> Embroiled in a continuous struggle to maintain control over its people, the Chinese government branded the demonstrators as part of a plot to "overthrow the Communist Party and the socialist system."<sup>66</sup> On May 20, the government declared martial law in Beijing.<sup>67</sup> Then on June 3, the Chinese military opened fire on the thousands of student protesters gathered in Tiananmen Square.<sup>68</sup> The remainders were escorted out at gunpoint.<sup>69</sup> The Tiananmen Square massacre brought international attention to human rights abuses in China, and prompted policymakers in the United States to begin formulating the proper response.

According to a recently declassified State Department document, the Chinese Communist Party at the time of the Tiananmen Square massacre was engaged "in an exquisite balancing act" between the United States and the Soviet Union.<sup>70</sup> The Chinese government hosted three U.S. Naval warships in Shanghai on May 19, 1989, the day after Soviet President Mikhail

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62. *See id.* at 454-55 (describing the benefits Cuban immigrants received through deferential U.S. asylum policies as "the spoils of the Cold War fervor."); *see also* Ted Conover, *The United States of Asylum*, N.Y. TIMES MAGAZINE, Sept. 19, 1993, at 56, 58 (noting that "Eastern Europeans fleeing Communist regimes were practically all approved for asylum; victims of violence in Central American countries that had the support of the United States Government were routinely denied").

63. 20th Century China: A Partial Chronology, Tiananmen Square T.V., Long Bow Group, Inc., <http://www.tsquare.tv/chronology> (last visited Aug. 31, 2005).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. CHINA AND THE U.S - A PROTRACTED ENGAGEMENT, *in* The U.S. "Tiananmen Papers" 2 (Michael L. Evans, ed., 2001), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB47/> (last visited Aug. 31, 2005).

Gorbechev visited the city.<sup>71</sup> The State Department document also reports that the Chinese government instigated “a massive [propaganda] campaign to discredit U.S. influence [on] the Chinese people”, denouncing American ideologies as “bourgeois liberalism.”<sup>72</sup> In response, the United States abruptly ceased arms sales and military contacts with China, and diplomatic relations between the two countries waned.<sup>73</sup>

Oddly, at the same time political relations between the United States and China deteriorated, economic relations between the countries flourished. The United States annually extended a discretionary trade waiver to China granting it “Most Favored Nation” status.<sup>74</sup> Since 1989, politicians in Washington have introduced legislation seeking to assign certain human rights prerequisites to the extension of China’s waiver renewal, but their efforts have failed.<sup>75</sup> The fact that these legislative measures did not succeed while section 601 passed is instructive. It shows that most of Congress viewed section 601 as a way to condemn Chinese human rights abuses without burdening a profitable economic relationship with China.

When viewed in this historical context, it is not surprising that the Board of Immigration Appeals decision in *Matter of Chang* aroused so much action on the part of Congress and the President.<sup>76</sup> Note that the BIA handed down *Chang* on May 12, 1989,<sup>77</sup> just as Tiananmen Square was heating up. Policymakers in Washington wanted to overrule *Chang* in order to express disapproval of human rights abuses in China. However, President Bush, cognizant of the important U.S. economic interests in China, would not sign a bill that could jeopardize those interests.<sup>78</sup> This conclusion seems even more plausible when one compares the text of the vetoed Armstrong-Deconcini amendment, entitled “Chinese Fleeing Coercive Population Control Policies,” to the text of section 601.<sup>79</sup> While section 601 uses neutral language, not specifically naming China, Armstrong-Deconcini explicitly singles out:

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71. *Id.*

72. *Id.* at 2.

73. *Id.* at 3.

74. International Trade Data System (I.T.D.S.), Normal Trade Relations (Formerly known as Most Favored-Nation status - MFN), <http://www.its.treas.gov/mfn.html> (last visited Aug. 31, 2005).

75. *Id.*

76. See generally *Matter of Chang*, 20 I. & N. Dec. 38, 43 (B.I.A. 1989) superseded by statute, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1101(a)(42) (2000); Pub. L. No. 104-208, §601, 110 Stat. 3009-689.

77. *Id.*

78. Bresnick, *supra* note 42, at 137 & n.97.

79. 135 Cong. Rec. H6731 (daily ed. Oct. 5, 1989).

[N]ationals of the People's Republic of China who express a fear of persecution upon return to that country because they refuse to abort a pregnancy or resist surgical sterilization in violation of Chinese Communist Party directives on population, if such refusal is undertaken with full awareness of the urgent priority assigned to such directives by all levels of the Chinese government, and full awareness of the severe consequences which may be imposed for violation of such directives.<sup>80</sup>

It goes on to say:

In view of the urgent priority assigned to the "one couple, one child" policy by high level Chinese Communist Party officials and local party cadres at all levels, as well as the severe consequences commonly imposed for violations of that policy, which are regarded as "political dissent," refusal to abort or to be sterilized . . . shall be viewed as an act of political defiance justifying a 'well founded fear of persecution' sufficient to establish refugee status.<sup>81</sup>

President Bush may have feared that the harsh language of Armstrong-Deconcini would do further damage to an already unstable relationship with China.

### 3. *Pro-life Politics and the United Nations Population Fund*

While anti-communism and relations with China seem to have contributed to section 601, debate within Congress reveals a much more direct motivation. Apparently, the driving force behind most of the opposition to China's population practices came from a strong abhorrence of government sponsorship of abortion and sterilization in general. Congress deliberated over two proposed prongs of opposition to coercive population control ("CPC") in China in the years leading up to the passage of section 601: (1) the drive to grant asylum to victims of China's one child policy; and (2) the desire to cut funding for United Nations Population Fund ("UNFPA") activities in China. Leading the charge, Representative Christopher Smith of New Jersey sponsored

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80. *Id.* at H6731-32.

81. *Id.* at H6732.



section 601 as well as legislation to eliminate funding for UNFPA activities.<sup>82</sup>

The UNFPA has long denied participating in China's one-child policy, and claims not to provide abortion related services.<sup>83</sup> However, many members of Congress find their denials hard to believe, especially in light of the fact that UNFPA shares office space with local Chinese population control cadres.<sup>84</sup> For example, in at least one instance, "the UNFPA office desk . . . faces—in fact touches—a desk of the Chinese Office of Family Planning."<sup>85</sup> U.N. watchdog groups also express distrust of the UNFPA's claimed anti-abortion policy in light of the fact that its "reproductive health kits" include vacuum aspirators, IUDs, and morning after pills.<sup>86</sup> On the other side of the aisle, liberals in Congress dismissed Representative Smith's statements as "anti-abortion rhetoric," claiming that the UNFPA provides important family planning and population assistance in over 140 countries.<sup>87</sup> Those who support funding UNFPA's efforts in China view the organization's work as a legitimate effort to deal with perceived impoverishing effects of overpopulation.<sup>88</sup>

Indeed, vigorous debate regarding the appropriate posture the United States should assume in addressing China's one-child policy circulated throughout Congress and elsewhere. Critics of section 601 argued that the bill's wide applicability would cause a vast expansion of millions of illegal immigrants and facilitate

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82. *Id.*; see also 141 CONG. REC. H6446, H6447-48 (daily ed. June 28, 1995).

83. *Coercive Population Control in China*, *supra* note 6, at 39 (letter submitted for the hearing record from Stirling Scruggs, Director of Information and External Relations, United Nations Population Fund).

UNFPA does not support China's one-child policy, and is unequivocally opposed to targets and quotas. UNFPA does not provide support for abortions or abortion-related activities anywhere in the world. It is the policy of the UNFPA not to provide assistance for abortions, abortion services, or abortion-related equipment and supplies as a method of family planning.

*Id.*

84. *Id.* at 13-14 (statement of Josephine Guy, Director of Governmental Affairs, America 21).

85. *Id.* at 14.

86. UNFPA Elusive About Abortion Aid for Tsunami Victims, Catholic Family and Human Rights Institute, 8 Friday Fax, No. 3 (Jan. 7, 2005), [http://www.c-fam.org/FAX/Volume\\_8/faxv8n3.html](http://www.c-fam.org/FAX/Volume_8/faxv8n3.html) (reporting on UNFPA's aggressive population control efforts in Afghanistan and areas affected by the December 2004 tsunami). For a list of contents of UNFPA's "reproductive health kits" see UNITED NATIONS POPULATION FUND, REPRODUCTIVE HEALTH IN REFUGEE SITUATIONS: AN INTER-AGENCY FIELD MANUAL, ch. 2, <http://www.unfpa.org/emergencies/manual/2.htm>.

87. See, e.g., 141 CONG. REC. H6450-51 (daily ed. June 28, 1995) (statements of Rep. Lowey of N.Y.).

88. See 141 CONG. REC. S16481, S16488-89 (daily ed. Nov. 1, 1995) (statements of Sen. Kassebaum of Kan. and Sen. Boxer of Cal.).

Chinese alien smuggling into the United States.<sup>89</sup> Proponents of this view, which can be thought of as the “floodgates” objection, emphasize the need for the annual statutory cap on the number of immigrants granted asylum under section 601. Liberals and feminists oppose China’s one-child policy for other reasons, such as the freedom to procreate and gender equality.<sup>90</sup> Some commentators equate “pronatalist” policies, such as bans on abortion in Islamic countries and Ireland and United States laws that fund and favor childbirth, with China’s policies of forced abortion and sterilization.<sup>91</sup> These critics believe current asylum law does not go far enough in addressing what they perceive as human rights violations.<sup>92</sup> Ultimately, the voices in favor of section 601 prevailed by describing in gruesome detail the population control practices implemented by the Chinese government and emphasizing the failure of the courts and INS to adequately address these claims.<sup>93</sup>

#### IV. CONTINUED NEED FOR SECTION 601

This section evaluates the various arguments for and against section 601 and population control in general. Of all the objections to section 601, the “floodgates” argument holds the most persuasive value. Arguably, every alien fleeing China could claim refugee status under section 601 because the practice of coercive population control permeates most areas of the country. Even with the statutory cap, if the number of aliens granted asylum under section 601 exceeds the cap for a given fiscal year, INS does not deport the surplus. Those aliens who exceed the cap are permitted to remain in the United States and apply for employment authorization while they await approval from the Executive Office of Immigration Review under the cap for the

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89. 141 CONG. REC. H5389-01, H5406 (daily ed. May 23, 1995) (statement of Rep. Hamilton of Ind.); see also Cleo J. Kung, Comment, Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the U.S. Statutory Definition of “Refugee”, 90 J. CRIM. L. & CRIMINOLOGY 1271, 1315-16 (2000).

90. See, e.g., *Coercive Population Control in China*, *supra* note 6, at 11 (statement of Rep. Lantos of Cal.).

91. See, e.g., Abrams, *supra* note 43, at 897-99 & n.107 (arguing that pronatalist biases should not obscure the significance of the harm that occurs when the state prevents a woman from controlling her fertility); *but c.f.* Bresnick, *supra* note 42, at 121-23 (agreeing that “[p]rotection of one’s body is a basic human right, not a privilege,” but conceding that “unavailability or illegality of abortion in some nations does not amount to a reproductive rights violation . . . . Although denial of abortion results in continued pregnancy, it does not amount to government control of a woman’s reproductivity.”).

92. See Abrams, *supra* note 43, at 905; see also Bresnick, *supra* note 42, at 153.

93. See 141 CONG. REC. H6447-H6450 (daily ed. June 28, 1995) (statements of Rep. Smith of N.J.).

following fiscal year.<sup>94</sup> Yet nearly ten years after section 601's enactment, the United States has not become inundated with Chinese refugees. Perhaps this is due to the fact that applicants must first make it from China to the United States, and then section 601 only applies if resistance to coercive family planning is the sole basis for the grant of asylum.<sup>95</sup> Also, asylum in general only accounts for a small percentage of total immigration to the United States.<sup>96</sup>

The claim that promoting abortion and sterilization practices will improve standards of living defies logic. In countries committed to social welfare, as population narrows, a smaller working class becomes *more* burdened by a larger population of the aged.<sup>97</sup> Even here in the United States, policymakers struggle with the future of Social Security as the "Baby Boom" generation begins to retire, forcing the next generation to contribute more and receive less. China's communist system of government magnifies the adverse effects of a narrowing population on the standard of living of its people because the government controls more than half of the economy, and most Chinese citizens depend on the government for resource allocation.<sup>98</sup> Consequently, communism in China causes its poverty problem, not its large population.

Claims that population control methods improve the status of women and minorities are equally unfounded. Such practices harm women and minorities in various ways. For example, a severe imbalance between the number of men and women in China continues to grow. At last estimate, the ratio of men to women was 120-to-100.<sup>99</sup> Chinese families favor male babies largely because of their earning capacity and social status in Chinese culture. When implemented in this cultural context, China's one child policy results in widespread sex-selective abortion and

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94. See OFFICE OF INT'L AFFAIRS, ASYLUM DIVISION, AFFIRMATIVE ASYLUM PROCEDURES MANUAL, 49 (2003).

95. *Id.*

96. Conover, *supra* note 62.

97. See Pontifical Council for the Family, Declaration on the Decrease of Fertility in the World, at § 5 (Feb. 27, 1998), [http://www.vatican.va/roman\\_curia/pontifical\\_councils/family/documents/rc\\_pc\\_family\\_doc\\_29041998\\_fecondita\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_29041998_fecondita_en.html). The Vatican reports that, for thirty years, "the rate of growth of the world's population has continued to decline." *Id.* at § 3. Fifty-one of the one hundred eighty-five countries worldwide, including the United States, Canada, China, and most of Europe, are currently at "below-replacement-level." *Id.* In addition, thirteen countries, mostly in eastern Europe, currently experience "depopulation" in which the annual "number of deaths surpass[es] the number of births." *Id.*

98. *China's Economy: Time to Hit the Brakes*, THE ECONOMIST (May 13, 2004), available at [http://www.economist.com/opinion/PrinterFriendly.cfm?Story\\_id=2668182](http://www.economist.com/opinion/PrinterFriendly.cfm?Story_id=2668182).

99. *Coercive Population Control in China*, *supra* note 6, at 36 (statement of Harry Wu, Director, Laogai Research Foundation).

infanticide.<sup>100</sup> Chinese orphanages are full of little girls and men are typically left with an inadequate pool of potential brides. These factors contribute to the increase in trafficking of women.<sup>101</sup> In addition to social ramifications, CPC procedures pose a physical threat to women because officials perform mass abortions and sterilizations hastily, without regard to the health of the woman.<sup>102</sup> In regard to minorities, although China purports to apply its CPC policy less stringently, victims still report that officials aggressively force abortions and sterilizations on minorities to meet local quotas.<sup>103</sup> The inability to produce multiple offspring virtually eliminates any possibility that a minority group will become the majority in the future.

The spread of genocidal population control practices to other countries presents a compelling reason for a non-country specific provision like section 601. For example, the State Department reports instances of North Korean government officials prohibiting live births in prison camps, and forcing abortions and the killing of newborn babies.<sup>104</sup> Reports indicate similar atrocities in Indonesian-occupied East Timor. For example, at least 500 students there reported instances where government officials offered them vitamin injections for nutritional purposes which actually contained depro provera, a drug causing sterilization.<sup>105</sup> In Colombia, the terrorist organization, Revolutionary Armed Forces of Colombia (FARC), "employed large numbers of female combatants, [and] prohibited pregnancies . . . [by] order[ing] forced implantation of intrauterine devices and forced abortions."<sup>106</sup> Even though CPC occurs in other countries throughout the world, virtually all cases brought under section 601 involve Chinese asylum-seekers. This phenomenon may be explained by the fact that, in practice, to qualify for asylum based on CPC, the applicant must base the claim for asylum *solely* on CPC practices.<sup>107</sup> Given

100. *Id.* at 35-36 (statement of Stephen W. Mosher, President, Population Research Institute).

101. *Id.* at 24 (statement of Harry Wu, Director, Laogai Research Foundation).

102. *Id.* at 25. By visiting several "family planning" facilities in China, Mr. Wu discovered that "[t]he physician performed the surgeries quickly, spending no more than ten minutes on each sterilized woman." *Id.*

103. *Id.*

104. U.S. DEPT OF STATE, 108th CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003, *supra* note 5, at 854.

105. *Human Rights in Indonesia, Hearing Before the Subcomm. on Int'l Operations and Human Rights of the Comm. on Int'l Relations*, pt. 1, 105th Cong. 10-12 (1998) (statement of Constancio Pinto, United States and United Nations Representative, National Council of Maubere (East Tomor) [sic] Resistance).

106. 2 U.S. DEPT OF STATE, 108th CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003 1791, 2349 (Joint Comm. Print 2004).

107. See OFFICE OF INT'L AFFAIRS, ASYLUM DIVISION, AFFIRMATIVE ASYLUM PROCEDURES MANUAL, 49 (2003).

the numerous other human rights violations occurring in countries that use CPC, aliens seeking asylum may more easily qualify under one of the five enumerated grounds for refugee status. Nevertheless, those victims of CPC who cannot establish the nexus requirement necessarily rely on section 601 to gain asylum.

Some courts have granted asylum by defining social groups by reference to opposition to the particular harm the persecutor desires to inflict. In *In re Kasinga*, the BIA held that:

[y]oung women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a "particular social group" within the definition of the term "refugee" under section 101(a)(42)(A) of the Immigration and Nationality Act.<sup>108</sup>

Many African tribes force female genital mutilation ("FGM") upon young women by seizing the women and cutting their genitalia with knives as part of a cultural ritual.<sup>109</sup> The *Kasinga* court recognized the narrow social group stated above in order to grant asylum to objecting victims of FGM.<sup>110</sup> In the absence of legislation like section 601, courts could apply the same reasoning to victims of coercive population control by defining the social group as: men and women who are residents of a country in which the government utilizes coercive population control, and who oppose forcible abortion and sterilization.<sup>111</sup> However, this social group definition differs from that used in FGM cases for several reasons: (1) it includes both men and women; (2) it does not specify a particular tribe or country; (3) it includes both past and potential victims of coercive population control. The main feature of the social group definition in *Kasinga* is its narrowness. Even the most liberal courts would not likely recognize such a broad social group to cover victims of CPC. For this reason, section 601 remains the only feasible basis for admitting aliens fleeing CPC.

Ultimately, one may conclude that governmental attempts to alter population increase as a force of nature are both foolish and

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108. *In re Fauziya Kasinga*, 21 I. & N. Dec. 357 (B.I.A.1996).

109. *Id.* at 361.

110. *See id.*

111. *Id.*

futile. Even Thomas Malthus, a proponent of population control, concedes:

[F]ood is necessary to the existence of man...the passion between the sexes is necessary and will remain nearly in its present state. These two laws, ever since we have had any knowledge of mankind, appear to have been fixed laws of our nature, and, as we have not hitherto seen any alteration in them, we have no right to conclude that they will ever cease to be what they now are, without an immediate act of power in that Being who first arranged the system of the universe, and for the advantage of his creatures, still executes, according to fixed laws, all its various operations.<sup>112</sup>

Furthermore, Darwin theorized in *On The Origin of Species*: [a]s many more individuals of each species are born than can possibly survive; and as, consequently, there is a frequently recurring struggle for existence, it follows that any being, if it vary however slightly in any manner profitable to itself...will have a better chance of surviving, and thus be naturally selected.<sup>113</sup>

By this, Darwin posits that natural population growth will inevitably result in competition, and in turn, evolution. Based on these ideas and observations, it seems unlikely that CPC practices will succeed in achieving decreased population, and conversely, increasing population may serve to benefit mankind in the long run.

## V. CONCLUSION

Regardless of one's political or moral views on abortion, contraception, and sterilization, objection to coercive population control remains a vital component of United States asylum law. Section 601 provides a workable solution to the dilemma facing victims of CPC in seeking refugee status, in terms of limiting a flood of immigrants from the People's Republic of China and expressing disapproval of a policy that violates basic human procreative rights and harms women and minority interests. As stated above, section 601 applies only to asylum-seekers who base their claims solely on objection to CPC practices, and removes the seemingly insurmountable barrier such victims face in proving a

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112. MALTHUS, *supra* note 2, at 4.

113. DARWIN, *supra* note 2.

nexus to one of the five enumerated grounds for refugee status. Whatever the motivations which led to section 601's passage, the statute represents a strong policy in favor of a culture that cherishes life and respects human dignity, thus exemplifying traditional values at the core of American society.

