

## A FINE LINE, REDEFINED: MOVING TOWARD MORE EQUITABLE ASYLUM POLICIES

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### I. INTRODUCTION

The small fishing boat sat empty at the end of a pier near a small row of townhouses on Layton Key, Florida. In it, an empty bottle of rum, a tarp, and a few limes. There were high winds that morning, a precursor to Hurricane Andrew,<sup>1</sup> which would arrive two days later. The boat traveled approximately 105 miles through the Florida Straits to arrive at its destination. Six Cuban men arrived that morning, and when they stepped ashore, they were presumably entitled to stay.<sup>2</sup> Just one year earlier, the Soviet Union had collapsed.<sup>3</sup> The subsidies and benefits Cuba received from its Soviet partner had diminished, if not completely disappeared.<sup>4</sup>

These Cuban men, like many Cubans who would arrive on U.S. shores during the early 1990s, were more likely seeking to escape

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1. Hurricane Andrew hit south Florida on August 24, 1992, as a category five hurricane. Ed Rappaport, *Preliminary Report Hurricane Andrew 16–28 August, 1992*, NAT'L HURRICANE CTR. (Dec. 10, 1998), <http://www.nhc.noaa.gov/1992andrew.html>.
2. See 8 U.S.C. § 1255 (2006).
3. ROBERT STRAYER, WHY DID THE SOVIET UNION COLLAPSE? UNDERSTANDING HISTORICAL CHANGE 3 (1998) (noting official dissolution of Soviet Union at the end of the day, December 25, 1991, after President Mikhael S. Gorbachev's resignation speech); Mikhael S. Gorbachev, President of the Union of Soviet Socialist Republics, Resignation Speech (Dec. 25, 1991), *available at* <http://www.publicpurpose.com/lib-gorb911225.htm>.
4. See LOUIS A. PEREZ, JR., CUBA: BETWEEN REFORM & REVOLUTION 381–87 (2d ed. 1995), *available at* <http://www.historyofCuba.com/history/havana/lperez2.htm> (discussing the impact that the collapse of the Soviet Union had on resources in Cuba and Cuba's relationship with its Eastern bloc trading partners, as well as government imposed rationing of goods).

food scarcity, avoid economic deprivation, and discover opportunity than they were seeking to escape an oppressive political regime.<sup>5</sup> Nearly twenty years later, Cubans continue to enjoy preferential immigration treatment, although it has been limited since 1994 to Cuban refugees who actually reach our shores.<sup>6</sup>

Imagine another small fishing boat lands the next day, having braved high winds and rough seas, but this one is filled with six Haitian men. They seek to escape political oppression and economic deprivation.<sup>7</sup> During the preceding year, Haitians had experienced a military coup that ousted their first democratically elected president; as a result, thousands of Haitians were paroled into the United States after prescreening in Guantanamo Bay.<sup>8</sup> However, this process grounded to a halt in May 1992 because of the sheer numbers of Haitians seeking to escape political violence.<sup>9</sup>

When these Haitians stepped ashore, there was no presumption that they were entitled to asylum, nor special consideration whatsoever.<sup>10</sup>

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5. *See id.*

6. *Wet-Foot Dry-Foot Policy*, U.S. IMMIGRATION SUPPORT, <http://www.usimmigration.support.org/wetfoot-dryfoot.html> (last visited May 16, 2011). While Cuban refugees intercepted at sea are still entitled to make an asylum claim, they are more likely to be returned to Cuba than permitted to enter the United States. *Id.*

7. *See* Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625, 625–26 (2008).

8. Jean Bertrand Aristide, who became the first democratically elected president of Haiti in 1991, was overthrown in a military coup by the Tonton Macoutes just seven months after he was elected. *Id.* at 693. In 1991, after the coup in Haiti, approximately 10,490 Haitians were paroled into the United States after a prescreening interview at Guantanamo determined that they had a credible fear of persecution if returned to Haiti. RUTH ELLEN WASEM, CONG. RESEARCH SERV., U.S. IMMIGRATION POLICY ON HAITIAN MIGRANTS 3 (Jan. 21, 2005), available at <http://trac.syr.edu/immigration/library/P960.pdf>. But this parole did not mean they would receive asylum, and in fact, many did not. *Id.* at 3–4.

9. WASEM, *supra* note 8, at 3. On May 24, 1992, because of the surge of Haitians, the U.S. Coast Guard was once again ordered to intercept all Haitians in boats and immediately return them to Haiti without interviews to determine whether they were at risk of persecution. *Id.* In 1994, the Clinton administration again attempted to prescreen Haitian refugees for asylum but stopped after a few weeks, citing the exodus of Haitians as the reason to suspend the screening, much like the Bush administration had. *Id.* at 3–4.

10. *See id.* at 2–3. Beginning in 1981, the U.S. Coast Guard had been directed to stop and search vessels suspected of transporting undocumented Haitians. *Id.* From 1981 through 1990, 22,940 Haitians were questioned at sea. *Id.* Of this number, eleven Haitians qualified to apply for asylum in the United States and the rest were denied access. *See id.* Other than the brief respites from interdiction in 1991 and 1994, Haitians have historically received little consideration in the asylum process. Currently, Haitians are still subject to interdiction and many more are denied asylum. *See* Javier Arteaga, *The Cuban Adjustment Act of 1966: More Than Forty Years Later*

In fact, they were more likely to be deported rather than receive asylum in this country, let alone the opportunity to seek permanent residency.<sup>11</sup> To this day, Haitians' "differences" remain a barrier to receiving the type of asylum protection enjoyed by their Caribbean neighbors.<sup>12</sup>

If discrimination based on nationality or politics is not absurd enough when dealing with those seeking refuge in this country, what about gender-based discrimination imposed on refugees fleeing the same country? Consider a young Chinese man who enters the country illegally after being smuggled in a container ship to the port in Los Angeles. Although he entered the United States to escape a country that forcibly aborted his unborn child and that allowed officials to detain him when he refused to tell them where the woman carrying his unborn child was hiding, he will not be entitled to asylum here because he is male and his "resistance" is not deemed sufficient to warrant asylum.<sup>13</sup> The irony is that, had the woman who

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*a Proposal for the Future*, 3 FLA. INT'L U. L. REV. 509, 510–11 (2008) (noting that a boat of fleeing Haitian nationals picked up two near-death Cubans at sea, and when the vessel arrived in Miami, the Haitians were deported and the Cubans were paroled into the United States). However, following the recent earthquake in Haiti, the Obama administration announced that it would grant tens of thousands of Haitian nationals Temporary Protected Status (TPS). See Sergio Bustos, *Obama Administration Grants TPS to Haitians*, MIAMI HERALD, Jan. 15, 2010, available at <http://www.latinamericanstudies.org/haiti/haitians-tps.htm>. Only those Haitians in the United States as of January 12, 2010, are eligible for TPS. *Id.* Those who traveled here after January 12, 2010, are not eligible for TPS and will be repatriated. *Id.*

11. The statistics from the U.S. Department of Justice show that on average, less than one-in-four Haitians receive asylum in the United States. See EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURTS ASYLUM STATISTICS, available at <http://www.justice.gov/eoir/efoia/foiafreq.htm> (follow hyperlinks for various years under the heading "Asylum Statistics by Nationality"). In 2007, 4486 Haitians applied for asylum, but asylum was only granted to 586. *Id.* In 2008, 3303 applied, and only 510 were approved. *Id.* In 2009, 1809 applied and only 406 were approved. *Id.*
12. See Nessel, *supra* note 7, at 693–94. Nessel notes that "[t]he 'othering' of Haitians dates back to the European slave trade with Africa." *Id.* (citing ROBERT LAWLESS, HAITI'S BAD PRESS 30–48 (1992)). Those roots of racism "contributed to the characterization of Haitians as "barbarians[,] cannibals," and "voodoo worshippers," who were described as "'dumb, drumming, demoralized, and up to no good.'" *Id.* at 694 (quoting ROBERT LAWLESS, HAITI'S BAD PRESS 33–34 (1992)).
13. See *Ming Shi Chen v. Bd. Of Immigration Appeals*, 247 F. App'x 304, 305 (2d Cir. 2007) (quoting *Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 313–14 (2d Cir. 2007) (noting that "the fact that an individual's spouse or partner has been forced to have an abortion 'does not, on its own, constitute resistance to coercive family planning'"); *Zhi Zhi Chen v. Gonzales*, 152 F. App'x 528, 529–31 (7th Cir. 2005) (holding that the immigration judge was not unreasonable in characterizing Chen's

was carrying his unborn child traveled to the United States in the container ship, she would be entitled to asylum based solely on the fact that she underwent the procedure that aborted their child.<sup>14</sup>

The regulation of the entry and exclusion of aliens<sup>15</sup> in our country is a “fundamental act[] of sovereignty” that is “vested exclusively in the legislative and executive branches.”<sup>16</sup> “The single most salient feature of the government’s immigration power is the fact that it is substantially unconstrained as a constitutional matter.”<sup>17</sup> Congress’s legislative power over the regulation of immigration is more complete than over any other conceivable subject.<sup>18</sup>

This power has disparate results in its application. Should these disparities be addressed when they violate our most basic societal precepts, particularly equal protection? When dealing with asylum and refugees, should our values control our policies? To the extent value judgments are made, how should those who shape immigration policy consider the implications of those value judgments, particularly when they may even conflict with our own cultural values, which by their very nature underlie our own legislative protections? Finally, to what extent should these decisions be reconsidered, adapted, and changed as time goes by?

This article addresses these questions with respect to the adoption and enforcement of per se asylum policies in the United States. Section II discusses the central concepts of asylum and how they have evolved in the United States. Section III reviews these protections as they apply to two different groups who have been afforded per se asylum protection—Chinese and Cuban nationals. Section IV discusses the problems that arise when similar social

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outburst at the family planning office “as mere disorderly conduct that fell short of the type of formal and public resistance” required). *But see* Jia Shan Ou v. Mukasey, 260 F. App’x 371, 372 (2d Cir. 2008) (alluding to the fact that a former husband might be able to demonstrate past persecution where his wife was sterilized and he was fined, arrested, detained, and beaten while in custody, but presumption of future persecution was rebutted because he was divorced and had lived in China for eight years without incident).

14. *See* 8 U.S.C. § 1101(a)(42)(A) (2006).

15. “Alien” is defined as “any person not a citizen or national of the United States.” *Id.* § 1101(a)(3).

16. *Kai Wu Chan v. Reno*, 916 F. Supp. 1289, 1296 (S.D.N.Y. 1996) (citing *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982); *Galvan v. Press*, 347 U.S. 522, 531 (1954)).

17. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 50 (2006).

18. *Id.* (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

2011]

## A Fine Line, Redefined

653

groups are afforded different levels of protection from persecution. Also, section IV considers whether such protection should be available at all and offers suggestions on how to better implement per se asylum protection if this type of preferential asylum method is retained.

## II. ASYLUM, PERSECUTION, AND PROCESS

A. *Asylum*

Asylum is not a product of the modern age; instead, it is a concept that has existed for at least 3500 years.<sup>19</sup> However, asylum, as that term is used today, is different than that of times past, shifting from “protection from extradition” to a concept that embodies both political and humanitarian dimensions.<sup>20</sup> Asylum is codified by both international declaration and domestic law that has been adopted by the United States.<sup>21</sup> Under international law, those who seek asylum must establish they are a “refugee,” which is defined as a person who has a

well-founded fear of being persecuted for reasons of race, religion, nationality [membership in a particular social group,] or political opinion, [and] is outside the country of his [or her] nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself [or herself] of the protection of that country;

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19. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *THE STATE OF THE WORLD'S REFUGEES: THE CHALLENGE OF PROTECTION* 33 (1993). The United Nations High Commissioner for Refugees report points to the revocation of the Edicts of Nantes in 1685 as the beginning of the modern tradition of asylum in Europe, but it existed long before that time. *Id.* Despite some shifts prior to the modern era, “asylum continued to be viewed more as a prerogative of the Sovereign than as an individual right to protection until the early years of the 20th century.” *Id.*
  20. *See id.* “The disintegration of the Turkish, Russian, and Austro-Hungarian empires in the early twentieth century emphasized the international scope of refugee movements.” Maryellen Fullerton, *The International and National Protection of Refugees*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 245, 247 (Hurst Hannum ed., 4th ed. 2004). As this disintegration occurred, refugees came to be described in terms of their nationality, “implicitly recognizing that political events had triggered” their flight. *Id.*
  21. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). The Universal Declaration of Human Rights provides that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.” *Id.*; *see also* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

or who, not having a nationality and being outside the country of his [or her] former habitual residence [as a result of such events], is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.<sup>22</sup>

Persons who qualify as refugees are protected from “refoulment,” the return of a person to a country where her life or freedom would be threatened.<sup>23</sup> Thus, in sovereign states that are signatories to the 1951 Refugee Convention<sup>24</sup> or the 1967 Protocol,<sup>25</sup> extending asylum to refugees comports with the principle of nonrefoulment and satisfies a nation’s obligations under those documents.<sup>26</sup> The process and the manner in which asylum is granted may vary from nation to nation.<sup>27</sup>

## B. Refugees in the United States

### 1. Persecution

Under the Immigration and Nationality Act<sup>28</sup> and the Refugee Act of 1980,<sup>29</sup> for a person to receive refugee status, that person must first

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22. G.A. Res. 429 (V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 48 (Dec. 14, 1950).

23. *Id.*

24. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. The United Nations convened a Conference of Plenipotentiaries in Geneva which resulted in a treaty concerning refugees known as the 1951 Convention Relating to the Status of Refugees. This covered only those persons who had become refugees as a result of events occurring before January 1, 1951. *Id.*

25. The 1967 Protocol extended coverage to all refugees regardless of when they had become refugees. Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267.

26. The United States was a signatory to the 1967 Protocol, which was codified in the Refugee Act of 1980. *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. Technically, asylum alone does not satisfy the United States’ obligation of nonrefoulment because it is discretionary, however, that is why federal law also provides for restriction of removal under the Immigration and Naturalization Act. § 241(b)(3).

27. *See, e.g., Migration Act 1958 (Cth) (Austl.)*, available at <http://www.comlaw.gov.au/> (search “Search ID or Current Titles” for “Migration Act 1958”; then follow “Migration Act 1958” hyperlink); Asylum and Immigration Appeals Act, 1993, c. 23 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1993/23>, amended by Asylum and Immigration Appeals Act, 1996, c. 49 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1996/49>; *see generally* REBECCA WALLACE & ADELE BROWN, ASYLUM PRACTICE AND PROCEDURE: COUNTRY-BY-COUNTRY HANDBOOK (1999).

28. 8 U.S.C. §§ 1101–1537 (2006).

29. Pub. L. No. 96-212, 94 Stat. 102.

demonstrate past persecution or a well-founded fear of future persecution.<sup>30</sup> The problem is that “persecution,” the touchstone of asylum claims, is not easily defined. Indeed, the immigration statutes offer no definition, although courts have tried to define it.<sup>31</sup> At its heart, persecution presumes punishment in some form.<sup>32</sup> However, this definition merely provides the context in which conduct must be examined. It also presumes some level of government approval or disregard and that such conduct is directed at a protected group.<sup>33</sup> Finally, it presumes that this conduct is not acceptable to other nation-states in the global community.<sup>34</sup>

The Fourth Circuit has found that “[p]ersecution involves the infliction or threat of death, torture, or injury to one’s person or freedom” on account of a protected ground.<sup>35</sup> It is less difficult to quantify persecution in terms of torture or the threat of death, but it is more problematic when it involves more discreet forms of punishment. Thus, persecution has also been identified as “the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials

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30. 8 U.S.C. § 1101(a)(42)(A).

31. *Nikijuluw v. Gonzales*, 427 F.3d 115, 120 (1st Cir. 2005) (defining past persecution as “requiring that the totality of a petitioner’s experiences add up to more than mere discomfort, unpleasantness, harassment, or unfair treatment”); *see, e.g.*, *Svistun v. Holder*, 354 F. App’x 872, 874 (5th Cir. 2009) (quoting *Yu Zhao v. Gonzales*, 404 F.3d 295, 307 (5th Cir. 2005)) (defining persecution as “the infliction of suffering or harm, under government sanction, under persons who differ in a way regarded as offensive . . . in a manner condemned by civilized governments”); *Qiao Hua Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005) (quoting *Kondakova v. Ashcroft*, 383 F.3d 797, 797 (8th Cir. 2004)) (holding that “persecution involves the infliction or threat of death, torture, or injury to one’s person or freedom . . . [A]lthough the term ‘persecution’ includes actions less severe than threats to life or freedom, actions must rise above the level of mere harassment”); *Osaghae v. INS*, 942 F.2d 1160, 1163 (7th Cir. 1991); T-Z-, 24 I. & N. Dec. 163, 170–72 (B.I.A. 2007) (quoting H.R. REP. NO. 95–1452, at 5, *as reprinted in* 1978 U.S.C.C.A.N 4700, 4704).

32. *See Osaghae*, 942 F.2d at 1163. Judge Posner defined persecution as “punishment for political, religious, or other reasons that our country does not recognize as legitimate.” *Id.* Similarly, the Fifth Circuit articulated the definition as “infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive . . . in a manner condemned by civilized governments.” *Svistun*, 354 F. App’x at 874 (quoting *Zhao*, 404 F.3d at 307).

33. *See Pilica v. Ashcroft*, 388 F.3d 941, 950 (6th Cir. 2004) (citing *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996)).

34. *See Svistun*, 354 F. App’x at 874 (quoting *Yu Zhao*, 404 F.3d at 307).

35. *Qiao Hua Li*, 405 F.3d at 177 (quoting *Kondakova v. Ashcroft*, 383 F.3d 792, 797 (8th Cir. 2004)).

of life.”<sup>36</sup> However, “mere discomfiture, unpleasantness, harassment, or unfair treatment” do not rise to the level of persecution.<sup>37</sup>

## 2. “Government Involvement” in Persecution

In addition to the problem of quantifying sufficient harm, courts have had to define “government involvement.”<sup>38</sup> While direct government action is easily identifiable, courts have also found an applicant has been persecuted when the harm is inflicted by persons “the government is unwilling or unable to control,” which is a different matter altogether.<sup>39</sup> The fate of the second claim, involving nongovernmental conduct, “depends on some showing either that the alleged persecutors are aligned with the government or that the government is unwilling or unable to control them.”<sup>40</sup> This subset of government involvement creates a broader range of potential issues because it extends from government complicity to government ineffectiveness.

“In determining whether a government is willing and able to control persecutors, . . . ‘the most telling datum’” is whether there was “a prompt response by local authorities to prior incidents.”<sup>41</sup> It is a threefold connection: a recognition of the problem, a willingness to investigate, and a commitment to prosecute where appropriate.<sup>42</sup> If there is a willingness to investigate and institute criminal proceedings, then the requisite connection between government inaction and fear of future persecution is not present.<sup>43</sup>

In *Al Khalili v. Holder*,<sup>44</sup> the asylee claimed previously inflicted and future threats, including potential honor killings, from his former wife’s family in Jordan.<sup>45</sup> The Sixth Circuit found there was insufficient evidence to demonstrate the government was unwilling or unable to control the family members and protect Al Khalili and his

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36. *T-Z*, 24 I. & N. Dec. at 170-72 (quoting H.R. REP. NO. 95-1452, at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 4700, 4708).

37. *Nikijuluw v. Gonzales*, 427 F.3d 115, 120 (1st Cir. 2005).

38. *See, e.g., Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993).

39. *See, e.g., id.*

40. *Raza v. Gonzales*, 484 F.3d 125, 129 (1st Cir. 2007) (citing *Orelien v. Gonzales*, 467 F.3d 67, 71 (1st Cir. 2006)).

41. *Ortiz-Araniba v. Keisler*, 505 F.3d 39, 42 (1st Cir. 2007) (quoting *Harutyunyan v. Gonzales*, 421 F.3d 64, 68 (1st Cir. 2005)).

42. *See id.*

43. *See id.*

44. 557 F.3d 429 (6th Cir. 2009).

45. *Id.* at 436.



family from harm.<sup>46</sup> However, in *In re R-A-*,<sup>47</sup> the Board of Immigration Appeals (BIA) upheld an immigration judge's finding that the Guatemalan government was unwilling or unable to protect a battered woman from an abusive spouse, where police responded initially but failed to follow through and a Guatemalan judge told her he would not interfere in domestic disputes.<sup>48</sup>

### 3. Persecution of "Particular Social Groups"

Finally, persecution must involve an identifiable group.<sup>49</sup> Under the 1951 Refugee Convention<sup>50</sup> and the Refugee Act of 1980,<sup>51</sup> five specific groups have already been identified as groups who can satisfy the "on account of" part of the definition of refugee, including persons who are persecuted on account of race, religion, ethnicity, nationality, or political opinion.<sup>52</sup> However, the Refugee Act and Convention also identify "particular social groups" as persons who may satisfy the "on account of" part of the definition.<sup>53</sup> This is not a readily identifiable group, but is defined by the circumstances present at the time of application.<sup>54</sup>

*Particular social group* is defined as individuals who are members of a group of persons who share a "common, immutable characteristic."<sup>55</sup> For example, based on this definition, the BIA has

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46. *Id.* The Sixth Circuit reached similar conclusions in *El Ghorbi v. Mukasey*, 281 F. App'x 514, 517 (6th Cir. 2008) and *Kere v. Gonzales*, 252 F. App'x 708, 713 (6th Cir. 2007).
  47. 22 I. & N. Dec. 906 (B.I.A. 1999), *vacated and remanded with stay of reconsideration*, 22 I. & N. Dec. 906 (Att'y Gen. Jan. 19, 2001), *remanded by* 23 I. & N. Dec. 694 (Att'y Gen. Jan. 19, 2005), *stay lifted and remanded by* 24 I. & N. Dec. 629 (Att'y Gen. Sept. 25, 2008).
  48. *Id.* at 909, 911, 914.
  49. *See id.* at 918 (noting four characteristics that are the focus of persecution: race, religion, nationality, and political opinion).
  50. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 152.
  51. Pub. L. No. 96-212, 94 Stat. 102.
  52. Refugee Act of 1980 § 201; Convention Relating to the Status of Refugees, *supra* note 50, at 152. Gender is notably absent from this broad definition.
  53. Refugee Act of 1980 § 201; Convention Relating to the Status of Refugees, *supra* note 50, at 152.
  54. *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (explaining that the determination of what constitutes a "particular social group" depends on the context in which it is applied).
  55. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *modified by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). The particular group characteristic is not fixed, but is determined on a case-by-case basis within the parameters of the broader definition. *Id.*

recognized a number of particular social groups for asylum purposes including Filipinos of mixed Filipino-Chinese ancestry, members of the Marehan subclan of Somalia who share ties of kinship and linguistic commonalities, and persons identified as homosexuals by the Cuban government.<sup>56</sup> Regardless of the characteristic identified, it must be one that members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.<sup>57</sup>

In addition to an immutable characteristic, the group identified must have a level of social visibility or recognition.<sup>58</sup> The lack of social visibility or recognition was highlighted by the BIA when that board reviewed a claim that “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination” was a particular social group.<sup>59</sup> While accepting that these women shared common characteristics, the BIA found that those characteristics did not translate into a societal recognition of this group in Guatemala.<sup>60</sup> The BIA observed that “the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown.”<sup>61</sup> Thus, tragic circumstances and harm were not a sufficient basis to establish social visibility or recognition without a more concrete connection to society as a whole.<sup>62</sup> *In re R-A-* has had a long, involved history as it

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56. Department of Homeland Security’s Supplemental Brief at 8 n.7, (name redacted) (B.I.A. Apr. 13, 2009) (citing *In re V-T-S-*, 21 I. & N. Dec. 792 (B.I.A. 1997); *In re H-*, 21 I. & N. Dec. 337 (B.I.A. 1996); *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990)), available at <http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-brief.pdf>. Other groups have not satisfied this definition, including Chinese citizens of low economic status, family members of deserters, and young working-class males who have not served in the military in El Salvador. *In re R-A-*, 22 I. & N. Dec. 906, 917-18 (B.I.A. 1999) (citing *Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996); *De Valle v. INS*, 901 F.2d 787, 792 (9th Cir. 1990); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1572 (9th Cir. 1986)), vacated and remanded with stay of reconsideration, 22 I. & N. Dec. 906 (Att’y Gen. Jan. 19, 2001), remanded by 23 I. & N. Dec. 694 (Att’y Gen. Jan. 19, 2005), stay lifted and remanded by 24 I. & N. Dec. 629 (Att’y Gen. Sept. 25, 2008). However, in these instances, the Ninth Circuit added another component to the definition of *particular social group*. The Ninth Circuit required “the existence of a voluntary associational relationship among the purported members.” *Id.* at 912.

57. *In re Acosta*, 19 I. & N. Dec. at 233.

58. *In re C-A-*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006).

59. *In re R-A-*, 22 I. & N. Dec. at 907.

60. *Id.* at 918.

61. *Id.* at 919.

62. *Id.* at 937–38 (dissenting opinion).

has bounced between the BIA and the Attorney General. At the heart of the matter is whether victims of domestic violence who seek asylum can be recognized as a particular social group.<sup>63</sup> It serves as an example of how difficult it can be to quantify a particular social group, and that such a determination must be made in spite of a tangible harm suffered.

The BIA faced a similar problem when it first addressed China's population control program in *In re Chang*.<sup>64</sup> There, the BIA's failure to find that Chinese couples whose children had been aborted were entitled to asylum hinged largely on its inability to categorize the persecution as "on account of" some identified group.<sup>65</sup> The BIA recognized that individuals who suffered forced abortion were not singled out—everyone was subject to the same treatment.<sup>66</sup> Thus, the failure to connect a forced abortion with an identifiable group—whether political opinion or particular social group—was a problem both with social visibility and an immutable characteristic where the law was not inherently persecutory on its face.<sup>67</sup> Interestingly, when Congress chose to recognize this group of persons, those who suffered forced abortion or involuntary sterilization under coercive population control, as an identifiable group, it did so based on political opinion and not based on particular social group.<sup>68</sup>

#### 4. Asylum Per Se

Generally, an asylee or refugee must satisfy the burden of proving that he or she has been persecuted in order to demonstrate eligibility for asylum.<sup>69</sup> However, not all persons seeking refugee status are required to satisfy that burden. In some instances, classes of persons are deemed to satisfy the burden by virtue of their nationality, ethnicity, or some event or episode they may have suffered.<sup>70</sup> For example, female Chinese nationals who demonstrate that they have been subject to a forced abortion and Chinese nationals of either gender subjected to involuntary sterilization are entitled to a

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63. *Id.* at 907 (majority opinion).

64. 20 I. & N. Dec. 38, 38 (B.I.A. 1989).

65. *Id.* at 44.

66. *Id.* at 44–45.

67. *Id.* at 45.

68. See 8 U.S.C. § 1101(a)(42)(A) (2006).

69. *Contreras-Martinez v. Holder*, 346 F. App'x 956, 957 (4th Cir. 2009) (citing *Naizgi v. Gonzales*, 455 F.3d 484, 486 (4th Cir. 2006) (holding that "[a]n alien bears the burden of proving eligibility for asylum")); see also 8 C.F.R. § 208.13(a), (b)(1) (2010).

70. See 8 U.S.C. §§ 1101(a)(42)(A), 1255.

presumption that they have been persecuted.<sup>71</sup> These presumptions have their genesis in legislative action prompted by events that occurred both in China as well as in the United States.<sup>72</sup> Cubans who arrive on our shores are presumably paroled<sup>73</sup> into this country without having to demonstrate that they have been persecuted.<sup>74</sup> They are able to skip asylum proceedings in their entirety and apply for permanent status within a year of arriving.<sup>75</sup>

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71. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, which essentially eliminated the requirement that an applicant must show persecution based on “race, religion, nationality, membership in a particular social group, or political opinion” as described by the United Nations for three classes of 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.” Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009, 3009–689. Based on the language in the statute, anyone who falls under one of the three definitions in section 601 can receive asylum in the United States. *See id.* This is not limited to individuals from China, even though the vast majority of asylum cases come out of China due to its population control policy.

72. *See infra* Part IV; *see also* Nicholas D. Kristof, *Tiananmen Square*, N.Y. TIMES (May 22, 2009), <http://topics.nytimes.com/topics/news/international/countriesandterritories/china/tiananmen-square/index.html>.

73. The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien . . . .

8 U.S.C. § 1182(d)(5)(A). Parole is a form of relief from immigration *detention*; it is not a form of relief from *removal proceedings*, and when the purposes of parole have been served, the parolee must be returned to custody, and removal proceedings must continue. *Id.*

74. *See* 8 U.S.C. § 1255. As noted in the introductory example, this class of persons is given *carte blanche* admission to the United States based upon their nationality, which entitles them to a presumption of refugee status and parole into this country. Cuban immigration to the United States has its roots in “major revolutionary upheaval.” ALEJANDRO PORTES & ROBERT L. BACH, *LATIN JOURNEY: CUBAN AND MEXICAN IMMIGRANTS IN THE UNITED STATES* 84 (1985). While historically there may have been a justification for this preferential treatment, more than one legal commentator has noted such justifications have eroded over time while the policies have remained largely unchanged. *See, e.g., id.*; Note, *The Cuban Adjustment Act of 1966: ¿Mirando por los Ojos de Don Quijote o Sancho Panza?*, 114 HARV. L. REV. 902, 907 (2001) [hereinafter *Mirando por los Ojos*].

75. *See* 8 U.S.C. § 1255.

Per se asylum provides certain classes of asylum seekers with a rebuttable presumption of persecution based upon an identifiable characteristic that is not available to others who seek asylum.<sup>76</sup> Thus, certain asylum applicants are relieved of the initial burden of demonstrating persecution and the burden shifts to the government to demonstrate a lack of persecution.<sup>77</sup>

### C. Process

Prior to 1980, the admission of refugees was largely unregulated by Congress.<sup>78</sup> Instead, the President determined which groups of asylum seekers would be granted admission to the United States.<sup>79</sup> Inherent in this approach was an ethnocentric and politically motivated judgment as to which groups of persons should be granted asylum.<sup>80</sup> Congress passed the Refugee Act of 1980, in part, to act as an equalizing force in the grant of asylum in the United States, and to create an “asylum framework based on a principle of

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76. *See id.* § 1101(a)(42).

77. *See Bah v. Mukasey*, 529 F.3d 99, 111 (2d Cir. 2008) (citing 8 C.F.R. § 1208.16(b)(1)(ii) (2008) (“If an applicant has established past persecution on account of one of the protected grounds, the government bears the burden of rebutting the presumption that the applicant’s life or freedom will be threatened in the future by a preponderance of the evidence.”)).

78. Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L. J. 458, 503–05 (2009) (explaining that Congress’s dissatisfaction with executive use of parole power to respond to refugee populations in the 1960s and 1970s prompted the passage of the Refugee Act of 1980).

79. *Id.* at 505–06. But, Congress acted on an ad hoc basis as well, creating legislation to benefit deserving groups of refugees as the need arose. *See* BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 233–35 (2004) (citing the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009; the Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400; the Immigration and Nationality Act, Pub. L. No. 82-414, § 212, 66 Stat. 163, 188 (1952)) (explaining that the Attorney General was granted discretionary authority to parole into the United States any alien for “emergent reasons” or for “reasons deemed strictly in the public interest”). It is worth noting that these acts were promulgated prior to the United States’ assent to the 1967 Protocol.

80. Cox & Rodriguez, *supra* note 78, at 506 (“Through the decades of the Cold War, the Executive used these tools to admit large numbers of refugees fleeing communist persecution, as well as the governments of the Middle East, thus advancing through delegated power a particular vision of what constituted a worthy refugee in line with the President’s prevailing foreign policy concerns.”); HING, *supra* note 79, at 238 (noting that the Refugee Act of 1980 removed language favoring those fleeing communist countries and countries in the Middle East).

nondiscrimination.”<sup>81</sup> The law created two distinct groups of applicants: those who applied for asylum abroad were designated refugees for purposes of the asylum process, and those who applied for asylum after reaching the United States were identified as “asylees.”<sup>82</sup> Both groups of applicants seek to be recognized as a refugee, because that recognition entitles them to asylum protection in this country.<sup>83</sup> Under the Refugee Act, the total number of refugees<sup>84</sup> that could be admitted each year was controlled by the President and Congress.<sup>85</sup> On the other hand, the number of asylees admitted each year was theoretically unlimited.<sup>86</sup>

An asylee who is present in the United States must apply for asylum within one year of arriving in this country.<sup>87</sup> The asylee must demonstrate that he or she is entitled to asylum on the grounds that she is a “refugee, defined as one who is “unwilling or unable to return” home “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.”<sup>88</sup> If an asylee or refugee

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81. Cox & Rodriguez, *supra* note 78, at 506 (citing Edward M. Kennedy, *Refugee Act of 1980*, 15 INT’L MIGRATION REV. 141, 143 (1981) (noting that the Act ensured refuge applied not only to refugees from communism or certain areas of the Middle East, but also to all who met the standard for refugee under the Refugee Convention and Protocol).
82. HING, *supra* note 79, at 238.
83. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A) (2006); *see also* 8 C.F.R. § 208.13 (2010) (stating that a claim of past persecution requires that an applicant demonstrate that she has suffered persecution in the past “on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to . . . that country”).
84. The term “refugees” refers to those persons who seek asylum while abroad. *See* HING, *supra* note 79, at 238.
85. *Id.*
86. *Id.* Hing notes that “until the 1990s, no more than 5,000 asylum applications were approved each year, usually less than a third of all applications.” *Id.* These numbers improved through the 1990s and asylum was granted to applicants from countries beyond the traditional communist bloc and the Middle Eastern countries, although those historically preferred applicants still dominated the asylum landscape. *Id.* at 239.
87. 8 U.S.C. § 1158(a)(2)(B); 8 C.F.R. § 1208.4(a)(2)(i)(A). Note that the one-year deadline may be extended if there are changed circumstances that materially affect the applicant’s eligibility for asylum, or other extraordinary circumstances related to the delay. 8 U.S.C. § 1158(a)(2)(D); *see also* Svistun v. Holder, 354 F. App’x 872, 873–74 (5th Cir. 2009).
88. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A). A claim of past persecution requires that an applicant demonstrate that she has suffered persecution in the past “on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to . . . that country.” 8 C.F.R. § 208.13.

is granted asylum, it is effective for an indefinite period, but it is not permanent and remains subject to termination.<sup>89</sup> However, an asylee or refugee who is granted asylum may apply for permanent residency after one year.<sup>90</sup>

### III. EVOLUTION OF TWO DIFFERENT APPROACHES TO ASYLUM CLAIMS

After the Refugee Act of 1980 was enacted, asylum was granted, for the most part, on a case-by-case basis if an applicant demonstrated the requisite persecution or well-founded fear of persecution.<sup>91</sup> But some groups were entitled to a presumption in favor of a finding of asylum.<sup>92</sup> Two of these groups continue to receive the benefit of asylum per se, in the form of a rebuttable presumption of persecution or in the form of parolee status upon arrival on our shores. The first group, Chinese nationals who claim they were subject to “coercive population control” in their home

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89. 8 U.S.C. § 1158(c)(2) (providing that asylum may be terminated when there is a fundamental change in circumstances, including something that would have excepted an alien from asylum initially, or when the alien receives protection from a third country or the alien’s own country); 8 C.F.R. § 1208.14(e). Asylum can be terminated if the recipient no longer has a fear of persecution or there is a change in circumstances relating to the original claim, where the alien’s life or freedom no longer would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion in the country from which deportation or removal was withheld. 8 C.F.R. § 1208.24.

90. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419–20 (1999) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428–29 n.6 (1987)).

91. *See* 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A). Recent cases continue to apply the same standard. *See, e.g., Sugiarto v. Holder*, 586 F.3d 90, 92–93 (1st Cir. 2009) (denying asylum to a Christian in Indonesia, who was robbed at work in a mall during a bomb threat and lived in an area where churches were being bombed because persecution against Christians in Indonesia did not rise to the level of a “pattern or practice”); *Melaj v. Mukasey*, 282 F. App’x 354, 355–56, 360 (6th Cir. 2008) (granting an Albanian policeman who refused to obey an order to fire upon demonstrators protesting the previous Democratic government in 1996 asylum because he suffered past persecution by being detained, tortured, and hunted by Albanian police officers within his own country); *Ahmed v. Keisler*, 504 F.3d 1183, 1188–89, 1194 (9th Cir. 2007) (granting asylum to a Bihari based on political opinion after he and others refused Bengali citizenship, and the Bengali government removed them from their homes, confiscated their property, and relocated them to resettlement camps); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1132, 1135–36 (9th Cir. 2004) (granting asylum because petitioner was beaten, jailed, and threatened by Armenian government officials that she would be jailed or killed in retaliation for her political expression if she continued to speak out against corruption in the ruling party).

92. *See* 8 U.S.C. § 1101(a)(42).

country, are entitled to a rebuttable presumption that they were persecuted if they have undergone a forced abortion or involuntary sterilization.<sup>93</sup> The second group, Cuban nationals who arrive on U.S. shores, are routed around the asylum process entirely and are fast tracked to parole status and potential citizenship upon arriving on U.S. shores.<sup>94</sup>

#### A. China

Chinese nationals became beneficiaries of per se asylum legislation in 1996 as part of an amendment to the Refugee Act of 1980.<sup>95</sup> Congress acted in response to pressure from both Chinese refugee groups as well as prolife advocates who criticized local practices in China of forced abortion and involuntary sterilization to enforce population control policies.<sup>96</sup>

China's One Child, One Family policy was part of a broader economic development policy.<sup>97</sup> As early as 1965, Zhou Enlai called for a reduction in the annual rate of population growth.<sup>98</sup> The policy

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93. See *id.*; *supra* notes 71–72 and accompanying text.

94. See 8 U.S.C. § 1255; *Mirando por los Ojos*, *supra* note 74, at 906. In September 1994, the United States and Cuba agreed to direct Cuban migration into safe, legal, and orderly channels, and to regularly review the migration situation and implementation of the accords. U.S. DEP'T OF STATE, FACT SHEET: CUBA–U.S. MIGRATION ACCORD (2000) [hereinafter FACT SHEET: CUBA–U.S. MIGRATION ACCORD], available at [http://www.state.gov/www/regions/wha/cuba/fs\\_000828\\_migration\\_accord.html](http://www.state.gov/www/regions/wha/cuba/fs_000828_migration_accord.html). The United States committed to process a minimum of 20,000 Cuban migrants each year, and Cuba pledged to discourage irregular and unsafe departures. *Id.*

95. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009, 3009-689 (codified as amended at 8 U.S.C. 1101(a)(42)). Although this group of potential refugees had received enhanced consideration from our government on the basis of forced abortion and involuntary sterilization as early as 1990, legislation failed before finally becoming codified in 1996. Policy Implementation with Respect to Nationals of the People's Republic of China, Exec. Order No. 12711, 55 Fed. Reg. 13897 (April 11, 1990).

96. HING, *supra* note 79, at 256.

97. *In re Chang*, 20 I. & N. Dec. 38, 41 n.2 (B.I.A. 1989); see also Tyrene White, *Two Kinds of Production: The Evolution of China's Family Planning Policy in the 1980s*, 20 POPULATION & DEV. REV. (SUPP.) 137, 137 (1994). "After years of resisting the view held widely outside China that the PRC had to take steps to limit the growth of its population, . . . the post-Mao reform leadership decided to institute family planning programs." *In re Chang*, 20 I. & N. Dec. at 46 n.2. China's leaders believed that "economic modernization goals [would] be unattainable without a low birth rate." *Id.*; see also W X Zhu, *The One Child Family Policy*, 88 ARCHIVES DISEASE CHILDHOOD 463, 463–64 (2003), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1763112/pdf/v088p00463.pdf>.

98. White, *supra* note 97, at 141.



was first introduced in 1979 with the idea that it would be a short-term solution as the country shifted its cultural bias toward a voluntary small-family society.<sup>99</sup> The underlying goal, in addition to population control, was to improve the standard of living among rural residents as a part of broader economic growth.<sup>100</sup>

However, the push to control population growth did not originate in China; instead, western countries had been pushing China to take steps to control population growth for several years based on projections of China's potential for overwhelming growth.<sup>101</sup>

### 1. China's Population Control Policy

The State Family Planning Bureau sets overall targets and policies for population control, which are then carried out by local committees.<sup>102</sup> Women are required to be twenty years of age in order to marry; men must be twenty-two years of age.<sup>103</sup> The regulations include restrictions on family size, late childbearing, and spacing of children when a second or third child is permitted.<sup>104</sup> Enforcement is strict but uneven; a second child is allowed under certain circumstances and is more common in rural areas.<sup>105</sup> The

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99. Therese Hesketh et al., *The Effect of China's One-Child Family Policy after 25 Years*, 353 NEW ENG. J. MED. 1171, 1171 (2005). China approached its goal with education, contraceptive counseling, free contraceptive devices, and economic and social incentives and disincentives. *In re Chang*, 20 I. & N. Dec. at 41 n.2. The State Council approved the "one is best, two at most" birth-control-policy slogan and rewarded couples for limiting themselves to one child while penalizing others for three or more births with fines and other economic sanctions. White, *supra* note 97, at 143. This shifted to more universal enforcement in the early 1980s and then a relaxation of goals in the late 1980s followed by an increase in rhetoric and a move for strict family planning in the 1990s. *Id.* at 154.

100. White, *supra* note 97, at 145.

101. *In re Chang*, 20 I. & N. Dec. at 44.

102. Hesketh et al., *supra* note 99, at 1171.

103. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: CHINA (INCLUDES TIBET, HONG KONG AND MACAU) (2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135989.htm> [hereinafter 2009 HUMAN RIGHTS REPORT: CHINA].

104. Hesketh et al., *supra* note 99, at 1171.

105. *Id.*; 2009 HUMAN RIGHTS REPORT: CHINA, *supra* note 103.

The law . . . allows eligible couples to apply for permission to have a second child if they meet conditions stipulated in local and provincial regulations. The one-child limit [is] more strictly applied in urban areas . . . . In most rural areas, the policy was more relaxed, with couples permitted to have a second child in cases where the first child was a girl.

2009 HUMAN RIGHTS REPORT: CHINA, *supra* note 103.

system has rewards and penalties. Rewards include health and education benefits, and in some limited instances cash rewards or paid time off to recover.<sup>106</sup> Official penalties include fines and dismissal from work.<sup>107</sup> Each person in a couple that has an unapproved child is required by law to pay a “‘social compensation fee,’ which can reach [ten] times a person’s annual disposable income.”<sup>108</sup>

The Chinese central government has long denied supporting any use of force to obtain compliance with birth quotas, but there is evidence that citizens, particularly in rural areas, have been subject to involuntary sterilization and forced abortion in the past.<sup>109</sup> A recent study indicated that with respect to women of reproductive age, 25% of women have had at least one abortion, both voluntary and forced.<sup>110</sup> While the incidence of forced abortion seems to be less than in previous years, the most recent State Department country report still reflects the existence of forced abortions.<sup>111</sup> In recent

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106. *In re Chang*, 20 I. & N. Dec. at 40–41. The Chinese government puts intense pressure on local birth-planning officials to meet birth-limitation targets. This pressure results in instances of physical coercion used to compel persons to submit to abortion or sterilization procedures. HUMAN RIGHTS REPORT: CHINA, *supra* note 103. The One Child, One Family policy has led to families’ use of ultrasound technology to identify female fetuses and terminate the pregnancy. Although this practice is illegal in China, the birth limitations, as well as the traditional preference for male children, particularly in rural areas, has led to a government-estimated 120 males born for every 100 females at the end of 2007. This number is alarming when compared to the norm of 103 to 107 males for every 100 females. *Id.* The One Child, One Family policy along with this traditional preference for male children continues after birth as a state media report stated, “infant mortality rates in rural areas were 27 percent higher for girls than boys and that neglect was one factor in the lower survival rate.” BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, 2008 HUMAN RIGHTS REPORT: CHINA (INCLUDES TIBET, HONG KONG, AND MACAU) (2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119037.htm>.

107. *See In re Chang*, 20 I. & N. Dec. at 40–41.

108. 2009 HUMAN RIGHTS REPORT: CHINA, *supra* note 103.

109. *See In re Chang*, 20 I. & N. Dec. at 40–41.

110. Hesketh et al., *supra* note 99, at 1172. By comparison, 43% of women of reproductive age in the United States have had an abortion. *Id.*

111. 2009 HUMAN RIGHTS REPORT: CHINA, *supra* note 103. The 2010 Human Rights Report on China stated,

Regulations requiring women who violate family-planning policy to terminate their pregnancies still exist in the 25th, 42nd, and 22nd provisions of the Population and Family Control Regulation of Liaoning, Jilin, and Heilongjiang provinces, respectively. An additional 10 provinces—Fujian, Guizhou, Guangdong, Gansu, Jiangxi, Qinghai, Sichuan, Shanxi, Shaanxi, and Yunnan—require unspecified ‘remedial measures’ to deal with unauthorized pregnancies . . .

years, enforcement of certain aspects of the population-control policy has been relaxed. Couples are not forced to obtain permission to have their first child and may often obtain permission for a second child.<sup>112</sup> As a practical matter, economic disincentives have not been as effective as imagined, and increased freedom of movement makes it more difficult to track down violators.<sup>113</sup>

## 2. China's Population Control Policy Becomes Persecution.

China's population control policy, including local enforcement through forced abortion and involuntary sterilization, was in place for approximately seven years before the BIA addressed the issue of whether such a policy could serve as a basis for asylum.<sup>114</sup> In May 1989, the BIA held that China's One Couple, One Child policy was not, on its face, persecutive and did not create a well-founded fear of persecution, even to the extent that involuntary sterilization might occur.<sup>115</sup> The BIA based its decision largely on the fact that the policy did not single out an identifiable group.<sup>116</sup> The BIA did not address whether the policy was appropriate or whether it should be "encouraged or discouraged," focusing instead on whether the

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BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, 2010 HUMAN RIGHTS REPORT: CHINA (INCLUDES TIBET, HONG KONG AND MACAU) (2011), available at <http://www.state.gov/g/drl/rls/hrrpt/2010/eap/154382.htm>.

112. See Hesketh et al., *supra* note 99, at 1171, 1174–75.

113. *Id.* at 1175.

114. *In re Chang*, 20 I. & N. Dec. at 38.

115. *Id.* at 44. Chang, a thirty-three-year-old citizen of the People's Republic of China, sought asylum and withholding of deportation. *Id.* at 39. He did not raise any claims about China's family planning policy until his deportation hearing. *Id.* At that time, he claimed that he and his wife had to flee their commune because they had two children and did not agree to stop having children, and that "they disagreed with China's family planning policies because 'in the countryside, especially in farming areas, we need more children.'" *Id.* He also testified that he was afraid if he returned to China, he would be required to undergo sterilization. *Id.* On appeal, Chang further explained that he was ordered to undergo sterilization and that he fled China because he had no other choice. *Id.*

116. See *id.* at 43–44. The BIA did not preclude any potential claim based upon persecution related to China's coercive family planning policy. *Id.* at 44. Instead, it held that an applicant must establish that the "application of the policy to him was in fact persecutive or that he had a well-founded fear" he would be persecuted on account of race, religion, national origin, particular social group, or political opinion. *Id.* The BIA explained that an application of the facially neutral policy had to be otherwise persecutive. *Id.* at 45.

applicant met the definition of refugee as a separate matter.<sup>117</sup> As applied to Chang, the BIA found that he did not satisfy the definition.<sup>118</sup>

Less than a month later, protestors seeking democratic reform entered Tiananmen Square.<sup>119</sup> Chinese students and citizens rallied in support of those protesting in Tiananmen Square.<sup>120</sup> Many Chinese citizens who were not part of the formal protest were shot and killed by members of the Chinese Army in the surrounding streets, seemingly without provocation.<sup>121</sup> Tanks rolling into Tiananmen killed bystanders and protesters alike, leaving a pile of crushed and crumpled bodies in their wake.<sup>122</sup>

In response, the United States government sought to offer protection to those who had openly opposed China's government.<sup>123</sup> Population control, a policy that had largely escaped political scrutiny in the United States just a year earlier, was recast based on public perception of the horrible human-rights abuses by China.<sup>124</sup> On April 11, 1990, President George H.W. Bush issued Executive Order 12711, which directed the Attorney General and the Secretary of State to exercise their authority under the Immigration and Nationality Act to protect citizens of the Peoples' Republic of China who were currently present in the United States so that they were not

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117. *Id.* at 47. The BIA also suggested that choosing to afford protection to those subject to mandatory sterilization under China's family-planning policy was a legislative matter. *Id.*

118. *Id.* Arguably, the BIA was focused solely on whether the applicant could satisfy the requisite test, not whether the underlying claim had some political currency in this country. *See id.*

119. Kristof, *supra* note 72.

120. *Id.*

121. Mengbai Zhong, *White Dawn*, CHINA NEWS DIGEST (June 8, 1999), <http://museums.cnd.org/CND-Global/CND-Global.99.2nd/CND-Global.99-06-07.html>. Zhong and his friend, Yefu took to the streets on the eve of June 3, 1989, to witness and document what was happening. *Id.* Zhong writes of being repeatedly shot at by the Chinese Army for nonviolent protests, seeing many bodies and injured citizens, and witnessing the tanks entering Tiananmen Square. *Id.*

122. *Id.*

123. Exec. Order No. 12711, 55 Fed. Reg. 13897 (Apr. 11, 1990). "In response to a foreign crisis, the President can authorize the entry of particular groups or extend temporary protection to members of such groups who may already be in the United States. . . ." *Kai Wu Chan v. Reno*, 916 F. Supp. 1289, 1293 (S.D.N.Y. 1996) (citing 8 U.S.C. §§ 1157, 1182(f) (2006)).

124. *See* Jacques de Lisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473, 481-82 (2002).

forced to return to China.<sup>125</sup> President Bush also directed that “enhanced consideration” be given to individuals from “any country” who expressed a fear of persecution upon return to their country related to that country’s policy of forced abortion.<sup>126</sup> While the events of May 1990 were not connected to China’s population control policy, the President took the opportunity to address the very same policy that had been at issue in the BIA’s decision in *In re Chang*.

In this political atmosphere, Congress amended the Refugee Act of 1980 to specifically provide that a person who was subject to persecution for resistance to a coercive population control (CPC) program was eligible for asylum.<sup>127</sup> This new protection was a result, at least in part, of a coalition of Chinese asylum supporters and right-to-life proponents.<sup>128</sup> Congress created recognition for two new groups of refugees. First, Congress afforded per se status to any person who had suffered forced abortion or sterilization.<sup>129</sup> These asylum applicants did not have to prove any resistance or opposition to a CPC program beyond being involuntarily aborted or sterilized.<sup>130</sup> Congress also afforded protection to persons who were subject to persecution for failure or refusal to undergo such a procedure, were subject to persecution for other resistance to a CPC program, or who held a well-founded fear of future persecution for one of these

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125. Exec. Order No. 12711, 55 Fed. Reg. 13897 (Apr. 11, 1990).

126. *Id.*

127. 8 U.S.C. § 1101(a)(42)(B) (2006). The statute provides that a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

*Id.* Initially, asylum was limited to 10,000 applicants per year under this per se protection, but that numerical limit was removed in 2005 when the REAL ID ACT was passed. See 8 U.S.C. § 115 (2006).

128. HING, *supra* note 79, at 256.

129. See 8 U.S.C. § 1101(a)(42)(A)–(B). While the language of the statute did not limit itself to Chinese nationals, as a practical matter, Chinese nationals are the only group that seek asylum under these provisions. See Kyle R. Rabkin, *The Zero-Child Policy: How the Board of Immigration Appeals Discriminates Against Unmarried Asylum-Seekers Fleeing Coercive Family Planning Measures*, 101 NW. U. L. REV. 965, 966 (2007).

130. See 8 U.S.C. § 1101(a)(42)(A)–(B).

reasons.<sup>131</sup> Congress enacted this legislation in direct response to the BIA's decision in *In re Chang*.<sup>132</sup>

Almost immediately, the BIA determined that the new per se protection offered to victims of coercive physical procedures could be extended to a victim's spouse.<sup>133</sup> The extended protection arose out of a concession by the Immigration and Naturalization Services (INS) that spouses of victims of forced abortions or sterilizations were allowed to stand in the shoes of those victims for asylum purposes.<sup>134</sup> The BIA then completely refused to extend this preferred status to fathers of aborted unborn children where the father and mother were not in a legally recognized marriage.<sup>135</sup>

From 1997 to 2007, federal courts followed this interpretation of section 1101(a)(42)(A),<sup>136</sup> although it was frequently questioned.<sup>137</sup> The courts struggled to apply the statute to other situations, particularly those involving men who were not in legally recognized marriages, because the underlying basis for the BIA's decision was never clearly explained.<sup>138</sup> The Seventh and Ninth Circuit Courts of Appeals took issue with the BIA's bright-line rule and extended the per se presumption to a divorced male asylee whose unborn child had been forcibly aborted and to a male asylee who had participated in a traditional marriage because China's population-control program

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131. *Id.*; *In re C-Y-Z-*, 21 I. & N. Dec. 915 (B.I.A. 1997).

132. *In re C-Y-Z-*, 21 I. & N. Dec. at 922. *In re Chang* was then superseded by the BIA's decision in *In re X-P-T-*, where the BIA recognized that an alien who has been forced to abort a pregnancy, undergo involuntary sterilization, or been persecuted for resistance to coercive population control has suffered past persecution on account of political opinion, and qualifies as a refugee. *Id.* at 917.

133. *See id.* at 918–19.

134. *Id.* at 917–18.

135. *See Kui Rong Ma v. Ashcroft*, 361 F.3d 553, 557 (9th Cir. 2004). Marriages in China must be registered to be recognized. *Id.* Many marriages are not registered because the couple is not yet old enough to marry under the marriage law. *Id.* Thus, the couple may choose to be married in a traditional ceremony, but the Chinese government will not recognize the marriage as valid until the couple is the appropriate age and registered. *Id.*

136. *See In re J-S-*, 24 I. & N. Dec. 520 (Att'y Gen. 2008); *Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 187–88 (2d Cir. 2005).

137. *See, e.g., Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 399–405 (2d Cir. 2007) (*en banc*); *Junshao Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006); *Shi Liang Lin*, 416 F.3d at 187; *Kui Rong Ma*, 361 F.3d at 559–61.

138. *See, e.g., Cai Luan Chen v. Ashcroft*, 381 F.3d 221, 225 (3d Cir. 2004) (noting that BIA did not offer a basis for concluding that spouses were entitled to per se protection from coercive family planning).

would not permit the applicant and his fiancé to marry based on their age.<sup>139</sup>

In 2007, the interpretation of section 1101(a)(42)(A) shifted again. The Second Circuit remanded a case back to the BIA to explain its position that husbands of women who were forcibly aborted or sterilized were entitled to per se asylum but unmarried partners of those women were not.<sup>140</sup> When the case returned to the Second Circuit, the court, sitting en banc, held that the statute was not ambiguous and it clearly applied only to the victim of forced abortion or sterilization.<sup>141</sup> In June 2008 the Attorney General weighed in, taking the position that applicants who did not themselves suffer a forced abortion or sterilization must demonstrate persecution on the basis of other resistance on a case-by-case basis.<sup>142</sup>

Since that time, the BIA and most circuit courts have refused to consider the abortion or sterilization of a man's wife or mother of his unborn child when considering his asylum claim.<sup>143</sup> Instead, the BIA and the courts have looked at two things: whether the applicant can demonstrate "resistance," and whether the applicant suffered persecution on account of that resistance.<sup>144</sup> Thus, where it would once perhaps have been appropriate to consider an applicant's connection to a forced abortion or sterilization, this swing in policy has meant that applicants must stand solely on their own experience, even under circumstances where their future child has been aborted.

Courts are, in essence, bifurcating claims of persecution and refusing to consider the abortion of a male applicant's unborn child in conjunction with any other resistance.<sup>145</sup> In *Ming Shi Chen v. Bd. of*

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139. *Junshao Zhang*, 434 F.3d at 999 (citing *Kui Rong Ma*, 361 F.3d at 559–61). *But see Cai Luan Chen*, 381 F.3d at 232–34 (holding that unmarried partners are not entitled to per se protection, even when prevented from marrying by family-planning policy).

140. *Shi Liang Lin*, 416 F.3d at 192.

141. *Shi Liang Lin*, 494 F.3d at 299–305.

142. *In re J-S-*, 24 I. & N. Dec. 520, 523 (Att'y Gen. 2008).

143. *See, e.g., Shun Guan Lin v. U.S. Dep't of Justice*, 366 F. App'x 272, 274 (2d Cir. 2010) (holding that helping his wife hide to avoid a forced abortion and his payment of a fine did not rise to the level of persecution); *Yue Ping Lin v. Holder*, 359 F. App'x 230, 232 (2d Cir. 2010) (holding that Lin failed to establish that he suffered any independent, personal persecution qualifying him for relief).

144. *See, e.g., Jia Duan Dong v. Holder*, 587 F.3d 8, 12 (1st Cir. 2009).

145. *See, e.g., Hao Zhu v. Gonzales*, 465 F.3d 316, 323 (7th Cir. 2006) (Rovner, J., dissenting). The dissent in *Zhu* astutely noted that "the forced abortion inflicted upon Zhu's partner may not be a fact that entitles Zhu to a per se presumption of past persecution . . . but neither can it be ignored as though it were entirely unrelated to the persecution at issue." *Id.*; *see also Zhi Zhi Chen v. Gonzales*, 152 F. App'x 528, 530

*Immigration Appeals*, the Second Circuit held that “the fact that an individual’s spouse or partner has been forced to have an abortion ‘does not, on its own, constitute resistance to coercive family planning policies.’”<sup>146</sup> However, in *Jia Shan Ou v. Mukasey*, the Second Circuit seemed to indicate that Ou, a former husband could demonstrate past persecution where his wife was sterilized but only because he was himself fined, arrested, detained, and beaten while in custody, even though Ou was ultimately denied asylum based on the fact he was now divorced and had lived in China for eight years without incident.<sup>147</sup>

The BIA has held that the term “‘resistance’ includes, but is not limited to, ‘expressions of general opposition, attempts to interfere with enforcement of government policy . . . and other overt forms of resistance to the requirements of the family planning law.’”<sup>148</sup> But it is telling what courts found to not constitute resistance. For example, impregnating one’s girlfriend, in direct contravention of China’s family planning policy, is not resistance.<sup>149</sup> This is presumably because the applicant cannot demonstrate it was intentional and not just an accident. Had it been a purposeful impregnation in protest of population-control policy, then it would seem to most certainly satisfy the concept of “overt form[] of resistance to the requirements of [] family planning.”<sup>150</sup> Also, failure to surrender one’s girlfriend or wife voluntarily is not resistance because hiding is not an overt form of resistance.<sup>151</sup> In *Bi Qi Liu v. Holder*, the Second Circuit held that in order to demonstrate persecution, a father would have to demonstrate he was “arrested, mistreated, or physically harmed.”<sup>152</sup> So, even if a male applicant could demonstrate resistance, absent his

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(7th Cir. 2005) (discussing the different approaches to male applicants whose partners have been subject to a forced abortion).

146. *Ming Shi Chen v. B.I.A.*, 247 F. App’x 304, 305 (2d Cir. 2007) (quoting *Shi Liang Lin v. U.S. Dep’t of Justice*, 494 F.3d 296, 313 (2d Cir. 2007)).

147. *See Jia Shan Ou v. Mukasey*, 260 F. App’x 371, 372–73 & 373 n.2 (2d Cir. 2008). This means Ou was unable to receive asylum based on past persecution alone. *See id.* at 372. The wisdom of this position is questionable, considering that those who abort and do not attempt to have more children will not be subject to future persecution.

148. *Xiao Fei Dong v. Mukasey*, 307 F. App’x 547, 549 (2d Cir. 2009) (quoting *In re S-L-L*, 24 I. & N. Dec. 1, 10 (B.I.A. 2006)). However, in 2005, the Third Circuit found that the standard was met where a doctor wrote articles critical of birth control measures and publicized a practice of hospital infanticide. *Yun Jun Cao v. Att’y Gen. of the U.S.*, 407 F.3d 146, 153 (3d Cir. 2005).

149. *Cheng Lin v. Holder*, 314 F. App’x 371, 372 (2d Cir. 2009).

150. *Xiao Fei Dong*, 307 F. App’x at 549.

151. *See id.*

152. *Bi Qi Liu v. Holder*, 349 F. App’x 664, 665 (2d Cir. 2009).



arrest or some physical harm to his own person, it would appear that he can never demonstrate he has been persecuted when his child is forcibly aborted.<sup>153</sup> Today, this application of asylum statutes remains the status quo with respect to Chinese men.<sup>154</sup>

### B. *Cuba and the Cuban Adjustment Act*

In 1959, Fulgencio Batista was overthrown in a coup orchestrated by Fidel Castro and Ernesto “Che” Guevara.<sup>155</sup> Castro’s rise to power marked the beginning of communism and the end of democratic freedoms for this U.S. island neighbor; it also marked mass Cuban migration to the United States.<sup>156</sup> The first waves of Cuban refugees were comprised of predominately white or Latino, educated, landowners and their families who were directly affected by Cuba’s shifting political landscape.<sup>157</sup>

Legislation protecting Cubans who might have otherwise entered the United States illegally was first passed in 1966 in response to this mass migration.<sup>158</sup> The Cuban Adjustment Act of 1966 provided a separate mechanism by which Cuban entrants could secure the right to permanent residence in the United States.<sup>159</sup> The Act provides, in pertinent part, that

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153. *See id.*

154. *See, e.g.,* Shun Guan Lin v. U.S. Dep’t of Justice, 366 F. App’x 272, 274 (2d Cir. 2010); Yue Ping Lin v. Holder, 359 F. App’x 230, 231–32 (2d Cir. 2010); Jia Duan Dong v. Holder, 587 F.3d 8, 11–12 (1st Cir. 2009); Xiao Fei Dong, 307 F. App’x at 549; *Cheng Lin*, 314 F. App’x at 372; *Bi Qi Liu*, 349 F. App’x at 665.

155. Roland Estevez, Note, *Modern Application of the Cuban Adjustment Act of 1966 and Helms-Burton: Adding Insult to Injury*, 20 HOFSTRA L. REV. 1273, 1273–74 (2002).

156. *Id.* at 1274 (citing PORTES & BACH, *supra* note 74, at 85).

157. *Id.* These immigrants have been identified as arriving in three distinct stages—of those arriving between 1959 and 1973, most moved freely, either by permission or agreement of the Cuban and United States governments. *See id.* Just under one million immigrants arrived from Cuba during this time period. *See id.*

158. Pub. L. No. 89-732, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255 (2006)).

159. *Id.* At the outset of this discussion, the difference in statutory mechanisms employed to resolve the issue of Cuban migration must be noted. Cubans, unlike Chinese victims of coercive population control, are not granted a presumption of persecution during asylum proceedings. *See Estevez, supra* note 155, at 1290–91. Instead, there is a separate system in place that offers Cuban nationals who enter our country in a similar manner, and arguably for similar reasons, far more immediate protection than those who seek asylum. *See id.* at 1292. However, while acknowledging these distinctions, the larger conversation about treatment of groups of asylum seekers is still a valid undertaking. *See id.* at 1292–95.

the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, in his discretion . . . to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.<sup>160</sup>

Because Cubans are generally paroled into the United States, they can take advantage of this provision and are not required to demonstrate they suffered persecution or otherwise satisfy the definition of refugee.<sup>161</sup>

Cubans who reach United States soil are generally paroled into the United States.<sup>162</sup> Once present in the United States for the requisite time, a Cuban may seek to adjust his or her status to that of a permanent resident.<sup>163</sup> Even Cubans who attempt to reach the United States through the Florida Straits and are interdicted are entitled to have their asylum claims heard, but are not automatically entitled to parole in the United States.<sup>164</sup> Still, they are more likely to have their asylum claims granted than Haitians or other Caribbean nationals.<sup>165</sup> No other group of aliens is afforded such preferential status.

In 1980, there was a shift in immigration flow from Cuba, marked by the Carter Administration's invitation to Cubans seeking refuge to

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160. 8 U.S.C. § 1255 (2006).

161. *Mirando por los Ojos*, *supra* note 74, at 906–07.

162. *See id.* at 907.

In September 1994 the United States and Cuba agreed to direct Cuban migration into safe, legal and orderly channels, and to regularly review the migration situation and implementation of the accords. . . . The U.S. committed to process a minimum of 20,000 Cuban migrants each year. [And,] Cuba pledged to discourage irregular and unsafe departures.

FACT SHEET: CUBA–U.S. MIGRATION ACCORD, *supra* note 94.

163. *See* 8 U.S.C. § 1255.

164. *See* Donald Brown, Comment, *Crooked Straits: Maritime Smuggling of Humans from Cuba to the United States*, 33 U. MIAMI INTER-AM. L. REV. 273, 277 (2002).

165. *See* Arteaga, *supra* note 10, at 510–11, 541 (noting instances where Haitians, Jamaicans, and Cubans in similar circumstances are treated differently, even where all of them reach United States soil). The United States' policy with respect to Cuba became heavily criticized in the latter part of the twentieth century, particularly as it was compared to the treatment of Haitians seeking asylum. Cox & Rodriguez, *supra* note 78, at 507.

come to the United States.<sup>166</sup> The “Marielitos,”<sup>167</sup> as they came to be known, included Cubans who were economically, ethnically, and socially distinct from those who emigrated in the early years of Castro’s political regime.<sup>168</sup>

For the most part, the United States continued to accept Cuban refugees freely, and those refugees continued to receive the benefits of the Cuban Adjustment Act until 1994.<sup>169</sup> At that time, Cuba and the United States formalized a process<sup>170</sup> by which Cubans interdicted at sea could be returned to Cuba or held at Guantanamo Bay, and a limited number of Cubans would be permitted to immigrate directly from Cuba.<sup>171</sup> Those who reached the United States, on the other hand, had reached a sanctuary from exile and deportation. The at-sea interdiction policy, which is still in force today, is designated “wet foot, dry foot” based on the disparate treatment afforded successful escapees from those interdicted at sea.<sup>172</sup>

#### IV. CULTURE, POLICY, BACKLASH, AND VALUE JUDGMENTS.

Assessing the impact of per se asylum preferences requires an examination of the underlying cultural and policy implications this

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166. Estevez, *supra* note 155, at 1275. This policy was known as “open hearts and open arms” policy. PORTES & BACH, *supra* note 74, at 87. In April 1980, over 150,000 Cubans boarded boats in Mariel Harbor and journeyed to the United States. Cox & Rodriguez, *supra* note 78, at 507.

167. They were known as Marielitos because the port was their point of departure from Cuba. Estevez, *supra* note 155, at 1275.

168. HING, *supra* note 79, at 257. In fact, many Marielitos “initially explained their departure as the result of food scarcity, or the desire to earn more money in the United States.” Cox & Rodriguez, *supra* note 78, at 507.

169. See Estevez, *supra* note 155, at 1275–76.

170. *Id.*

171. FACT SHEET: CUBA–U.S. MIGRATION ACCORD, *supra* note 94.

172. *Id.* The shift from “open hearts” to “at-sea interdiction” was a slow one, and was marked more by external forces than the reality that the type of refugee fleeing Cuba had changed. See 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, 445 (2004). In the 1980s and 1990s there was a general public outcry of the disparate treatment of Haitians and Cubans who arrived in the United States. *Id.* at 454–55. That, in addition to waning public support for the continued migration of Cubans to South Florida, are the predominant reasons the shift occurred. Cox & Rodriguez, *supra* note 78, at 508–09. Even with this movement, Cubans still receive preferential treatment—both at sea and once they arrive in our borders. See Stephen H. Legomsky, *The USA and the Caribbean Interdiction Program*, 18 INT’L J. REFUGEE L. 677, 684 (2006). Unlike Haitians, “Cubans who are interdicted at sea are advised of their right to apply for asylum.” *Id.*

type of protection affords. The universal definition of refugee is highly politicized, based on a Eurocentric-type refugee, to the detriment of a broader class of refugees from less-developed nations.<sup>173</sup> This definition favors asylum seekers fleeing communist regimes to the detriment of Third World refugees, whose “flight [was] more often prompted by natural disaster, war, or broadly-based political and economic turmoil than by ‘persecution,’ at least as that term is understood in the European context.”<sup>174</sup> To some extent, this illustrates why Cubans receive preferential treatment while the plight of Haitian refugees avoiding political upheaval, natural disasters, and economic deprivation has caused the United States to reach out beyond its borders to prevent an influx of asylees from that country.

The nations that decide who is a refugee for purposes of asylum make value judgments. These value judgments are rife with our own cultural views about immigration, poverty, politics, war, and socially charged issues such as abortion, domestic violence, and race.<sup>175</sup> “Even in the area of asylum, our policies are implemented in ways that are not generous toward those who would not fit the real image of who an American is.”<sup>176</sup> Lost in the inherent definition of *refugee* is the idea that those who are persecuted—for whatever reason—should be afforded asylum.<sup>177</sup> Thus, the definition should be read more fully than it currently is in many countries, including the United States. The problem is that while targeted legislation can fill gaps in the definition of refugee, too often such legislation reinforces disparities in the treatment of those who seek asylum.<sup>178</sup>

In the United States, these definitions and concepts—who is a refugee, who is entitled to presumptive asylum, and who is entitled to parole without proof—must be balanced with our notion of “equal protection.”<sup>179</sup> Equal protection mandates that determinations of asylum should require that “‘distinctions between different classes of

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173. Nessel, *supra* note 7, at 635.

174. James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT’L L.J. 129, 162 (1990).

175. See HING, *supra* note 79, at 257.

176. *Id.*

177. See, e.g., Refugee Act of 1980, 96-212, § 201, 94 Stat. 102, 102 (codified as amended at 8 U.S.C. § 1101(a)(42) (2006)).

178. See HING, *supra* note 79, at 257–58.

179. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). In some ways this is an oversimplification of a complex issue. For the purposes of this discussion, the concept of “equal protection” refers broadly to the legal concept our country has embraced in the Fifth and Fourteenth Amendments to the United States Constitution at the macro level and has applied judicially and legislatively at lower levels. See U.S. CONST. amend. V; U.S. CONST. amend. XIV.

persons must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”<sup>180</sup> Yet, one commentator has stated that

courts have developed doctrines and drawn lines that distinguish between state- and federally sponsored alienage discrimination, between deprivations of constitutional and subconstitutional rights, between the rights afforded to permanent resident aliens and those afforded to undocumented or other nonresident aliens, between economic and political forms of alienage discrimination, and between discriminatory action taken by different branches or agencies of the federal government.<sup>181</sup>

The Refugee Act of 1980 recognized discriminatory practices in the application of asylum policy, and attempted to resolve those practices to create reasonable distinctions and to treat similarly circumstanced asylum seekers alike.<sup>182</sup> While the Refugee Act of 1980 took a large step forward in formalizing asylum practices and allowing a more equitable system of application, problems of disparate treatment still remain.<sup>183</sup> This disparate treatment is heightened by legislatively enacted *per se* asylum protection for Cubans and Chinese nationals.<sup>184</sup> These legislatively created preferences and rebuttable presumptions of persecution violate notions of equal protection and undermine the purpose of the Refugee Act of 1980;<sup>185</sup> further, they are a vestige of old policies, and continue to perpetuate misconceptions about those who seek protection at U.S. borders as well as those already in the United States who are still perceived as different.<sup>186</sup>

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180. *Kai Wu Chan v. Reno*, 916 F. Supp. 1289, 1305 (S.D.N.Y. 1996) (quoting *Francis v. INS*, 532 F.2d 268, 272 (2d Cir. 1976)).

181. *BOSNIAK*, *supra* note 17, at 49 (footnotes omitted).

182. Pub. L. No. 96-212, 94 Stat. 102 (1980).

183. *Cox & Rodriguez*, *supra* note 78, at 506.

184. *See supra* text accompanying notes 91–94.

185. *Cox & Rodriguez*, *supra* note 78, at 506 (citing *Kennedy*, *supra* note 81, at 143).

186. In the context of race, for example, the impact of asylum protection that distinguishes based on race, and preference for “sameness,” reinforces “domestic subordination of the same racial minority groups who are excluded. . . . Exclusion in immigration laws must be viewed as an integral part of a larger mosaic of racial discrimination in American society.” *Nessel*, *supra* note 7, at 694 (citing KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION*

For example, Chinese men and women are treated differently in terms of the persecution they suffer as the result of losing a child. The woman who carried the child, by virtue of being subject to the procedure that ends a fetus's existence, is deemed worthy of asylum without proving anything beyond the fact that she suffered an unwanted abortion;<sup>187</sup> she must simply claim it was forced.<sup>188</sup> The father of the child, on the other hand, must show that he was persecuted for other activities.<sup>189</sup> It is not enough that a father actively attempted to avoid the abortion by trying to hide his wife, arguing with cadre officials, or otherwise trying to prevent the loss.<sup>190</sup> He must demonstrate he suffered a separate and distinct episode of persecution aside from the abortion itself.<sup>191</sup> This disparity is highly problematic because it does not recognize that the father has as much a claim to the loss of his child as the mother.<sup>192</sup>

The reality, however, is that this disparity reflects our own societal judgments about the impact the loss of a fetus has on a father. Our society views abortion as a woman's issue, particularly where abortion is elective.<sup>193</sup> Although fathers have legal rights in adoption decisions and those involving matters like frozen embryos, our country has not extended that legal protection to putative fathers in the context of abortion.<sup>194</sup> Fathers who experience the loss of a child

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LAWS 153 (2007)). On some level, "[i]mmigration law allows the United States to do at its borders what it cannot do within them." JOHNSON, *supra*, at 89.

187. See Shi Liang Lin v. U.S. Dep't of Justice, No. 02-4611, 2006 U.S. App. LEXIS 28465, at \*1 (2d Cir. Nov. 13, 2006).

188. *Id.*; *In re J-S-*, 24 I. & N. Dec. 520, 520 (Att'y Gen. 2008).

189. See *In re J-S-*, 24 I. & N. Dec. at 520.

190. See, e.g., Bi Qi Liu v. Holder, 349 F. App'x 664, 665 (2d Cir. 2009); Cheng Lin v. Holder, 314 F. App'x 371, 372 (2d Cir. 2009); Xiao Fei Dong v. Mukasey, 307 F. App'x 547, 549 (2d Cir. 2009); Hao Zhu v. Gonzales, 465 F.3d 316, 323 (7th Cir. 2006).

191. See, e.g., Bi Qi Liu, 394 F. App'x at 665; Cheng Lin, 314 F. App'x at 372; Xiao Fei Dong, 307 F. App'x at 549; Hao Zhu, 465 F.3d at 323.

192. This argument does not try to ignore the obvious, that a woman has undergone an invasive physical procedure where the man has not. But as noted, *infra* notes 208–09 and accompanying text, women who are required to submit to insertion of an intrauterine device are not presumptively entitled to asylum and women who are required to submit to frequent physical exams to check for pregnancy are not either. Instead, a woman must be forcibly required to end a pregnancy for the presumption to attach.

193. See Catherine T. Coyle, *Men and Abortion: A Review of Empirical Reports Concerning the Impact of Abortion on Men*, 3 INTERNET J. MENTAL HEALTH (2007), <http://www.ispub.com/ostia/index.php?xmlFilePath=journals/ijmh/vol3n2/abortion.xml>.

194. See *id.*

via miscarriage do not fare much better, even though research suggests they evidence a higher degree of difficulty coping than women.<sup>195</sup> Recent research indicates that men suffer from the same postabortion psychological issues that women do.<sup>196</sup> Men report feeling depression, anxiety, helplessness, and guilt.<sup>197</sup> This not only impacts the couple but has implications for the parents' relationship with their extended family as well.<sup>198</sup>

Currently, a woman in the United States may have an abortion, and the father has no legal rights to prevent it.<sup>199</sup> If a woman miscarries, then often a father's feelings are not the paramount concern. While it is true that a woman carrying a child may bond with it faster, the reality is that for a man who wants a child, the loss is just as palpable, particularly where the loss was not only involuntary but forced.<sup>200</sup> Assigning these roles to Chinese fathers does them a disservice because this country does not engage in or allow forced abortion, and so there is no social construct to address it. It does more than simply impose a value judgment on the role of the father in Chinese society: it fails to recognize the oppressive atmosphere and official capacity in which forced abortions are carried out.

Chinese men have been cast as opportunists, taking advantage of the option to travel to the United States and leave their families

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195. See *id.*; Marya Burgess, *How Miscarriage Can Hit Very Hard*, BBC NEWS (June 19, 2006), <http://news.bbc.co.uk/2/hi/5082442.stm> (noting that the impact on men goes unrecognized and that men are stuck between a rock and hard place, socially not permitted to be too emotional or too stoic). Men's grief can also take a different form, with a man trying to problem-solve, take action, gather facts, or simply avoid the grief by working. *After a Miscarriage: Surviving Emotionally*, AM. PREGNANCY ASS'N, <http://www.americanpregnancy.org/pregnancyloss/mcsurvivingemotionally.html> (last updated Oct. 2008) [hereinafter *After a Miscarriage*].

196. Coyle, *supra* note 193.

197. *Id.*

198. Francine De Montigny et al., *A Baby Has Died: The Impact of Perinatal Loss on Family Social Networks*, 28 J. OBSTETRIC GYNECOLOGIC & NEONATAL NURSING 151, 152–53 (1999) (reporting that family members' quality and quantity of ties with their network were profoundly affected by prenatal loss and many suffered the permanent loss of relationships with friends, colleagues, or extended family members).

199. See *Planned Parenthood of Mo. v. Danforth*, 428 U.S. 52, 67–69 (1976) (holding that the state is not required to notify or obtain permission from a woman's husband when she seeks an abortion).

200. See *After a Miscarriage*, *supra* note 195 (explaining that “[a] woman can begin bonding [with a baby] from the moment she has a positive pregnancy test”); Coyle, *supra* note 193 (describing the feelings of “worthlessness,” “voicelessness,” and “emasculatation” a man experiences after learning that his girlfriend had an abortion without informing him).

behind.<sup>201</sup> This, again, fails to recognize a reality of immigration that has been present for decades. Our current legislative policy toward China's CPC fails to take into account a cultural norm that, historically, men immigrate first and then their families follow.<sup>202</sup>

In her concurrence in *In Re C-Y-Z*,<sup>203</sup> Board Member Rosenberg noted the following:

The fact that respondent preceded his family is no different from the cultural practice followed by hundreds of thousands of immigrants and refugees who fled anti-Semitic pogroms in czarist Russia, famine in Ireland, [or] fascism in Germany . . . . The men come first; the husband and father forges the way for the wife and children, who follow when he has established a place to live and a means to support them. In an ideal world, perhaps she who has suffered the more egregious physical persecution should be the first to leave the zone of danger and be afforded refuge. In any event, the applicant's conformity with historical and cultural norms in preceding his wife and family certainly has no bearing either on the merits of his asylum claim or on the exercise of discretion.<sup>204</sup>

Rosenberg hit upon an important consideration in deciding what type of asylum claims are entitled to per se relief. More than one Chinese father has been vilified in a court opinion for leaving his wife and children behind to come to the United States.<sup>205</sup> Oddly, the

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201. Patricia Wen, *Law Offers Chinese a Path to US Policy Giving Asylum to Those Facing Coerced Birth Control Benefits Mostly Men*, BOS. GLOBE, Aug. 18, 2002, at B1 ("Of the 10,000 Chinese people who have obtained political asylum based on China's one-child policy, federal statistics show, three out of four are men.").

202. *Id.* (noting that most men who are granted asylum petition to have the rest of their family join them). Even our immigration statutes contemplate derivative status and family members arriving at different times depending upon the circumstances. *See, e.g.*, 8 C.F.R. § 207.7 (2010). In fact, immediate relatives of United States citizens brought in through family immigration laws account for more than 40% of the annual flow of legal immigrants to this country. RANDALL MONGER, OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SECURITY, U.S. LEGAL PERMANENT RESIDENTS: 2009 3 tbl.2 (2010), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr\\_fr\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2009.pdf). Twenty-eight percent of legal immigrants to the United States are spouses brought by a legal resident and 8.7% are children brought by a parent who is a legal immigrant. *Id.*

203. 21 I. & N. Dec. 915, 927 (B.I.A. 1997) (concurring opinion).

204. *Id.*

205. *See, e.g.*, *Yin Fang Lin v. Holder*, No. 09-2398-ag, 2010 WL 3733910, at \*1 (2d Cir. Sept. 27, 2010).



wife will likely not be subject to further persecution when he is gone because she is not likely to get pregnant in his absence.<sup>206</sup> Because the bar is now set even higher, the applicants must deviate from what may be deemed culturally appropriate by sending mothers ahead.<sup>207</sup>

This makes little sense because the per se presumption of persecution for women, who are forcibly aborted, contemplates more than a physical invasion of a woman's person. Generally, an abortion, if performed correctly, does not impede a woman from becoming pregnant again. The real loss, and the loss that the protective statute inherently recognizes, is the loss of that child.<sup>208</sup> Chinese women are not entitled to per se asylum from temporary sterilization, such as forced insertion of an intrauterine device, even though this too is an invasive procedure; nor are they entitled to per se asylum when they are subject to monthly exams to check for illegal pregnancy.<sup>209</sup>

If the child is desired by both parents, then the harm extends to both parents regardless of the legal status of their relationship. Yet, a father is precluded from relying on the loss of his unborn child to support an asylum claim while a mother's sole basis for receiving a rebuttable presumption of asylum is the loss of the same child.<sup>210</sup> While the mother may suffer physically as well, the emotional and psychological harm extends to both parents. However, this harm is not recognized by current legislation or policies.<sup>211</sup>

This juxtaposition of parental protection is at odds with the Refugee Act of 1980 because the Act recognized the fundamental nature of the right to procreate.<sup>212</sup> The right to procreate must be shared by both parents, and should be reflected in protection extended to those who suffer persecution based on their desire to

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206. Rabkin, *supra* note 129, at 970–71 (discussing how couples who have “unapproved children” often face high fines, forced abortions, and sterilization).

207. *See In re C-Y-Z-*, 21 I. & N. Dec. at 927.

208. *See* 8 U.S.C. § 1101(a)(42) (2006) (stating that “a person who has been forced to abort a pregnancy . . . shall be deemed to have been persecuted on account of political opinion”).

209. *See id.* (omitting a presumption of persecution for temporary sterilization or routine exams to check for illegal pregnancy).

210. *See id.*

211. *See, e.g., id.*

212. Pub. L. No. 96-212, 94 Stat. 102. Even the Universal Declaration of Human Rights provides that men and women have the right to marry and to found a family. Universal Declaration of Human Rights, *supra* note 21, art. 16(1). It goes on to recognize that the “family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” *Id.* art. 16(3).

procreate. Thus, this failure to extend protection to similarly situated individuals runs afoul of our notions of equal protection<sup>213</sup> as well as the intent of the Refugee Act itself.<sup>214</sup> It also carries with it stereotypes U.S. culture has adopted and does not consider whether fathers are treated similarly in China.<sup>215</sup>

If we are to recognize that a single event can satisfy the definition of refugee for the purposes of asylum, then we should not lay judgment on the length of time it takes an applicant to arrive in the United States or how a family unit decides who should come first. Even in the case of a boyfriend or former spouse, the loss of his unborn child should be the triggering event, not the procedure performed. If Congress feels that such an application is untenable, then the requirements imposed upon Chinese men whose unborn children have been forcibly aborted should also be imposed upon the women who carried those unborn children.<sup>216</sup> This would impose the same requirement, “other resistance,” on both classes of claimants and establish equitable treatment for the same harm.<sup>217</sup>

The treatment of Cuban and Haitian nationals offers another view of the problem with extending preferential legislative protection to one group of potential asylees without taking a sufficiently broad view of the implications. It also illuminates why, at a minimum, such legislation should be revisited with regularity instead of simply adapted to shifting politics on an ad hoc basis.

While there may have been a justification for treating the first waves of Cuban immigrants differently because of the sudden shift in government, modern waves of Cuban and Haitian refugees are more alike than different: they typically seek to escape poverty as well as government oppression. The difference in their treatment is based on

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213. See *supra* note 179 and accompanying text.

214. See *supra* note 182 and accompanying text.

215. See *supra* notes 200–02 and accompanying text.

216. Theoretically, this is not a one-time harm. See *In re C-Y-Z-*, 21 I. & N. Dec. 915, 915–16 (B.I.A. 1997). If a couple continues to become pregnant in violation of coercive population control, a woman may be subject to forced abortion, and both may face the loss of yet another unborn child. See *id.* While the woman may disproportionately bear the physical and psychological burden, it should not diminish the harm suffered by the man simply because he cannot become pregnant. See *id.* at 920–23, 926–27 (concurring opinion). This is particularly true in this context, where the question is not who suffered the physical act, but who has suffered persecution at the hands of a government or other group. See *id.* at 926–27.

217. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-2008 § 601(a)(1), 110 Stat. 3009, 3009–689 (codified as amended at 8 U.S.C. § 1101(a)(42)).

historic conceptions and value judgments placed on those entering that have not withstood the test of time.<sup>218</sup>

The first wave of Cubans were white, middle-aged, and well-educated.<sup>219</sup> They were the product of a society that was pre-Castro and anti-Castro.<sup>220</sup> They fled Communist tyranny in family units.<sup>221</sup> The second wave, who arrived from 1965 to 1970, were still mostly white and educated, working class, and came in family units.<sup>222</sup> It was this group of immigrants that Congress sought to protect, because they were “like us” and deemed capable of assimilation.<sup>223</sup> Again, we judged them by their sameness and enacted legislation to protect them. When the next waves of Cuban nationals arrived, they became less like us, and the public was less interested in accommodating them.<sup>224</sup>

In 1980, the Marielitos, who were the last big wave of refugees from Cuba, were blue collar, less educated, and younger.<sup>225</sup> Many did not come with families.<sup>226</sup> Many spoke only Spanish; half were black.<sup>227</sup> Many expressed economic reasons for seeking refuge in the United States rather than expressing a basis recognized by the Refugee Act of 1980.<sup>228</sup> These people, in many instances, were also the first generation to have grown up under Fidel Castro.<sup>229</sup> They had not experienced anything other than communism, and fled, not to escape political persecution, but to try their luck in America or to escape food scarcity in Cuba.<sup>230</sup> These circumstances are not markedly different from illegal immigrants fleeing to the United States to avoid similar hardships in many countries around the world, including Haiti.<sup>231</sup> In spite of this shift, Congress did nothing to adjust the requirements for Cuban refugees.<sup>232</sup> Even in the face of

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218. See *infra* notes 219–23.

219. HING, *supra* note 79, at 257.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Mirando por los Ojos*, *supra* note 74, at 910–11.

224. See *id.* at 914; HING, *supra* note 79, at 256.

225. HING, *supra* note 79, at 257.

226. *Id.*

227. *Id.*

228. See *Mirando por los Ojos*, *supra* note 74, at 912–13. In fact, many Marielitos initially explained their departure as a result of food scarcity or desire to earn more money in United States. See *id.*; Cox & Rodriguez, *supra* note 78, at 507.

229. See Arteaga, *supra* note 10, at 513 n.37.

230. Cox & Rodriguez, *supra* note 78, at 507.

231. Arteaga, *supra* note 10, at 545.

232. PORTES & BACH, *supra* note 74, at 85; *Mirando por los Ojos*, *supra* note 74, at 907.

comparison with Haitian refugees who were seeking to escape political turmoil surrounding the Duvaliers' ruthless reign,<sup>233</sup> the legislative protections stood. The scale has remained tipped so far in favor of Cubans it makes Congress look ridiculous.

When Clinton entered into an accord with Cuba to reduce the flow of Cuban asylum seekers, both countries agreed to the wet foot, dry foot policy.<sup>234</sup> Regrettably, this policy created a whole new class of presumptively protected Cubans—those that made it to shore—which has created its own problems.<sup>235</sup> Now, in addition to treating Cubans differently than other asylum seekers, there is even a distinction between Cubans who plant one foot on United States soil and those who are interdicted just off shore, regardless of whether either person has a valid underlying claim for asylum.<sup>236</sup>

The purposeful protections enumerated in the Cuban Adjustment Act have outlived their usefulness and do not reflect the realities of today.<sup>237</sup> Neither the nature of those who seek protection upon arrival on our shores, nor the competing interests of other similarly situated asylum seekers permit the continued reliance on this legislative protection.<sup>238</sup> The problem is that there is no practical mechanism other than repeal of the Cuban Adjustment Act, which would literally take an act of Congress, to properly address this problem.<sup>239</sup> Rather than take an opportunity to adjust the status of all Cuban refugees, the

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233. See *Times Topics: Francois Duvalier*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/people/d/francois\\_duvalier/index.html](http://topics.nytimes.com/top/reference/timestopics/people/d/francois_duvalier/index.html) (last visited May 16, 2011). Francois Duvalier was “President for Life” in Haiti from 1957 until he died in 1971. *Id.* His son, Jean-Claude Duvalier, ruled the country until 1986 when he was overthrown. *Id.* Both regimes were marked by corruption, brutality, and significant human rights abuses. See Larry Rohter, *Mission to Haiti: The Thugs—Loose Cannons; Violence by Paramilitary Groups in Haiti Raises Pressure on U.S. to Disarm Them*, N.Y. TIMES, Oct. 1, 1994, at 1, available at [www.nytimes.com/1994/10/01/world/mission-haiti-thugs-loose-cannons-violence-paramilitary-groups-haiti-raises.html?fta=y](http://www.nytimes.com/1994/10/01/world/mission-haiti-thugs-loose-cannons-violence-paramilitary-groups-haiti-raises.html?fta=y) (noting that the United States was doing little to control the plain clothes paramilitary called attaches who kill at will).

234. *Mirando por los Ojos*, *supra* note 74, at 907.

235. *Id.*

236. *Id.* Even worse, instead of creating an understandable immigration policy that addresses the needs of asylum seekers traveling here by sea, Congress and the Executive have created a game of “immigration roulette.” Those seeking asylum by traveling to our shores, particularly Cubans, have a huge incentive in the form of parole status when they arrive. *Id.* However, the reality is that many lose their lives seeking the promise of easy entry once they stand ashore. See generally Nessel, *supra* note 7.

237. See *Mirando por los Ojos*, *supra* note 74, at 911–14.

238. *Id.* at 912–15.

239. *Id.* at 917.

only shift in policy U.S. government has undertaken has resulted in yet another preferential subset of Cuban refugees.<sup>240</sup>

Instead of maintaining these problematic legislatively created presumptions for discrete groups at the expense of a broader class of potential refugees, a full application of the Refugee Act of 1980 would be more practical. Legislative enhancements could still be used to support the Refugee Act, but every asylum applicant would have to satisfy the burden of demonstrating he or she is a refugee without the benefit of a rebuttable presumption of persecution. For example, those who suffer persecution as a result of a coercive population control may be deemed, via legislation or regulation, to have been persecuted on account of political opinion, but those designations should stop short of creating presumptive classes of refugees. Such an action could help other groups of potential asylees as well, including victims of domestic violence. In such a situation, an applicant for asylum would still have to demonstrate persecution, which lies at the heart of every asylum claim.<sup>241</sup> In the case of Chinese nationals, it would mean that both men and women would have to prove something beyond a forced abortion, such as actual resistance, but the policy would create a more equitable treatment of these claims.<sup>242</sup>

In the same way, the Cuban Adjustment Act could be repealed and Cuban “dry foot” refugees would be in no worse a position than their “wet foot” counterparts or other similarly situated asylum seekers.<sup>243</sup> With fewer Cubans being granted automatic parole status, perhaps more equitable treatment of Haitian asylum claims could be achieved, even in conjunction with current interdiction policies.<sup>244</sup>

## V. CONCLUSION

While no system will be perfect, and our country’s current system is far from perfect, we must continue to move forward in removing

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240. *See id.* at 915.

241. *See id.* at 919.

242. *See supra* notes 208–11 and 217 and accompanying text.

243. This may be a good time to revisit our position on Cuba given the current economic reforms Cuba plans to implement. *See* Marc Lacey, *Cuba Resets the Revolution*, N.Y. TIMES, Sept. 19, 2010, at WK1, available at <http://www.nytimes.com/2010/09/19/weekinreview/19lacey.html>. Cuba recently announced that it is implementing broad-based economic changes including cutting 10% of the government work force and permitting much more extensive privatization. *Id.*

244. The wisdom of our current interdiction policies, and their future, is beyond the scope of this article.

vestiges of discriminatory asylum preferences that originated in the 1951 Refugee Convention and remain today. The application of nondiscriminatory asylum policies is an aspiration that is worth pursuing, and the removal of legislative preferences is the next step in that process.