

THE DESPOTIC STATE DEPARTMENT IN REFUGEE LAW: CREATING LEGAL FICTIONS TO SUPPORT FALUN GONG ASYLUM CLAIMS

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I. INTRODUCTION

The past decade has witnessed the tumultuous rise and fall of a group in the People's Republic of China (PRC) known as the Falun Gong.¹ Variably described as “a heretical cult,”² “a seemingly benign

¹ The Falun Gong (法轮功) (“law wheel *qigong*”) is also referred to as *Falun Dafa* (法轮大法) (“the way of the law wheel”), *Falun Dafa Yanjiu Hui* (法轮大法研究会) (“the way of the law wheel research society”), and *Falun Xiulian Dafa* (法轮修炼大法) (“cultivating the way of the law wheel”).

² E.g., *U.S. Senate Urged to Stop Interfering in China's Internal Affairs*, XINHUA NEWS AGENCY (Beijing), Nov. 4, 1999 (quoting Zhang Qiyue, PRC foreign

breathing exercise group,”³ and “a religious and/or political view,”⁴ the Falun Gong has been the focus of an exceptional amount of worldwide interest considering its relatively short history in the Chinese social arena. In 1992, Li Hongzhi founded the group;⁵ in 1996, the Qigong Scientific Research Association of the PRC expelled the group and banned Li’s publications;⁶ in 1999, the PRC central government outlawed the group, deeming it a heretical cult;⁷ and soon thereafter, international news media and academia alike produced an array of analyses as the group’s visible following in the PRC dwindled down to a virtual nonexistence.⁸ This rise of worldwide interest, however, is less exceptional when considered in light of the role played by the Falun Gong in the PRC. As the world’s fastest developing and most populous country promulgated an increasingly transparent body of law, it simultaneously outlawed the

ministry spokeswoman, as saying that the “Falun Gong is by no means a religious institution but a heretical cult which poses a threat to Chinese society and people”).

³ Anne S. Y. Cheung, *In Search of a Theory of Cult and Freedom of Religion in China: The Case of Falun Gong*, 13 PAC. RIM L. & POL’Y J. 1, 2 (2004).

⁴ *Gao v. Ashcroft*, 299 F.3d 266, 271 (3d Cir. 2002).

⁵ *E.g.*, DANNY SCHECHTER, *FALUN GONG’S CHALLENGE TO CHINA* 119 (rev. paperback prtg. 2002).

⁶ The Qigong Scientific Research Association expelled the Falun Gong because of its practice of “advocating superstitions,” and the News and Publication Bureau banned all publications by Li Hongzhi. *See* James Tong, *An Organizational Analysis of the Falun Gong: Structure, Communications, Financing*, 171 CHINA Q. 636, 653 (2002).

⁷ *Decision of the Standing Committee of the National People’s Congress on Banning Heretical Cult Organizations, and Preventing and Punishing Cult Activities* (Oct. 30, 1999) (P.R.C.), available at http://www.novexc.com/stand_comit_cult_activ.html (last visited Nov. 16, 2004) [hereinafter *Standing Committee Decision on Heretical Cults*].

⁸ Although the number of Falun Gong followers in the PRC that privately retain allegiance to the group remains unclear, public support has ceased. An example of the group’s activity in the public sphere was seen during the Spring Festival of 2002, when the police arrested 40 Falun Gong supporters during a protest in Tiananmen. Notably, all of the participants were foreign citizens. *E.g.*, Erik Eckholm, *Chinese Police Detain Westerners in Falun Gong Protest*, N.Y. TIMES, Feb. 14, 2002, at A6.

Falun Gong and vigorously prosecuted its leaders. The Falun Gong also evidenced a seeming Dr. Jekyll - Mr. Hyde personality: some media sources depicted a peaceful meditation practice, while others reported psychosis, suicide and murder.⁹ Currently, the debate over the identification of the evildoer – the PRC government or the Falun Gong leadership – continues in this blizzard of allegations.

The world of the Falun Gong survives not only in the halls of academia but also the courts of the U.S. judicial system. In recent years, increasing numbers of émigrés from the PRC have eluded removal from the United States by claiming refugee status based on their association with the Falun Gong. Courts have held that PRC citizens who can demonstrate an imputed or actual membership in the Falun Gong possess colorable claims of a well-founded fear of persecution by the PRC government.

This article argues that Falun Gong asylum cases represent a flaw in U.S. refugee law, namely the U.S. Department of State (USDOS)'s overbearing control over adjudicators of asylum claims. The system forces adjudicators to accept the USDOS's politically motivated yet unsubstantiated descriptions of the Falun Gong's situation in the PRC, causing them to grant asylum to aliens who would otherwise be excluded or removed. Part II offers a brief overview of U.S. refugee law and focuses on aspects central to Falun Gong asylum cases, including religious persecution, political persecution, and the prosecution-persecution dichotomy. Part III examines the nature of the Falun Gong as perceived by the three central parties in Falun Gong asylum cases: (1) the applicant, the Falun Gong itself; (2) the alleged persecutor, the PRC government; and (3) the provider of the pivotal evidence, the USDOS. Analysis of the Falun Gong's history and doctrine reveals a self-perception that resembles neither a religion, nor a form of *qigong*, nor a political opinion. The PRC government, through a legal framework that defines permissible social spheres such as religion and *qigong*, perceives the Falun Gong as an impermissible social entity – a heretical cult. The USDOS, however, propagates an unsubstantiated perception of the Falun Gong as both a religion and a political opinion. As Part IV demonstrates, despite the Falun Gong's and the PRC government's perceptions, adjudicators of Falun Gong asylum

⁹ See generally JI SHI, LI HONGZHI & HIS "FALUN GONG": DECEIVING THE PUBLIC AND RUINING LIVES (1999) (providing an in-depth and somewhat graphic study of alleged victims of Falun Gong practice).

cases embrace the USDOS's foundation, which forces them to create a legal fiction. Although Falun Gong members do not fit into the legal definition of refugee, adjudicators must accept the mandate of the USDOS and grant them asylum.

II. UNITED STATES REFUGEE LAW

A. *Elements of an Asylum Claim*

The Refugee Act of 1980 (Refugee Act) incorporated the term "refugee" into U.S. immigration law.¹⁰ The goal of the Refugee Act was to codify refugee law, a subsection of immigration law that had played a large role in forming the U.S. immigration population yet had never enjoyed a statutory definition.¹¹ Although the legislation was meant to eliminate a foreign policy bias that had underlain decisions for those fleeing persecution,¹² policy-based determinations remain a common occurrence.¹³ The Refugee Act did succeed, however, in providing a structured test that asylum seekers must pass, one closely conforming with the standards set forth in the United Nations Protocol Relating to the Status of Refugees.¹⁴

¹⁰ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in various sections of 8 U.S.C.).

¹¹ See Ira J. Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865, 882 n.4 (1982) (noting that "[t]he Act provides a statutory definition of 'refugee' that corresponds to the definition in the United Nations Convention Relating to the Status of Refugees").

¹² Tahl Tyson, *The Refugee Act of 1980: Suggested Reforms in the Overseas Refugee Program to Safeguard Humanitarian Concerns from Competing Interests*, 65 WASH. L. REV. 921, 924 (1990) (explaining that "Congress also intended the definition to reflect a humanitarian concern for the plight of refugees, rather than a narrow concern with foreign policy interests").

¹³ See Michelle N. Lewis, *The Political-Offense Exception: Reconciling the Tension Between Human Rights and International Public Order*, 63 GEO. WASH. L. REV. 585, 591 (1995) (citing Joan Fitzpatrick & Robert Pauw, *Foreign Policy, Asylum and Discretion*, 28 WILLAMETTE L. REV. 751, 765-68 (1992) (citing Board of Immigration Appeals cases in which the decision to grant asylum turned on foreign policy considerations); Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 2 UTAH L. REV. 279, 283, 289 n.35 (1991) (discussing the unstated influence of foreign policy on asylum determinations)).

¹⁴ The United States is a signatory to the 1967 United Nations Protocol relating to the Status of Refugees, which incorporates Articles 2 through 34 of the

The Immigration and Nationality Act (INA) defines “refugee” as one who is unwilling to stay in or return to his/her home country or last habitual residence 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.”¹⁵ Applicants for asylum carry the burden of proving they fall within this definition,¹⁶ which is satisfied by demonstrating (1) a well-founded fear, and (2) a nexus between the fear and one of the five enumerated factors.

Regarding the first prong, U.S. courts have held that a well-founded fear of persecution consists of two components, subjective and objective.¹⁷ The subjective component is satisfied if the fear is “genuine.”¹⁸ The objective component is satisfied with a showing of “credible, direct, and specific evidence”¹⁹ of a “reasonable possibility”²⁰ of persecution. Applicants face a moderate standard of proof in demonstrating a well-founded fear, needing to show merely possible, rather than probable, persecution.²¹

1951 United Nations Convention relating to the Status of Refugees. *See* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) (“If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.”).

¹⁵ INA § 101(a)(42) (2004), 8 U.S.C. § 1101(a)(42) (2004). 8 C.F.R. § 208.13(b)(1) (2004).

¹⁶ 8 C.F.R. § 208.13(a) (2004) (“The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act.”).

¹⁷ *E.g.*, *Malty v. Ashcroft*, 381 F.3d 942, 947 (9th Cir. 2004) (citing *Singh v. INS*, 134 F.3d 962, 966 (9th Cir. 1998)) (“Eligibility for asylum based on a well-founded fear of future persecution requires an applicant to satisfy both a subjective and an objective test.”).

¹⁸ *Desir v. Ilchert*, 840 F.2d 723, 726 (9th Cir. 1988) (citing *Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir. 1985)).

¹⁹ *Id.* (citing *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986)).

²⁰ *Id.* (citing *Cardoza-Fonseca*, 480 U.S. at 438).

²¹ *Cardoza-Fonseca*, 480 U.S. at 440 (“There is simply no room in the United Nations’ definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no “well-

For the second prong, a sufficient nexus is demonstrated if the applicant produces specific documentary evidence or credible and persuasive testimony that the persecutor acted out of a motivation to harm the applicant because of an actual or imputed status or belief.²² The applicant's status or belief, whether actually held by the applicant or imputed by the persecutor, must conform to one of the five enumerated factors. The applicant, however, is not required to demonstrate that s/he will be singled out individually for persecution. Rather, the applicant merely needs to establish that (1) a pattern of persecution exists in the home country against a group similarly situated to the applicant on account of one of the enumerated factors; and (2) the applicant identifies with such a group to the extent that a fear of persecution is reasonable.²³

Perhaps the most fundamental element of an asylum claim, therefore, is identifying one of the five enumerated factors. The following two sections review the issues involved in religious and political opinion asylum claims, respectively. Although the Falun Gong cannot be classified as any of the enumerated factors, as will be discussed in detail in *infra* Part III, adjudicators of Falun Gong asylum applications nonetheless struggle to thrust the group into one of the classifications, usually either religion or political opinion.

B. *Refugee Status Based on Religious Persecution*

In adjudicating a claim based on religious persecution, a duty of the court is to determine whether the subject of the persecution is in fact a religious belief. Because "religion" is an appellation not easily elucidated and remains undefined in international law,²⁴ however, adjudicators of religious asylum claims have a tendency to make decisions based on mistaken assumptions of what the term actually means.²⁵

founded fear" of the event happening.").

²² *E.g.*, *Desir*, 840 F.2d at 726.

²³ 8 C.F.R. § 208.13(b)(2)(iii) (2004).

²⁴ *E.g.*, T. Jeremy Gunn, *The Complexity of Religion and the Definition of "Religion" in International Law*, 16 HARV. HUM. RTS. J. 189, 190 (2003) (noting that "the term 'religion' remains undefined as a matter of international law").

²⁵ *Id.* at 192 (citing Karen Musalo, *Claims for Protection Based on*

The International Religious Freedom Act of 1998 (IRFA) provided seeming relief to this problem.²⁶ It delegated the duty of identifying occurrences of international religious persecutions to the Office of International Religious Freedom, under the USDOS.²⁷ The Office's findings are included in the USDOS's annual Human Rights Reports, which IRFA expressly indicates shall be used in religious persecution asylum cases.²⁸ An adjudicator faced with a claim of persecution the likes of which have been detailed in a Human Rights Report would thus avoid the hurdle of determining the nature of the applicant's belief by relying on the expertise of those in the Office of International Religious Freedom. The relief, however, is illusory, for the task of determining whether something is a "religion" remains, yet now is removed from the context of refugee law.

In response to the problem of defining "religion" in asylum claims, scholars have advocated a shift in the adjudicator's perspective from focus on definitions of the term "religion" in scholarly and legal discourse to focus on how the persecutor defines the subject in question.²⁹ If the persecutor's actions are motivated by what she perceives to be a religious belief on the part of the applicant, her actions shall be considered religious persecution regardless of whether her perception is accurate. This method emphasizes the motivation behind the persecutor's action rather than the nature of the applicant's belief.

The current method of adjudicating a religious asylum claim, however, does not shift focus to the persecutor's perception of the applicant. If a claim is not based on one of the world's well-recognized forms of religion, the adjudicator must rely on conceptualizations formed by the Office of International Religious

Religion or Belief: Analysis and Proposed Conclusions (2002) (on file with Gunn).

²⁶ International Religious Freedom Act of 1998, 22 U.S.C. §§ 6401-6481 (2004).

²⁷ 22 U.S.C. § 6411 (2004).

²⁸ 22 U.S.C. § 6412 (2004).

²⁹ Gunn, *supra* note 24, at 198 ("The relatively important issue in race and gender persecution . . . is not an 'objective' or scholarly definition of the terms from the perspective of experts, but the understanding of race and sex from the perspective of the persons who are causing the persecution. So it is the case with religion as well.").

Freedom. Falun Gong asylum cases demonstrate the problem with this method: the Office is not bound to substantiate its conclusions.

C. *Refugee Status Based on Political Persecution*

Although the INA does not define the meaning and scope of the phrase “on account of political opinion,” the courts have described political persecution as that in which the persecutor’s acts were motivated by the applicant’s actual or imputed political belief.³⁰ In order to receive asylum based on political opinion, an applicant must show (1) that he has been a victim of persecution; (2) that he holds a political opinion; (3) that the political opinion is known to or imputed by the persecutors; and (4) the persecution of the applicant has been or will be on account of this opinion.³¹ Furthermore, the applicant must demonstrate that the “particular belief or characteristic a persecutor seeks to overcome in an individual must be his political opinion... [which] refers not to the ultimate political end that may be served by persecution, but to the belief held by an individual that causes him to be the object of the persecution.”³²

A potential issue of discord, and one that is relevant in Falun Gong cases, occurs when the alleged persecution takes the form of criminal prosecution. The initial assumption when addressing the prosecution-persecution dichotomy is that prosecution for illegal activities does not constitute persecution.³³ However, prosecution that is based on one of the five enumerated factors is considered persecution.³⁴ In theory, the applicant has the burden of showing that

³⁰ *E.g.*, *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) (citing *INS v. Elias-Zacarias*, 502 U.S. 478 (1992)).

³¹ *Id.*

³² *Matter of Acosta*, 19 I. & N. Dec. 211, 234-35 (BIA 1985).

³³ *E.g.*, *Sadeghi v. INS*, 40 F.3d 1139, 1142 (10th Cir. 1994) (quoting *Kapcia v. INS*, 944 F.2d 702, 708 (10th Cir. 1991)) (holding that “prosecution for illegal activities ‘is a legitimate government act and not persecution as contemplated by the Act’”).

³⁴ *E.g.*, *Chang v. INS*, 119 F.3d 1055, 1061 (3d Cir. 1997) (ruling that “if the law itself is based on one of the enumerated factors and if the punishment under that law is sufficiently extreme to constitute persecution, the [law] may provide the basis for asylum or withholding of deportation even if the law is ‘generally’ applicable”).

the governmental action is one of persecution rather than legitimate criminal prosecution.³⁵ In practice, however, this issue is not raised in Falun Gong cases, as discussed in *infra* Part IV.

III. UNDERSTANDING THE FALUN GONG WITHIN THE FRAMEWORK OF REFUGEE LAW

A consensus has yet to be reached regarding the nature of the Falun Gong, even after several years under the international spotlight. Although differences of perception abound throughout the media, they are mostly irrelevant in an attempt to define the Falun Gong within the framework of refugee law. An inquiry into whether the group falls within one of the five enumerated factors of persecution must focus on perceptions as held by three particular parties: the applicants, or the Falun Gong members themselves; the alleged persecutor, or the PRC government; and the USDOS, through the Office of International Religious Freedom. Understanding the Falun Gong's self-perception reveals whether members actually possess characteristics on which to base colorable asylum claims. The PRC government's perception of the group sheds light on whether it acted out of a motivation to harm applicants because of an actual or imputed status or belief, or due to disparate motivations. Finally, an analysis of the Office of International Religious Freedom's understanding of the situation, including the nature of both the Falun Gong and the PRC government's actions, helps determine whether the contents of its reports should in fact be used as the pivotal evidence in substantiating Falun Gong asylum claims.

This section demonstrates that neither the Falun Gong nor the PRC government consider Falun Gong a religion. Furthermore, the prosecution of Falun Gong members within the PRC does not make it a political opinion. The Office of International Religious Freedom, however, has indicated that Falun Gong is both a religion and a political opinion, albeit without explaining why the group is deserving of such classifications.

A. *Defining the Falun Gong: Self-Perceptions*

Li Hongzhi, founder and leader of the Falun Gong, once stated: "We don't have various provisions that people have to follow,

³⁵ *Sadeghi*, 40 F.3d at 1142.

as religions do, nor do we have any temples, churches, or religious rituals. People can come to learn or leave as they please, and we have no membership rosters. How is it a religion?"³⁶ A Falun Gong Internet site also declares that it is not a religion,³⁷ and scholars have noted the extent to which the group has gone to preserving its non-religious identity.³⁸ Li Hongzhi has also spoken to the non-political nature of the Falun Gong: "At no time in the future may Dafa be used for any political matters. . . . Never get involved in politics, nor

³⁶ LI HONGZHI, ESSENTIALS FOR FURTHER ADVANCEMENT II 3 (Eng. trans. 2002) (2002), available at <http://www.falundafa.org/book/eng/pdf/jjyz2.pdf> (last visited Nov. 15, 2004) [hereinafter LI, ESSENTIALS II]. Li Hongzhi on numerous occasions has denied that Falun Gong is a religion. For example, he stated the following:

From now on, when somebody says Falun Gong is a religion, just let it go. If they want to learn more you can tell them how Falun Gong is not a religion; and if they don't want to learn more, you don't need to talk about whether it's a religion. If somebody wants to call it a religion, so be it, since in society the term "religion" doesn't have any bad connotations.

LI HONGZHI, TEACHER'S NEW "JING WEN" 261 (Eng. trans. 2004) (2004), available at <http://www.falundafa.org/book/eng/pdf/newjw.pdf> (last visited Nov. 15, 2004) [hereinafter LI, JING WEN].

³⁷ Falun Dafa Information Center, available at <http://www.faluninfo.net/faq.asp> (last visited Nov. 14, 2004). On the "Frequently Asked Questions" page, the site states the following:

Is Falun Gong a religion? Like religions, Falun Gong has its spiritual beliefs. Through practicing, one strives to become a better person who is able to contribute more to our society, so the goal is similar. But in Falun Gong there are not any devotional activities or worship, nor any set doctrine or canon; there is also no membership, organization, or hierarchy. Falun Gong is more properly referred to as an ancient form of self-cultivation practice, often called qigong or 'Chinese Yoga.'

Id.

³⁸ *E.g.*, Julia Ching, *The Falun Gong: Religious and Political Implications*, 19 AMER. ASIAN REV. 1, 4 (2001) ("The Falun Gong was careful not to make itself into a religion. In China, it had no temple, no official headquarters, no formal rituals, and it exacted no fees from its followers. Its gatherings were always in public.").

interfere with state affairs.”³⁹ Although such statements are indicative of the non-religious and non-political nature of the Falun Gong, a thorough analysis of the group’s history and doctrine is necessary to demonstrate why the group’s self-perception does not fall within one of the enumerated factors of persecution.

1. *Historical overview of the Falun Gong*

In May of 1992, Li Hongzhi made a successful bid to the PRC Qigong Scientific Research Association and initiated his new school of *qigong*.⁴⁰ The Falun Gong was granted status as a branch of the

³⁹ LI HONGZHI, ESSENTIALS FOR FURTHER ADVANCEMENT 34 (Eng. trans. 2001) (1999), available at http://www.falundafa.org/book/eng/pdf/jjyz_en.pdf (last visited Nov. 15, 2004) [hereinafter LI, ESSENTIALS]. Li Hongzhi has described the non-political nature of the Falun Gong on numerous occasions. In response to a question regarding whether members of his group should take part in elections, he stated the following:

If you say Dafa disciples can’t get involved in ordinary society’s politics, I wouldn’t say that’s 100% correct. What I told you was that *Dafa* doesn’t get involved in politics. And a lot of our Dafa disciples work in politics, that’s their job. So if there’s a government election, should you take part in it? If you take part in it and cast your vote, well then you’ve gotten involved in politics. A Dafa disciple cultivating in the ordinary society means that you try your best to cultivate while conforming to the ordinary society, and then there won’t be a problem. You, too, are a member of the ordinary society. And the existence of the ordinary society is necessary for Dafa, for the cosmos, and for sentient beings. We can only help maintain it and can’t disrupt it. When you’re supposed to vote, just go vote, that’s not a problem. If you say that a certain Congressman is your personal friend, and you’d like to help him do something, then of course there might be things that involve elections and you’d be doing volunteer work—that doesn’t matter. But our Dafa as a whole doesn’t get involved in politics, and we can’t do anything political in the name of Dafa.

LI, JING WEN, *supra* note 36, at 65. Other members of the Falun Gong have also denied that the group is political. See Alex Ho, *Politics Off Limits, Says Falun Gong*, S. CHINA MORNING POST (Hong Kong, P.R.C.), May 8, 1999, at 4 (quoting a Hong Kong leader of the Falun Gong: “We are not a political or religious movement.”).

⁴⁰ SCHECHTER, *supra* note 5, at 119.

Association, and Li was given the title “Qigong Master.”⁴¹ The following year, Li attended the annual Oriental Health Exposition in Beijing, a convention devoted, among other things, to the science of *qigong*.⁴² The convention climaxes each year with the presentation of the “Borderline Sciences Progress Award,” a prestigious distinction. Li received this award, and was honored with the title “Qigong Master Most Acclaimed by the Masses.”⁴³

Although the Falun Gong was well received on the *qigong* circuit, Li’s teachings differed markedly from other *qigong* groups, which generally focused solely on systems of exercise.⁴⁴ Li thus attempted to change the group’s identity in society. He applied for admission as a non-religious, academic organization into the China Buddhist Association, the National Minorities Affairs Commission, and the United Front Department, but all applications were denied.⁴⁵ By the end of 1996,⁴⁶ the Qigong Scientific Research Association had expelled the Falun Gong because of its practice of “advocating superstitions,” and the News and Publication Bureau had banned all publications by Li.⁴⁷ For the next three years, the Falun Gong operated as a well-organized but non-associated group in the PRC.⁴⁸

⁴¹ *Why does Jiang Zemin Persecute Falun Gong? Part I* (Mar. 31, 2001), at http://clearwisdom.net/emh/special_column/expoevil/why_jzm_perse_flg_041401.pdf (last visited Nov. 14, 2004).

⁴² IAN ADAMS ET AL., *POWER OF THE WHEEL: THE FALUN GONG REVOLUTION* 21 (2000).

⁴³ *Id.*

⁴⁴ See discussion *infra* Part III.A.2.

⁴⁵ Tong, *supra* note 6 at 641.

⁴⁶ By the end of 1996, Li had already emigrated to the United States. *E.g.*, Nancy N. Chen, *Healing Sects and Anti-Cult Campaigns*, 174 CHINA Q. 505, 511 (2003) [hereinafter Chen, *Sects and Campaigns*]; see also *U.S. Rejects Detention of Falun Gong Leader*, ASIAN POL. NEWS, Aug. 2, 1999 (“U.S. government officials said ... Washington would not honor a request from Chinese authorities to extradite Li Hongzhi, the head of the banned Falun Gong meditation group who now resides in the United States.”).

⁴⁷ Tong, *supra* note 6 at 653.

⁴⁸ For an in depth discussion of the Falun Gong’s operational structure within the PRC during the 1990s, see generally Tong, *supra* note 6.

The year 1999 brought events that catapulted the group onto the world stage. On April 19, Dr. He Zuoxiu, celebrated member of the Chinese Academy of Sciences, published an article which focused on “false qigong,” citing the Falun Gong as the primary example, and claimed that the practice of *qigong* was detrimental to the health of youths.⁴⁹ The Falun Gong subsequently held protests in Tianjin, Dalian and Xi’an, and on April 25, approximately 15,000 members gathered outside of Zhongnanhai, the government’s central headquarters in Beijing, and demanded official recognition.⁵⁰ Three months later, on July 22, 1999, the PRC Ministry of Civil Affairs declared the Falun Gong an illegal organization.⁵¹

2. Doctrinal overview of the Falun Gong

In 1993, Li Hongzhi published his first book, *Falun Gong*,⁵² and a series of publications would follow in its wake, including the 1996 best-selling book *Zhuan Falun*.⁵³ The doctrine of Falun Gong as presented in Li’s publications describes a system of practice that is not a religion, nor is it simply a method of *qigong*. Rather, it combines elements of *qigong* practice with a supernatural worldview that grants Li the position of an omnipresent being who demands strict devotion from his followers.

⁴⁹ He Zuoxiu, *I Do Not Approve of Teenagers Practicing Qigong*, 4 TIANJIN QINSHOUNIAN KEJI BOLAN [TIANJIN TEENAGER SCIENCE AND TECHNOLOGY OUTLOOK] (Tianjin, P.R.C.) (Apr. 1999), translated in 32 CHINESE L. & GOV’T 95 (1999).

⁵⁰ See Jasper Becker, *The Icon Who Could Vanish at Will*, S. CHINA MORNING POST (Hong Kong, P.R.C.), May 2, 1999, at 9; but see, e.g., Erik Eckholm, *China’s Rulers on Guard as Spiritual Sect Pushes the Envelope*, N.Y. TIMES, May 2, 1999, at A7 (numbering the gathering at approximately 10,000).

⁵¹ *Decision of the Ministry of Civil Affairs of the People’s Republic of China Concerning the Banning of the Research Society of Falun Dafa* (July 22, 1999) (P.R.C.), reprinted in 32 CHINESE L. & GOV’T 31 (1999) [hereinafter *Decision Banning Falun Gong*], discussed *infra* Part III.B.

⁵² LI HONGZHI, *FALUN GONG* (Eng. trans. 2001) (1993), available at http://www.falundafa.org/book/eng/pdf/flg_2001.pdf (last visited Nov. 15, 2004) [hereinafter LI, *FALUN GONG*].

⁵³ LI HONGZHI, *ZHUAN FALUN* (Eng. trans. 2003) (1995), available at http://www.falundafa.org/book/eng/pdf/zfl_new.pdf (last visited Nov. 16, 2004) [hereinafter LI, *ZHUAN FALUN*].

The goal of the Falun Gong practitioner is to cultivate *qi*, or inner energy, through the manipulation of a “law wheel.”⁵⁴ Li places a law wheel, a miniature of the universe, in the practitioner’s lower abdomen, where it commences emulation of the principles of the universe.⁵⁵ Once inside the abdomen the law wheel continually spins, capturing the energy of the universe and transforming it into “cultivation energy” in the practitioner’s “true being.”⁵⁶ The capacity of cultivation energy attainment varies among practitioners according to the level of the person’s “mind nature.”⁵⁷ The higher one’s level of mind nature, the more cultivation energy one can obtain.⁵⁸ Ultimately, the practitioner should not be concerned with the supernatural powers that come with the spinning law wheel.⁵⁹ Rather, the goal is to absorb into the mind nature the true nature of the universe, “Truthfulness-Benevolence-Forbearance.”⁶⁰

⁵⁴ LI, FALUN GONG, *supra* note 52, at 43.

⁵⁵ *Id.* at 76. *See also* LI, ZHUAN FALUN, *supra* note 53, at 21 (“The Law Wheel is a miniature universe, it has all the functions of a universe, and it can operate and rotate automatically.”).

⁵⁶ LI, FALUN GONG, *supra* note 52, at 43.

⁵⁷ *Id.* at 85. Li teaches that increased levels of cultivation results in supernormal capabilities:

Different supernormal capabilities will be developed at different levels. The critical factor is your Xinxing [(mind nature)] at each level. If attachments have been removed in a certain aspect, a supernormal capability may be developed in that aspect. However, the supernormal capability has to be at its early stage and will not be very powerful. When your Xinxing [(mind nature)] has not reached a very high level, it is impossible to have supernormal capabilities. However, in our class some individuals have pretty good inborn quality. They have developed a supernormal walking ability that shields them from rain. Some have also developed the supernormal capability of teleportation.

Id.

⁵⁸ *Id.*

⁵⁹ *Id.* at 5.

⁶⁰ *Id.* at 1.

Li describes the law wheel as an intelligent being consisting of high-energy substances that exists in a dimension different from that in which the body exists.⁶¹ As Li points out, “If it were in this dimension, with the intestines that are inside of your lower abdomen, what would happen if it started to spin?”⁶² Those practitioners whose cultivation has reached the point of producing a “third eye” can view this other dimension, and have described the law wheel as being a shade of golden yellow that does not exist in our physical dimension (but the exact color varies between the different levels of the other dimension).⁶³ The law wheel consists of two red-and-black and two red-and-blue *Taiqi* symbols, with a rotation comparable to an electric fan, and practitioners who are able to see the law wheel are inspired by its beauty and cultivate all the more vigorously.⁶⁴

As Li’s teachings reveal, the law wheel is not the only other-dimensional item that is central to the practice of Falun Gong. Because of his unusually high level of mind nature, hence high level of cultivation energy attainment, Li has developed a *fashen* (law body).⁶⁵ Li does not instruct his followers how to develop a law body because such an endeavor requires a level of cultivation unattainable by most. A conscious decision by Li, he wanted to make the practice of Falun Gong available to everyone, not just those with unusually high levels of mind nature. He is thus the only Falun Gong member to possess and activate a law body, and only a law body can insert a law wheel.⁶⁶

The nature of a law body reveals how Falun Gong practitioners, even those who have not studied directly under Li, are capable of attaining a law wheel. Placement of a law wheel in the lower abdomen can be done either by Li or his law body. For those

⁶¹ *Id.* at 66.

⁶² *Id.* at 67.

⁶³ LI, ZHUAN FALUN, *supra* note 53, at 92.

⁶⁴ LI, FALUN GONG, *supra* note 52, at 66.

⁶⁵ *Id.* at 91 (“Fashen looks the same as the person does. You don’t have Fashen now. When your cultivation has reached a certain level, you will be finished with Shi-Jian-Fa (*In-Triple-World-Fa*) and enter into an extremely high level. Only then will you develop Fashen.”).

⁶⁶ *Id.*

practitioners who learn in the presence of Li, he personally inserts the law wheel into the abdomen. He does this by directing his law body, which exists in the same dimension as the law wheel.

The law bodies of a high-level *qigong* grand master are controlled and dictated by the thoughts of his main body. A Law Body also has his own thoughts and his own independent ability to solve problems and carry out tasks. He is an entirely independent self. At the same time, Law Bodies know the thoughts of the *qigong* master's main body and will carry out tasks according to those thoughts. For example, if the *qigong* master wants to treat a particular person's illness, Law Bodies will go there. Without that thought they will not go. When they see an extremely good thing to do they will do it on their own.⁶⁷

Even practitioners who have not studied directly under Li possess a law wheel, because when Li directs his law body to insert a law wheel into the body of a practitioner, the law body remains within the body. When the practitioner later teaches an acquaintance about the law wheel, Li's law body will go to the acquaintance and insert a law wheel. Li explains:

[a]ny student can teach others how to practice. When students teach the exercises to others, it is not like how I have been teaching you here. I directly make adjustments to your bodies. But there are still people who acquire Falun as soon as they start practicing, because behind every student exists my [law body] who can directly handle these matters.⁶⁸

The law body has the ability to provide the benefits that come as a result of proper practice. Like most *qigong* groups, an underlying theme of Falun Gong practice is the improvement of one's physique, and as Li explains, the law body has the power to grant such improvements: "I'll directly remove your health problems for you. At

⁶⁷ *Id.* at 26.

⁶⁸ *Id.* at 80.

the practice sites they're removed by my Law Bodies, and people who learn the practice on their own by reading the books have my Law Bodies to remove theirs, too."⁶⁹ In fact, Falun Gong doctrine contains strict guidelines regarding the treatment of physical ailments, such as refraining from taking medication:

Taking medication during cultivation implies that you do not believe in the disease-curing effects of cultivation. If you believed in it, why would you take medication? However, if you do not hold yourself up to the standards of Xinxing [(mind nature)], once problems arise, you will say that you have been told by Li Hongzhi not to take medication. However, Li Hongzhi has also asked you to strictly hold yourself to high standards of Xinxing [(mind nature)]. Have you done it? The things that exist in the body of true cultivators are not those of ordinary people. All of the illnesses that ordinary people get are not allowed to occur in your body. If your mind is in the right place and believes that cultivation can cure illnesses, if you stop your medication, do not worry about it and do not get treatments, someone will naturally cure it for you. All of you are getting better and feeling better everyday. Why is that? My Fashen (law body) have been busy coming in and out of many of your bodies, helping you by doing these things in this regard. If your mind is not stable, adopting an attitude of disbelief or "let's give it a try" while cultivating, then you will get nothing.⁷⁰

The law body is an embodiment of the Falun Gong's laws and principles – it is present within each practitioner and acts as the source behind the beneficial outcomes of proper cultivation. Furthermore, it makes decisions as to what is acceptable and what is improper in the practice of Falun Gong, as revealed in one of Li's anecdotes:

⁶⁹ LI, ZHUAN FALUN, *supra* note 53, at 63-64.

⁷⁰ LI, FALUN GONG, *supra* note 52, at 70.

I have a student who saw my Law Body come one day. He was full of joy —"Teacher's Law Body is here. Teacher, please come in." My Law Body said, "Your room is too messy, and there are too many things here." And then he left. Generally speaking, if there are too many spirits in other dimensions, my Law Bodies will clean them out. But this student's room was full of this awful mess of qigong books. He realized it and cleared them out by burning them or selling them for recycling. Then my Law Body came back.⁷¹

Li forbids the exploration of religions or *qigong* practices, and he uses the concept of his law body and the benefits it can incur on faithful followers as leverage to retain their allegiances.

One of the attractions of the Falun Gong to its members is that it does not demand a rigorous schedule of practice. The law wheel, once inserted, will continuously rotate as long as the mind nature is directed toward Truthfulness-Benevolence-Forbearance and the practitioner occasionally engages in the exercise routines.⁷² The exercises, while not required to be frequent, are of major importance to the continuing cultivation of the law-wheel and the well-being of the practitioner. Proper mind-nature and occasional practice is what retains Li's beneficial law-body.

I give everyone Falun. There is a Falun for cultivation and there are Falun for adjusting the body. At the same time, my Fashen (law body) is taking care of you, every one of you, as long as you cultivate Falun Gong. If you do not cultivate, the Fashen naturally will not look after you. He would not go even if he were told to. My Fashen knows clearly and exactly what you are thinking about.⁷³

⁷¹ LI, ZHUAN FALUN, *supra* note 53, at 124.

⁷² LI, FALUN GONG, *supra* note 52, at 20 (explaining that the continuous rotation of the law wheel allows for a relaxed schedule of the Falun Gong exercises).

⁷³ *Id.* at 68.

The law body of Li Hongzhi knows the thoughts of all Falun Gong practitioners. It governs the practitioners according to Li's precepts, deciding who is worthy of its benefits and who should be expelled from the group. The law body cannot be deceived. If practitioners are not acceptant of Truthfulness-Benevolence-Forbearance, the law body will remove the law wheel from their abdomens and leave them to the mercy of an existence that lacks the overseeing guidance and protection of Li Hongzhi.

On the surface, the practice of Falun Gong seems comparable to officially permitted *qigong* groups in the PRC.⁷⁴ An underlying goal of the practitioner is to increase cultivation energy, or *qigong*, through the manipulation of inner energy, or *qi*. This is achieved through a series of meditative exercises that combine focused movements and practiced breathing. An analysis of the Falun Gong that considers only its exercises, however, would miss out on a significant portion of the group's doctrine, and ultimately would be unable to distinguish it from other *qigong* groups.

Falun Gong's uniqueness is found not in its physical exercises but rather the concept of law body and the relationship that this concept develops between Li and his followers. Li, unlike a typical *qigong* master, is elevated to the position of a god. Through his law body he is omni-present, expelling followers that stray from the path of his teachings. Li's followers, therefore, must be devoted to him both physically and mentally. If one was to take medicine or read about other forms of *qigong*, Li's law-body would depart, and not even the meditative exercises would be beneficial to the practitioner.

B. *Defining the Falun Gong: Perceptions of the PRC Government*

Approximately three months after the Ministry of Civil Affairs

⁷⁴ See Chen, *Sects and Campaigns*, *supra* note 46, at 510.

On the one hand, [Falun Gong] emphasized meditation and movements similar to standard *qigong* forms. Some *qigong* practitioners even managed to practise several forms including [Falun Gong], at different times of the day. However the primary focus on spiritual cultivation through the spinning wheel was quite different from concentrating just on *qi* energy.

Id. at 512.

banned the Falun Gong, the legislative and judicial branches of the PRC government began preparations for criminal trials. On October 9, 1999, the Judicial Committee of the Supreme People's Court adopted "Explanations of the Supreme People's Court and Supreme People's Procuratorate Concerning Laws Applicable to Handling Cases of Organizations and Employing Heretical Cult Organizations to Commit Crimes" ("Explanations of the Judiciary on Heretical Cults"), which explained the legal basis of criminal prosecutions against Falun Gong leaders.⁷⁵ Three weeks later, the Standing Committee of the National People's Congress promulgated "Decision of the Standing Committee of the National People's Congress on Banning Heretical Cult Organizations, and Preventing and Punishing Cult Activities" ("Standing Committee Decision on Heretical Cults"), which outlawed "heretical cult organizations," a classification distinct from religion and *qigong* and one in which the Falun Gong was placed.⁷⁶ An understanding of these legislative acts can be achieved only if viewed through the lens of PRC policy on religion and *qigong* as developed in the years leading up to their promulgations.

1. *Religion in PRC legal discourse*

In 1979, when Deng Xiaoping proclaimed the adoption of *gaige kaifang* (open-door policy), he initiated change to more than just the PRC's international economic relations.⁷⁷ The nature of state-society relations began to resemble something akin to civil society in the West, or, as some commentators would say, civil society with Chinese characteristics.⁷⁸ Relations were formed through a process of

⁷⁵ *Explanations of the Supreme People's Court and Supreme People's Procuratorate Concerning Laws Applicable to Handling Cases of Organizations and Employing Heretical Cult Organizations to Commit Crimes* (adopted by the Judicial Committee of the Supreme People's Court on Oct. 9, 1999, and by the Supreme People's Procuratorate on Oct. 8, 1999) (P.R.C.), available at http://www.novexc.com/sup_peop_ct_heretical_cult.html (last visited Nov. 16, 2004) [hereinafter *Explanations of the Judiciary on Heretical Cults*].

⁷⁶ *Standing Committee Decision on Heretical Cults*, *supra* note 7.

⁷⁷ See generally MAURICE MEISNER, *THE DENG XIAOPING ERA: AN INQUIRY INTO THE FATE OF CHINESE SOCIALISM, 1978-1994* 270-88 (1996).

⁷⁸ See generally RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW 201-02* (2002) [hereinafter PEERENBOOM, *CHINA'S LONG MARCH*].

symbiosis: the state sought to co-opt social groups in order to keep them in line with the status quo, and social groups saw alliance with the state as a means to effect policy.⁷⁹ The emerging religious policy subscribed to this model.

Article 36 of the 1982 Constitution documents the state's religious policy in the post-Mao era:

Citizens of the People's Republic of China enjoy freedom of religious belief. No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion. The state protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state. Religious bodies and religious affairs are not subject to any foreign domination.⁸⁰

Article 36 identifies four elements of the right to religious belief. First, the citizen is in control of her personal religious belief - she can either believe in a religion, or choose not to be religious. Second, the state is the guardian of the right - it protects the citizen's right to determine her own religious belief, and protects against discrimination based on that choice. Third, abnormal religious activities are illegal - activities that "disrupt the public order, impair the health of citizens or interfere with the educational system," though religious, are not allowed. Fourth, religious bodies and their affairs shall not be subject to foreign domination.

The PRC Constitution is inspirational in nature,⁸¹ and article

⁷⁹ *Id.* at 202, 230 n.68 (citing GORDON WHITE ET AL., *IN SEARCH OF CIVIL SOCIETY: MARKET REFORM AND SOCIAL CHANGE IN CONTEMPORARY CHINA* 213-14 (1996)).

⁸⁰ ZHONGHUA RENMIN GONGHEGUO XIANFA [Constitution] (1982) (amended 1999) art. 35 (P.R.C.), *translated in* <http://english.people.com.cn/constitution/constitution.html> (last visited Nov. 16, 2004) [hereinafter P.R.C. CONST. art 35].

⁸¹ As Randall Peerenboom observes, "The inspirational character of Confucian ethics explains in part an observation of Andrew Nathan, namely, that rights in Chinese constitutions are programmatic – 'that is, they are presented as goals to be realized.'" Randall P. Peerenboom, *What's Wrong with Chinese Rights?*:

36 sets the pace for further legislature on the freedom of religion. An underlying characteristic of the PRC's conception of religious freedom, one that repeatedly emerged in legislature that followed the 1982 Constitution, is the differentiation between religious belief and religious activity. While a citizen has the right to believe in any religion, her right to actively engage in the practice of that religion is restricted to "normal religious activity."⁸²

"Document 19: The Basic Viewpoint and Policy on the Religious Question During Our Country's Socialist Period" (Document No. 19), also promulgated in 1982, provides a more specific definition of the right to religious belief.⁸³ Document No. 19 is a *zhong fa*, a Politburo-approved document considered the most authoritative policy initiator of the Party.⁸⁴ It addresses elements of the religious policy not previously discussed, including the Party's stance toward the practice of religion: "This is a long-term policy, one which must be continually carried out until that future time when religion will itself disappear."⁸⁵ The refreshed Marxist line on religion

Toward a Theory of Rights with Chinese Characteristics, 6 HARV. HUM. RTS. J. 29, 42 n.60 (1993) (quoting Andrew J. Nathan, *Political Rights in the Chinese Constitutions*, in HUMAN RIGHTS IN CONTEMPORARY CHINA 79-80 (R. Randle Edwards et al. eds., 1986)).

⁸² P.R.C. CONST. art 35, *supra* note 80.

⁸³ *Document No. 19: The Basic Viewpoint and Policy on the Religious Question During Our Country's Socialist Period* (1982) (P.R.C.) [hereinafter *Document No. 19*], translated in MICKEY SPIEGEL, FREEDOM OF RELIGION IN CHINA 33-45 (1992).

⁸⁴ *Zhong fa* were employed for even the most routine decisions during the Cultural Revolution because lawmaking was simply discontinued. Following the Cultural Revolution, a confusing array of normatively binding laws, provisions, regulations, directives, measures, etc., replaced *zhong fa* as the main source of lawmaking. *E.g.*, PEERENBOOM, CHINA'S LONG MARCH, *supra* note 78 at 241. The practice of *zhong fa*, however, was not discontinued, nor was its power, or withdrawal thereof, ever addressed. According to Article 62 of the *Explanation of Various Issues Concerning the Implementation of the Administrative Litigation Law*, issued by the Supreme People's Court on March 8, 2000, the courts have the ability to cite not only rules of legislative promulgations in their judgments. If a case involving vagueness of law were to occur, the courts may and should rely on other normative governmental documents, including, it would seem, *zhong fa*. See generally Peter Howard Corne, *Creation and Application of Law in the PRC*, 50 Am. J. Comp. L. 369, 385 (2002).

⁸⁵ *Document No. 19*, *supra* note 83, at 33.

is that religious practice should be tolerated because it will eventually peter out on its own.

Document No. 19 also defines the role of the newly formed patriotic religious associations:

The basic task of these patriotic religious associations is to assist the party and the government in carrying out and implementing the religious policy on the freedom of religious belief, to help the broad mass of religious believers and personages in religious circles to continually raise their awareness of patriotism and socialism, to represent the lawful rights and to manage well religious affairs. All patriotic religious organizations must follow the party's and the government's leadership.⁸⁶

The state co-opts religious activity through the patriotic religious associations. For a religious group to be officially recognized by the state, and hence receive the protective benefits of the legal system, it must belong to a religious association. These associations are the overlying organizational units of religious groups and fall under the jurisdiction of the Bureau of Religious Affairs.⁸⁷

Along with outlining the framework of permissibility, Document No. 19 further defines abnormal religious activity to include "all superstitious practices which fall outside the scope of religion," "all those who spread fallacies to deceive and who cheat people of their money," and "all who make their living by phrenology, fortune telling and geomancy."⁸⁸ Religions that center on abnormal religious activity will not be admitted into a patriotic

⁸⁶ *Id.*

⁸⁷ There are eight patriotic religious associations under the Bureau of Religious Affairs, namely the Buddhist Association of China, the Taoist Association of China, the Islamic Association of China, the Patriotic Catholic Association of China, the Administrative Commission of the Catholic Church of China, the Catholic Bishops' Conference of China, the Patriotic Protestant Three Self Movement of China, and the Protestant Association of China. See <http://www.china.org.cn/english/eng-shuzi2003/zz/zj1.htm> (last visited Nov. 17, 2004).

⁸⁸ *Document No. 19, supra* note 83, at 33.

religious association, and will be “dealt with according to the law.”⁸⁹

The decade and a half following 1982 saw the promulgation of numerous documents that further outlined procedures for practicing normal religious activities.⁹⁰ In 1997, article 300 of the amended Criminal Law identified punishments for those who engage in abnormal religious activity.

Whoever organizes and utilizes superstitious sects, secret societies, and evil religious organizations or sabotages the implementation of the state’s laws and executive regulations by utilizing superstition is to be sentenced to not less than three years and not more than seven years of fixed-term imprisonment; when

⁸⁹ *Id.*

⁹⁰ See, e.g., *Survey Report Concerning the Implementation of the Party’s Policies on Religion and Relevant Issues* (Dec. 10, 1985) (P.R.C.), translated in MICKEY SPIEGEL, *FREEDOM OF RELIGION IN CHINA* (1992) (addressing how the Party “should give religious organizations a free hand to exercise self-determined management and conduct normal religious activities within the scope permitted by the Party’s general and specific policies and by China’s constitution”); see also *Document No. 6: Circular on Some Problems Concerning Further Improving Work on Religion* (adopted by the State Council on Feb. 5, 1991) (P.R.C.), translated in MICKEY SPIEGEL, *FREEDOM OF RELIGION IN CHINA* 27-32 (1992) (“Implementing administration of religious affairs is aimed at bringing religious activities within the bounds of law, regulation, and policy, but not to interfere with normal religious activities or the internal affairs of religious organizations.”); see also *Regulations Regarding the Management of Places of Religious Activities, Order No. 145* (adopted by the State Council on Jan. 31, 1994) (P.R.C.), translated in HUMAN RIGHTS WATCH ASIA, *CHINA: STATE CONTROL OF RELIGION* (1997), available at <http://www.hrw.org/reports/1997/china1/> (last visited Nov. 20, 2004) (defining religious venues as fixed places that required formal registration for establishment); see also *Registration Procedures for Venues for Religious Activities* (May 1, 1994) (P.R.C.), translated in HUMAN RIGHTS WATCH ASIA, *CHINA: STATE CONTROL OF RELIGION* (1997), available at <http://www.hrw.org/reports/1997/china1/> (last visited Nov. 20, 2004) (addressing the registration and managerial procedures of religious organizations); see also *Method for the Annual Inspection of Places of Religious Activity* (adopted by the Religious Affairs Bureau on July 29, 1996) (P.R.C.), translated in HUMAN RIGHTS WATCH ASIA, *CHINA: STATE CONTROL OF RELIGION* (1997), available at <http://www.hrw.org/reports/1997/china1/> (last visited Nov. 20, 2004) (providing specific criteria for the annual inspection of a place of religious activity).

circumstances are particularly serious, to not less than seven years of fixed-term imprisonment.⁹¹

Article 300 identifies additional characteristics of abnormal religious activity – the organization and utilization of “superstitious sects, secret societies, and evil religious organizations.”⁹² In doing so, it follows the policy of differentiating between belief and activity as initiated in the 1982 Constitution.⁹³ The rule reserves punishment for those in leadership positions, i.e., those who act to organize and utilize the groups, but not for those incited to follow the leaders.

2. Qigong in PRC legal discourse

In 1977, the joint team of the Shanghai Academy of Traditional Medicine and the Shanghai Nuclear Research Center conducted an experiment that claimed to prove the existence of *qi*, using a special device to measure its variant levels as radiated by a *qigong* master.⁹⁴ This was the first success in what was to become the newest branch of the Chinese scientific community. The experiment was also the start of a somewhat less expected trend in popular society, one that would earn the title “*Qigong Re*,” or “*Qigong Craze*.”⁹⁵

In the early- to mid-1980s, the practice of *qigong* was adopted in various forms by an enormous segment of the Chinese population.⁹⁶ Simultaneously, the state was leading conceptions of the practice in a new direction, away from the traditional religious

⁹¹ ZHONGHUA RENMIN GONGHEGUO XINGFA [Criminal Law] (1979) (amended 1997) art. 300 (P.R.C.), translated in <http://www.qis.net/chinalaw/prclaw60.htm> (last visited Nov. 17, 2004).

⁹² *Id.*

⁹³ P.R.C. CONST. art 35, *supra* note 80.

⁹⁴ See generally Anne Harrington, *Finding Qi and Chicanery in China* (2001), at http://www.spiritualityhealth.com/newsh/items/article/item_3717.html (last visited Nov. 17, 2004).

⁹⁵ Jian Xu, *Body, Discourse, and the Cultural Politics of Contemporary Chinese Qigong*, 58 J. ASIAN STUD. 961, 962 (1999).

⁹⁶ E.g., Chen, *Sects and Campaigns*, *supra* note 46, at 506.

discourse.⁹⁷ *Qigong* was coming to be considered a practice in hard science, one that should be studied and utilized through application of scientific principles.⁹⁸ Yet while ground was being broken in the laboratories, more was being trampled upon in the parks and gymnasiums. *Qigong* had caught the attention of not only the scientific community but also the elderly and youth alike, for people wished to better their health, extend their lives and perform neat tricks for their friends. Was this a movement that could be applied to the realization of the nation's modernization goals?

In 1985, the Qigong Scientific Research Association made its debut in Chinese society.⁹⁹ In order to become a master of *qigong* one would have to submit a satisfactory application, the requirements of which were a combination of a medical degree and appropriate training in Traditional Chinese Medicine, the completion of a training period under an officially recognized master, or a satisfactory performance in the presence of Association officials.¹⁰⁰ Admission into the Qigong Scientific Research Association resembles the process of joining a religious association in that one must obtain a certification of permissibility prior to commencement of practice, but differs in that official standing is based upon one's personal level of ability, a level that is measured according to one's prior training.

The nature of *qigong* practice was such that its co-option was not an exact replica of the religious policy. Although religion had been suppressed during the Cultural Revolution, *qigong*, however, was a lesser-known practice identified more as an aspect of a greater religion than a social phenomenon in and of itself. Utilizing its lack of formal conceptualization, the state strove to rid it of its religious overtones and transform it into a purely scientific endeavor. As one

⁹⁷ See Jian Xu, *supra* note 95, at 970 ("The post-Mao claim that the fundamentals of *qigong* rest firmly on scientific principles that can be gradually revealed signals significant changes in people's attitudes towards traditional forms of self-cultivation.").

⁹⁸ *Id.* at 979 ("In the mid 1980s books were published that treated *qigong* as a systematic field of study, one with a historiography, a theory, and a citing of the major popular schools at that time.").

⁹⁹ David Ownby, *China's War Against Itself*, N.Y. TIMES, Feb. 15, 2001, at A1.

¹⁰⁰ Chen, *Sects and Campaigns*, *supra* note 46, at 510.

commentator observed, “the *qi* itself is no longer the primordial creative power of the universe, but merely one force among others, somewhat like electricity. The gods are dethroned, the cosmos is made measurable, and man remains strictly within the confines of the known.”¹⁰¹ While the practice was frowned upon during the Cultural Revolution because of its association with religion, the 1980s witnessed controlled scientific experiments that aimed to capture the essence of the mysterious material. Scientific journals such as *Ziran* (Nature) devoted articles to the practice,¹⁰² and new publications such as *Qigong and Science* emerged and received broad readerships.¹⁰³ Renowned scientists, including Professor Qian Xuesen, former Chairman of the Chinese National Association of Scientists and the “Father of Chinese Science,” advocated the study of *qigong* and the establishment of a department of Phenomenalistic Qigong Studies.¹⁰⁴ To be sure, the state had successfully co-opted the practice of *qigong*.

3. *Heretical cult organizations in PRC legal discourse*

On October 20, 1999, the National People’s Congress promulgated “Standing Committee Decision on Heretical Cults,” thereupon further defining the concept of abnormal religious activity:

Heretical cult organizations shall be resolutely banned according to the law, and all of their criminal activities shall be dealt with severely. Heretical cults, operating under the guise of religion, qigong or other forms, employ various means to disturb social order and jeopardize people’s lives and property and economic

¹⁰¹ Kunio Miura, *The Revival of Qi: Qigong in Contemporary China*, in TAOIST MEDITATION AND LONGEVITY TECHNIQUES 357 (Livia Kohn ed., 1989).

¹⁰² Chen, *Sects and Campaigns*, *supra* note 46, at 509.

¹⁰³ Jian Xu, *supra* note 95, at 965.

¹⁰⁴ *Id.* at 977. Professor Qian further stated: “In terms of content these experiments are the first of their kind in the world. They have irrefutably proved that the human body can exert influence on matter without touching it, and can change the structure and properties of molecules. There has never been work like this before.” *Id.* at 965 (citing LI LUN, YAN XIN QIGONG XIANXIANG [YAN XIN QIGONG PHENOMENA] (P.R.C. 1989)).

development, and they must be banned according to the law and punished resolutely.¹⁰⁵

The state-society relations enveloping religion and *qigong* continued down the inspirational path initiated in article 36 of the 1982 Constitution and continued by Document No. 19 and article 300 of the 1997 Criminal Law. “Standing Committee Decision on Heretical Cults” provided a specific example of abnormal religious activity, namely heretical cults operating under the guise of a permissible form of social organization.¹⁰⁶

The law also distinguishes between intentional and unintentional evil religious activity:

In the process of handling cult organizations according to the law, people who, unaware of the truth, have participated in cult activities shall be differentiated from the criminal elements who organize and take advantage of cult organizations for illegal activities and to intentionally destroy social stability. The deceived members shall not be prosecuted. The organizers, plotters, leaders and core members who have committed crimes shall be investigated firmly and given criminal sanctions according to the law.¹⁰⁷

Like article 300 of the 1997 Criminal Law, “Standing Committee Decision on Heretical Cults” focuses on individuals who organize and lead heretical cults. Viewed in the conceptual framework of civil society with Chinese characteristics, the state is not concerned with members of society who join impermissible spheres. Rather, it punishes those who attempt to form spheres that do not conform to the rules governing the symbiotic relations between society and state. This system of governance is not unique to the PRC. France, for example, has a law that empowers the state to ban sects, and countries throughout the world, including the United States, prosecute religious organizations that violate the law.¹⁰⁸

¹⁰⁵ *Standing Committee Decision on Heretical Cults, supra* note 7.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *E.g., PEERENBOOM, CHINA’S LONG MARCH, supra* note 78, at 95.

“Standing Committee Decision on Heretical Cults,” however, did not provide express characteristics by which to identify heretical cults, other than describing them as acting under the guise of religion or *qigong*.¹⁰⁹ In determining whether the PRC can substantiate its claim against the Falun Gong, one must therefore turn to the nature of the group. Although the Falun Gong resembles *qigong* on the surface (though not religion), doctrinal analysis reveals not only concepts that distinguish it from permitted *qigong* activities, but also characteristics that might compel a government to deem it a heretical cult. Furthermore, following its ban from the Qigong Scientific Research Association in 1996, the group fell out from under the protection of the law. The PRC, it would seem, has a colorable claim, one based on the legal system and an entrenched societal structure. Why, then, does the United States continue to grant refugee status to Falun Gong members?

C. *Defining the Falun Gong: Perceptions of the U.S. Department of State’s Office of International Religious Freedom*

On September 15, 2004, the USDOS’s Office of International Religious Freedom, through the Bureau of Democracy, Human Rights and Labor, released the “International Religious Freedom Report 2004: China” (IRFR 2004).¹¹⁰ Like reports of the previous three years, IRFR 2004 discusses the situation of the Falun Gong in the PRC, but its description of the group is brief and misleading.

Falun Gong blends aspects of Taoism, Buddhism, and the meditation techniques and physical exercises of *qigong* (a traditional Chinese exercise discipline) with the teachings of Falun Gong leader Li Hongzhi (a native of the country who lives in the United States). Despite the spiritual content of some of Li’s teachings,

¹⁰⁹ *Standing Committee Decision on Heretical Cults*, *supra* note 7.

¹¹⁰ Bureau of Democracy, Human Rights, & Labor, U.S. Dep’t of State, *International Religious Freedom Report 2004: China*, available at <http://www.state.gov/g/drl/rls/irf/2004/35396.htm> (last visited Nov. 17, 2004) [hereinafter *IRFR 2004*].

Falun Gong does not consider itself a religion and has no clergy or places of worship.¹¹¹

Contrary to the claim of IRFR 2004, the Falun Gong does not blend aspects of certain religions and *qigong* with the teachings of Li Hongzhi; rather, the Falun Gong doctrine *is* the teachings of Li Hongzhi, which to some extent includes his interpretation of concepts borrowed from various forms of *qigong*.¹¹² Interestingly, IRFR 2004 states that the Falun Gong does not consider itself a religion, but implies that the group might be mistaken in this belief due to the “spiritual content” of Li’s teachings.¹¹³ The report does not examine the spiritual content, nor does it posit a theory by which a group that does not consider itself a religion nonetheless can be deemed a religion due to some spiritual content in the teachings of its leader.

In its description of the Falun Gong, IRFR 2004 verges on characterizing the group as a political entity.

During the period covered by this report, the Government’s respect for religious freedom and freedom of conscience remained poor, especially for members of some unregistered religious groups and spiritual movements such as the Falun Gong. The Government tends to perceive unregulated religious gatherings or groups as a potential challenge to its authority, and it attempts to control and regulate religious groups to prevent the rise of groups or sources of authority outside the control of the Government and the CCP.¹¹⁴

On the surface, this statement seemingly implies that the PRC

¹¹¹ *Id.*

¹¹² For example, Li says that his teachings draw from Buddhist and Daoist versions of *qigong*, but he notes that such forms of *qigong* are distinct from the religions themselves: “Buddhist *qigong* is not Buddhism the religion – I want to make sure you understand this. And actually, Daoist *qigong* isn’t Daoism the religion.” LI, *ZHUAN FALUN*, *supra* note 53, at 52.

¹¹³ *IRFA 2004*, *supra* note 110.

¹¹⁴ *Id.*

government imputes a political opinion to the Falun Gong, suggesting that it considers the Falun Gong a challenge to its authority. Indeed, the PRC government is concerned with challenges to its authority. IRFR 2004, however, does not provide documentation of the PRC government's alleged perceptions of the Falun Gong, nor does it account for the stated purposes of laws regulating the social spheres of the PRC, namely "[t]o maintain social stability, protect the interests of the people, and guarantee the smooth progress of reform and opening and the socialist modernization drive."¹¹⁵ Rather than infringing on a freedom of belief, the PRC government is prohibiting the exploitation of this freedom. Furthermore, the situation as described in IRFR 2004 does not conform to the concept of imputed political opinion as an enumerating factor of U.S. refugee law, which "refers not to the ultimate political end that may be served by persecution, but to the belief held by an individual that causes him to be the object of the persecution."¹¹⁶

IRFR 2004 also discusses the mistreatment of Falun Gong prisoners in the PRC penal system.

According to Falun Gong practitioners in the United States, since 1999 more than 100,000 practitioners have been detained for engaging in Falun Gong practices, admitting that they adhere to the teachings of Falun Gong, or refusing to criticize the organization or its founder. The organization reports that its members have been subject to excessive force, abuse, detention, and torture, and that some of its members have died in custody. For example, in December 2003, Falun Gong practitioner Liu Chengjun died after reportedly being abused in custody in Jilin Province. Foreign observers estimate that half of the 250,000 officially recorded inmates in the country's reeducation-through-labor camps are Falun Gong adherents. Falun Gong places the number even higher. Hundreds of Falun Gong adherents were also incarcerated in legal education centers, a form of administrative detention, upon completion of their reeducation-through-labor

¹¹⁵ *Standing Committee Decision on Heretical Cults*, *supra* note 7.

¹¹⁶ *See supra* note 32 and accompanying text.

sentences. According to the Falun Gong, hundreds of its practitioners have been confined to psychiatric institutions and forced to take medications or undergo electric shock treatment against their will.¹¹⁷

Abuse and torture of prisoners is a serious violation of international law. Ultimately, however, the content of this statement is somewhat weakened due to the fact that Falun Gong members are the source of the information.

Finally, in its discussion of the Falun Gong in the PRC, IRFR 2004 briefly described the contents of article 300 of the 1997 Criminal Law, “Explanations of the Judiciary on Heretical Cults,” and “Standing Committee Decision on Heretical Cults.”¹¹⁸ In doing so, it explicitly raised the prosecution-persecution issue for asylum cases. However, the other content regarding the Falun Gong in the report, indeed the mere inclusion of the Falun Gong in the report, forces adjudicators to ignore this issue.

IV. FALUN GONG ASYLUM CASES

A finding of adverse credibility is a common reason for an immigration judge (IJ) to deny asylum, and is often the first obstacle encountered in a Falun Gong claim. A federal appellate court, however, will overturn such a finding if the applicant is careful in how s/he initially presented the claim to the IJ. An adverse credibility determination of an IJ or the Board of Immigration Appeals (BIA) must be supported by substantial evidence in the record in order to be affirmed by a federal court.¹¹⁹ The cases discussed below demonstrate the accommodating nature of the appellate process to Falun Gong asylum claims. They also provide insight into the main evidentiary elements of a successful Falun Gong claim: (1) a USDOS Country

¹¹⁷ *IRFA 2004*, *supra* note 110.

¹¹⁸ *Id.*

¹¹⁹ *E.g.*, *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002) (citing *Yi Quan Chen v. INS*, 266 F.3d 1094, 1098 (9th Cir. 2001)) (“Although the substantial evidence standard is deferential, the IJ must provide ‘a specific cogent reason’ for the adverse credibility finding.”); *but see, e.g.*, *Krouchevski v. Ashcroft*, 344 F.3d 670, 673 (7th Cir. 2003) (citing *Pop v. INS*, 270 F.3d 527, 529 (7th Cir. 2001)) (“We reverse only if the evidence is such that a reasonable fact finder would be compelled to reach an opposite conclusion.”)

Report that discusses the Falun Gong in the PRC; (2) supporting documents that indicate a membership in or relationship with the Falun Gong, the legitimacy of which is unascertainable by an adjudicator; (3) a corresponding story that includes past police detention or the possibility of future detention; and (4) a less than elementary understanding of Falun Gong exercises and doctrine.

A. *Chenyun Gao v. Ashcroft*¹²⁰

When Chenyun Gao¹²¹ was in the seventh grade, she began accompanying her aunt to Falun Gong meetings.¹²² Chenyun often missed school to attend these meetings – she was absent 18 times during her first semester of seventh grade,¹²³ absent 25 times and tardy 9 times during the first semester of eighth grade,¹²⁴ and absent 43 times and tardy 5 times during the second semester of eighth grade.¹²⁵ During the eighth grade, she was recruited by her aunt to serve as a messenger for the Falun Gong, a position for which she was paid on a monthly basis.¹²⁶ The school principal repeatedly warned Chenyun to discontinue her absenteeism and finally gave her an ultimatum: “The principal ordered me to stop participating in the group, but I did not obey him. The principal reported me to the local public security, and they came to the school to arrest me immediately after I was formally expelled.”¹²⁷

The local police detained Chenyun for two days, during which time she claims to have been held without food, kept awake for long

¹²⁰ *Gao v. Ashcroft*, 299 F.3d 266 (3d Cir. 2002).

¹²¹ The applicant in this case and another discussed *infra* share the same last name, and thus to avoid confusion, discussion will refer to applicants by their first names.

¹²² *Gao*, 299 F.3d at 269.

¹²³ *Id.* at 270 n.3.

¹²⁴ *Id.* at 280.

¹²⁵ *Id.*

¹²⁶ *Id.* at 269 n.1.

¹²⁷ *Id.*

periods, and struck twice on the buttock with a stick.¹²⁸ After two days, the police placed Chenyun with a group performing manual labor at a park, which consisted of “cutting grass and moving stones.”¹²⁹ She ran home during a lunch break, and then left to stay with a relative in another town.¹³⁰ After a few months, she fled to the United States to join relatives,¹³¹ and upon arrival in Los Angeles faced removal proceedings for not possessing a valid visa and likelihood to become a public charge.¹³² In her application for asylum, Chenyun submitted two pieces of documentary evidence to support her claim: a school transcript book that recorded her repeated absence and the letter stating the grounds for her expulsion from school, which noted her excessive absence due to activities as a member of the Falun Gong.¹³³

The Immigration Judge (IJ), based on information in the USDOS’s reports, concluded “that the Falungong belief and activity is a religious, and/or political view, and persecution on account of it is persecution on account of one’s religious or political views.”¹³⁴ The IJ doubted the credibility of Chenyun’s testimony, however, questioning the legitimacy of Chenyun’s supporting documents,¹³⁵ and whether

¹²⁸ *Id.* at 269.

¹²⁹ *Id.* at 270.

¹³⁰ *Id.*

¹³¹ *Id.* at 280. On her way to the United States, Chenyun stayed approximately one month in Thailand and one month in Brazil. *Id.* at 269 n.1.

¹³² 8 U.S.C. § § 1182(a)(4)(A); 1182(a)(7)(A)(i)(I). *Id.* at 268-269.

¹³³ *Gao*, 299 F.3d at 270.

¹³⁴ *Id.* at 270-271. Chenyun submitted USDOS’s “Country Reports on Human Rights Practices, 1999: China” as evidence. Bureau of Democracy, Human Rights, & Labor, U.S. Dep’t of State, *Country Reports on Human Rights Practices, 1999: China*, available at <http://www.state.gov/g/drl/rls/hrrpt/1999/284.htm> (last visited Nov. 19, 2004) [hereinafter *CRHRP 1999*]. *Gao*, 299 F.3d at 267.

¹³⁵ *Id.* at 275, 276 n.6 (the IJ noted that Chenyun, her parents, her relatives in the United States, and her lawyer all handled the documents. “Court finds it hard to believe, actually, that the comments about her involvement in those outside activities were indeed put in her note booklet by the school itself.”). In reply, the appellate judge argued: “If the IJ believes that the alteration occurred and it impacts on his finding of lack of credibility, he must state a reason and detail with

the “torture” actually took place.¹³⁶ The IJ also concluded that a fear of persecution was inconsistent with her position as a mere messenger.¹³⁷

On appeal, the Third Circuit applied a heightened level of deference to the lower court’s decision under the substantial evidence standard of review.¹³⁸ This standard holds that a lower court’s adverse credibility determination is reversible if it is “based on speculation or conjecture, rather than on evidence in the record,”¹³⁹ or if “any reasonable adjudicator would be compelled to conclude to the contrary.”¹⁴⁰

Judge Barzilay of the U.S. Court of International Trade, sitting by designation, held that the IJ’s adverse credibility determination was not based on evidence in the record.¹⁴¹ The case was remanded “with the understanding that any further [adverse credibility] conclusions must be supported by substantial evidence in the record.”¹⁴² Barzilay identified three events that occurred because of

specificity the issues of non-credibility.” *Id.* at 275-76 (citing *Turcios v. INS*, 821 F.2d 1396, 1399 (9th Cir. 1987) (“trier of fact who rejects a witness’s positive testimony because in his or her judgment it lacks credibility should offer ‘a specific, cogent reason for [his] disbelief.’”)).

¹³⁶ *Id.* at 271 (questioning whether “the treatment that she suffered is plausible, sufficiently detailed, and credible to allow us to conclude that she was in fact persecuted for these few activities”).

¹³⁷ *Id.* (describing the situation as “implausible . . . the preoccupation of Chinese authorities for someone who is a mere adjunct to the activity that the government is trying to stop or prevent, but that is not at all involved in it herself”).

¹³⁸ The Third Circuit was reviewing the IJ’s decision because the BIA had deferred to the opinion. *Id.* (citing *Abdulai v. Ashcroft*, 239 F.3d 542, 549 n.2 (3d Cir. 2001) (“When the BIA defers to an IJ, a reviewing court must, as a matter of logic, review the IJ’s decision to assess whether the BIA’s decision to defer was appropriate.”)).

¹³⁹ *Id.* (citing *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000)).

¹⁴⁰ *Id.* (citing INA § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B); *accord INS v. Elias-Zacarias*, 502 U.S. 478, 483-84, 117 L. Ed. 2d 38, 112 S. Ct. 812 (1992)).

¹⁴¹ *Id.* at 279. “The IJ rested his decision on a credibility determination that is not supported by substantial evidence in the record.” *Id.*

¹⁴² *Id.*

Chenyun's membership in Falun Gong, each of which she interpreted as acts of persecution: (1) Chenyun was expelled from school; (2) she was "beaten" by police; and (3) she was imprisoned in a "labor camp." The evidence, however, indicates that Barzilay misconstrued the nature of these events.

Barzilay cites the Disciplinary Determination as evidence that the school expelled Chenyun because of her activities with Falun Gong rather than her absenteeism.¹⁴³

[Chenyun] during her school period, did not obey the school moral education, joined the so called social exercise movement by her own will; has been a messenger for the illegal group: Fa Lun Gong Group. She was absent from class for 43 times, the policy and administration department had educated her over and over, she still did not regret it and caused this serious problem, this student was disciplined for a major demerit in March 2000, right now she keeps on joining the Fa Lun Gong activities as their messenger, she was questioned by the local justice department in June and has been absent from class for 56 times since then, she has set up a very bad influence. Based on regulation 11 section 4 (continuous high school discipline violation, law violation regulation) and the regulations of the public security authority, after the study and the decision of the school administration, [Chenyun] is expelled from school, this case is reported to the public security bureau and be processed based on the regulations [multiple sic].¹⁴⁴

The Disciplinary Determination demonstrates that the school expelled Chenyun not merely for her membership with the Falun Gong, but for participating in Falun Gong activities instead of attending class. The fact that Chenyun was expelled because of a "high school discipline

¹⁴³ *Id.* at 277 ("The government in its brief attempts to show that the primary reason for [Chenyun]'s expulsion from school was absenteeism. The Disciplinary Determination explicitly contradicts this, and, if credible, makes clear that the primary reason for her expulsion was not school truancy, but rather her link to the Falun Gong.").

¹⁴⁴ *Id.*

violation”¹⁴⁵ shows that the school would not have taken action had Chenyun participated during off-school hours. This is supported by the fact that the Disciplinary Determination repeatedly noted Chenyun’s excessive absences. Barzilay did not question why the Falun Gong would require an eighth-grader to miss out on her education, and instead noted that they “apparently cannot function without messengers.”¹⁴⁶ She suggested that the school acted excessively in expelling Chenyun: “the school took this link [with the Falun Gong] so seriously that they not only expelled her, but also noted in the letter they were referring the matter to the local public security bureau.”¹⁴⁷ Barzilay’s position is that expulsion due to absenteeism is legitimate, but if the absenteeism is based on membership in the Falun Gong, then expulsion is not a legitimate form of punishment but persecution. Essentially, she held that an eighth-grade girl in the PRC should be able to skip school if the purpose is to run messages for the Falun Gong.

Barzilay, in describing the two-day detention period, misconstrued action taken by the police as verging on torture.

[Chenyun] also says that police made her remove her pants and beat her on her buttocks. The instrument they beat her with was a long rod, which may or may not have been able to deliver an electric charge. [Chenyun] does not know if she was electrocuted, only that she was struck twice and kicked.¹⁴⁸

Electrocution, by its very nature, is a form of punishment that causes the victim explicit awareness of its occurrence. Barzilay did not indicate why she characterized Chenyun as not knowing whether she was electrocuted, rather than stating Chenyun knew that she was not electrocuted. The dissenting opinion’s description of events highlights Barzilay’s distortion: “She was held for two days, scolded, teased and hit twice on her bottom with a stick.”¹⁴⁹ Barzilay, it seems, was

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 279.

¹⁴⁷ *Id.* at 277.

¹⁴⁸ *Id.* at 269.

¹⁴⁹ *Id.* at 280.

influenced by the USDOS's repeated claims that Falun Gong members received torture by electric rods.¹⁵⁰

Barzilay also misconstrued the nature of Chenyun's punishment, stating that she was "imprisoned in a labor camp"¹⁵¹ in the "countryside."¹⁵² Barzilay did not indicate what she considers to be a "labor camp," but Chenyun's description of "cutting grass and moving stones"¹⁵³ in a park "with lots of trees"¹⁵⁴ nearby her home falls short of the term "laogai," used to describe the PRC's system of labor camps.¹⁵⁵

Why would the court condone rather than criticize an aunt who compels her niece to partake in illicit activities rather than attend school? The answer is found in the court's deference to the USDOS's Human Rights Reports, which insinuate that legislation outlawing Falun Gong activity is a form of religious persecution. The second prong of the test for refugee status requires Chenyun, in a claim of religious persecution, to demonstrate a nexus between her fear of persecution and her religious belief.¹⁵⁶ This nexus must be based on the government's motivation to imprison the applicant based on an actual or imputed belief.¹⁵⁷ Chenyun does not consider Falun Gong to be religious, so the nexus cannot be based on an actual belief. The PRC also does not consider Falun Gong to be religious, so the nexus cannot be based on an imputed religious belief. Is a claim of religious persecution legitimate if the imputed nature of the belief comes from neither the applicant nor the one who imprisoned her, but from the USDOS?

¹⁵⁰ *CRHRP 1999*, *supra* note 134 ("According to Amnesty International, some adherents of Falun Gong were tortured with electric shocks.").

¹⁵¹ *Gao*, 299 F.3d at 268.

¹⁵² *Id.* at 277.

¹⁵³ *Id.* at 270.

¹⁵⁴ *Id.* at 279 n.7.

¹⁵⁵ *See generally* Laogai Research Foundation, at <http://www.laogai.org/news/index.php> (last visited Nov. 19, 2004).

¹⁵⁶ *See supra* nn. 22-23 and accompanying text.

¹⁵⁷ *Id.*

In confronting this issue, the IJ held that while Falun Gong may or may not be a religious belief, it also may or may not be a political belief: “Falungong belief and activity is a religious, and/or political view.”¹⁵⁸ The IJ’s handling of the case, however, indicates that he did not consider the practice of Falun Gong to be a political view. During Chenyun’s oral testimony, the IJ asked if she was familiar with the practice of Falun Gong.

Q: Do you yourself practice Falungong?

A: Seldom. I, basically I was watching people practicing . . .

Q: You can do some Falungong now?

A: I don’t know the details. I watch people doing it, because my job is just a messenger.¹⁵⁹

This is not a line of questioning that can logically apply to a political belief. When the IJ asked for Gao to perform some Falun Gong at the hearing, he was not asking if she was or was not capable of expressing a political opinion.

Although Falun Gong belief is not political in nature, the PRC’s proscription of the group, however, is an act of state and thus political. In order for a claim of political persecution to succeed, the applicant must demonstrate that she has a right to her actual or imputed opinion. The court in *Chenyun Gao v. Ashcroft* did not address whether spreading the doctrine of Falun Gong – the law body of Li Hongzhi is present in your abdomen and will cure your illnesses if you refrain from taking medicine or studying other forms of *qigong* – is a fundamental human right. Nor did it discuss the possibility that the PRC’s proscription is comparable to the banning of sects in France and elsewhere throughout the world.¹⁶⁰ Interestingly, these omissions – which represent the crux of the matter – are absent throughout Falun Gong appellate opinions.

¹⁵⁸ *Gao*, 299 F.3d at 271.

¹⁵⁹ *Id.* at 273.

¹⁶⁰ See *supra* note 108 and accompanying text.

B. *Meling Gao v. Ashcroft*¹⁶¹

Meiling was working in her father's bookstore when police officers found two Falun Gong books in a drawer behind the counter.¹⁶² She was arrested, detained for ten days and released after paying a fine.¹⁶³ When her father's friend, a police officer, told her that her name appeared on a list of Falun Gong members, she came to the United States and applied for asylum.¹⁶⁴ During proceedings, Meiling testified that she feared persecution upon return to the PRC because her name appeared on the list, and the government was "cracking down on the Falun Gong."¹⁶⁵ She presented "Country Reports on Human Rights Practices, 2000: China" (CRHRP 2000)¹⁶⁶ as supporting evidence.¹⁶⁷

The BIA dismissed Meiling's claim, concluding that she failed to demonstrate a well-founded fear of persecution, because (1) she is not an actual member of Falun Gong, and (2) the authorities did not imprison her father, the owner of the bookstore.¹⁶⁸ The appellate court reversed, holding that the BIA committed a legal error:

Gao's testimony established that she appeared on a government list of Falun Gong members after her arrest and imprisonment when the police found Falun Gong books behind the counter in the bookstore where she was working. She therefore demonstrated that she

¹⁶¹ *Gao v. Ashcroft*, 49 Fed. Appx. 180 (9th Cir. 2002)

¹⁶² *Id.* at 181.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 181.

¹⁶⁵ *Id.*

¹⁶⁶ "Country Reports on Human Rights Practices, 2000: China" as evidence. Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, *Country Reports on Human Rights Practices, 2000: China*, available at <http://www.state.gov/g/drl/rls/hrrpt/2000/eap/684.htm> (last visited Nov. 19, 2004) [hereinafter *CRHRP 2000*].

¹⁶⁷ *Gao*, 49 Fed. Appx. at 181-182.

¹⁶⁸ *Id.* at 182.

appeared on a “hit list” after she was found to have possessed Falun Gong literature, because of her imputed affiliation with the persecuted group.¹⁶⁹

In finding a well-founded fear of persecution on account of political opinion, the court equated Meiling, a bookstore owner who spent ten days in jail for possessing banned Falun Gong publications, to an informant against the New People’s Army, a violent rebel group opposed to the Philippine government.¹⁷⁰ Her testimony and the USDOS Country Report were sufficient to overturn the lower court’s adverse credibility determination.

C. *Zhang v. Ashcroft*¹⁷¹

Hongke Zhang first came to the United States in 1996 on a non-immigrant employment visa.¹⁷² The following year, he returned to the PRC for a month-long visit, at which point an acquaintance introduced him to the Falun Gong.¹⁷³ Upon return to the United States, he explored Falun Gong through books and videos, and after some positive experiences he told his family and friends in the PRC about the group.¹⁷⁴ In 1999, Zhang learned that his brother had been arrested for taking part in protests, as had his parents, who informed the police that Zhang had introduced them to the Falun Gong and had mailed them Falun Gong media.¹⁷⁵ The police told his parents that Zhang should immediately report to the police station upon return to

¹⁶⁹ *Id.* (citing *Mejia v. Ashcroft*, 298 F.3d 873, 878 (9th Cir. 2002) (holding that the applicant’s “unchallenged testimony demonstrated that he appeared on an NPA hit list after acting as an informer against the NPA. Under our precedents, these facts establish eligibility for asylum.”)).

¹⁷⁰ *Id.*

¹⁷¹ *Zhang v. Ashcroft*, 2004 U.S. App. LEXIS 23401 (9th Cir. 2004).

¹⁷² *Id.* at 2.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 3.

¹⁷⁵ *Id.* at 3-4, 6.

the PRC.¹⁷⁶

In 2001, during removal proceedings, Zhang applied for withholding of removal¹⁷⁷ and asylum.¹⁷⁸ Zhang submitted CRHRP 2000 as supporting evidence.¹⁷⁹ The IJ found Zhang statutorily ineligible for asylum because his application came more than a year after arrival in the United States, and denied withholding of removal for failure to show a clear probability of persecution.¹⁸⁰

The appellate court reversed the IJ's decision to deny withholding of removal, ruling that Zhang was entitled to relief on account of imputed political opinion and religious belief.¹⁸¹ The court held that the IJ did not make an explicit negative credibility finding, and thus accepted Zhang's evidence and testimony as true.¹⁸² In finding that Zhang met his burden of proof, the court found that "any reasonable adjudicator would have to conclude that Zhang would face a clear probability of persecution upon return to China, on account of his practice of Falun Gong and his perceived anti-government activities."¹⁸³ Although the court cited CRHRP 2000's description of article 300 of the 1997 Criminal Law,¹⁸⁴ it did not address the prosecution-persecution dichotomy in its deliberations.

V. CONCLUSION

¹⁷⁶ *Id.* at 6.

¹⁷⁷ 8 U.S.C. § 1231(b)(3) (2004). Aside from a higher standard of proof, the test for determining eligibility for withholding of removal does not differ significantly from that for asylum. *Id.*

¹⁷⁸ *Id.* at 7.

¹⁷⁹ *Id.* at 2. See *CRHRP 2000*, *supra* note 166.

¹⁸⁰ *Id.* at 7-8.

¹⁸¹ *Id.* at 18.

¹⁸² *Id.* at 9-10 (citing *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137-38 (9th Cir. 2004) (holding that "implicit credibility observations in passing" do not constitute credibility findings)).

¹⁸³ *Id.* at 10.

¹⁸⁴ *Id.* at 5.

In analyzing the legitimacy of Falun Gong asylum claims, it is difficult to avoid a debate, legal standards aside, on whether Falun Gong members are deserving of asylum in the United States. Existing discourse has established clearly demarcated sides to this debate. The first focuses on the exercise component of the group's practice, and argues that the PRC government should not have discontinued the Falun Gong's peaceful existence in the PRC social arena. The other focuses on the metaphysical component, and cites episodes of psychosis and other social disorders to justify the government's prosecution. The inability to reach a consensus in this debate, it seems, is due to the fact that the two sides are describing different social entities.

Perhaps an explanation exists that can resolve this divide, one that considers the societal system in which the Falun Gong operates as a factor in determining the group's underlying nature. In the PRC, the Falun Gong came into being during a time in which *qigong* was both a scientific endeavor and a popular social pastime. Members of the Falun Gong accepted the omnipresent leadership of Li Hongzhi, while observers witnessed the disruption that it caused to their communities. In the United States, the Falun Gong did not gain popularity until after the PRC government prosecuted the group. Observers' perceptions are defined by a combination of factors, including a Judeo-Christian foundation that lacks familiarity with the manifestations of *qi*, the PRC government's poor human rights record, and the Falun Gong's seemingly peaceful exercise components. This division between social arenas might govern not only the perceptions of observers, but also the nature of the group itself. Perhaps the current Falun Gong that exists in America is a different entity from the PRC Falun Gong of the past because members no longer devote their individual existences to their inner Li Hongzhi. Alternatively, perhaps the negative effects of Falun Gong devotion have yet to manifest themselves outside the PRC.

No matter what societal order one ascribes to the Falun Gong debate, the extent to which adjudicators are forced to bend the law to accommodate the USDOS results in a burden of credibility so low that it practically invites fraudulent claims of Falun Gong membership. The resulting success of Falun Gong asylum claims provides valuable ammunition to human smugglers in the PRC. In an industry with an estimated annual profit of three billion dollars,¹⁸⁵

¹⁸⁵ Cleo J. Kung, *Comment: Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the U.S. Statutory Definition of*

snakeheads use asylum claims as a means to gain entry into the United States for their client.¹⁸⁶ Snakeheads can easily coach migrants how to present a claim based on membership or affiliation with the Falun Gong. With the deference that is currently given to the USDOS Country Reports, such claims provide easy entrance into the country and the possibility of parole with work-authorization.¹⁸⁷

Ultimately, a debate that is confined to the framework of refugee law cannot disregard the fact that the PRC government proceeded against the Falun Gong through the rule of law. U.S. courts, however, have consistently failed to address this issue. Instead, they yield to the claims of the USDOS and grant asylum to members of a non-religious, non-political, criminal organization. Much as the U.S. executive branch relied on misconceptions of the Falun Gong to create a useful addition to its China-policy arsenal, federal judges reconstructed Falun Gong precepts in order to accommodate the demands of the USDOS. Although the judiciary should give deference to the executive branch in matters of immigration policy, the Falun Gong asylum situation is not a mere policy determination but a deviation from jurisprudential standards. In a field rife with caseload backlog and resource constraints, the selective application of precedent can lead to drastic results, especially given the flood of applicants the deviation may produce.

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“*Refugee*”, 90 J. CRIM. L. & CRIMINOLOGY 1271, 1273 (2000) (citing 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., 1997)).

¹⁸⁶ *Id.* at 1286, 1305-1308.

¹⁸⁷ *Id.* at 1292.

¹⁸⁸ Class of 2005, University of Hawai‘i at Mānoa, William S. Richardson School of Law.