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**A PROPOSAL FOR CHANGE IN IMMIGRATION POLICY: ASYLUM FOR  
TRADITIONALLY MARRIED SPOUSES**

*Tamika S. Laldee* \*

*In Lin v. U.S. Department of Justice, the Second Circuit defied ten years of precedent by holding that 8 U.S.C. § 1101(a)(42) does not automatically provide asylum eligibility to the spouses or unmarried partners of individuals who have been forced to undergo abortions or sterilizations under China's coercive family planning policies. This Note argues that Lin's interpretation of § 1101(a)(42) was correct, though misplaced, for the particular facts of that case. Furthermore, this Note concludes that, based on the clear circuit split that has been fortified by Lin, lawmakers should clarify the statutory requirements for asylum. This Note proposes that automatic asylum eligibility should ultimately be extended to legally married couples and cohabitating, traditionally married couples (who would be married but for China's age requirement for marriage) because such relationships possess presumptions of paternity and commitment that are consistent with the family unit.*

INTRODUCTION

The Chinese government claims that the guiding principle of the abortion program is 'voluntarism,' but there was nothing voluntary about the process I observed when living in a Chinese village in 1980. It involved subjecting pregnant women, many very close to term, to exhausting morning-to-night 'study sessions,' levying heavy penalties on them and their families, and the actual incarceration of those who still proved recalcitrant. Nor does the description 'voluntary' adequately encompass the reports that have come out of China since then of pregnant women being handcuffed, thrown into hog cages and taken to operating tables of rural clinics.

—Steven Mosher, President of the Population Research Institute<sup>1</sup>

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\* Executive Notes Editor, *Case Western Reserve Journal of International Law*. B.S., Syracuse University (2006); J.D., Case Western Reserve University School of Law (2009). First and foremost, I would like to thank God for blessing me with the strength and motivation to pursue my goals and providing me with the opportunities I have received. To my parents, Gloria and Stephen, thank you for your love and support. Sincerest thanks to Kenneth Serrant, Lyndona Andrew, LerVal Elva, Lorraine Evelyn, and Tonya Phillips for always being there for me. My deepest gratitude to professors Jennifer Cupar, Jonathan Entin, and Carol Tyler Fox for all of your assistance throughout the development of my Note and for my overall legal writing skills.

The birth of a child is widely considered to be not only a joyous occasion but also a fundamental human right, which is recognized by the United Nations in the Universal Declaration of Human Rights and implied in the Fourteenth Amendment of the United States Constitution.<sup>2</sup> Any favorable sentiments surrounding a pregnancy, however, may be stifled by unfortunate consequences when the pregnancy is “unauthorized” under the family planning policies of the People’s Republic of China (China).<sup>3</sup> When a couple has an unauthorized pregnancy in China, they risk exposure to the coercive population control practices of forced abortion and sterilization.<sup>4</sup>

In response to such activity, the United States has expressed its deep commitment “to upholding the liberty and dignity of human life” and its strong and absolute opposition to “the practices of coercive abortions and sterilizations.”<sup>5</sup> In 1996, Congress amended section 1101(a)(42) of the Immigration and Nationality Act (INA) to broaden the definition of refugee under the statute.<sup>6</sup> The new definition grants automatic asylum eligibility to victims of forced abortions or involuntary sterilizations and specifically

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<sup>1</sup> Steven Mosher, *How China Uses U.N. Aid for Forced Abortions*, WALL ST. J., May 13, 1985, at 23. Mosher described his observations after doing educational work and living in rural China in 1980. See *Forced Abortion and Sterilization in China: The View from the Inside*, Hearing Before the Subcommittee on International Operations and Human Rights, House Committee on Foreign Relations, 105th Cong. (1998), available at [http://commdocs.house.gov/committees/intlrel/hfa49740.000/hfa49740\\_of.htm](http://commdocs.house.gov/committees/intlrel/hfa49740.000/hfa49740_of.htm) [hereinafter *View from the Inside*]. Although Mosher recalled forced abortions and sterilizations that occurred in 1980, reports of coercive practices in China due to China’s population control policies continue today. See Associated Press, *U.S.: Infanticide and Forced Abortions Rampant in China*, NEWSMAX.COM, Dec. 15, 2004, <http://archive.newsmax.com/archives/articleEs/2004/12/15/112856.shtml> [hereinafter *Infanticide and Forced Abortions Rampant in China*].

<sup>2</sup> See *In re C-Y-Z-*, 21 I. & N. Dec. 915, 922 n.2 (B.I.A. 1997) (Rosenberg, J., concurring); see also Universal Declaration of Human Rights, G.A. Res. 217A, at 73, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) (proclaiming that persons “have the right to marry and found a family”); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), at 55, U.N. Doc. A/6316 (Dec. 19, 1968) (acknowledging the right to privacy, family, and home, and the right to marry and found a family); Kyle R. Rabkin, Comment, *The Zero-Child Policy: How the Board of Immigration and Appeals Discriminates Against Unmarried Asylum-Seekers Fleeing from Coercive Family Planning Measures*, 101 Nw. U. L. Rev. 965, 965 (2007) (arguing that per se marriage eligibility should be extended to non-legally married, cohabiting partners of victims of coercive family planning policies, regardless of whether they were married in traditional Chinese ceremonies or not).

<sup>3</sup> See *View from the Inside*, *supra* note 1. Unauthorized pregnancies are those pregnancies that are not approved by the Chinese government and do not comply with China’s population control policies. See *infra* Part I.

<sup>4</sup> See Arthur E. Dewey, Assistant Secretary for Population, Refugees and Migration: One-Child Policy in China, Testimony Before the House International Relations Committee (Dec. 14, 2004), available at <http://www.state.gov/g/prm/rls/39823.htm>.

<sup>5</sup> *Id.*

<sup>6</sup> See 8 U.S.C. § 1101(a)(42)(B) (2006).

provides refugee status to direct victims of “a coercive population control program.”<sup>7</sup>

Although INA § 1101(a)(42) refers only to individuals who have personally endured forced abortions or involuntary sterilizations, the Board of Immigration Appeals (BIA) held,<sup>8</sup> in the 1997 case of *In re C-Y-Z*,<sup>9</sup> that the spouses of victims of coercive population control practices automatically qualify for asylum as refugees.<sup>10</sup> Although the Third, Seventh, and Ninth Circuits have consistently accepted the BIA’s interpretation of section 1101(a)(42),<sup>11</sup> the Second Circuit recently defied ten years of precedent by holding that neither a spouse nor an unmarried partner is automatically entitled to refugee status based on a partner’s forced abortion or sterilization.<sup>12</sup> By finding that the BIA and the Third, Seventh, and Ninth Circuits incorrectly interpreted section 1101(a)(42) as extending refugee status to the partners (e.g., legally married spouses and traditionally married partners) of the persecuted, the Second Circuit has created a split among the circuits.<sup>13</sup> The Second Circuit’s interpretation of section 1101(a)(42) has also prompted Congressional support for an amendment to section 1101(a)(42) that would extend refugee status to the “legally recognized spouse[s]” of “persons who have been forced to abort [a] pregnancy or undergo [an] involuntary sterilization.”<sup>14</sup>

Although United States immigration law currently provides foreign-nationals who have been directly victimized by coercive population control policies of foreign governments a chance to obtain refugee status, there is no similar opportunity for the spouses of victims of population control policies. This Note argues that Congress and the courts should expand the scope of asylum to include the legally married spouses and traditionally married, cohabiting partners of victims of coercive population control programs. Part I provides an overview of the evolution of China’s family planning policies. Part II examines the legislative evolution of asylum law in response to those policies. Part III explores the BIA’s decision to extend per se asylum eligibility to husbands based on the persecution of their wives in China in *C-Y-Z* as well as how the Third, Seventh, and Ninth Circuits have approached

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<sup>7</sup> *Id.*

<sup>8</sup> The Board of Immigration Appeals (BIA) “is the highest administrative body for interpreting and applying immigration laws.” U.S. Dep’t of Justice: Executive Office for Immigration Review, Board of Immigration Appeals, <http://www.usdoj.gov/eoir/biainfo.htm> (last visited Jan. 18, 2008) (hereinafter U.S. Dep’t of Justice).

<sup>9</sup> See *In re C-Y-Z*, at 919-20.

<sup>10</sup> *Id.*

<sup>11</sup> See *infra* note 98 (discussing the Fifth Circuit’s holding).

<sup>12</sup> See *Shi Liang Lin v. U.S. Dep’t of Justice*, 494 F.3d 296, 300 (2d Cir. 2007).

<sup>13</sup> See *En Banc Matter of C-y-Zmanadamusmandamus*, CONN. L. TRIBUNE, July 23, 2007.

<sup>14</sup> See H.R. 3552, 110th Cong. (2007).

*C-Y-Z-*, the Second Circuit's request for clarification of *C-Y-Z-*, and the BIA's subsequent clarification of *C-Y-Z-*.<sup>15</sup> Part IV analyzes the Second Circuit's unprecedented determination that neither spouses nor unmarried partners are per se eligible for asylum. Part IV also discusses the events precipitated by the Second Circuit's decision. Finally, Part V argues that the Second Circuit was correct in its interpretation of section 1101(a)(42). Part V also recommends that section 1101(a)(42) be amended to extend automatic asylum eligibility to legally married spouses as well as to partners in cohabiting, traditional marriages who would be legally married but for China's coercive family planning policies.

### I. BACKGROUND

Family planning has been practiced in China for more than twenty-five years. In 1979, Chinese leader Deng Xioping encouraged the concept of family planning legislation and established the one-child policy to curb the population growth of communist China and conserve scarce resources.<sup>16</sup> Although the one-child policy was initially designed as a temporary measure, the Chinese government has declared that the policy will continue through the middle of the twenty-first century.<sup>17</sup> Part A of this section provides a brief overview of China's one-child policy. Part B examines how the Chinese government enforces its population control policies, highlighting both the legally recognized, noncoercive techniques openly used by the government and the illegally employed, coercive practices covertly applied by some Chinese authorities.

#### A. *China's One-Child Policy*

Although China's family planning policy is often called the "one-child policy," this term is a misnomer. While China's population and family

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<sup>15</sup> While I will often refer to the male petitioner with a wife or girlfriend who has been forced to undergo an abortion or sterilization, my reasoning applies equally to a female petitioner's male spouse or boyfriend who has been forced to undergo sterilization. This reasoning is also accepted by several circuit courts. See, e.g., *Shi Liang Lin*, 494 F.3d at 303 n.5.

<sup>16</sup> See Mina Chang, *Tipping the Scale: Gender Imbalance in China*, HARV. INT'L REV. (Spring 2008), <http://hir.harvard.edu/index.php?page=article&id=1735>; see also Population and Family Planning Law of the People's Republic of China (Order of the President No. 63), Dec. 29, 2001, available at [http://www.gov.cn/english/laws/2005-10/11/content\\_75954.htm](http://www.gov.cn/english/laws/2005-10/11/content_75954.htm) [hereinafter Population and Family Planning Law].

<sup>17</sup> See Associated Press, *Premier Says China to Continue with One-Child Policy*, INT'L HERALD TRIBUNE, Dec. 27, 2006, available at [http://www.iht.com/articles/ap/2006/12/27/asia/AS\\_GEN\\_China\\_One\\_Child\\_Policy.php](http://www.iht.com/articles/ap/2006/12/27/asia/AS_GEN_China_One_Child_Policy.php); see also Congressional-Executive Commission on China, 2005 Annual Report: Monitoring Compliance with Human Rights (2005), available at <http://www.cecc.gov/pages/annualRpt/annualRpt05/index.php> [hereinafter 2005 Annual Report].

planning laws advocate that each married couple have only a single child, the law also allows a married couple to have a second child if they make the appropriate requests and satisfy the necessary formalities, which are subject to regulation by local, provincial, and municipal governments.<sup>18</sup> For example, in order for an urban couple to be allowed a second child, both parents must be the products of one-child families.<sup>19</sup> Other couples facing “genuine difficulties,” particularly rural couples, whose first child was a girl, and ethnic minorities may also seek permission to have a second child by satisfying particular policy control requirements.<sup>20</sup> In addition to advocating the one child per couple policy, the law “maintains its current policy for reproduction” by “encouraging late marriage and child bearing.”<sup>21</sup> Under the marriage laws of China, the legal age for marriage is twenty-two for men and twenty for women.<sup>22</sup>

*B. Enforcement of China’s Population Control Policies*

China’s population and family planning law specifically prohibits “oversimplified and uncivilized” approaches to implementing birth control policies, particularly: (1) illegally performed operations related to family planning (i.e., forced abortions and involuntary sterilizations), (2) fetal gender identification techniques for non-medical purposes (such as population control) or sex selective abortions, and (3) fake birth control operations, false medical reports, or counterfeit certifications of family planning (for the purposes of coercive population control); and it declares that those who engage in such activities will be fined and punished.<sup>23</sup> Despite the law’s clear disapproval of such activities, local authorities continue to use physical coercion to ensure compliance with China’s strict family planning policies and to keep the birth rate down.<sup>24</sup> Thus, implementation and enforce-

<sup>18</sup> See Population and Family Planning Law, *supra* note 16, ch. III, art. 18.

<sup>19</sup> See *China Steps Up ‘One Child’ Policy*, BBC NEWS, Sept. 25, 2000, <http://news.bbc.co.uk/2/hi/asia-pacific/941511.stm>.

<sup>20</sup> *Id.*

<sup>21</sup> Population and Family Planning Law, *supra* note 16, ch. III, art. 18.

<sup>22</sup> See Marriage Law of the People’s Republic of China (1980) (amended 2001), available at <http://www.nyconsulate.prchina.org/eng/lqz/laws/t42222.htm>.

<sup>23</sup> See Population and Family Planning Law, *supra* note 16, ch. VI, art. 36.

<sup>24</sup> Local authorities particularly use illegally performed operations related to family planning and fetal gender identification for non-medical purposes. See *Immigration and Refugee Board of Canada, China: Whether Forced Abortion or Sterilizations are Still Occurring: Prevalence and Location of Forced Abortions or Sterilizations; Reports of Forced Sterilization of Men*, UNHCR REFORLD, May 10, 2007, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=updates&docid=46fa5379c> [hereinafter *Immigration and Refugee Board of Canada*]; see also 2005 Annual Report, *supra* note 17; see also U.S. Citizenship and Immigration Services, China: Information on Return to China After Having Children Abroad, Jan. 21, 2004, available at <http://uscis.gov/graphics/services/asylum/ric/do>

ment of China's family planning policies can be divided into two broad categories: (1) legislated, noncoercive techniques, and (2) nonlegislated, coercive techniques. This section initially focuses on the noncoercive techniques (which are mainly economic incentives) and then highlights the coercive practices illicitly employed by Chinese officials to comply with population control standards. Finally, this section discusses the effects of such techniques on China's population.

#### 1. Noncoercive techniques

China's noncoercive family planning techniques include economic and social incentives and disincentives, as well as educational policies and media propaganda.<sup>25</sup> Citizens who comply with China's family planning policies are rewarded with "longer nuptial and maternity leaves" and special occupational protections and subsidies.<sup>26</sup> Couples who volunteer to have a single child in their lifetime are designated a "Certificate of Honor Single-Child Parents" and are given larger living quarters, better child care, and other rewards from local officials.<sup>27</sup> The Chinese government has also called on family planning and healthcare professionals to provide citizens in different reproductive age groups with "basic knowledge about the population program and family planning, provide pregnancy check-ups and follow-ups for married women of reproductive age, [and to] offer advice and guidance and provide technical services in respect of family planning and reproductive health."<sup>28</sup> The media are also required to publicize population control and family planning initiatives.<sup>29</sup> The noncoercive penalties for non-compliance with family planning policies may include fines called "social compensation fees," demotions, loss of employment, destruction of housing or other property, higher school tuition, denial of social services, and expulsion from the Communist Party.<sup>30</sup>

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cumentation/ CHN04001.htm [hereinafter U.S. Citizenship and Immigration Services]; see also Edward Cody, *Birth Control Sparks Riots in China*, WASH. POST, May 23, 2007, <http://www.msnbc.msn.com/id/18812874>.

<sup>25</sup> See Population and Family Planning Law, *supra* note 16, ch. II, art. 13; Erin Bergeson Hull, Note, *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*, 25 UTAH L. REV. 1021, 1025 (2005).

<sup>26</sup> See Population and Family Planning Law, *supra* note 16, ch. IV, art 25.

<sup>27</sup> *Id.* ch. IV, art. 27; see Hull, *supra* note 28, at 1025.

<sup>28</sup> Population and Family Planning Law, *supra* note 19, ch. V, art. 33.

<sup>29</sup> See *id.* ch. II, art. 13.

<sup>30</sup> See *Immigration and Refugee Board of Canada*, *supra* note 27; see also Hull, *supra* note 25, at 1025; U.S. Citizenship and Immigration Services, *supra* note 24. Some commentators, however, consider the destruction of homes and the fines for noncompliance with China's population control policies to be exorbitant thereby constituting economic forms of coercive punishment. See View from the Inside, *supra* note 1, at 17-18.

## 2. Coercive techniques

Going beyond the above-described techniques, coercive techniques illicitly used by local authorities to limit population control have created “an atmosphere of fear in which most women feel they have little choice but to comply” or else their families will suffer.<sup>31</sup> In addition to the economic and occupational punishments for noncompliance, local officials also use public pressure and dangerous medical procedures to ensure compliance.<sup>32</sup> Population control centers often: (1) employ a network of paid informants to report the unauthorized pregnancies of their neighbors and loved ones; (2) keep records of the sexual history of every woman within their jurisdiction; (3) target unauthorized babies for extermination; and (4) publicly display monthly summaries of every woman’s birthday, marriage date, menstrual cycle, and births for villagers to see.<sup>33</sup> The most repressive population control practices include mandatory intrauterine device (IUD) insertions, forced late-term abortions, and involuntary sterilizations.<sup>34</sup> However, it is difficult, if not impossible, to determine the pervasiveness of such practices, presumably because they are covert or because Chinese officials turn a blind eye to them.<sup>35</sup>

## 3. Effect of China’s population control policies

As a result of China’s family planning policies, “the average number of children of a Chinese family has dropped from 5.8 in the early 1970s to 1.8” in 2005.<sup>36</sup> In 2008, China’s total fertility rate (the number of births per woman) was estimated at 1.77, which is lower than the United States’ estimated rate of 2.1.<sup>37</sup> Additionally, the government-sought effects of China’s population control policies include an estimated 300 million births prevented over the first 20 years and a delay in China’s population growth by

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<sup>31</sup> 2005 Annual Report, *supra* note 17, at 76.

<sup>32</sup> See Hull, *supra* note 25, at 1025; see also *id.*

<sup>33</sup> See View from the Inside, *supra* note 1.

<sup>34</sup> See Hull, *supra* note 25, at 1025–26; see also *Immigration and Refugee Board of Canada*, *supra* note 24.

<sup>35</sup> See U.S. Citizenship and Immigration Services, *supra* note 24.

<sup>36</sup> *China to Continue its Population Control Policy*, PEOPLE’S DAILY ONLINE, Jan. 6, 2005, [http://english.peopledaily.com.cn/200501/06/eng20050106\\_169767.html](http://english.peopledaily.com.cn/200501/06/eng20050106_169767.html).

<sup>37</sup> CIA, *The World Factbook: China*, <https://www.cia.gov/library/publications/the-world-factbook/print/ch.html> (last visited Mar. 12, 2009); CIA, *The World Factbook: United States*, <https://www.cia.gov/library/publications/the-world-factbook/print/us.html> (last visited Mar. 12, 2009). The U.S. figure is used as a point of comparison.



at least four years.<sup>38</sup> But even if slowing population growth is seen as positive, the population control policies also have had negative effects on China's social outlook and population by causing "a stark gender imbalance," "lack of effective pension and social welfare systems for senior citizens," an increasing rate of female suicides, and a rise in human trafficking.<sup>39</sup> Despite these negative impacts on China's population, Chinese officials vow to continue to adhere to current population control policies and consider them to be "crucial to China's modernization and the building of a 'harmonious society.'" <sup>40</sup>

## II. UNITED STATES' APPROACH TO CHINA'S COERCIVE FAMILY PLANNING POLICIES

Because of domestic opposition to human rights violations such as China's coercive family planning policies, the United States has enacted legislation to protect victims of coercive population control practices. Part A of this section examines the relevant asylum legislation enacted by the United States government. Part B highlights the United States' specific measures to counteract coercive population control policies, particularly the amendment to the definition of "refugee" to include victims of forced abortions and sterilizations.

### A. *United States Asylum Legislation*

As China has continued to employ its coercive family planning policies, the United States has taken legislative steps to aid victims of persecution, particularly through asylum relief. In order to gain asylum, an alien must be considered a "refugee" under the INA.<sup>41</sup> The INA defines a refugee to include:

[An individual] who is outside any country of such person's nationality, . . . is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution

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<sup>38</sup> See Hull, *supra* note 25, at 1025; see also *China to Continue its Population Control Policy*, *supra* note 36 (noting that the "effects" are positive in that they have helped China to curb its population boom).

<sup>39</sup> According to the 2000 census, approximately 117 males are born for every 100 females. Dewey, *supra* note 4; see also *Infanticide and Forced Abortions Rampant in China*, *supra* note 1; Associated Press, *supra* note 17. Critics of the policy attribute the gender imbalance to China's "traditional preference to boys." *China Steps Up 'One Child' Policy*, *supra* note 19.

<sup>40</sup> Associated Press, *supra* note 17.

<sup>41</sup> See *Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 187 (2d Cir. 2005). The INA "vests the Attorney General with the discretionary authority to grant asylum to any alien who is a refugee." *Id.*

or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>42</sup>

Thus, essentially three elements are necessary to satisfy the refugee definition: (1) a subjective fear of harm supported by objective conditions; (2) a form of harm or punishment rising to the level of persecution; and (3) an explanation for such mistreatment demonstrating that it is motivated, at least in part, by the persecutor's interest in quashing what it considers to be an offensive belief or characteristic.<sup>43</sup>

Although coercive population control policies persisted in China, the INA did not directly address whether such policies were persecutive enough to satisfy the requirements for refugee status. Then, in 1989, an important development in asylum legislation occurred with the BIA decision of *In re Chang*, which held that China's one-child policy was not "on its face persecutive," and that forced sterilization does not constitute "persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>44</sup> Following this decision, victims of China's coercive family planning policies were not considered refugees. Despite congressional disapproval of *In re Chang* and President George H.W. Bush's 1990 Executive Order calling for immigration laws to have "enhanced consideration . . . for those individuals expressing fear of persecution related to their home country's policy of forced abortion and sterilization," the BIA continued to follow the precedent set forth in *In re Chang* until 1996.<sup>45</sup>

### B. *The Refined Definition of "Refugee"*

Although President George H. W. Bush and members of Congress faced considerable difficulties in providing protections to victims of China's population control policies, the 1989 Tiananmen Square massacre and the 1993 Long Island grounding of a ship of individuals fleeing China's coercive family planning policies enhanced the United States' awareness of China's policies and provided the United States with the motivation for

<sup>42</sup> 8 U.S.C. § 1101(a)(42)(A) (2006).

<sup>43</sup> See *In re C-Y-Z-*, 21 I. & N. Dec. 915, 921 (Rosenberg, J., concurring) (B.I.A. 1997).

<sup>44</sup> *In re Chang*, 20 I. & N. Dec. 38, 43 (B.I.A. 1989), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 601, 110 Stat. 3009-689 (1996).

<sup>45</sup> Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (Apr. 13, 1990); see Nicholas Cutaiia, Note, *A Circuit Split on Judicial Deference: Interpreting Asylum Claims by Fiancés and Boyfriends of Victims of China's Coercive Family Planning Policies*, 80 ST. JOHN'S L. REV. 1307, 1312 (2006).

change.<sup>46</sup> In 1996, Congress amended section 1101(a)(42) of the INA by passing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>47</sup> Section 601(a) of the IIRIRA specifically provides victims of coercive population control policies a legal basis for asylum by expanding the definition of “refugee” to include:

[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.<sup>48</sup>

While the IIRIRA initially permitted only 1,000 aliens per year to receive asylum under this provision, the cap was abolished in 2005 by the Real ID Act.<sup>49</sup>

Subsequently, *In re Chang* was superseded by *In re X-P-T*, which held that “[a]n alien who has been forced to abort a pregnancy or undergo involuntary sterilization, or who has been persecuted for resistance to a coercive population control program, has suffered past persecution on account of political opinion and qualifies as a refugee within the amended definition of that term under section 1101(a)(42) of the Immigration and Nationality Act.”<sup>50</sup>

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<sup>46</sup> See Rabkin, *supra* note 2, at 973–74. The Tiananmen Square massacre occurred on June 4, 1989 when several student protesters were slaughtered when they challenged communism and called for democracy. See 1989: *Massacre in Tiananmen Square*, BBC, [http://news.bbc.co.uk/onthisday/hi/dates/stories/june/4/newsid\\_2496000/2496277.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/june/4/newsid_2496000/2496277.stm) (last visited Jan. 17, 2009); see also JOHN S. AIRD, *SLAUGHTER OF THE INNOCENTS: COERCIVE BIRTH CONTROL IN CHINA 2* (1990) (“[I]t was the brutal slaughter of student protesters in Tiananmen Square on June 4, 1989, that revealed more clearly than any previous outrage how little regard the present leadership has for human rights.”).

<sup>47</sup> See Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 601(a), 110 Stat. 3009-689 (1996).

<sup>48</sup> See 8 U.S.C. § 1101(a)(42)(B) (2006).

<sup>49</sup> See Real ID Act of 2005, tit. I, § 101(g)(2), Pub. L. No. 109-13, div. B, 119 Stat. 231 (codified at 8 U.S.C. § 1157(a)(5) (2006)); see also *Shi Liang Lin*, 416 F.3d at 188 n.1; Raina Nortick, Note, *Singled Out: A Proposal to Extend Asylum to the Unmarried Partners of Chinese Nationals Fleeing the One-Child Policy*, 75 *FORDHAM L. REV.* 2153, 2165 (2007) (arguing that derivative asylum rights should be extended to all Chinese nationals fleeing China’s coercive population control programs, regardless of marital status). The INA was amended through the Real ID Act of 2005 to provide that “in the absence of an explicit adverse credibility finding, ‘the applicant or witness shall have a rebuttable presumption of credibility on appeal.’” *Lin v. Gonzales*, 489 F.3d 182, 191 n.2 (4th Cir. 2007).

<sup>50</sup> *In re X-P-T*, 21 I. & N. Dec. 634, 634 (B.I.A. 1996).

## III. JUDICIAL APPROACH AND EVOLUTION

Following the amendment to the refugee definition by the IIRIRA, the BIA and several circuits have debated the scope of section 601(a) and whether it extends to individuals who had not personally endured a forced abortion or involuntary sterilization. Part III (A) of this Note discusses the administrative protocol required when circuit courts review the statutory interpretations of administrative agencies under the *Chevron* analysis. Part B discusses *In re C-Y-Z-*, in which the BIA set a ten-year precedent by extending asylum protection to spouses of victims of forced abortions and sterilizations under section 601(a). Part C examines the Ninth and Seventh Circuits' attempts to further extend *In re C-Y-Z-* to traditionally married partners. Part D highlights the Third Circuit's criticism of extending section 601(a) protections to traditionally married partners and the Second Circuit's request for the BIA to clarify its holding in *C-Y-Z-* amid the circuit split. Finally, Part E discusses the BIA's attempt to clarify *C-Y-Z-* with its decision in *In re S-L-L-*.

A. *Administrative Deference Under Chevron*

Before examining the interaction of the BIA and several circuit court decisions in determining who should be granted automatic asylum eligibility, it is important to briefly discuss the level of deference a reviewing court should give to an administrative agency, such as the BIA, which has interpreted a particular statute. In *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, the United States Supreme Court provided a two-step analysis for reviewing courts to use when determining administrative deference.<sup>51</sup> Under *Chevron*, when a court reviews an agency's construction of a statute which it has administered, the court must first ask "whether Congress has directly spoken to the precise question at issue."<sup>52</sup> If congressional intent is clear, then both the court and the agency "must give effect to the unambiguously expressed intent of Congress" and need not advance in their inquiry.<sup>53</sup>

If, on the other hand, the court concludes that "Congress has not directly addressed the precise question at issue," then the court must proceed to the second part of the *Chevron* analysis and ask "whether the agency's answer [to the question at issue] is based on a permissible construction of the statute."<sup>54</sup> If the statute is silent or ambiguous on a particular issue, the

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<sup>51</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 842–43.

<sup>54</sup> *Id.* at 843.

court may not “simply impose its own construction on the statute.”<sup>55</sup> Although *Chevron* rejects the concept of a court merely forcing its own construction onto a statute, the Court noted that “[t]he judiciary is the final authority on issues of statutory construction and must reject the administrative constructions which are contrary to clear congressional intent.”<sup>56</sup> Therefore, “[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue that intention is the law and must be given effect.”<sup>57</sup> The Court also emphasized that the rules regarding administrative deference were necessary in creating a mechanism “to fill any gap left, implicitly or explicitly, by Congress.”<sup>58</sup> When Congress expressly leaves a gap in a statutory provision, the agency is given controlling interpretive authority over that provision.<sup>59</sup> This authority is not absolute, however, because the “controlling weight” of an agency’s interpretation may be superseded by a court if the interpretation is “arbitrary, capricious, or manifestly contrary to the statute.”<sup>60</sup> If legislative delegation of interpretive authority is implicit, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>61</sup> Thus, although administrative agencies are accorded considerable deference in terms of interpreting statutes, courts are not completely foreclosed from imposing their interpretation when the administrative agency has made an error that is inconsistent with the spirit of the statute.

*B. BIA Decision: The Precedent of In re C-Y-Z-*

As the administrative agency authorized to interpret and apply immigration laws, the BIA first discussed the issue of whether an asylum applicant could establish past political persecution based on his spouse’s forced abortion or sterilization in the 1997 case of *In re C-Y-Z*.<sup>62</sup> In *C-Y-Z*, the petitioner claimed that he was persecuted under China’s population control policies.<sup>63</sup> After the birth of his first child in 1989, the petitioner’s wife was forced to obtain an IUD.<sup>64</sup> Because the petitioner protested the IUD

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 843 n.9.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 843.

<sup>59</sup> *See id.* at 844–45.

<sup>60</sup> *Id.* at 844.

<sup>61</sup> *Id.*

<sup>62</sup> *See* U.S. Dep’t of Justice, *supra* note 8; *see also In re C-Y-Z*, 21 I. & N. Dec. at 917.

<sup>63</sup> *See In re C-Y-Z*, 21 I. & N. Dec. 915, 915–16 (B.I.A. 1997).

<sup>64</sup> *Id.*

insertion, he was detained for a day.<sup>65</sup> When his wife removed the IUD, she became pregnant again and was ordered to have an abortion.<sup>66</sup> The petitioner's wife avoided the abortion by hiding with relatives but returned home to give birth to the child in 1990.<sup>67</sup> The applicant was fined for noncompliance.<sup>68</sup> When his wife became pregnant a third time, she went into hiding again but returned home to give birth.<sup>69</sup> The applicant's wife was subsequently forcibly sterilized in 1991.<sup>70</sup>

The BIA held that the applicant "established eligibility for asylum by virtue of his wife's forced sterilization," and noted that "the husband of a sterilized wife can essentially stand in her shoes."<sup>71</sup> Although the majority made no reference to the specific statutory language of the IIRIRA and did not explain the basis for its conclusion, it appeared to place considerable weight on a memorandum from the Office of the General Counsel of the Immigration and Naturalization Service (INS) written after the IIRIRA was passed.<sup>72</sup> The memorandum 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."<sup>73</sup> Ultimately, the majority based its decision on an "agreement of the parties," which recognized "that the forced sterilization of one spouse on account of a ground protected under the [Immigration and Nationality Act] is an act of persecution against the other spouse," and "the regulatory presumption of a well-founded fear of persecution that arises from a finding of past persecution and the absence of changed country conditions."<sup>74</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 918; *See In re S-L-L-*, 24 I. & N. Dec. 1, 3 (B.I.A. 2006) ("Although Matter of C-Y-Z- involved a spouse's forced sterilization, the holding has been understood to apply to a spouse's forced abortion as well.").

<sup>72</sup> *In re C-Y-Z-*, 21 I. & N. Dec. at 917; *see Cai Luan Chen v. Ashcroft*, 381 F.3d 221, 225 (3d Cir. 2004). The Second Circuit noted that "[t]he BIA did not . . . identify the specific statutory language pursuant to which it deemed spouses eligible for asylum under IIRIRA § 601(a), nor did the BIA endeavor to explain the reasoning motivating its chosen construction." *Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 187 (2d Cir. 2005).

<sup>73</sup> *In re C-Y-Z-*, 21 I. & N. Dec. at 917-18 (citing INS memorandum dated October 21, 1996, entitled "Asylum Based on Coercive Family Planning Policies—Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996").

<sup>74</sup> *Id.* at 919.

C. *Ninth and Seventh Circuits Attempt to Extend In re C-Y-Z- to Traditionally Married Couples*

1. *Ma v. Ashcroft*: Ninth Circuit

Following *C-Y-Z-*, the Ninth Circuit attempted to broaden the scope of section 601(a) with its decision in *Ma v. Ashcroft*.<sup>75</sup> The primary issue in *Ma* was “whether husbands, whose marriages are denied recognition by virtue of the population control program that Congress has condemned, may be deprived of eligibility for asylum on the basis of that denial.”<sup>76</sup>

In *Ma*, the asylum applicant was prohibited from entering into legally recognized marriage because he did not satisfy the minimum age requirement of twenty-two years old for males.<sup>77</sup> His wife, Chiu, met the age requirement of twenty for females because she was twenty-one years old.<sup>78</sup> Since Ma and Chiu did not want to wait until Ma turned twenty-two, they had a traditional Chinese marriage.<sup>79</sup> Shortly thereafter, Chiu became pregnant and went into hiding because China’s population control policies prohibited any pregnancy that was not the product of a legally recognized marriage.<sup>80</sup> Thus, Chiu’s pregnancy was “subject to termination by forced abortion.”<sup>81</sup> When Ma attempted to register his marriage with local officials, he was denied and inadvertently informed the authorities of his wife’s illegal pregnancy.<sup>82</sup> Officials went to Ma’s house and demanded that Chiu comply with the abortion procedure.<sup>83</sup> When Ma refused, the officials beat him and detained his father.<sup>84</sup> When Chiu heard of her father-in-law’s detention, she pleaded with the Family Planning Office to release him.<sup>85</sup> Instead, local officials took her into custody, forced her to abort her third trimester pregnancy, and imposed a fine on the couple. Ma subsequently fled to the Unit-

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<sup>75</sup> See *Ma v. Ashcroft*, 361 F.3d 553, 553 (9th Cir. 2004). Section 601(a) specifically provides refugee status to the direct victims of forced abortions and sterilizations as a result of a country’s coercive population control policies. See 8 U.S.C. § 1101(a)(42)(B). In *C-Y-Z-*, the BIA extended the asylum protections of section 1101(a)(42) to the spouses of direct victims of China’s coercive population control policies. See *In re C-Y-Z-*, 21 I. & N. Dec. at 915.

<sup>76</sup> *Ma v. Ashcroft*, 361 F.3d at 559.

<sup>77</sup> *Id.* at 555. Ma was nineteen years old. *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

ed States in hopes of eventually sending for Chiu.<sup>86</sup> After being detained, Ma filed for asylum.<sup>87</sup> Since the BIA denied Ma's asylum application, the Ninth Circuit reviewed Ma's appeal of the BIA's decision.

The Ninth Circuit reviewed the BIA's construction of section 601(a) de novo and asserted that such review was "subject to established principles of deference."<sup>88</sup> Essentially, deference is given to the BIA's reasonable interpretation of a particular provision, so long as it does "not contravene other indications of Congressional intent" and does not produce "absurd results."<sup>89</sup> The Ninth Circuit court agreed with Ma's contention that "the marriage restriction is an integral part of the policy Congress targeted."<sup>90</sup> Additionally, the court noted that Congress's goal in passing the amendments was "to provide relief for 'couples' persecuted on account of an 'unauthorized' pregnancy and to keep families together."<sup>91</sup> The court refused to defer to the BIA's decision because it contravened the statute and led to "absurd and wholly unacceptable results" by breaking families apart.<sup>92</sup> Thus, the court ruled in Ma's favor by holding that the statutory asylum protection under section 601(a) extends to couples whose marriages would be legally recognized but for China's coercive family planning policies.<sup>93</sup>

## 2. *Junshao Zhang v. Gonzales*: Seventh Circuit

The Seventh Circuit echoed the holding of *Ma* in *Junshao Zhang v. Gonzales*,<sup>94</sup> by finding that a person who weds in a traditional marriage ceremony that is "not recognized by the Chinese government because of the age restrictions in the population control measures . . . nevertheless qualifies as a spouse for purposes of asylum."<sup>95</sup> Furthermore, that court noted that to deny asylum to such an applicant would "entirely subvert the Congressional amendment."<sup>96</sup> While the court recognized the applicant's wife as a victim of persecution, it also noted that the applicant also suffered at the hands of China's population control measures because he was deprived of his unborn

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 558. INA § 1101(a)(42), (8 U.S.C. § 1101(a)(42)) contains section 601(a) of the IIRIRA).

<sup>89</sup> *Id.* See *supra* Part III.A.

<sup>90</sup> *Ma*, 361 F.3d at 555.

<sup>91</sup> *Id.* at 559.

<sup>92</sup> *Id.* at 559–61.

<sup>93</sup> *Id.* at 561.

<sup>94</sup> See *Junshao Zhang v. Gonzales*, 434 F.3d 993, 993 (7th Cir. 2006).

<sup>95</sup> *Id.* at 999.

<sup>96</sup> *Id.*



child, the ability to realize the family that he and his wife desired, and the ability to ever become a parent to that unborn child with his wife.<sup>97</sup>

*D. Keeping it Legal: The Third Circuit and the BIA Limit Automatic Asylum to Legally Married Spouses While the Second Circuit Calls for Clarification*

1. *Cai Luan Chen v. Ashcroft*: Third Circuit

Shortly after *Ma*, the Third Circuit addressed the issue of extending automatic asylum eligibility to unmarried partners of victims of China's coercive population control policies. In contrast to *Ma*, however, *Cai Luan Chen v. Ashcroft* ultimately held that "the BIA's decision not to extend *C-Y-Z-* to unmarried partners [was] reasonable."<sup>98</sup> Thus, the Third Circuit deferred to the BIA's interpretation of section 601(a).

In *Cai Luan Chen*, the petitioner argued that he was eligible for asylum based on his fiancée's forced abortion due to China's population control practices.<sup>99</sup> Although Chen and his fiancée, Chen Gui, lived together, their application for a marriage license was denied because they had not reached the legal age to marry under Chinese law.<sup>100</sup> Chen Gui became pregnant.<sup>101</sup> Shortly thereafter, Chinese officials found out about the pregnancy and demanded that Chen Gui have an abortion.<sup>102</sup> Chen Gui went into hiding and Chen fled the country.<sup>103</sup> While in the United States, Chen learned that his fiancée had been forced to abort her pregnancy.<sup>104</sup> Chen argued that the BIA's decision in *C-Y-Z-* to limit per se asylum to married persons was "irrational and arbitrary and must be rejected."<sup>105</sup>

The immigration judge initially held in Chen's favor and concluded that, although Chen did not obtain a formal marriage, his case was analogous to the *C-Y-Z-* case.<sup>106</sup> The BIA reversed the immigration judge's deci-

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<sup>97</sup> *Id.* at 1001.

<sup>98</sup> *See Cai Luan Chen v. Ashcroft*, 381 F.3d 221, 235 (3d Cir. 2004). The Third Circuit's reasoning for granting deference to the BIA's interpretation was followed by the Fifth Circuit in *Zhang v. Ashcroft*. *See Ru-Jian Zhang v. Ashcroft*, 395 F.3d 531, 532 (5th Cir. 2004). In *Ru-Jian Zhang*, the court also found *Ru-Jian Zhang's* situation distinguishable from the situation discussed in *Ma* because "Zhang and his girlfriend neither formally nor informally married." *Id.* Therefore, the Fifth Circuit declined to analyze the issue raised in *Ma*. *Id.*

<sup>99</sup> *See Cai Luan Chen*, 381 F.3d at 222.

<sup>100</sup> *Id.* at 223. Chen was 19 and Chen Gui was 18. *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 222.

<sup>106</sup> *Id.*

sion on grounds that *C-Y-Z-* had not been extended to include unmarried partners and that Chen's experience did not constitute past persecution.<sup>107</sup>

In *Cai Luan Chen*, the Third Circuit upheld the BIA's determination, thereby contrasting the Ninth Circuit's holding in *Ma*.<sup>108</sup> The Third Circuit concluded that the BIA's interpretation of section 601(a) was entitled to *Chevron* deference.<sup>109</sup> Although the court refused to decide whether *C-Y-Z-*'s interpretation of section 601(a) was "permissible," the court did note that the mere fact that the BIA's use of marital status as a bright line standard was "undoubtedly both over- and under- inclusive" was not alone "sufficient to render the use of a metric like marital status irrational."<sup>110</sup> The Third Circuit also pointed out that the marital status standard promoted administrative convenience and efficiency in light of the BIA's "crushing caseload" because marital status "can often be proven easily and reliably through objective documentary evidence such as marriage certificates or 'household registration booklets.'"<sup>111</sup>

After acknowledging that the BIA did not explain its basis for accepting the proposition of *C-Y-Z-*, the Third Circuit provided two possible rationales for the BIA's conclusion.<sup>112</sup> The first justification was based on the assumption that the persecution of one spouse through a forced abortion or sterilization causes the other spouse to "experience intense sympathetic suffering that rises to the level of persecution."<sup>113</sup> The Third Circuit noted, however, that such an interpretation would face difficulties in terms of spouses who did not directly undergo the procedure but sided with the government and favored the abortion or sterilization.<sup>114</sup> The second possible rationale was the impact on a husband's ability to reproduce and raise children as a result of his wife's involuntary abortion or sterilization.<sup>115</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 235.

<sup>109</sup> *Id.* at 224.

<sup>110</sup> *Id.* at 227. The court recognized that Chen's situation indicated the underinclusive aspect of the *C-Y-Z-* holding with regards to "a narrow but sympathetic class" but that "a rule is not irrational just because it is underinclusive to some extent." *Id.* at 230. The court noted that several areas of law use marital status as a benchmark, including income tax, welfare benefits, property, inheritance, and testimonial privilege. *Id.* at 227 n.6.

<sup>111</sup> *Id.* at 228–29. The court further noted that extending automatic asylum to nonspouses "would create numerous practical difficulties," particularly the problem of proving paternity and "the difficulty of determining the 'genuineness' of emotional harm felt by one upon hearing the harm to his fiancée." *Id.* at 228–29 n. 8.

<sup>112</sup> *Id.* at 225.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 226.

<sup>115</sup> *Id.*

The *Cai Luan Chen* court also acknowledged the disparity between its holding and the reasoning in *Ma*. The Third Circuit disagreed with *Ma*'s determination that the BIA's interpretation of section 601(a) was contrary to Congress's intent. The Third Circuit inferred that Congress intentionally left that definition of persecution unclear in order to provide the BIA with "interpretive authority . . . to decide . . . the precise contours of its meaning."<sup>116</sup> Furthermore, the Third Circuit determined that, in light of the IIRIRA's imposition of an annual cap of 1,000 on the number of aliens that may gain asylum under the 1996 amendment, "[t]he BIA's interest in promoting administrability and verifiability is sufficient to clear the low hurdle presented by the step two standard [of *Chevron*]."<sup>117</sup> In examining the congressional intent regarding the IIRIRA, the Third Circuit found that it was "highly unlikely" that Congress would broaden the concept of "persecution" for individuals suffering under coercive population control programs "while contemporaneously imposing a yearly cap strictly circumscribing the relief available to them."<sup>118</sup> Thus, *Cai Luan Chen* limited per se asylum protection to legally married spouses.

2. The Second Circuit's Request for Clarification: *Shi Liang Lin v. United States Department of Justice (Lin I)*

In light of the contrasting positions of other circuits regarding the extension of asylum protection to unmarried partners of victims of forced abortion and sterilization at the hands of Chinese officials, the Second Circuit called for a review of the BIA's rationale in *C-Y-Z-* and clarification of the qualifications for asylum under section 601(a). In *Shi Liang Lin*, three petitioners, two boyfriends and one fiancée, challenged the immigration judge's denial of their asylum applications based on the victimization of their respective partners due to China's coercive population control practices.<sup>119</sup> Shi Liang Lin claimed that he suffered persecution in China when his girlfriend was forced to abort her pregnancy because she did not meet the age requirements for a legal marriage.<sup>120</sup> In Xian Zou's petition, he also maintained that he suffered as a result of his girlfriend's involuntary abortion and that he also "vocally protested" his girlfriend's forced abortion.<sup>121</sup>

<sup>116</sup> *Id.* at 232.

<sup>117</sup> *Id.* at 229. *See supra* Part III.A for a summary of *Chevron*. The 1,000 cap on the number of aliens that may gain asylum under the IIRIRA was abolished by the Real ID Act. *See* Real ID Act of 2005, tit. I, § 101(g)(2), Pub. Law 109-13, 119 Stat. 231 (codified at 8 U.S.C. § 1157(a)(5)).

<sup>118</sup> *Cai Luan Chen*, 381 F.3d at 223.

<sup>119</sup> *See Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 188 (2d Cir. 2005).

<sup>120</sup> *See id.*

<sup>121</sup> *Id.* The immigration judge did not consider Zou's claim that he protested his girlfriend's forced abortion to be credible. *Id.*

Unlike petitioners Lin and Zou, petitioner Zhen Hua Dong sought asylum in connection with the two abortions that his fiancée underwent and the threats of fines and sterilization against him if his fiancée became pregnant again.<sup>122</sup> The immigration judge denied all three petitioners' asylum applications because the BIA had not extended protection under section 601(a) to "fiancées or girlfriends or boyfriends of people who have been forced to undergo an involuntary abortion or sterilization."<sup>123</sup> The BIA summarily affirmed, without opinion, the immigration judge's decision in each of the three cases.<sup>124</sup>

Since the BIA summarily affirmed the immigration judge's decision, the Second Circuit reviewed the decision of the immigration judge directly.<sup>125</sup> The court held that the immigration judge's summarily affirmed statutory interpretation of the INA should not be accorded *Chevron* deference because immigration judges "lack the jurisdictional power to issue decisions that are in any way binding on future parties, on one another, or on the BIA" and an immigration judge's decision "cannot be construed as a 'rule' promulgated by the BIA on behalf of the Attorney General."<sup>126</sup> Although the Second Circuit admitted that it had previously deferred to the BIA's decision in *C-Y-Z-*, it acknowledged that the BIA had "never adequately explained" its rationale for extending asylum to spouses under section 601(a).<sup>127</sup> Consequently, the Second Circuit found that it could not "reasonably determine the status of boyfriend and fiancée eligibility under IIRIRA § 601(a)."<sup>128</sup>

As a result of the Second Circuit's refusal to defer to the immigration judge's construction of the INA and because of the BIA's failure to articulate its reasoning for the *C-Y-Z-* holding, the Second Circuit remanded this case to the BIA for the BIA to (i) provide a specific explanation for making spouses eligible for per se asylum under section 601(a) and to (ii) "clarify whether, when, and why boyfriends and fiancés may or may not

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<sup>122</sup> *Id.* at 188–89. The immigration judge found Dong's claims to be credible but did not find him eligible for asylum. *Id.*

<sup>123</sup> *Id.* at 189.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 190 ("[T]he fact that the BIA deems an immigration judge's decision to be a 'final agency determination' does not transform the immigration judge's legal construction into a BIA rule carrying the force of law.").

<sup>127</sup> *Id.* at 191. The Second Circuit emphasized that it was not suggesting that there was no basis for the BIA's determination but only that the BIA failed to supply adequate justification. *Id.*

<sup>128</sup> *Id.* at 192. The Second Circuit found it difficult to distinguish between spousal eligibility and boyfriend and fiancée eligibility under IIRIRA § 601(a). *Id.*

similarly qualify as refugees pursuant to IIRIRA § 601.”<sup>129</sup> Moreover, the Second Circuit retained jurisdiction to rule on the case and “decide the issues on appeal after the disposition of the remand.”<sup>130</sup>

*E. The BIA Clarification of C-Y-Z-: In re S-L-L-*

At the request of the Second Circuit, the BIA revisited the issue of extending asylum to spouses and unmarried partners of victims of forced abortions and sterilizations in China and clarified its position regarding asylum eligibility under section 601(a).<sup>131</sup> The BIA reaffirmed its holding in *C-Y-Z-* but clarified that the extension of per se asylum is limited to legally married partners who are opposed to their spouses' abortion or sterilization.<sup>132</sup> The BIA based its determination on its belief that Congress was “concerned [not only] with the offensive assault upon the woman, but also with the obtrusive government interference into a married couple's decisions regarding children and family.”<sup>133</sup> The BIA also noted that married couples may suffer as a result of “social ostracism and pressures from Government officials to agree to submit to an abortion.”<sup>134</sup> Thus, the BIA found that the government persecutes the “married couple as an entity” when it forces that couple to have an abortion or sterilization.<sup>135</sup> Moreover, the BIA noted that, due to the uniquely interconnected nature of the marital relationship, “[a] forced abortion imposed on a married couple . . . has a profound impact on both parties to the marriage.”<sup>136</sup> The BIA referred to and embraced the Third Circuit's justification for the *C-Y-Z-* decision to support its assertion, specifically that a husband experiences “intense sympathetic suffering that rises to the level of persecution” when his wife is forced to have an abortion or sterilization.<sup>137</sup>

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See *In re S-L-L-*, 24 I. & N. Dec. at 1.

<sup>132</sup> *Id.* at 4.

<sup>133</sup> *Id.* at 6. The BIA referenced the China's Population and Family Planning Law which “explicitly imposes joint responsibility on married couples for decisions related to family planning.” *Id.*

<sup>134</sup> *Id.* at 6–7.

<sup>135</sup> *Id.* at 6.

<sup>136</sup> *Id.* at 7.

<sup>137</sup> *Id.* Since the law considers the reproductive opportunities of the wife to be “bound up with” those of the husband, a forced abortion or sterilization affects a husband and wife's “shared right to reproduce and raise children” such that the persecution suffered by the wife could be imputed to her husband. *Id.* at 7–8.

The BIA refused to extend asylum protection to fiancées and boyfriends based on their partners' forced abortion or sterilization.<sup>138</sup> The BIA explained that:

[T]he sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried father . . . . [A] husband shares more responsibility in determining, with his wife, whether to bear a child in the face of societal pressure and government incentives than does a boyfriend or fiancé for the resolution of a pregnancy of a girlfriend or fiancée.<sup>139</sup>

Like the Third Circuit, the BIA acknowledged that using marriage as a bright line standard can be over- and under-inclusive, but noted that such a classification "is a practical and manageable approach which takes into account the language and purpose of the statutory definition in light of the general principles of asylum law."<sup>140</sup> Additionally, the BIA recognized the "practical difficulties" that could arise from extending *C-Y-Z-* to non-spouses, particularly "[p]roof or presumption of paternity."<sup>141</sup>

In addition, the BIA recognized that although an unmarried partner is unable to show past persecution on the basis of his partner's forced abortion or sterilization, he may still pursue asylum by demonstrating persecution based on "other resistance to a coercive population control program."<sup>142</sup> According to the BIA, "resistance" under section 601(a) includes general opposition to a government's coercive family planning policy, attempts to interfere with enforcement of the government's family planning policy, and "other overt forms of resistance to the requirements of the family planning law."<sup>143</sup> In addition to proving resistance, an unmarried asylum applicant must demonstrate that he endured harm that is sufficient to constitute persecution on account of that resistance.<sup>144</sup>

*In re S-L-L-* endorsed the holdings of such decisions as *Cai Luan Chen v. Ashcroft* and refuted the holdings of *Ma v. Ashcroft* and *Junshao Zhang v. Gonzales* by concluding that only members of legally married couples are allowed automatic refugee status based on their spouses' persecution.<sup>145</sup> Since *Ma* and *Junshao Zhang* "were rendered before the BIA's *S-*

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<sup>138</sup> *Id.* at 8.

<sup>139</sup> *Id.* at 9.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 10. For example, it may be more difficult for an immigration judge to determine whether a boyfriend fathered a child who was forcibly aborted when compared to a legally married spouse. *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1.

*L-L-* decision interpreting the spouse requirement in *C-Y-Z-*,” some courts may view them as having “little persuasive value.”<sup>146</sup> Even after *S-L-L-*, however, the Ninth Circuit, without discussing *S-L-L-*, noted that it has held, “at least for couples who do not meet the age requirements to marry under the population control policies, the failure to have an unofficial marriage ceremony does not preclude male partners of women who have had forced abortions from obtaining asylum under § 1101(a)(42)(B).”<sup>147</sup> While a majority of Third Circuit judges supported the BIA’s determination in *S-L-L-* and found that *S-L-L-* “provided an extensive defense and explanation of its determination that ‘a husband whose wife was forcibly sterilized could establish past persecution’ under 8 U.S.C. § 1101(a)(42),” the Second Circuit was not satisfied with the BIA’s reasoning.<sup>148</sup> As the next section will highlight, the Second Circuit concluded that section 601(a) applied only to the direct victims of forced abortions and sterilizations. Thus, the Second Circuit took matters into its own hands and went against the trend of prior circuit courts and the BIA by providing a less generous, though more accurate, interpretation of section 601(a).

IV. GOING AGAINST THE GRAIN: THE SECOND CIRCUIT DEFIES  
PRECEDENT: *SHI LIANG LIN V. UNITED STATES DEPARTMENT OF JUSTICE (LIN II)*

Following *S-L-L-*, the Second Circuit revisited *Lin* on appeal and considered whether the BIA’s interpretation of section 601(a) was correct.<sup>149</sup> The Second Circuit, sitting en banc, faced the issue sua sponte and ultimately concluded that the BIA erred in its interpretation of section 601(a) “by failing to acknowledge the language in § 601(a), [when]viewed in the context of the statutory scheme governing entitlement to asylum [i.e., § 1101(a)(42)], . . . is unambiguous and . . . does not extend automatic refugee status to [the] spouses or unmarried partners of individuals [that] § 601(a) expressly protects.”<sup>150</sup> Consequently, Dong’s petition was denied,

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<sup>146</sup> *Yi Qiang Yang v. U.S. Att’y Gen.*, 494 F.3d 1311, 1318 (11th Cir. 2007).

<sup>147</sup> *Zi Zhi Tang v. Gonzales*, 489 F.3d 987, 990 (9th Cir. 2007). The Seventh Circuit made a comments similar to that of the Ninth Circuit following *S-L-L-* regarding its recognition of protecting traditionally married couples who would have been married but for China’s population restriction. *See Hao Zhu v. Gonzales*, 465 F.3d 316, 321 (7th Cir. 2006).

<sup>148</sup> *Sun Wen Chen v. Att’y Gen. of U.S.*, 491 F.3d 100, 107 (3d Cir. 2004). One Third Circuit Judge also found the *S-L-L-* rationale to be insufficient. *Id.* at 115 (McKee, J., dissenting in part and concurring in part).

<sup>149</sup> *See Shi Liang Lin v. U.S. Dep’t of Justice (Lin II)*, 494 F.3d 296, 299 (2d Cir. 2007).

<sup>150</sup> *Id.* at 300; After admitting that the Second Circuit had previously deferred to the BIA’s interpretation of 8 U.S.C. § 1101(a)(42) in *C-Y-Z-* without performing a threshold *Chevron* analysis of the ambiguity of the statute, the majority overruled previous cases to the extent that they were read to give deference to the BIA’s interpretation in *C-Y-Z-*. *Id.* at 305.

Lin's petition was dismissed as moot, and Zou's petition was dismissed for lack of jurisdiction.<sup>151</sup> Furthermore, the Second Circuit expressed that it recognized that its "decision creates a split among the circuits."<sup>152</sup> The following sections of this Note will further examine the rationale and holding of the majority in *Lin II* as well as the concurring opinions. Section A will discuss the majority decision which held that section 601(a) asylum protections do not extend to the spouses or unmarried partners of victims of forced abortions or sterilizations. Section B will examine Judge Katzmann's concurrence with the majority's judgment. Section C will highlight Judge Sotomayor's concurrence in judgment. Section D will discuss Judge Calabresi's concurrence in part and dissent in part. Section E will focus on the events that followed the *Lin II* decision.

#### A. *Majority Decision*

The majority acknowledged that it would apply the *Chevron* principles when reviewing the BIA's interpretation of section 601(a).<sup>153</sup> Before beginning the *Chevron* analysis, however, the majority attempted to reconcile the facts of the case at issue, which involved petitioners who were the "unmarried partners, and not spouses, of individuals who have been subject to forced abortions," with its review of the BIA's interpretation of section 601(a) (which "extend[ed] a *per se* presumption of persecution to spouses, but not the non-married partners, of individuals who have been involuntarily subjected to an abortion or sterilization") by noting that "[i]t is the existence of [the] spousal policy [as interpreted by the BIA] that the petitioners argue is an arbitrary and capricious interpretation of the statute."<sup>154</sup>

Under step one of *Chevron*, the majority concluded that Congress has "unambiguously" spoken on the issue of "whether an individual can establish past persecution based solely on his spouse or partner's forced abortion or sterilization."<sup>155</sup> The majority found that Congress intended section 601(a) to provide refugee status only to applicants who have undergone forced abortions or involuntary sterilizations. The majority based its conclu-

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<sup>151</sup> *Id.* at 300. For discussion of the background of *Shi Liang Lin*, see *supra* Part III.D.2.

<sup>152</sup> *Id.* While stating that its decision creates a circuit split, the Second Circuit also noted that circuits are already split over "whether § 601(a) provides protection for individuals who marry in traditional ceremonies not recognized by their government and later seek asylum based on the forced abortion or sterilization of their 'common law' spouse." *Id.* at 300 n.4.

<sup>153</sup> *Id.* at 304.

<sup>154</sup> *Id.* The majority justified its approach further by stating that "[i]f the BIA's policy is at odds with the plain language of the statute, it makes little sense to consider only whether it can reasonably be limited to couples who are formally married." *Id.*

<sup>155</sup> *Id.*



sion on its analysis of the individual clauses within section 601(a).<sup>156</sup> The majority made the following observations and arguments based on the clauses within section 601(a):

- Section 601(a) refers “to ‘a person’ rather than ‘a couple,’ who has been subject to a forced abortion or involuntary sterilization.”<sup>157</sup>
- Congress could have easily referred to the “spouse or partner of a person who has been physically subjected to a forced procedure” if that was its intention.<sup>158</sup>
- Since the language of section 601(a) referred “to individuals who have failed or refused to *undergo* (i.e., ‘submit to’) a procedure affecting *their own bodies*” and not the forced procedure undergone by someone else, “having someone else, such as one’s spouse, undergo a forced procedure does not suffice to qualify an individual for refugee status.”<sup>159</sup>
- “[T]he use of the pronouns ‘he’ and ‘she’ reinforced the intention of Congress to limit the application of the [fourth] clause to individuals who *are themselves* physically forced to undergo an abortion or sterilization.”<sup>160</sup>
- Based on the language of the fifth clause and its use of “a person” and “he or she,” “it cannot be read reasonably to cover an individual’s fears arising from a coercive procedure performed on someone else.”<sup>161</sup>

In addition to reviewing the language used by Congress, the majority also noted that Congress’s specific inclusion of certain groups “obviously result[ed] in the exclusion of others.”<sup>162</sup> The majority argued that since Congress used “clear and unmistakable language,” when it rejected the

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<sup>156</sup> See *id.* at 305. The Second Circuit numbered the clauses within section 601(a) as follows:

[ (1) ] a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or [ (2) ] who has been persecuted for failure or refusal to undergo such a procedure or [ (3) ] for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and [ (4) ] a person who has a well founded fear that he or she will be forced to undergo such a procedure or [ (5) ] subject to persecution for such failure, refusal, or [ (6) ] resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

*Id.* (quoting 8 U.S.C. § 1101(a)(42) (2006)).

<sup>157</sup> *Lin II*, 494 F.3d at 305.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 305–06.

<sup>160</sup> *Id.* at 306.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 307.

BIA's view in *Chang* by "identify[ing] those to whom asylum could be granted" (i.e., those who fear, resist, or undergo particular medical procedures), Congress "reaffirmed the need for direct personal persecution."<sup>163</sup> Moreover, the majority noted that, since section 601(a) does not alter the pre-IIRIRA definition of "political opinion," it "further demonstrates the exclusivity of the group of persons entitled to *per se* asylum under § 601(a)" by "creat[ing] a specific exception to the general statutory requirement that a person claiming refugee status based on past persecution has the burden of demonstrating that the particular conduct experienced by him rose to the level of persecution and that the persecution had a specified impermissible nexus."<sup>164</sup> Thus, the majority argued, "[i]f the language of § 601(a) indicates that the woman who is subjugated to the outrage of a forced abortion has not herself been persecuted for the 'political opinion' of conceiving a child under pre-IIRIRA § 1101(a)(42), then so much less the man who has impregnated her; . . . he is not 'deemed' under § 601(a) to hold a political opinion and he must prove the existence of a political opinion or other protected ground under § 1158(b)(1)(B)(i)."<sup>165</sup>

After reviewing the language of section 1101(a)(42) as a whole, and section 601(a), the majority attacked "the BIA's policy of according *per se* refugee status to spouses of individuals explicitly protected by § 601(a)."<sup>166</sup> The majority found the "critical defect" of the BIA's policy to be "its creation of an irrebuttable presumption of refugee status for a new class of persons," which "effectively absolve[d] large numbers of asylum applicants of the statutory burden to prove that they have (i) a well-founded fear of persecution (ii) based on an impermissible nexus."<sup>167</sup> According to the majority, the presumption is impermissible because it is "contrary to the text of 8 U.S.C. § 1158(b)(1)(B)"<sup>168</sup> and "beyond the [BIA's] statutory authority."<sup>169</sup>

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 308 ("Accordingly, we conclude that the statutory scheme unambiguously dictates that applicants can become candidates for asylum relief only based on persecution that they themselves have suffered or must suffer.").

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* The statute specifies that: (1) the burden of proof is on the applicant; (2) that the applicant must establish that political opinion was or will be at least one central reason for persecuting the applicant; and (3) that an applicant's testimony may be sufficient to meet this burden only if it refers to specific facts to demonstrate that the applicant is a refugee. *Id.* (citing 8 U.S.C. § 1158(b)(1)(B) (2005)).

<sup>169</sup> *Lin II*, 494 F.3d at 308 ("[T]he BIA lacks authority to adopt a policy that presumes that every person whose spouse was subjected to a forced abortion or sterilization has himself experienced persecution based on political opinion.").

The majority also attacked the BIA's decision in *S-L-L-* because the BIA was highly influenced by the long-standing precedent of *C-Y-Z-* and numerous circuit court deferrals to *C-Y-Z-*.<sup>170</sup> The majority pointed out that "the Supreme Court 'ha[s] never applied *stare decisis* mechanically to prohibit overruling . . . earlier decisions determining the meaning of statutes.'" <sup>171</sup>

Since the majority concluded that the language of section 601(a) was unambiguous, they refrained from deferring to the BIA's "contradictory interpretation" and found "no need to resort to legislative history."<sup>172</sup> The majority noted, however, that even if they did refer to legislative history, they would find that their interpretation comported with Congress's intent based on the House Report accompanying the amendment. The Report refers to "a person" and "the alien" in order to emphasize that the focus of the amendment is on direct victims of persecution, and it mentions several examples of victims who themselves have had to endure involuntary abortions and sterilizations. However, "spouses," "significant others," or "intimate friends" of individuals who have been subjected to forced abortions or sterilizations are not mentioned.<sup>173</sup> Thus, the majority concluded that "[w]hile Congress disapproved of coercive family planning policies as a whole, [section 601(a)] was meant to provide protection only for "individuals who have been subjected to persecution themselves."<sup>174</sup> The majority also reinforced its conclusion by noting that "Congress already provides for family members elsewhere in the statute by authorizing derivative asylum status for spouses and children of individuals who qualify as 'refugees'" under 8 U.S.C. § 1158(b)(3)(A).<sup>175</sup> Finally, the majority found the BIA's interpre-

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<sup>170</sup> *Id.* at 310.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 309–10.

<sup>173</sup> *Id.* at 310–11. The House Report accompanying the passage of § 601(a) states that its "primary intent . . . is to overturn several decisions of the Board of Immigration Appeals, principally *Matter of Chang* and *Matter of G-* . . . which . . . hold that a *person* who has been compelled to undergo an abortion or sterilization, or has been severely punished for refusal to submit to such a procedure, cannot be eligible on that basis for refugee or asylum status unless *the alien* was singled out for such treatment on account of such factors as religious belief or political opinion." *Id.* at 310 (quoting H.R. Rep. 104-469 at 173–74 (1996)).

<sup>174</sup> *Id.* at 310–11 ("Section [601(a)] is not intended to protect persons who have not actually been subjected to coercive measures or specifically threatened with such measures . . ."). The majority also noted the Supreme Court's interpretation of "refugee" under § 1101(a)(42) to mean "'persecution on account of . . . political opinion' in [§ 1101(a)(42)] is persecution on account of *the victim's* political opinion." *Id.* at 311 (internal citations omitted).

<sup>175</sup> *Id.* at 312 ("[U]nder § 1158(b)(3)(A), an individual whose spouse or parent has been granted asylum on the basis of having undergone or been threatened with the prospect of a forced abortion or sterilization is automatically eligible for derivative asylum: '[a] spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligi-

tation of section 601(a) in *S-L-L-* is incompatible with congressional intent because the BIA's interpretation had "the perverse effect of creating incentives for husbands to leave their wives."<sup>176</sup>

Furthermore, because the majority concluded that section 601(a) does not provide for a spouse, boyfriend or fiancée to qualify for automatic refugee status based on their partner's forced abortion and sterilization, the majority declared that, in order to qualify under the amendment, "an individual must turn to the two remaining categories of § 601(a), which provide protection to petitioners who demonstrate 'other resistance to a coercive population control program' or 'a well founded fear that he or she will be . . . subjected to persecution for such resistance . . .'"<sup>177</sup>

*B. Concurrence in Judgment: Judges Katzmann, Straub, Pooler, and Sotomayor*

Judge Katzmann, concurring in judgment and joined by Judges Straub, Pooler, and Sotomayor, found it "unnecessary [for the majority] to resolve whether the BIA can legally extend asylum relief to legal spouses" because: (1) none of the petitioners in these consolidated cases was married; (2) the parties in these cases did not even dispute the extension of asylum relief to spouses; and (3) this case "could have been resolved simply and nearly unanimously by assuming the reasonableness of the BIA's construction of the statute as applied to legal spouses and then holding that it was also reasonable as applied to boyfriends and fiancés."<sup>178</sup> Thus, Judge Katzmann found that the majority had "gone out of its way to create a circuit split where none need exist, thereby frustrating the BIA's uniform enforcement of a national immigration policy."<sup>179</sup>

Judge Katzmann found that the majority's focus on the language of section 601(a) to be "misplaced" and that "the entirety of 8 U.S.C. § 1101(a)(42) [should be examined in order] to determine whether the statute is ambiguous [under the first step of the *Chevron* analysis]."<sup>180</sup> Judge Katzmann viewed section 601(a) as an expansion of asylum relief, as op-

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ble for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien."").

<sup>176</sup> *Id.* An example of the perverse effect would be allowing a married man to "capitalize on the persecution of his wife to obtain asylum even though he has left his wife behind and she might never join him and he might intend that she not do so." *Id.* (citing *Chen v. Ashcroft*, 376 F.3d 215, 223 n.2 (3d Cir. 2004)).

<sup>177</sup> *Lin II*, 494 F.3d at 309–10.

<sup>178</sup> *Id.* at 316 (Katzmann, J., concurring).

<sup>179</sup> *Id.* ("When a governmental body with substantial experience in interpreting a complex statutory scheme concludes that a statute is ambiguous, that determination should give us pause . . . Text without context can lead to confusion and misunderstanding.").

<sup>180</sup> *Id.* at 317–18.

posed to the majority, which viewed section 601(a) as a limitation.<sup>181</sup> In order to support his arguments, Judge Katzmman noted that nothing in the language of section 601(a) indicates Congress's intent to prohibit the extension of asylum eligibility relief to spouses and that "Congress has done nothing to indicate such an intent in the years since the amendment's enactment."<sup>182</sup>

Under the analysis suggested by Judge Katzmman, section 601(a) is ambiguous because the statute, on its face, does not directly address the precise questions of "whether the spouses of those who have been forced to undergo an abortion or sterilization are entitled to asylum relief,"<sup>183</sup> whether "the emotional and psychological harm one suffers when one's spouse is forced to undergo an abortion or sterilization is . . . severe enough to constitute persecution," or whether "the statute preclude[s] the BIA from considering the effect that China's family planning policies have on a couple's shared right to reproduce and raise children."<sup>184</sup> Therefore, he concluded that the BIA must determine such issues and that the majority usurped the BIA's task by "holding that persecution cannot encompass such individuals."<sup>185</sup>

Under the second step of the *Chevron* analysis (i.e., whether the BIA's interpretation was based on a permissible construction of the statute), Judge Katzmman concluded that "the BIA reasonably considered the general principles underlying the definition of persecution and concluded that a husband is persecuted 'when the government forces an abortion on a married couple.'"<sup>186</sup> Although the BIA created a distinction between legally married spouses and unmarried partners by "presum[ing] that the family planning officials target[ed] legal spouses for persecution to a greater extent than boyfriends and fiancés," . . . [Judge Katzmman] could not say . . . that

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<sup>181</sup> *Id.* at 319 ("Congress's intent in enacting IIRIRA § 601(a) was to clarify that, contrary to the BIA's prior rulings, the imposition of some aspects of China's family planning policy can constitute persecution on the basis of political opinion, and that certain victims of that persecution are entitled to protection under our asylum laws. Nothing in the amendment suggests that Congress intended to prevent the BIA from extending relief to victims other than those explicitly identified in the amendment.").

<sup>182</sup> *Id.* at 323. Moreover, "[t]here are obscure areas of public policy, largely hidden from public attention and concern, in which it makes little sense to ascribe meaning to the absence of congressional response to administrative and judicial interpretations of the statute." *Id.*

<sup>183</sup> *Id.* at 318.

<sup>184</sup> *Id.* at 324.

<sup>185</sup> *Id.* at 325 ("Once we determine that a statute is ambiguous, we must defer to the BIA's interpretation of the statute if it is reasonable, whatever our own personal policy preferences.").

<sup>186</sup> *Id.* at 326. Katzmman supported his determination by noting that several court decisions "have explicitly recognized that non-physical harm may support a finding of past persecution at least in some circumstances." *Id.*

the BIA's reading is not based on a permissible construction of the statute."<sup>187</sup>

Ultimately, Judge Katzmman held that the BIA's interpretation of the statute was reasonable and "would defer to that interpretation."<sup>188</sup>

C. *Concurrence in Judgment: Judges Sotomayor and Pooler*

Just as Judge Katzmman declared, Judges Sotomayor and Pooler found that the majority chose "to go far beyond [the limited question before the court] to address an issue that is unbriefed, unargued, and unnecessary to resolve this appeal."<sup>189</sup> Judges Sotomayor and Pooler wrote separately to highlight that "the majority's zeal in reaching a question not before [the court] require[d] the unprecedented step of constricting the BIA's congressionally delegated powers—a decision whose ramifications [the court is] ill-prepared . . . to understand fully."<sup>190</sup> Furthermore, Judges Sotomayor and Pooler found that there was no indication of how personal or direct the injury must be on an asylum applicant under section 1101(a)(42) and "no unambiguous language in the text of § 1101(a)(42) . . . compel[led] the limiting construction of the INA that the majority" posited.<sup>191</sup> Consequently, under this reasoning, it is within the BIA's authority to interpret the statute as long as the interpretation is reasonable.<sup>192</sup> Ultimately, Judges Sotomayor and Pooler concurred with the majority's judgment for the same reasons as Judge Katzmman, particularly that the Second Circuit should have followed the approach taken by the Third Circuit in *Chen* (i.e., finding no need to reach the question of whether section 601(a) or section 1101(a)(42) were ambiguous and that the BIA's distinction between married and unmarried couples was reasonable).<sup>193</sup>

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 327.

<sup>189</sup> *Id.* (Sotomayor, J., concurring).

<sup>190</sup> *Id.* Sotomayor and Pooler concluded that the majority's decision "may unduly and inappropriately limit the BIA not merely in cases under § 601(a) but in others as well." *Id.*

<sup>191</sup> *Id.* ("It is pellucidly clear from the text of § 1101(a)(42) that Congress did not define nor intend to define 'persecution' to exclude harms 'not personally' suffered by an applicant.")

<sup>192</sup> *Id.* Sotomayor and Pooler also argued that the majority's "misguided exercise in statutory interpretation" calls the case law of the Second Circuit as well as several other circuits into question and may also have started a "domino effect" that may have "significant, unintended consequences." *Id.* at 331–34. As a result of the "majority's limiting construction," the majority suggests "that the BIA is precluded from *ever* considering harm to others as evidence of persecution to the applicant." *Id.* at 332.

<sup>193</sup> *Id.* at 333.

*D. Concurrence in Part and Dissent in Part: Judge Calabresi*

Judge Calabresi agrees with the majority's analysis that "because § 601(a) does not grant [per se] asylum to spouses, it also cannot be read as granting asylum to non-spouses—like the petitioners in this case."<sup>194</sup> Judge Calabresi, however, partially dissents from the majority opinion that the BIA would be impermissibly reading section 1101(a)(42)(A) if it were to construe the general definition of "refugee" under section 1101(a)(42)(A) as granting per se refugee status to certain categories of people (e.g., spouses or non-spouses) because:

- The majority's argument that the BIA could not, because of *Chang*, grant per se status to spouses pursuant to section 1101(a)(42)(A) is an illogical inference.<sup>195</sup>
- "There is nothing in the language or history of § 1101(a)(42)(A) that suggests that the BIA could not adopt such a per se rule."<sup>196</sup>
- The majority precluded the BIA from interpreting § 1101(a)(42)(A) on the first instance.<sup>197</sup>

Judge Calabresi also refused to join in the primary concurrence because he found that Judges Sotomayor and Pooler also precluded the BIA from "thinking deeply and fully on the matter,"<sup>198</sup> by arguing that "*S-L-L-* was based, not on § 601(a), but on the general definition of 'refugee' found in § 1101(a)(42)(A)."<sup>199</sup>

Judge Calabresi concluded that the majority properly rejected the BIA's ruling interpreting the coverage of section 601(a), but the majority should "now ask the BIA something that it has never been asked by any court: *What would you do under § 1101(a)(42)(A), given that § 601(a) does not give you the authority to do what you did in C-Y-Z- and S-L-L-?*"<sup>200</sup>

<sup>194</sup> *Id.* at 334 (Calabresi, J., concurring in part and dissenting in part).

<sup>195</sup> *Id.* at 335.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* Judge Calabresi noted that such preclusion was "dangerously in tension" with the United States Supreme Court's command in *INS v. Orlando Ventura*, 537 U.S. 12, 123 (2002), which held that "[g]enerally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." *Id.* at 336. Judge Calabresi also discussed the majority's haste in narrowly construing § 1101(a)(42)(A) would have "sweeping ramifications" for the Second Circuit's immigration law docket that has 70 to 80 percent of its composition involving Chinese petitioners "seeking asylum to escape their homeland's family planning policies." *Id.* at 338 (Calabresi, J., concurring in part and dissenting in part).

<sup>198</sup> *Id.* at 343.

<sup>199</sup> *Id.* at 342.

<sup>200</sup> *Id.* at 343. Furthermore, Calabresi noted that, due to the majority and concurers rush "to reach a conclusion in terms of who gets asylum and who does not, [they] sanction bad law

Thus, while Calabresi concurred with the majority with regards to: (1) its dismissal of Zou's petition for lack of jurisdiction; (2) its denial of Lin's petition as moot; and (3) its interpretation of "8 U.S.C. § 1158(c)(2)(A) as being limited to a 'fundamental change' in *country* conditions," he dissented from the majority's denial of Dong's petition because an interpretation of § 1101(a)(42)(A) might have covered Dong's situation.<sup>201</sup>

*E. Congressional and Judicial Reaction to Lin II*

Legislation to amend the INA to include "legally recognized spouse[s]" of persons who have been forced to abort a pregnancy or undergo involuntary sterilization was introduced in the House of Representatives on September 17, 2007.<sup>202</sup> Unless this legislation becomes law, the Second Circuit is still bound by the *Lin* judgment.<sup>203</sup> Based on the *Lin* decision, the Third Circuit recently adopted the Second Circuit's reasoning and interpretation of section 601(a).<sup>204</sup> Despite the Second Circuit's continued adherence to *Lin* and the Third Circuit's acceptance of *Lin*, it remains to be seen how other circuits will react to *Lin* and its rationale. While the Fifth, Seventh, and Ninth Circuits could follow the Third Circuit's change of heart, such a scenario is not guaranteed; these circuits may still retain their positions until the statute is amended or the issue is decided by the United States Supreme Court. In light of the evolving dialogue regarding the interpretation of § 601(a), it is increasingly difficult to anticipate how circuits that have not yet addressed the issue will rule if and when the issue is placed before them.

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and bad practices with respect to our relationship with the BIA." *Id.* at 343. He admits that their rush is "certainly understandable," but "unnecessary." *Id.* at 343–44.

<sup>201</sup> *Id.* at 344.

<sup>202</sup> H.R. 3552, 110th Cong. (2007).

<sup>203</sup> We are bound by our recent *en banc* decision in *Shi Liang Lin v. U.S. Dep't of Justice*. See *Yong Fu Lin v. U.S. Dep't of Justice*, 2007 WL 2296160, at \*1 (2d Cir. 2007); see also *Cheng Yang Lin v. Board of Immigration Appeals*, 2007 WL 2050961, at \*1 (2d Cir. 2007); *Xue Jian Zheng v. Gonzales*, 2007 WL 2309790, at \*1 (2d Cir. 2007); *Yu Ye Chen v. Gonzales*, 2007 WL 2398509, at \*1 (2d Cir. 2007); *Bao De Weng v. Gonzales*, 2007 WL 2492095, at \*2 (2d Cir. 2007).

<sup>204</sup> *Guang Lin-Zheng v. Attorney General of the U.S.*, 2009 WL 398257, at 1, 8 (3d Cir. 2009) ("[W]hile interpreting § 601(a), the BIA 'put aside' the very statutory text that should have controlled its inquiry into congressional intent.").



## V. ANALYSIS AND RECOMMENDATIONS

This section argues that the Second Circuit's interpretation of section 601(a)<sup>205</sup> was correct but that section 601(a) should be amended and extended to protect both the legally recognized spouses and the traditionally married, cohabiting partners of the victims of forced abortions and sterilizations. Part A uses evidence from the statutory language, statutory scheme, and the legislative history of section 601(a) to argue that the Second Circuit's interpretation was accurate. Part B (1) claims that the amendment to section 601(a) would further promote the congressional intent of family unification. Part B (2) maintains that expanding section 601(a) protections to legally recognized spouses and traditionally married, cohabiting spouses would not heighten the threat of fraudulent claims by asylum applicants. Part B (3) argues that, without an amendment to section 601(a), traditionally married, cohabiting partners would have to resort to ambiguous and inadequate alternatives in order to gain asylum eligibility. Part B (4) claims that arguments in favor of amending section 601(a) would not be unpersuasive or deterred simply because of derivative asylum protections covered under other statutes.

A. *Second Circuit Majority was Correct in its Analysis of Section 601(a)*

The Second Circuit majority's conclusion that the language of section 601(a), when viewed in the context of 8 U.S.C. § 1101(a)(42), is unambiguous and does not extend automatic refugee status to the spouses or unmarried partners of individuals who have undergone forced abortions or involuntary sterilizations is a valid and appropriate interpretation of section 601(a) based on the well-established canons of statutory construction.<sup>206</sup> The majority's conclusion was based on the following four principles: (1) "begin with the language employed by Congress and [assume] that the ordinary meaning of that language accurately expresses the legislative purpose," (2) "begin with understanding that Congress says in a statute what it means and means in a statute what it says there,"<sup>207</sup> (3) the statutory scheme encompassing section 1101(a)(42); and (4) the legislative history of section 601(a).

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<sup>205</sup> The Second Circuit interpreted section 601(a) as protecting only those individuals who have personally suffered a forced abortion or sterilization due to China's coercive population control policies. See discussion *supra* Part IV.

<sup>206</sup> See *Lin II*, 494 F.3d at 300. I base my arguments on the majority's conclusion despite the concurrences' apprehension about the Second Circuit majority's ability to review the BIA's interpretation of § 601(a) to extend to the spouses, but not the unmarried partners, of individuals who have been involuntarily subjected to an abortion or sterilization.

<sup>207</sup> *Id.* at 305.

The majority initially examined the plain language of section 601(a) by analyzing the individual clauses of section 601(a) and referring to the language within those clauses which expressly indicates that Congress intended “to limit the application of the clause[s] to individuals who are themselves physically forced to undergo an abortion or sterilization.”<sup>208</sup> The use of such pronouns as “person,” “he,” and “she” as well as the terms “undergo” and “deem” within the language of section 601(a) (and throughout section 1101(a)(42)) are clear indications that section 601(a) refers to the persecution suffered by the individual who underwent the forced abortion or sterilization. Furthermore, “Congress’s statements neither expressly nor implicitly include[d] a marriage requirement” nor any mention of the victim’s spouse or significant other.<sup>209</sup>

In terms of the canon that Congress expresses its intention through what it states expressly, the specific designation of asylum protections to some persons under section 601(a) implies the exclusion of those protections to others.<sup>210</sup> In section 601(a), Congress never referred to spouses, significant others, or any other individual or relationship apart from that of the individual who personally endured an involuntary procedure based on the population control program of a particular country. Congress could have easily drafted section 601(a) to extend to the spouses (or unmarried partners) of victims of forced abortions or involuntary sterilizations if that was its intention.<sup>211</sup> Although the Third Circuit has claimed that the BIA’s interpretation of section 601(a) was reasonable since the BIA was permissibly filling in a “gap” left by Congress,<sup>212</sup> such an argument is unconvincing because the plain language of section 601(a) is clear and the BIA’s interpretation conflicted with the plain language of section 601(a).<sup>213</sup> Although the statute did not refer to spouses (or unmarried partners), the statutory lan-

<sup>208</sup> *Id.* at 305–06; *see Thom v. U.S.*, 283 F.3d 939, 943 (2006) (“In determining whether a statutory exception applies, we look first to the statute’s plain language.”); *see also Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (interpreting the “well-founded fear of persecution” language from section 1101(a)(42)).

<sup>209</sup> Nortick, *supra* note 49, at 2184.

<sup>210</sup> *Lin II*, 494 F.3d at 307; *see also Cardoza-Fonseca*, 480 U.S. at 431 (“With regard to this very statutory scheme, we have considered ourselves bound to assume that the legislative purpose is expressed by the ordinary meaning of the words used.”) (quotations omitted).

<sup>211</sup> *Lin II*, 494 F.3d at 307; *see also Cardoza-Fonseca*, 480 U.S. at 453 (“Where the language of [a] law[] is clear, we are not free to replace it with an unenacted legislative intent.”); *see also Sun Wen Chen v. Att’y Gen. of U.S.*, 491 F.3d 100, 115 (3d Cir. 2004).

<sup>212</sup> *See Sun Wen Chen*, 491 F.3d at 107 (“Silence on a particular matter germane to the provisions of the statute suggests a gap of the sort that that the administering agency may fill.”).

<sup>213</sup> *See Nat’l Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 417 (1992) (“If the agency interpretation is not in conflict with the plain language of the statute, deference is due.”).

guage was otherwise clear that the statute was directed only towards the individuals who personally underwent forced abortions and sterilizations. Essentially, there was no need for the BIA to fill in the gaps of section 601(a) because there were no gaps to fill. The language used in section 601(a) was unambiguous because there was only one reasonable interpretation of section 601(a).<sup>214</sup> For instance, the use of “a person,” “he,” and “she” apparently refers to a single individual and does not, on its face or in the context of the entire statute, indicate other interpretations such as extension to the spouse or marital entity.<sup>215</sup>

The majority noted that a reviewing court should not confine itself to examining a particular statutory provision in isolation, but rather it must interpret the statutory provision as a “symmetrical and coherent regulatory scheme.”<sup>216</sup> Therefore, the majority properly recognized the importance of considering the whole statute and not merely the section at issue.<sup>217</sup> Nothing in the definition of “refugee” under section 1101(a)(42) “would permit ‘any person’ who has *not personally* experienced persecution or a well-founded fear of future persecution” on account of race, religion, nationality, membership in a particular social group, or political opinion to obtain asylum, as the BIA’s interpretation would permit.<sup>218</sup> The exclusivity of the group entitled to per se asylum under section 601(a) (i.e., only those individuals who have personally undergone the forced abortion or sterilization) is supported by the fact that “the language of § 601(a) does nothing to alter the pre-IRIRA definition of ‘political opinion’ in § 1101(a)(42).”<sup>219</sup> Like section 601(a), section 1101(a)(42) also uses language such as “a person,” “himself,” and “herself.”<sup>220</sup> Moreover, the fact that “Congressmen typically vote on the language of a bill” and that the judiciary must ultimately defer to “the supremacy of the Legislature” provides additional support for the argument that the “legislative purpose [was] expressed by the ordinary meaning of the

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<sup>214</sup> See *McCord v. Bailey*, 636 F.2d 606, 614–15 (D.C. Cir. 1980) (“Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.”).

<sup>215</sup> According to the Merriam-Webster Dictionary, “a” is an indefinite article that can be “used as a function word before” a singular noun such as “person” (i.e. “human being”). Merriam-Webster Online Dictionary, <http://www.m-w.com> (last visited Jan. 21, 2009). “She” is defined as “the female one who is neither speaker nor hearer” (pronoun) and “a female person” (noun). *Id.* “He” is defined as “the male one who is neither speaker nor hearer” (pronoun) and “a male person” (noun). *Id.* Thus, any interpretation of the previous terms in the context of more than one person would be unreasonable.

<sup>216</sup> *Lin II*, 494 F.3d at 306–07; See also *Food and Drug Administration v. Brown & Williamson Tobacco Corporation*, 529 U.S. 120, 121, 120 S.Ct. 1291, 1294 (2000).

<sup>217</sup> See *Thom*, 283 F.3d at 943.

<sup>218</sup> *Lin II*, 494 F.3d at 306.

<sup>219</sup> *Id.* at 307.

<sup>220</sup> 8 U.S.C. § 1101(a)(42) (2006).

words used” in the statute.<sup>221</sup> Thus, section 601(a) and section 1101(a)(42) both appear to focus on the individual who directly experienced the forced abortion or sterilization.

In addition to the actual text of section 601(a) and its relationship to the statutory scheme of section 1101(a)(42), the legislative history of section 601(a) also supports the Second Circuit majority’s interpretation of section 601(a). The House Report not only uses terms such as “the alien” and “a person” but also refers to examples that include the direct victims of forced abortions and sterilizations without mention of their spouses or significant others.<sup>222</sup> Thus, the BIA’s interpretation of section 601(a) is “irreconcilable” with the legislative history.<sup>223</sup>

Since section 601(a) unambiguously provides per se asylum only to the direct victims of forced abortions and sterilizations and the BIA’s construction of section 601(a) was unreasonable based on the statutory language, statutory scheme of section 1101(a)(42), and the legislative history of section 601(a), the Second Circuit was not required under *Chevron* to defer to the BIA’s interpretation of section 601(a).<sup>224</sup>

*B. Section 601(a) Should be Amended to Include Both Legally Married Spouses and Traditionally Married, Cohabiting Spouses*

Although the Second Circuit correctly interpreted section 601(a) as applying only to the direct victims of forced abortions and involuntary sterilizations, the scope of section 601(a) should be expanded. In addition to extending asylum protections to the legally married spouses of victims of forced abortions and involuntary sterilizations, as proposed by H.R. 3552, asylum protections should also be extended to traditionally married, coha-

<sup>221</sup> See *U.S. v. Locke*, 471 U.S. 84, 95 (1985).

<sup>222</sup> H.R. REP. NO. 104-469, at 174 (1995). Although the House Report does mention couples who have been fined excessively and had their homes destroyed, couples are not specifically mentioned in the House’s discussion of victims of forced abortion or sterilization. Instead, the report refers to *women* with unauthorized pregnancies being forced to have abortions and *both men and women* that *may be* forcibly sterilized. *Id.* Excessive fines do not constitute persecution; coercive measures encompass forced abortions or sterilizations and a well-founded fear of such treatment. *Id.*

<sup>223</sup> See *Sun Wen Chen v. Att’y Gen. of U.S.*, 491 F.3d 100, 114 (3d Cir. 2004).

<sup>224</sup> See *Nat’l Cable Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 969 (2005) (“*Chevron* requires a federal court to defer to an agency’s construction, even if it differs from what the court believes to be the best interpretation, if the particular statute is within the agency’s jurisdiction to administer, the statute is ambiguous on the point at issue, and the agency’s construction is reasonable.”); see also *Cardoza-Fonseca*, 480 U.S. at 447–48 (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”).

biting spouses of victims of forced abortions and involuntary sterilizations.<sup>225</sup> Thus, section 601(a) should be amended to include both legally married spouses and traditionally married, cohabiting spouses of victims of forced abortions and involuntary sterilizations because: (1) such an amendment would promote the congressional intent of keeping families together; (2) such an amendment would not raise the risk of fraudulent claims; (3) the “other resistance” alternative of section 601(a) is ambiguous and difficult for an unmarried partner to satisfy; and (4) derivative asylum protections under other statutes do not undermine justifications for an amendment to section 601(a).<sup>226</sup>

1. Amendment would clearly promote congressional intent of keeping families together

The Ninth Circuit declared in *Ma* that Congress’s goal in passing section 601(a) was “to provide relief for ‘couples’ persecuted on account of an ‘unauthorized’ pregnancy and to keep families together.”<sup>227</sup> An amendment to section 601(a) that extends asylum eligibility protections to legally married spouses and traditionally married, cohabiting spouses of victims of forced abortions and involuntary sterilizations would promote congressional goals of family unification because such relationships support the existence of a familial relationship, even in some circumstances where the couple

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<sup>225</sup> Traditionally married, cohabiting spouses under my definition encompass individuals who would have been married but for China’s minimum marriage age requirements, but who have engaged in a marriage ceremony that is recognized by traditional Chinese customs. Furthermore, these individuals live with their significant others and, if possible, share in the maintenance of each other’s lifestyle (i.e. financial affairs are interconnected and they are recognized in their community as a couple). Traditionally married, cohabiting couples may further demonstrate their dedication to becoming a committed couple by attempting to register as a legally married couple and being rejected because of failure to meet age requirements.

<sup>226</sup> While my arguments may also be directed toward the Supreme Court and the various circuits, the most plausible way to change perspective regarding this issue would be to amend the language of § 601(a). The Second Circuit majority also referred to Congress’s power to amend § 601(a) if its holding was inconsistent with congressional intent. See *Shi Liang Lin v. U.S. Dep’t of Justice (Lin II)*, 494 F.3d 296, 309 (2d Cir. 2007) (“If this conclusion is inconsistent with Congress’s intentions, it can, if it so chooses, of course, amend the statute, as it did when it adopted IIRIRA § 601(a) in response to the BIA’s decision in *Matter of Chang*.”). Thus, Congress might be better able to serve its intention of nuclear family unification by extending § 601(a) protections to legally recognized spouses and traditionally recognized, cohabiting spouses.

<sup>227</sup> *Kui Rong Ma*, 361 F.3d at 559; See H.R. REP. NO. 104-469, at 174 (1995) (“[P]reservation of the nuclear family . . . should be the cornerstone of our immigration policy.”); see also *Junshao Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006); see also *Cutaia*, *supra* note 45, at 1326.

could not be legally married.<sup>228</sup> The actions of such couples may serve as an indicator of their intention to commit to (and promote) a familial relationship as a couple either through legal means or in the eyes of their community and through their sharing and maintaining of a home together when legal marriage is not yet an option for them due to China's population control policies.<sup>229</sup> While the BIA based its reasoning about a spousal relationship requirement on an antiquated view of "the virtues of the sanctity of procreation and marriage,"<sup>230</sup> it forgets that "[p]arents are equally persecuted partners because they *commit to a familial relationship, not because their relationship is sanctioned by the state.*"<sup>231</sup> The efforts of these couples to be viewed as couples in the eyes of the law and in the eyes of others (in addition to the actual procreation) help to create "a rough way of identifying a class of persons whose opportunities for reproduction and child-rearing [would be] seriously impaired or [would] suffer serious emotional injury as a result of the performance of a forced abortion or sterilization on another person."<sup>232</sup>

Furthermore, if asylum relief were extended only to legally married spouses (and failed to protect traditionally married, cohabiting spouses), then there would be "absurd and wholly unacceptable results," particularly breaking families apart, because the "early marriage prohibition is inextricably linked to the restrictions on childbirth."<sup>233</sup> Although critics may argue that American courts should follow China's minimum marriage age requirements and, therefore, limit asylum relief to couples who meet the re-

<sup>228</sup> See Rabkin, *supra* note 2, at 989. The primary policy of the preference system of visas was the "the reunification of families." *Id.* The existence of a familial relationship could be proven by a petitioner, even if that petitioner was not married. *Id.*

<sup>229</sup> Thus, "[t]he important inquiry, it seems, ought to be the nature of the relationship between the asylum applicant and the woman who has been forced to terminate her pregnancy" and not (solely) whether the Chinese government recognized the marriage. *Hao Zhu v. Gonzales*, 465 F.3d 316, 325 (7th Cir. 2006) (Rovner, J., dissenting).

<sup>230</sup> *Sun Wen Chen*, 491 F.3d at 115 (McKee, J., dissenting in part and concurring in part).

<sup>231</sup> Nortick, *supra* note 49, at 2188 (emphasis added).

<sup>232</sup> *Cai Luan Chen v. Ashcroft*, 381 F.3d 221, 227 (3d Cir. 2004). Though the Third Circuit applied the emotional injury argument to apply to legally married spouses, this argument should also be applied to traditionally married, cohabiting couples who intended to obtain a legally recognized marriage but were precluded from doing so because of China's population control policies. *See id.*; *see also* Nortick, *supra* note 49, at 2184 ("Congress intended quite simply to protect a class of persons who have lost a child as punishment for violating China's family planning law—this class naturally includes married and unmarried couples.").

<sup>233</sup> *Ma v. Ashcroft*, 361 F.3d 553, 559–61 (9th Cir. 2004) ("Application of the BIA's rule [of limiting asylum relief to legally married couples] would result in the separation of a husband and wife, the break-up of a family a result that is at odds not only with [§ 601(a)], but also with significant parts of our overall immigration policy."). Thus, the position posited by the BIA in *S-L-L-* and proffered by Congressman Fossella in his proposed amendment to section 601(a) would be unsound and undesirable.

quisite marriage standards under Chinese law, such compliance would contravene Congress's desire to "give relief to the victims of China's oppressive population control policy" through section 601(a).<sup>234</sup> Moreover, the wish to alleviate persecution of asylum applicants rises from the United States' view of legitimate and humane activity, even if such alleviation may contravene the policies of the persecuting country.<sup>235</sup> While Judge Alito noted in *Chen* that the "marriage relation" is applied to several legal areas including "income tax, welfare benefits, property, inheritance, testimonial privilege, etc.,"<sup>236</sup> he "rigidly ignore[d] the restrictions in China that make marriage unattainable for many who wish to marry."<sup>237</sup> Therefore, Alito's analysis and rationale was incomplete.

Moreover, extension of asylum protection to all unmarried couples, or to any cohabiting couple regardless of whether they have obtained a traditional marriage, would arguably cause absurd and unacceptable results because such extensions would ignore the distinction between mere procreation and the actual intention of a couple to form a familial relationship.<sup>238</sup> Such broad asylum protection would be unnecessarily over-inclusive because it would include many couples that did not desire to enter into a familial relationship or have a long-term commitment.<sup>239</sup> Thus, there is no

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<sup>234</sup> *Id.* at 561 ("[B]ecause the prohibition on underage marriage is an integral part of [China's oppressive population control] policy, it would contravene the fundamental purpose of the statute to deny asylum on the basis of that rule."). *But see Cai Luan Chen*, 381 F.3d at 230 ("[A]lthough minimum ages of 23 and 25 are contrary to our traditions and international practice, we cannot go so far as to say that enforcement of these laws necessarily amounts to persecution. American constitutional law recognizes marriage as a fundamental right, but all states impose minimum age requirements, and we assume these laws are constitutional.").

<sup>235</sup> Courts have previously defined persecution as "punishment or the infliction of harm for political, religious, or other reasons that *this country* does not recognize as legitimate." *Hao Zhu*, 465 F.3d at 318 (emphasis added). Thus, America bases its definition of punishment on its own standards, and not those of another country. Moreover, although American states do set marriage age requirements, the punishment for violation of such policies would not be coercive. Thus, the connection between China's marriage requirement and coercive punishment for violating those requirements makes the stakes much higher and distinguishes China's practices from those of America.

<sup>236</sup> *Cai Luan Chen*, 381 F.3d at 227.

<sup>237</sup> Rabkin, *supra* note 2, at 991 ("It is difficult to see how [a petitioner's] involuntary legal status would diminish the pain and injury of [his] partner.").

<sup>238</sup> *But see* Nortick, *supra* note 49, at 2191 ("The United States should extend derivative asylum rights to Chinese nationals fleeing the one-child policy, regardless of marital status."); *see also* Rabkin, *supra* note 2, at 992 ("The BIA should . . . make non-legally married, cohabitating partners of victims of coercive family planning, whether married in traditional Chinese ceremonies or not, as per se eligible for asylum as their legally married counterparts have been since *C-Y-Z*.").

<sup>239</sup> For example, such a broad extension of asylum protection would include individuals who had a one night stand or otherwise platonic roommates that may desire to leave China. Thus, the problems of paternity would also be heightened because there would be greater

need for broad asylum protection of all unmarried couples because, unlike Congress's primary aim in passing section 601(a), there would be no familial relationship to preserve.

## 2. Amendment would not heighten risk of fraudulent claims

Several circuits have refused to extend section 601(a) protections beyond the direct victims of forced abortions and sterilizations and their legally married spouses based on a fear of a heightened risk of defrauding the immigration process.<sup>240</sup> But amending section 601(a) to extend asylum protections to the legally and traditionally married cohabiting spouses of victims of forced abortions and sterilizations would not increase the risk of fraudulent asylum claims. Since all of this group of asylum applicants must satisfy the burden of showing that they suffered persecution in China,<sup>241</sup> fears that an amendment to section 601(a) extending protections to legally and traditionally married, cohabiting spouses would encourage fraud are unfounded. While a legally married applicant may prove a relationship with the victim of a forced abortion or involuntary sterilization by providing a marriage license and other such official documents, traditionally married, cohabiting spouses may prove cohabitation "by producing a household registry."<sup>242</sup> Potential documentation of a traditional marriage may also be evidenced through a document indicating that a traditionally married couple was fined for having an early marriage.<sup>243</sup>

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difficulty in determining the level of commitment of the couple. Moreover, a broad extension of asylum protection would go far beyond Congress's intention of providing relief for "couples" by providing relief to any two individuals who happen to procreate (or happen to procreate and live together). Thus, such an extension would place considerable focus on the sexual relationship, which is a relatively casual relationship when compared to the implied connotations of long-term commitment associated with the familial relationship.

<sup>240</sup> A distinction between legally recognized spouses and unmarried partners could serve the statutory purposes of: "(1) providing a convenient way to weed out cases in which 'close family ties' were lacking and (2) avoiding 'problems of proof and the potential for fraudulent visa applications.'" The Third Circuit also noted that the "problems of proving paternity" would also be greater in situations involving unwed partners. *See Cai Luan Chen*, 381 F.3d at 228; *see also* Nortick, *supra* note 49, at 2184–85. While I argue that such concerns would be inapplicable to traditionally married, cohabiting couples, these concerns would still apply to a broad extension of asylum protection to all unmarried couples or to any cohabiting couple regardless of whether they have obtained a traditional marriage.

<sup>241</sup> *See* H.R. REP. NO. 104-469(I), at 174 ("Determining the credibility of an applicant and whether the actual or threatened harm rises to the level of persecution is a difficult and complex task, but no more so in the case of claims based on coercive family planning than in cases based on factual situations"); *see also* Nortick, *supra* note 49, at 2185.

<sup>242</sup> *See* Rabkin, *supra* note 2, at 990. The household registry is "an official document listing all residents of a dwelling, which the Chinese government requires citizens to submit every year." *Id.*; *see also* *Cai Luan Chen*, 381 F.3d at 228–29.

<sup>243</sup> *See* *Ma*, 361 F.3d at 556 n.4.



Several courts have also recognized that an asylum applicant may have difficulty obtaining official documentation from his persecutory home country to support his claim for asylum since he may have been forced to flee in haste.<sup>244</sup> Therefore, such an applicant can support his claim for asylum with little or no documentary support (particularly, relying on his own testimony).<sup>245</sup>

Thus, the “competing goals” of asylum law (i.e., “to harbor those in need of asylum while weeding out illegitimate claims”) can best be served by amending section 601(a) to protect both the legally recognized and traditionally married, cohabiting spouses of victims of forced abortions and sterilizations.<sup>246</sup>

3. “Other Resistance” is a difficult and ambiguous alternative for unmarried partners

*In re S-L-L-* suggested that, though legally married partners may obtain asylum relief based on their spouses’ persecution, unmarried partners may obtain asylum based on their own resistance to China’s population control policy under the “other resistance” option.<sup>247</sup> The BIA listed the following as “relevant factors” when considering whether an unmarried partner satisfied the other resistance element of section 601(a):

[whether the couple] has children together, has cohabited for a significant length of time, holds themselves out to others as a committed couple, has

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<sup>244</sup> See Nortick, *supra* note 49, at 2185–86; see also *Zhou Yun Zhang v. U.S. Immigration and Naturalization Service*, 386 F.3d 66, 71 (2d Cir. 2004) (“Because refugees frequently leave their native countries under urgent circumstances, the law recognizes that in some asylum cases, the only evidence of persecution an applicant may be able to offer will be his own testimony. Accordingly, such testimony, if credible, may be sufficient to sustain the burden of proof.”); *Hao Zhu*, 465 F.3d at 326 (Rovner, J., dissenting) (“Many asylum applicants likely lack proof of a state sanctioned marriage, and even fewer have proof of engaging in a ‘traditional marriage ceremony.’”). *Zhang* also noted that fraud is an ever-present risk when reviewing a partner’s claim for asylum based on the forced abortion or sterilization of his partner, particularly when the applicant does not possess supporting documentation. See *Zhou Yun Zhang*, 386 F.3d at 72 (“[V]irtually, any young, undocumented Chinese male seeking to enter the United States can assert that he is married and seeking asylum based on his spouse’s forcible abortion or sterilization.”).

<sup>245</sup> See Nortick, *supra* note 49, at 2185; *Jin Shui Qui v. Ashcroft*, 329 F.3d 140, 150 (2d Cir. 2003) (“Specific, detailed and credible testimony and corroborative background evidence, is necessary to prove the case for asylum.”)

<sup>246</sup> *Hao Zhu*, 465 F.3d at 325 (Rovner, J., dissenting). The factors contained in an inquiry determining a partner’s commitment to familial relationship include the following: “is the couple at issue involved in a spouse-like relationship where both parties have demonstrated an intent to enter into and sustain a long-term partnership for the purpose of raising a child together, and but for the persecuting country’s restrictive population control measures, they would have married.” *Id.*

<sup>247</sup> See *In re S-L-L-*, 24 I. & N. Dec. 1, 10 (B.I.A. 2006); Nortick, *supra* note 49, at 2188.

taken steps to have their relationship recognized in some fashion . . . , is financially interdependent, and [whether] persuasive objective evidence of that relationship's continued existence during the time that the applicant has been in the U.S.<sup>248</sup>

While those factors encompass several of the elements that characterize a traditionally married, cohabiting couple, they make it unnecessarily difficult for such couples by requiring immigration judges to make “individual findings of fact” based on the closeness of the relationship between traditionally married, cohabiting partners.<sup>249</sup> Furthermore, since traditionally married couples are not sanctioned by the Chinese government and China prohibits unmarried couples from having children, it is unlikely that such couples would be able to indicate that they had children together.<sup>250</sup>

Another problem with the “other resistance” option is its ambiguousness.<sup>251</sup> Although the term “resistance” has not been defined, the BIA has asserted that the term could cover several circumstances, “including expressions of general opposition, attempts to interfere with the enforcement of government policy in particular cases, and other overt forms of resistance to the requirements of family planning law.”<sup>252</sup> Despite the BIA's suggestions regarding the coverage of “resistance,” there is very little case law analyzing the “other resistance” clause of section 601(a) and the legislative history behind section 601(a) does not indicate any clear congressional intent regarding the scope of the “other resistance” clause.<sup>253</sup>

<sup>248</sup> *In re S-L-L-*, 24 I. & N. Dec. at 10–11.

<sup>249</sup> See Nortick, *supra* note 49, at 2189. Traditionally married, cohabiting partners would be able “credibly testify to persecution and to the closeness of their relationship with their partners if given the chance.” *Id.*

<sup>250</sup> *Id.* at 2190. Thus, some of the factors listed by the BIA contradict the prohibitions of China's family planning policies.

<sup>251</sup> See *Shi Liang Lin*, 494 F.3d at 312; see also *In re S-L-L-*, 24 I. & N. Dec. at 10 (“The term ‘resistance’ is not defined in the Act.”).

<sup>252</sup> *In re S-L-L-*, 24 I. & N. Dec. at 10.

<sup>253</sup> *Shi Liang Lin*, 494 F.3d at 313; see *Zhi Zhi Chen*, 2005 WL 2709346, at \*3 (7th Cir. 2005) (acknowledging that there is a “paucity of cases analyzing the meaning of the term ‘resistance’” and finding that an outburst in a family planning office would not qualify as resistance but a doctor's article that was critical of China's birth control measures and that publicized a practice of hospital infanticide was considered resistance.); see also *Zheng Zhou v. Bureau of Citizenship and Immigration Services*, No. 04-3157-ag, 2007 WL 2389743, at \*1 (2d Cir. 2007) (finding that applicant's letter to family planning authorities constituted resistance).

4. Justification for the amendment is not precluded by grant of derivative asylum protection under other statutes

While the Second Circuit recognized that “Congress already provides for family members elsewhere in the statute by authorizing derivative asylum status for spouses and children of individuals who qualify as “refugees” under 8 U.S.C. § 1158(b)(3)(A),<sup>254</sup> such a reference does not “unambiguously preclude” an amendment to section 601(a) that provides “an additional basis of relief” to the legally and traditionally married, cohabiting spouses of individuals who have been subjected to a forced abortion or sterilization.<sup>255</sup> The language of section 1158(b)(3)(A), though it may cover legally and traditionally married cohabiting spouses, arguably serves as a catch-all because it applies when an applicant is “not otherwise eligible” for asylum under the section. Furthermore, section 1158(b)(3)(A) may not be available to the legally recognized spouses or traditionally married partners of direct victims of coercive population control practices because such partners usually leave China before their victimized partners; thus, the spouses and the traditionally married partners seeking asylum based on the persecution of their wives would not satisfy the requirements of section 1158(b)(3)(A) because they are not “accompanying, or following to join” their wives and their wives usually have not been previously granted asylum status.<sup>256</sup>

#### CONCLUSION

Although the Chinese government and the international community have officially denounced coercive family planning policies, such as forced abortions and involuntary sterilizations of couples who have unauthorized pregnancies, such coercive practices continue to be enforced by local officials and condoned by government inattention. The United States has responded to China’s coercive population control policies by passing IIRIRA section 601(a), which provides asylum relief to those who have suffered forced abortions and sterilizations. While the BIA and several circuits have

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<sup>254</sup> Under 8 U.S.C. § 1158(b)(3)(A), “[a] spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.” 8 U.S.C. § 1158(b)(3)(A) (2005); see *Shi Liang Lin*, 494 F.3d at 312.

<sup>255</sup> *Shi Liang Lin*, 494 F.3d at 325 (Katzmann, J., concurring) (“There is no apparent tension in providing derivative asylum status to spouses who have not themselves suffered any harm and providing an additional basis of relief to those spouses who have, that is, those who have themselves suffered harm when their partners were subjected to a forced abortion or sterilization.”).

<sup>256</sup> See 8 U.S.C. § 1158(b)(3)(A); see also *Shi Liang Lin*, 494 F.3d at 331 n.6 (Sotomayor, J., concurring) (“[I]t is not uncommon for Chinese couples to separate and have one spouse go abroad and amass the necessary resources to bring over the other spouse.”).

held for ten years that section 601(a) extends to the legally married spouses of those victims,<sup>257</sup> the Second Circuit has recently narrowed the effect of section 601(a) by finding that section 601(a) protects only the direct victim of forced abortion or sterilization. The Second Circuit held that 601(a) does not automatically extend asylum eligibility protections to the spouse, boyfriend, or fiancé of a victim of forced abortion or sterilization. The Second Circuit's narrowed interpretation of 601(a) in *Lin II* ultimately called attention to the statute's inadequacy. Even though the Second Circuit was justified in its interpretation of section 601(a) based on statutory interpretation and legislative history, section 601(a) should be amended to extend automatic eligibility for refugee status to both the legally recognized and the traditionally married, cohabiting spouses of individuals who have undergone forced abortions and sterilizations.

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<sup>257</sup> The Seventh and Ninth Circuits extended asylum protection even further, to traditionally married couples who would be legally married but for China's minimum marrying age requirements.