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COMMENTS

SUPPORTING THE SNAKEHEADS: HUMAN SMUGGLING FROM CHINA AND THE 1996 AMENDMENT TO THE U.S. STATUTORY DEFINITION OF "REFUGEE"

CLEO J. KUNG*

I. INTRODUCTION

The traffic of human beings to the United States has a long and sordid history.¹ Although slavery and indentured servitude are now illegal,² the law has not stopped this country's demand for cheap labor.³ Because workers with legal status in the U.S. must be paid the federally-mandated minimum wage, illegal

* The author thanks Bi Xiaosheng and Joyce A. Hughes. In memoriam Joan Rajala Kung.

¹ PETER KWONG, *FORBIDDEN WORKERS: ILLEGAL CHINESE IMMIGRANTS AND AMERICAN LABOR* 42-45, 140-42 (1997). See also Mary Sarah Bilder, *The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743 (1996) (discussing the history of indentured servitude as a form of immigration regulated by Congress' commerce power).

² "Neither slavery nor involuntary servitude . . . shall exist within the United States . . ." U.S. CONST. amend. XIII, § 1. The U.S. is also a signatory to the Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 182 U.N.T.S. 51.

³ KWONG, *supra* note 1, at 7-10. Kwong states:

It is my contention that the problem of illegal immigration, including Chinese immigration, can only be understood in the context of the underlying supply-and-demand principle enshrined in traditional U.S. economics America's immigration history is punctuated by American industry's need for labor. Immigrants have historically been recruited for two reasons: during times of economic expansion, when all levels of skilled and unskilled laborers were in great demand, and whenever business forces felt a need to increase the labor pool in order to undermine wage levels and the bargaining power of existing domestic labor organizations.

Id.

immigrants provide the cheap labor that American businesses believe they need to stay competitive.⁴ In the last few decades, international trafficking rings have profited from this illicit American market by smuggling migrants from all over the world to the U.S.⁵ Driven by social upheaval, persecution, or poverty, people endure treacherous journeys and incur huge debts for passage to the prosperous shores of the United States.⁶ Human smuggling is thus "both an international migration phenomenon and a transnational crime problem."⁷

Each year illicit networks move an estimated four million people through organized smuggling rings that operate world-

⁴ Louis F. Nardi, Director of the Smuggling/Criminal Organizations Branch of the Immigration and Naturalization Service (INS), reports that some U.S. companies arrange to have aliens smuggled in to work for them. August Gribbin, *INS Has Trouble Keeping Up With Alien Smugglers*, WASH. TIMES, Jan. 18, 2000, at A1. Although "the INS has long maintained that there is a nexus between alien smuggling and illegal employment," there has been only one successful prosecution of such an employer. *Id.*

The press often covers the plight of migrant workers and illegal immigrants. See, e.g., Sam Howe Verhovek, *Illegal Immigrant Workers Being Fired in I.N.S. Tactic*, N.Y. TIMES, Apr. 2, 1999, at A1; Steven Greenhouse, *Farm Work by Children Tests Labor Laws*, N.Y. TIMES, Aug. 6, 2000, at A12. On the legal issues surrounding undocumented workers, see Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179 (1994); Charles R. Chaiyarachta, Comment, *El Monte is the Promised Land: Why do Asian Immigrants Continue to Risk Their Lives for Substandard Wages and Conditions?*, 19 LOY. L.A. INT'L & COMP. L.J. 173 (1996); Fang-Lian Liao, Note, *Illegal Immigrants in Garment Sweatshops: The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, 3 SW. J.L. & TRADE AM. 487 (1996).

⁵ See *Alien Smuggling and Visa Overstays: Hearing on Immigration Issues Before the Subcomm. on Immigration and Claims*, 106th Cong. (1999) (statement of Louis F. Nardi, Director, Smuggling/Criminal Organizations Branch, INS) [hereinafter Nardi Statement]. See also *Illegal Immigrations, Before the Immigration and Claims Subcomm. of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of William R. Brownfield, Principal Deputy Assistant Secretary of State, Bureau for International Narcotics and Law Enforcement Affairs) available in 1999 WL 8085749 [hereinafter Brownfield Statement]. Brownfield reports that:

The United Nations estimates that nearly four million human beings are trafficked across national boundaries every year, and roughly \$7 billion is paid to criminal organizations involved in the smuggling. We know that the United States is the most popular point of destination of the trafficking organizations. Every year, hundreds of thousands are smuggled into the United States by land, sea, and air.

Id.

⁶ Paul J. Smith, *Chinese Migrant Trafficking: A Global Challenge*, in HUMAN SMUGGLING: CHINESE MIGRANT TRAFFICKING AND THE CHALLENGE TO AMERICA'S IMMIGRATION TRADITION 9 (Paul J. Smith ed., Significant Issues Series, Volume XIX, No. 2, The Center for Strategic and International Studies 1997).

⁷ Smith, *Introduction*, in HUMAN SMUGGLING, *supra* note 6, at ix.

wide.⁸ In the past decade, human smuggling has grown from a relatively small-scale intra-regional movement into a major global business.⁹ The People's Republic of China¹⁰ is a major source of smuggled migrants.¹¹ Experts estimate that 50,000 Chinese are smuggled into the United States each year¹² and that the Chinese human trade yields an estimated annual profit of three billion dollars.¹³

When transnational crime intersects with U.S. immigration law, the result poses serious ethical and normative legal questions. This Comment argues that the economic and cultural divide between the U.S. and China has resulted in misguided American policies that have exacerbated the Chinese migrant

⁸ Brownfield Statement, *supra* note 5.

⁹ Gordon Witkin et. al., *One Way, \$28,000. Why Smuggling Aliens Into America is a Boom Business*, U.S. NEWS AND WORLD REP., April 14, 1997, at 15. See also Brownfield Statement, *supra* note 5 (estimating that "roughly \$7 billion is paid to criminal organizations involved in the smuggling").

¹⁰ The PRC refers to the Chinese mainland. The Republic of China (ROC) refers to Taiwan. After the 1949 revolution, both the PRC and the ROC have claimed to be the official government of "China." The PRC treats Taiwan as a "renegade province." See generally JOHN KING FAIRBANK, CHINA: A NEW HISTORY 230-55 (1992). This Comment will sidestep that political debate and refer to the PRC as "China" and the ROC as "Taiwan."

¹¹ Smith, *supra* note 6, at ix. For the purposes of this Comment, the term "migrants" refers to people who freely choose to relocate for personal reasons. INTERNATIONAL ORGANIZATION FOR MIGRATION, IOM AND EFFECTIVE RESPECT FOR MIGRANTS' RIGHTS 2 (1997). This definition does not include refugees, exiles or others who are compelled to leave their homes by external forces. *Id.*

¹² Accurate data on illegal immigration are scarce. Estimates of the number of Chinese smuggled into the U.S. each year vary from 10,000 to 100,000. Smith, *supra* note 6, at x. Ken Elwood, Deputy Executive Associate Commissioner for Field-Operations Enforcement with the INS, estimates that approximately 5,000 Chinese nationals try to enter the United States illegally each year. He says that the INS "may be getting half of them, but it's hard to tell how many we're not catching." Susan Gilmore, *Traffic of Chinese Human Cargo Increases on Container Ships*, SEATTLE TIMES, Jan. 13, 2000, at A1. Pacific Forum, an organization based in Hawaii, estimates that up to 100,000 Chinese migrants reach the United States each year, many of them through Canada. Susan Gilmore, *Canadians Arrest 25 Smuggled Chinese*, SEATTLE TIMES, Jan. 4, 2000, at B1.

China is not, however, the source of the largest number of illegal immigrants in the United States. *Illegal Immigration: Hearings Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. (1997) (testimony of George Regan, Acting Associate Commissioner of Enforcement, INS). The vast majority of illegal immigrants in the U.S. come from Mexico and Central America. *Id.*

¹³ Ko-lin Chin, *Safe House or Hell House? Experiences of Newly Arrived Undocumented Chinese*, in HUMAN SMUGGLING, *supra* note 6, at 170.

smuggling problem. The Comment begins in Part II by tracing the history of human smuggling from China and summarizing the current state of the problem.¹⁴ Part III discusses current approaches to the Chinese human trade and describes the socioeconomic forces driving Chinese migration.¹⁵ Part IV explains how American aversion to China's family planning programs resulted in the 1996 Amendment to the U.S. refugee law that recognizes opposition to "coercive population control programs" as a basis for political asylum.¹⁶ Part V calls for the repeal of this amendment because it is culturally biased, facilitates human smuggling from China, and contradicts traditional and reformatory ideals of asylum law and refugee policy.¹⁷

II. CHINESE MIGRANTS SMUGGLED TO THE UNITED STATES

Chinese human smuggling is run by "big snakeheads" who control transnational networks of "small snakeheads," enforcers, and debt collectors.¹⁸ With close ties to local Chinese officials, many big snakeheads are seen as "philanthropists" because they contribute large sums to improve their home villages.¹⁹

Most smuggled migrants never meet these big snakeheads, but deal solely with their lower-level "employees."²⁰ Little snakeheads are usually local Chinese people who recruit customers and collect down payments.²¹ Numerous middlemen guide emigrants from one transit point to the next and enforcers are hired to control passengers en route to the U.S.²² After the migrants arrive in the United States, debt-collectors lock them in safe houses until their fees are paid.²³

¹⁴ See *infra* pp. 5-23.

¹⁵ See *infra* pp. 23-35.

¹⁶ See *infra* pp. 35-46.

¹⁷ See *infra* pp. 46-65.

¹⁸ KO-LIN CHIN, *SMUGGLED CHINESE: CLANDESTINE IMMIGRATION TO THE UNITED STATES* 29-35 (1999). "Snakehead" is a literal translation of the Chinese term *shetou*. *CONCISE ENGLISH-CHINESE CHINESE-ENGLISH DICTIONARY* 388, 446 (Oxford Univ. Press 1992).

¹⁹ CHIN, *supra* note 18, at 30-31.

²⁰ *Id.* at 30.

²¹ *Id.* at 29. Little snakeheads are also known as *lakejia* (recruiters) and they are paid between \$500 to \$1,000 per recruit. *Id.* at 32.

²² *Id.* at 33.

²³ *Id.* at 34.

Although big snakeheads may hire gang members as debt-collectors, there is no evidence that "organized crime" controls the Chinese human smuggling business.²⁴ Rather, the Chinese human trade is run by clandestine "entrepreneurs" whose underlings commit serious crimes in the course of their illicit business.²⁵

Lured by the prospect of a richer life in the United States, Chinese emigrants may endure treacherous journeys by air, sea and land in abhorrent conditions made worse by the violent abuse of enforcers.²⁶ Smugglers charge from \$30,000 to \$60,000 per person for their services.²⁷ To ensure that the snakeheads will successfully deliver them to their destination, Chinese migrants typically make only a down payment of \$1,000 to \$3,000 before their departure.²⁸

Contrary to many reports that Chinese migrants are forced to work as indentured servants in American restaurants or sweatshops to pay off the smugglers, relatives or friends of the migrants (their sponsors) will pay their debts as soon as the migrants arrive in the U.S.²⁹ Debt-collectors use brutal tactics to insure this immediate, full payment.³⁰ If a migrant's debt has not been paid within a week of their arrival, debt-collectors may force the migrant to call his or her sponsor and then torture the victim over the phone to shock their relatives into immediately sending the money.³¹

²⁴ *Id.* at 39-42.

²⁵ *Id.* at 41 (quoting the scholar Willard H. Myers).

²⁶ For example, in 1995 the ship *Jung Sheng 8* was stopped south of Hawaii. The ship was carrying 147 Chinese migrants, some of whom were beaten and sexually abused by enforcers on board. Many also suffered from skin and urinary tract infections due to dehydration and unsanitary conditions. As one Coast Guard official said, "When we pulled the hatch on the hold, we were overwhelmed with a rush of hot steamy air that smelled of urine and fecal matter. The smell just never went away." Witkin, *supra* note 9, at 15.

²⁷ Chin, *supra* note 13, at 170; Brownfield Statement, *supra* note 5. See also Scott Sunde, *Starvation, Thirst Killed 3 Stowaways, Tests Find*, SEATTLE POST-INTELLIGENCER, Feb. 24, 2000 at B1 (citing estimates of INS officials).

²⁸ Chin, *supra* note 13, at 174; Brownfield Statement, *supra* note 5.

²⁹ Smith, *supra* note 6, at 11; Chin, *supra* note 13, at 178-79. Thus, migrants work tirelessly to pay their debts to their relatives, friends or loansharks, *not* the smugglers.

³⁰ Chin, *supra* note 13, at 178-79.

³¹ *Id.* at 185. See also Gribbin, *supra* note 4. Ken Elwood of the INS says that the Service found "a Chinese smuggler's victim shot in the head and dropped on New York's Grand Central Parkway We had a woman whose skull was crushed. We

A. ORIGINS AND REASONS FOR LEAVING

The majority of smuggled Chinese migrants come from the southern coastal province of Fujian.³² Since the late 1980s, smuggling networks have brought tens of thousands of Fujianese to the U.S.³³ Lying along Mainland China's side of the Taiwan Straits, Fujian is a natural gateway for international trade and the province has a maritime tradition dating back to the 15th century.³⁴ Fujian was also the birthplace of *San Lian Hui*, the original Chinese Triad, and a center of maritime smuggling.³⁵ During the tumultuous collapse of the Qing dynasty in the late 19th century, thousands of Fujianese fled chaos and poverty to migrate overseas.³⁶ When Deng Xiaoping em-

have had people kidnapped, taped from head to foot with duct tape and left in closets to die." *Id.*

According to one expert, "[t]he *shetou* have avoided the extension of credit because it increases their exposure to law enforcement and requires a permanent U.S. organization to supervise the collection of periodic payments." Willard H. Myers III, *Of Qinshu, Guanxi, and Shetou: The Dynamic Elements of Chinese Irregular Population Movement*, in HUMAN SMUGGLING, *supra* note 6, at 125 n. 44. See also Chin, *supra* note 13, at 178 nn. 37-38. Chin's research found that although "U.S. authorities assume that illegal immigrants need not pay their smugglers in advance or upon their arrival . . . [.] [h]uman traffickers . . . demanded immediate payment of the entire fee." CHIN, *supra* note 18, at 101. This was, in part, because "[m]igrants are the best evidence a prosecutor has to successfully indict a smuggling network." Chin, *supra* note 13, at 194 n. 38.

³² See generally Marlowe Hood, *Sourcing the Problem: Why Fuzhou?*, in HUMAN SMUGGLING, *supra* note 6, at 77.

³³ John Pomfret, *Smuggled Chinese Enrich Homeland, Gangs; Villagers Work, Chase Dreams in United States*, Jan. 24, 1999, WASH. POST, at A19. An official from the city of Tingjiang estimates that 30,000 of the approximately 70,000 townspeople are in the United States. *Id.*

³⁴ Marlowe Hood explains this history:

[T]he province's maritime tradition . . . dates back at least to Zheng He's expeditions to South Asia and Africa during the early fifteenth century. For it was a handful of sailors and merchant marines from Fuzhou and neighboring Ma Wei, men like Alan Mansin Lau, a former president of the Fukien American Association, who planted the first seeds of Fuzhou's New York-based community by jumping ship in the United States during the two decades following World War II.

Hood, *supra* note 32, at 77.

³⁵ *Id.* "Triad" refers to the Triad societies formed by ousted Chinese officials to overthrow the Qing dynasty government in the late 17th century. KO-LIN CHIN, CHINESE SUBCULTURE AND CRIMINALITY: NON-TRADITIONAL CRIME GROUPS IN AMERICA 9 (1990). Triad organizations evolved into powerful groups who used intimidation and violence to support their criminal activities. *Id.* Branches of the triads in the United States are called tongs. *Id.*

³⁶ See generally FAIRBANK, *supra* note 10, at 230-55.

braced market-oriented economic reforms in the 1980s, contact and trade between Fujian and Taiwan increased.³⁷

The main source of Fujianese migrants is the area surrounding Fuzhou City in the northeastern corner of Fujian province.³⁸ Several villages in this area are inhabited mostly by elderly couples caring for grandchildren whose parents are in the U.S., and many families are financially dependent on their overseas relatives.³⁹

Although economics are a clear "push" factor behind Chinese migration to the United States,⁴⁰ a subtler and more pervasive force is the toll that official corruption and arbitrary abuse of power wreak on every level of Chinese society.⁴¹ One expert

³⁷ This economic reliance on Taiwan has historical roots. Marlowe Hood attributes the lack of any large state-run enterprises in Fujian to "a deliberate Maoist-era strategy designed to deprive a hostile Nationalist regime a scant 100 kilometers away of military targets." Hood, *supra* note 32, at 78.

³⁸ *Id.* at 76 (stating that the vast majority come from greater Fuzhou). Chinese from the Fuzhou city area in Fujian province replaced immigrants from Guangzhou province (the "Cantonese") as the majority of Chinese immigrants to the United States in the 1980s. KWONG, *supra* note 1, at 9. Ninety percent of Fujianese immigrants come from three small towns surrounding Fuzhou: Lianjiang, Minhou and Changle. *Id.* at 22.

³⁹ Hood, *supra* note 32, at 80. Many illegal Chinese immigrants in the U.S. also send their newborn children back to China. Somini Sengupta, *Women Keep Garment Jobs By Sending Babies to China*, N.Y. TIMES, Sept. 14, 1999, at A1. For example, a woman working in a New York sweatshop paid a friend \$1,000 to take her newborn son back to China to be raised by his grandmother. *Id.* According to Celia Ng, the nursing coordinator at the Chinatown Health Center, 10 to 20 percent of the 1,500 babies delivered there last year were sent away. *Id.* At the St. Vincent's Hospital Chinatown clinic, the social worker Sara Lee estimates that one-third to one-half of the women who seek prenatal care there say they plan to send their babies away. *Id.*

⁴⁰ International migration is often analyzed in terms of "push" and "pull" factors. Smith, *supra* note 6, at 13. Economic deprivation or unemployment may "push" migrants out of China, while demand for cheap labor, higher earning potential and family reunification "pull" migrants to the United States. *Id.*

⁴¹ See Elisabeth Rosenthal, *Beijing Gets a Scolding for Official Corruption, and Applauds*, N.Y. TIMES, March 6, 2000, at A10; Elisabeth Rosenthal, *China's Fierce War on Smuggling Uproots a Vast Hidden Economy*, N.Y. TIMES, March 6, 2000, at A1. As Marlowe Hood has observed, in contemporary Chinese society "[t]hose who are either unable or unwilling to *la guanxi*—pull strings and open back doors—are locked out of the opportunities offered by China's booming, but profoundly corrupt, economy." Hood, *supra* note 32, at 80-81. To illustrate this societal alienation, Hood tells the story of Ren Wanxia, a woman who was murdered inside the local police station after protesting a minor fine. *Id.* Her brother petitioned tirelessly to bring her murderer to justice. When all attempts failed he became deeply discouraged by his prospects in China, took a boat to New York and now washes dishes in a Brooklyn takeout. *Id.*

argues that official corruption coupled with the abrupt decentralization of China's economy could lead to massive social unrest that would drastically increase the number of Chinese migrants seeking refuge in the United States.⁴² Given Fujian's distance (more than 1,000 miles) from China's capital Beijing, Paul J. Smith predicts that the weakening grip of the Chinese Communist Party will increase emigration as local officials simply ignore government attempts to crack down on human smuggling.⁴³

Although it is now easier for educated, wealthy or professional Chinese to travel abroad, it is still very difficult for the average Chinese citizen to get the documents needed to leave China.⁴⁴ Unlike the United States, China does not allow its citizens to freely apply for passports. Chinese people must apply for a passport through their *danwei* (work unit) or local village officials.⁴⁵ To come to the United States they must then procure a visa from the U.S. Embassy in Beijing or the Consulate in Guangzhou.⁴⁶ Only after they have both a valid passport and

⁴² Jack A. Goldstone, *A Tsunami on the Horizon? The Potential for International Migration*, in HUMAN SMUGGLING, *supra* note 6, at 66-68.

⁴³ Smith, *supra* note 6, at 14. In January, 2000, a vast smuggling ring was exposed in Fujian that involved several high-ranking provincial officials. Erik Eckholm, *Big Smuggling Ring with a Wide Reach Scandalizes China*, N.Y. TIMES, Jan. 22, 2000, at A1. The case revealed "critical weaknesses in the Communist Party and its ability to govern the vast country." *Id.*

⁴⁴ BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T. OF STATE, CHINA: PROFILE OF ASYLUM CLAIMS AND COUNTRY CONDITIONS 35 (1998) [hereinafter CHINA PROFILE]. According to Chin, "currently, only the rich, the powerful, the talented, and the well-connected [Chinese] can go abroad legally. Many rural Chinese emigrate illegally simply because they have no legal option." CHIN, *supra* note 18, at 160.

⁴⁵ *Id.* at 35-36.

⁴⁶ CHINA PROFILE, *supra* note 44, at 35. The United States will not grant immigrant visas to Chinese citizens unless they have immediate relatives in the United States who are U.S. citizens or who have obtained legal permanent residence ("green cards") and have filed the proper immigrant petitions through the INS. INA § 203, 8 U.S.C.A. § 1153 (1999). Even if a Chinese person is eligible for an immigrant visa, they may wait up to 11 years before their visa is issued due to the per-country immigration quotas set by the U.S. Congress and the enormous backlog. INA § 202, 8 U.S.C.A. § 1152. For an explanation of this system, see THOMAS A. ALEINIKOFF ET. AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 296 (4th ed. 1998). Tourist and employment-based visas are largely beyond the reach of most Chinese nationals. For an explanation of the requirements for these visas, see *id.* at 289-90, 385-425. See also Stefano Esposito, *Three Dead Among 18 Illegal Immigrants Found on Ship*, NEWS TRIB., Jan. 11, 2000, at A1 (quoting Jim Wu, a Seattle immigration attorney, explaining that

visa can Chinese citizens then apply to the Public Security Bureau for the final document needed to leave—an exit permit.⁴⁷ Bureaucratic hurdles face the Chinese at every step in this process.⁴⁸

Given these obstacles, it is no surprise that many Fujianese turn to the more accessible, albeit more expensive, services of the smugglers. For a handsome fee, smugglers will procure fake travel documents and passage to the United States.⁴⁹ Lax legal enforcement and entrenched corruption facilitate this criminal activity in China and several transit countries.⁵⁰ Local Chinese officials themselves may contract with snakeheads to smuggle their family members out of China for a discounted price.⁵¹ Other authorities may profit from selling their official passports to emigrants eager to pay an inflated price.⁵²

B. TRANSIT AND ARRIVAL

Illegal immigrants from Fujian come to the United States by sea, land, air—or any combination thereof—based on how much they can afford to pay up front.⁵³ Regardless of how they arrive, emigrants' journeys are replete with danger, fear and suffering.⁵⁴ The trip from China to the U.S. can take anywhere from a few weeks to over a year and may pull migrants through several transit countries in Southeast Asia, Europe, and South or Central America.⁵⁵ At every point in their journeys, emigrants

if Chinese nationals "don't have skills, a family relationship or the grades to come to a U.S. college," they have little hope of coming to the U.S. legally).

⁴⁷ CHINA PROFILE, *supra* note 44, at 35-36; CHIN, *supra* note 18, at 49, 192 n.1.

⁴⁸ CHIN *supra* note 18, at 10. For those Chinese with connections, escape is much easier. There are several reports of local Fujian officials colluding with the smuggling networks. See *infra* notes 51-52 and accompanying text.

⁴⁹ Smith, *supra* note 6, at 13-14.

⁵⁰ *Id.* at 14. See also CHIN, *supra* note 18, at 42-46.

⁵¹ Smith, *supra* note 6, at 14.

⁵² *Id.* Unlike regular Chinese passports, official passports are easily doctored by removing the official's photograph and replacing it with a picture of the emigrant. *Id.*

⁵³ See Myers, *supra* note 31, at 107-11. Chin reports that the total price does not differ significantly between the various methods of transport, but those migrants who travel by air make the highest down payments and those who travel by sea pay the lowest amount up front. CHIN, *supra* note 18, at 92.

⁵⁴ See generally CHIN, *supra* note 18, at 89-91.

⁵⁵ *Id.* at 49-53.

are vulnerable to the violent abuse of snakeheads and enforcers.⁵⁶

The human cost of these crimes first came to worldwide attention in June, 1993, when the freighter *Golden Venture* ran aground off the New York coast.⁵⁷ Nearly 300 Chinese people were packed into 800 square feet of cargo space and had been at sea for more than three months with little water or food, no sanitary facilities, no life preservers and only a single ladder to escape the hold.⁵⁸ Pandemonium erupted on board when the ship grounded.⁵⁹ As Coast Guard and police officials boarded the ship, nearly 200 passengers fled, leapt blindly into the water and swam to shore while clutching plastic bags with their belongings.⁶⁰ Many of these people suffered hypothermia from swimming in the freezing water.⁶¹ Ten of the migrants died while trying to reach the shore.⁶²

In the early 1990s thirty-two ships carrying a total of over 5,000 Chinese migrants destined for the U.S. were apprehended throughout Asia and South America.⁶³ Although sea smuggling decreased after the post-*Golden Venture* crackdown, thousands of Chinese people continue to be smuggled across the ocean in decrepit fishing boats.⁶⁴

⁵⁶ *Id.* at 89-91.

⁵⁷ Seth Faison, *Hunt Goes on For Smugglers in Fatal Trip*, N.Y. TIMES, July 18, 1993, at A27.

⁵⁸ Malcolm Gladwell, *Alien-Smuggling Ship Runs Aground*, WASH. POST, June 7, 1993, at A1.

⁵⁹ Matter of G—, 20 I. & N. Dec. 764 (1993) (stating the “general facts” of the *Golden Venture* incident in regards to alien’s exclusion proceedings and applications for asylum and withholding of deportation).

⁶⁰ *Id.* at 767.

⁶¹ *Id.*

⁶² *Hearing on Immigration Bills Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Captain Anthony Tangeman, Chief Office of Law Enforcement, U.S. Coast Guard) [hereinafter Tangeman Statement].

⁶³ CHIN, *supra* note 18, at 4.

⁶⁴ *Id.* at 62-78. A U.S. official describes a typical ship: “It’s rotting. You can grab a handful of the wall, and it crumbles in your hand.” *Id.* at 71. Journeys begin once snakeheads secure vessels in China and start to recruit “customers.” *Id.* at 67. Emigrants then wait in hiding places until the ship is ready. *Id.* at 68. The smuggling vessel, or “mother ship,” stays in international waters to avoid detection and the passengers are ferried out to the ship on small boats. *Id.* at 69. The transfer is treacherous and some people have died while trying to board the mother ship. *Id.* at 70. Once on board, the emigrants find themselves crammed into the bowels of ships

Although the horrific conditions of smuggling ships capture more media attention, most Chinese migrants arrive by air or land.⁶⁵ One INS official claims that "at any given time, thirty thousand Chinese are stashed away in safe houses around the world, waiting for entry."⁶⁶ In 1998 the INS exposed a criminal syndicate responsible for smuggling up to 150 Chinese migrants per month into the United States across the Canadian border.⁶⁷ The network spanned five continents and earned an estimated \$169 million over two years.⁶⁸ Each migrant was charged \$47,000 and was smuggled into Canada using fake documents.⁶⁹ The migrants were then taken to New York City via the Saint Regis Mohawk Territory at Akwesasne, a Native American reservation that straddles the United States-Canadian border.⁷⁰ Forty-seven members of the smuggling ring were indicted and thirty-seven were arrested.⁷¹

As the INS and the Coast Guard increased their interdiction forces at traditional entry points, Chinese smugglers moved their operations elsewhere.⁷² In the mid-1990s smugglers shifted their routes to travel through Mexico and Central America.⁷³ Recently, the island of Guam has become a popular destination for Chinese smuggling vessels.⁷⁴

with up to 300 other people. *Id.* at 71. Designed for cargo, not human passengers, these ships lack adequate toilets and showers. *Id.* at 71-72. "Passengers" soon get sick from lack of water and food, but if they complain, they may suffer violent physical or sexual abuse from the enforcers. *Id.* at 72-75.

⁶⁵ *Id.* at 179.

⁶⁶ *Id.* at 4.

⁶⁷ Tangeman Statement, *supra* note 62.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* See also Jamie Dettmer, *Boatloads May Contain More than Immigrants*, INSIGHT MAG., Aug. 23, 1999, at 6 (reporting an ongoing alliance between Chinese smugglers and a Mexican drug cartel).

⁷⁴ Jana Mason, *Where America's Day Begins: Chinese Asylum Seekers on Guam*, REFUGEE REPORTS, Aug./Sept. 1999, at 1. A mere 1,700 miles from China (as compared to the 8,000 miles between China and the continental U.S.), Guam is an attractive target for smugglers because it is a United States Territory and U.S. immigration law applies to the island. *Id.* at 2. Once they have landed on U.S. territory, Chinese migrants may seek asylum and be flown to the continental U.S. to await the resolution of their cases. *Id.* at 5. In 1999 a bill was introduced in the House to address the problems caused by the wave of smuggled Chinese migrants landing in Guam. The bill was

INS detention centers could not contain the surge of Chinese migrants and many Chinese are now kept in local county jails that profit from lucrative contracts with the INS.⁷⁵ This detention method raises serious legal, political, and policy issues as illustrated by recent events in Illinois.⁷⁶

On October 24, 1999 a Chinese woman detained by the INS at the DuPage County Jail in Illinois gave birth on the toilet of her jail cell.⁷⁷ Unaware that the woman was pregnant, the jail guards rushed to the cell only after other detainees began banging on the door to get their attention.⁷⁸ The guards and a jail nurse revived the baby and her mother and quickly sent them to a local hospital.⁷⁹

Similarly shocking events have happened all over the country,⁸⁰ and organizations like Human Rights Watch and the

sponsored by Representative Robert Underwood who said that its purposes were two-fold:

I want the U. S. government to send a strong message to the criminal syndicates in the People's Republic of China that the exploitation of human cargo particularly from Fujian Province is inhuman and won't be tolerated. Secondly, I want the United States government to reevaluate its immigration policies as it applies [sic] to Guam in order to stop such human rights abuses from occurring.

Hearing on Immigration Bills Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary, 106th Cong. 104 (1999) (statement of Representative Robert Underwood on H.R. 945). Through April 1999, Guam spent \$3 million for detention-related costs and the projected cost of detaining the migrants through the end of that fiscal year was \$7.5 million. *Id.*

⁷⁵ See, e.g., Christy Gutowski, *Deporting from DuPage Jail: INS Paying Millions to Rent County Cell Space*, DUPAGE DAILY HERALD, Oct. 4, 1999, § 1, at 1.

⁷⁶ Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 and 22 U.S.C.), people arriving in the United States without valid documentation are subject to "expedited removal." If aliens express an intent to seek asylum, they will be interviewed by an INS asylum officer to determine whether they have a "credible fear" of returning to their native country. If the applicants pass this interview, they may be held in detention pending the final resolution of their case in immigration court. Detention severely limits asylum-seekers' access to counsel and evidence that can support their claims. See DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 523-24 (3d ed. 1999); see also Michele R. Pistone, *Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197 (1999).

⁷⁷ Ted Gregory, *INS Use of Jails Debated*, CHI. TRIB., Nov. 15, 1999, § 2, at 1.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See, e.g., Nicholas D. Kristof, *Correspondence: Jail-House Translator. Seeking Asylum, Some Immigrants Find A Fate Worse Than Criminal*, N.Y. TIMES, Jan. 16, 2000, § 4, at 7. Kristof reports that Chinese women from Fujian detained by the INS at the Yamhill

American Civil Liberties Union denounce detention as a human rights violation.⁸¹ The INS policy of mandatory detention seems particularly harsh given the ghastly conditions that smuggled migrants endure on their journeys.⁸² Some of the worst conditions were exposed by the recent wave of Chinese migrants smuggled across the ocean in cargo shipping containers.⁸³

On January 10, 2000, the freighter *Cape May* docked in Seattle and began unloading its cargo.⁸⁴ Suddenly, fifteen Chinese men stumbled out of one of the huge metal boxes and pointed inside the dark and filthy container.⁸⁵ The bodies of three people who died in transit lay amidst the garbage and human waste of a fifteen-day journey at sea from Hong Kong.⁸⁶ According to INS official Ken Elwood, rips in the canvas cover showed that the men "had tried desperately to tear the top off the container and get out. It's horrific to think what happened to these people."⁸⁷ The survivors were immediately hospitalized.⁸⁸

The next day, eighteen more Chinese stowaways were found on another ship docking in Seattle.⁸⁹ Since 1998, officials have detained 203 Chinese migrants who were smuggled in cargo containers to the U.S. and Canada.⁹⁰ How many more escape

County Jail in Oregon "were ordered to switch bunks and did not understand [so] guards knocked them to the ground and handcuffed them, bloodying one. *Id.* Those two women's fear, humiliation and wretchedness increased when they were placed on a punishment regimen for the next four weeks . . .". *Id.*

⁸¹ See Pistone, *supra* note 76, at 204-11. People detained by the INS in county jails are often mixed in with criminal inmates. *Id.*

⁸² See Kristof, *supra* note 80, at 7. As a former correspondent based in China, Kristof reflects:

I have hectored so many Chinese officials about the importance of a justice system that treats people with compassion that I still feel deeply let down by the fate of these women . . . It would have been nice if Americans could have adhered to the standards to which they hold China.

Id.

⁸³ Sam Howe Verhovek, *Deadly Choice of Stowaways: Ship Containers*, N.Y. TIMES, Jan. 12, 2000, at A1.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at A19.

⁸⁸ *Id.* The local Medical Examiner's Office later confirmed that the death of the three young men was caused by severe malnutrition and dehydration. See Sunde, *supra* note 27, at B1.

⁸⁹ Kim Murphy, *Smuggling of Chinese Ends in a Box of Death, Squalor*, L.A. TIMES, Jan. 12, 2000, at A1.

⁹⁰ *Id.*

detection is unknown.⁹¹ The INS maintains that this new smuggling method is proof of the Service's success in earlier crack downs on the mass transit of migrants in smuggling ships.⁹² As INS spokesperson Virginia C. Kice explains, "Chinese smuggling has been on our radar screen for years. This is the smugglers adjusting their strategy."⁹³

The new smuggling method poses a serious challenge to U.S. authorities.⁹⁴ One cargo ship may carry thousands of containers and searching for those that hide stowaways can be futile.⁹⁵ In addition, the stowaways are unaccompanied by snakeheads, leaving no link to the leaders of the smuggling networks.⁹⁶ Although shipping companies and their crews often have no idea that they are transporting human cargo,⁹⁷ the INS seeks to hold these companies responsible.⁹⁸ Because all of the ships containing stowaways were loaded in Hong Kong, American officials secured a promise from Hong Kong authorities to crack down on container smuggling.⁹⁹ Canada has also stepped up its interdiction efforts and has taken a harder line on smuggled migrants.¹⁰⁰

⁹¹ Susan Gilmore, *INS Hasn't Kept Track of Earlier Stowaways*, SEATTLE TIMES, Jan. 12, 2000, at A1.

⁹² U.S. Immigration Tightens Noose Around Chinese Immigrant Smugglers, AGENCE FRANCE PRESSE, Jan. 4, 2000, available in LEXIS, News Group File.

⁹³ *Id.*

⁹⁴ Murphy, *supra* note 89, at A16.

⁹⁵ *Id.* Jim Stewart, of the Orient Overseas Container Line, explained that there may be 3,000 containers on a ship with only 15 crew members: "We do not routinely inspect what's inside the containers. It's physically impossible, unless we get a tip." Gilmore, *supra* note 91, at A18.

⁹⁶ Barbara Whitaker, *Immigrant Smuggling Draws New Attention*, N.Y. TIMES, Jan. 4, 2000, at A11.

⁹⁷ Verhovek, *supra* note 83, at A20.

⁹⁸ Gilmore, *supra* note 91, at A1. By law, shippers who transport stowaways can be fined \$2,000 for each stowaway, be forced to pay for the detention and deportation of the migrants, and their ships may be seized by the government. *Id.*

⁹⁹ Politics played a large part in Hong Kong's pronouncement. Two of the ships were owned by the Orient Overseas Container Line, a shipping company controlled by Tung Chee-hwa, Hong Kong's Chief Executive. Mark Landler, *A Crackdown is Promised by Hong Kong*, N.Y. TIMES, Jan. 12, 2000, at A20. Hong Kong's promise may be impossible to fulfill because carriers have no authority to open sealed containers. Bill Mongelluzzo, *Lines Face Higher Costs, Possible Delays*, JOURNAL OF COMMERCE, Jan. 14, 2000, at 1.

¹⁰⁰ See James Brooke, *Vancouver is Astir Over Chinese Abuse of Immigration Law*, N.Y. TIMES, Aug. 29, 1999, at A8. In Canada the issue of smuggled migrants from mainland China has evoked class-based resentment. Some infuriated Chinese-Canadians

Smugglers also use commercial airlines to transport their "customers" and evade the Coast Guard and Border Patrol.¹⁰¹ Chinese smugglers began flying migrants into the United States in the 1970s.¹⁰² Besides increased comfort, flying has several advantages over smuggling ships.¹⁰³ Migrants traveling alone or in pairs on international flights are less likely to draw attention and be caught by immigration officials at the airport.¹⁰⁴ However, air travel is often more complex and lengthy than travel by land or sea. Boarding an international flight requires travel documents, and smugglers will demand a higher down payment from their customers to secure fake passports and visas.¹⁰⁵ Emigrants may then wait over two months before those documents are ready.¹⁰⁶ Depending on the quality of their snakeheads and forged travel papers, Chinese emigrants may spend from under

accuse the migrants of abusing Canada's asylum law and "water[ing] down the community." *Id.*; see also James Brooke, *Canada is Taking a Tougher Line With Illegal Chinese Migrants*, N.Y. TIMES, Sept. 30, 1999, at A14.

¹⁰¹ Myers, *supra* note 31, at 111. The prevalence of this method is confirmed by the author's own observations in Illinois. Of the approximately 100 Chinese INS detainees the author spoke with at the DuPage Co. Jail, all had arrived by plane and were detained by officials at the airport and then taken into INS custody. Most of the detainees arrived with fake documents or no documents at all. Some detainees were instructed by their snakeheads to tear up their documents and flush them down the toilet during the flight before they landed in the United States. Author's Discussions with Chinese Citizens from Fujian Province (Sept. 8, Oct. 6, Nov. 3, and Dec. 17, 1999).

¹⁰² Myers refers to this as the *feixing houmen* (flying back door) period. Myers, *supra* note 31, at 97-100. Myers divides the history of Fujianese migration to the United States into four periods. *Id.* From the 15th to the 19th centuries, Chinese men from Fujian and Guangzhou were taken abroad as "coolies." *Id.* After passage of the Chinese Exclusion Act in 1873, Fujianese could only come to the United States through the "back door," working on merchant ships bound for the United States and jumping ship upon arrival. *Id.* In the 1970s, the "seed population" of Fujianese men had established themselves in the U.S. and had enough money to send for their wives and children. *Id.* During this period, Fujianese could flee Maoist China as "refugees" to Hong Kong where they could get identity and travel documents. *Id.* The modern era of Chinese smuggling began in 1986 with the passage of the Immigration Reform and Control Act (IRCA). Pub. L. 99-603, 100 Stat. 3359. IRCA granted amnesty to undocumented Fujianese and allowed them to get employment authorization, temporary residence, and the rights to travel and permanent residence. Myers, *supra* note 31, at 111-15.

¹⁰³ *Id.* at 114-15.

¹⁰⁴ *Id.*

¹⁰⁵ CHIN, *supra* note 18, at 49-50.

¹⁰⁶ *Id.* at 50.

two weeks to over a month in transit and may change planes in several different countries.¹⁰⁷

Whether they arrive by land, sea or air, Chinese migrants apprehended by the INS can claim they are fleeing persecution due to China's "one child policy" (as instructed by their smugglers), and escape immediate deportation by seeking asylum.¹⁰⁸ With overcrowded detention facilities, the INS may release detainees on parole pending the resolution of their asylum cases.¹⁰⁹ Lawyers hired by snakeheads often file frivolous asylum applications simply to get their "clients" out on parole.¹¹⁰ Once released, the migrants can slip into established Chinese communities and escape further detection.¹¹¹

III. CURRENT APPROACHES TO THE CHINESE HUMAN SMUGGLING PROBLEM

Human smuggling is a business fueled by market forces.¹¹² In China there is a vast "supply" of people ready and willing to buy smuggling services and the U.S. has a steady demand for their illegally cheap labor.¹¹³ To stem this tide of illicit smuggling, the U.S. has turned to domestic criminal and immigration law and worked with the international community to address the problem on a global level. Unfortunately, these efforts are largely reactive and do not address the source of the problem. Successful measures to combat human smuggling from Fujian

¹⁰⁷ For example, Chin recounts the story of one Chinese man who flew from Fujian to Kunming province in southwestern China. *Id.* at 59-60. He then climbed the mountains through the border into Burma (Myanmar) and stayed there for 20 days. *Id.* The guides next put him on a boat to Thailand where he stayed in Bangkok for over a month. *Id.* Given a fake Chinese passport and visa, he flew to Yugoslavia, but was caught at the airport and deported back to Thailand. *Id.* He then flew to Czechoslovakia using a "photo-sub" Malaysian passport and took a train to Germany. *Id.* From Germany he flew to New York with a fake Japanese passport. *Id.*

¹⁰⁸ Smith, *supra* note 6, at 16; CHIN, *supra* note 18, at 156-57, 162. See also *supra* Part V-B.

¹⁰⁹ Mason, *supra* note 74, at 9; Gilmore, *supra* note 91, at A1.

¹¹⁰ See CHIN, *supra* note 18, at 99. On September 20, 2000, Robert E. Porges, a lawyer in New York City, was indicted for aiding smugglers. Susan Sachs, *Immigrant Smuggling: As in Any Big Business, a Good Lawyer Helps*, N.Y. TIMES, Sept. 23, 2000 at A13. Federal prosecutors charged the Porges law firm as a racketeering enterprise engaged in the trafficking of Chinese migrants from Fujian. *Id.*

¹¹¹ See *supra* note 18 and accompanying text.

¹¹² KWONG, *supra* note 1, at 7-10.

¹¹³ *Id.*

must proactively address the socioeconomic forces driving Chinese migration.

A. DOMESTIC LAW AND INTERNATIONAL AGREEMENTS

Current law in the United States imposes criminal penalties on anyone who knowingly brings or attempts to bring an alien into the U.S.¹¹⁴ It is also a crime to knowingly or recklessly transport or harbor illegal aliens within the United States.¹¹⁵ These provisions also punish anyone who "encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law."¹¹⁶

Anyone convicted of these crimes will be fined and/or imprisoned for up to five years.¹¹⁷ If the alien smuggling is done "for the purpose of commercial advantage or private financial gain," the maximum sentence is ten years.¹¹⁸ If the smuggler "causes serious bodily injury . . . to, or places in jeopardy the life of, any person," the sentence is capped at twenty years.¹¹⁹ If a death results, the smuggler shall be "punished by death or imprisoned for any term of years or for life, fined . . . or both."¹²⁰

Harsh as they appear, these sentences do little to deter Chinese smugglers.¹²¹ Those caught are usually little snakeheads or enforcers who are dispensable to the heads of the organizations.¹²² Fines are equally ineffective. A fine of a few thousand dollars is nothing compared to a smuggler's potential profits.¹²³

In 1996 Congress designated alien smuggling and immigration-related visa fraud as RICO predicate offenses.¹²⁴ Prosecu-

¹¹⁴ 8 U.S.C.A. § 1324(a)(1)(A)(i) (1999).

¹¹⁵ *Id.* § 1324(a)(1)(A)(ii-iii).

¹¹⁶ *Id.* § 1324(a)(1)(A)(iv).

¹¹⁷ *Id.* § 1324(a)(1)(B)(ii).

¹¹⁸ *Id.* § 1324(a)(1)(B)(i).

¹¹⁹ *Id.* § 1324(a)(1)(B)(iii).

¹²⁰ *Id.* § 1324(a)(1)(B)(iv).

¹²¹ See Myers, *supra* note 31, at 110-14.

¹²² *Id.*

¹²³ Under the United States Sentencing Commission guidelines, the minimum fine for smuggling one-to-five aliens is \$3,000, a negligible sum compared to a potential \$47,000 profit. *Statements on Introduced Bills and Joint Resolutions Before the Senate Comm. on the Judiciary*, 106th Cong. 2 (Sept. 27, 1999) (statement of Sen. Abraham on S. 1644) [hereinafter Statement of Sen. Abraham].

¹²⁴ Federal Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. § 1961(1)(F) (1999); see also Brownfield Statement, *supra* note 5.

tions under RICO attack the leaders of smuggling enterprises, rather than just the middlemen caught at the scene.¹²⁵ If prosecutors can secure at least two convictions for alien-smuggling related crimes that are linked to the same network, they will have the predicate offenses necessary to prosecute under RICO.¹²⁶ Violations of RICO are federal crimes carrying stiff penalties: fines or imprisonment up to twenty years.¹²⁷

Combating human smuggling clearly motivated Congress' action. During the deliberations on the House bill, Representative Kennedy explained that:

In the past couple of years we have heard about boatloads of Chinese immigrants being brought to the United States under horrifying conditions—weeks with no clean water, minimal food, and unsanitary conditions beyond imagination. The gangs responsible for smuggling these people into the United States then force them into slave labor, working 12- to 14-hour days, seven days a week in gruesome conditions just to pay off the \$30,000 to \$40,000 debt they incurred. These horrible abuses at the hands of people willing to profit from the trade of human beings must be stopped.¹²⁸

Representative McCollum also invoked the image of abused Chinese migrants to support the legislation:

Of particular concern is the recent increase in alien smuggling crime. Organized crime rings in this country, with ties to others abroad, have developed to prey upon illegal immigrants These criminals extort large sums from these illegal immigrants in return for passage to the United States and for the fraudulent documents they need to obtain entry. . . . In some cases, such as the "Golden Venture" in New York City, the attempt to smuggle these illegals goes tragically wrong and people die.¹²⁹

RICO may be a powerful weapon to combat smuggling networks. Yet despite a few publicized successes,¹³⁰ it is unclear if the threat of prosecution under RICO has substantially deterred

¹²⁵ 141 CONG. REC. 4395-96 (1995) (statement of Representative Kennedy).

¹²⁶ *Id.*

¹²⁷ 18 U.S.C.A. § 1963(a) (1999).

¹²⁸ 141 CONG. REC. 4395-96 (1995). *But see supra* note 29 and accompanying text.

¹²⁹ 141 CONG. REC. at 4394.

¹³⁰ *See supra* Part II-B.

smuggling enterprises or simply forced their operations further underground.¹³¹

Document fraud is another large branch of the human smuggling business.¹³² The INS regularly trains its inspectors to spot fraudulent passports and visas.¹³³ Yet smugglers now instruct their "customers" to dispose of their fake travel documents during the flight and coach them on how to present an asylum claim upon arrival in the U.S.¹³⁴

The United States has also participated in several United Nations efforts to address the problem of transnational trafficking in human beings.¹³⁵ However, these resolutions focus on the traffic of women and children in indentured servitude or prostitution, not on human smuggling as a form of illegal immigration.¹³⁶ Combating the transnational problem of human smuggling requires global cooperation, but international efforts are frustrated by local corruption in transit countries and the lack of extradition treaties.¹³⁷ Even with the cooperation of

¹³¹ See Brownfield Statement, *supra* note 5.

¹³² Smith, *supra* note 6, at 7-8. See also, Amy McCallen, Note, *Non-Immigration Visa Fraud: Proposals to End the Misuse of the L Visa by Transnational Criminal Organizations as a Method of Illegal Immigration*, 32 VAND. J. TRANSNAT'L L. 237, 239 (1999). The L-1 Non-Immigrant Visa allows international companies with branches in the U.S. to transfer employees to the U.S. McCallen reports that in some Chinese provinces "between eighty and ninety percent of all L visa applications are fraudulent, and many are from companies that only exist on paper." *Id.*

¹³³ Brownfield Statement, *supra* note 5 ("[b]etween November 1996 and August 1998, the Department of State and the Immigration and Naturalization Service conducted 14 international immigration or training development courses for approximately 500 participants from 22 countries."). See also KWONG, *supra* note 1, at 84.

¹³⁴ Myers, *supra* note 31, at 115; Kenneth Yates, *Canada's Growing role as a Human Smuggling Destination and Corridor to the United States*, in HUMAN SMUGGLING, *supra* note 6, at 159 (discussing "coaching"). See also *supra* notes 263-66 and accompanying text.

¹³⁵ See Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, U.N. ESCOR, 3d Sess., U.N. Doc. E/CN.15/1999/5 ¶¶ 28-29 (1999); Resolution on Transnational Organized Crime, G.A. Res. 111, U.N. GAOR, 53d Sess., Agenda Item 101, ¶ 10, U.N. Doc. A/RES/53/111 (1999); International Cooperation in Combating Transnational Crime, Commission on Crime Prevention and Criminal Justice, Report of the Secretary General, U.N. ESCOR, 7th Sess., Agenda Item 6(a), at 4, U.N. Doc. E/CN.15/1998/6 (1998); Resolutions on Measures for Prevention of the Smuggling of Aliens, G.A. Res. 62, U.N. GAOR, 51st Sess., Agenda Item 101, U.N. Doc. A/RES/51/62 (1997).

¹³⁶ See, e.g., Resolution on the Traffic in Women and Girls, G.A. Res. 116, U.N. GAOR, 53d Sess., Agenda Item 103, U.N. Doc. A/RES/53/116 (1999).

¹³⁷ See CHIN, *supra* note 18, at 157-58. The U.S. does not have extradition treaties with China, Taiwan or Thailand. *Id.*

China's central government, the prospects of stopping the human smuggling business are dim.¹³⁸ Local Chinese officials often encourage the smuggling business because it supports their districts' economies.¹³⁹ As discussed *supra* in Part II.A, this rampant corruption prevents the national government from controlling local officials.¹⁴⁰

It is also extremely difficult for the INS to find informants within the "tightly knit and tightlipped gangs."¹⁴¹ Most of the smuggled migrants distrust government officials and fear reprisal from the smugglers if they reveal anything to the INS.¹⁴² When American officials do succeed in apprehending stowaways and smugglers, it may have little to do with their own intelligence sources. Since Chinese migrants began to arrive smuggled in cargo containers, American officials caught some of the migrants only by virtue of anonymous tips from Hong Kong.¹⁴³ Some experts believe that rival smuggling rings are informing the INS in efforts to drive each other out of business.¹⁴⁴

B. UNDERSTANDING THE SOCIOECONOMIC FORCES

Criminal sanctions and tougher enforcement of immigration laws are reactive defenses against the Chinese migrant smuggling business. History has shown that the Chinese networks are extremely adept at changing their methods to evade U.S. authorities.¹⁴⁵ The horrors of the *Golden Venture*, the deadly cargo containers of *Cape May*, and the threat of indefinite detention have all failed to deter Chinese nationals from paying smugglers to bring them to the United States.¹⁴⁶ Some commentators argue that stricter labor laws must hold employers accountable for exploiting illegal immigrants.¹⁴⁷ However, do-

¹³⁸ Myers, *supra* note 31, at 125.

¹³⁹ *Id.*

¹⁴⁰ See discussion *supra* notes 41-52 and accompanying text.

¹⁴¹ Gribbin, *supra* note 4, at A1.

¹⁴² *Id.*

¹⁴³ Michael J. Martinez, *Chinese Stowaways Die in Cargo Box: More Immigrants Hiding in Containers Aboard Ships*, SAN DIEGO UNION-TRIB., Jan. 12, 2000, at A2.

¹⁴⁴ *Id.*

¹⁴⁵ Gribbin, *supra* note 4, at A1.

¹⁴⁶ See Murphy, *supra* note 89, at A1.

¹⁴⁷ See Foo, *supra* note 4, at 2182. See also Roshani M. Gunewardene, *Criminalization of Employer Fraud Against Alien Employees? A National Priority*, 25 NEW ENG. L. REV. 795 (1991).

mestic labor laws alone cannot stop the flow of migrants seeking a better life in this country.¹⁴⁸

After Deng Xiaoping instituted market reforms in the early 1980s, China witnessed unprecedented economic growth.¹⁴⁹ Until the mid 1980s, this new-found wealth was distributed fairly equally among all sectors of Chinese society.¹⁵⁰ Yet the last decade has left much of the country behind.¹⁵¹ China's welfare state is dissolving.¹⁵² Dismantled state-owned enterprises have left thousands of factory workers without jobs¹⁵³ and peasant farmers have been displaced by an increasingly modernized agricultural industry.¹⁵⁴ In short, conditions are ripe for emigration.¹⁵⁵

Migration within China is predominately from rural to urban areas where migrants fill the menial jobs that urbanites shun.¹⁵⁶ Unlike internal Chinese migrants, current emigrants from Fujian are not driven overseas by poverty, for Fujian is one of China's wealthiest provinces.¹⁵⁷ The Fujianese are simply the best situated to take advantage of existing networks to seek even better fortunes abroad.¹⁵⁸ The huge gap in the standard of living between China and the United States is the most obvious force behind Chinese migration to the U.S.¹⁵⁹ Until that gap is

¹⁴⁸ Kim Murphy, *Illegal Chinese Immigration: Misery on the High Seas*, AUSTIN AMERICAN-STATESMAN, Jan. 12, 2000, at A2.

¹⁴⁹ Erik Eckholm, *In China's Boom, Rural Poor Feel a Widening Gap*, N.Y. TIMES, Oct. 9, 1999, at A3.

¹⁵⁰ *Id.*

¹⁵¹ According to the World Bank, China is now one of the most unequal countries in Asia. *Id.* The gaps between urban and rural areas, the developed coast and the isolated interior, and the upper and lower classes in the cities have all widened and 124 million Chinese live below the World Bank's poverty line of one dollar per day. *Id.*

¹⁵² *Id.*

¹⁵³ Goldstone, *supra* note 42, at 61. See also Erik Eckholm, *Caught Between Eras: China's Factory Workers*, N.Y. TIMES, Nov. 18, 1999, at A3.

¹⁵⁴ Goldstone, *supra* note 42, at 60-61.

¹⁵⁵ See *id.* at 58-62.

¹⁵⁶ Erik Eckholm, *For Chinese Rural Migrants, An Education Wall*, N.Y. TIMES, Dec. 12, 1999, at A1.

¹⁵⁷ Hood, *supra* note 32, at 81; see also, Peter Hessler, *It's the 'Rich' Chinese Who Flee to U.S.*, SEATTLE POST-INTELLIGENCER, Feb. 10, 2000, at A1.

¹⁵⁸ Hood, *supra* note 32, at 91; Hessler, *supra* note 157, at A1.

¹⁵⁹ Hood, *supra* note 32, at 82. Hood quotes Chen Yuan, a Fuzhou-based entrepreneur:

When the income differential between China and the United States is 1:2 rather than 1:15 or 1:20, that is when Fuzhouese will stop going and even start to come back. . . . Look at

narrowed, Chinese people will keep emigrating and the underground American economy will continue to exploit their labor.¹⁶⁰

The American reaction to the Chinese smuggling crisis reflects the vast economic and cultural divide between the two countries.¹⁶¹ Under U.S. penal law, alien smuggling is a crime, but from a Fujianese perspective the snakeheads are businessmen providing a needed service.¹⁶² Similarly, while visa and passport fraud are criminal violations of American law, Fujianese migrants view doctored passports and fake visas as tickets to the U.S.¹⁶³ Living in the U.S. without legal status may be a deportable offense, but to many Chinese migrants being caught by the INS, claiming asylum and getting released on parole with work-authorization is the next best thing to owning a "green card."¹⁶⁴

To American eyes the sights are shocking—migrants struggling to shore from a sinking ship or emaciated men crawling from a dank cargo container.¹⁶⁵ The suffering a person has to endure on such journeys strikes us as inhumane.¹⁶⁶ Yet for many

it this way—in terms of income potential for the average worker, one year in the United States equals 15 Chinese years.

Id.

¹⁶⁰ KWONG, *supra* note 1, at 7, 10. See also, Myers, *supra* note 31, at 124-25.

¹⁶¹ See Gribbin, *supra* note 4, at A1 ("[M]any Americans misunderstand the sophistication and power of the smugglers and the motivations of the people they smuggle.").

¹⁶² "None of these people see emigrating illegally to another country as a crime, the way we do." *Id.* (quoting INS official Ken Elwood). Some Chinese migrants sign detailed contracts with their smugglers before leaving China. Chin, *supra* note 13, at 192-93 n.36. The first provision of one contract states:

1. Both parties concur that the total fee for Party A to go to the United States is \$30,000. Party A will provide Party B with a copy of his/her identification card and an application fee of \$1,000, and with an additional \$2,000 after travel documents are secured (The \$3,000 will be deducted from the \$30,000 total fee after Party A arrives in the United States). Party A will also present Party B with the address and phone number of a relative in the United States who will serve as the sponsor.

Id.

¹⁶³ See *supra* notes 52, 104-06 and accompanying text.

¹⁶⁴ Chinese being held in detention by the INS refer to the work-authorization permits as "work cards" (*gong ka*) in a terminology that echoes the term "green card" (*lu ka*). Author's Discussions with INS Detainees from Fujian Province, *supra* note 101.

¹⁶⁵ See *supra* notes 57-62, 84-88 and accompanying text.

¹⁶⁶ See, e.g., *supra* note 125 and accompanying text (In the words of Representative Kennedy, such suffering is "horrifying" and "beyond imagination.").

Chinese emigrants, these hardships are a small price to pay for the wealth to be gained by working in the United States.¹⁶⁷

Chinese immigrants are not daunted by the harsh working conditions they face on arrival. American workers long empowered by union representation and the right to collective bargaining see the fourteen-hour work days of many Chinese migrants as blatantly unjust and illegal.¹⁶⁸ But to the Chinese worker, such labor is the path to wealth unobtainable in their native country.¹⁶⁹ Most Fujianese migrants face immense social pressure to endure tireless labor on behalf of their families.¹⁷⁰ Even after their debts are paid and they become disappointed and frustrated by life in the U.S., these immigrants still feel compelled to stay.¹⁷¹

Given these socioeconomic factors, nothing short of gradual redistribution of wealth can stop the tide of illegal Chinese mi-

¹⁶⁷ Verhovek, *supra* note 84, at A1, A20. One man from Fujian said that migrants' deaths aboard the *Cape May* would not stop him from risking the journey himself: "For the money, I think it's worth it. If you're caught, you can go back again. Staying in China is useless, we won't make any money here." *Illegal Immigrants Feel Getting to U.S. Worth Risk and Money*, HONG KONG STANDARD, Jan. 13, 2000, available in LEXIS, Emerging Markets Datafile.

¹⁶⁸ See Steven Greenhouse, *Four Companies Gain Accord in Labor Suit*, N.Y. TIMES, Aug. 10, 1999, at A5. In general, economic migrants to the United States are resented and blamed by organized labor groups for depressing wages and lowering working conditions. See Liao, *supra* note 4, at 491-94. In February, 2000, the AFL-CIO announced a dramatic shift in their policy by supporting amnesty for illegal immigrants. Steven Greenhouse, *Labor, in Switch, Urges Amnesty for Illegal Immigrants*, N.Y. TIMES, Feb. 17, 2000, at A26. In 1985, the AFL-CIO pushed for legislation that imposed sanctions on employers who hired illegal immigrants. *Id.* Labor leaders changed their position when they realized that the sanctions had failed to stop employers from exploiting workers without legal status. *Id.* These employers prevent unionization of their employees by threatening to report them to immigration officials. *Id.*

¹⁶⁹ Smith, *supra* note 6, at 13.

¹⁷⁰ See CHIN, *supra* note 18, at 9-16, 21-22. In villages where almost every family has at least one relative in the United States, many people believe that going to America is "the only way that they and their families can dramatically change their economic and social status." *Id.* at 10.

¹⁷¹ *Id.* at 113-14. In the words of one immigrant:

Work in America is tough. I work in a restaurant for more than twelve hours a day and rarely have a chance to see the sunlight. It's like I am a cow or a horse. That's why America for me is like a prison. Besides, I am all by myself here, with no family or relatives. . . . This is a utilitarian society where people have no compassion.

Id.

gration from Fujian to the United States.¹⁷² However, if American officials address the socioeconomic factors fueling the Chinese human trade, they may be able to prevent further abuse of U.S. law by smugglers and their victims.¹⁷³ Reforming U.S. refugee policy is a crucial starting point.

IV. THE 1996 AMENDMENT TO THE U.S. STATUTORY DEFINITION OF "REFUGEE": OPPOSITION TO "COERCIVE POPULATION CONTROL PROGRAMS" AS A BASIS FOR POLITICAL ASYLUM

People arriving in the United States without valid travel or immigration documents are eligible for asylum only if they qualify as refugees under the Immigration and Nationality Act.¹⁷⁴ That Act defines a "refugee" as any person who is unable or unwilling to return to his or her country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."¹⁷⁵ None of these five categories for asylum are further defined in the Act and asylum cases have traditionally been determined on the particular facts and merits of each individual's situation.¹⁷⁶

However, in 1996 the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amended the definition of refugee by adding the following provision:

For purposes of determinations under this chapter, 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

¹⁷² See *supra* notes 149-164 and accompanying text. Although it may take decades, the wealth earned by Fujianese migrants in the United States that is sent back to their families in China, if invested in the local economy, may eventually narrow the gap and render further emigration from Fujian undesirable. *Id.*

¹⁷³ CHIN, *supra* note 18, at 133.

¹⁷⁴ 8 U.S.C.A. § 1101(a)(42) (1999).

¹⁷⁵ *Id.*

¹⁷⁶ See generally Dirk Vanheule, *United States*, in WHO IS A REFUGEE? A COMPARATIVE CASE LAW STUDY (Jean-Yves Carlier et al. eds., 1997).

failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.¹⁷⁷

This amendment allows thousands of Chinese migrants to claim political asylum upon their arrival in the United States and possibly be released on parole pending their hearing before an immigration judge.¹⁷⁸ If released, they may never return to court and will simply vanish into Chinese migrant communities in the U.S.¹⁷⁹ The Amendment thus acts as a safety net: smugglers assure the migrants that if they are apprehended on arrival they can claim asylum and still be released.¹⁸⁰ Although the majority of these people are economic migrants, not refugees, the Amendment grants them *prima facie* eligibility for political asylum.¹⁸¹ This abuse of the law stems, in part, from the Amendment's authors' basic misunderstanding of China's family planning programs.¹⁸²

¹⁷⁷ 8 U.S.C.A. § 1101(a)(42) (1999).

¹⁷⁸ The INS reports that 3,436 Chinese were granted port-of-entry parole in fiscal year 1996, while 5,301 Chinese received this parole in fiscal year 1997. People who arrive at a port-of-entry without proper documentation are subject to "expedited removal" under IIRIRA unless they indicate that they seek asylum by expressing a "credible fear of persecution." U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS: USE OF THE ATTORNEY GENERAL'S PAROLE AUTHORITY UNDER THE IMMIGRATION AND NATIONALITY ACT (1999).

¹⁷⁹ Gilmore, *supra* note 91, at A1 (according to one INS spokesperson, "The ones who disappear are those who come here for economic reasons, which is not a legitimate asylum claim . . . Someone who's an economic migrant and feels he won't get asylum is not as likely to stay around.")

¹⁸⁰ Those migrants that are detained and not granted parole are more likely to be deported back to China unless they have strong asylum claims. *Id.* Chinese migrants released on bond are considered less of a priority than those in custody and their hearings are placed further down the court calendar. *Id.*

¹⁸¹ The United Nations High Commissioner for Refugees distinguishes economic migrants from refugees:

A migrant is a person who . . . voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee.

OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 62 (1992). However, the UNHCR recognizes that in many situations the distinction is blurred and if economic deprivation is imposed by state discrimination, those persecuted may qualify as refugees. *Id.* ¶¶ 63-64. See also discussion *infra* notes 248-57 and accompanying text.

¹⁸² See discussion *infra* notes 200-47 and accompanying text.

A. FAMILY PLANNING PROGRAMS IN CHINA

As the most populous nation in the world, China supports 20% of the world's total population on only 7% of the world's arable land.¹⁸³ China's current population is over 1.2 billion and is expected to peak at 1.6 billion by the year 2050.¹⁸⁴ After two decades of encouraging its citizens to have many children to build a strong and prosperous socialist state, the Chinese government faced an impending population explosion in the 1970s.¹⁸⁵ Throughout that decade, the government tried to slow population growth by encouraging people to marry later, wait longer in between children, and have fewer children.¹⁸⁶

In 1979, the government began promoting the "one couple, one child" program.¹⁸⁷ Contrary to popular belief in the United States, this "policy" has never been uniformly administered across China.¹⁸⁸ Although urban families are usually limited to one child, those couples who are both only children themselves may have two children.¹⁸⁹ Rural couples whose first child is a girl may have a second child after a certain amount of time has passed.¹⁹⁰ Ethnic minorities may have two children per couple and minorities in the border regions may have three children.¹⁹¹

¹⁸³ Gerrie Zhang, *United States Asylum Policy and Population Control in the People's Republic of China*, 18 Hous. J. Int'l L. 557, 567 (1996).

¹⁸⁴ RESEARCH DIRECTORATE, IMMIGRATION AND REFUGEE BOARD, OTTAWA, CANADA, CHINA: ONE CHILD POLICY UPDATE, June 1999, at 2. [hereinafter CHINA UPDATE]; BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, 1999 CHINA COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 23 (2000) [hereinafter CHINA COUNTRY REPORT].

¹⁸⁵ Zhang, *supra* note 183, at 561.

¹⁸⁶ This propaganda campaign was known as *wan, xi, shao* (later, longer, fewer). *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ CHINA UPDATE, *supra* note 184, at 3. Indeed, the Chinese government insists that the term "one child policy" is actually a misnomer. *Id.* The current fertility rate of 2.1 births per woman clearly shows that "one-child policies" are not uniformly enforced across China. CHINA COUNTRY REPORT, *supra* note 184, at 23.

¹⁸⁹ CHINA UPDATE, *supra* note 184, at 3; CHINA COUNTRY REPORT, *supra* note 184, at 23.

¹⁹⁰ CHINA UPDATE, *supra* note 184, at 3; CHINA COUNTRY REPORT, *supra* note 184, at 23.

¹⁹¹ This exception is allowed because many minorities live in remote, sparsely-populated areas of China. The Chinese government maintains a policy of preferential treatment for its 108 million ethnic minorities in family planning, marriage regulations, university admissions, and employment. CHINA COUNTRY REPORT, *supra* note 184, at 54.

In some remote areas, families may have up to four children and in places like rural Tibet there are practically no limits.¹⁹²

China's "policy" has been attacked as a violation of human rights.¹⁹³ Such criticism ignores the fact that abusive enforcement of the policy is attributable to corrupt local officials, not the country as a whole.¹⁹⁴ Indeed, Chinese officials respond to such criticism by explaining that the goal of the policy is to stem population growth through birth control and education, not coercive sterilization.¹⁹⁵ More importantly, uncontrolled population growth in China would lead to severe violations of the fundamental human rights to food and shelter.¹⁹⁶ Yet in the

¹⁹² CHINA UPDATE, *supra* note 184, at 3; CHINA COUNTRY REPORT, *supra* note 184, at 23.

¹⁹³ See, e.g., April Adell, Note, *Fear of Persecution for Opposition to Violations of the International Human Right to Found a Family as a Legal Entitlement to Asylum for Chinese Refugees*, 24 HOFSTRA L. REV. 789 (1996).

¹⁹⁴ Forced abortion and sterilization continue to occur in some parts of China. CHINA UPDATE, *supra* note 184, at 4-5. However, the enforcement of family planning programs varies greatly throughout the country. *Id.* The most popular sanction is steep fines rather than coercive sterilization. CHINA COUNTRY REPORT, *supra* note 184, at 23-24.

¹⁹⁵ Chinese law forbids the use of force to compel abortion or sterilization. CHINA COUNTRY REPORT, *supra* note 184, at 24. In 1998, Chinese officials admitted that abuses of the policy had occurred and they released information on local leaders who had been punished for coercively enforcing family planning policies. China has also launched a four-year project with the United Nations Population Fund to address family planning issues through greater education and economic development. *Id.* at 25.

¹⁹⁶ China's infrastructure is already overburdened and many experts believe that if China does not control population growth, much of the country will sink deeper into poverty. See Ling Li, *Mass Migration within China and Implications for Chinese Emigration*, in HUMAN SMUGGLING: CHINESE MIGRANT TRAFFICKING AND THE CHALLENGE TO AMERICA'S IMMIGRATION TRADITION, *supra* note 6, at 33. But see Amartya Sen, *Fertility and Coercion*, 63 U. CHI. L. REV. 1035 (1996). Sen cautions against justifying coercive restriction of reproductive rights for fear of overpopulation without empirical proof of imminent danger. Sen argues that lower fertility rates may be achieved through economic and social development without resorting to coercive population control. *Id.* at 1049. Sen speculates that China's success in lowering its fertility rate may primarily be due, not to family planning policies, but to the expansion of educational and occupational opportunities for Chinese women. *Id.* at 1055. Sen mistakenly conflates China's family planning policies with coercive sterilization and abortion. *Id.* at 1054. Again, one must distinguish between China's national policies to stem population growth and the unfortunate exceptional abuse of those policies through coercive enforcement. Once that distinction is recognized, there is no reason why China's family planning programs cannot be reconciled with Sen's view of economic and social development. See Amartya Sen, *Population and Gender Equity*, THE NATION, July 24, 2000, at 16.

early 1990s, many Americans believed that shocking stories of Chinese women forced to undergo abortions were the norm, rather than the exception.¹⁹⁷ American legislators soon amended the U.S. refugee definition to specifically address the "China problem."¹⁹⁸ As revealed by its history, that Amendment injected cultural misperceptions into an allegedly neutral law that has been, and will continue to be, abused by human smuggling networks.¹⁹⁹

B. THE POLITICAL AND LEGAL HISTORY OF THE AMENDMENT

The American policy regarding Chinese asylum claims based on the "one child policy" has a controversial and inconsistent history.²⁰⁰ In 1988, then-Attorney General Edwin Meese III disclosed new guidelines for asylum claims based on opposition to China's family planning policies.²⁰¹ Meese directed INS asylum officers to give special consideration to Chinese who "express[ed] a fear of persecution upon return to the PRC because they refus[ed] to abort a pregnancy or resist[ed] sterilization.... [I]t may be appropriate to view such refusal as an act of political defiance sufficient to establish refugee status."²⁰² Meese announced these guidelines at a press conference where he granted asylum to three Chinese couples in deportation proceedings.²⁰³ The couples all claimed that they feared persecution if forced to return to China because they had violated the one child policy by conceiving children while in the United States.²⁰⁴

A number of scholars criticize the Western bias inherent in much of international human rights law that elevates civil and political rights above the basic rights to food, shelter and personal security. See, e.g., Makau Wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 593 (1996). See also *infra* notes 235-47 and accompanying text.

¹⁹⁷ Zhang, *supra* note 183, at 580-84.

¹⁹⁸ See *infra* Part IV-B.

¹⁹⁹ See CHIN, *supra* note 18, at 156-57. ("The political asylum program clearly needs to be reformed; as it stands, it is an open invitation to exploitation . . .").

²⁰⁰ *Id.* at 156; see also Jana Mason, *United States Asylum Law and China's One Child Policy*, REFUGEE REPORTS, Aug./Sept. 1999, at 6-7.

²⁰¹ Zhang, *supra* note 183, at 578.

²⁰² Wang v. Reno, 862 F. Supp. 801, 804 n.4 (E.D.N.Y. 1994), (quoting from the Memorandum from Edwin Meese III, Attorney General, to Alan C. Nelson, Commissioner, INS (Aug. 5, 1988)).

²⁰³ See Zhang, *supra* note 189, at 578.

²⁰⁴ Ruth Marcus, *Three Chinese Families Win United States Asylum from Meese*, WASH. POST, Aug. 6, 1988, at A14.

Soon after this media event, the Board of Immigration Appeals (BIA) refused to apply Meese's guidelines in *In re Chang*.²⁰⁵ In that case, a Chinese man appealed an immigration judge's denial of his asylum claim based on his fear that he would be forced to submit to sterilization if returned to China because he and his wife had two children.²⁰⁶ Although Chang argued that involuntary sterilization violated internationally-recognized human rights, the BIA dismissed his claims.²⁰⁷ The Board found that China's policy was not persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion."²⁰⁸ Rather, the BIA held that China's national policy would be the basis for asylum only if selectively enforced against an individual "on account of" one of the enumerated grounds for refugee status.²⁰⁹

This decision evoked strong public opposition.²¹⁰ After the crackdown on demonstrators in Tiananmen Square in Beijing on June 4, 1989, President Bush directed the INS to allow Chinese nationals in the United States to remain for another year.²¹¹ The Tiananmen Square incident drew American attention to other human rights concerns in China and President Bush directed the Attorney General to give "enhanced consideration . . . under the immigration laws for individuals . . . who express a fear of persecution upon return to their country related to that country's policy of forced abortion or coerced ster-

²⁰⁵ *In re Chang*, 20 I. & N. Dec. 38, 43 (1989). The BIA's decision in this case was published in the official reports as a precedent decision. Precedent decisions are binding on immigration judges and the INS. See 8 C.F.R. § 3.1(g) (1999); ANKER, *supra* note 76, at 7-9.

²⁰⁶ *Chang*, 20 I. & N. Dec. at 43.

²⁰⁷ *Id.* at 44.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ In November 1989, Congress passed the Emergency Chinese Immigration Relief Act of 1989 in response to the Tiananmen Square incident, primarily focusing on the situation of Chinese students in the United States. H.R. 2712, 101st Cong., 1st Sess. (1989). The bill also included an amendment to provide asylum to people fleeing the one child policy and required the INS to give 'careful consideration' to asylum applicants from the People's Republic of China (PRC) who expressed a fear of persecution related to the policy. The bill provided that if the applicant established that he or she "ha[d] refused to abort or be sterilized, such applicant [would] be considered to have established a well-founded fear of persecution, if returned to China, on the basis of political opinion" Mason, *supra* note 200, at 6.

²¹¹ *Id.* Bush's order also drew illegal Chinese immigrants living in Canada into the U.S. in hopes of getting legalized. See CHIN, *supra* note 18, at 18-19.

ilization."²¹² An interim rule to this effect was then promulgated by the Attorney General in January of 1990 which effectively overruled the BIA's holding in *In Re Chang*.²¹³ Yet when the final asylum regulations were published by the INS in July 1990 this interim rule was inexplicably omitted.²¹⁴ On the last day of the Bush Administration, then-Attorney General William Barr promulgated a rule that would have reinstated the aims of the January 1990 rule and allowed asylum eligibility based on opposition to family planning policies.²¹⁵ However, Barr's 1993 rule was never published.²¹⁶ This inconsistency led to confusion in the courts about the proper standard for evaluating Chinese asylum claims based on opposition to the one child policy.²¹⁷

In early 1993, the Acting Assistant Secretary for Human Rights and Humanitarian Affairs testified to Congress that the

²¹² Exec. Order No. 12711, 55 Fed. Reg. 13897 (1990), reprinted in 8 U.S.C.A. § 1157 (1999). See Zhang, *supra* note 183, at 580-84; Mason, *supra* note 200, at 6-7.

²¹³ Zhang, *supra* note 189, at 580-84.

²¹⁴ *Id.*

²¹⁵ See *Chai v. Carroll* 48 F.3d 1331, 1337 (4th Cir. 1995) (tracing the complicated history of the various administrative regulations).

²¹⁶ After President Clinton took office he directed all federal agencies to withdraw any pending regulations so his administration could review them. The 1993 Barr rule was never published in the Federal Register. *Id.* at 1338.

²¹⁷ The January 1990 regulation recognized asylum claims based on opposition to coercive population control policies. Chinese were eligible for asylum if they expressed a "well-founded fear that they [would] be required to abort a pregnancy or to be sterilized" if forced to return to China. 55 Fed. Reg. 2803, 2805 (1990). When these regulations were omitted in the July 1990 INS procedures, the agency directed asylum officers to continue to follow the original January 1990 regulations. However, that direction was not binding on the Board of Immigration Appeals. In 1993, the BIA asked Attorney General Reno to review two cases involving Chinese nationals seeking asylum based on opposition to the one child policy to settle the issue. Although she initially granted review, Reno later rescinded her order. The BIA subsequently upheld *In re Chang* in *Matter of G—*, 20 I. & N. Dec. 764 (BIA 1993) (Chinese man not found to have been persecuted for his alleged opposition to the one child policy and not eligible for asylum). See Kevin S. Barber, Note, *Xin-Chang Zhang v. Slattery: Rejecting China's Coercive Population-Control Policy as Grounds for Political Asylum in the United States*, 41 VILL. L. REV. 521, 534 (1996) (charting the BIA decisions and their conflict with the various executive and administrative orders from 1988 to 1993).

Many Chinese applicants sought to have Barr's 1993 rule enforced even though it was never published. The majority of courts found the rule unenforceable. See *Chai*, 48 F.3d at 1341-42 n.10 (listing cases). Only one court found the rule enforceable. *Xin-Chang v. Slattery*, 859 F. Supp. 708, 711-13 (S.D.N.Y. 1994). One court refused to follow *In re Chang* because the "cacophony of administrative voices" on the issue undermined *Chang's* validity. *Guo v. Carroll*, 842 F. Supp. 858, 865-70 (E.D. Va. 1994).

policy regarding coercive family planning practices in China was under review because it was being abused by organized criminal networks who were smuggling Chinese into the United States in record numbers.²¹⁸ Responding to the fallout from the *Golden Venture* incident, the Clinton Administration set a new policy in 1994 to deal with the estimated 1,000 undocumented Chinese then in INS detention.²¹⁹ Under those rules, Chinese migrants who alleged fear of returning to China because of coercive family planning practices were not eligible for asylum in most cases.²²⁰ However, "to address the genuine humanitarian issues," the new policy allowed Chinese nationals to be considered for a stay of deportation or parole at the discretion of INS district directors.²²¹

This policy was fiercely opposed by many members of Congress.²²² Bills were quickly passed in both houses to amend the refugee definition to include those people fleeing countries

²¹⁸ Zhang, *supra* note 183, at 585 (citing *Oversight of State Department Country Reports on Human Rights Practices for 1992 and Human Rights Policy: Hearing Before the Subcomm. on International Security, International Organizations and Human Rights of the House Comm. on Foreign Affairs*, 103d Cong., 1st Sess. 17 (1993) (testimony of James K. Bishop, Acting Assistant Secretary, Bureau of Human Rights and Humanitarian Affairs, Department of State)).

²¹⁹ Zhang, *supra* note 183, at 590-91.

²²⁰ *Id.* at 591.

²²¹ *Id.*

²²² See, e.g., *Coercive Population Control in China, Hearings Before the Subcomm. on International Operations and Human Rights of the House Comm. on International Relations*, 104th Cong. (1995) (statement of Rep. Christopher H. Smith). Rep. Smith claimed that Chinese women detained by the INS:

may be forced back to China because of a novel and bizarre interpretation of United States asylum law, under which those who resist forced abortion . . . are regarded as common criminals rather than victims of persecution Never mind fundamental human rights and broken lives. A law is a law, and people who break a forced-abortion law . . . must be sent back to take their punishment. This is the kind of thinking we are up against.

Id.

Some commentators have cast Rep. Smith in the role of "anti-abortion legislator." See Zhang, *supra* note 183, at 592; Mason, *supra* note 200, at 7. The mistaken conflation of family planning programs with coercive sterilization and abortion provokes heated ethical debates. It is beyond the scope of this article to fully discuss this topic. Other commentators have addressed this issue. See Julie Tang, *The United States' Immigration Laws: Prospects for Relief for Foreign Nationals Seeking Refuge from Coercive Sterilization or Abortion Practices in Their Homelands*, 15 ST. LOUIS U. PUB. L. REV. 371 (1996); Adell, *supra* note 193.

with coercive population control programs.²²³ In 1996 Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).²²⁴ Amending the definition of "refugee" under the Immigration and Nationality Act, section 601(a) of IIRIRA officially recognized opposition to coercive population control programs as persecution on account of political opinion.²²⁵ However, a limit of 1,000 was placed on the number of people who could be admitted or granted asylum under this provision each year.²²⁶

V. THE AMENDMENT SHOULD BE REPEALED BECAUSE IT FACILITATES HUMAN SMUGGLING AND CONFLICTS WITH SOUND ASYLUM POLICY

The political history behind the 1996 Amendment belies its facially neutral language. The law codifies Western misperceptions of China's family planning policies, is abused by Chinese smugglers, and creates a fundamentally unsound asylum policy.

A. CULTURAL MISPERCEPTIONS

Although the Amendment's supporters were motivated by humanitarian concerns, their focus on China's national policy reveals serious misperceptions and cultural biases.²²⁷ First, the 1996 Amendment is redundant because it is not the Chinese policy itself that is persecutive.²²⁸ Rather, persecution arises from the selectively coercive enforcement and arbitrary abuse of the policy by local officials as applied to certain individuals.²²⁹

²²³ It is clear from the historical context and legislative history that this provision focused only on China. See Mason, *supra* note 200, at 6-7.

²²⁴ Enacted as Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

²²⁵ 8 U.S.C.A. § 1101(a)(42)(A) (1999) as amended by § 601(a) of IIRIRA. See *supra* note 177 and accompanying text.

²²⁶ INA § 207(a)(5), 8 U.S.C.A. § 1157(a)(5) (1999). For any fiscal year, not more than a total of 1,000 refugees may be admitted under this subsection or granted asylum under section 208 pursuant to a determination under the third sentence of section 101(a)(42) (relating to persecution for resistance to coercive population control methods). *Id.*

²²⁷ William P. Alford, *Making a Goddess of Democracy from Loose Sand: Thoughts on Human Rights in the People's Republic of China*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 65, 74-75 (Abdullahi Ahmed An-Na'im ed., 1992).

²²⁸ *Id.* at 74.

²²⁹ CHINA COUNTRY REPORT, *supra* note 184, at 25.

Chinese people who suffer persecution at the hands of such officials have valid asylum claims under the original law.²³⁰

Second, by targeting another nation's domestic policy, the Amendment codifies diplomatic condescension.²³¹ The family planning policies of China were humanitarian responses to the overwhelming threat of a skyrocketing population.²³² By the time China's family planning policies were introduced in the late 1970s, the country had already suffered the consequences of uncontrolled population growth coupled with ineffective government.²³³ Between 1958 and 1962, a nationwide famine killed at least 20 million people.²³⁴

By equating the violation of a population control program with grounds for political asylum, U.S. policy reflects the cultural bias inherent in much of traditional refugee and human rights law.²³⁵ In the Refugee Act of 1980, the United States adopted the refugee definition from the 1967 United Nations Protocol Relating to the Status of Refugees.²³⁶ The Protocol's

²³⁰ See *infra* notes 295-301.

²³¹ See Mutua, *supra* note 196, at 652 ("Authoritarian but economically-prosperous Asian states, such as Singapore, China (PRC), Indonesia, and South Korea, have attacked the linkage of human rights to aid and trade as an abuse of human rights and a new form of imperialism by the West."). See also Anne Joyce, *China: United States Withdrawal of Support from the United Nations Fund for Population Activities*, 1 HARV. HUM. RTS. Y.B. 205 (1988) (discussing the politicization of funding for population control programs).

²³² Joyce, *supra* note 231, at 206.

²³³ JASPER BECKER, *HUNGRY GHOSTS: MAO'S SECRET FAMINE* 81-82 (1996). In the late 1950s China launched a campaign to glorify the abundance produced by newly collectivized farms. *Id.* Under the illusion of surplus, China urged people to eat as much as they wanted. *Id.* By 1958 most of the country's grain reserves were empty, but under the pressure of the "Great Leap Forward," provincial leaders continued to report grossly inflated harvests. Those who honestly reported severe shortages were denounced as "rightists" and blamed for creating the shortage by hoarding grain for themselves. *Id.* Combined with Mao's refusal to limit population growth, these disastrous agricultural policies soon led to a nationwide famine. *Id.*

²³⁴ *Id.* at 273. The Chinese government has never officially admitted that the famine occurred, but the era is indelibly etched in the minds of its survivors. *Id.* Chinese and Western estimates of the total death toll range from 20 to 60 million. *Id.* at 266-74.

²³⁵ See generally Mutua, *supra* note 196.

²³⁶ July 28, 1951, Protocol, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 268. The 1967 Protocol adopted the refugee definition of the 1951 United Nations Convention Relating to the Status of Refugees but removed the latter's temporal and geographic restrictions. See generally Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 743-45 (1998).

definition of refugee derives from concepts embodied in the 1948 Universal Declaration of Human Rights.²³⁷ Written to codify the norms of Western liberal democracy, these documents focus on civil and political rights.²³⁸ Many developing countries were not independent when the Universal Declaration was adopted and they had no voice in the formulation of what has become the modern law of human rights.²³⁹ As a result, some scholars argue that "international human rights law" cannot effectively address the pressing economic and social problems facing developing countries.²⁴⁰

While the civil and political rights favored by current human rights law may be essential to a free society, these liberties cannot take precedence over the fundamental human rights to life, food, and shelter.²⁴¹ From the American viewpoint, China's restriction on reproduction violates its citizens' right to "found a family" as recognized by Article 16 of the Universal Declaration of Human Rights.²⁴² But that conclusion comes from the privileged context of a country not threatened by overpopulation.²⁴³

²³⁷ G.A. Res. 217A(III), U.N. Doc. A/810 (1948).

²³⁸ See, e.g., Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 4 (1988).

²³⁹ *Id.*

²⁴⁰ Mutua, *supra* note 196, at 604-07. But see ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 11-12, 96-97 (1994). Higgins argues that international law applies to developing countries nonetheless. *Id.* In her view, international law is of "universal application" precisely because it is *not* a static code of fixed content. *Id.* at 1-2, 12. Rather, international law is a "normative system" that is "relevant to us all." *Id.* at 1, 12. When developing countries challenge the inequity of certain norms of international law and demand the reformation of those norms to "reflect contemporary realities and aspirations," the change is not a rejection of international law, but a vital part of the international "law-developing process." *Id.* at 12.

²⁴¹ See Bilahari Kausikan, *Asia's Different Standard*, 92 FOREIGN POL'Y 24, 34-35 (1993) (discussing Western countries' focus on civil and political rights over economic and social rights). But see Aryeh Neier, *Asia's Unacceptable Standard*, 92 FOREIGN POL'Y 42 (1993) (arguing that Kausikan legitimates the illegitimate denial of civil and political rights in certain Asian countries).

²⁴² Alford, *supra* note 227, at 74.

²⁴³ *Id.* "Distance makes it easier to be virtuous, proximity makes for prudence." Kausikan, *supra* note 241, at 31. Kausikan argues that the U.S. and other Western countries use "universal human rights" as a policy tool to promote their own economic interests. *Id.* at 26-32. For example, Americans worried about market competition criticize the labor conditions of some Asian countries as human rights violations while ignoring human rights abuses in their own country. *Id.* at 28. Kausikan warns that international consensus on human rights "will require finding a bal-

As one scholar explains, "the Universal Declaration and the other major international human rights documents . . . were drafted predominantly by Western men having little direct interest in or experience with the type of population pressures confronting nations such as China."²⁴⁴

By implementing family planning policies, China hopes to secure the "collective welfare" of all its citizens.²⁴⁵ China's leaders are well aware that if all Chinese were free to bear as many children as they liked, "mass malnutrition . . . starvation—and a concomitant loss of human dignity—would ensue."²⁴⁶ Many Americans may consider state restriction on reproduction to be a human rights violation, but for the citizens of developing nations (especially women), access to effective birth control and family planning education is an equally important human right.²⁴⁷

B. ABUSE OF THE LAW

Regardless of its supporters' motivations, the 1996 Amendment facilitated a dramatic rise in the number of Chinese migrants smuggled into the U.S.²⁴⁸ Because the amended law

ance between a pretentious and unrealistic universalism and a paralyzing cultural relativism." *Id.* at 32. *Cf.* Mutua, *supra* note 196, at 609-10. Mutua points out that American law schools draw a dichotomy between "civil rights" (taught as "American" courses) and "human rights" (taught as "foreign" or "international" courses). *Id.* As Mutua explains:

American law school graduates who have taken courses on race, gender, employment law, sexuality, housing, or the criminal justice system probably associate those fields with civil rights, not human rights. This organizational format could lead to a sense of cultural superiority and . . . could adversely affect attempts at an international consensus on human rights.

Id.

²⁴⁴ Alford, *supra* note 227, at 74.

²⁴⁵ *Id.* at 75.

²⁴⁶ *Id.* at 74. Critics may argue that any restriction on reproductive freedom violates human rights and that to say otherwise is to engage in cultural relativism. Again, one must distinguish between a policy that limits the number of children per family and the coercive abuse of such a policy. The difficult task of defining "reproductive freedom" is beyond the scope of this Comment. Ideally, fertility rates in China will continue to fall as a natural result of economic and social development and the task of defining "reproductive freedom" can be left to moral philosophers. *See supra* note 196 and accompanying text.

²⁴⁷ *See* Barbara Crane & Jason Finkle, *The Conservative Transformation of Population Policy*, HARV. J. PUB. POL'Y, Winter-Spring 1987, at 9, 11, 14.

²⁴⁸ Smith, *supra* note 6, at 16. *See also* Zhang, *supra* note 183, at 594 (predicting that such legislation would increase the flow of asylum seekers from China).

recognizes opposition to the one child policy as *prima facie* asylum eligibility, thousands of Chinese migrants are allowed into the United States based on their "credible fear of persecution."²⁴⁹ If those detained have sponsors in the United States, the INS may release them on parole pending the resolution of their asylum claims.²⁵⁰ In other cases, the Chinese embassy or consulate may refuse to issue travel documents for certain smuggled migrants and they may be kept in detention indefinitely or be released under an "order of supervision."²⁵¹ If released, these people can receive work authorization although they are ineligible to apply for legal permanent residence.²⁵² Some experts argue that these procedures help fuel the market for undocumented Chinese workers.²⁵³

Some Chinese nationals may have valid and serious claims of persecution if they are subject to coercive sterilization or abortion by local officials. Yet they do not need the Amendment to qualify for refugee status in the United States. The original law could cover their claims.²⁵⁴ Thus, instead of granting protection to true refugees, the Amendment has subjected an already over-burdened asylum system to the routine abuse of Chinese smugglers and their customers.²⁵⁵

One young woman's story typifies the practice. After being detained by immigration officials at New York's John F. Kennedy airport and questioned about her fake travel documents, she said:

I told him, as instructed by my snakehead, "I am married. I already have a child, and I am now pregnant. The Chinese government was about to force me to have an abortion," and so on and so forth. It was

²⁴⁹ CHIN, *supra* note 18, at 8.

²⁵⁰ Mason, *supra* note 74, at 5; Gilmore, *supra* note 91, at A1.

²⁵¹ 8 C.F.R. § 241.5 (1999). Under "orders of supervision," people are released from INS detention on the condition that they regularly report to INS officials. *Id.* These people have no legal status within the United States and can be removed if situations in their country change or if their country's consulate agrees to issue them travel documents. *Id.*

²⁵² 8 C.F.R. § 274.12(c)(18) (1999); ANKER, *supra* note 76, at 524.

²⁵³ See KWONG, *supra* note 1, at 35-36 (discussing the short-term labor agencies dealing in undocumented workers from Fujian who are marketable because they have been released by the INS and have temporary work permits but no legal status and so can be hired for sub-minimum wage).

²⁵⁴ See *infra* notes 296-302 and accompanying text.

²⁵⁵ CHIN, *supra* note 18, at 8.

really a joke.²⁵⁶ I was not even married. They took my fingerprints and released me.

The sheer number of such claims makes INS officers skeptical of any Chinese asylum-seeker and increases the chance that those Chinese with real claims of persecution may be summarily dismissed.²⁵⁷

C. UNSOUND ASYLUM POLICY

The refugee definition adopted by the United States is based on an individualist approach.²⁵⁸ The determination of whether or not a person is a refugee is not solely dependent on broad political or social categories, but requires a detailed evaluation of the merits of each case.²⁵⁹ The 1996 Amendment frustrates this policy by arguably granting asylum eligibility to any Chinese citizen who alleges opposition to China's family planning programs. None of the other grounds for asylum has such a sweeping applicability.²⁶⁰

Simply alleging opposition to a domestic policy should not be enough to support a true claim of persecution.²⁶¹ "Persecution" for purposes of asylum law has not been defined by the U.S. Congress or the United Nations.²⁶² However, standards for what constitutes persecution may be found in the two decades of case law since the enactment of the Refugee Act of 1980.²⁶³ Persecution need not be a direct threat to "life or freedom," but can also include "the well-founded fear of non-life-threatening violence and physical abuse."²⁶⁴ In addition, punishment for

²⁵⁶ *Id.* at 188-89.

²⁵⁷ *Id.* at 8.

²⁵⁸ JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 5 (1991).

²⁵⁹ *Id.*

²⁶⁰ CHIN, *supra* note 18, at 8.

²⁶¹ T. Alexander Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5, 23 (1991).

²⁶² See *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 427-40 (1987) (discussing the meaning of "persecution or well-founded fear of persecution" in the Refugee Act of 1980 and the 1967 United Nations Protocol Relating to the Status of Refugees).

²⁶³ See generally Aleinikoff, *supra* note 261.

²⁶⁴ *Balazoski v. Immigration and Naturalization Serv.*, 932 F.2d 638, 642 (7th Cir. 1991).

reasons that the United States "does not recognize as legitimate" may also constitute persecution.²⁶⁵

Claims of opposition to China's "one child policy" seem to fit this definition. Forced sterilization is not "legitimate" punishment. However, problems arise when applicants allege opposition to a policy that applies to the entire country, rather than a specific instance of personal persecution. As the Seventh Circuit maintains, "[c]onditions that affect entire populations . . . do not rise to the level of persecution contemplated by the Act."²⁶⁶ For a claimant to qualify for political asylum, the statute requires a clear nexus between the claimant's "political opinion" and the alleged persecution. Applicants must show that they have suffered past persecution or fear future persecution "on account of" their "political opinion."²⁶⁷

In keeping with the individualized perspective of U.S. asylum law, courts previously denied asylum claims based on opposition to China's "one child policy" unless there was evidence that the applicant had been specifically targeted for persecution.²⁶⁸ For example, in *In Matter of G—*, a Chinese man from Fujian who had been smuggled to the U.S. on the *Golden Venture* applied for asylum based on the fact that he had two children and thus disagreed with China's one child policy.²⁶⁹ He submitted a letter from his wife stating that the birth control authorities in their village had fined him for having a second child and were forcing her to be sterilized.²⁷⁰ Although he claimed that he would face persecution if forced to return to China, the BIA, following *In re Chang*, held that he was not eligible for asylum unless he could show that the policy was selectively applied against him "on account of" one of the five grounds (race, religion, nationality, social group, or political opinion).²⁷¹

The Board also rejected the argument that the doctrine of imputed political opinion applied to G—'s case.²⁷² Under that

²⁶⁵ *Sayaxing v. Immigration and Naturalization Serv.*, 179 F.3d 515, 519 (7th Cir. 1999) (quoting *Cuevas v. Immigration and Naturalization Serv.*, 43 F.3d 1167, 1170 (7th Cir. 1995)).

²⁶⁶ *Sayaxing*, 179 F.3d at 519.

²⁶⁷ I.N.A. § 101(a)(42)(A); 8 U.S.C.A. § 1101(a)(42)(A) (1999).

²⁶⁸ ANKER, *supra* note 76, at 373-76.

²⁶⁹ *Matter of G—*, 20 I. & N. Dec. 764, 773 (1993).

²⁷⁰ *Id.*

²⁷¹ *Id.* at 778.

²⁷² *Id.*

doctrine, a person may be persecuted because of a political opinion which his or her persecutors presume him or her to have.²⁷³ In G—'s case, the court found no evidence that the village authorities had ascribed any political opinion to G— and would persecute him "on account of" that opinion, but only that they would punish him for his violation of the law.²⁷⁴

With the passage of IIRIRA and its Amendment to the refugee definition, the BIA was forced to change its adjudication of these cases. In *In re X-P-T*, the BIA explicitly overruled *In re Chang*.²⁷⁵ The applicant in X-P-T was a Chinese woman who was forcibly sterilized after having three children.²⁷⁶ The Board granted her asylum and stated that section 601 of IIRIRA superseded its ruling in *In re Chang*.²⁷⁷

One year later, *In re C-Y-Z* presented the BIA with a more difficult issue.²⁷⁸ The applicant in that case was the Chinese father of three children.²⁷⁹ He sought asylum claiming that he was persecuted in China because of his opposition to the one child policy.²⁸⁰ He was arrested and detained by the police for one day and was fined 2,000 yuan (approximately \$250).²⁸¹ His wife was forcibly sterilized, but he left China a full year-and-a-half after her operation.²⁸² The Immigration Judge observed that

²⁷³ See generally ANKER, *supra* note 76, at 325-45.

²⁷⁴ *Matter of G—*, 20 I. & N. Dec. at 778-79. Subsequent federal cases upheld the BIA's analysis. See *Chai v. Carroll*, 48 F.3d 1331, 1343 (4th Cir. 1995) (evidence only showed that Chinese applicant was sanctioned for violating the "one couple, one child" policy, not that he was persecuted on account of "political opinion"); *Huan v. Carroll*, 70 F.3d 114 (4th Cir. 1995) (family-planning policy not selectively applied to Chinese man. No fear of future persecution on the basis of "political opinion" because his brother had paid his fine.); *Di v. Moscato*, No. 94-1416, 66 F.3d 315 (4th Cir. 1995) (Chinese man failed to show that he would be persecuted on account of "political opinion" and not just his violation of the family-planning policy).

²⁷⁵ *In re X-P-T*, 21 I.&N. Dec. 634 (BIA 1996).

²⁷⁶ *Id.* at 635.

²⁷⁷ *Id.* at 638 ("We conclude, as a result of the amendments made by section 601 of the IIRIRA, that forcible sterilization is a basis for grants of asylum and withholding of deportation to China.").

²⁷⁸ *In re C-Y-Z*, 21 I.&N. Dec. 915 (BIA 1997).

²⁷⁹ *Id.* at 915.

²⁸⁰ *Id.* at 916.

²⁸¹ *Id.*

²⁸² *Id.*

[the applicant's wife] did not gain anything from having the applicant abandon her and the children for the United States. . . . In effect, the applicant seeks to ride on his wife's coattails or claim asylum because of alleged adverse factors to his wife, including forced sterilization. He, himself, has never been persecuted and he cannot show either past persecution or a reasonable fear of future persecution.²⁸³

At the time of the Immigration Judge's decision, *In re Chang* was still binding law.²⁸⁴ But by the time the case reached the BIA on appeal, IIRIRA had passed and the Board found that the applicant had established eligibility for asylum "by virtue of his wife's forced sterilization."²⁸⁵

Two judges dissented from the opinion.²⁸⁶ Judge Vacca refused to recognize claims based only on the forced sterilization of a spouse.²⁸⁷ More importantly, Judge Vacca noted that the applicant's wife had already been sterilized, which "effectively ended the likelihood that the applicant would be forced to undergo such a procedure in the future, or that he would be persecuted for a failure to undergo such a procedure if he return[ed] to China."²⁸⁸

Judge Villageliu also dissented. He acknowledged that the applicant's wife would be eligible for asylum under the Amendment if she had been forcibly sterilized²⁸⁹ and that her husband would then be eligible for derivative asylum status.²⁹⁰ However, Judge Villageliu found that the facts of the case did not warrant a grant of asylum because he "[found] it implausible that the natural reaction of a husband whose wife has been sterilized, and who deems it persecutive, would be to then pro-

²⁸³ *Id.*

²⁸⁴ *In re C-Y-Z*, 20 I.&N. Dec at 917.

²⁸⁵ *Id.* at 918.

²⁸⁶ *Id.* at 931, 935.

²⁸⁷ *Id.* at 933.

²⁸⁸ *Id.* Judge Vacca also questioned the applicant's credibility by noting that the only evidence of his wife's sterilization was an "unauthenticated copy of a purported sterilization certificate." *Id.* at 934. The State Department reports that "[d]ocumentation from China, particularly from the Fuzhou and Wenzhou areas . . . is subject to widespread fabrication and fraud." CHINA PROFILE, *supra* note 44, at 33.

²⁸⁹ *In re C.Y.Z.*, 21 I.&N. Dec. at 935.

²⁹⁰ *Id.* An asylee's spouse and minor children may also be granted asylum "derivatively." I.N.A. § 207(c)(2), 8 U.S.C.A. § 1157(c)(2) (1999).

ceed to the United States seeking asylum, leaving her behind.”²⁹¹

While the law thus requires courts to treat violations of China’s “coercive population control programs” as a valid basis for political asylum, the majority of such claims are denied.²⁹² Part of the problem lies in the fact that violations of Chinese “policy” do not always comport with Western notions of “political opinion.” In an authoritarian country, almost any serious disagreement with official regulations might be characterized as “political” in the Western sense.²⁹³ The concept of “liberty”—enshrined in U.S. law—is foreign to the Chinese political system.²⁹⁴ Thus, it is difficult to determine when punishment for violating the law becomes “persecution on account of political opinion.” Under both United Nations High Commissioner for Refugees guidelines and U.S. case law, punishment for breaking the law is not “persecution on account of political opinion” unless the punishment is extremely disproportionate to the offense or the enforcement of the law is a pretext for abusive discrimination.²⁹⁵

Repealing the Amendment would not deny asylum eligibility to Chinese people who truly oppose the selective and perse-

²⁹¹ *In re C.Y.Z.*, 21 I.&N. Dec. at 935.

²⁹² According to INS spokeswoman Irene Mortensen, only 24% of more than 5,000 Chinese applicants were granted asylum in 1999. Scott Sunde, *Most of 60 Stowaways Likely to Seek Asylum; Move Would Delay, Possibly Prevent Deportation*, SEATTLE POST-INTELLIGENCER, Jan. 13, 2000, at A1. The INS estimates that up to 75% of Chinese migrants who are detained will post bond and “disappear” because they have weak asylum claims. See Gilmore, *supra* note 91, at A1. To assuage fears that the 1996 Amendment would cause a flood of Chinese asylum-seekers, Congress set a limit of 1,000 people who could qualify under the provision each fiscal year. See *supra* note 226. See Mason, *supra* note 200, at 7 (explaining the history of this provision). See also Steinbock, *supra* note 236, at 802 n.303 (discussing the provision as an example of the normative judgments inherent in asylum adjudications but not resolvable under the refugee definition).

²⁹³ See Aleinikoff, *supra* note 261, at 21-22.

²⁹⁴ Aleinikoff explains:

The problem is to decide what kinds of harms are so severe that their imposition constitutes persecution. Despite its obvious attraction, United States constitutional law should not be the measure. Few nations in the world protect freedom of expression and other rights as closely as United States law; and to make that law the test might give credence to the ‘floodgates’ arguments.

Id. at 21.

²⁹⁵ UNHCR Handbook, *supra* note 181, ¶¶ 56, 84; Anker, *supra* note 76, at 200-09, 348-51.

cutive enforcement of the "one child policy." Chinese people have valid claims of persecution "on account of political opinion" if they not only violate the policy, but also publicly oppose the program and subsequently suffer or truly fear abuse by the authorities.²⁹⁶

Furthermore, any amendment to U.S. refugee law should not selectively favor just one country, as the 1996 Amendment did for China.²⁹⁷ If the law is expanded it should encompass persecution on the basis of broader characteristics that people all over the world may share. Gender is one such characteristic.²⁹⁸ If women fleeing gender-based persecution were eligible for asylum, the Chinese cases would pose less normative and jurisprudential problems. For example, in some parts of China people believe that vasectomies render men weak and women bear the brunt of family planning policies.²⁹⁹ If a Chinese woman in such a community is forced to undergo an abortion or sterilization but her husband is not, she may suffer persecu-

²⁹⁶ For example, in 1995, a Fujianese woman was accused of bearing and hiding a second child despite physical evidence to the contrary. Hessler, *supra* note 157, at A1. Local officials threatened to forcibly sterilize the woman and she filed a successful lawsuit against them. *Id.* Infuriated by her actions, the officials soon made life extremely difficult for her family. *Id.* This woman would be eligible for asylum under the original U.S. refugee law because she publicly opposed the selective abuse of the policy and suffered retaliation from government officials. She was persecuted on account of her expressed political opinion or the opinion which the local officials imputed upon her. See *supra* note 273 and accompanying text.

²⁹⁷ See *supra* Part IV-B.

²⁹⁸ See Mattie L. Stevens, Note, *Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL'Y 179 (1993). See also Becki Young, Note, *Trafficking of Humans Across United States Borders: How United States Laws Can be Used to Punish Traffickers and Protect Victims*, 13 GEO. IMMIGR. L.J. 73, 100 ("The optimal solution in the context of asylum standards may be the expansion of asylum standards, to cover more gender-based claims, rather than the manipulation of gender-based claims to fit current asylum standards.").

Some commentators welcomed the 1996 Amendment as long-overdue recognition of the persecution suffered by some women because of their gender. *Id.* at 21. These authors argued that U.S. asylum law favored traditionally male political activities and that the Amendment would ameliorate that bias by granting relief to many women. Deborah Anker, et. al., *Women Whose Governments are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709, 711-13 (1997); Maya Raghu, Note, *Sex Trafficking of Thai Women and the United States Asylum Law Response*, 12 GEO. IMMIGR. L.J. 145, 168 (1997). That prediction failed, as most of the plaintiffs in cases following the Amendment were men, not women. See discussion *supra* pp. 57-59.

²⁹⁹ CHINA UPDATE, *supra* note 184, at 5, 16.

tion on the basis of her gender. More importantly, if gender were recognized as a basis for asylum, relief would not be limited to Chinese women alone. Women (and potentially men) all over the world who suffer gender-based persecution could claim refugee status in the U.S.³⁰⁰

Although the current law does not explicitly recognize gender-based persecution as a basis for asylum, an evolving body of case law supports such claims under the category of "membership in a particular social group" or under the imputed political opinion doctrine.³⁰¹ Under these precedents, asylum may be granted to Chinese women who genuinely fear persecution because of their opposition to the selective and coercive enforcement of family planning programs.³⁰²

The original law encompasses the asylum claims of Chinese men and women who truly fear persecution based on their opposition to the selective and coercive enforcement of population control programs. Both men and women who are punished for their public opposition to—rather than simple vio-

³⁰⁰ In this respect, U.S. law lags behind international recognition of gender-based persecution. See, e.g., *U.N. Diplomatic Conf. of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 Art. 7 (1998) (including gender-based persecution as a crime against humanity). Ideally, asylum law would provide refuge to all people who are persecuted in a country whose government is unwilling or unable to protect them, regardless of whether or not the persecution is "on account of" one of the five grounds recognized by U.S. law. See Donald P. Gagliardi, *The Inadequacy of Cognizable Grounds of Persecution as a Criterion for According Refugee Status*, 24 STAN. J. INT'L L. 259 (1987). Critics argue that U.S. recognition of gender-based persecution, let alone the severity of the persecution alone, as grounds for asylum would throw open the "floodgates." However, any asylum applicant must first reach the United States. For millions of people around the world, that is an impossible journey. *Id.* at 284.

³⁰¹ See *Angoucheva v. Immigration and Naturalization Serv.*, 106 F.3d 781 (7th Cir. 1997) (sexual assault and rape against a woman constitute "persecution" for asylum purposes); *Lopez-Galarza v. Immigration and Naturalization Serv.*, 99 F.3d 954 (9th Cir. 1996) (woman who was raped because of her "imputed political opinion" was persecuted and eligible for asylum); *In re Kasinga*, 21 I.&N. Dec. 357 (BIA 1996) (woman who fled female genital mutilation feared persecution based on her "membership in a particular social group" and was granted asylum). But see *In re R.A.*, Int. Dec. (BIA) 3402 (1999), 1999 WL 424364 (woman who fled the severe domestic violence of her husband not granted asylum because she failed to show she was persecuted "on account of" her membership in a particular social group). See generally ANKER, *supra* note 76, at 365-76.

³⁰² Granted, these cases "manipulate" gender-based claims to fit within one of the enumerated grounds. See Young, *supra* note 298, at 100. However, until the law or the regulations are changed, such cases are a pragmatic compromise to the problem.

lation of—the policy are eligible for political asylum. Chinese women who have been targeted for coercive sterilization instead of their husbands may also bring social group claims. The 1996 Amendment is thus redundant and unnecessary. There is no evidence that more people have been granted asylum under the Amendment.³⁰³ But there is ample evidence that the Amendment has exacerbated the Chinese migrant smuggling problem: Chinese migrants now routinely invoke the Amendment to gain entry into the U.S.³⁰⁴ In fact, the Chinese government often blames American asylum policy for attracting illegal Chinese immigrants.³⁰⁵ Xi Jinping, the governor of Fujian province claims that:

China and Fujian alone cannot solve the problem of human smuggling; the international community must join hands in eradicating it. It would be hard to stop human smuggling as long as some countries make a fuss over political [and] human rights . . . and as long as illegal immigrants can claim "refugee" status and remain abroad by merely showing a ticket of fining for violations of family planning rules.³⁰⁶

Political rhetoric aside, the U.S. should heed the criticism. Instead of fighting a losing battle against the smuggling networks, the United States can divest them of their profits by eliminating their customer base.³⁰⁷ If more Chinese were allowed to legally immigrate to the United States, they would not need to resort to smuggling nor suffer the violent abuse of snakeheads and enforcers.³⁰⁸ Yet given the fierce political debates surrounding immigration quotas, Congress is unlikely to

³⁰³ See *supra* note 292 and accompanying text.

³⁰⁴ CHIN, *supra* note 47, at 156-57, 162.

³⁰⁵ *New Fujian Governor on Xiamen Scandal*, WEN WEI PO, Hong Kong, Jan. 28, 2000, at 3.

³⁰⁶ *Id.*

³⁰⁷ CHIN, *supra* note 18, at 162.

³⁰⁸ *Id.* at 165. The complex policy questions posed by the per-country immigration quotas are beyond the scope of this Comment. However, it is worth noting that in 1998 the U.S. admitted 36,884 Chinese as immigrants, only 5.6% of the total number of immigrants admitted that year. In comparison, 131,575 Mexicans—19.9% of the total—were admitted as immigrants in 1998. U.S. DEP'T. OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, ANNUAL REPORT ON LEGAL IMMIGRATION, FISCAL YEAR 1998, Table 2 (1999).

increase China's limit.³⁰⁹ Legislators can, however, easily stem the tide of Chinese human smuggling by repealing the 1996 Amendment and eliminating one major avenue of Chinese migrants' illicit entry into the U.S.—fraudulent asylum claims.³¹⁰ Beyond weakening the Chinese trade in human smuggling, the Amendment's repeal would restore integrity to U.S. asylum law and allow it to more equitably serve its humanitarian purpose.³¹¹

VI. CONCLUSION

De facto foreign policy may shape American immigration law, but refugee protection must rise above political myopia. The 1996 Amendment to the U.S. refugee definition is misguided legislation that reflects the cultural biases of its authors.³¹² The Amendment should be repealed because it facilitates the Chinese human smuggling business and conflicts with sound refugee policy.³¹³ Asylum protects refugees who flee persecution in their native countries.³¹⁴ Chinese people who are truly persecuted by the abuse of family planning programs can present valid asylum claims under the original statute and evolving case law.³¹⁵ Current efforts to “crack down” on alien smuggling crimes and illegal immigration are reactive and ineffective in the face of transnational smuggling networks and the socioeconomic factors driving Chinese migration.³¹⁶

Although the 1996 Amendment is not the source of this problem, it facilitates human smuggling by validating a type of claim that predominantly applies to only one country: China.³¹⁷ The Amendment grants Chinese applicants *prima facie* asylum eligibility even though the majority of their claims are fraudulent.³¹⁸ Meanwhile, millions of people forced to flee persecution

³⁰⁹ See, e.g., Smith, *supra* note 6, at 2-3 (discussing national “anti-immigrant sentiment”).

³¹⁰ See *supra* Part V-B.

³¹¹ See *supra* notes 319-21 and accompanying text.

³¹² See *supra* notes 202-04 and accompanying text.

³¹³ See *supra* Part V-B and C.

³¹⁴ ANKER, *supra* note 76, at 1.

³¹⁵ *Id.* at 379-81.

³¹⁶ See *supra* Part III.

³¹⁷ See *supra* Part IV-B.

³¹⁸ See *supra* notes 181, 249, 256, 304 and accompanying text.

in their native countries remain ineligible for asylum in the U.S.³¹⁹ By focusing on only one country, the 1996 Amendment ignored the plight of millions of victims in desperate need of international protection.³²⁰ In a world continually beset by war and inhuman ethnic conflict, this selective refugee policy is both unwise and unfair.³²¹

³¹⁹ In 1997 there were over 22 million refugees worldwide, yet only a fraction of these people were granted legal "refugee status." See Volker Turk, *The Role of UNHCR in the Development of International Refugee Law*, in REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES 153 (Frances Nicholson and Patrick Twomey, eds. 1999). In the United States, applicants are often denied asylum because their persecution is judged not to have been inflicted "on account of race, religion, nationality, membership in a particular social group, or political opinion," regardless of the severity of the persecution itself. For example, the Board of Immigration Appeals has held that "the tragic and widespread savage violence affecting all Salvadorans as the result of civil strife and anarchy is not persecution." *Matter of Sanchez and Escobar*, 19 I.&N. Dec. 276, 284 (BIA 1985). See also, *Matter of J-J*, Int. Dec. 3323 (BIA 1997) (Asylum denied despite the fact that in the applicant's native Liberia "warring factions continued to be as active or more active than previously, engaging in arbitrary detentions or 'prisoners of war,' and . . . murder, mutilation, forced rape, torture, and abductions of each other and the civilian population.").

³²⁰ Despite the fact that the Refugee Act of 1980 states that "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C.).

³²¹ See HATHAWAY, *supra* note 258, at 231-33 (discussing the "challenge of humane protection in a self-interested world") Under U.S. asylum law "evidence of widespread violence and human rights violations affecting all citizens [of an asylum applicant's native country] is insufficient to establish persecution." *Ravindran v. I.N.S.*, 976 F.2d 754, 759 (1st Cir. 1992). Arguably, the humanitarian purpose of asylum law would be better served by removing all of the eligibility grounds and determining refugee status solely on the severity of persecution suffered. Hathaway argues that by recognizing only certain reasons for persecution based on "value-laden distinctions, the selective focus of [U.S.] refugee law is invidious." James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129, 134 (1990). See also Gagliardi, *supra* note 300 at 281-82.