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THE GRANT OF ASYLUM TO CHINESE CITIZENS WHO OPPOSE CHINA’S ONE-CHILD POLICY: A POLICY OF PERSECUTION OR POPULATION CONTROL?

CHARLES E. SCHULMAN*

I. INTRODUCTION

The bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all nations and religions, whom we shall welcome to a participation of all our rights and privileges. . . .

—George Washington1

In June 1993, the freighter Golden Venture accidentally ran aground near Long Island, New York.2 The freighter contained 284 Chinese citizens who intended to enter the country illegally.3 Twenty-three of the passengers were women, all of whom were jailed in New Orleans.4 Many of these women are applying for or have applied for political asylum in the United States.5 In some cases, the basis of their asylum applications is a fear of forced abortion or sterilization. In other cases, the basis is actual forced abortion or sterilization.6

* SENIOR ARTICLES EDITOR, BOSTON COLLEGE THIRD WORLD LAW JOURNAL.

1 27 George Washington 257 Letter to the members of the Volunteer Association and other Inhabitants of the Kingdom of Ireland who have lately arrived in New York City, in RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 169 (Suzy Platt ed., 1989).


3 Id.

4 Id.

5 Id.

6 See id. The report traces the story of Mrs. Wong, one of the female passengers aboard the Golden Venture and a mother of two children. She worked with her husband as a farmer close to the town of Wenzhou in Zhijiang province. Mrs. Wong was fearful that the Chinese government would seek reprisals against her family members if her identity was revealed. In 1992, Mrs. Wong
How should the United States respond to the Golden Venture incident and the larger problem of human smuggling from China that it represents? A response might include consideration of whether the United States is treating Chinese immigrants in a fair manner, consistent with the rest of its immigration policy. The response might also include consideration of the effectiveness of anti-smuggling enforcement.7

The first question above, namely, whether we are treating these Chinese immigrants in a manner consistent with the rest of our immigration policy, is the topic of this Note. One reason the answer to this question is unclear is that there are two government organizations that have jurisdiction over asylum cases. The two organizations are the

and her husband fled the country after the government forcibly sterilized her and threatened her with fines and imprisonment for violating it's one-child policy. She recalls the details of her forced sterilization:

I was cooking alone at home and several of them came. I ran but they caught me and took me to the hospital and they performed the operation. The authorities decided to fine me and because I didn’t have the money, I decided to run. I left my two children with my mama, and then my husband and I decided to flee. I had no choice. Even if I stayed in China, they would have prosecuted me and put me in jail, so I had to decide for the best of the family, for the children and myself, to flee.

Mrs. Wong had to pay smugglers for her trip on the Golden Venture. Chinese immigrants pay up to $30,000 per person for passage on ships where conditions are similar to those of slave ships of the 1700s.

7 A discussion of this second consideration, the effectiveness of anti-smuggling enforcement, is beyond the scope of this note. However, see Marlowe Hood, The Taiwan Connection, L.A. TIMES, Oct. 9, 1994 (Magazine) at 20. President Clinton outlined his strategy for combating human smuggling in June 1993, two weeks after the grounding of the Golden Venture. Id. The President stated that “[w]e can’t afford to lose control of our own borders, . . . deterring this transport in human cargo and traffic in human misery is a priority for our Administration.” Id.

His agenda had three parts. Id. First, Clinton proposed using interdiction, stopping boats at sea before they arrived at U.S. borders, to deter future illegal immigrants. Id. Second, Clinton proposed that the United States expand its present investigative efforts in order to strengthen law enforcement. Id. According to President Clinton, by doing so, this country will pursue smugglers and their operations at the source. Id. Third, he proposed a bill that would: 1) facilitate repatriating smuggled immigrants, 2) make available racketeering laws which have been used effectively against organized crime, and 3) increase the penalty for smuggling aliens from two years to ten years. Id.

A year and a half later, Congress passed a crime bill. Id. However, all anti-smuggling provisions were removed, leaving human smuggling organizations to continue unaffected. Id.

One of the largest such organizations is based in Taiwan. Id. This network makes millions smuggling approximately 100,000 illegal aliens from China each year. Id. The Immigration and Naturalization Service (INS) believes that the aliens are encouraged, even coached by the smugglers to pursue asylum based on persecution. Id. Mrs. Wong, referred to in footnote 6, has attempted to demonstrate that she has actually suffered persecution by indicating her willingness to show her sterilization scars. See All Things Considered, supra note 2.
Executive Office of Immigration Review (EOIR) and the Immigration and Naturalization Service (INS), both of which have jurisdiction over political asylum cases within the Justice Department. The two organizations have taken opposite positions on these Chinese asylum applications. This Note suggests that both the executive and legislative branches have failed to provide a uniform policy with respect to Chinese asylum seekers. This absence of a uniform policy leaves individual judges to determine the fate of the majority of these Chinese asylum applicants. Part II describes China’s population control policies. Part III examines the conflicting treatment this asylum issue has received by the agencies and individuals involved. Part IV outlines the current federal statutory standards for a successful asylum case and applies these standards to Chinese asylum claims. In particular, Part IV focuses on the interpretation of the phrase “a well-founded fear of persecution on account of . . . political opinion” as it is defined in § 101(a)(42)(A) of the Immigration and Naturalization Act (INA). In doing so, Part IV examines the validity and effect, if any, of the various administrative efforts to interpret the phrase above. Finally, Part V explores possible methods of achieving a singular interpretation of this phrase. The inconsistency and unpredictability caused by more than one interpretation is unsatisfactory to all involved.

II. THE CHINESE PLAN FOR POPULATION CONTROL

The people and the government of China are understandably concerned with population control. China’s population has approximately doubled in the past forty years. This rapid growth is primarily due to a dramatic increase in fertility rates and a decrease in mortality rates that began in the 1950s.

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8 All Things Considered, supra note 2.
9 Id. While the INS believes family-planning persecution is grounds for asylum, the BIA, a department within the EOIR, has held that the one-child policy does not constitute persecution. See infra Part III for a discussion of the inconsistent declarations by the INS and the BIA.
In order to understand China’s response to this population explosion, one should first examine the Chinese concept of human rights generally. In December of 1982, China adopted the fourth Constitution of the People’s Republic of China (PRC). Article 48 relates to the rights of women. Article 48 states:

Women in the People’s Republic of China enjoy equal rights with men in all spheres of political, economic, cultural, social and family life. The state protects the rights and interests of women, applies the principles of equal pay for equal work for men and women alike and trains and selects cadres from among women.

Article 49 states that “both the husband and wife have the duty to practice family planning.” Article 49 further states that the “[m]altreatment of old people, women and children is prohibited.” The explicit reference to family planning and the maltreatment of women within the same article suggests that the government is aware of the connection between population control measures and women’s rights.

The Constitution further stipulates that government-given rights may not overly impinge on the interests of the collective and of society. The government grants particular rights when it considers the rights to be in concert with the best interest of the state. If a granted right comes in conflict with a state interest, that right may be withdrawn. China granted its citizens the legal right to an abortion in 1957 in an effort to control population growth, support industrialization, and increase the citizens’ standard of living.

Just as the Chinese government granted its citizens the right to an abortion, it also altered or removed the right to have more than one child. In June of 1979, supporting nearly a quarter of the world’s

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14 Id.
15 Id.
16 Id.
17 Id.
19 Id.
20 Id.
22 Savage, supra note 18, at 1068–70.
population with less than eight percent of the world’s farmland, China adopted a population control policy. The policy included a goal of zero growth by the turn of the century. Confronted with massive starvation as well as economic and social stagnation, the Chinese government established a policy primarily focused on limiting each couple to one child.

The policy is enforced by a combination of incentives and punishments. Asylum applicants often complain of the most extreme punishments, namely forced abortion or sterilization. However, the penalties may range from physical force and imprisonment to mere persuasion and economic sanctions. Economic sanctions may include loss of employment or demotion, fines, and denial of human services. Incentives, on the other hand, may include preferred housing assignments, better child care, cash awards, and longer maternity leave.

The Chinese government created a State Family Planning Commission (SFPC) in 1981 to establish birth control goals. However, the

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23 1990 Country Reports, supra note 11. Official government records indicate a 25 percent increase in the number of annual sterilizations after the implementation of the government population control policies. Id.

24 Id.

25 Erika Platte, China's Fertility Transition: The One-Child Campaign, 57 Pac. Aff. 646, 650 (1984). The principal reason for the implementation of this program was the increasingly critical shortage of grain that had the potential to result in massive starvation. Sue Bigelow, Agriculture Reaching Crisis Point, China Rev., Aug. 1989, at 20, 23. However, the fear of widespread starvation did not prevent the use of billions of kilograms of grain in the production of alcohol. China Goes on Booze, China Rev., Mar. 1989, at 25. Although the government has imposed stiffer taxes on producers, China consumes more alcohol than any other country in the world. Id.


27 See Karen Y. Crabbs, United States Domestic Policies and Chinese Immigrants: Where should Judges Draw the Line when Granting Political Asylum, 7 Fla. J. Int'l L. 249, 255 (1992). In Los Angeles, approximately ninety percent of the Chinese immigrants seek asylum because of opposition to China's family planning policies. Id. Although the national government may not openly endorse forced sterilization or abortion, it does not punish local officials who use such measures. House Comm. on Foreign Affairs & Senate Comm. on Foreign Relations Country Reports on Human Rights Practices for 1991, 102d Cong., 2d Sess. 809, 818-19 (1992) [hereinafter 1991 Country Reports]. In fact these local officials are penalized for excessive births occurring in their jurisdictions. Id.

28 See Melinda Jordan, China's Open Abortion Policy, Toronto Star, Oct. 17 1991, at A27. In one case, it was reported that Chinese men had been "ordered to strip bare and lie prone on the floor while beaten on the buttocks with a stick as many times as the number of days their wives had been pregnant." Id.

29 See 1990 Country Reports, supra note 11.


enforcement of the family planning system is left to local governments and volunteers as well as social (particularly familial) pressure. Thirteen million volunteers are organized into a system of street committees that monitor the use of contraceptives and the occurrence of pregnancies in the local population. In addition, some local authorities monitor non-native personnel by requiring that they obtain a temporary residence certificate.

Individual provinces create regulations with the purpose of satisfying the population control goals of the SFPC. When the individual provinces fail to meet these goals, the central government increases pressure on the local government officials to be more strict. Therefore,

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33 Steven W. Mosher, A Mother's Ordeal: One Woman's Fight Against China's One-Child Policy, 10 (1992). Sinologist (a specialist in Chinese culture) Steven Mosher was one of the first to describe the rural enforcement of the Chinese one-child policy in Broken Earth: The Rural Chinese 224, 255 (1983). In his recent book, A Mother's Ordeal: One Woman's Fight Against China's One-Child Policy, Mosher recounts the story of a nurse, Chi An, who was both victim and victimizer of the population control policies. Like others, when she married she was strongly encouraged to sign a one-child agreement. Id. at 15. After accidentally becoming pregnant with her second child, Chi An found herself subject to "remedial measures." Id. at 22.

After having an abortion, she became part of a comprehensive population control program including state-allocated "birth quotas" of one child per family, mandatory contraception, and sterilization. Id. Chi An described how some doctors performed so many tubal ligations they reportedly felt as if they were "spaying cows." Id.

The collection of personal information for government purposes is regarded as being a higher priority than any individual's right to privacy. Id. at 40. As Chi An reports: "Every shop and office in the factory had a Women's Federation representative, whose job it was to track the menstrual cycles and the contraceptive methods of all young women of childbearing age who worked there." Id. This record keeping was done publicly, by writing each woman's name, means of contraception, and expected date of menstruation on a large blackboard. Id. If a woman failed to start her period on schedule, the Women's Federation representative would order her to go to the women's health clinic for an examination. Id. A positive pregnancy test for a woman with a child could mean forced sterilization or abortion. Id.

34 See Solinger, supra note 32, at 98-99 (describing the process by which non-native individuals must go to the local police station and obtain a Temporary Residence Certificate.).


36 E. Tobin Shiers, Coercive Population Control Policies: An Illustration of the Need for a Conscientious Objector Provision for Asylum Seekers, 13 IMMIGR. & NATIONALITY L. REV. 476, 484 (1991) (describing how the central authority criticizes localities as being ideologically confused when they fail to implement population controls). See also Judith Banister, supra note 12, at 727-28. The vice-governor of Guandong province, Wang Pingshan, made the following statement in 1983 about the newly promulgated population control policies:

The technical policy on birth control was formulated by the State Family Planning Commission with the approval of the leadership of the Party Central. Its principal content is: "Those women who have already given birth to one child must be fitted
the intensity of enforcement may vary in time and location, depending on the past effectiveness of a particular province’s population controls. 37

Many Chinese have more than one child, either believing they can avoid being caught or deliberately choosing to disregard the incentive/disincentive system. This occurs most often in farming areas, where more children can mean more available farm labor, greater security for the elderly family members, and a greater chance of continuing the family name. 38 Thus, population control goals seem most likely to fail in rural areas. In contrast, parents in the cities have limited space and resources; therefore, they often find having only one child more attractive. 39 Furthermore, in the city, many citizens are not as dependent on their children for support in their old age because they work for the state. The citizens who work for the state receive pensions. 40

The one-child policy does have exceptions, most of which apply to minorities. 41 However, China may soon eliminate the exceptions as its population continues to grow. 42 For the majority of Chinese who are

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with IUDs, and couples who already have two children must undergo sterilization by either the husband or the wife. Women pregnant outside the plan must adopt remedial measures [induced abortion] as soon as possible." This is based on the directives of the CCP Central Committee and the State Council and on the summation of family planning practice for many years. . . . The State stipulates that under no circumstances may a third child be born. Sterilization for either party, husband or wife, of those couples with two or more children is the most effective measure to eliminate excessive numbers of births.

Id. The new policies had a dramatic impact by raising the number of sterilizations performed country-wide in one month in 1983 to approximately one and a half times the total number performed in all 1981. Id. at 728.

Guangdong was among those areas which revised their population control policy to include SFPC guidelines including the following:

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

Platte, supra note 25, at 658.

37 See Platte, supra note 25, at 646–47, for a discussion of the disparity between urban and rural areas with respect to the progress and effectiveness of their family planning programs.

38 See id. at 654–55.

39 See id. at 659.

40 See id. at 660.

41 See 1991 Country Reports, supra note 27. These exceptions occasionally also apply to women in particularly sparsely populated rural areas. Decision of the Family Planning Committee, XINHUA, Aug. 3, 1988, translated in Foreign Broadcast Information Service, FBIS-CHI-88-150, Aug. 4, 1988, p. 40. 15 ANN. REV. POP. L. 7, (1988 yearbook on population law). In particular, Shandong Province permits rural mothers over 30 years old with only one female child to have another child. Id.

42 Platte, supra note 25, at 663.
not exempt from the one-child policy, compliance with the policy is sustained not only by government-supplied incentives and punishments but also by familial and social pressures.\textsuperscript{43} Starting at an early age, many Chinese citizens learn to value rules that sustain social order.\textsuperscript{44} Generally speaking, many Chinese consider deviance to be shameful.\textsuperscript{45} Consequently, the result of violating the population control policies can range from shame and censure to exile from one’s community.\textsuperscript{46} The government, specifically the SFPC, has taken advantage of this cultural disposition to portray compliance with national birth control policy as an honor.\textsuperscript{47} However, pressure from one’s family may be an even stronger influence on individual birth control decisions.

Even in the presence of government incentives and social pressure to conform to the population control policies, many rural Chinese violate these policies. In the face of potentially severe penalties for these violations, many individuals flee China. Such individuals immigrate to various countries including the United States. Once within United States’ borders, many of these individuals choose to apply for asylum under the INA. However, the current United States’ policy on such asylum cases is not clear.

III. THE HISTORY OF DECLARATIONS ON CHINESE ASYLUM CASES

In a 1994 case, \textit{Guo Chun Di v. Carroll},\textsuperscript{48} Judge T.S. Ellis cited to nine inconsistent declarations concerning the validity of Chinese asylum claims based on opposition to coercive population control policies.\textsuperscript{49} First, in August 1988 then Attorney General Edwin Meese III issued guidelines to ensure the granting of asylum to aliens who show a well-founded fear of persecution based on the People’s Republic of China’s (PRC) forced abortion and sterilization programs.\textsuperscript{50} Second,
less than a year later in May 1989, the Board of Immigration Appeals (BIA) held in *Matter of Chang* that such aliens were not eligible for asylum. The BIA appeared to have either ignored the above guidelines or concluded that, although a finding of a well-founded fear of persecution would be reasonable in the case of China's programs, they did not in fact find such a well-founded fear.

Third, in January 1990, then Attorney General Dick Thornburgh issued an interim rule contrary to the BIA decision. The interim rule amended the existing regulations concerning asylum to allow such aliens to qualify for asylum.

Fourth, in April 1990, then President George Bush issued an executive order restating the interim rule. This executive order supported the position of the 1990 interim rule.

Fifth, in July 1990, the INS published a final rule setting forth extensive revisions in its asylum regulations. This July 1990 rule made no reference to the issue of asylum applications for persecution based

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51 Int. Dec. 3107 (BIA 1989). The BIA held that China's policies, even involuntary sterilization, do not meet the definition of persecution required for asylum by the INA. See id. The court stated: [W]e do not find that the "one couple, one child" policy of the Chinese Government is on its face persecutive. There is no evidence that the goal of China's policy, [limiting population growth,] is other than stated, or that it is subterfuge for persecuting any portion of the Chinese citizenry on account of one of the reasons enumerated in section 101(a)(42)(A) of the Act.


1. Aliens who have a well-founded fear that they will be required ... to be sterilized because of their country's family planning policies may be granted asylum on the ground of persecution on account of political opinion.

2. An applicant who establishes that the applicant (or the applicant's spouse) has refused ... to be sterilized in violation of a country's family planning policy, and who has a well-founded fear that he or she will be required ... to be sterilized or otherwise persecuted if the applicant were returned to such country may be granted asylum.

53 Exec. Order, No. 12,711, 55 Fed. Reg. 13,897 (1990). Section 4 of the Executive Order read as follows:

The Secretary of State and the Attorney General are directed to provide for enhanced consideration under the immigration laws for individuals from any country who express a fear of persecution upon return to their country related to that country’s policy of forced abortion or coerced sterilization, as implemented by the Attorney General’s regulation effective January 29, 1990.

54 *See Final Asylum Regulations Finally Published*, 67 INTERPRETER RELEASES 817 (July 30,
on population control policies or the 1990 interim rule. The lack of reference to the interim rule was particularly noteworthy considering the recent release of the April 1990 executive order.

Sixth, in November 1991, then INS General Counsel Grover Rees III distributed a memorandum stating that such aliens do qualify for asylum. This memorandum appeared to change the previous INS position as represented by the July 1990 final rule. However, a memorandum by the INS General Counsel is not binding on the BIA or a federal judge.

Seventh, in January 1993, then Attorney General William Barr issued a final rule codifying the January 1990 interim rule and overturning Chang. This 1993 final rule had the potential to settle this asylum issue.

Eighth, in June 1993, the BIA responded to Attorney General Barr’s final rule by holding in Matter of Chu and Matter of Tsun that

1990) (for a discussion of the revisions); see also Arthur Helton, Final Asylum Rules: Finally, 67 Interpreter Releases 789 (July 23, 1990).


54 8 C.F.R. 208.13 (1995). The relevant parts of the rule are the following:

Establishing refugee status; burden of proof.

(b)(1) An applicant (and the applicant’s spouse, if also an applicant) shall be found to be a refugee on the basis of past persecution on the basis of political opinion if the applicant establishes that, pursuant to the implementation of the country of the applicant’s nationality or last habitual residence 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.

. . . . .

(2) 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 by the country of the applicant’s nationality or last habitual residence 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 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.


58 A72 824 320 (BIA June 7, 1993).
such aliens were not eligible for asylum. The BIA reiterated this position in December 1993, in *Matter of G*-.

Ninth, in December 1993, Attorney General Janet Reno issued a pronouncement declining to address the different positions of *Chang and the April 1990 executive order*. The Attorney General implied that the standards embodied in *Chang* and the executive order were not in conflict.

In January 1994, because of the cacophony of pronouncements by the Department of Justice (DOJ), the Federal District Court of Virginia held in *Carroll* that judicial deference was not warranted and that the court would make its own determination of whether the INA sanctions asylum in the particular case being considered. The court determined that the grant of asylum in that case was warranted under the statute. Subsequently, in August 1994, the District Court for the Southern District of New York held in *Zhang v. Slattery* that the January 1993 rule is controlling law. Before, examining these holdings and their significance further, a discussion of the history and current state of United States’ asylum law may be helpful.

IV. U.S. Asylum Law

A. A Brief History

A historical survey of relevant asylum law may illuminate the sources of disagreement manifest in the variety of pronouncements described above. Before 1968, federal asylum law was composed of a collection of non-coordinated statutes and regulations. However, in

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59 A72 761 974 (BIA Dec. 8, 1993).

60 See Attorney General Order No. 1756–95 (June 29, 1993) (for the complete statement by Janet Reno regarding her review of the two cases). Attorney General Reno states:

IN EXCLUSION PROCEEDINGS

In referring these cases for my review, the BIA requested that I resolve the conflict. I granted the BIA’s request for review. Attorney General Order No. 1756–93 (June 29, 1993). After review, it is apparent that the BIA’s determination in these cases do [sic] not require a determination that one or the other of these standards is lawful and binding. Because such a determination is not required, the Order granting review is rescinded.

*Id.*

61 See *Carroll*, 842 F. Supp. at 870.

62 See *id.* at 874.


1968, the United States signed the United Nations Protocol Relating to the Status of Refugees (Protocol), a multi-national treaty including the issue of asylum.\textsuperscript{65} The Protocol required that participating countries not return refugees to their home country, where a refugee is defined as the following:

[One who] owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in 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.\textsuperscript{66}

In 1980, more than a decade later, Congress enacted the Refugee Act, statutorily embodying much of the Protocol. Major adjustments made by the Refugee Act can be found in sections 208 (asylum) and 243(h) (withholding of deportation) of the INA.\textsuperscript{67} An alien may apply for political asylum under section 208 of the INA.\textsuperscript{68} Asylum status has certain advantages; an alien who successfully achieves this status may apply for public assistance, work authorization and lawful permanent residence.\textsuperscript{69} A successful asylum applicant must meet the definition of refugee as defined in the INA.\textsuperscript{70} The INA definition, which is derived from the Protocol's definition, is the following:

[A person outside his or her country] 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 group, or political opinion.\textsuperscript{71}

Unfortunately for the alien applicant, meeting the definition of a refugee only makes the alien eligible for a discretionary grant of asylum status.\textsuperscript{72} Certain factors can weigh negatively in asylum deci-
sions, including past criminal or fraudulent behavior, or previous opportunities to resettle in a third country.

Alternatively, withholding of deportation under Section 243(h), is a nondiscretionary form of relief. However, this relief puts a higher burden of proof on the applicant than that required by Section 208; the alien must show that her "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." Furthermore, withholding of deportation only prevents deportation as long as the threat of persecution continues and does not provide for lawful permanent residence, public assistance, or work authorization.

The regulations pursuant to the INA provide that any application for asylum will automatically constitute an application for withholding of deportation as well. Unfortunately, the INA does not contain definitions of many of the standards it refers to in describing a successful asylum applicant; for example, it does not contain a definition of persecution. The nebulosity of the standards used to judge individual asylum cases impedes fair and consistent outcomes.

§ 1158(a) (1980). "[The alien] may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee. . . ."

8 C.F.R. § 208.14(c)(1) (1990) (requiring mandatory denial of asylum status if applicant has conviction for serious crimes).

See Matter of Shirdel, 1984 BIA LEXIS 4 (BIA 1984); Matter of Salim, 18 I & N Dec., 311 (BIA 1982). Not surprisingly, most asylum applicants have committed some form of immigration law violation. Therefore, the BIA has come to be more lenient on this factor. See Matter of Gharadaghi, Int. Dec. 3001 (BIA 1985) (holding that fraud should not necessarily result in denial of asylum status).


INA § 243(h); 8 U.S.C. § 1253(h) (1980).

Id.

Id., supra note 64, at 687.


8 C.F.R. § 208.3(b). This Note will focus on asylum relief rather than withholding of deportation since it places a lower burden of proof on the applicant. See INA § 208, codified at 8 U.S.C. § 1158 (1980); INA § 243(h) codified at 8 U.S.C. § 1253(h) (1980).

In fact the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status, published in 1979, reports that "there is no universally accepted definition of persecution and various attempts to formulate such a definition have met with little success." U.N. Doc. HCR/PRO/4 (1979). This handbook was created to fill out the principals laid out in the Protocol, which Congress used as a guide in formulating the Refugee Act. Id.

B. A Discussion of Standards

In examining the legal standards applied in asylum cases and how those standards apply to Chinese asylum cases, one should first look to the Refugee Act and its successor, the INA, both of which outline asylum application procedures. One debate that preceded the adoption of the Refugee Act concerned which aliens should be granted asylum.

On the one hand, some argued that U.S. immigration law should not require that all asylum applicants demonstrate that they were repeatedly, severely beaten by officials of the country's government for leading pro-democracy demonstrations. On the other hand, others argued we should not grant asylum to all citizens of countries whose governments abuse human rights. Where to draw the line between these extremes is a difficult and often subjective decision. This subjective undertaking has led to inconsistent results. The line drawing (i.e. statutory interpretation) in past cases has been based on the following three interpretive concepts: (1) the probability of persecution, (2) what constitutes persecution, and (3) the grounds for persecution.

1. The Probability of Persecution—“a Well-Founded Fear”

Until 1987, the standard of proof required for asylum applications had been a source of controversy. However in INS v. Cardoza-Fonseca, the Supreme Court held that the “well-founded fear” standard is more generous than the standard used in withholding of deportation cases, the “clear probability” standard. The Court reasoned that a fear could be well-founded even if the event which is feared has less than a fifty

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83 Refugee Act § 201(b); INA § 208(a); 8 U.S.C. §§ 1103, 1158(a), 1226, 1252, 1282; 31 U.S.C. 9701; 8 CFR pt. 2.
84 Martin, supra note 79, at 88.
85 See id.
86 Id.
88 Id.
89 Martin, supra note 79, at 90. See Guevara Flores v. INS, 786 F.2d 1242, 1249-50 (5th Cir. 1986); Youkhanna v INS, 749 F.2d 360, 362 (6th Cir. 1984); Cenavjal-Munoz v. INS, 743 F.2d 562, 574-75 (7th Cir. 1984).
91 Id. at 448.
percent chance of occurring.\textsuperscript{92} However, the Court did not completely resolve the ambiguity of this standard.\textsuperscript{93} It did not state how much lower a burden of proof is necessary under the “well-founded fear standard” compared to the “clear probability” standard. Nor did it state how this burden should be met from an evidentiary perspective.

Whatever the burden of proof or the requirements for fulfilling that burden might be, the 1990 rule seems to combine the “well-founded fear” and “clear probability” standards into one less demanding standard for citizens fearing coercive population control policies. The 1990 rule reads “aliens [who claim fear of coercive population control policies] in their homeland . . . can establish a well-founded fear, in the case of an asylum applicant, or a clear probability, in the case of an applicant for withholding . . . if evidence exists that [one] will be persecuted if returned to his or her homeland.”\textsuperscript{94} Hence, the standard according to the 1990 rule has become “if evidence [of potential future persecution] exists.”\textsuperscript{95}

A plain language interpretation of the “if evidence exists” standard suggests a lower burden of proof than that required by the “well-founded fear” standard; the existence of evidence of potential future persecution does not necessarily establish a well-founded fear of persecution. For example, an applicant could have a letter from a SFPC official stating that the applicant would be subject to sterilization upon return to China; this could be construed as evidence of potential future persecution. However, if the INS attorney opposing the application submits evidence suggesting that most of these letters are not enforced, the applicant may not have a well-founded fear of potential future persecution. Thus, an applicant may be able to submit evidence of potential future persecution without establishing a well-founded fear.

The change in the burden of proof placed on the applicant is particularly significant in this context. In China there are large variations in the degree of population control policy enforcement depending on recent events and geography.\textsuperscript{96} Therefore, Chinese asylum cases will present evidence of a spectrum of persecution ranging from mild to severe. According to the 1990 rule, all cases that meet the “if evidence exists” threshold will deserve both a grant of asylum and

\textsuperscript{92} Id.
\textsuperscript{93} See id. at 444. The court mentioned that a 1 in 10 chance of being persecuted could be the basis for a well-founded fear of persecution. Id.
\textsuperscript{95} Id. at 2804.
\textsuperscript{96} Platte, supra note 25, at 646.
withholding of deportation, eliminating the distinction between the two types of relief.\textsuperscript{97} Having examined the probability of persecution required, one naturally turns to the question of what constitutes persecution.

2. What Constitutes Persecution

a. The Definition of Persecution

There is a conspicuous absence of a statutory definition of persecution.\textsuperscript{98} The \textit{United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status}\textsuperscript{99} states that "[t]here is no universally accepted definition of persecution and various attempts to formulate such a definition have met with little success."\textsuperscript{100}

The definition of persecution found in a readily available dictionary is "to oppress or harass with ill-treatment."\textsuperscript{101} In \textit{Kovac v. INS}, the court first defined persecution as "the infliction of suffering or harm upon those who differ \ldots in a way regarded as offensive."\textsuperscript{102}

Subsequently, the BIA further refined the concept of persecution in \textit{Matter of Mogharrab}\textsuperscript{103} by specifying the following collective requirements: (1) the alien must possess a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort, (2) the persecutor must be aware, or have the potential to become aware, that the alien possesses this belief or characteristic, (3) the persecutor must have the capability of punishing the alien, and (4) the persecutor must have the inclination to punish the alien.\textsuperscript{104} The INS Asylum Branch has stated that "serious violations of human rights" may constitute persecution; examples include "arbitrary interference with a person's privacy, family, home or correspondence; relegation to substandard dwellings; exclusion from institutions of higher learning; enforced social or civil inactivity; passport denial; constant surveillance and pressure to become an informer."\textsuperscript{105}

\textsuperscript{97} See 55 Fed. Reg. 2801, 2804.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} \textit{The American Heritage Dictionary of the English Language} 977 (6th ed. 1976).
\textsuperscript{102} 407 F.2d 102, 107 (9th Cir. 1969).
\textsuperscript{103} Int. Dec. 3028 (BIA 1987).
\textsuperscript{104} Id.
\textsuperscript{105} Deborah Anker, \textit{The Law of Asylum in the United States} 19 (1991, 2nd ed.) and
One could imagine a situation in which the Mogharrabi definition of persecution is satisfied by a Chinese citizen who opposes the one-child policy. For example, imagine a Chinese immigrant’s application for asylum with the following characteristics: (1) the Chinese immigrant believes in the freedom to have more than one child, a belief the government seeks to overcome by means of a range of punishments; (2) the government has demonstrated its awareness of the applicant’s beliefs by applying certain punishments (such as forced sterilization) prior to the applicant’s departure; (3) the Chinese government has demonstrated its ability to punish the applicant by in fact forcibly sterilizing her; and (4) the government has demonstrated its inclination to punish the applicant by its past punishment of the applicant and those similarly situated to the applicant.

One might argue that, in the above scenario, forced sterilization does not represent punishment or persecution, but rather a measure taken to prevent a population explosion. Those who demonstrate that they cannot voluntarily live by the policy of the collective lose their right to freedom from state intervention. Thus, one way to frame the examination of whether the Chinese government is persecuting its citizens is to ask whether the measures it takes to curb population growth are merely enforcement of a policy or if the measures also constitute punishment for a political belief.

b. Past Persecution

The INA describes past persecution as a distinct basis for qualification as a refugee.\textsuperscript{106} The BIA in \textit{Matter of Chen}\textsuperscript{107} confirmed that past persecution alone, even without a well-founded fear of future persecution, may be a basis for refugee status.\textsuperscript{108} The BIA in Chen further found that past persecution creates a rebuttable presumption that the appli-

\textsuperscript{106}INA § 101(a)(42)(A) ("[A]ny person ... unable or unwilling to avail himself or herself of the protection [of his or her country of nationality] because of persecution or a well-founded fear of persecution.").

\textsuperscript{107}Int. Dec. 3104 (BIA 1989).

\textsuperscript{108}Id.; see also Desir v. Ilchert, 840 F.2d 723, 729 (9th Cir. 1988); Singh v. Ilchert, No. C-92-1826-MHP, slip op. at 14–15 (N.D.Cal. July 17, 1992).
cant has a well-founded fear of future persecution.\textsuperscript{109} Thus, a Chinese immigrant who has suffered a forced abortion may have suffered past persecution; and such past persecution could qualify that immigrant as a refugee.

c. \textit{Persecution by Groups the Government Will Not Control}

With a few exceptions, the courts will only recognize persecution by the controlling government.\textsuperscript{110} The exceptions include cases where the government does not control the entire country, is unable to check mob violence toward the applicant, or is unable or unwilling to provide the alien with protection.\textsuperscript{111} Additionally the threat may come from groups, such as guerrillas, that the government is unable or unwilling to suppress.\textsuperscript{112}

Those opposed to Chinese immigration might argue that, although certain individuals commit terrible acts in the name of China’s one-child policy, it is not the policy of the government to commit such acts. They might further argue that the national government maintains broad control of all of China; and they might characterize these terrible acts as unfortunate but unavoidable actions of overzealous individuals.

However, one may convincingly respond to this argument. Not only is the Chinese national government aware of and unwilling to control the local governments, who are committing these acts, but it is in fact encouraging these governments via the SFPC.\textsuperscript{113}

d. \textit{Persecution v. Prosecution}

Given that an individual applicant has suffered harm at the hands of the government, the applicant must further demonstrate that her treatment was persecution and not prosecution.\textsuperscript{114} Punishment for a nonpolitical crime is not usually judged to be persecution.\textsuperscript{115} Public and uniform government treatment suggests prosecution and not persecution.\textsuperscript{116}

\textsuperscript{109} Int. Dec. 3104 (BIA 1989).
\textsuperscript{111} Id.
\textsuperscript{112} McMullen v. I.N.S. 658 F.2d 1312, 1315, n.2 (9th Cir. 1981).
\textsuperscript{113} See Pear, supra note 35, at 5.
\textsuperscript{115} See Matter of Sun, 11 I & N Dec. 872, 875 (BIA 1966). The author would define a political crime as actions that express a clear belief in a political theory as opposed to merely anti-social behavior.
\textsuperscript{116} See ANKER, supra note 105, at 19.
However, the uniform application distinction blurs when an alien is subject to punishment on account of political activity.\textsuperscript{117} In the case of Chinese asylum applicants, reasonable people disagree as to whether the punishment the applicants suffer is persecution or prosecution.\textsuperscript{118} Some view the facial neutrality of the population control policies (i.e., they do not apply disproportionately to a minority group) as evidence that the punishment is prosecution.\textsuperscript{119} Others view the punishment for violations of the population control policies as punishment for the expression of a political belief, a belief in the fundamental human right to procreate. According to this view, such punishment constitutes persecution.\textsuperscript{120}

e. The Similarly Situated Standard

In the past, the BIA required that an applicant demonstrate that she has a well-founded fear of being “singled out for persecution.”\textsuperscript{121} The 1990 asylum regulations changed this requirement:

[T]he Asylum Officer or Immigration Judge shall not require the applicant to provide evidence that he would be singled out individually for persecution if:

(A) He establishes that there is a pattern or practice in his country of nationality or last habitual residence of persecution of groups of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) He establishes his own inclusion in and identification with such group of persons such that his fear of persecution upon return is reasonable.\textsuperscript{122}

Thus, a Chinese applicant seeking the advantage of the similarly situated standard would present evidence of the punishments applied in the name of the one-child policy. Such evidence would satisfy part

\textsuperscript{117} Id.


\textsuperscript{121} Matter of Acosta, Int. Dec. 2986 (BIA 1985).

\textsuperscript{122} 8 C.F.R. § 208.13(b)(2)(i).
(A) of the above test. Such evidence might include the United States State Department's Human Rights Report on China. To satisfy part (B) of the above test, a successful applicant might present evidence of giving birth to a second child. Such evidence could come in a variety of forms including birth certificates or testimony. Thus, the courts will recognize the connection between the persecution of those who are similarly situated to the applicant and the applicant's well-founded fear of future persecution.\textsuperscript{123} Although the court may allow this method of establishing a well-founded fear of persecution, the persecution must be on account of one of five grounds specified in the INA.\textsuperscript{124}

3. Grounds for Persecution

The INA restricts asylum relief to aliens who can show that they fear persecution "on account of" or because of one of five grounds: race, religion, nationality, membership in a particular social group, or political opinion.\textsuperscript{125} Chinese asylum applicants have rarely specified one of the first three grounds as the main reason for their persecution; these applicants most often cite membership in a particular social group, or political opinion as the principal cause of their persecution.\textsuperscript{126}

a. Social Group

The BIA defines social group persecution as persecution "directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic, i.e., a characteristic that is . . . so fundamental to their identity or consciences that it ought not be required to be changed."\textsuperscript{127} The Ninth Circuit has developed a four-part test in order to qualify claims based on social group persecution. The four requirements are the following: (1) an identification of a recognizable group, (2) a demonstration that the applicant is a

\textsuperscript{123} See Abudu v. INS, 802 F.2d 1096, 1100 (9th Cir. 1986) (the treatment of an applicant's family is evidence of a threat against the applicant); Zaval-Bonilla v. INS, 730 F.2d 562 (9th Cir. 1984) (stating that persecution of certain organizations, i.e. unions, is evidence of a threat against the applicant).


\textsuperscript{125} Id.

\textsuperscript{126} See Sarah G. Epstein, China Has Humane and Fair Birth Policy, N.Y. TIMES, Sept. 15, 1988, at A34, col. 4 (letter to editor).

\textsuperscript{127} Matter of Acosta, Int. Dec. 2986 (BIA 1985). Examples of immutable characteristics include "sex, color, kinship ties . . . [or] shared past experiences." Id.
member of the group, (3) a demonstration that the persecution is directed at a unifying characteristic of the group, and (4) the existence of particular circumstances that call for relief primarily based on recognition of social group persecution. The immigration attorneys for Chinese asylum applicants often combine social group with political opinion when describing the basis for an alien's persecution.

b. Political Opinion

Although immigration attorneys differ about which activities are appropriately considered political, they generally accept the following examples: membership in a political organization, expression of political opinion through party membership, political demonstrations, and propaganda distribution. Many Chinese asylum applicants argue that their persecution is on account of political opinion. The applicants argue that their refusal to comply with China’s population control policies is an expression of their political belief in the fundamental human right to procreate.

The U.S. District Court for Eastern Virginia applied this refusal-to-comply-as-political-expression analysis to justify a grant of asylum in January 1993. In Guo Chun Di v. Carroll, Judge Ellis held that the incoherence of the Department of Justices’ asylum policy with respect to China’s population control policies did not require judicial deference. Instead of deferring to any of the previous pronouncements by the Justice Department, Judge Ellis stated that forced sterilization has been viewed as “an egregious infringement of the fundamental right to procreate,” and furthermore “the right to procreate . . . is a fundamental right analogous to other fundamental rights that may support an asylum claim based on ‘persecution on the basis of political opinion.’”

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128 Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1574 (9th Cir. 1986).
129 See Anker, supra note 105, at 25.
132 See Carroll, 842 F. Supp. at 858.
133 Id. at 867.
134 Id. at 872–73.
V. Analysis and Possible Resolutions

Judge Ellis’s holding was far from the final word in the confused legal world surrounding Chinese asylum seekers. Judge Patterson’s decision in Zhang seems to have improved the chances of asylum seekers in general by implying the existence of a presumptive pro-asylum legal standard.\(^{135}\)

Judge Patterson argued that the January 1993 rule remained in effect because the Administrative Procedure Act only requires the publication of rules which adversely affect individuals.\(^{136}\) Invoking Montilla v. I.N.S. for support, he stated that “where a rule confers a substantive benefit to a person, an agency must comply with it, even if the rule is not published.”\(^{137}\) Hence, Judge Patterson concluded, the 1993 rule, although unpublished, is binding because it confers the benefit of refugee status to qualified applicants. Conversely, the Department of Justice cannot change the 1993 rule to the position of the BIA in Matter of Chang without publication because Chinese asylum seekers, such as Zhang, would be adversely affected by such a change and are therefore entitled to notice of that change.\(^{138}\)

Judge Patterson’s reasoning appears logical considering the content of the January 1993 rule and other associated administrative pronouncements.\(^{139}\) Unfortunately for Chinese asylum seekers, cases in the Southern and Eastern Districts of New York have taken contrary positions to that of Zhang regarding the effect of unpublished rules. In Xiu Qin Chen v. Slattery,\(^{140}\) Judge Sifton held that “an agency cannot be bound by a non-published rule [where] the agency never actually adopted the rule.”\(^{141}\) Judge Sifton described Judge Patterson’s argument requiring notice to repeal the 1993 rule as circular; he explained that Judge Patterson’s argument assumes that the rule was binding in the first place. This assumption rests on the judgment that an agency may be required to enforce an unpublished and unadopted regula-


\(^{137}\) Id. at 712; see Montilla, 926 F.2d 162, 167 (“Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures... even though the procedural requirement has not yet been published in the federal register.”) (quoting Morton v. Ruiz, 415 U.S. 199, 235 (1974)).

\(^{138}\) Id., 859 F. Supp. at 712.

\(^{139}\) See supra notes 48 to 63 and accompanying text.

\(^{140}\) 862 F. Supp. 814 (E.D.N.Y. 1994).

\(^{141}\) Id. at 822.
tion. Furthermore, in *Peng-Fei Si v. Slattery*, Judge Cederbaum held that "not only were the 1993 Regulations never published in the Federal Register, they were affirmatively withdrawn . . . [and hence they] have no binding effect."\(^{143}\)

In light of the conflict between these cases, it is important to note that Judge Patterson passed up an opportunity to follow suit with Judge Ellis. Judge Patterson’s decision turned upon whether an unpublished rule that benefits an asylum applicant is binding. He could have based his decision on whether punishment for opposition to China’s population control policies constitutes persecution on account of political opinion; in doing so, he would have helped put to rest the conflict between the EOIR, more specifically the BIA, and the INS.

Judge Patterson could have given vigorous judicial attention to the alleged persecution suffered by Zhang and other Chinese asylum seekers. By examining present conditions in China and reviewing prior asylum case law, Judge Patterson could have justified departure from *Matter of Chang* on any one of several grounds.\(^{144}\)

For example, one reason for denying asylum to Chinese applicants is that the source of their persecution is a law of general application.\(^{145}\) However, even laws of general application can be the source of political persecution when those laws infringe on a fundamental right.\(^{146}\) Forced abortion and sterilization, one of the most extreme punishments invoked under the Chinese population control policies, infringes on a universally acknowledged fundamental right, the right to procreate.\(^{147}\) The courts have ruled that government violation of certain human rights is persecution despite being instituted under a nationwide policy.\(^{148}\)

Furthermore, one could reasonably determine that some Chinese officials enforce population control policies to discourage political and

\(^{142}\) Id. at 823.


\(^{144}\) *Chen*, 862 F. Supp. at 821 ("An interpretation will be rejected only where it is unreasonable and at odds with the plain meaning of the statute.").

\(^{145}\) See supra notes 114 to 120 and accompanying text.


\(^{147}\) See *e.g.*, *Carroll*, 842 F. Supp. at 872; *cf.* *Skinner v. Oklahoma*, 316 U.S. 536, 541 (1942).

\(^{148}\) See Bolanos-Hernandez *v. I.N.S.*, 767 F.2d 1277, 1285 (9th Cir. 1984) ("[T]he significance of a specific threat to an individual’s life or freedom is not lessened by the fact that the individual resides in a country where the lives and freedom of a large number of person’s are threatened.").
ideological differences. One could find support for this proposition in the geographically uneven enforcement of the policy. One could argue that the degree of discretion given to local officials makes the one-child policy a tool of political oppression. Local officials of the governing party can suppress ideas concerning rights of procreation that are not consistent with the party line by punishing those who hold such ideas in the name of the one-child policy. Adopting either of these theories, Patterson could have overruled Matter of Chang and adopted an approach to Chinese asylum cases consistent with existing U.S. and international asylum law.

The holding in Zhang may have positive results for the asylum appeals of the approximately three hundred similarly situated Golden Venture asylum applicants. If other courts adopt the Zhang analysis, Zhang may also lead to a grant of asylum for the approximately one thousand illegal Chinese aliens who are in detention awaiting deportation. However, the ruling in Zhang does not address the larger, substantive issue of whether government punishment for violations of population control policies is persecution on account of political opinion. How this larger issue is resolved will determine the fate of many future Chinese asylum applicants.

A memorandum from the INS Office of the Deputy Commissioner, dated August 4, 1994, granted the directors of the INS district offices discretion in awarding humanitarian stays of deportation. However, the applicants are required to show that they specifically face forced sterilization or have been targeted for punishment for refusing to abort a pregnancy. The purpose of this memorandum was to provide short term safety to some Chinese aliens while the asylum policy battles continue.

The Deputy Commissioner’s memorandum and the Zhang decision will likely renew the battle in Congress because they both provide some encouragement to Chinese asylum seekers. Anti-abortion, pro-

149 Bannister, supra note 12, at 200.
150 See Platte, supra note 25, at 646.
153 Id.
154 See id.
life legislators will pursue an immigration policy that is more accepting of aliens from the People's Republic of China. 155

Those who oppose illegal immigration will argue that the United States must discourage the growing number of illegal Chinese immigrants. 156 They will argue that the combined effect of judicial decisions such as Zhang and agency actions such as the Deputy Commissioner's memorandum is to unfairly reward Chinese asylum seekers. They will contend that uneven application of the political asylum process will subvert its goal of limiting immigration while protecting deserving refugees. 157

Jesse Helms presented the issue to Congress in the form of an amendment in early 1994. 158 However, Congress removed the amendment, and has yet to express its intent concerning this particular immigration policy. Thus, unless the executive or legislative branches take an affirmative step to provide a uniform policy, the fate of the majority of Chinese asylum seekers will be determined (at least in the short term) case by case.


156 From 1991 to 1993, the volume of undocumented immigrants has grown approximately ten times. Elizabeth Hull, United States Asylum Process: Problems and Proposals, 16 In Defense of the Alien 114, 126 (Lydia T. Tumasi ed., 1994).

157 See id. at 126–27.

158 Refuge to China, supra note 155, at A11.