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Tale of Two Policies: A Defense of China's Population Policy and an Examination of U.S. Asylum Policy

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A TALE OF TWO POLICIES: A DEFENSE OF CHINA'S POPULATION POLICY AND AN EXAMINATION OF U.S. ASYLUM POLICY

MONA MA*

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* J.D. May 2011, Cleveland-Marshall College of Law, Cleveland State University; B.A. School of Foreign Languages, Shijiazhuang University of Economics. This note is dedicated to my husband, Scott Farkas. I would like to thank my research editor, David Sporar, a 2010 graduate of Cleveland-Marshall College of Law, for his invaluable comments.

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I. INTRODUCTION

In 1993, Wu and Yang, two Chinese citizens from Fujian province, separately and illegally entered the United States. They met and were married in the U.S., and had two children. In 1996 and in 1999 respectively, Wu and Yang were placed in deportation proceedings because of their illegal status. Both conceded deportability, but they nonetheless maintained that they could not return to China because they feared the possibility of persecution for violating China's family planning policy. The Eighth Circuit Court of Appeals granted asylum in 2005.¹

China has the largest population in the world, totaling 1.33 billion as of 2007.² Supporting 20% of humanity with 7% of the world's arable land has posed significant challenges to the Chinese.³ Against such a background, China adopted a national population control policy to curb its explosive population growth and to sustain the nation's long-term survival and development. The policy is primarily focused on limiting each couple to one child, but exceptions are made for families with foreseeable hardship. The policy is implemented through a combination of economic incentives and disincentives, the preventive and protective measure of sterilization, and the threat of abortion for policy violations. The policy has made significant contributions to curbing China's population explosion.

China's policy, however, has been a perennial target of attack by the West. It is routinely criticized as notorious and harsh because of alleged infringement on

¹ These facts are from *Yang v. Gonzales*, 427 F.3d 1117 (8th Cir. 2005).

² THE ECONOMIST, POCKET WORLD IN FIGURES 16 (2009) [hereinafter ECONOMIST FIGURES]. China undertook the latest census in 2010, but the tallies will not be completed until April, 2011. However, preliminary statistics by China's National Bureau of Statistics showed that China's population reached 1.341 billion by the end of 2010. *Population Now Stands at 1.341 Billion*, CHINA DAILY (Feb. 21, 2011), <http://bbs.chinadaily.com.cn/viewthread.php?gid=2&tid=693675>.

³ Charles E. Schulman, Note, *The Grant of Asylum to Chinese Citizens Who Oppose China's One-Child Policy: A Policy of Persecution or Population Control?*, 16 B.C. THIRD WORLD L.J. 313, 316-17 (1996).

reproductive rights. The U.S. asylum law reflects this criticism: section 104(a)(42)(A) of the Immigration and Nationality Act (INA), as amended by section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), grants Chinese citizens who oppose China's policy, such as Wu and Yang, a basis for political asylum.

The U.S. asylum law presents a distorted view of China's policy to the world and unfairly taints China's image in the international arena. It also undermines the effectiveness of the policy by encouraging Chinese citizens to break the law. This article advocates the repeal of IIRAIRA § 601 by demonstrating that China's population policy is a necessary and responsible social policy. Part II gives a brief history of the U.S. asylum law relating to China's population policy, including the pre-1996 court split on whether to grant Chinese nationals asylum based on violations of China's population policy. *In re Chang*, a Board of Immigration Appeals case that denied asylum, will be briefly examined. Part III presents the background of China's policy and articulates various justifications for the policy and its enforcement mechanism. Part IV returns to *In re Chang* and discusses the opinion's appreciation for the exigency and the non-persecutive nature of China's policy. Part V concludes that IIRAIRA § 601 is unjustifiable and should be repealed, and that *In re Chang* should be reinstated.

II. U.S. ASYLUM LAW RELATING TO CHINA'S POPULATION CONTROL POLICY

A. *From the 1968 United Nations Protocol Relating to the Status of Refugees to the 1980 U.S. Refugee Act*

In 1968, the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees, thereby binding itself to the obligations under the 1951 Convention Relating to the Status of Refugees.⁴ The Convention requires that participating states not return refugees to their home countries.⁵ It defines a refugee as one who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."⁶

In 1980, the United States Congress enacted the Refugee Act to implement the Protocol domestically.⁷ Major adjustments made by the Act are reflected in INA § 208, under which an alien may apply for political asylum.⁸ An alien who

⁴ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. The United States is not a party to the 1951 Convention because it has a geographical limitation to Europe. The Protocol is a supplement to the 1951 Convention. State parties to the Protocol bind themselves to the obligations under the 1951 Convention even if they are not parties to the Convention.

⁵ Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

⁶ *Id.* art. 1A(2).

⁷ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of Title VIII of the United States Code).

⁸ Immigration and Nationality Act (INA) § 208, 8 U.S.C. § 1158 (2006) (setting out the authority and procedures for applying for asylum and the conditions for granting asylum).

successfully achieves asylee or refugee status may work legally in the United States,⁹ apply for public assistance and lawful permanent residence,¹⁰ and eventually obtain United States citizenship.¹¹ A successful applicant must meet the definition of refugee as defined in the INA, which adopts nearly identical language from the 1951 Convention Relating to the Status of Refugees.¹² An alien may be eligible for asylum on any one of five grounds: if the alien is persecuted because of his or her race, religion, nationality, membership in a particular social group, or political opinion.¹³

B. Pre-1996 Case Law on Chinese Nationals Applying for Asylum Based on China's Population Policy

Before the enactment of the IIRAIRA in 1996, U.S. courts were divided on whether to grant asylum to Chinese nationals who claimed persecution because of alleged resistance to China's population policy. Some courts accepted the justification advanced by some Chinese asylum applicants that resistance to China's family planning policy was an expression of their "political opinion" in the right to procreate. For instance, the U.S. District Court for the Eastern District of Virginia applied this refusal-to-comply-as-political-expression analysis to justify a grant of

⁹ *Benefits and Responsibilities of Asylees*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/> (follow "Green Card" hyperlink; then follow "Green Card for a Refugee" hyperlink; then follow "Benefits and Responsibilities of Asylees" hyperlink) (last visited May 15, 2011).

¹⁰ *Id.*

¹¹ *Citizenship Through Naturalization*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/> (follow "Citizenship Through Naturalization" hyperlink) (last visited May 15, 2011).

¹² INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id.

¹³ *Id.* Both asylees and refugees must meet the definition of refugee. The only difference between a refugee and an asylee is that a refugee applies for admission while outside the United States and an asylee applies for admission either at a port of entry or at some point after entry into the United States. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS 1 (2009), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf.

asylum in 1993.¹⁴ The district court ruled that “an individual’s expression of his or her views in opposition to a country’s coercive population control measures may constitute a ‘political opinion’ within the meaning of 8 U.S.C. § 1101(a)(42)(A).”¹⁵

Other courts denied asylum to Chinese nationals claiming persecution under China’s population policy. For example, in *In re Chang*, a Chinese native alleged that he and his wife had to flee China to escape sterilization because they had had two children and wanted to have more.¹⁶ Chang claimed protection as a member of a “particular social group” that opposed China’s population policy.¹⁷ The Board of Immigration Appeals (BIA) denied asylum.¹⁸ It held that China’s population policy is not “a subterfuge for persecuting any portion of the Chinese citizenry” on account of any of the reasons enumerated in section 101(a)(42)(A) of the INA.¹⁹ It further held that implementation of the policy, “even to the extent that involuntary sterilizations may occur,” is not persecution and does not create a well-founded fear of persecution on any of the grounds enumerated in INA § 101(a)(42)(A).²⁰

*C. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996
(IIRAIRA)*

In response to *In re Chang*, Congress enacted section 601 of the IIRAIRA.²¹ Section 601 expanded the definition of refugee under INA § 101(a)(42) to include persons persecuted under a coercive family planning policy.²² To demonstrate eligibility under section 601, an applicant must show that she “(1) resisted China’s

¹⁴ *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 872 (E.D. Va. 1994).

¹⁵ *Id.* at 874.

¹⁶ *In re Chang*, 20 I. & N. Dec. 38, 39 (BIA 1989), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), 110 Stat. 3009-546, 3009-689 (1996) (codified at 8 U.S.C. § 1101(a)(42) (2006)).

¹⁷ *Id.* at 43.

¹⁸ *Id.* at 48. The BIA is an administrative appellate body that reviews decisions of the Immigration Courts and some decisions of the U.S. Citizenship and Immigration Services.

¹⁹ *Id.* at 44.

²⁰ *Id.* A more detailed discussion of the BIA’s decision will be had *infra* Part IV.

²¹ IIRAIRA, Pub. L. No. 104-208, 110 Stat. 3009 (codified at 8 U.S.C. § 1101(a)(42) (2006)). In clarifying Congress’s purpose in implementing section 601, the United States House of Representatives Committee of the Judiciary stated that Congress intended to overturn earlier BIA decisions. H.R. Rep. No. 104-469, at 173-74 (1996).

²² INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (as amended in 1996).

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

Id.

family planning policy; (2) . . . was persecuted (or has a well-founded fear of persecution); and (3) the persecution was or would be because of [her] . . . resistance to the policy.”²³ Additionally, section 601 provides asylum eligibility to spouses.²⁴ Approximately 2,000 Chinese citizens receive asylum under this basis each year.²⁵

III. JUSTIFICATIONS FOR CHINA’S POPULATION CONTROL POLICY

A. *The Background and History of China’s Family Planning Policy*

China’s population policy originated out of necessity. When the People’s Republic of China was founded in 1949, it was already sustaining a population of 541.67 million.²⁶ With the improvement of medical and health conditions, economic development, as well as a lack of awareness of the importance of birth control, China witnessed a rapid population increase to 806.71 million in 1969.²⁷ In the 1970s, the average number of children per family was 5.8.²⁸ Because the growth in population outstripped economic development, China experienced significant problems.²⁹ Most depressingly, famine was a frequent occurrence in rural China, and as many as 30 million people died of starvation in 1960-61 alone.³⁰ Realizing the drawbacks of an overly large population, in the 1970s the Chinese government began campaigns to encourage late marriages, longer intervals between births, and fewer children.³¹ Due to its large population base, these measures were not drastically effective in slowing population growth.³² In 1979, China’s population climbed to 975 million.³³ By that

²³ *Xue Hua Liu v. Holder*, No. 08-5201-ag, 2009 WL 2837628, at *1 (2d Cir. Sept. 4, 2009).

²⁴ H.R. Rep. No. 104-469, at 174 (1996).

²⁵ RUTH ELLEN WASEM, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 23 (2007), available at [http://pards.org/crs/CRSReportsImmigrationPolicyOnAsylumSeekers\(January25,2007\)Updated.pdf](http://pards.org/crs/CRSReportsImmigrationPolicyOnAsylumSeekers(January25,2007)Updated.pdf). Although Figure 5 of the CRS report does not indicate source countries, the accompanying text clarifies that “[t]he country of origin for all conditional coercive population control grantees as of FY2003 has been the People’s Republic of China.” *Id.* Asylum approvals were conditional beyond the 1,000 annual numerical limit. The numerical cap was lifted in 2005.

²⁶ *Population*, ECON. & COMMERCIAL COUNSELOR’S OFFICE OF THE EMBASSY OF THE P.R.C. IN THE KINGDOM OF SWED. (Dec. 9, 2004), <http://se2.mofcom.gov.cn/aarticle/aboutchina/population/200412/20041200009275.html>.

²⁷ *Id.*

²⁸ *China to Continue Population Control Efforts*, EMBASSY OF THE P.R.C. IN THE U.S. (Jan. 6, 2005), <http://www.china-embassy.org/eng/gyzg/t178704.htm>.

²⁹ Thomas A. Brown, II, *Forced Abortions and Involuntary Sterilization in China: Are the Victims of Coercive Population Control Measures Eligible for Asylum in the United States?*, 32 SAN DIEGO L. REV. 745, 750 (1995).

³⁰ *Id.*

³¹ Gerrie Zhang, *U.S. Asylum Policy and Population Control in the People’s Republic of China*, 18 HOUS. J. INT’L L. 557, 561 (1996).

³² Yang Chun-Xi et al., *China’s Treatment of Crimes Against the Environment: Using Criminal Sanctions to Fight Environmental Degradation in the PRC*, 8 J. CHINESE L. 145, 148 n.14 (1994).

time, China was already supporting 25% of the world's population with 7% of the world's arable land.³⁴

Confronted with the prospect of recurrent massive starvation as well as economic and social stagnation, the Chinese government revised its policy to primarily focus on limiting each couple to one child, especially in cities where the residents generally have governmental social security and pension plans and where overcrowding is especially severe.³⁵ Exceptions are made for residents in rural farming areas and ethnic minorities where children provide the only security for aged parents.³⁶ In all cases, couples are encouraged to have only one child, and rewards are given to couples who are allowed to have more than one child but choose to have only one.³⁷ The policy also encourages late marriages (23 or older for female and 25 or older for male).³⁸

Although the program achieved substantial success in curbing population explosion, China's population still soared from 975 million in 1979 to 1.14 billion in 1990,³⁹ thanks to its large population base. That increase alone represented a population larger than Brazil, the world's fifth most populous country.⁴⁰ China's

³³ *Id.*

³⁴ Schulman, *supra* note 3, at 316-17.

³⁵ Zhang, *supra* note 31, at 561.

³⁶ *Id.* at 564; *see also* Jiangxisheng Renkou yu Jiahuashengyu Tiaoli [Jiangxi Province Population and Family Planning Regulations] (promulgated by Standing Comm. Jiangxi People's Cong., Mar. 27, 2009, effective May 1, 2009), 2009 STANDING COMM. JIANGXI PEOPLE'S CONG. GAZ. 24, art. 9, *available at* <http://www.jxjsw.gov.cn/html/readwm.asp?tablename=2&id=1154> (last visited May 15, 2011); Guangdongsheng Renkou yu Jiahuashengyu Tiaoli [Guangdong Province Population and Family Planning Regulations] (promulgated by Standing Comm. Guangdong People's Cong., July 25, 2002, effective Sept. 1, 2002), 2002 STANDING COMM. GUANGDONG PEOPLE'S CONG. GAZ. 136, art. 19, *available at* http://www.china.com.cn/zhuanti2005/txt/2002-08/08/content_5185529.htm (last visited May 15, 2011).

³⁷ *See, e.g.*, Hebeisheng Renkou yu Jiahuashengyu Tiaoli [Hebei Province Population and Family Planning Regulations] (promulgated by Standing Comm. Hebei People's Cong., July 18, 2003, effective Oct. 1, 2003), 2003 STANDING COMM HEBEI PEOPLE'S CONG. GAZ., arts. 32-38, *available at* http://www.china.com.cn/zhuanti2005/txt/2003-12/09/content_5457905.htm (last visited May 15, 2011). For a list of the Population and Family Planning Regulations of all Chinese provinces, *see* http://www.china.com.cn/zhuanti2005/node_5457646.htm (last visited May 15, 2011).

³⁸ Zhonghua Renmin Gongheguo Renkou yu Jiahuashengyu Fa [Population and Family Planning Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2001, effective Sept. 1, 2002), 2001 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 63 (P.R.C.), art. 25, *available at* http://www.unescap.org/esid/psis/population/database/poplaws/law_china/chttitle.htm (follow "Population and Family Planning Law of the People's Republic of China" hyperlink) (last visited May 15, 2011). The legal marriage age in China is 20 or older for female and 22 or older for male. *Marriage Registration in China*, CHINESE EMBASSY AND CONSULATES GENERAL IN THE U.S.A. (Aug. 1, 2003), <http://houston.china-consulate.org/visa/english/marriage/jh.htm> (last visited May 15, 2011).

³⁹ Yang Chun-Xi et al., *supra* note 32, at 148 n.14.

⁴⁰ *Id.*

current population stands at 1.33 billion.⁴¹ Without the policy in place, China's population today would have been larger by at least 300 million, the size of the current U.S. population.⁴²

B. Population Control Is Essential to Sustainable Development

1. The Importance of Population Control to Sustainable Development Is Recognized Globally

One objective behind China's efforts of population control is "to promote sustainable development of the population as well as the economy, resources and environment."⁴³ Sustainable development emphasizes that the current population's use of resources should be in a way that preserves the environment so that future generations can meet their needs as well.⁴⁴ The concept highlights the interrelationships between economic development, environmental degradation, and population pressure.⁴⁵ The effect of population on sustainable development is readily apparent: for humans to survive, we must consume resources, but the world's resources are not inexhaustible. In fact, delegates attending the World Summit on Sustainable Development called for the world to set the issue of population as the core of sustainable development.⁴⁶

The importance of population control to sustainable development is recognized internationally. The Asian community endorses "effective control of excessive population growth" as "the prerequisite to achieving sustainable development."⁴⁷ The European Union also approves that a balance between population growth and development "can only be established when population policies are an integral part

⁴¹ ECONOMIST FIGURES, *supra* note 2, at 16. Although China's territory is smaller than that of the United States, China's population is four times the size of the U.S. population. *Id.* The U.S. population (2007 estimate) is 303.9 million. *Id.*

⁴² Claudia Meulenbergh, *Definitely Probably One: A Generation Comes of Age Under China's One-Child Policy*, WORLD WATCH MAG., Aug. 15, 2004, available at <http://www.worldwatch.org/node/556> (last visited May 15, 2011).

⁴³ *China Pursues Population Control to Promote Sustainable Development*, CHINA.ORG (Oct. 18, 2002), <http://www.china.org.cn/english/government/46147.htm>.

⁴⁴ G.A. Res. 42/187, U.N. Doc. A/RES/42/187 (Dec. 11, 1987), available at <http://www.un.org/documents/ga/res/42/ares42-187.htm> (last visited May 15, 2011) (Sustainable development is development that "meet[s] the needs of the present without compromising the ability of future generations to meet their own needs.").

⁴⁵ *Id.* ¶ 5.

⁴⁶ See *Roundup: Population Issue Called for Core of Earth Summit Agenda*, HUMANRIGHTS.ORG, <http://www.humanrights-china.org/news/2002-8-28/200282882049.htm> (last visited May 15, 2011).

⁴⁷ Yoshio Yatsu, Chairman, Asian Forum of Parliamentarians on Population and Development (AFPPD), Remarks at the Opening Ceremony of the Seventh General Assembly of the AFPPD (Oct. 17, 2002), available at <http://www.china.org.cn/english/government/46147.htm> (last visited May 15, 2011). The AFPPD is "an international inter-parliamentary organization that aims to promote communication and cooperation among government members in Asian and Oceanic nations regarding world population and development." *Id.*

of sustainable development strategies.”⁴⁸ Even the United States acknowledged that “[p]opulation growth will make the objective of sustainable development more difficult”⁴⁹ and “all nations have responsibility for managing population growth.”⁵⁰ It further proclaimed that the U.S. “should have policies and programs that contribute to stabilizing global human population; this objective is critical if we hope to have the resources needed to ensure a high quality of life for future generations.”⁵¹ Non-governmental actors shared this concern as well. In 1993, the world population reached 5.5 billion.⁵² Perturbed by the unprecedented increase in world population, representatives from sixty national science academies, led by the U.S. National Academy of Sciences and Britain’s Royal Society, convened in New Delhi, India, and issued a warning that “[h]umanity is approaching a crisis point with respect to the interlocking issues of population, environment, and development.”⁵³ The world population currently is 6.9 billion and is projected to escalate to 9.4 billion by 2050.⁵⁴

2. China’s Large Population Threatens Sustainable Development

China’s large population base is the biggest contributing factor to its excessive population growth. Its large population and the accompanying high growth rate frustrate China’s sustainable development in many ways. Providing sufficient food, employment, housing, and medical care for a large population necessarily demands the consumption of a large amount of resources.⁵⁵ An enormous need for consumption inevitably leads to the extensive exploitation of natural resources and

⁴⁸ Manfred Kanther, Federal Minister of the Interior of Germany, Address on Behalf of the European Union at the International Conference on Population and Development of the United Nations in Cairo (Sept. 5, 1994), *available at* <http://www.un.org/popin/icpd/conference/gov/940905184044.html> (last visited May 15, 2011).

⁴⁹ PRESIDENT’S COUNCIL ON SUSTAINABLE DEVELOPMENT, SUSTAINABLE AMERICA: A NEW CONSENSUS FOR THE PROSPERITY, OPPORTUNITY, AND A HEALTHY ENVIRONMENT FOR THE FUTURE 141-42 (1996), *available at* http://clinton2.nara.gov/PCSD/Publications/TF_Reports/amer-top.html (last visited May 15, 2011).

⁵⁰ *Id.* at 144.

⁵¹ *Id.* at vi.

⁵² U.S. CENSUS BUREAU, THE WORLD AT A GLANCE: 1994, at 1 (1994), *available at* http://www.census.gov/aprd/www/statbrief/sb94_4.pdf (last visited May 15, 2011).

⁵³ U.N. POPULATION INFO. NETWORK, SCIENCE ACADEMIES URGE ‘INCISIVE ACTION’ ON POPULATION, *available at* http://www.un.org/popin/icpd/newslett/93_10/8.html (last visited May 15, 2011).

⁵⁴ U.S. POPULATION REFERENCE BUREAU, 2009 WORLD POPULATION DATA SHEET 2, 6 (2009), *available at* http://www.planetwire.org/files.fcgi/8242_PRB_2009_World_Population_Data_Sheet.pdf (last visited May 15, 2011).

⁵⁵ See ASEAN Environmental Education Action Plan, 2000-2005, ASS’N OF SE. ASIAN NATIONS (2005), *available at* <http://www.aseansec.org/12656.htm> (last visited May 15, 2011). Many ASEAN member countries “face common problems of . . . depletion or degradation of natural resources such as rapid consumption of fossil fuels” and “rapid growth of population with the accompanying land use changes brought about by increasing need for more living space, food and other amenities.” *Id.*

large-scale production.⁵⁶ Exploitation, production, and consumption all lead to the depletion of natural resources and environmental degradation.⁵⁷ For instance, air pollution is China's leading environmental hazard.⁵⁸ Out of the forty-six cities worldwide with the worst air pollution, twenty-four are Chinese cities.⁵⁹ China also discharges the largest amount of water pollutants worldwide.⁶⁰ Most of China's rivers are polluted and many urban areas suffer from a serious shortage of drinking water.⁶¹ Greenhouse gas emissions are directly proportional to population growth.⁶² China is the second largest carbon dioxide emitter, contributing to the increasing global greenhouse effect.⁶³ Failure to control its population growth will only worsen these environmental hazards. As its large population continues to expand, more resources and more energy will need to be consumed, causing further degradation to the environment.

The threat to sustainable development is intensified by the exponential nature of population growth.⁶⁴ A cursory review of the world population growth exposes "the explosive nature of exponential growth": 2.5 billion in 1950, 5.3 billion in 1990, 6.3 billion in 2000, and 8.5 billion in 2025.⁶⁵ World population did not reach one billion until 1804, but then it only took 123 years to reach 2 billion in 1927, 33 years to reach 3 billion in 1960, 14 years to reach 4 billion in 1974, 13 years to reach 5 billion in 1987, and 12 years to reach 6 billion in 1999.⁶⁶ As mentioned above, the world population currently is estimated at 6.9 billion and is projected to reach 9.4 billion by the middle of the twenty-first century.⁶⁷

⁵⁶ Zhang, *supra* note 31, at 568.

⁵⁷ GLOBAL SCI. PANEL, INT'L INST. FOR APPLIED SYS. ANALYSIS, POPULATION IN SUSTAINABLE DEVELOPMENT 2 (2002), available at http://www.iiasa.ac.at/Admin/INF/hague/GSP_final_statement.pdf (last visited May 15, 2011); see also JEFFREY A. FRANKEL, THE ENVIRONMENT AND ECONOMIC GLOBALIZATION 135 (Michael M. Weinstein ed., 2005) ("[W]hen GDP increases, the greater scale of production leads directly to more pollution and other environmental degradation.").

⁵⁸ Zhang, *supra* note 31, at 568.

⁵⁹ ECONOMIST FIGURES, *supra* note 2, at 105.

⁶⁰ *Id.*

⁶¹ Zhang, *supra* note 31, at 568.

⁶² AUSTL. INST., HIGH POPULATION POLICY WILL DOUBLE GREENHOUSE GAS GROWTH (1999), available at <https://www.tai.org.au/documents/downloads/MR62.pdf> (last visited May 15, 2011).

⁶³ ECONOMIST FIGURES, *supra* note 2, at 106.

⁶⁴ Omar Saleem, *Be Fruitful, and Multiply, and Replenish the Earth, and Subdue It: Third World Population Growth and the Environment*, 8 GEO. INT'L ENVTL. L. REV. 1, 2 (1995).

⁶⁵ *Id.*

⁶⁶ UNITED NATIONS, THE WORLD AT SIX BILLION (1999), available at <http://www.un.org/esa/population/publications/sixbillion/sixbilpart1.pdf> (last visited May 15, 2011).

⁶⁷ U.S. POPULATION REFERENCE BUREAU, *supra* note 54, at 2, 6.

A population with a mere 2% annual growth rate will double itself in thirty-five years.⁶⁸ Such a growth rate is manifestly unacceptable for China, given that China has a population base of 1.33 billion.⁶⁹ China's annual population growth rate was 1.7% between 1970 and 1990, 1% between 1990 and 2000, and 0.8% between 2000 and 2009.⁷⁰ One important thing we should bear in mind is that even as a country's population growth rate declines, so long as the growth rate is not negative, the country's population is still increasing. As a result, China's population has been increasing even though there has been a persistent drop in growth rate.⁷¹ Furthermore, even though China's population growth rate has been declining over the years, the number of people added to the population each year has been increasing because the population base has become larger.⁷²

Further, positive factors such as "[a]dvances in medicine, public health measures, and better nutrition" have greatly improved human life expectancy.⁷³ Under the combined effect of these positive factors and the negative factor of a large population base, the consequences of uncontrolled exponential growth are beyond calculation. Population growth rate is an important factor in determining how great a burden the changing needs of its people for infrastructure, resources, and jobs would impose on a country.⁷⁴ To reverse the cycle of a large population and high growth numbers, the most important thing the Chinese government could do is to reduce the population base, and this can only be accomplished through an effective national population policy that limits the number of children for each family.⁷⁵

⁶⁸ Saleem, *supra* note 64, at 2. Population growth rate is the "average annual percent change in the population, resulting from a surplus (or deficit) of births over deaths and the balance of migrants entering and leaving a country." *Appendix D: Glossary*, U.S. CENSUS BUREAU, <http://www.census.gov/ipc/www/wp96glos.html> (last visited May 15, 2011).

⁶⁹ *ECONOMIST FIGURES*, *supra* note 2, at 16.

⁷⁰ United Nations Children's Fund, *China: Statistics*, available at http://www.unicef.org/infobycountry/china_statistics.html#78 (last visited May 15, 2011).

⁷¹ *China's Population, 1969-2006*, CHINABILITY, <http://www.chinability.com/Population.htm> (last visited May 15, 2011).

⁷² *China*, *THE WORLD FACTBOOK*, <https://www.cia.gov/library/publications/the-world-factbook> [hereinafter *WORLD FACTBOOK*] (last visited May 15, 2011). A graph demonstrating China's growth rate is available at http://www.google.com/publicdata?ds=wbwdi&met=sp_pop_grow&idim=country:CHN&dl=en&hl=en&q=china%27s+population+growth+rate.

⁷³ BETSY HARTMANN, *REPRODUCTIVE RIGHTS AND WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL* 5 (rev. ed. 1995).

⁷⁴ *Definitions and Notes*, *WORLD FACTBOOK*, <https://www.cia.gov/library/publications/the-world-factbook/docs/notesanddefs.html>.

⁷⁵ For example, India's population policy also seeks to restrict the size of the family. See Carl Haub, *India's Population Policy*, <http://www.berlin-institut.org/online-handbook-demography/india.html> (last visited May 15, 2011).

3. Population Control Is Essential to Improving Chinese People's Living Standards

Another objective behind China's population policy is to "improve the quality of Chinese people's lives."⁷⁶ A large population, however, has impaired China's efforts to do so. In recent years, China has achieved impressive successes with its economy, but there remains a stark contrast between China's economy as a whole and its wealth when spread to the entire population.

In terms of Gross Domestic Product (GDP), China only trails the United States by three places: the U.S. ranks No. 1 and China ranks No. 4.⁷⁷ China is the third largest exporter and the third largest trader of goods.⁷⁸ China also has the second largest industrial output and the third largest manufacturing output.⁷⁹ Additionally, China has enjoyed one of the world's most extraordinary economic growth rates—an average annual rate of 15% between 1987 and 2007.⁸⁰ However, China's per capita GDP currently is only \$3,678.⁸¹ Without the population policy having been implemented, China's GDP per capita would have been only \$1,800.⁸² Per capita GDP is often seen as an indicator of the living standard in an economy.⁸³ In the case of the United States, its per capita GDP is \$45,590,⁸⁴ ranking No. 10 worldwide.⁸⁵ China's GDP per capita only ranks No. 133, lower than Iraq, a much smaller country that has long been plagued by civil unrest and warfare.⁸⁶ China has the largest agricultural output worldwide,⁸⁷ but its arable land per head is less than a quarter of an acre.⁸⁸

⁷⁶ *China Pursues Population Control*, *supra* note 43. To improve the qualities of citizens' lives is a common motivation behind governmental population policies. See, e.g., *India: National Population Policy*, YOUTH-POLICY, <http://www.youth-policy.com/Policies/India%20Population%20Policy.pdf> (last visited May 15, 2011) ("The overriding objective of economic and social development is to improve the quality of lives that people lead, to enhance their well-being, and to provide them with opportunities and choices to become productive assets in society.").

⁷⁷ ECONOMIST FIGURES, *supra* note 2, at 26 (2007 figures).

⁷⁸ *Id.* at 34.

⁷⁹ *Id.* at 46.

⁸⁰ *Id.* at 32.

⁸¹ *Background Note: China*, BUREAU OF E. ASIAN AND PAC. AFFAIRS (2010), <http://www.state.gov/t/pa/ei/bgn/18902.htm> (last visited May 15, 2011).

⁸² *Official: China's Family Planning Policy Benefits Country, World*, PEOPLE'S DAILY (Oct. 24, 2008), <http://english.people.com.cn/90001/90776/90882/6521133.html> (last visited May 15, 2011).

⁸³ *Measures of National Income and Output*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Gross_domestic_product (last visited May 15, 2011).

⁸⁴ ECONOMIST FIGURES, *supra* note 2, at 28.

⁸⁵ WORLD FACTBOOK, *supra* note 72.

⁸⁶ *Id.*

⁸⁷ ECONOMIST FIGURES, *supra* note 2, at 48.

⁸⁸ Zhang, *supra* note 31, at 567 n.65.

China's large population has also complicated unemployment. From 2000 to 2007, when it enjoyed one of the world's fastest economic growths, China still experienced an unemployment rate of approximately 4%.⁸⁹ Although this percentage is slightly lower than that of the United States during the same period,⁹⁰ China's unemployment issue is magnified by its much larger population. Additionally, although China has been expanding access to college education, its effort has been impeded by grossly inadequate job placement for college graduates: there are only so many jobs China's economy can provide.⁹¹ Governments value investment in college education because the benefits of college education are manifold: it creates opportunities and a higher standard of living for the individual students and society in turn benefits from individual improvement.⁹² However, job placement insufficiency deters individuals from pursuing a college education, thereby hindering China's objective of improving the population's living standards.⁹³ The unemployment rate for college graduates has remained high: about 30% for 2003 and 2004, and 60% for 2006.⁹⁴ In 2009, 6.1 million graduates were expected to have difficulty locating a job.⁹⁵ China's job placement insufficiency for college graduates is already substantial when only about 20% of the college-age population enrolls in higher education.⁹⁶ The conflict between college education access and job placement will only aggravate if China wants to enhance its enrollment rate to a level comparable to those of the developed countries: Japan has a 55% college enrollment rate, the United States 67.2%, and Australia 72%.⁹⁷

With less than 8% of the world's arable land to support nearly 20% of humanity,⁹⁸ China will face catastrophe if it does not aggressively pursue family planning as a fundamental national policy.⁹⁹ "Man has the fundamental right to

⁸⁹ Shiyelv [Unemployment Rate], NAT'L BUREAU OF STATISTICS OF CHINA, http://www.stats.gov.cn/tjsj/qtsj/gjsj/2008/t20090610_402564440.htm (last visited May 15, 2011).

⁹⁰ *Id.*

⁹¹ Wei-Jun Jean Yeung & Fang Lai, *Assessing the Impact of College Enrollment Policy in China*, http://www.umdcipe.org/conferences/policy_exchanges/conf_papers/Papers/1161.pdf; Tao Li, *Why Graduates Can't Find Jobs in a Soaring Economy: Rent-Seeking Migration of College-Educated Young Workers in China* 5 (2007) (preliminary draft), http://www.aea.org/annual_mtg_papers/2008/2008_433.pdf (last visited May 15, 2011); Tim Johnson, *As Economy Sours, China Frets over Jobless Graduates*, MCCLATCHY NEWSPAPERS (2008), <http://www.mcclatchydc.com/255/story/59779.html> (last visited May 15, 2011).

⁹² SANDY BAUM & KATHLEEN PAYEA, *EDUCATION PAYS* 7 (rev. ed. 2005), available at http://www.collegeboard.com/prod_downloads/press/cost04/EducationPays2004.pdf (last visited May 15, 2011).

⁹³ See Tao, *supra* note 91; Johnson, *supra* note 91.

⁹⁴ Tao, *supra* note 91.

⁹⁵ Johnson, *supra* note 91.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Schulman, *supra* note 3, at 316-17.

⁹⁹ See Zhang, *supra* note 31, at 568.

freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”¹⁰⁰ An oversized population and excessive population growth unduly tax the ability of the environment to sustain human’s survival.¹⁰¹ If China does not vigorously control its population, it risks a future of degenerated environment, intense competition for limited resources, fierce competition for limited education and employment opportunities, and a marginal existence for its population.¹⁰² Life in such a society can hardly be called a life of freedom and dignity.

C. Reproductive Right Is Not an Absolute Right

Individuals’ reproductive right is a fundamental human right, but it is by no means absolute. It must be restricted by concerns for other fundamental human rights. Two of the most important considerations are the current population’s right to survival as well as decent life conditions, and the right of future generations.

1. Individuals’ Reproductive Right Is Not Absolute and Is Subject to the Public Welfare

The concept of the relativity of rights is not new. Few rights, if any, are absolute. Even in the United States, no right, however fundamental, has been recognized as absolute. For instance, the right to privacy, a fundamental right, is not absolute and may be restrained in favor of the First Amendment.¹⁰³ Religious individuals’ exercise of the freedom of religion is not absolute and may be restricted in light of the freedom of religion by non-religious individuals and individuals of different religions.¹⁰⁴ Neither is the venerated freedom of speech an absolute constitutional guarantee.¹⁰⁵ This constitutional protection does not extend to defamatory, crime inciting, or hate speeches the exercise of which injures the interest of the public.¹⁰⁶ “Even liberty . . . the greatest of all rights, is not unrestricted license to act according to one’s own will,” but is subject to “the good and welfare of the

¹⁰⁰ U.N. Conference on the Human Environment, *Declaration of the U.N. Conference on the Human Environment* [hereinafter Stockholm Declaration], Principle 1, U.N. Doc A/CONF.48/14 (June 16, 1972), available at http://www.unep.org/Law/PDF/Stockholm_Declaration.pdf (last visited May 15, 2011).

¹⁰¹ See generally Zhang, *supra* note 31.

¹⁰² See generally *id.*

¹⁰³ *The Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989) (holding that to impose damages on newspaper for publishing the name of a rape victim is unconstitutional).

¹⁰⁴ See *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (holding it is unconstitutional for state officials to compose an official school prayer and to require its recitation in public schools); *Abington Twp. School Dist. v. Schempp*, 374 U.S. 203, 223 (1963) (declaring school-sponsored Bible reading in public schools unconstitutional).

¹⁰⁵ *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 675 (1996) (The First Amendment “does not guarantee absolute freedom of speech.”).

¹⁰⁶ CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 7 (1995).

Commonwealth.”¹⁰⁷ It is simply inconceivable to propose, as some do, that an individual’s freedom to procreate should be “unfettered.”¹⁰⁸

Although individualism is prevalent in Western ideology, individual right is nonetheless “subordinate to the general welfare.”¹⁰⁹ Civil liberties “must be measured by the public welfare and must be limited by it.”¹¹⁰ “The concept of the public welfare is broad and inclusive.”¹¹¹ It includes such diverse values as spiritual, physical, aesthetic, and monetary values,¹¹² “the protection of public safety, order, and morals,”¹¹³ “economic welfare and development,”¹¹⁴ natural resources,¹¹⁵ protection of the environment,¹¹⁶ collective wealth,¹¹⁷ and “maintaining a certain quality of life in a community.”¹¹⁸

Considered in the context of these illustrations, ensuring a population’s collective survival against an explosive population growth and achieving adequate conditions of life for current and future populations is surely a public welfare. In fact, China’s population policy was enacted solely out of considerations for the public health, safety, and welfare: to preserve natural resources and to protect the environment, and ultimately to improve Chinese people’s living standards.¹¹⁹ China values the right of its citizens to have children. However, the absolute exercise of individuals’ reproductive rights will impinge upon the welfare of the population as a whole. An individual may rationalize that one more child does no harm, but this reasoning cannot remain valid if many individuals behave this way. Individuals may be

¹⁰⁷ *Jacobson v. Massachusetts*, 197 U.S. 11, 26-27 (1905) (upholding state statute mandating smallpox vaccination of inhabitants as necessary for the public health or safety).

¹⁰⁸ *In re C-Y-Z*, 21 I. & N. Dec. 915 (1997) (en banc), *abrogated by Shi Liang Lin v. U.S. Dep’t of Justice*, 494 F.3d 296, 299 (2d Cir. 2007). It is telling that the court in *C-Y-Z* analogized the right to reproductive choice to “the right to privacy” and “the right to bodily integrity,” neither of which is absolute. *C-Y-Z*, 21 I. & N. Dec. at 921-22.

¹⁰⁹ *Miller v. Bd. of Pub. Works of L.A.*, 234 P. 381, 488 (Cal. 1925).

¹¹⁰ *Chrisman v. Culinary Workers Local Union No. 62*, 115 P.2d 553, 555 (Cal. Ct. App. 1941).

¹¹¹ *Berman v. Parker*, 348 U.S. 26, 33 (1954).

¹¹² *Id.* (upholding the constitutionality of legislation that takes account of aesthetics in condemnation of private properties).

¹¹³ David G. Tucker & Alfred O. Bragg, III, *Florida’s Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837, 839 (2001).

¹¹⁴ Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2125 (2009).

¹¹⁵ David S. May, *Trends & Insights*, 12 Fall NAT. RESOURCES & ENV’T 133, 133 (1997).

¹¹⁶ *See, e.g.*, 42 U.S.C. § 7409 (2006); Consuelo Bokum, *Implementing the Public Welfare Requirement in New Mexico’s Water Code*, 36 NAT. RESOURCES J. 441, 470-71 (1996).

¹¹⁷ Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 371 (2002).

¹¹⁸ *City of Marion v. Schoenwald*, 631 N.W.2d 213, 218 (S.D. 2001).

¹¹⁹ *China Pursues Population Control*, *supra* note 43.

shortsighted and narrowly focused, but a responsible government needs to be concerned with the well-being of the entire populace as well as future generations.

In essence, China has to balance two important interests: the right of individual citizens to have children and to perpetuate their family, and the well-being of the entire population and the long-term survival of the race. Both interests deserve to be protected, and neither shall be pursued to the exclusion of the other. However, to ensure both interests are protected, compromises in the pursuit of each interest must be made. To strike a proper balance, China's population policy merely seeks to *limit* the size of each family. Although this is a partial compromise of the right to determine the size of one's family, it does not abrogate the right to have a family altogether. China's population control goals are not pursued by, for example, imposing the unreasonable requirement that certain portions of the population have zero children. Such measures would certainly be more expeditious in slowing population growth, but such measures, which entirely preclude an individual's reproductive rights, are not employed. Instead, by limiting the size of families, China's policy strikes a proper balance between two important, competing interests.

2. Individuals' Reproductive Right Is Subject to the Right of Future Generations

The world belongs to future generations who must have sufficient resources to ensure their survival. The right of future generations was recognized as early as in 1972. The Stockholm Declaration announced that "[t]he natural resources of the earth . . . must be safeguarded for the benefit of present *and future generations* through careful planning or management."¹²⁰ Inter-generational equity requires each generation to "pass the planet on in no worse condition than it received it and to provide equitable access to its resources and benefits."¹²¹ The 2002 World Summit on Sustainable Development further declared that

the children of the world spoke to us in a simple yet clear voice that the future belongs to them, and accordingly challenged all of us to ensure that through our actions they will inherit a world free of the indignity and indecency occasioned by poverty, environmental degradation and patterns of unsustainable development.¹²²

Respecting the right of future generations requires that individuals' reproductive freedom be restricted in view of China's circumstances. Natural resources are limited; and for natural resources to last, they cannot be depleted at a rate faster than they can replenish.¹²³ Our daily survival demands many conditions. The two most basic conditions are adequate supplies of food and water, both of which are fundamental human rights and are "of crucial importance for the enjoyment of all

¹²⁰ Stockholm Declaration, *supra* note 100, Principle 2 (emphasis added).

¹²¹ EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS 24 (1989).

¹²² U.N. World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, ¶ 3, U.N. Doc. A/Conf.199/L.6Rev.2 (Sept. 4, 2002), available at http://www.un.org/jsummit/html/documents/summit_docs/0409_16rev2_pol_decl.pdf (last visited May 15, 2011).

¹²³ See Christopher B. Amandes, *Controlling Land Surface Subsidence: A Proposal for a Market-Based Regulatory Scheme*, 31 UCLA L. REV. 1208, 1209 n.21 (1984).

rights.”¹²⁴ Arable land is an important resource not only because it produces food, but also because many industries depend on agricultural products.¹²⁵ China only has a relatively small area of cultivated land.¹²⁶ Additionally, urbanization caused by population growth, together with natural disasters and “grain for green” conservation projects that returned cropland to forests, claims a considerable amount of arable land each year.¹²⁷ The arable land per person in China has declined continually to below one quarter of an acre per person and may decline even further.¹²⁸ Water, like land, is “a limited natural resource.”¹²⁹ In meeting its large population’s demand for water, China is already faced with severe water shortages.¹³⁰ An uncontrolled population will further undermine the right of everyone to “sufficient, safe, acceptable, physically accessible and affordable water.”¹³¹ China’s population, if unchecked, will exacerbate China’s shortage of resources and threaten the population’s survival and its opportunities for a decent life.¹³²

Families do not just enjoy the *right* to have children. Individuals, couples, and families also bear the *responsibility* to have a reasonable number of children that

¹²⁴ Comm. on Econ. Soc. and Cultural Rights, *Right to Adequate Food*, ¶ 1, U.N. Doc. E/C.12/1999/5 (1999), available at <http://www1.umn.edu/humanrts/gencomm/escgencom12.htm> (last visited May 15, 2011).

¹²⁵ Lihu Chen & Yun Gu, *China’s Safeguard Measures Under the New WTO Framework*, 25 FORDHAM INT’L L.J. 1169, 1175-76 (2002).

¹²⁶ Stefanie Beyer, *Environmental Law and Policy in the People’s Republic of China*, 5 CHINESE J. INT’L L. 185, 187 (2006).

¹²⁷ David Harman, *China’s Arable Land Acreage Falls in 2007* (Apr. 17, 2008), available at <http://www.resourceinvestor.com/News/2008/4/Pages/China-s-Arable-Land-Acreage-Falls-in-2007.aspx> (last visited May 15, 2011).

¹²⁸ Zhang, *supra* note 31, at 567 n.65. The arable land per person in the U.S., by contrast, is two acres per person. *Id.*; see also Harman, *supra* note 127.

¹²⁹ Comm. on Econ. Soc. and Cultural Rights, *The Right to Water*, ¶ 1, U.N. Doc. E/C.12/2002/11 (2002), available at <http://www1.umn.edu/humanrts/gencomm/escgencom15.htm> (last visited May 15, 2011).

¹³⁰ See *supra* notes 60-61 and accompanying text.

¹³¹ Comm. on Econ. Soc. and Cultural Rights, *supra* note 129, ¶ 2.

¹³² See Nafis Sadik, *Population Growth and the Food Crisis* (1991), available at <http://www.fao.org/docrep/U3550t/u3550t02.htm> (last visited May 15, 2011). Dr. Nafis Sadik is Executive Director of the United Nations Fund for Population Activities (UNFPA).

A country’s ability to feed itself very much depends on three factors: availability of arable land, accessible water and population pressures. The more people there are, especially in poor countries with limited amounts of land and water, the fewer resources there are to meet basic needs. If basic needs cannot be met, development stalls and economies begin to unravel. In some poor countries, attempts to increase food production and consumption are undermined by rapid population growth; migration from rural to urban areas; unequal land distribution; shrinking landholdings; deepening rural poverty; and widespread land degradation. Lower birth rates, along with better management of land and water resources, are necessary to avert chronic food shortages.

Id.

respects the capacity of the environment. International law provides for women's right to decide "freely" on such matters as the number and spacing of their children.¹³³ However, international law also emphasizes women's obligation to decide such matters "responsibly."¹³⁴ This responsibility is heightened in developing countries such as China where uncontrolled population growth arising out of a large base is incompatible with the capability of the natural environment. Individuals' reproductive right must be balanced against the public welfare of the overall population as well as the right of future generations.

D. Economic and Social Rights Are Preconditions to the Enjoyment of Civil and Political Rights

Human rights are composed of two sets of rights—economic and social rights, and civil and political rights.¹³⁵ Economic and social rights guarantee that individuals are afforded conditions under which they are able to meet their basic needs.¹³⁶ Economic and social rights include such rights as the right to food, housing, work, education, health, and social security.¹³⁷ Civil and political rights are the rights of citizens to liberty and equality and include such classic rights as the freedom to worship, to vote, and to take part in political life.¹³⁸ The two sets of rights are interrelated: "Without economic, social and cultural rights, civil and political rights might be purely nominal in character; without civil and political rights, economic, social and cultural rights could not be long endured."¹³⁹ However, countries at different stages of economic development justifiably have divergent views as to which group of rights is more important.¹⁴⁰

Economically prosperous, developed Western states commonly emphasize the importance of political and civil rights over economic and social rights.¹⁴¹ Some states even question whether economic and social rights may be considered rights at

¹³³ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), art. 16(1)(e), *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13; Cairo Conference on Population, Sept. 5-13, 1994, *Programme of Action of the United Nations International Conference on Population & Development*, ¶ 7.3, U.N. Doc. A/Conf. 171/13, U.N. Sales No. E. 95.XIII.18.CI Annex (1994), *available at* <http://www.iisd.ca/Cairo/program/p07002.html> (last visited May 15, 2011).

¹³⁴ *Id.*

¹³⁵ JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW, NORMS, ACTORS, PROCESS* 487 (2d ed. 2006).

¹³⁶ *What Are Economic and Social Rights?*, NATURAL ECON. & SOC. RIGHTS INITIATIVE (NESRI), http://www.nesri.org/economic_social_rights/index.html (last visited May 15, 2011).

¹³⁷ *Id.*

¹³⁸ *A Human Rights Glossary*, HUMAN RIGHTS RES. CTR., http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-5/6_glossary.htm (last visited May 15, 2011).

¹³⁹ U.N. Secretariat, *Annotations on the Text of the Draft International Covenants on Human Rights*, at 7, U.N. Doc. A/2929 (July 1, 1955).

¹⁴⁰ DUNOFF, *supra* note 135, at 488. As a result of this divergence, two sets of covenants were drafted and adopted to implement the Universal Declaration of Human Rights. *Id.*

¹⁴¹ *Id.* at 487-88.

all.¹⁴² This position is not surprising, as Western countries have already achieved economic prosperity and therefore have less incentive to strive for economic and social rights. Socialist and developing countries, on the other hand, usually maintain that “the achievement of a minimum standard of economic and social welfare is an essential precondition to the realization of political and civil rights.”¹⁴³ This position is logical, as developing countries are first and foremost concerned with their citizens’ basic needs such as food and employment.¹⁴⁴ Reproductive right or more specifically, the right to decide the size of one’s family, falls under the category of civil and political rights.¹⁴⁵ Because China’s large population seriously threatens the government’s ability to satisfy the population’s basic needs for survival, such as adequate food, water, and employment,¹⁴⁶ its citizens’ right to determine the size of their family must be restricted so that both reproductive right and the population’s basic economic and social rights can be accommodated.

E. China’s Population Policy Needs to Be Enforced Through Effective Means

1. Population Policy Is a Legitimate Instrument to Achieve National Objectives

Population policies are widely utilized by developed countries to increase the size of population. Countries that desire to increase population or fertility rates usually set up a “Baby Bonus” whereby the government makes a payment of a certain amount for each baby born. The “Baby Bonus” may be complemented by other incentives such as a long, mandatory maternity leave. For example, in 1988 the Quebec government introduced the Allowance for Newborn Children that paid up to \$8,000 to a family after the birth of a child.¹⁴⁷ Since 2002, Australia has introduced its own Baby Bonus program under which the Australian government makes a tax-free payment of \$5,185 per eligible child to the mother.¹⁴⁸ Singapore

¹⁴² *Id.* at 487.

¹⁴³ *Id.*; see also African Charter on Human and Peoples’ Rights, Preamble, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at <http://www.dfa.gov.za/foreign/Multilateral/africa/treaties/banjul.htm> (last visited May 15, 2011).

¹⁴⁴ See *Topic B: The Question of Measures Needed to Ensure the Eradication of Extreme Poverty and Hunger Under the Millennium Development Goals*, OXFORD INT’L MODEL UNITED NATIONS (OXIMUN), 16 (Nov. 2007), <http://www.oximun.org/ECOSOCRini.pdf> (last visited May 15, 2011).

¹⁴⁵ International Covenant on Civil and Political Rights: General Comments, U.N. GAOR, Hum. Rts. Comm., general cmt. No. 19(39), ¶ 5, U.N. Doc. CCPR/C/21/Rev.1/Add.2 (1990); see also Rachael N. Pine, Comment, *Civil & Political Rights and the Right to Nondiscrimination*, 44 AM. U. L. REV. 1311, 1312 (1995). But see Sandra Coliver, *The Right to Information Necessary for Reproductive Health and Choice Under International Law*, 44 AM. U. L. REV. 1279, 1281 (1995) (“The right to decide on the number and spacing of one’s children . . . includes both civil and economic components.”).

¹⁴⁶ See *supra* Part III.B.

¹⁴⁷ Kevin Milligan, *Quebec’s Baby Bonus: Can Public Policy Raise Fertility?* (Jan. 24, 2002), http://www.cdhowe.org/pdf/Milligan_Backgrounder.pdf.

¹⁴⁸ *Australian Government Baby Bonus Payment Rates*, CENTRELINK, http://www.centrelink.gov.au/internet/internet.nsf/payments/baby_bonus_rates.htm (last visited May 15, 2011). The mother also receives other benefits that help with the cost of childcare. *Id.*

has a Child Development Co-Savings Scheme under which the cash payouts are \$4,000 for the first and second child, and \$6,000 for the third and fourth child.¹⁴⁹ Other countries that have programs in the nature of a Baby Bonus include France, Germany, Russian, Scotland, and Estonia.¹⁵⁰

Of course, China's population policy seeks to achieve the opposite result: it seeks to decrease rather than increase population. However, China's policy to decrease population is as much necessitated by its country conditions as, for example, Australia's policy to increase population. Australia's land territory is comparable to China's land territory: 7.7 million square kilometers, compared to China's 9.6 million square kilometers.¹⁵¹ However, Australia only has a population of 21 million, comprising approximately 1.5% of China's population.¹⁵² Furthermore, nations such as Australia and Singapore encourage procreation because of their rapidly aging populations.¹⁵³ Lastly, but most importantly, almost all of the nations that employ a Baby Bonus program are developed countries where the people have a high standard of living and low enthusiasm for having children, where fertility rate is low, and where additional population can expect to maintain a high standard of living. For example, Australians enjoy a high standard of living with a per capita GDP of \$38,500.¹⁵⁴ Singapore also enjoys one of the highest living standards in the world.¹⁵⁵ Even with the incentive system, Australia only has a population growth rate of 1.195%, ranking No. 112 worldwide.¹⁵⁶ (At this rate, Australia adds 250,000 people to its population each year. In contrast, even with a growth rate of 0.655%, which is about half of Australia's rate, China adds 8.5 million to its population each year, which alone represents more than one third of Australia's population.) With the incentive system, Singapore only has a population growth rate of 0.998%, ranking No. 128 worldwide.¹⁵⁷

China is confronted with the polar opposite situation. It has such a large population base that even a declining population growth rate still means that the number added to the population each year is increasing, its per capita GDP has only increased marginally despite its monumental economic growth, and it is faced with

¹⁴⁹ *Children Development Co-Savings (Baby Bonus) Scheme*, FAMILY SERVS. DIV., <http://www.babybonus.gov.sg/bbss/html/index.html> (last visited May 15, 2011).

¹⁵⁰ *Bonus Rates*, VOLUNTARY HUMAN EXTINCTION MOVEMENT, <http://www.vhemt.org/bbbounty.htm> (last visited May 15, 2011).

¹⁵¹ WORLD FACTBOOK, *supra* note 72.

¹⁵² *Id.*

¹⁵³ See, e.g., *Population Trends 2009*, SING. DEP'T OF STATISTICS, MINISTRY OF TRADE & INDUS., 2 (Sept. 2009), available at <http://www.singstat.gov.sg/pubn/popn/population2009.pdf> (The median age of Singapore's population rose from 20 years in 1970 to 37 years in 2009).

¹⁵⁴ WORLD FACTBOOK, *supra* note 72. China's per capita GDP is \$2,430. BUREAU OF E. ASIAN AND PAC. AFFAIRS, *supra* note 81.

¹⁵⁵ *Standard of Living*, MINISTRY OF INFO., COMMC'NS AND THE ARTS, <http://app.www.sg/what/48/Standard-of-Living.aspx> (last visited May 15, 2011).

¹⁵⁶ WORLD FACTBOOK, *supra* note 72.

¹⁵⁷ *Id.*

the serious problems of overcrowding, unemployment, and depletion of resources.¹⁵⁸ Under these circumstances, China naturally should have a population policy aimed at curbing its population growth.

2. Enforcement Through Incentives and Disincentives Is the Norm

In broad terms, China's policy limits one child to one family, especially in cities, but exceptions are made for farmers in rural areas who are allowed to have two children in certain circumstances and for ethnic groups who are allowed to have three children.¹⁵⁹ The policy is enforced by a combination of incentives and disincentives.¹⁶⁰ Incentives may include preferred housing assignments, better childcare, cash awards, and longer maternity leave.¹⁶¹ For example, couples who have late marriages (23 or older for female and 25 or older for male) get a longer wedding leave and maternity leave as well as other welfare benefits.¹⁶² Rural parents who voluntarily have one child receive an annual payment once they reach a certain age.¹⁶³ People of some ethnic groups who are allowed to have three children but who voluntarily stop at two receive an additional one-time cash benefit.¹⁶⁴

Disincentives may include economic sanctions such as fines, loss of employment for government employees,¹⁶⁵ or disciplinary punishment for Communist Party members.¹⁶⁶ Generally, fines may bankrupt an average rural family and are effective deterrents, but the wealthy could easily buy out their violations.¹⁶⁷ To avoid the negative social influence of flouting violations and to make sure the policy is enforced in an even-handed manner, the fines on the wealthy are set many times higher than for the average citizens.¹⁶⁸ For example, several Chinese provinces impose a fine equal to two to six times the offenders' incomes for the previous year.¹⁶⁹

¹⁵⁸ See *supra* Part III.B.

¹⁵⁹ *China's Family Planning Policy*, *supra* note 82.

¹⁶⁰ Schulman, *supra* note 3, at 317.

¹⁶¹ *Id.*; see also Population and Family Planning Law of the People's Republic of China, *supra* note 38.

¹⁶² Population and Family Planning Law of the People's Republic of China, *supra* note 38, art. 25.

¹⁶³ *China Raises Incentives for Observing Family Planning Policy*, PEOPLE'S DAILY (Oct. 21, 2008), available at <http://english.people.com.cn/90001/90776/90882/6518855.html>.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Chinese Province Raises Fines on Wealthy Flouters of Family Planning Laws*, PEOPLE'S DAILY (Sept. 30, 2007), available at <http://english.people.com.cn/90001/90776/6274776.html>.

¹⁶⁷ *China's Celebrities 'Buy' Extra Children*, PEOPLE'S DAILY (Jan. 21, 2008), available at <http://www.guardian.co.uk/world/2008/jan/22/china.international>.

¹⁶⁸ *Id.*

¹⁶⁹ *China Raises Incentives*, *supra* note 163.

China's incentive and disincentive system has been effective.¹⁷⁰ The average number of children per family has dropped from 5.8 in the early 1970s to 1.8 in 2005.¹⁷¹ More and more people have accepted the idea of later marriage and later childbearing as well as fewer and healthier births, the fertility level of women has dropped by a huge margin, excessive population growth has been controlled, and the quality of people's lives has gradually improved.¹⁷²

3. Enforcement Through Mandatory Sterilization and Forced Abortion Is the Exception

Perhaps the most controversial part of China's population control policy is compulsory sterilizations and forced abortions. Asylum applicants often allege these as punishments.¹⁷³ Critics also tend to attack these two forms of enforcement mechanisms.¹⁷⁴ However, both compulsory sterilization and forced abortion are necessary measures to ensure the effectiveness of the policy and the equality of enforcement.

Sterilization is a desirable preventive measure because it is highly effective, convenient, free from side effects associated with most temporary methods, does not interfere with sexual intercourse, and does not require routine follow-up care or prescription refills.¹⁷⁵ Furthermore, long-term reversible methods allow couples the opportunity to have children in the future.¹⁷⁶ For example, after the 2008 earthquake in Sichuan province, the Chinese government promptly revised its policy to allow parents who lost their only child in the disaster to have another child.¹⁷⁷ Sterilization is a necessary preventive measure because it curtails couples' temptations and decreases couples' chances for intentional unlawful pregnancies. Sterilization also reduces unintended pregnancies. By reducing intentional and unintentional unlawful pregnancies, sterilization also reduces the need for forced abortion, which is admittedly an extreme measure.

Abortions should be used sparingly as a last resort. As evidence of this commitment, the Chinese government primarily utilizes an incentive and disincentive system.¹⁷⁸ Further, it endeavors to raise the citizens' awareness and to

¹⁷⁰ *The National Family Planning Program of China 1995-2000*, UNESCAP.ORG, http://www.unescap.org/esid/psis/population/database/poplaws/law_china/ch_record015.htm (last visited May 15, 2011).

¹⁷¹ *China to Continue Population Control*, *supra* note 28.

¹⁷² *Id.*

¹⁷³ Schulman, *supra* note 3, at 317.

¹⁷⁴ See, e.g., Kala M. Strawn, *Standing in Her Shoes: Recognizing the Persecution Suffered by Spouses of Persons Who Undergo Forced Abortion or Sterilization Under China's Coercive Population Control Policy*, 24 WIS. J.L. GENDER & SOC'Y 205, 205 (2009).

¹⁷⁵ *Female Sterilization Safe, Very Effective*, FAMILY HEALTH INT'L (Fall 1997), http://www.fhi.org/en/RH/Pubs/Network/v18_1/NW181ch2.htm.

¹⁷⁶ *Id.*

¹⁷⁷ *Family Planning Policy Revised for Quake Areas*, CHINA DAILY (May 27, 2008), http://www.chinadaily.com.cn/china/2008-05/27/content_6714891.htm.

¹⁷⁸ See *supra* notes 157-66 and accompanying text.

change outdated conventions, thereby reducing the occurrence of abortions. For example, the voluntary, selective abortion of girls is a product of traditional preference for male children who not only carry the family name, but also stay home with the elderly parents.¹⁷⁹ To lessen the problem of abortion of female children, Fujian province provides insurance to households with daughters and exempts girls from paying school fees.¹⁸⁰ Other provinces also offer special privileges in housing, employment, education, job training, and welfare support to daughters-only families.¹⁸¹ Anhui province presents lectures to parents and grandparents on gender equality to help them give up bias against girls, gives small loans to families with only daughters to help them develop income-generating household economy, teaches women modern production skills, and offers them jobs to enable them to contribute to the family income.¹⁸² As a result, in one village in Anhui province, “75 per cent of the families have expressed a desire to have only one child, regardless of the baby’s sex.”¹⁸³

Although forced abortions should be utilized sparingly and should only be used as a last resort, they should not be abolished because they serve as a threat that deters people from violating the policy. Though extreme, the threat of forced abortions is a necessary safeguard to ensure the overall effectiveness of the policy. Of course, actual violations should be punished, or the threat of abortion will lose its deterring function. Sterilization and abortion should be part of the enforcement mechanism of China’s population policy because, as even critics recognize, “persuasion generally fails to achieve compliance with China’s population control policy.”¹⁸⁴ Some critics concede that “overpopulation represents a legitimate concern in China,” but they nonetheless oppose forced abortions or sterilizations.¹⁸⁵ However, they propose no feasible alternatives.¹⁸⁶ The room for abuse of the policy by China’s large population is too great of a risk to take and the cost of excessive births is too high. China’s circumstances, namely, a large population and the many issues brought about by it, mandate that there be an effective policy that includes compulsory sterilization and the threat of forced abortions.

¹⁷⁹ See *Preference for Boys in China*, FACTSANDDETAILS.COM (2008), <http://factsanddetails.com/china.php?itemid=126&catid=4&subcatid=15> (last visited May 15, 2011).

¹⁸⁰ *Incentives Offered to Families with Girls*, CHINA.ORG (Aug. 12, 2004), <http://www.china.org.cn/english/government/103748.htm> (last visited May 15, 2011).

¹⁸¹ *Id.*

¹⁸² *‘Care for Girls’ Gaining Momentum*, CHINA DAILY (July 8, 2004), http://www.chinadaily.com.cn/english/doc/2004-07/08/content_346700.htm (last visited May 15, 2011).

¹⁸³ *Id.*

¹⁸⁴ Strawn, *supra* note 174, at 209.

¹⁸⁵ *Id.* at 226.

¹⁸⁶ *Id.*

F. There Are No Alternatives to a National Population Policy

1. Voluntary Population Control Is Ineffective

China's population is a significant problem that must be resolved, and it must be resolved through an effective national population control policy. Some may insist that the use of any form of disincentive or even incentive is coercive and constitutes unacceptable government intrusion.¹⁸⁷ However, given the gravity of China's population challenges, a guarantee of effectiveness is imperative. Such a guarantee cannot be achieved if China's population control and family planning were left to the initiative of individuals, as couples will only opt for voluntary sterilization after they have had "more children than would be commensurate with a reduced rate of population growth."¹⁸⁸ India's experience with population control is an example where voluntary compliance has failed to achieve the desired result.

"India was the first country [in the world] to declare a policy to slow population growth in 1952."¹⁸⁹ However, India's policy relies almost exclusively on economic incentives, and it has relied on individual abortion without coercion.¹⁹⁰ As a result, India's declines in fertility and population growth rates have been much slower.¹⁹¹ Although India's territory is only about one third of China's territory, India currently has a population of 1.18 billion, a figure comparable to China's 1.33 billion.¹⁹² India's population is predicted to surpass China in 2025 when India will become the most populous country.¹⁹³ Furthermore, India's population is expected to explode to 1.74 billion by 2050, while China's population is forecast to maintain its peak of 1.43 billion by the same year.¹⁹⁴

Because of China's large population foundation and its exponential growth potential, China must have an effective, nationwide policy that is strictly enforced by the central government. A voluntary family planning policy that operates in an inspirational way cannot achieve the goal of population control or meet the objectives of sustainable development.

¹⁸⁷ HARTMANN, *supra* note 73, at xviii.

¹⁸⁸ *Id.* at 246.

¹⁸⁹ Haub, *supra* note 75.

¹⁹⁰ *Incentives and Disincentives to Promote the Small Family Norm*, NAT'L COMM'N ON POPULATION, <http://populationcommission.nic.in/incentive.htm> (last visited May 15, 2011).

¹⁹¹ *Id.*

¹⁹² WORLD FACTBOOK, *supra* note 72 (select India and China from the "Select a Country or Location" drop down menu). Combined, China and India (2.5 billion) account for well over one-third of the population on the planet (6.9 billion). *Id.* (select World from the "Select a Country or Location" drop down menu).

¹⁹³ Tom Edwards, *China's Population to Peak at 1.4 Billion Around 2026 Census Bureau Projects India to Become Most Populous Country in 2025*, PUBLIC INFO. OFFICE, U.S. CENSUS BUREAU (Dec. 16, 2009), <http://www.usasianwire.com/release.php?id=1395501698> (last visited May 15, 2011).

¹⁹⁴ U.S. POPULATION REFERENCE BUREAU, *supra* note 54, at 2.

2. The Improvement of Living Standards Cannot Be Achieved Without Population Control

China's population control policy is implemented with the goal of improving Chinese people's living standards.¹⁹⁵ It is true that the ultimate improvements in living standards through economic development could motivate people to want fewer children,¹⁹⁶ thus reducing or even eliminating the need for persuasion by the government. Wealthy countries generally have lower population growth rates,¹⁹⁷ and fertility rate and population growth are usually the highest in the world's poorest countries.¹⁹⁸ Further, it is a proven fact that wealthier families have fewer children.¹⁹⁹ Due to its current economic status, however, China cannot yet rely on these economic theories to solve its population issue, although in the future it may be able to. China is still a developing country and the vast majority of Chinese families are not wealthy. For example, China's GDP per capita is only \$3,678²⁰⁰ and ranks No. 133 worldwide.²⁰¹ Further, about half of China's population lives on less than \$2 per day.²⁰²

There may be a misconception of China's wealth because China has become the world's largest manufacturing base.²⁰³ However, this notion neglects the motivation

¹⁹⁵ *China Pursues Population Control*, *supra* note 43.

¹⁹⁶ HARTMANN, *supra* note 73, at xx.

¹⁹⁷ ILAN SHRIRA, *History's Mysteries: Why Do Birth Rates Decrease When Societies Modernize?*, PSYCHOLOGY TODAY (Mar. 14, 2009), <http://www.psychologytoday.com/blog/the-narcissus-in-all-us/200903/history-s-mysteries-why-do-birth-rates-decrease-when-societies-m> (last visited May 15, 2011) ("Starting in Europe in the late 1800s and continuing today, birth rates have been declining in societies as they become more affluent, industrialized, and technologically advanced. In fact, fertility output is dropping so precipitously in some countries—such as Japan, Germany, and Italy—that their total population is now in decline.").

¹⁹⁸ The total fertility rate (TFR, which is the lifetime births per woman) worldwide is 2.6. "TFRs range from 1.7 in more developed countries to 4.6 in the least developed countries." U.S. POPULATION REFERENCE BUREAU, *supra* note 54, at 1. Most of the top 48 countries with the fastest growing populations are also on the list of world's 48 least developed countries. *Least Developed Countries: Country Profiles*, U.N. OFFICE OF THE HIGH REPRESENTATIVE FOR THE LEAST DEVELOPED COUNTRIES, LANDLOCKED DEVELOPING COUNTRIES AND THE SMALL ISLAND DEVELOPING STATES (UN-OHRLLS), <http://www.unohrlls.org/en/ldc/related/62> (last visited May 15, 2011).

¹⁹⁹ Larry E. Jones & Michèle Tertilt, *An Economic History of Fertility in the U.S.: 1826-1960*, at 6, 52 (2007), available at <http://www.stanford.edu/~tertilt/research/Fertility07.pdf> (last visited May 15, 2011) (noting that the "negative relationship between fertility and wealth goes back so far in time" and "much of the difference in fertility experiences . . . can be accounted for by differences in income alone").

²⁰⁰ BUREAU OF E. ASIAN AND PAC. AFFAIRS, *supra* note 81.

²⁰¹ WORLD FACTBOOK, *supra* note 72 (select China from the "Select a Country or Location" drop down menu).

²⁰² *Focus on Asia Pacific*, BUS. FOR MILLENNIUM DEV., <http://www.b4md.com.au/Files/FocusOnAsiaPacific.pdf> (last visited May 15, 2011).

²⁰³ ECONOMIST FIGURES, *supra* note 2, at 34 (2007 figures).

of why foreign companies are attracted to China as their manufacturing base in the first place: they are attracted to China precisely because Chinese labor is inexpensive, which maximizes their profits. One reason Chinese labor is inexpensive is precisely because of its large population: China has a 100 million manufacturing workforce that supplies cheap labor.²⁰⁴ The average hourly manufacturing compensation in China is only \$0.57, “about 3 percent of the average hourly compensation of manufacturing production workers in the United States and of many developed countries of the world.”²⁰⁵

In any event, China’s current economic success is not a reason to discontinue its population policy. Although China’s economy has witnessed rapid growth, such success is achieved partly *because of* its population control. The size of China’s population is not the only cause of all of its struggles, and accordingly China never targeted population control without the contemporaneous employment of other socio-economic measures. For example, the Chinese government places equal emphasis on economic development, poverty eradication, improving education, improving healthcare, commencing a social security and pension system, and promoting the status of women in society.²⁰⁶ However, developing economy and raising standards of living would be a difficult task at best in the face of rising population growth.²⁰⁷ Without the population policy, China’s population today would have been larger by at least 300 million.²⁰⁸ Even with the policy in place for decades, China has only been able to raise its GDP per capita, an important indicator of the population’s living standard, to a modest \$3,678.²⁰⁹ It is more than mere speculation that without the population having been stabilized, the excess population could have offset the economic success China has been able to achieve.

To further its development and to raise its citizens’ living standards, China must properly deal with its population issue while it develops its economy and society. Without effective population control, any increase in Chinese’s wealth would be offset by the overwhelming growth in population. This is especially so because even with the continuation of the policy, China’s population will still rise, thanks to its large population base. To prevent population growth from outpacing the development of the economy and the replenishment of natural resources, China’s population policy must remain in place.

IV. *IN RE CHANG* IS CORRECT

In light of the background and the many justifications behind China’s population policy, *In re Chang* is an insightful opinion. A large population has burdened China’s ability to sustain development and to achieve a long-term balance between

²⁰⁴ Judith Banister, *Manufacturing Employment and Compensation in China*, U.S. DEPT’T OF LABOR, BUREAU OF LABOR STATISTICS, 26 (Nov. 2005), <http://www.bls.gov/fls/chinareport.pdf> (last visited May 15, 2011).

²⁰⁵ *Id.* at 26.

²⁰⁶ Jihua Shengyu (Family Planning), http://www.people.com.cn/electric/hh50/9/9_4_0.html (last visited May 15, 2011).

²⁰⁷ *See* Haub, *supra* note 75.

²⁰⁸ Meulenberg, *supra* note 42.

²⁰⁹ BUREAU OF E. ASIAN AND PAC. AFFAIRS, *supra* note 81.

the sustainability of natural resources and human consumption.²¹⁰ The opinion accurately recognized the necessity of China's policy by observing that China is "concerned not only with the ability of its citizens to survive, but also with their housing, education, medical services, and the other benefits of life that persons in many other societies take for granted."²¹¹ Further, population control is essential to improving Chinese people's living standards, but a large population base and its attendant large additional population each year has contributed to the rapid depletion of natural resources, extensive pollution to the environment, high unemployment rate, and nominal improvement of living standards.²¹² The opinion properly noted the dire consequences that would occur if China did not implement its policy: "For China to fail to take steps to prevent births might well mean that many millions of people would be condemned to, at best, the most marginal existence."²¹³

Additionally, China's policy is implemented to harmonize population growth with resources and environment, to improve the quality of Chinese people's living standards, and to achieve sustainable development for generations to come.²¹⁴ *In re Chang* correctly observed that the objective of China's policy is to "discourage births" and properly concluded that China's population policy is not persecutive on account of any of the grounds enumerated in INA § 101(a)(42)(A).²¹⁵ China's policy is reasonable and strikes a proper balance between protecting families' right to have children and ensuring the collective survival of the current and future generations. Significantly, the opinion noted that the policy "does not prevent couples from having children but strives to limit the size of the family."²¹⁶

Finally, because of the imperativeness of mandatory sterilization and forced abortion as preventive and protective measures, the opinion properly concluded that implementation of the policy "in and of itself, even to the extent that involuntary sterilizations may occur," is not persecution.²¹⁷ Because the policy is "solely tied to controlling population" and the success of population control requires strict nationwide compliance with the policy, Chinese citizens cannot claim to be the victim of persecution simply because they "do not wish to have the policy applied to them."²¹⁸ Forced sterilization and abortions do not represent persecution. Instead, they are necessary measures of enforcement to prevent a population explosion, a legitimate objective.²¹⁹ Even if they are extreme measures, their severity is excused

²¹⁰ See *supra* Part III.B.1-2.

²¹¹ *In re Chang*, 20 I. & N. Dec. 38, 43 (BIA 1989), *superseded by statute*, Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-689 (codified at 8 U.S.C. § 1101(a)(42) (2006)).

²¹² See *supra* Part III.B.3.

²¹³ *In re Chang*, 20 I. & N. Dec. at 43-44.

²¹⁴ See *supra* Part III.B.

²¹⁵ *In re Chang*, 20 I. & N. Dec. at 43-44.

²¹⁶ *Id.* at 44.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ In any event, occurrences of sterilization and abortion are exaggerated. Chinese nationals arriving illegally in the U.S. are routinely instructed by their smugglers to tell the

by the greater evils these measures prevent, namely, overpopulation. *In re Chang* sufficiently appreciates China's population policy, and is a sound decision.

V. CONCLUSION

China's population policy originated out of necessity and has an ongoing justification for its existence. It is essential to sustainable development and to improving Chinese citizens' living standards. Far from persecutive, the Chinese government is acting as a responsible government for the best interests of the race by enacting and enforcing the policy. Without the policy, China will face an intergenerational cycle of population explosion and economic and environmental degeneration. Individuals' reproductive right is not absolute and shall be restricted by legitimate public interests. The policy is a nationwide law of general application and does not target any particular segment of the citizenry. Its sole objective is to prevent overly rapid population growth that is incompatible with the capacity of the environment. It is not a persecutive policy. The U.S. asylum law fails to appreciate China's conditions and the context in which the policy is implemented, and ignores the positive impact this policy has had on China and the world. *In re Chang* properly articulates the policy reasons behind China's population program and should be reinstated. IIRAIRA § 601 frustrates China's legitimate population control objective and presents a distorted view of China to the world. IIRAIRA § 601 should be repealed to encourage global awareness of the necessity for and positive impact of China's population policy.

typical story of forced abortion. One young Chinese woman, after being detained by immigration officials at New York's John F. Kennedy airport and questioned about her fake travel documents, 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 really a joke. I was not even married. They took my fingerprints and released me.

KO-LIN CHIN, SMUGGLED CHINESE: CLANDESTINE IMMIGRATION TO THE UNITED STATES 188-89 (1999). Further, the U.S. Department of State has consistently reported "wide fabrication and fraud" in Chinese asylum cases, especially in claims by Fujianese. OFFICE OF COUNTRY REPORTS AND ASYLUM AFFAIRS, U.S. DEP'T OF STATE, CHINA: PROFILE OF ASYLUM CLAIMS AND COUNTRY CONDITIONS 43, 51-52 (1998), 39-40 (2004), 49-51 (2007), *available at* <http://pards.org/pevaluc.html> (last visited May 15, 2011).