Lin v. United States Department of Justice: The Circuits Split On the Issue of Whether Marital Status is Dispositive of Asylum Eligibility in the United States for Individuals Who Suffer Persecution under China's Coercive Family Planning Practices

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LIN V. UNITED STATES DEPARTMENT OF JUSTICE: THE CIRCUITS SPLIT ON THE ISSUE OF WHETHER MARITAL STATUS IS DISPOSITIVE OF ASYLUM ELIGIBILITY IN THE UNITED STATES FOR INDIVIDUALS WHO SUFFER PERSECUTION UNDER CHINA'S COERCIVE FAMILY PLANNING PRACTICES

Sara E. Stewart

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PRACTICES

Sara E. Stewart

May 1993, when I was nineteen, I was found to be pregnant. We were both so happy,
and went to the government office to get legal paperwork for our marriage. We were
refused because I was under 20 . . . Feeling sick, I go to the hospital. The doctor
who examined me reported my apparent pregnancy to the government. As I had no
legal paper for marriage and no government-approved birth-allowed documents, my
baby was illegal and I could not have a baby: . . . [T]hey took me to the hospital.
They locked me up for hours in a small room in the hospital. They gave me a pill and
they were to come back in about thirty minutes with a shot. They forced me to
swallow the pill, but I escaped the shots. My boyfriend knew I was locked up. He
gave [one dollar] to a nurse for her to open the window. She opened the window and
I jumped out. Then my boyfriend took me by a car straight to Guangzhou.¹

I. INTRODUCTION

In Lin v. United States Department of Justice,² the United States Court of Appeals
for the Second Circuit remanded three consolidated appeals to the Board of Immigration
Appeals (BIA) for reconsideration.³ Petitioners Shi Liang Lin, Xian Zou, and
Zhen Hua Dong applied for asylum⁴ based on persecution they and their unmarried
girlfriends suffered under the coercive family planning practices employed by the
People’s Republic of China.⁵

¹ J.D. Candidate, 2007, University of Maine School of Law.
² Forced Abortions and Sterilization in China: The View from the Inside: Hearing Before the
Subcomm. on International Operations and Human Rights of the H. Comm. on International Relations,
³ Id. at 192.
⁴ Once an individual is granted asylum status in the United States he or she is eligible to apply for
specific benefits, including an Employment Authorization Card (allowing him or her to work legally in the
United States), an unrestricted Social Security Card, cash and medical assistance, employment assistance,
and a refugee travel document with which he or she can travel, provided he or she does not return to the
country from which he or she fled as a refugee. U.S. Citizenship and Immigration Services, Frequently
Asked Questions About Asylum, http://www.uscis.gov/graphics/services/asylum/faq.htm#dec3a (last visited
Sept. 24, 2006).
⁵ Lin, 416 F.3d at 188-89. See generally Erin Bergeson Hull, Comment, When is the Unmarried
Partner of an Alien Who Has Been Forcibly Subjected to Abortion or Sterilization a “Spouse” for the
Purpose of Asylum Eligibility? The Diverging Opinions of Ma v. Ashcroft and Chen v. Ashcroft, 2005
Retaining jurisdiction over the petitions after re-disposition by the BIA, the Second Circuit demanded that the BIA clarify two issues regarding its interpretation of United States' immigration laws. First, the Second Circuit insisted on a precise explanation of the rationale behind interpreting the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) section 601(a) to include the "forced sterilization of one spouse on account of a ground protected under the Act" as an "act of persecution against the other spouse," resulting in the spouse's per se asylum eligibility. Secondly, the court asked the BIA to clarify "whether, when, and why boyfriends and fiancés may or may not similarly qualify as refugees pursuant to IIRIRA § 601(a).” As of March 29, 2006, the BIA has not yet considered the appeals on remand.

Although analyzed disparately by Immigration Judges (IJIs), the BIA, and the United States Courts of Appeals, the question that lingers is whether refugee status, and the concomitant eligibility for asylum in the United States, should be extended to individuals who are persecuted pursuant to China’s coercive family planning practices because their unmarried partners are forced to undergo an unwanted abortion or sterilization procedure.

This Note begins with a brief outline of the history of China’s coercive population control and the United States’ expression of opposition to China’s policies through the enactment and amendment of immigration law. Section IV discusses the BIA’s ambiguous holding in In re C-Y-Z-, in which it first extended asylum status to the spouse of an individual directly persecuted under China’s coercive population control. Next, it reviews two recent cases with disparate outcomes decided by the Third and Ninth Circuit Courts of Appeals regarding whether such protection should be extended to the unmarried partner of a person similarly persecuted.


7. Id. at 192. As of February 20, 2006, the BIA has not had the opportunity to analyze these petitions on remand.

8. See, e.g., Yuan v. U.S. Dep’t of Justice, 416 F.3d 192, 197 (2d Cir. 2005) (expressing doubt as to the BIA’s reasoning in C-Y-Z-); Ma v. Ashcroft, 361 F.3d 553, 561 (9th Cir. 2004) (holding that “spouse” may be interpreted to include those individuals who were married in a traditional Chinese ceremony and would be legally married in China but for China’s coercive family planning policies); In re C-Y-Z-, 21 I. & N. Dec. at 919 (holding that IIRIRA section 601(a) demands that the spouses of those directly victimized by coercive family planning policies are per se as eligible for asylum as those directly victimized). But see Chen v. Gonzales, 152 Fed. App’x. 528, 530 (7th Cir. 2005) (affirming, without comment, the decision not to extend presumption of persecution to unmarried individuals); Zhang v. Ashcroft, 395 F.3d 531, 532 (5th Cir. 2004) (agreeing with the Third Circuit’s decision in Chen v. Ashcroft not to extend the presumption of persecution to unmarried individuals); Chen v. Ashcroft, 381 F.3d 221, 227-29 (3d Cir. 2004) (determining that the presumption of persecution extends to spouses of women forced to undergo abortions but not to unmarried men). In a recent decision that never reached the issue of unmarriages’ asylum eligibility, the United States Court of Appeals for the First Circuit characterized the case law as a “circuit split.” Chen v. Gonzales, 418 F.3d 110, 111 (1st Cir. 2005).
In conclusion, this Note argues for the extension of refugee status and asylum eligibility to unmarried partners under section 601(a) of IIRIRA, based, in part, on the reasoning put forth in the concurrence to C-Y-Z-. Although practicality and efficiency of process may be served by a bright-line rule restricting derivative asylum status to legally recognized spouses, such a limitation produces absurd and unjust results. As a result of China’s coercive family planning practices, couples who are denied access to a legally recognized marriage, and who fear a traditional marriage will alert Chinese authorities of their unlawful cohabitation, are faced with a dismal decision: either remain in China and suffer continued threat and persecution, or flee to the United States and encounter a judicial system whose interpretation of immigration laws will result in the denial of asylum based on a marital status that is the consequence of coercive family planning laws.

II. POPULATION BOMB

A. China’s Coercive Population Control Policies

In 1949, the year the People’s Republic was founded, China’s population totaled 541.67 million. 9 Convinced a large population was essential for productivity and socialist composition, the Maoist leadership ignored ample warning about the perils of overpopulation from China’s foremost economists, and promoted population growth throughout the 1950s. 10 Increased fertility rates, coupled with declining mortality and the government’s endorsement of population growth, resulted in the doubling of China’s population in just over thirty-five years. 11 It was not until the late 1950s and early 1960s that China implemented its first population control policies. They were short-lived, however, and were thwarted by the turbulence accompanying the start of the Great Proletarian Cultural Revolution. Although dormant for nearly a decade, the Chinese government’s concerns about overpopulation did not disappear.

Acute political unrest subsided in the 1970s and, shortly thereafter, the first formal family planning policy was announced. It took the form of a propaganda campaign called “wan, xi, shao” or “later, longer, fewer,” and contemplated later marriages, longer time lapses between births, and fewer births. 12 Then, in 1979, the “one couple, one child” policy was adopted, limiting parents to one child. 13 The following year, the Marriage Law took effect 14 under which men were not permitted to marry legally until


10. In 1974, a spokesman for the Chinese government claimed that a rapid increase in population was “a very good thing” and the theories on population explosions were “fallac[ies] peddled by the superpowers.” Zhang, supra note 9, at 561.

11. Id. at 560.

12. Id. at 561.

13. Couples were limited to one child with exceptions permitted in a limited number of cases. In 1984, the one-child policy was modified specifically to allow ethnic minorities to have more than one child, and in some rural areas, parents are permitted to have more than one child. In 1988, couples in rural provinces were eligible to have more than one child, after a period of time, if their first child was a girl. Id. at 561-62.

the age of twenty-two and women not until the age of twenty. Under China's 1982 Constitution, the government sets the target population and endorses a family planning policy, thereby encouraging "delayed marriage and postponement of having children, giving birth to fewer but healthier children, and one family, one child . . . ." Notwithstanding China's stringent policies, its population continues to grow at the rate of sixteen million per year. Meanwhile, China supports one-fifth of the total world population on less than eight percent of the world's arable land. The Chinese government contends that, if it is not regulated, "rapid population growth could threaten the subsistence of the Chinese nation, leading to a catastrophe and an exodus of refugees." As reasonable as China's population concerns may be, policies that subject Chinese citizens to human rights violations, creating thousands of victims annually, cannot be justified.

15. Id.
16. See XIAN FA art. 25 (1982) (P.R.C.) ("The state promotes family planning so that population growth may fit the plans for economic and social development . . . .").
17. China "hopes to reach its maximum desired population size of 1.6 billion no sooner than 2050." Hull, supra note 5, at 1022.
18. Zhang, supra note 9, at 562.
20. Hull, supra note 5, at 1022.
21. Zhang, supra note 9, at 566.
22. Testifying before the United States House of Representatives' Committee on International Relations, Harry Wu, executive director of the Laogai Research Foundation, stated that despite the recent attempts at reform, China's population control policy fails to conform to UN principles. In a prepared statement, Wu declared that:

The one-child policy is the most pervasive source of human rights violations in China today. It affects every family, every woman . . . . A majority of Chinese women are required to use intrauterine devices (IUDs). Violators, if discovered to be pregnant, are coerced into having an abortion. Most violators of the one-child policy are forced to undergo sterilization. Doctors who do not perform IUD insertion or sterilization, or who fake these operations, are jailed. Family members of violators are often jailed if they do not reveal the violator's whereabouts. Despite relaxation of certain aspects of China's family planning regulations, enforcement of the one-child policy continues to be coercive.


23. Leaders of the communist government in China, such as Jiang Zemin, have attempted to justify China's coercive policies by touting its positive impact on economic well-being and stability. Wu statement, supra note 22, at 36. The same leaders have relied on the ratio of China's massive population to the small amount of land capable of supporting agricultural activities, arguing that harsh measures are necessary to restrict population and guarantee there is sufficient food for everyone to eat. Id. However, these arguments are groundless; "[w]hat China needs most in order to thrive is a free political and social system." Id. Wu argues that by analogizing to the situations in Japan and Taiwan China's argument can be refuted. Id. With a population of more than 1.3 billion, 22% of the world and only just over 9% of arable land of the world, Japan and Taiwan enjoy[] relatively prosperous economic conditions and stability." Id. In contrast to China, "Japan and Taiwan [have] free and open political and social system[s] that drive[] [their] success." Id.
B. China's Enforcement Mechanism

There is ample evidence that the Chinese government knowingly continues to employ coercive tactics in order to achieve lower birth rates, especially in rural provinces. 24 To guarantee compliance with China’s one-child plan, family planning officials use insidious techniques, ranging from political pressure and public degradation to invasive medical procedures. 25 A volunteer network consisting of thirteen million cadres oversees the distribution and use of contraceptives and regulates unlawful pregnancies in their communities. 26 In some provinces, every woman’s menstrual cycle and choice of contraceptive is publicly tracked and women who avoid the policy are publicly humiliated. 27 Among the most severe practices relied on by officials are forced late-term abortions, obligatory sterilization, and non-consensual insertion of intrauterine devices. 28 Recently, however, more extreme measures have been reported. 29 Although

24. Chinese leadership has consistently “signaled” to their subordinates that coercive strategies were expected. Aird statement, supra note 22, at 54. As early as the 1980s Deng Xiaoping clarified this position. Id. In 1981, Chen Muhua, the head of family planning, purportedly quoted Deng as stating, “In order to reduce the population, use whatever means you must, but do it!” Id. Hoping to calm the fears of local family planning officials, and worried that they would be accused of utilizing coercion, Chen said, “With the support of the Party Central Committee, you should have nothing to fear.” Id. In 1983, Premier Zhao Ziyang told local family planning officials to “prevent additional births by all means.” Id. Moreover, there is abundant evidence that coercive policies continue today. As late as March 11, 2001, Jiang Zemin pronounced that population control was a “major affair for strengthening the country, enriching the people, and maintaining tranquility . . .” Id. at 55. Its successful continuance required “really effective measures” and necessitated that the government “grasp ever more tightly and still do better with this major item of economic and social work without the slightest slackness or relaxation.” Id. Aird argues, “When the central authorities issue injunctions such as these and do not include warnings to avoid coercion, the lower levels know what is expected of them!” Id.


26. Sicard, supra note 25, at 930. It should be noted that local family planning cadres and officials are also victims of governmental coercion. Through a system referred to as “veto with one vote,” those cadres and officials who fail to meet family planning goals were to be deemed an utter failure in their annual evaluations, irrespective of their achievements in other areas of responsibility and are punished accordingly. Aird statement, supra note 22, at 59. Literally, a “failure in family planning ‘vetoed’ all other achievements.” Id.

27. Hull, supra note 5, at 1025.

28. Id. at 1025-26.

29. In February of 2001, Amnesty International reported an incident in Changsha, Hunan Province that occurred in May 1998, involving a man named Zhou whose wife left for Guangdong Province to seek work. Aird statement, supra note 22, at 56. Family planning officials in Changsha suspected that she was pregnant without permission and, in an attempt to force him to disclose her location, captured and tortured her husband twice. Id. The second time, he was “denied food, hung upside down, whipped and beaten with wooden clubs and burned with cigarette butts.” Id. He became “doubly incontinent, his body covered with excrement. The officials reportedly then branded his lower body with soldering irons, tied a wire around his genitals, and ripped off his penis. Zhou died on 15 May 1998.” Id. In August of 2000, in Caidian Township, Hubei Province, cadres kidnapped a newborn baby boy as she was taking him home to care for him. Id. In a nearby flooded paddy field, within site of the doctor and neighbors, they drowned the baby in shallow water. Id.
incidents of death in connection with family planning practices are rare, the few stories that make the headlines “probably represent many more incidents, no word of which has reached the international media.”

The Chinese government shields these atrocities from Chinese journalists, insists that they are fabricated, and forces journalists and victims to publicly admit to lying.

In addition to coercive measures, the Chinese government exploits “non-coercive” techniques, including “economic and social incentives and disincentives, propaganda and education.” Couples who promise to comply with the one-child policy receive monthly stipends and preferred access to medical treatment and education. Moreover, the government offers benefits such as “larger living quarters, better child care, and longer maternity leave . . .” On the contrary, noncompliance results in penalties that “range from fines, job demotions, and withholding of social services, to loss of employment, imprisonment, and confiscation or destruction of property.”

III. THE UNITED STATES RESPONDS TO CHINA’S COERCIVE PRACTICES

A. Asylum Law and Policy

In order to establish eligibility for asylum under the Immigration and Nationality Act (INA), an individual must prove that she is a refugee within the meaning of the statute. The INA defines refugee as one who is “unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” Although the applicant bears the burden of proving that she meets the statutory definition of refugee, the Attorney General nonetheless retains ultimate discretion to grant or deny any application.

Although an affirmative finding of refugee status will not necessarily result in a conferral of asylum, such a conclusion forbids deportation of the applicant to a country where her life or liberty is threatened on account of her race, religion, nation-

30. Id. at 57.
31. Id. at 58.
32. Hull, supra note 5, at 1025.
33. Id.
34. Id.
35. Id.
37. 8 U.S.C. § 1101(a)(42) (1994). After the Supreme Court’s decision in Cardoza-Fonseca, the BIA has held that an asylum applicant must establish that “a reasonable person in his circumstances would fear persecution [and] that his fear of persecution is both subjectively genuine and objectively reasonable.” Zhang, supra note 9, at 576 (quoting In re R-O-, Int. Dec. 3170 at 5 (B.I.A. 1992) (citations omitted)); see also INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (holding that Congress used different, broader language to define the term refugee, as used in § 208(a), than it used to describe the class of aliens who had a right to withholding of deportation under § 243(h), and thus, the IJ and the BIA erred in applying the “more likely than not” objective standard of proof from § 243(h) to respondent’s § 208(a) asylum claim and should have instead applied the more generous, subjective “well founded fear” standard).
38. Lin, 416 F.3d at 187.
39. Id.
ality, membership in a specific social group, or political opinion. To establish eligibility for withholding of deportation, a non-citizen must demonstrate that she faces the "clear probability of persecution," a standard more stringent than that required to establish asylum. Thus, if an applicant fails to obtain asylum, she will necessarily not be eligible for withholding of deportation.

Where an applicant establishes eligibility based on past persecution, she creates the presumption of a "well-founded fear of persecution." Such a presumption may be rebutted, however, based on a preponderance of the evidence demonstrating that a "fundamental change in circumstances" has occurred "such that the applicant no longer has a well-founded fear of persecution," which often results in the denial of an asylum application.

B. From "Careful Consideration" to the Amended Definition of Refugee Under IIRIRA

Since China initiated its coercive population control practices, the United States has expressed opposition to China's coercive family planning policies. However, it was not until 1998 that the United States government made the first administrative pronouncement requiring all asylum adjudicators to give "careful consideration" to applications filed by Chinese nationals who articulated a fear of persecution because of their refusal to undergo a sterilization procedure or to abort a pregnancy in resistance to China's population control policies. Nine years earlier, in In re Chang, the BIA refused to extend refugee status to a Chinese national who fled China after the birth of his second child because Chinese officials threatened to sterilize him.

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40. 8 U.S.C. § 1253(h)(1) (1994). This section provides: "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Id.
43. Id. § 1208.13(b)(1)(I)(A). Previously, the regulation required proof of changed country conditions in lieu of the current requirement of a "fundamental change in circumstances." Hull, supra note 5, at 1028 n.66 (quoting In re C-Y-Z-, 21 I. & N. Dec. 915, 919 (B.I.A. 1997)). In 2001, the language was altered so that "other changes in circumstances surrounding the asylum claim, including a fundamental change in personal circumstances, may be considered, so long as those changes are fundamental in nature and go to the basis of the fear of persecution." The low preponderance of the evidence standard, coupled with the broadened conception of "fundamental circumstances," arguably makes it less difficult for the government to rebut an asylum applicant's "well founded fear of persecution." Id. (quoting In re Y-T-L-, 23 I. & N. Dec. 601, 604-05 (B.I.A. 2003)).
44. Zhang, supra note 9, at 578. This directive for enhanced consideration came in the form of a memorandum drafted by then-Attorney General Edwin Meese III. The memorandum mandated that if the refusal to submit to China's intrusive procedures was "an act of conscience with full awareness" of the importance the Chinese government placed on its family planning policies and with a knowledge of the likely consequences of such a defiance, it would be appropriate to interpret such non-cooperation "as an act of political defiance sufficient to establish refugee status under 8 U.S.C. § 1101(a)(42)(A)." Id. (quoting Memorandum from Edwin Meese III, Attorney General to Alan C. Nelson, Commissioner, Immigration & Naturalization Service (Aug. 5, 1988)). Thus, a finding of well-founded fear would be reasonable under those circumstances.
45. In re Chang, 20 I. & N. Dec. 38, 47 (B.I.A. 1989). The BIA determined that policy guidelines contained in administrative pronouncements were directed at the INS, and thus, did not apply to decisions.
Congress responded to the BIA's decision with an attempt to pass the Emergency Chinese Immigration Relief Act.\(^{46}\) Despite overwhelming support for the Bill in both Houses,\(^{47}\) then-President George H. W. Bush vetoed it, announcing that he would provide the same immigration benefits administratively that the bill offered, while maintaining the ability to manage foreign relations.\(^{48}\) Concurrent to his pronouncement, President Bush directed the Secretary of State and the Attorney General to provide "enhanced consideration . . . for individuals from any country who express a fear of persecution upon return to their country related to that country's policy of forced abortion or coerced sterilization."\(^{49}\) By Executive Order in April of 1990, President Bush "reaffirmed his original directive" requiring "enhanced consideration."\(^{50}\)

Thereafter, Attorney General Thornburgh amended the INA and promulgated an interim rule providing that asylum applicants "who have a well-founded fear that they will be required to abort a pregnancy or to be sterilized . . . may be granted asylum on the ground of persecution on account of political opinion."\(^{51}\) The amended regulations allowed the applicant or her spouse to be granted asylum if either of them refused to abort a pregnancy or undergo a sterilization procedure in violation of their country's family planning policy.\(^{52}\) Inexplicably, in the asylum regulations, published in July of 1990, the INS omitted the interim rule, reinstating In re Chang.\(^{53}\)

Inconsistency in immigration policy resulted in irreconcilable adjudication.\(^{54}\) In 1994, after a protracted inter-agency review of conflicting policy, the Clinton administration declared that the INS was permitted in certain cases to provide "discretionary humanitarian relief" outside of the context of asylum.\(^{55}\) But this policy was criticized for its ambiguity; there was no indication of how long the policy was to remain in effect or whether asylum relief extended to the applicants' family members.\(^{56}\)

\(^{47}\) The House of Representatives passed the bill by a vote of 403-0, and the Senate passed it by voice vote. President Vetoes Chinese Student Bill, Offers Administrative Relief Instead, 66 INTERPRETER RELEASES 1313, 1314 (1989).
\(^{48}\) Zhang, supra note 9, at 581 (citing Memorandum of Disapproval for the Emergency Chinese Immigration Relief Act of 1989, 25 WKLY. COMP. PRES. DOC. 1853, 1853-54 (1989)).
\(^{49}\) Id. (quoting Memorandum of Disapproval for the Emergency Chinese Immigration Relief Act of 1989, 25 WKLY. COMP. PRES. DOC. 1853, 1853 (1989)).
\(^{50}\) Id. at 582 (citing Exec. Order No. 12,711, 3 C.F.R. 283 (1991)).
\(^{51}\) Id. (quoting 55 Fed. Reg. 2803 (Jan. 29, 1990)).
\(^{53}\) Zhang, supra note 9, at 582-83; see also supra note 45 and accompanying text.
\(^{54}\) See generally Zhang, supra note 9, at 582-88.
\(^{55}\) Id. at 590. Discretionary measures were only exercised where the applicant displayed a "credible fear" of returning to China based on an imminent danger of forced abortion or sterilization, the threat of severe harm for refusal to submit to abortion or sterilization, or the risk of grave harm for violating other family planning practices. Id. at 591. The relief offered was a stay of deportation for an unspecified amount of time. Id.
\(^{56}\) Id. at 592. One critic, an immigration policy consultant, proffered that President Clinton's directive would result in "a profusion of asylum policies among the 36 INS districts" because INS district directors would be "free to expand individual interpretation in granting stays of deportation . . . ." James H. Walsh, Passing the Buck on Immigration, WASH. POST, Aug. 20, 1994, at A18.
Finally, in 1996, Congress passed IIRIRA, mandating that the BIA recognize "persecution" where an individual has suffered under China's coercive population control policies. Congress achieved this recognition by expanding the INA's definition of "refugee." Before IIRIRA's passage, Congress held a series of hearings on the issue of coercive population control in China. One of the main sponsors of the amendment, Congressman Christopher Smith, noted that forced abortion and sterilization were "among the most gruesome human rights violations." Since IIRIRA's enactment, the BIA and the courts have consistently extended the statute's protections to the husbands of women forced to undergo abortion and/or sterilization procedures. Arguably, by providing relief for partners persecuted as a result of an "unlawful" pregnancy and by keeping families together, these decisions further congressional intent.

Simultaneous to enacting IIRIRA, Congress implemented a one-thousand-per-fiscal-year cap on the number of Chinese citizens eligible for asylum under IIRIRA.


59. Section 601(a) of IIRIRA amended the original definition of refugee under section 101(a)(42) of the Immigration and Nationality Act. The following sentence was added:

For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.


61. See, e.g., Ma v. Ashcroft, 361 F.3d 553, 559 (9th Cir. 2004) (holding that where China's marriage laws prevent a legal marriage, a traditional marriage should be recognized for the purposes of establishing asylum status based on the forced abortion of the petitioner's de facto wife); He v. Ashcroft, 328 F.3d 593, 603-04 (9th Cir. 2003) (reasoning that where the petitioner's wife underwent a sterilization procedure, the petitioner was automatically eligible for asylum); Qui v. Ashcroft, 329 F.3d 140, 151 (2d Cir. 2003) (acknowledging that where a petitioner's wife undergoes either a forced abortion or sterilization, he is eligible for asylum). In these cases, neither the INS nor the BIA called into question the petitioners' lack of a legally recognized marriage certificate, nor did the lack of a Chinese marriage certificate result in the denial of their asylum applications. Ma, 361 F.3d at 559 n.8.

62. See Ma, 361 F.3d at 559 (citing H.R. Rep. No. 104-469(I), at 174 (1996)). But see Chen v. Ashcroft, 381 F.3d 221, 222 (3d Cir. 2004) (holding that the BIA's decision that asylum based on China's coercive family planning policies can only be granted to "spouses," which contributes to "efficient administration" while avoiding "difficult and problematic factual inquiries, is reasonable" even though it may produce "unsatisfactory results" in certain cases).

63. Chen, 381 F.3d at 225. The statute provides, "For any fiscal year, not more than a total of 1,000 refugees may be . . . granted asylum . . . pursuant to a determination under the third sentence of section
Pursuant to section 101(g) of the REAL ID Act, the cap was repealed in 2005. Currently, the issue of whether asylum relief will be extended to unmarried partners of victims of China’s family planning policy has erupted into what the First Circuit describes as “an active circuit split.”

IV. INTERPRETATION OF SECTION 601(A) OF IIRIRA

A. In re C-Y-Z-: The BIA Interprets Section 601(a) of IIRIRA to Protect the Spouse of a Victim

In 1997, the BIA had its first opportunity to apply the amended definition of refugee, determining that the statutory amendment extended asylum eligibility to an applicant whose “legally recognized” spouse was forced to undergo a sterilization procedure. In C-Y-Z-, the applicant fled China and, upon arriving in the United States, applied for asylum based on his wife’s forced sterilization procedure.

Relying on the enactment of section 601(a) of IIRIRA and the INS’s stance that past persecution of one spouse can be proved by forced abortion or sterilization of the other spouse, the BIA overruled the Immigration Judge’s (IJ’s) decision. Granting the applicant’s request for asylum, the BIA held that a non-citizen whose spouse was compelled to undergo an abortion or sterilization may establish past persecution as a

101(a)(42) (relating to persecution for resistance to coercive population control methods).” Id. at n.2 (quoting 8 U.S.C. § 1157(a)(5) (2000)). As of September 2003, the total list of eligible individuals awaiting a grant of asylum was over seven thousand. Press Release, U.S. Department of Justice, EOIR Notifies Persons Eligible for Full Asylum Benefits for Fiscal Year 2003 Based on Coercive Population Control Policies (Sept. 30, 2003), available at http://www.usdoj.gov/eoir/press/03/CPCAsylumRelease0903.pdf. Thus, applicants who are afforded conditional asylum must wait at least seven years before full asylum benefits, including applying for lawful permanent residence status and the ability to petition for the admission into the United States of family members not contemplated by the original asylum application. Id.


67. Id. at 915-16. The sterilization procedure was imposed as punishment for their violation of China’s one-child policy. Id.

68. Id. at 918. In a memorandum issued on October 21, 1996, the INS expressly stated that “an applicant whose spouse was forced to undergo an abortion or involuntary sterilization has suffered past persecution, and may thereby be eligible for asylum under the terms of the new refugee definition.” Id. (quoting Memorandum from the Office of the Gen. Counsel of the Immigration and Naturalization Svc. on Asylum Based on Coercive Family Planning Policies—§ 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 4 (Oct. 21, 1996)). Moreover, in its brief, the INS conceded that “the husband of a sterilized wife can essentially stand in her shoes and make a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than on him.” Id.

69. Id. at 919. The U reasoned that it seemed that the Chinese government merely “put some roadblocks in this applicant and his wife’s way in having their family.” Id. at 916. Although he recognized the wife’s forced sterilization procedure, he noted that the applicant did not have many other issues in China and that his wife “did not gain anything from having the applicant abandon her and the children for the United States.” Id. Finally, the U held that the applicant “himself, has never been persecuted and he cannot show either past persecution or a reasonable fear of future persecution.” Id. In the U’s defense, his decision was rendered prior to the enactment of section 601(a) of IIRIRA. Id. at 915.
result of his political opinion in opposition to China’s family planning policy, thereby qualifying as a refugee within the amended definition.\textsuperscript{70}

**B. Circuit Split: Does Section 601(a) of IIRIRA Apply to the Unmarried Partner of a Victim?**

Based on the BIA’s reasoning in \textit{C-Y-Z}, unmarried applicants have attempted to establish past persecution and asylum status in the United States by virtue of an unmarried partner’s forced abortion or sterilization at the hands of the Chinese government. Arguing to extend the reasoning in \textit{C-Y-Z} has been especially persuasive where a couple is precluded from registering their marriage as a result of China’s severe marriage laws. Although arguably distinguishable on the facts,\textsuperscript{71} two decisions by the Ninth and Third Circuit Courts of Appeals analyzed the issue to conflicting ends.

In \textit{Ma v. Ashcroft},\textsuperscript{72} the Ninth Circuit reviewed the BIA’s decision to overrule the IJ’s determination to grant Ma asylum based on the forced abortion of his de facto “wife.”\textsuperscript{73} After considering the applicability of section 601(a) to the de facto “husband”\textsuperscript{74} of a Chinese woman whose pregnancy was forcefully aborted during the third trimester, the Ninth Circuit held that “husbands whose marriages would be legally recognized, but for China’s coercive family planning policies,” were entitled to asylum as a result of their wives’ forced sterilization or abortion.\textsuperscript{75} The Ninth Circuit reasoned that China’s prohibition of underage marriage “is inextricably linked” to its coercive family planning policies and specifically aimed at reducing the period

\textsuperscript{70} \textit{Id}. at 919-20.

\textsuperscript{71} See Hull, \textit{supra} note 5, at 1038 (citing two major factual distinctions between the two cases). First, Ma was married to his wife in a traditional ceremony in their village, whereas Chen never formalized his relationship with his girlfriend. Second, during his lengthy detention in Guam as an “illegal immigrant,” Ma turned twenty-two, registered his marriage with the Chinese government, and received a marriage certificate. Ma v. Ashcroft, 361 F.3d 553, 556-57 (9th Cir. 2004). Unlike Ma, Chen never registered his marriage with the Chinese government. Hull, \textit{supra} note 5, at 1038-39. In contrast to the Ninth Circuit’s decision in \textit{Ma}, the Third Circuit refused to recognize that its decision in \textit{Chen} created a circuit split on the issue of eligibility of unmarried partners. See Chen v. Ashcroft, 381 F.3d 221, 231 (3d Cir. 2005).

\textsuperscript{72} 361 F.3d 553 (9th Cir. 2004); see also Zheng v. Ashcroft, 382 F.3d 993, 1001-02 (9th Cir. 2004) (holding that China’s coercive birth control program would render Zheng eligible for asylum based on his wife’s forced abortion despite the fact that they were not legally married).

\textsuperscript{73} \textit{Ma}, 361 F.3d at 559. The IJ assigned to Ma’s application concluded that refugee status was “not limited to individuals who actually undergo a[n] involuntary abortion or sterilization but appears to encompass those who would offer resistance to coercive population control programs.” \textit{Id}. at 556. The IJ reasoned as follows:

\begin{quote}
In a situation where a marriage cannot be registered because foreign law precludes marriage by men under the age of [twenty-two], while no visa petition for example, could be granted on a spouse . . . petition, there does not appear to be a logical or statutory basis to rule that a common law husband cannot meet his burden of proof when his common law wife has had a forced abortion.
\end{quote}

\textit{Id}.

\textsuperscript{74} Because Ma was prohibited from marrying his girlfriend, Chiu, as a result of China’s marriage laws, Ma and Chiu were married in a traditional Chinese ceremony. \textit{Id}. at 555. However, during his lengthy detention in the United States, Ma turned twenty-two and legally registered his marriage with the Chinese government. \textit{Id}. at 557. He presented this certificate recognizing his de facto marriage to the BIA on appeal from the IJ’s grant of his asylum application. \textit{Id}.

\textsuperscript{75} \textit{Id}. at 561.
of time during which Chinese couples can legally reproduce. Moreover, the Ninth Circuit recognized that in the case of C-Y-Z-, where the male petitioner entered into a marriage deemed illegal by the Chinese government because the woman was underage, the BIA did not deny relief on the ground that the petitioner failed to produce a marriage "registration" certificate from the Chinese government, nor did the BIA refer to the lack of marriage registration as an issue to be considered in reviewing asylum petitions.

The Ninth Circuit found that denying asylum to applicants who are not permitted to marry because of China's intrusive family planning policies would subvert Congress's intent "to provide relief for 'couples' persecuted on account of an 'unauthorized' pregnancy and to keep families together." Holding otherwise, the court reasoned, would create "absurd" results, whereby a woman would be eligible for asylum but her husband would not, forcing the separation of a de facto husband and wife. Interpreting section 601(a) in this manner is "at odds not only with the provision at issue here, but also with significant parts of our overall immigration policy." The Ninth Circuit asserted that it is "absurd and wholly unacceptable" to deny asylum to a person based solely on the consequence of a population control policy expressly "deemed by Congress to be oppressive and persecutory;" it goes against the purpose and policies of the statutory amendment outlined in IIRIRA.

About five months after the Ninth Circuit's decision in Ma v. Ashcroft, the Third Circuit decided Chen v. Ashcroft. Similar to Ma, Chen was not permitted to marry his live-in girlfriend, Chen Gui, because of China's inflated minimum age marriage requirement. Although she went into hiding, Chen Gui was eventually captured and forced to undergo an abortion in the eighth month of her pregnancy. Shortly thereafter, Chen left China for the United States and applied for asylum. Analogizing to C-Y-Z-, the IJ granted relief and the BIA reversed, holding that the reasoning in "C-Y-Z- had 'not been extended to unmarried partners ...'" Chen appealed the BIA's decision to the Third Circuit.

Then Third Circuit Judge, now Justice Samuel Alito rejected Chen's argument that the BIA's interpretation of section 601(a) was "arbitrary and capricious" under the

76. Id. at 560.
77. Id. at 559 n.8.
78. Id. at 559.
79. Id. at 561.
80. Id.
81. Id. at 559.
82. See Chen v. Ashcroft, 381 F.3d 221 (3d Cir. 2004).
83. Id. at 223.
84. Id.
85. Id.
86. Id.
87. Id.
88. Id.
Chevron doctrine.\textsuperscript{89} Although the BIA’s decision to use marital status as the dispositive factor in an asylum petition is over-and-under-inclusive, Judge Alito found that the BIA could have logically concluded that “aliens who are married are more likely than aliens not so situated to be severely injured... when their partners are forced to endure forced abortions or sterilization.”\textsuperscript{90} From an administrative perspective, with efficacy of procedure as the goal, the existence of a marriage can be easily proven through “objective documentary evidence.”\textsuperscript{91} Moreover, without such a requirement, applicants would be encouraged to falsify an intimate relationship in order to increase their chances of securing asylum in the United States.\textsuperscript{92} A bright-line rule prevents intractable factual inquiries into the private lives of asylum applicants.

Finally, Judge Alito found the mere fact that Chen was denied access to marriage because of China’s family planning laws was inconsequential.\textsuperscript{93} Unlike the Ninth Circuit, the Third Circuit found no evidence that the BIA’s bright-line rule requiring a legally recognized marriage subverted congressional intent.\textsuperscript{94} Analyzing section 601(a), the court held that because “persecution” was left “completely undefined,” Congress intended to leave the interpretational authority in the hands of the BIA, “including the ability to decide, within a reasonable range, the precise contours of [the term’s] meaning.”\textsuperscript{95} Additionally, the court found the Ninth Circuit’s decision in \textit{Ma v. Ashcroft} inconsistent with the 1000-person-per-year statutory cap because Congress could not have “intended to dramatically broaden the notion of ‘persecution’ with respect to persons suffering under coercive population [control] programs... ”\textsuperscript{96} Thus, the Third Circuit held that, “assuming... C-Y-Z- permissibly applied the 1996 amendment to spouses, ... the BIA’s decision not to extend C-Y-Z- to unmarried partners is reasonable” and worthy of Chevron deference.\textsuperscript{97}

Upon this cracked foundation, the Second Circuit decided \textit{Lin v. United States Department of Justice}.\textsuperscript{98}

V. THE LIN DECISION

In \textit{Lin v. United States Department of Justice}, three Chinese citizens sought judicial review of the BIA’s decisions to affirm the IJ’s denial of each of their asylum applications. According to their petitions, Lin and Zou suffered persecution when their

\textsuperscript{89} Under principles set forth in \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.}, the BIA’s interpretation of section 601(a) to exclude from eligibility for asylum the unmarried partners of individuals who were forced to undergo an abortion or sterilization was entitled to deference unless it was “arbitrary and capricious.” \textit{Id.} at 223-24 (quoting \textit{Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.}, 467 U.S. 837, 843-44 (1984)).
\textsuperscript{90} \textit{Id.} at 228 (internal quotation marks omitted).
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.} at 229.
\textsuperscript{93} \textit{See id.} at 229-31.
\textsuperscript{94} \textit{Id.} at 231-32.
\textsuperscript{95} \textit{Id.} at 232 (citing \textit{FDA v. Brown & Williamson Tobacco Corp.}, 529 U.S. 120, 159 (2000)); see also Hull, supra note 5, at 1037.
\textsuperscript{96} \textit{Chen}, 381 F.3d at 233.
\textsuperscript{97} \textit{Id.} at 235.
\textsuperscript{98} 416 F.3d 184 (2d Cir. 2005).
girlfriends, whom they were not permitted to marry, were kidnapped by Chinese family planning officials, taken to local hospitals, and forced to undergo late-term abortions. The devastating events and attendant fear of subsequent persecution drove Lin and Zou to seek refuge in the United States. Upon their arrival, they promptly applied for asylum.

Similarly, Dong endured persecution at the hands of the Chinese government when his fiancé discovered she was pregnant during a routine gynecological exam in August of 1998. What started out as a routine physical exam morphed into a nightmare when family planning officials forcefully aborted her baby on that same day and warned Dong that he would face fines and sterilization if she ever were to become pregnant again. Notwithstanding the threat, Dong’s fiancé became pregnant in May of 1999. Fearing for the life of her baby and her fiancé, she fled their village, but ultimately was captured and forced to undergo an abortion late in her third trimester. Depressed and afraid, Dong escaped China and applied for asylum in the United States, hoping to secure asylum for his fiancé as well.

The essential issue presented to the Second Circuit on appeal was whether section 601(a) of IIRIRA could be interpreted to extend asylum eligibility to the unmarried partner of an individual forced to undergo an abortion and/or sterilization procedure. The IJ responsible for considering Lin’s asylum application denied asylum, refusing to extend the reasoning in Matter of C-Y-Z- because Lin was not married to the victim who suffered persecution directly. The IJ stated, “it would not be appropriate to expand... Matter of C-Y-Z- to include unmarried couples.” Such an expansion “would be inappropriate because, inter alia, Congress had imposed a 1,000 person-per-year cap on the number of persons eligible for asylum under IIRIRA § 601(a).” The IJ assigned to Zou’s case rejected his application, arguing that there was “absolutely no way that § 101(a)(42) of the Immigration and Nationality Act and supporting case law apply” because Zou had not married his girlfriend in either a traditional or legal ceremony. Finally, a third IJ denied Dong’s application, holding that the BIA had refused to extend the reasoning in C-Y-Z- to protect “fiancées or girlfriends or...
boyfriends of people who have been forced to undergo an involuntary abortion or sterilization.” Accordingly, the IJs did not permit any of the three asylum petitioners to establish eligibility for asylum in connection with their fiancées’ forced abortions. The BIA summarily affirmed the IJ’s decision in each case. In other words, “a single Board member affirmed, without opinion, the results of the IJ’s decision below,” pursuant to the BIA’s “streamlining regulations.”

On appeal, the Court of Appeals for the Second Circuit held that an IJ’s interpretation of the INA, and specifically section 601(a) of IIRIRA, is not entitled to Chevron deference. In some instances, individual IJ decisions may be entitled to a lesser form of Skidmore deference. The Second Circuit found that the BIA in C-Y-Z- failed to “articulate a reasoned basis for making spouses eligible for asylum under IIRIRA § 601(a)” and, therefore, “IJs cannot possibly advance principled—let alone persuasive—reasons” for distinguishing between spousal eligibility and the eligibility of boyfriends and fiancés. Moreover, because “a fresh look at C-Y-Z- reveals that the BIA never adequately explained how or why . . . it construed IIRIRA § 601(a)” to allow spouses of the direct victims of coercive family planning to become eligible for asylum, even upon a de novo review of section 601(a) of IIRIRA, it would be “impossible” to determine whether to affirm or to reverse the BIA’s decision.

The court clarified that it was not suggesting that there could “be no such basis” for granting eligibility to the spouses, or even to the boyfriends or fiancés, of the direct victims of persecution; rather, the court was merely highlighting the fact that the BIA, the sole administrative body possessed of the authority to supply such a reasoned basis, never did. Relying on Supreme Court precedent, the court stated that it would not

108. Id. at 189.
109. Id.
110. See generally Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (holding that where a statute is silent or unclear, courts will defer to an administrative agency's reasonable interpretation of that statute). The Second Circuit declared that although the Attorney General expressly delegated rulemaking authority to the BIA, there is no rule or regulation indicating that the Attorney General either delegated or ever intended to delegate the same authority to IJs. Based in part on the fact that regulations are made through formal procedures involving advance public notice and comment, the Second Circuit determined that rulings by IJs are not customarily afforded Chevron deference. Lin, 416 F.3d at 190. It follows that because IJs lack the capacity to issue legally binding decisions, they cannot possibly possess the requisite ability to promulgate a rule on behalf of the Attorney General. Id. Finally, when the BIA summarily affirms the decision of an IJ, the BIA’s own regulations hold that the BIA approves only the result reached in the decision below, not necessarily the reasoning relied upon to reach the decision. Id.
111. See generally Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (“[T]he rulings, interpretations and opinions of [administrative agencies], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”).
112. Lin, 416 F.3d at 191.
113. Id. For example, the BIA never explained the precise statutory language pursuant to which it deemed spouses eligible for asylum under IIRIRA section 601(a), nor did the BIA elucidate the reasoning that motivated its preferred construction. Id. In fact, the Court opined that “frankly” it appeared that the BIA’s analysis in C-Y-Z- “rested largely on the Immigration and Naturalization Service’s concession in that case.” Id.; see also In re C-Y-Z-, 21 I. & N. Dec. 915, 918 (B.I.A. 1997) (professing that the Service conceded that “the husband of a sterilized wife can essentially stand in her shoes”).
114. Lin, 416 F.3d at 191.
be "conscripted into making policy" for "myriad and obvious reasons . . . ."115 Such an activity, the court explained, is "more properly the province of other bodies, particularly where, as here, the other body [(the BIA)] is an agency that can bring to bear particular subject matter expertise."116 Notwithstanding arguments advanced by Lin, Dong, Zou, and the United States Government, the Second Circuit held that it could not "reasonably" ascertain the status of boyfriend and fiancé eligibility under IIRIRA section 601(a).117 It left for the BIA to determine whether "permissible distinctions can be drawn between spousal eligibility, on the one hand, and boyfriend and fiancé eligibility, on the other[,]" or whether "the rationale for spousal eligibility applies with equal logic and force to the eligibility of boyfriends and fiancés."118 Moreover, the court stated that it cannot know whether to apply spousal eligibility to boyfriends and fiancés "[u]ntil the BIA has clarified why it established spousal eligibility in the first instance . . . ."119 Satisfied with its judicial rebuff, the Second Circuit retained jurisdiction and remanded the consolidated appeals to the BIA, demanding that it elucidate the reasoning behind C-Y-Z-120

VI. ANALYSIS

A. Divergent Conclusions in Ma v. Ashcroft and Chen v. Ashcroft

Customarily, the United States respects the marriage rules and regulations enforced in foreign countries, including the implementation of a minimum age

115. Id. at 192; see also SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1947) ("It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.").

116. Lin, 416 F.3d at 192.

117. Id. The Government argued that the Second Circuit could merely supply its own rationale for the BIA's determination in C-Y-Z- and then act in accordance with that rationale. Id. However, the Second Circuit rejected the offer. See id. (quoting Chenery Corp., 332 U.S. at 196-97). Conversely, petitioner Lin argued that the IF and the BIA "misapplied the statutory definition of refugee in failing to recognize that [he] was eligible for asylum" under IIRIRA section 601(a). Brief for Petitioner Lin, supra note 99, at 14. Lin averred that he met the definition because he had a well-founded fear that he would be persecuted for his resistance to China's obtrusive birth control policy and that the Chinese government forced his fiancé to abort their child. Id. at 15. Citing to the Ninth Circuit's decision in Ma, Lin argued that the mere fact that he was not married to the mother of his aborted child should not be dispositive where, as here, the lack of a marriage certificate is the result of the implementation of obtrusive family planning policies such as minimum age requirements. Id. at 16-17. Similarly, petitioner Zou argued that Congress's express purpose in amending the asylum definition was to grant relief to asylum seekers in Zou's circumstances; the BIA's interpretation that section 601(a) of IIRIRA was inapplicable in his case was patently unreasonable. Brief for Petitioner Zou, supra note 99, at 17. Where, as here, "Chinese birth control policy was the sole reason that [Zou] and his wife were unable to officially marry[,] . . . the act of cohabitating and conceiving the child itself constituted an act of 'resistance' to birth control policy." Id. at 21. Moreover, Zou argued that "[t]he Supreme Court has held that, in the absence of a marital relationship, a biological father's relationship with his child is protected under the Constitution." Id. at 24 (citing Stanley v. Illinois, 405 U.S. 645 (1972); Quillioin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983)). Petitioner Dong's argument was congruous with that of petitioner Lin. See Brief for Petitioner Dong, supra note 101, at 18-21.

118. Lin, 416 F.3d at 192.

119. Id.

120. Id.
requirement. Perhaps an argument can be advanced for greater respect of China’s marriage laws because, as the Chinese Constitution establishes,\textsuperscript{121} it is an effective way for China to attempt to curtail overpopulation and promote a stable economy and society; however inhumane, the ends justify the means. Arguably, the United States has an interest in deferring to and respecting the marriage laws enforced by other countries in the expectation that the same deference and respect will be afforded to its own marriage laws. Finally, there are political and international policy considerations at stake; the United States’ imposition of its own cultural norms in the intimate realm of China’s conceptualization of marriage and family laws may be regarded as offensive and imperialistic. Thus, individual rights are sacrificed to the “greater good” of international stability. Perhaps the BIA and the Third Circuit had these sweeping principles in mind.

However, as the Ninth Circuit recognized in \textit{Ma v. Ashcroft}, a careful review of the development of China’s coercive family planning policy reveals the ban on “underage” marriage to be an essential part of China’s obtrusive population control program.\textsuperscript{122} Thus, to deny asylum eligibility to a man who would be legally married to his persecuted partner, \textit{but for} an inhumane law, is an absurd conclusion. Absurdity aside, the denial of asylum under such a circumstance subverts Congress’s intent in amending the immigration laws so as to provide protection to people who suffer under the atrocious population control practices of the Chinese government. BIA decisions, to the contrary, function in direct opposition to the implicit purposes of the enactment of section 601(a) of IIRIRA and, as the Ninth Circuit concluded, are not worthy of judicial respect even under the most deferential standards.

In addition to undermining congressional intent, the BIA’s recent interpretation of section 601(a) of IIRIRA results in harsh and arbitrary consequences, specifically the breaking apart of a family. For example, if Lin’s wife applied for asylum based on her forced abortion procedure, she would automatically be eligible under the amended definition of refugee. However, under the BIA’s rule, adopted by the Third Circuit, Lin would not be eligible (nor Zou, nor Dong) because his girlfriend was “underage” and, therefore, unlawful and incapable of legal registration under the Chinese population control program. Conceivably, this rule presents the couple with a Hobson’s choice: either break up the family or avoid such a harsh result by remaining in China to face continued persecution and human rights violations. Regrettably, a bulk of the responsibility for such an outrageous consequence falls squarely on the shoulders of the United States government as a result of the BIA’s unjustifiable interpretation and Congress’s acquiescence.

Perhaps from the perspective of judicial economy—situating the goal of efficient adjudication before that of the protection of human rights (the ends justify the means)—the BIA’s rule, and Judge Alito’s decision in \textit{Chen v. Ashcroft}, is reasonable judicial policy. After all, as Judge Alito points out, requiring proof of a marriage certificate is a clean-cut, easily enforceable standard that benefits the legal process by circumventing difficult and problematic factual inquiries. Moreover, it deters applicants from attempting to falsify intimate relationships in order to gain access to

\textsuperscript{121} See supra notes 16-18 and accompanying text.

\textsuperscript{122} Ma v. Ashcroft, 361 F.3d 553, 559 (9th Cir. 2004); see also discussion supra Part II.A.
the United States. Thus, the argument proceeds, undesirable results in some cases, as atrocious as they may be, are the price to be paid for the efficient function of the immigration laws; the ends justify the means.

Putting aside the fact that the BIA’s bright-line rule sabotages congressional intent, Judge Alito never explains why immigration policy in this circumstance should turn on the legitimacy of a marriage law that is itself a part of a population control regime that the United States government has repeatedly decried as coercive and atrocious. Rather, Judge Alito declared the outcome of the marriage law to be “inconsequential.” With all due respect to Justice Alito, it is absurd to declare a law that violates an individual’s human rights—and at the same time results in that individual’s ineligibility for asylum and protection of his violated rights—“inconsequential.” In effect, Judge Alito’s proclamation, although arguably merely dicta, allows an inhumane policy to work an additional, and perhaps more appalling, hardship on the applicant.

Absent a bright-line standard, scrutinizing asylum applications filed pursuant to section 601(a) of IIRIRA will consume additional time and judicial resources. However, if such a use of resources results in the protection of individuals who are exposed to unimaginable violations of their personal rights, it is a valid and reasonable use of those resources. Moreover, in the area of immigration law, difficult and protracted factual inquiries come with the territory. Denying access to such resources in such a grave situation and in an area in which the United States has expressed clear opposition is unreasonable and absurd. This denial transforms the United States into a Janus-faced hypocrite: the justice system underhandedly supports a policy, while the government (perhaps disingenuously) vehemently opposes it.

It is worth noting that, in his opinion for the Third Circuit, Judge Alito expressed reservation as to why “every spouse of a person who undergoes a forced abortion or sterilization should be deemed to have ‘resisted’ the ‘coercive population control program[,]’” asking: “what if the spouse who did not personally undergo the procedure sided with the government and favored the abortion or sterilization?” 123 Although the question is fair and reasonable, the answer is simple: the Attorney General, the IJs, the BIA and the Courts of Appeals are not only capable, but also are relied upon to adequately dispose of asylum applications based on fraudulent pretenses. Judge Alito’s argument proves too much. If government officials and judges can scrutinize whether spouses have in fact been persecuted, what makes them unable to engage in the same analysis concerning non-spouses? Are government officials and the courts so afraid of opening the door to a greater number of asylum applications that they would be willing to prevent men and women who have suffered human rights violations from obtaining asylum?

The Third Circuit’s final rationale for not protecting the unmarried partners of individuals who suffer an abortion and/or sterilization procedure was extinguished by a subsequent act of Congress. Judge Alito looked to the 1,000 person-per-fiscal-year cap on the number of refugees permitted access to asylum under section 601(a) of IIRIRA as an indication of Congress’s intent that the statute be interpreted narrowly so as to preclude asylum eligibility to unmarried partners. However, this limitation

123. Chen v. Ashcroft, 381 F.3d 221, 226 (3d Cir. 2004) (internal quotation marks omitted).
was repealed pursuant to the REAL ID Act of 2005. Therefore, what Judge Alito saw as an implicit expression of congressional intent to restrict protection now reads as an express indication that asylum protection should be expanded. Accordingly, as the Second Circuit noted in *Lin*, "a construction of IIRIRA § 601(a) can no longer rely—in whole or in part—on the existence of an annual cap."

Analyzing the radically different decisions handed down by the Third and the Ninth Circuits while interpreting the same statute and relying on the same BIA precedent decision, it is clear that the BIA in *C-Y-Z* did not adequately explain the rationale behind its reading of section 601(a) of IIRIRA. Thus, given that the BIA is the body solely responsible and most adequately situated to interpret and apply the immigration laws, it is equally clear that the Second Circuit was correct to remand *Lin* so that the BIA might clarify its rationale. Debatably, until the BIA complies with the Second Circuit's demands, the Circuit Courts will remain split; the conservative circuits will favor a narrow interpretation of section 601(a), whereas liberal circuits will interpret the statute broadly in order to protect unmarried partners.

**B. How the BIA Should Decide Lin v. United States Department of Justice on Remand from the Second Circuit**

First, and most specifically, the BIA should grant asylum to all three petitioners: Lin, Dong, and Zou. Although section 601(a) of IIRIRA provides ample reason to expand asylum protection to the unmarried partner of an individual persecuted under China's coercive population control policies, asylum should be granted to Lin, Dong, and Zou because "in a well-documented and credible case, plausible in light of country conditions, the applicant[s] [have] articulated [their partners'] and [their] opposition to a compulsory government policy that fails to respect fundamental human rights, and the punishment they individually and jointly suffered because of that opposition."

Independent of their marital status, Lin, Dong, and Zou were victims of persecution. Upon their return to China, each man reasonably faces, among other penalties, sterilization, fines, loss of employment, and the reoccurrence of the atrocities they were already forced to endure, namely the forced abortion of their children. Why should refugee status ever turn on the marital status of the individual applicant?

Second, and more generally, the BIA should elucidate the proper reason for granting asylum to the Chinese applicant in *C-Y-Z*. Standing alone, circumstances such as those faced by the applicants in *Lin* are sufficient to guarantee their protection under the asylum laws of the United States. The amended definition of refugee supplied by section 601(a) of IIRIRA merely specifies that certain individuals who have been forced to undergo invasive medical procedures as a result of China's population control policies, or who have suffered because of their opposition to undergoing such procedures, or have a well-founded fear of being subjected to such

124. See supra notes 63-64, and accompanying text.
127. Notably, where the marital status of the individual is dispositive of her ability to qualify for refugee status, other individuals who are not permitted to marry (i.e., gays, lesbians, and transgendered individuals) will be ineligible even though their partners suffer the same type of persecution.
persecution, are eligible for asylum under the definition.\textsuperscript{128} The amended definition, therefore, should not be interpreted as a limiting provision, precluding an applicant’s ability to establish his refugee eligibility based on the pre-amendment definition of refugee. Rather, the amendment should be interpreted as a clear congressional mandate that these individuals qualify as refugees.

As Board Member Rosenburg so aptly recognized in her concurrence in \textit{C-Y-Z-}, "[t]he right to privacy, the right to have a family, the right to bodily integrity, and the right to unfettered reproductive choice are fundamental individual rights, recognized domestically and internationally."\textsuperscript{129} The belief that these are inalienable rights, along with the choice to exercise them and the conviction that such a decision must be revered, not trampled, constitutes a "political opinion" regardless of whether such a choice is in direct opposition to governmental policies. Because the individual’s choice to remain fertile and procreate in violation of government policy is a political opinion, the forced infliction of abortion and/or sterilization (not to mention other coercive tactics that are implemented) is persecution on the basis of political opinion, which is protected by the statute both before and after the amendment.

Regardless of whether an individual is capable of articulating and conceptualizing his or her opinion and rights in a sophisticated manner, he or she holds a political opinion in the eyes of the law if he or she opposes or resists a coercive governmental policy on personal, ethical, religious, or philosophical grounds. In broadly defining refugee and political opinion to embrace those persecuted on the basis of political opinion, and in enacting section 601(a) of IIRIRA, it was Congress’s intent to provide for the protection of individuals who are persecuted on the basis of political opinion; it is the function of the courts to adhere to congressional intent.

\textbf{VII. CONCLUSION}

If and when the BIA reconsiders Lin, Dong, and Zou’s asylum applications, it should grant asylum to all three applicants. Additionally, it should extend the protection of refugee status and asylum to the unmarried partners of individuals who were forced to undergo sterilization and/or abortion procedures as a result of China’s coercive family planning practices. To hold otherwise, whether for the sake of international policy, procedural efficiency, or to avoid intractable factual inquiries, inextricably binds the United States to China as a partner in the continued violation of the human rights of thousands of Chinese citizens.

\textsuperscript{128} See supra note 59 and accompanying text.
\textsuperscript{129} In re \textit{C-Y-Z-}, 21 I. & N. Dec. at 921 (Rosenburg, Board Member, concurring).