Till Death—or the Attorney General–Do Us Part: How the Extension of Asylum Eligibility to Spouses of Victims of China's "One Couple, One Child" Policy Still Comports with Domestic Immigration Jurisprudence

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"A positive [pregnancy] test spells trouble for any woman . . . . She is urged to have an abortion, offered a cash bonus and time off from work as a reward. If she refuses, the pressure mounts. This is where China's family-planning apparatus comes down with full force . . . . First come the tactics of persuasion played out in what [are] known euphemistically as 'heart-to-heart chats.' Several activists visit the pregnant woman . . . . She is urged to have an abortion . . . . Husbands and mothers-in-law are recruited for the talks because they often pose the biggest obstacle to abortion. If she holds her ground, the talks intensify. More officials enter the fray, sometimes eight or ten at a time. They come for hours every day, lecturing, cajoling, pleading. Eventually, the local party chief joins . . . . Now the pregnant woman is criticized for resisting and warned of the penalty for [an] unauthorized birth, which . . . can include loss of farmland, fines of up to $1,000, firing from factory jobs, public censure and the denial of land, medical benefits, grain rations and educational opportunities for the unplanned child. To increase the pressure for speedy abortion, the woman is charged a penalty . . . [of] $2 per day . . . . Fines begin in the fourth month of pregnancy . . . where both husband and wife lose fifty percent of their monthly wage—to be refunded if she finally has an abortion . . . [A] 32–year–old woman named Li . . . had a baby girl and became pregnant again in the hope of having a boy. After numerous visits to her home by 'persuasion groups' proved unsuccessful, eight activists appeared at her doorstep one morning and told Li, then four months pregnant, 'if you don't go to the clinic willingly, we'll take you' . . . 'The woman struggled and started crying when they started taking her by the arms' . . . . 'She was dragged about fifty yards and finally gave in.'"
One of the four goals of immigration policy\textsuperscript{2} is to provide refuge for people who face the risk of political, racial, or religious persecution in their country of origin.\textsuperscript{3} This Comment will discuss the third goal of providing refuge to people who face the risk of political persecution, specifically on account of opposition to coercive birth control policies in their home country.\textsuperscript{4} Currently, the courts of appeals are divided as to whether or not the spouse\textsuperscript{5} of a victim of forced abortion or sterilization\textsuperscript{6} shall be eligible for asylum in the United States.\textsuperscript{7} This Comment argues that the spouse of such a victim should be eligible for asylum in the United States.\textsuperscript{8}

The involuntary privation of a couple's jointly conceived, unborn child or ability to conceive together in the future is a violation of the fundamental rights of both parties of the couple.\textsuperscript{9} As a result of this persecution, Congress saw fit to provide refuge in the United States for the victims of these barbaric acts.\textsuperscript{10} The courts should recognize that pain and suffering is sustained not only by one member of the couple when victimized in such a manner, but to both, and the inviolable nature of a familial bond.\textsuperscript{11} Accordingly, the courts should extend refuge to both parties of a marriage after one has been victimized.\textsuperscript{12}

After providing background information in Part II, Part III will first analyze statutory interpretation, especially utilizing the legislative history of 8 U.S.C. § 1101 (a)(42), which is consistent with the grant of asylum eligibility to the spouses of victims of coercive birth control policies.\textsuperscript{13} The second section of Part III will argue that the Court of Appeals for the Second Circuit's decision in \textit{Shi Liang Lin v. U.S. Department of Justice}\textsuperscript{14} erred in declining to give \textit{Chevron}\textsuperscript{15} deference to the Board of Immigration Appeals (BIA) decision in \textit{In re C-Y-Z-}.\textsuperscript{16} The last section of Part III will additionally analyze other instances of extension of asylum eligibility to victims of severe psychological harm, and suggests that the \textit{In re C-Y-Z-} decision and its
progeny are consistent with current asylum case law.\textsuperscript{18} It will further discuss how the court of appeals and BIA decisions extending asylum eligibility to family members of victims of Female Genital Mutilation (FGM) are analogous to the extension of eligibility to spouses of victims of forcible abortion or sterilization in that both recognize sympathetic suffering and both led to the creation of new legal standards.\textsuperscript{19}

For these reasons, Part IV of this Comment proposes that either the Supreme Court overturn \textit{Shi Liang Lin} v. U.S. Department of Justice and the recent decision by the Attorney General in \textit{Matter of J-S}\textsuperscript{20} or, alternatively, Congress should amend 8 U.S.C § 1101 (a)(42) to clarify the intent of the statute to include spousal asylum eligibility.\textsuperscript{21} This Comment further proposes three possible methods of circumventing the \textit{Matter of J-S} ruling and a three-part test, that courts should utilize in the interim, to determine spousal eligibility, which will satisfy the Board of Immigration Appeals and the various circuit courts.\textsuperscript{22} A remedy must be enacted to maintain consistent application of national immigration policy throughout the courts of appeals and the BIA, and in order to continue implementation of the venerable humanitarian goals of United States' immigration policy.\textsuperscript{23}

II. Background

A. China's One Couple, One Child Policy

In 1979, China\textsuperscript{24} commenced a country-wide program to regulate the nation's birth rate by way of a family planning program.\textsuperscript{25} The program’s principal feature is a state-imposed limit on the number of children a couple may bear, known as the "one couple, one child policy" (One Child Policy).\textsuperscript{26} Compliance is enforced by requiring couples to obtain permission from the
Chinese Government to become pregnant or face a wide range of penalties, ranging from economic sanctions, including fines of up to ten times the couple's annual income, to destruction of property to obligatory abortions and sterilizations. Although Chinese law formally prohibits the use of coercion to compel a couple to submit to a forced abortion or sterilization, “implementation of the policy by local officials [has] resulted in serious violations of human rights.” Decisions of the U.S. federal courts confirm that forced abortion and sterilization remain prevalent official practices in China. China’s coercive family planning program targets fathers as well as mothers of unauthorized children. China’s National Family Planning Law also requires that “husbands and wives shall bear joint responsibility in the implementation of family planning.”

B. 8 U.S.C. § 1101 (a)(42)

Asylum law originated internationally with the 1951 United Nations Convention Relating to the Status of Refugees. The Convention was later amended by the 1967 United Nations Protocol Relating to the Status of Refugees, which was ratified by the United States. The United States subsequently enacted federal statutes regarding refugee law, specifically the Immigration and Nationality Act (INA), which was amended by the Refugee Act of 1980, and codified in 8 U.S.C. § 1101 (a)(42). The statute, as finalized in 1990, read:

The term "refugee" means any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or . . . any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and
who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.\textsuperscript{37}

In 1996, Congress broadened the definition of "refugee" by amending the statute with the addition of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) § 601 (a):

\begin{quote}
[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.\textsuperscript{38}
\end{quote}

This amendment effectively overruled the seminal opinion in coercive population control measures, \textit{Matter of Chang},\textsuperscript{39} and recognized that victims of China's One Child Policy were victims of persecution on account of political opinion.\textsuperscript{40} After the decision in \textit{Matter of X-P-T-}\textsuperscript{41} affirmed the validity of the IIRIRA § 601(a) amendment to 8 U.S.C. § 1101 (a)(42) (the Statute) for those who have undergone forcible abortions or sterilizations, the next issue of debate became the scope of the "person" referenced in the amendment.

For statutory interpretation purposes, is important to realize that it is established law that a credible showing of past persecution gives rise to a regulatory presumption that the applicant has a well-founded fear of future persecution.\textsuperscript{42} Thus, an individual who is able to prove that they were persecuted in their home country, on account of their race, religion, nationality, membership in a particular social group, or political opinion has already met the burden of proving a well-founded fear.\textsuperscript{43} Accordingly, a person who has already been victimized by the particular practice of forced abortion or sterilization has successfully proved a well-founded fear.\textsuperscript{44}
Moreover, the word persecution, itself, is the subject of much debate.\textsuperscript{45} Black's Law Dictionary defines persecution as violent, cruel, and oppressive treatment directed toward a person or group of persons because of their race, religion, sexual orientation, politics, or other beliefs.\textsuperscript{46} The statute leaves the term undefined, but \textit{Cardoza-Fonseca v. U.S. Immigration & Naturalization Service}\textsuperscript{47} afforded a widely accepted definition: either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.\textsuperscript{48}

C. \textit{In re C-Y-Z-}

\textit{In re C-Y-Z-} involved a male Chinese national who fled to the United States eighteen months after his wife endured an involuntary sterilization.\textsuperscript{49} After the applicant and his wife gave birth to one daughter, birth control officials forcibly implanted an intrauterine device (IUD) inside her uterus to prevent impregnation.\textsuperscript{50} After removal of the device, his wife became pregnant again and was forced into hiding until the birth of the couple's second daughter.\textsuperscript{51} After the birth of their second child, the couple was forced to pay a large fine to birth control officials to avoid the punitive destruction of their home.\textsuperscript{52} Soon after, the couple, hoping for a son, conceived once more and the wife again hid to avoid detection.\textsuperscript{53} After the birth of their third child, a son, the applicant's wife was subjected to forcible sterilization.\textsuperscript{54}

The Immigration Judge held that the applicant was only able to demonstrate persecution against his wife, but "the applicant [sought] to ride on his wife's coattails . . . [h]e, himself, has never been persecuted and he cannot show either past persecution or a reasonable fear of future persecution."\textsuperscript{55} The Board of Immigration Appeals granted a hearing to decide if the IIRIRA
amendment was applicable to the instant case and ultimately, whether an applicant can claim statutory eligibility for asylum by establishing past political persecution based on his wife's forcible sterilization.\textsuperscript{56}

The panel in this case relied on a memorandum from the Immigration and Naturalization Service (INS)\textsuperscript{57} which specifically addressed the issue of spousal eligibility and concluded that "the husband of a sterilized wife can essentially stand in her shoes and make a \textit{bona fide} and non-frivolous application for asylum based on problems impacting more intimately on her than on him."\textsuperscript{58} The BIA then granted the petitioner a rebuttable presumption of future persecution because he successfully established, under the statute, that he suffered past persecution on the basis of political opinion in providing evidence of his wife's forcible sterilization\textsuperscript{59} The BIA thus held that an applicant whose spouse was subjected to a forcible abortion or sterilization was eligible for asylum.\textsuperscript{60}

D. Shi Liang Lin v. U.S. Department of Justice

\textit{Shi Liang Lin II (Lin)} concerned three unmarried males, Chinese nationals, who were victimized by coercive family planning policies.\textsuperscript{61} The case was first brought in 2005.\textsuperscript{62} The Second Circuit initially remanded the case to the Board of Immigration Appeals for further elaboration concerning the reasoning behind the \textit{In re C-Y-Z-} decision.\textsuperscript{63} After the BIA issued its decision in \textit{In re S-L-L-},\textsuperscript{64} the Second Circuit granted a rehearing, \textit{en banc}.\textsuperscript{65}

Applicant Zhen Hua Dong's case was decided alone, as Shi Liang Lin's petition was dismissed as moot,\textsuperscript{66} and Xian Zou's petition was dismissed for lack of jurisdiction.\textsuperscript{67} Zhen Hua Dong's fiancé was subjected to a forcible abortion the same day she was discovered to be pregnant during a routine exam.\textsuperscript{68} The applicant was threatened by family planning officials
with fines and sterilization. The applicant's fiancé became pregnant again one year later, at which time the applicant fled to the United States and his fiancé was subjected to a second forcible abortion.

A divided court held that spouses are not eligible for asylum on account of their partner's forcible abortion or sterilization unless they can prove "other resistance" to China's coercive birth planning policy. The Second Circuit concluded that a plain language reading of the statute implied extension of asylum eligibility only to the singular person outlined in the statute. Attorney General Mukasey spoke to the circuit split created by Lin in Matter of J-S- on May 15, 2008. The Supreme Court denied certiorari on May 19, 2008.

E. Matter of J-S-

Matter of J-S- involved a male Chinese national who applied for asylum on the grounds that his wife suffered the forced insertion of an IUD, along with frequent and mandatory monitoring x-rays to ensure its presence. The applicant was fined for marrying below the age prescribed by China's coercive population control program and warned by family planning officials that if he attempted to have another child, he or his wife would be sterilized, as were his sister and mother.

The case reached the Third Circuit on a Petition for Review of a Decision of the Board of Immigration Appeals. The Court ordered an en banc rehearing. The Third Circuit then dismissed the appeal after the court received notice of the Attorney General's decision to conduct further administrative review of the case. Attorney General Mukasey held that the Statute does not confer automatic, or per se, asylum eligibility to spouses of persons who have suffered forcible abortions or sterilizations.
III. Analysis

A. Statutory Interpretation of 8 U.S.C. § 1101 (a)(42) Permits the Finding of Persecution for Spouses of Persons Who Have Undergone Forcible Abortions or Sterilizations

In re C-Y-Z- set the standard for interpretation of 8 U.S.C. § 1101 (a)(42). In re S-L-L- affirmed this construction and elaborated, "absent evidence that the spouse did not oppose an abortion or sterilization procedure, we interpret the forced abortion and sterilization clause of section 101 (a)(42) of the Act, in light of the overall purpose of the amendment, to include both parties to a marriage." In contrast, Lin interpreted the statute in a very different manner, claiming the BIA presented no reasoning in C-Y-Z- or S-L-L- for the reading of the Statute in such a manner to compel its results. The majority recounted its discussion in Ai Feng Yuan v. U.S. Department of Justice that "[b]y its plain language, the law would seem to extend refugee status only to actual victims of persecution—for example, a woman who was 'forced to abort a pregnancy,' but not her husband." The court continued on to analyze the language of the Statute, which referred only to "a person," and asserted that this language indicated a grant of asylum eligibility only to a singular person rather than a couple. The court, however, failed to consider the possibility that the spouse is also "a person" who has been victimized by the One Child Policy. Contrary to the view held by the Lin court, In re C-Y-Z- fulfilled the "two cardinal rules" enumerated by Lin, that construction of the statute must accord with the language employed by Congress and the ordinary meaning of that language accurately expresses the legislative purpose. The BIA, in C-Y-Z-, used the ordinary meaning of the statutory language to read that the spouse of an individual who has been subjected to forcible abortion or
sterilization as, likewise, a victim and believed their interpretation to be in accord with the language employed by Congress. 89

Furthermore, the Lin majority stated that Congress would have included mention of the spouse had they intended to grant them asylum eligibility. 90 However, the converse argument can also be made that if Congress had intended to exclude spouses from asylum eligibility they easily could have. 91 Concurring on other grounds, four justices in Lin argued that there is an explicit prohibition of asylum eligibility in the Statute, for those who "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion," suggesting that Congress intentionally excluded these persons as the only individuals they believed should not be granted asylum eligibility. 92

Legislative history offers further evidence of Congressional intent. 93 Contrary to Lin's declarations, legislative history reveals Congress' intention for a broad construction of 8 U.S.C. § 1101 (a)(42), not exclusively encompassing those who personally suffered a forcible abortion or sterilization. 94 In Congressional House Report 2202, Congress explicitly stated that they intended to overrule "several decisions of the Board of Immigration Appeals," 95 and specified four cases. These cases included Matter of G-, 96 where the applicant was the husband of a female who, after giving birth to their second child, was fined by the government and his wife was ordered to report for sterilization. Allusion to this case as one to be overruled indicates that, with the new amendment, Congress intended to give persons in similar situations, namely spouses of persons subject to coercive birth control practices, access to asylum claims. 97 Chang Lian Zheng v. Immigration & Naturalization Service 98 was another case referenced to be overturned, where one of the four applicant's persecution claims was based on the forcible
sterilization of his wife along with the imposition of a large fine for having unauthorized
children.  

Additionally, the same House Report stated that Congress intended to grant asylum eligibility
to all those who have been "subjected to undeniable and grotesque violations of human rights"
without ever specifying that the only persons they consider to be victims are those who have
personally undergone forcible abortion or sterilization.  
The report further contemplated
pregnant women who had been subjected to forcible abortion, men or women forcibly sterilized,
as well as couples subjected to excessive fines, with homes and possessions destroyed, as
instances of persecution that the amended refugee definition meant to include.  

If one member
of a couple who has been subjected to an excessive fine is to be eligible for asylum on the basis
of past persecution, as the fine affects both members of the couple, one member of a couple who
has been subjected to forcible abortion or sterilization should be eligible for asylum as well.  

Moreover, there is a long history of ultimately unavailing legislative action which indicates that
Congress' purpose in the amendment to 8 U.S.C. § 1101 was directed toward providing relief for
both members of the couple.  

Finally, Congress further broadened the scope of the statute by
repealing the 1,000 person cap that had previously restricted asylum grants on account of
coercive birth control policy.

It is clear that Congress' intention in the codification of the IIRIRA amendment to 8 U.S.C. §
1101 (a)(42) was meant to include a broad definition of the victim, including spouses whose
husbands or wives had suffered forcible abortion or sterilization.
B. The Importance of Applying Chevron Deference to the Board of Immigration Appeals in In re C-Y-Z-

According to the long-standing precedent provided by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., courts of appeals are obliged to give deference to statutory constructions of government agency decisions in accordance with the two-step Chevron test. The step-one inquiry looks into whether Congress has spoken directly to the issue at hand or, instead, if the statute is ambiguous. If Congress has clearly spoken to the matter, their intention is controlling. However, if the statute is ambiguous, the step-two inquiry requires that if the statute grants implicit interpretive authority to a particular agency, the court must uphold the agency's interpretation of the statute if it is reasonable.

The statute in question here is 8 U.S.C. § 1101 (a)(42). If the statute is ambiguous, Chevron directs the court to go to step-two. Lin and C-Y-Z- interpreted the statute in conflicting ways. Therefore, the statute is likely ambiguous and the Lin court should have gone on to step-two to determine the reasonableness of In re C-Y-Z-'s interpretation. After deciding that Congress had spoken directly to the issue, though, they decided it was not necessary to move on to step-two of the Chevron test.

However, both Congress and the Board of Immigration Appeals made statements suggesting that there is definite ambiguity in the statute. There was vigorous dissent against the majority's interpretation of 8 U.S.C. § 1101 (a)(42) by Justices Katzmann, Sotomayor, and Calebresi, lambasting the majority's finding "in textual silence an expression of unambiguous congressional intent" and claiming that the absence of reference to a spouse in the statute left a gap that the BIA was authorized to fill. The Third Circuit in Cai Luan Chen v. Ashcroft acknowledged both that the BIA should be accorded Chevron deference for its interpretations of
immigration laws and that its interpretation of 8 U.S.C. § 1101 (a)(42) was reasonable.\textsuperscript{123} Moreover, other courts have deferred to the BIA's interpretation, suggesting it is reasonable.\textsuperscript{124}

Accordingly, the majority opinion in \textit{Lin} erred in declining to apply \textit{Chevron} deference.\textsuperscript{125} They should have deferred to the statutory interpretation provided by the Board of Immigration Appeals because they appropriately and reasonably interpreted the Congressional intent behind 8 U.S.C. § 1101 (a)(42).\textsuperscript{126}

C. Why Spouses are Victims of Persecution Sufficient to be Granted a Finding of Past Persecution and, thus, a Rebuttable Presumption of Future Persecution

1. Psychological Persecution is a Valid form of Persecution

The persecution of an individual may occur in many forms, not only as the result of physical violence.\textsuperscript{127} Persecution has been held to encompass psychological persecution in the form of ostracism, stigma, or other extreme circumstances including loss of home or employment.\textsuperscript{128} In 1965, Congress removed the word "physical" from modifying the word "persecution" in the Statute to allow the term persecution to include both physical and psychological suffering.\textsuperscript{129} However, the majority in \textit{Lin} gave little weight to the fact that a spouse would experience severe psychological harm from the forcible abortion of their child or the removal of the ability for their spouse to ever conceive another child.\textsuperscript{130} Justices in \textit{Lin}, dissenting in the majority's analysis of the spousal eligibility issue, and other courts, have discussed the fact that this harm alone constitutes persecution independent of their spouse's claim for having undergone a forcible abortion or sterilization.\textsuperscript{131} Notwithstanding the many personal accounts of emotional trauma,\textsuperscript{132} a long line of case law also supports these affirmations.\textsuperscript{133}
Most significantly, the 1969 landmark non-physical harm case, *Kovac v. Immigration & Naturalization Service*, caused courts to take note of the fact that acts of persecution may present themselves in many different forms, including the imposition of economic and psychological harm. In *Kovac*, the applicant was a Hungarian citizen of Yugoslavia who refused to spy on Hungarian refugees on behalf of Yugoslavian secret police. The secret police then contacted his place of employment and caused the applicant to be fired from this and any future job he obtained. Finally, he secured a position on a marine ship as a cook during which time he defected to the United States to seek asylum. The applicant claimed that if he returned, his government would make it impossible for him to make a living or support his family. The court held that severe economic sanctions including the deprivation of an ability to earn a livelihood amount to persecution. Subsequent cases have held persecution to include a victim of severe threats who also suffered the stress of having a gun held to his head; an individual who incurred a demotion, reduction in pay, the assignment of menial tasks at his place of employment, and denial of access to education; and a family who was unable to earn a livelihood or travel safely in public, forced to sell their belongings to buy food. In comparing these findings of persecution, forcible abortion or sterilization of one's spouse or the extermination of one's unborn child are distinguishable acts—they are more extreme, severe, and permanent sanctions which clearly rise above the level of persecution found in the aforementioned cases.

Indeed, many judges have pursued this line of reasoning in their opinions. Four justices in *Lin* contradicted the majority's perspective and encouraged consideration of China's coercive birth control policies on a "couple's shared right to reproduce and raise children," suggesting that the tremendous impacts similarly affect the potential mother and father. Two
justices went on to analogize forcible abortion to the murder of one's child, having devastating effects on both the husband and wife.\textsuperscript{147} They further concurred with the Ninth Circuit's observation in \textit{Qili Qu v. Gonzalez},\textsuperscript{148} that "[i]n addition to the physical and psychological trauma that is common to many forms of persecution, sterilization involves drastic and emotionally painful consequences that are unending: The couple is forever denied a pro-creative life together."\textsuperscript{149} Board Member Rosenberg, in \textit{In re C-Y-Z-}, agreed that this type of harm rises to the level of persecution necessary for asylum.\textsuperscript{150} She advanced the holding of \textit{Kahsai v. Immigration & Naturalization Service},\textsuperscript{151} that persecution need not be only physical violence but any experiences that adversely affect the asylum-seeker's personal, religious, or gender-based identity.\textsuperscript{152} \textit{En banc}, the Board of Immigration Appeals agreed that stripping a couple of the inability to bear future children adversely affects both the mother and father's identity.\textsuperscript{153} \textit{Qili Qu} emphasized that the sterilization of one individual in a couple is a permanent and continuous form of persecution that deprives both individuals, who form the couple, of the child or children who might have been born to them.\textsuperscript{154} Regarding forced abortions, it also noted that it is "a form of persecution [that] possesses . . . unusual characteristics . . . the pain, psychological trauma, and shame are combined with the irremediable and ongoing suffering of being permanently denied the existence of a son or daughter."\textsuperscript{155} Moreover, in \textit{In re Y-T-L-}, BIA Board Member Pauley stated that the loss of opportunity to bear children could rise to the level of persecution necessary for an asylum claim.\textsuperscript{156}

Accordingly, persecution has been held to arise from various situations and circumstances.\textsuperscript{157} Non-physical forms of persecution, including psychological harm, are equally valid forms of persecution.\textsuperscript{158} Such emotional and mental suffering, as well as various economic
harm of 159 is unequivocally present in cases of a spouse's forced abortion or sterilization. On this ground alone, asylum eligibility must be granted. 161

2. Persecution Can be Extended to Family Members of Victims Who Have Suffered or Will Suffer Extreme Forms of Physical Harm

An extension of the previous argument, that spouses will undergo psychological persecution from the forcible abortion of their unborn child or the sterilization of their spouse, is that the individual will suffer additional extreme emotional trauma resulting from their spouse being forced to undergo an unwanted, and possibly dangerous or painful, medical procedure. 162 After Abay v. Ashcroft, 163 the courts have continuously granted remedies to mothers and fathers whose daughters would be subjected to Female Genital Mutilation (FGM) 164 if they were forced to return to their home countries. 165 The premise of such relief is that the sympathetic suffering undergone by a parent whose child is facing such harm constitutes persecution to the parent himself. 166

Abay concerned a mother and her minor daughter who both requested asylum because they feared that if deported to Ethiopia, the daughter would be forced to undergo FGM. 167 After concluding that the daughter faced a distinct risk of being forcibly subjected to FGM, 168 the majority found the mother to have a well-founded fear of personal persecution despite the fact that the violent act was be endured by her daughter. 169 This persecution was grounded in the idea that the emotional and mental harm that would occur to the mother, if her daughter were forced to undergo the excruciatingly painful and dangerous practice of FGM, constituted indirect persecution against the mother. 170
There are many other instances of the extension of asylum eligibility on account of persecution, including torture, physical violence, and threats, suffered by the asylum-seeker’s family members. Additionally, in 1997, the Asylum Division of the Office of International Affairs published a memorandum to asylum officers supporting the extension of asylum to family members who have been persecuted. Ananeh-Firempong v. Immigration & Naturalization Service concluded that negative treatment of one's family is probative of a threat against the asylum applicant. The Sixth Circuit in Neli v. Ashcroft regarded one asylum-seeker's persecution to have included the murder of various members of his family. The Ninth Circuit surmised persecution in personal death threats which were compounded with the beatings of the applicant's parents, and murders of his political counterparts and also held a separate applicant to have suffered persecution on the grounds that she had witnessed the torture and murder of her sister. Finally, the BIA considered the extreme persecution of one applicant's father in deciding his individual's case. The courts showed signs of constricting familial extension of asylum eligibility in cases such as Ciorba v. Ashcroft and Akhtar v. Gonzales, but such cases are distinguishable because the applicant's claim of persecution was entirely unrelated to the family member who had been harmed; there was no indication that the applicant would be targeted as a result of, or for the same reasons as, the persecuted family member. Forcible abortion and sterilization cases, in contrast, consistently demonstrate that the couple is targeted jointly.

Familial extension of asylum eligibility to parents who fear their child will be subjected to FGM, thus, is analogous to the extension of asylum eligibility to spouses of individuals who have undergone forcible abortions. In June 2008, the Second Circuit analogized FGM, a continuing harm, to forced abortion or sterilization, thereby constituting continuing
The BIA affirmed the comparable nature of these two types of cases in its holding in In re Sillah, stating that its observations of the situation of this FGM case were consistent with its holding in In re Y-T-L-, a forcible sterilization case. Marcelle Rice's article, Protecting Parents: Why Mothers and Fathers who Oppose Female Genital Cutting Qualify for Asylum makes this connection as well, and acknowledges that the BIA drew analysis concerning familial persecution from the In re C-Y-Z- opinion to come to a decision in Abay. The author continued by reiterating that the legal theory of indirect political oppression experienced by a severely impacted family member in forcible abortion and sterilization cases parallel parent/child FGM cases.

Consequently, the In re C-Y-Z- court properly granted asylum eligibility to spouses of forcible abortions or sterilizations, because familial extension of persecution is widely accepted by this nation's courts, especially when the harm suffered is as severe as that experienced by FGM or forcible abortions or sterilizations.

3. The Legal Fiction of Persecution on Account of Political Opinion, Affirmed by In re C-Y-Z-'s Interpretation of 8 U.S.C. § 1101 (a)(42), is Analogous to Prior Jurisprudence in Asylum and Refugee Law

What the Lin majority failed to recognize, but was analyzed by Justices Katzmann, Sotomayor, and Calebresi, was that Congress created a legal fiction by enacting 8 U.S.C. § 1101 (a)(42), to allow asylum eligibility to victims of coercive birth control policies where Matter of Chang, was unable to find the persecution as a result of any of the protected grounds—race, religion, nationality, membership in a particular social group, or political opinion. Congress, accordingly, decided to create the legal fiction that a victim of coercive birth control policy is persecuted on the grounds of their political opinion. Congress found this necessary because of
the sheer atrocity of the act of forcible abortion or sterilization. News of forcible abortions and sterilizations, violating fundamental rights, shocked Congress enough to cause them to act. Congress found these violations to be so severe as to require Asylum Officers and Immigration Judges to take notice and provide relief to these victims, despite the fact that courts were unable to construe these victims as fitting into the Statute, as it read at the time. Congress and the courts have referred to such procedures as "grotesque," "barbaric," and "one of the gravest crimes against women and children in all of human history." They found it necessary, then, to amend the statute to include one particular group of individuals. This is unprecedented in the Statute, as no other group has been specifically identified and subsequently included in §1101 of the Immigration and Nationality Act.

Again turning to prior jurisprudence arising from Female Genital Mutilation cases beginning with In re Fauziya Kasinga, a similar legal standard was constructed to allow asylum eligibility to victims of FGM despite the fact that they were seemingly not covered by race, religion, nationality, membership in a particular social group, or political opinion. However, courts still—as with Congressional findings for coercive birth control practices—found the practice devastating emotionally and physically to those who were subjected to it. Therefore, courts found victims of FGM could be granted asylum protection by declaring the victims to be members of a particular social group, a statutory ground on which courts are reluctant to grant asylum. Furthermore, when Matter of A-T- threatened to revoke asylum eligibility from women who had already suffered female genital mutilation, the Second Circuit refused to follow suit and various members of Congress and the legal community formally requested Attorney General Mukasey's review and reversal of the Board of Immigration Appeals'
opinion. The Attorney General subsequently decided to reverse and remand Matter of A-T-I.

Thus, the Lin court importantly and fundamentally misunderstood the intended effect of 8 U.S.C. § 1101 (a)(42). It was not to name those persons who could be granted asylum, but rather to lay out a rule that opposition to a coercive birth control policy is deemed to be a political opinion, and a forcible abortion or sterilization is persecution of such severity that it warrants asylum eligibility. This rule was enacted by Congress because of the reprehensible and atrocities nature of these acts, similar to the characterization of victims of FGM as fitting within the context of a particular social group and, similarly, allowing them asylum eligibility.

IV. Recommendations

Going forward, it is important for the courts understand the implications resulting from the Lin and Matter of J-S- decisions, both of which rejected per se spousal asylum eligibility. Neither In re C-Y-Z- nor In re S-L-L- intended to provide automatic, per se asylum eligibility in the same way that the Statute granted eligibility to one who had physically undergone a forcible abortion or sterilization. Rather, the applicant was still charged not only with proving his spouse had undergone such procedure, but also with proving his opposition to the spouse's abortion or sterilization. This contrasts with the burden of proof for asylum eligibility for the person who underwent one of the forcible procedures, in that they need not prove past persecution, having suffered the act itself constitutes an automatic finding of persecution. The individual who underwent the procedure only needs to prove that they were, in fact, subject to a forcible abortion or sterilization.
Thus, **Matter of J-S-** overruled **In re C-Y-Z-** and its progeny only to the extent that it granted *per se*, or automatic, eligibility to the spouses of persons who were victims of forcible abortions or sterilizations.\(^{222}\) **Matter of J-S-** emphasized that "this decision does not prevent the spouse of a person who has physically undergone a forced abortion or sterilization procedure from qualifying for political asylum under 601(a)'s "failure," "refusal," "other resistance," or "well-founded fear" provisions set forth above . . . . My decision holds only that spouses are not entitled to the same *per se* refugee status that section 601(a) expressly accords persons who have physically undergone forced abortion or sterilization procedures."\(^{223}\) **Lin** was opposed to a *per se* eligibility, due to the court's belief that it accorded an irrefutable presumption of refugee status to a new class of persons.\(^{224}\) In fact, a grant of asylum eligibility could be refuted by a finding that the spouse was not opposed to the forcible abortion or sterilization.\(^{225}\) **Lin** went on to say that **In re C-Y-Z-** absolved an applicant from the statutory burden of proving first, that they had a well-founded fear of persecution, and second, that the persecution occurred as a result of their political opinion.\(^{226}\) The first prong of this burden, a well-founded fear proven by past persecution,\(^{227}\) though, has not been eliminated, and **In re C-Y-Z-** actually added the necessity of showing that the applicant was indeed opposed to the forcible medical procedure performed on their spouse.\(^{228}\) The second prong, though, has been decidedly removed as a result of the Statute.\(^{229}\)

Additionally, **Lin**, along with **Matter of J-S-**, has insisted that an individual is eligible for asylum if they can prove "other resistance" to China's coercive family planning policies.\(^{230}\) Thus far, the courts' reading of other resistance has been rather narrow.\(^{231}\) Recently, however, the BIA accepted that the removal of a forcibly inserted IUD may constitute other resistance to a coercive
birth control policy. Accordingly, the courts of appeals and the BIA should continue discourse regarding what acts or behaviors may constitute other resistance. 

Accepting the Matter of J-S- as binding, there are several paths for courts to explore. First, they can further analyze the other resistance clause to generate an innovative interpretation of "other resistance." Second, courts may apply the Chevron test to decide whether or not to give deference to the BIA in Matter of J-S-. Finally, this Comment recommends the creation of a set of factors that if met, will satisfy the Board of Immigration Appeals prohibition against per se asylum for spouses, the Second Circuit's worry that the applicant will have been relieved of his statutory burden, and the circuit courts need to comply with the intent of the Statute.

A. A Finding of Other Resistance Will Satisfy All the Courts

Board member Filippu, in In re C-Y-Z-, discussed the applicability of the "other resistance" clause issue by dividing the Statute's amendment into three parts and noting that the majority did not assert that the spouse of a coercive birth control policy victim falls under the first or third clause of the statute but rather depends on either those "who [have] been persecuted for failure or refusal to undergo" an abortion or sterilization "or for other resistance to a coercive population control program." In re S-L-L- agreed that Lin's recommendation would grant asylum eligibility on account of the spouse's resistance to the family planning laws and that the resulting harm amounted to persecution. Accordingly, if the factfinder determines that the applicant has credibly and persuasively testified that he has engaged in some behavior that can be classified as other resistance to the coercive family planning policies of his home country, he will be eligible for asylum. Matter of J-S- clarifies that the applicant must establish that 1) they resisted China's family planning policy, 2) they were persecuted, and 3) the persecution was
or would be because of the respondent's resistance to the policy.\textsuperscript{243} A spouse qualifies under the first part of the Matter of J-S- test when they resist the family planning policy, the second part is fulfilled when their partner suffers forcible abortion or sterilization, and the third part is met because their partner endured the procedure as a result of their having been pregnant or having born children in excess of the Government's allowance.\textsuperscript{244}

As discussed above, a person who has been subjected to forcible abortion or sterilization's political opinion is imputed to them on account of having been victimized.\textsuperscript{245} Their political opinion could likewise be imputed to them by the Chinese Government by virtue of being pregnant or having born children in excess of the allowance from birth planning officials.\textsuperscript{246} Desir v. Ilchert first noted that "[t]he relationship between victim and persecutor is especially significant in situations where the petitioner may not have overtly given any expression to his opinions, but because of particular acts or circumstances, certain opinions are attributed to him. In several cases we have recognized that such decisions or acts, when sufficiently conscious and deliberate on the part of the petitioner, may support a claim of well-founded fear on account of political opinion."\textsuperscript{247} In the situation of China's birth control policies, one who has engaged in conscious and deliberate reproductive acts, leading to the violation of such policies, necessarily has resistance to such policies attributed to them, especially because the results of these acts—pregnancy and childbirth without the Government's permission—are easily perceivable to the persecutors.\textsuperscript{248} Thus, both members of the couple have engaged in "other resistance to a coercive population control program" by engaging in acts of reproduction.\textsuperscript{249}
B. Whether *Chevron* Deference to *Matter of J-S-* May Compel A Finding of Unreasonableness

In conducting the *Chevron* test with regards to the Attorney General opinion *Matter of J-S-*, the courts should find that the statute is ambiguous and continue on to step-two. In light of the preceding arguments, the second step, though, may give way to the conclusion of an unreasonable interpretation, at which point the courts may continue to follow prior precedent and are not required to give any deference to *Matter of J-S-*. Furthermore, *Matter of J-S-’s* departure from corresponding FGM precedent could plausibly lead to an additional finding of unreasonableness. In such a situation, the courts of appeals may allow the grant of per se asylum eligibility upon their own reading of 8 U.S.C. § 1101 (a)(42).

C. Factors to Determine Spousal Asylum Eligibility

The Board of Immigration Appeals and the respective courts of appeals have a viable compromise by implementing a test for certain factors to determine spousal asylum eligibility. An appropriate test would include a demonstration that 1) the spouse did indeed oppose the forcible abortion or sterilization of their partner, 2) the spouse was significantly harmed as a result of the procedure their spouse underwent, either by proving that they suffered psychological or sympathetic harm, and 3) the spouse fled to the United States for the express purpose of escaping China's coercive family planning policies. A showing that there was an intention of bringing the spouse, who the asylum claim was based upon, while not dispositive, would further strengthen the case of the applicant.
V. Conclusion

In re C-Y-Z-, and the subsequent analysis in In re S-L-L-, provided sufficient and persuasive analysis of the 1996 statutory amendment to the Immigration and Nationality Act. The BIA accurately applied Congress' full intent in providing asylum eligibility to spouses of those who had undergone forcible abortions or sterilizations.\textsuperscript{260} The IIRIRA Amendment was a plain attempt to provide refuge to victims of a reprehensible and atrocious policy that has victimized millions.\textsuperscript{261} The United States, in addition to giving full recognition to its humanitarian goals\textsuperscript{262} in the enactment of domestic immigration policy, must take affirmative action\textsuperscript{263} so as to condemn these practices and demonstrate our nation's general disapproval to any policies that are implemented at the expense of individual human rights.\textsuperscript{264} Nevertheless, it is possible to circumvent the adverse authority that arose from the Lin decision and the Matter of J-S- opinion, in order to continue to pursue these important domestic and international goals.

The courts have realized in the past, and should continue to accept, that an asylum applicant whose spouse has been subjected to a forcible abortion or sterilization has himself suffered persecution. Persecution may be non-violent, and can be comprised of psychological or economic harm, both of which are present in these cases. Furthermore, asylum cases have repeatedly granted the extension of asylum eligibility and other forms of relief to parents whose children face the prospect of FGM, on the basis that they will suffer extreme sympathetic suffering as a result of the severity of the harm that their child will suffer. Courts, too, have pointed out that this is analogous to the extension of asylum eligibility to spouses whose partners have been forced to undergo these medical procedures. Finally, the extreme nature of forcible abortion or sterilization, which caused Congress to enact an amendment explicitly granting relief
on this ground, corresponds to the courts’ characterization of FGM victims in a section of case law that has historically been narrow and restrictive, because the acts committed were simply too brutal to ignore.

To most effectively resolve this issue, the Supreme Court could opine on the issue, but even more to the point, Congress should clarify the purpose of the amendment as it was intended and drafted in 1996. Until that is done, though, the Board of Immigration Appeals and the circuit courts should not be discouraged from continuing to analyze the statute and the relevant case law to make case-by-case determinations on whether a particular spouse is eligible for asylum on the grounds of their partner's forcible abortion or sterilization. A new test, which would fit within the bounds of all prior jurisprudence, could resolve the tension among the circuits, and within the Board of Immigration Appeals precedent, by requiring a showing that the spouse did indeed oppose the forcible abortion or sterilization of their partner, that the spouse was significantly harmed as a result of the procedure their spouse underwent, and that the spouse left their country with the conscious intention of escaping China's coercive family planning policies.

* Emma Lazarus, 1883.

1 Michael Weisskopf, One Couple One Child, Second of Three Articles Abortion Policy Tears at China's Society, Wash. Post, Jan. 7, 1985, at A1 (compiling information from over two–hundred interviews, over three years, with officials, doctors, peasants, and workers).

Child Policy. 4 Seton Hall Cir. Rev. 409, 437–43 (2008) (recommending that spouses of individuals victimized by coercive birth control policies be eligible for asylum given the family reunification goals of domestic immigration policy). Second, it pledges to admit workers with specific skills and to fill positions in occupations deemed to be experiencing labor shortages. Immigration Policy in the United States. Third, the policy attempts to provide refuge to those persecuted on certain grounds in their home country. Id. Finally, it promises to ensure diversity by providing admission to people from countries with historically low rates of immigration to the United States. Id.

3 Id.


5 While outside the scope of this Comment, there is ongoing discussion as to whether the proposed protections should be enjoyed only by partners to a legal marriage or similarly shared by parties to a traditional marriage, common law marriage, engagement, or a dedicated couple. See generally Yuan Rong Chen v. Gonzales, 457 F.3d 670 (7th Cir. 2006); Junshao Zhang v. Gonzalez, 434 F.3d 993 (7th Cir. 2006); Hao Zhu v. Gonzales, 465 F.3d 316 (7th Cir. 2006); Ru-Jian Zhang v. Ashcroft, 395 F.3d 531 (5th Cir. 2004); Cai Luan Chen v. Ashcroft, 381 F.3d 221 (3d Cir. 2004); Kui Rong Ma v. Ashcroft, 361 F.3d 553 (9th Cir. 2004); Megan C. Dempsey. A Misplaced Bright-Line Rule: Coercive Population Control in China and Asylum for Unmarried Partners, 92 Iowa L. Rev. 213 (2006); Erin Bergeson Hull, When is the Unmarried Partner of an Alien Who Has Been Forcibly Subjected to Abortion or Sterilization a "Spouse" for the Purpose of Asylum Eligibility? The Diverging Opinions of Ma v. Ashcroft and Chen v. Ashcroft, 2005 Utah L. Rev. 1021 (2005); Raina Nortick, Singled Out: A Proposal to Extend Asylum to the Unmarried Partners of Chinese Nationals Fleeing the One-Child Policy, 75 Fordham L. Rev. 2153 (2007); Katherine F. Riordan, Untitled, 41 Suffolk U. L. Rev. 983 (2008); Meredith M. Snyder, For Better or Worse: A Discussion of the BIA's Ambiguous C-Y-Z-Decision and its Legacy for Refugees of China's One Child Policy, 84 Wash. L. Rev. 1541 (2006). Additionally, there have been instances of parents, parents-in-law, and children who have attempted to gain asylum as a result the forcible abortion or sterilization of their daughter, daughter-in-law, or

Additionally, there has been recent discourse regarding whether or not the forcible insertion of a temporary birth control implant, an intrauterine device (IUD), constitutes persecution. This debate is, also, outside the scope of this Comment. See generally Chao Qun Jiang v. Bureau of Citizenship and Immigration Services, 520 F.3d 132 (2d Cir. 2008); Matter of J-S-, 24 I. & N. Dec 520, Interim Decision 3611 (B.I.A. 2008); Ying Zheng v. Gonzalez, 497 F.3d 201 (2d Cir. 2007); Li Fang Lin v. Mukasey, 517 F.3d 685 (4th Cir. 2008).

Compare Sun Wen Chen v. Att'y Gen., 491 F.3d 100 (3d Cir. 2007) and Chen Lin-Jian v. Gonzalez, 489 F.3d 182 (4th Cir. 2007) and Junshao Zhang v. Gonzalez, 434 F.3d at 993 and Hong Zhang Cao v. Gonzales, 442 F.3d 657 (8th Cir. 2006) and Jiu Shu Wang v. U.S. Att'y Gen., 152 F. App'x at 761 and Mei Guan Lin v. Ashcroft, 371 F.3d 18 (1st Cir. 2004) and Guang Hua Huang v. Ashcroft, 113 Fed. App'x 695 (6th Cir. 2004) (unpublished opinion) and Gong Fu Li v. Ashcroft, 82 Fed. App'x 357 (5th Cir. 2003) (unpublished per curiam opinion) and Wang He v. Ashcroft, 328 F.3d 593 (9th Cir. 2003) and Ke Zhen Zhao v. U.S. Dep't of Justice, 265 F.3d 83 (2d Cir. 2001) (demonstrating cumulatively that the First, Second (previously), Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits have deferred to the BIA interpretation that asylum eligibility based on coercive birth control encompasses the spouse of an individual who has undergone forcible abortion or sterilization) with Cai Luan Chen v. Ashcroft, 381 F.3d at 221 (questioning, but ultimately validating, the BIA interpretation despite vigorous dissent) and Shi Liang Lin v. U. S. Dep't of Justice, 494 F.3d 296 (2nd Cir. 2007) (declining to defer to the BIA interpretation, overruling previous Second Circuit jurisprudence, and holding that the spouse of a victim of forcible abortion or sterilization is not a victim of past persecution on account of political opinion and, therefore, not per se eligible for asylum). See also Matter of J-S-, 24 I. & N. Dec. at 522, Interim Decision 3611 (acknowledging the circuit split created by the Shi Liang Lin ruling, conflicting with the other courts of appeals who had deferred to the Board of Immigration Appeals' interpretation).

The majority of cases, including those analyzed in this Comment, have specifically dealt with a female having been victimized by forcible abortion or sterilization. However, as sterilization is also a threat to a male, and is occasionally performed, the argument applies equally to a wife whose husband has been sterilized and is seeking asylum in the United States. See Shi Liang Lin, 494 F.3d at n. 5 ("While here, as throughout the opinion, we refer to
a male petitioner with a wife or girlfriend who has been forced to undergo an abortion or sterilization, our reasoning
applies with equal force to the perhaps more uncommon situation in which a female petitioner's male spouse or
boyfriend has been forced to undergo sterilization.

9 See infra note 264.
10 See infra Part III.A.
11 See infra Part III.C.
12 See infra Part IV (providing recommendations for how courts may properly allow grants of asylum eligibility to
individuals whose spouses have undergone forcible abortions or sterilizations).
13 See infra Part III.A.
14 494 F.3d 296. See infra Part II.D.
16 21 I. & N. Dec. 915, Interim Decision 3319 (B.I.A. 1997) (deciding a case where the applicant was the husband of
a woman who was forcibly sterilized). See infra Part II.C.
17 See also In re S-L-L-, 24 I. & N. Dec. 1, Interim Decision 3541 (B.I.A. 2006) (affirming and clarifying the In re
C-Y-Z- holding).
18 See infra Part IV.C.
19 See id.
21 See Shi Liang Lin, 494 F.3d at 323 (Katzmann, Sotomayor, Calabresi, J.J., concurring) ("There are obscure areas
of public policy, largely hidden from public attention and concern . . . . Immigration is hardly one of those areas. To
the contrary, immigration—and the issues of the appropriate scope of asylum relief—have consistently been on
Congress's radar. Immigration is frequently in the news, and Congress has repeatedly legislated in this area. Indeed,
as recently as 2005, Congress revisited this very provision and removed the annual cap on the number of asylees
who could be admitted under it.").
22 See infra, Part IV.
23 See Shi Liang Lin, 494 F.3d at 316 n. 2 (Katzmann, Sotomayor, Calabresi, J.J., concurring) (observing that the majority opinion frustrated the BIA's uniform enforcement of a national immigration policy); see also Jian Jui Shao v. Bd. of Immigration Apps., 465 F.3d 497, 502 (2d Cir. 2006) (claiming that uniformity and adherence to BIA decisions is crucial in immigration cases, and suggesting that it is "unsound" for circuit courts to create conflicting precedent); Ramirez v. Immigration & Naturalization Serv., 32 F.3d 1085, 1091 (7th Cir. 1994) (advancing the importance of nationwide uniform immigration standards but noting that the BIA is bound to implement the law of the circuit in which the proceedings are held); Meredith M. Snyder, For Better or Worse: A Discussion of the BIA's Ambiguous C-Y-Z-Decision and its Legacy for Refugees of China's One Child Policy, 84 Wash. L. Rev. 1541 (2006) (recognizing the importance of uniform asylum law).

24 Official Name: People's Republic of China, U.S. Dep't of State, Background Note: China, available at http://www.state.gov/r/pa/ei/bgn/18902.htm. While current asylum jurisprudence has addressed primarily Chinese nationals, coercive population control policies have also been reported in Brazil, Costa Rica, Cuba, El Salvador, Guatemala, India, Indonesia, Morocco, Mexico, Peru, Scotland, Sri Lanka, South Africa, Thailand, Tibet, United Kingdom, Venezuela, and Vietnam, all of which could potentially provide grounds for asylum under 8 U.S.C. § 1101 (a)(42). Steven W. Mosher, Population Control: Real Costs, Illusory Benefits (Transaction Publishers 2008).


26 See id.; see also id. at 6 (citing a 1983 bulletin promoting the policy still in effect, stating: "Women with one child are required to have an IUD inserted. Couples with two or more children are required to have one partner sterilized. Women pregnant without official permission are required to have an abortion.").

27 Id. at 15–18.


29 See, e.g., Yi Qiang Yang v. U.S. Att’y Gen., 494 F.3d 1311 (11th Cir. 2007) (recognizing that the government forced an abortion approximately six months into pregnancy because the couple was below the legal age of marriage); Kui Rong Ma v. Ashcroft, 361 F.3d 553 (accepting that family planning officials seized applicant’s wife’s sixty–three year old father-in-law to compel her to have an abortion); Wenda Ge v. Ashcroft, 367 F.3d 1121 (9th Cir. 2004) (noting that after applicant’s wife became pregnant, the applicant was arrested, beaten, and placed in solitary confinement for three days), in addition to the numerous cases discussed throughout the Comment.

30 See infra note 183.


Id. ch. 6, art. 40.


36 See 8 C.F.R. § 208.13 (b) (explaining that an individual must first qualify as a refugee in order to gain asylum eligibility); see also Matter of J-S-, 24 I. & N. Dec. at 527, Interim Decision 3611 (confirming that "[a]n alien seeking political asylum in the United States must establish that he or she is a refugee").


39 20 I. & N. Dec. 30 (B.I.A. 1989) (holding that an asylum-seeker, the father of two children, who feared forcible sterilization upon return to China did not face persecution on account of one of the protected grounds—namely: race, religion, nationality, membership in a particular social group, or political opinion).


42 8 C.F.R. § 208.13 (b) (commenting that a victim of past persecution on any of the five protected grounds shall also be presumed to have a well-founded fear of future persecution on the basis of the original claim. This presumption can only be rebutted by a fundamental change in country conditions or evidence that the petitioner can relocate within their home country to avoid persecution.); see, e.g., Desir v. Ilchert, 840 F.2d 723, 729 (9th Cir. 1988) ("[P]ast persecution, without more, satisfies the requirement of § 101 (a)(42)(A), even independent of establishing a well-founded fear of future persecution. If an alien establishes eligibility for relief under section 208 (a), '[n]o further showing that he or she 'would be' persecuted is required.'").


45 See Ivanishvili v. U.S. Dep't of Justice, 433 F.3d 332, 340 (2d Cir. 2006) (conceding that the statute does not provide the meaning of "persecution").


48 See Zhen Hua Li v. Att'y Gen. of the United States, 400 F.3d 157 (3d Cir. 2005); Alfaro v. Immigration &
Naturalization Serv., 1997 U.S. App. LEXIS 2503 at *5 (9th Cir. 1997) (unpublished); Matter of Mogharrabi, 19 I.
& N. Dec 439 (B.I.A. 1987); Guevara Flores v. Immigration & Naturalization Serv., 786 F.2d 1242 (5th Cir. 1986);
see also Ivanishvili, 433 F.3d at 341 (defining persecution as "the infliction of suffering or harm upon those who
differ on the basis of a protected statutory ground").


50 Id. at 916.

51 Id.

52 Id.

53 Id.

54 Id.

55 Id.

56 Id. at 917.

57 Memorandum from the Immigration and Naturalization Serv., Asylum Based on Coercive Family Planning

58 Id. at 4.

(reaffirming and emphasizing that this is a mandatory regulatory presumption that cannot be dismissed); Shi Liang
Lin, 494 F.3d at 331 (Sotomayor, Pooler, J.J., concurring) (rebutting the Shi Liang Lin majority's claim that the
BIA's interpretation of 8 U.S.C. § 1101 (a)(42) eliminated the asylum-seeker's burden of establishing past
persecution).

60 Id. at 915.

61 Lin, 494 F.3d at 299.

62 Shi Liang Lin I v. U.S. Dep't of Justice, 416 F.3d 184, 187 (2d Cir. 2005).
63 Id. (emphasizing the necessity "because the BIA failed, in C-Y-Z-, to articulate a reasoned basis for making spouses eligible for asylum under the Statute").

64 24 I. & N. Dec. at 1.

65 Lin, 494 F.3d at 299.

66 Id. at 300 (explaining that the applicant was believed to have either returned to China or become deceased).

67 Id. (conceding that his case was remanded by the BIA to Immigration Court for further findings).

68 Shi Liang Lin I, 416 F.3d at 188.

69 Id.

70 Id.

71 Lin, 494 F.3d at 296.

72 See infra notes 69–74.


74 Lin, 494 F.3d at 296, cert. denied, Zhen Hua Dong v. Dep't of Justice, 128 S. Ct. 2472 (May 19, 2008) (No. 07–639).


76 Id.


78 Id.

79 Matter of J-S-, 24 I. & N. Dec. at n. 1, Interim Decision 3611; see also Associated Press, Court Ordered To Reconsider Asylum Case, Wash. Post, Sept. 23, 2008, at A7 (mentioning that in the past three years the Attorney General has weighed in on only three immigration cases). However, the Attorney General recently directed the BIA to refer a new case for his review. See Matter of R-A-, 4 I. & N. Dec. 629, Interim Decision 3624 (B.I.A. 2008).


81 In re C-Y-Z-, 21 I. & N. Dec. at 915, Interim Decision 3319. But see Lin, 494 F.3d at 303 (stating that "the BIA's interpretation of the statute [in In re C-Y-Z-] is incorrect").

82 24 I. & N. Dec. at 1, 8.
83 Lin, 494 F.3d at 301; see also In re C-Y-Z-, 21 I. & N. Dec. at 933, Interim Decision 3319 (Vacca, Bd. Member, dissenting) (reading the statute to include only those who have personally undergone forcible abortion or sterilization procedures).

84 416 F.3d at 192.

85 Lin, 494 F.3d at 305.

86 Id. But see 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things . . . ."); Francis J. Mcafferty, Statutory Construction: A Statement and Exposition of the General Rules of Statutory Construction § 20 (Central Book Company, Inc. 1953) (indicating that when necessary to give effect to the intention of Congress, words in the singular may be construed in the plural and vice versa).

87 See, e.g., In re S-L-L-, 24 I. & N. Dec. at 1, Interim Decision 3541 (elaborating on the extent of spouses' victimization); see also infra. Part III.C (interpreting the spouse of an individual as constituting a singular person who has suffered forcible abortion or sterilization because the spouses themselves are victims of psychological persecution and sympathetic suffering rising to the level of persecution. Accordingly, the Statute, even as read by the Lin, permits categorization of the spouse as a victim of forcible abortion or sterilization).


89 See supra note 87.

90 Lin, 494 F. 3d at 307. But see Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) (rejecting this form of statutory construction); Richard A. Posner, The Federal Courts: Crisis and Reform, 282 (Harvard University Press 1985) (noting that expressio unius est exclusio alterius, the canon used by Lin here, "is based on the assumption of legislative omniscience, because it would make sense if only all omissions in legislative drafting were deliberate").

91 In re S-L-L-, 24 I. & N. Dec. at 5, Interim Decision 3541 (contending that the lack of reference to spouses in the amendment does not preclude their asylum eligibility).

92 Lin, 494 F.3d at 318 (Katzmann, Sotomayor, Calabresi, J.J., concurring).

94 Lin, 494 F.3d at 310 (majority opinion) (insisting that the legislative history of 8 U.S.C. § 1101 (a)(42) supports their narrow interpretation of the Statute). But see infra 95–106.


97 See In re Y-T-L-, 23 I. & N. Dec. at 607 (reasoning that Congress spoke to its intent to allow spousal asylum eligibility by including the reference to Matter of G-). But see Matter of J-S-, 24 I. & N. Dec at n. 11, Interim Decision 3611 (contending that Matter of G- does not necessarily support spousal eligibility because the applicant was himself fearful of forcible sterilization).

98 44 F. 3d 379 (5th Cir. 1995) (explaining that the decision not to overturn the Immigration Judge's decision was due to the Matter of Chang precedent).

99 See Br. for Pet'r Zhang at 2, Chang Lian Zheng v. Immigration & Naturalization Serv., 44 F.3d 379 (5th Cir. 1995) (No. 94–40644).


101 H.R. Rep. No. 104–469, at 173–74 (emphasis added). The mention of couples in the House Report implies that Congress views both members of a couple as warranting protection from coercive family planning practices, as both are part of the decision-making process which results in the foundation of their family.

102 But see Lin, 494 F.3d at 311 (discussing legislative history but inaccurately applying the statement "Section [601 (a)] is not intended to protect persons who have not actually been subjected to coercive measures or specifically threatened such measures . . . " as foreclosing the option of asylum eligibility to spouses. This phrase, though, occurred directly after a discussion of smuggled aliens who may be "coached" into making coercive family planning claims, and referred to these "coached" aliens who did not have valid, credible claims, because they were never actually victimized by China's One Child Policy. Accordingly, this phrase did not concern application of asylum eligibility to spouses of individuals who had undergone forcible abortions or sterilizations.). Furthermore, the majority argued that the statement "the burden of proof remains on the applicant" proved the validity of their interpretation. However they failed to understand that the burden of proving that an individual's spouse has been subjected to forcible abortion or sterilization still falls on the petitioner; a broader interpretation does not include an
"automatic grant of asylum" as suggested by the court. Id. at 311–12. See e.g., Matt O'Connor, Fear of Sterilization Spurs Asylum Plea; Chinese Woman Tells Court of Forced Abortions, Chi. Tribune, Dec. 9, 2003 at Metro, Zone C, Pg. 1 (reporting that one woman produced documentation of her sterilization, for example, at her asylum hearing which could properly demonstrate that she was indeed a victim).


William P. Barr's January 1993 rule corrected the 1990 rule and stated that both conjugal partners who had been forced to undergo an involuntary abortion or sterilization were eligible for asylum. January 1993 Rule, § 208.13 (2)(ii), Att'y Gen. Order No. 1659–93. The publication of this rule was set for January 25, 1993 but was suspended by the inauguration of President Clinton, prohibiting the publication of new bills until approved by Agency heads. The new Acting Assistant Attorney General withdrew the Barr Rule and published the asylum regulations in 1993, without anything from the January 1993 rule. Guo Chun Di v. Carroll, 842 F.Supp. 858, 864 (E.D. Va. 1994). But cf. Matter of J-S-, 24 I. & N. Dec at 538–42, Interim Decision 3611 (discounting various examples of Congressional intent evidenced by legislative history and asserted in amicus curiae by drafters and sponsors of Section 601 of IIRIRA, Representative Chris Smith and Former Representative Henry Hyde).

105 In re S-L-L-, 24 I. & N. Dec. at 1, Interim Decision 3541 (concluding that Congress no longer desired the amendment have any restrictions); see also Lin, 494 F.3d at 323 (Katzmann, Sotomayor, Calabresi, J.J., concurring) (recounting that Congress revisited the statute in 1997 with the repeal of the 1,000 person cap to the statute and, in light of the BIA interpretation in In re C-Y-Z-, Congress did not amend the statute to preclude spouses of victims of forcible abortions or sterilizations from asylum eligibility); Kimberly Sicard, Section 601 of IIRIRA: A Long Road to a Resolution of United States Asylum Policy Regarding Coercive Methods of Population Control, 14 Geo. Immigr. L.J. 927, 940 (2000) (suggesting that a repeal of the 1,000 person cap would demonstrate "complete condemnation of China's human rights abuses in the area of population control"). But cf. In re C-Y-Z-, 21 I. & N. Dec. at 935–36, Interim Decision 3319 (Villageliu, Bd. Member, dissenting) (pointing to the 1,000 person limit as the reason for interpreting the amendment narrowly). Conversely, Board Member Villageliu's comment suggests that a repeal of the 1,000 person cap would lend itself to a broad interpretation.

106 See also Sun Wen Chen v. Att'y Gen. of the United States, 491 F.3d at 106 (maintaining that when Congress amended the statute to broaden asylum eligibility to include victims of coercive birth control policies, it was not likely they intended to also define the outer limits of this eligibility).

107 Chevron, 467 U.S. 837 (deciding whether a petitioner could file for review of an order of the Environmental Protection Agency).

paradigm shift that redefined the roles of courts and agencies when construing statutes over which agencies have been given interpretive rights); Thomas W. Merrill, Judicial Deference to Executive Precedent 101 Yale L.J. 969, 969 (1992) (explaining that the Courts' reasoning of the Chevron doctrine was that "Congress has implicitly delegated interpretative authority to all agencies charged with enforcing federal law"); see also Immigration & Naturalization Serv. v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999) (holding that decisions of the Board of Immigration Appeals construing the Immigration and Nationality Act are entitled to Chevron deference); Delgado v. Mukasey, 516 F.3d 65, 69 (2d Cir. 2008) (ruling that substantial deference shall be given to BIA decisions which interpret immigration regulations); Zhen Nan Lin v. U.S. Dep't of Justice, 459 F.3d 255 (2d Cir. 2006).

109 Chevron, 467 U.S. at 842.
110 Id.
111 Id. at 843–45, 866 (holding that "whenever Congress explicitly left a gap for the agency to fill, a court must proceed to step two and the agency's [interpretation] is given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." This is a test of reasonableness.).
112 Lin, 494 F.3d at 304.
113 Chevron, 467 U.S. at 842.
114 Id. at 308 (concluding that the statutory scheme unambiguously dictates that only those who personally suffered persecution would be eligible for asylum. They ultimately concluded that the sufferers of persecution were only the individuals who underwent forcible abortions or sterilizations, overlooking the fact that an individual may suffer persecution if these actions were committed against their spouse). But cf. id. at 329 (Sotomayor, Pooler, J.J., concurring) (disagreeing that there is absolutely no unambiguous language in the text of the statute). See also Martinez v. State, 24 S.W.3d 10 (Mo. Ct. App. E.D. 2000) (acknowledging the idea that a statute is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses).
115 Cai Luan Chen v. Ashcroft, 381 F.3d at 222, 224 (accepting the BIA's interpretation after analyzing its reasonableness in accord with the Chevron test).
116 Lin, 494 F.3d at 306 (majority opinion) ("[A]n examination of the overall statutory scheme reassures us that, pursuant to Chevron, we must conclude that Congress has clearly and unambiguously spoken to the issue at hand.").
See H.R. Rep. No. 104–469, at 173–74 (explaining that "there is much confusion about this provision" and subsequently attempting to shed some light on the statute, as discussed in Part III.A of this Comment).

See In re S-L-L-, 21 I. & N. Dec. at 8, Interim Decision 3541 (reiterating the "significant tensions inherent in the IIRIRA amendment" and noting that there is "no clear or obvious answer to the scope of the protections afforded" by the amendment while acknowledging that the statutory construction will be vulnerable to criticism no matter what conclusion is ultimately drawn); cf. In re C-Y-Z-, 21 I. & N. Dec. at 920, Interim Decision 3319 (Rosenberg, Bd. Member, concurring) (claiming that the statute clearly expresses the notion that spouses of persons who have undergone forcible abortions or sterilizations are considered eligible for asylum). But cf. id. at 933 (Vacca, Bd. Member, dissenting) (concluding that the statute clearly expresses the opposite notion that spouses of persons who have undergone forcible abortions or sterilizations are not to be considered eligible for asylum). See also Lin, 494 F.3d at 315 (Katzmann, Sotomayor, Calabresi, J.J., concurring) (reiterating the fact that both parties initially agreed that the statute was ambiguous); Lin, 494 F.3d at 329 (Sotomayor, Pooler, J.J., concurring) (expressing the ambiguity in the term persecution); Cai Luan Chen v. Ashcroft, 381 F.3d at 232 (speaking of Congress's inherent lack of clarity by leaving the term "persecution" undefined in the statute).

See also Merideth M. Snyder, For Better or Worse: A Discussion of the BIA's Ambiguous C-Y-Z- Decision and Its Legacy for Refugees of China's One Child Policy, 84 Wash. U. L. Rev. 1541, 1548 (commenting on the ambiguous nature of the statute).

See Lin, 494 F.3d at 316 (Katzmann, Sotomayor, Calabresi, J.J., concurring); see also id. (continuing on to say, "[w]hen a governmental body with substantial experience in interpreting a complex statutory scheme concludes that a statute is ambiguous, that determination should give us pause. Here, the fact that the BIA concluded that the INA is ambiguous with respect to the question we are called upon to answer suggests that we would do well to probe further, to consider whether the seemingly plain language belies a more complicated meaning. It suggests that we should consider carefully not only the text of the statute, but also the context—both the events that gave rise to that text and the various agency and judicial responses to it. Text without context can lead to confusion and misunderstanding. The majority's analysis is testament to that proposition.").

See Lin, 494 F.3d at 322 n. 11, 327 (expressing doubt in the majority's determination of an unambiguous Congressional intent, contending that the BIA is in a better position to interpret immigration laws occurring under
their mandate, and concluding that Congress' resulting ambiguities were left specifically to allow the BIA to interpret them. "In enacting the [Immigration and Nationality Act], Congress established a framework for determining when asylum relief should be provided to such individuals, and in doing so, it delegated considerable authority to the BIA to fill in statutory gaps and define the broad language used in the INA."); Lin, 494 F.3d at 329 (Sotomayor, Pooler, J.J., concurring) (claiming that the majority in Lin has usurped BIA's power in depriving them of the ability to interpret 8 U.S.C. § 1101 (a)(42)).

122 381 F.3d 221.

123 Id. at 222, 224 (allowing the applicant to contend that the statute is ambiguous and thus requiring review of the reasonableness of the BIA's interpretation).

124 See, e.g., Sun Wen Chen v. Att'y Gen. of the United States, 491 F.3d at 100; Junshao Zhang v. Gonzales, 434 F.3d at 1001; Guang Hua Huang v. Ashcroft, 113 Fed. App'x at 700; Gong Fu Li v. Ashcroft, 82 Fed. App'x at 358; Wang He v. Ashcroft, 328 F.3d at 604.

125 Matter of J-S-, 24 I. & N. Dec. at 531, Interim Decision 3611 (explicitly refusing to address whether Lin properly applied the Chevron doctrine to In re C-Y-Z-).

126 See also Stephanie M. Duda, Drawing the Interpretive Lines for Victims of Coercive Population Control: Why the Definition of "Refugee" Should Include Spouses of Individuals Fleeing China's One-Child Policy, 4 Seton Hall Cir. Rev. 409, 437–43 (2008) (arguing similarly that the Lin court erred in declining to defer to the BIA's interpretation of 8 U.S.C. § 1101 (a)(42)).

127 See infra notes 128–44.

128 See, e.g., Ouk v. Gonzalez, 464 F.3d 108 (1st Cir. 2006) (maintaining that "[u]nder the right set of circumstances a finding of past persecution might rest on a showing of psychological harm"); Ivanishvili, 433 F.3d at 341 (advancing the notion that non-physical forms of harm also rise to the level of persecution); Mashiri v. Ashcroft, 383 F.3d 1112, 1120 (9th Cir. 2004) (acknowledging that persecution may be emotional or psychological, including mental abuse). Kovac v. Immigration & Naturalization Serv., 407 F.2d 102, 105 (9th Cir. 1969) (holding that a showing of persecution requires a showing of harm and suffering, but is not required to be physical harm).

129 Kovac, 407 F.2d at 105 (discussing the 1965 amendment and observing this to be a clear demonstration of legislative intent to allow forms of persecution outside of physical violence to be valid claims for which asylum
should be granted); see also H.R. Rep. No. 89–745, 22 (1965) (asserting that "techniques of persecution are not limited to bodily violence alone"); 111 Cong. Rec., pt. 16 at 21586 (Aug. 24, 1965) (remarks of Congressman Feighan) (reiterating that "tyranny over the mind and spirit of a person has been demonstrated as more fearsome than the ancient methods of torture which characterized the Communist takeover of many countries of Central and East Europe").

130 Lin, 494 F.3d at 309 (majority opinion) (insisting that the court "do[es] not deny that an individual whose spouse undergoes, or is threatened with, a forced abortion or involuntary sterilization may suffer a profound emotional loss as a partner and a potential parent . . . " but refusing to give this any weight in the determination of spousal asylum eligibility). But see Lin 494 F.3d at 324 (Katzmann, Sotomayor, Calabresi, J.J., concurring) (noting that the majority did not elaborate on why the emotional and psychological harm suffered by a spouse whose partner has undergone abortion or sterilization is not severe enough to constitute persecution).

131 See infra notes 146–49.

132 See Forced Abortion and Sterilization in China: The View from the Inside: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the H. Comm. on Int'l Relations, 105th Cong. 49–740 (1998) [hereinafter Forced Abortion and Sterilization in China Hearing] (statement of Witness Ms. Gao Xiao Duan, Former Adm'r, Planned Birth Control Office, People's Republic of China) (recounting one incident where "I found a woman who was nine months pregnant, but did not have a birth-allowed certificate. According to the policy, she was forced to undergo an induced abortion. In the operating room, I saw the child's lips were moving and how its arms and legs were also moving. The doctor injected poison into its skull and the child died and it was thrown into the trash can. Afterwards the husband was holding his wife and crying loudly and saying, what kind of man am I? What kind of husband am I? I can't even protect my wife and child. Do you have any sort of humanity?"); Steven W. Mosher, A Mother's Ordeal: One Woman's Fight Against China's One-Child Policy (Harcourt Brace & Company 1993) (mentioning several instances where husbands suffered from the hardships their wives faced); Stephanie Simon, Changing Abortion's Pronoun, L.A. Times, Jan. 7, 2008, at Col. 1 (describing the emotional trauma suffered by several fathers whose children were aborted); Jeffery M. Leving, Abortion: When Fathers Can't Protect Their Children, Inside Journal- Chicago, IL, Feb. 2003, available at http://www.dadsrights.com/ed10.html (discussing the anguish endured by men when their partners undergo an abortion). But cf. Yueh-Ting Lee et al., Cross-cultural
Research on Euthanasia and Abortion, 52 J. Soc. Issues 131, 144–45 (1996) (finding that, as a result of socio-cultural differences, Chinese view voluntary abortion and infanticide with less disfavor than Americans).

See infra notes 145–61.

407 F.2d at 102.

Id.

Id. at 104.

Id.

Id.

Id.

Id. at 106; see also Dunat v. Hurney, 297 F.2d 754 (3d Cir. 1961) (interpreting even the unamended "physical persecution" statute to allow economic sanctions so severe as to deprive a person of all means of earning a livelihood amount to physical persecution).


Berdo v. Immigration & Naturalization Serv., 432 F.2d 824 (6th Cir. 1970).


Compare Abay v. Ashcroft, infra note 163 (stating that a persecution determination can easily be made when the treatment feared by the applicant violates recognized standards of basic human rights) with Part V infra (noting that forcible abortion and sterilization violates internationally recognized standards of human rights). See generally H.R. Rep. No. 104–469, at 173–74 (1996) (mentioning the various economic harms inflicted on victims of coercive birth control policies including crippling fines, dismissal from employment, destruction of belongings, and demolition of housing); accord e.g., Sheryl Wudunn, Births Punished by Fine, Beating or Ruined Home, N.Y. Times Apr. 25, 1993, at Sec. 1, pg. 12, col. 5 (emphasizing that coercion of couples, in accordance with birth control policies, includes frequent incidents of beating, intimidation, ruination of home, theft of animals, and confiscation of harvest tools, on which many peasants rely for their livelihood); Steven W. Mosher, One Family, One Child: China's Brutal Birth Ban: For Chinese Women, It's Abortion or Sterilization, Wash. Post, Oct. 18, 1987, at D1 (reporting that one couple who violated the birth control policy, by going into hiding to avoid forcible abortion, was subject to a fine
equivalent to two years' salary while simultaneously receiving a wage reduction by two-thirds); Michael Weisskopf, One Couple One Child, Second of Three Articles Abortion Policy Tears at China's Society, Wash. Post, Jan. 7, 1985, at A1 (describing the tearing off of roofs and knocking down of walls by county birth control officials, as well as the firing of twenty women who refused sterilization surgery).

145 See infra notes 146–61.

146 Lin, 494 F.3d at 324 (Katzmann, Sotomayor, Calabresi, J.J., concurring) (contending that emotional and psychological harm is sufficient to rise to the level of persecution).

147 Id. at 330 (Sotomayor, Pooler, J.J., concurring).

148 399 F.3d 1195 (9th Cir. 2005).

149 Lin, 494 F.3d at 330; cf. Tamas-Mercea v. Reno, 222 F.3d 417 (7th Cir. 2000) (declaring that certainly having one's children forcibly kidnapped or killed rises to the level of persecution).


151 16 F.3d 329 (9th Cir. 1994).


153 In re S-L-L-, 24 I. & N. Dec. at 5, Interim Decision 3541 (accepting both spouses to be harmed, in the case of the forcible abortion or sterilization of one spouse, because the Chinese government is interfering with the private affairs of a married couple—recognized by Congress as one unit—and has profound impacts on both parties to the marriage); accord e.g., Junshao Zhang v. Gonzalez, 434 F.3d at 993 (holding that a husband whose wife was subject to a forcible abortion was likewise a victim because he was deprived of his unborn child and the ability to become a parent to that child); Jie Lin v. Ashcroft, 356 F.3d 1027, 1041 (9th Cir. 2004) (asserting that the forced sterilization, and thus persecution, of a wife could be imputed to the husband, "whose reproductive opportunities the law considers to be bound up with those of his wife").

154 399 F.3d 1195.

155 Id.

156 23 I. & N. Dec. at 601 (Pauley, Bd. Member, dissenting).

157 See supra notes 127–56.

158 See id.
See supra note 144.

See supra notes 144–56.

See generally Marcelle Rice, Protecting Parents: Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum, in Immigration Briefings No. 04–11, 1, 14 (Thompson West Nov. 2004) (responding to the allegation that judges are worried findings of non-physical forms of persecution will open the floodgates for asylum claims, by emphasizing that the refugee definition itself provides stable footing. "Persecution is nothing less than severe, and mere psychological discomfort does not rise to a sufficient level to meet it.").

See id. at 7 (reasoning that In re C-Y-Z- demonstrates the court's sophisticated understanding of harm causation in instances of indirect persecution); see also Sun Wen Chen v. Att'y Gen. of the United States, 491 F.3d at 108 (explaining that "the persecution of one spouse can be one of the most potent and cruel ways of hurting the other spouse"); Cai Luan Chen v. Ashcroft, 381 F.3d at 225–26 (acknowledging that an individual suffers emotional and sympathetic harm arising from their spouse's mistreatment and the infringement on their shared reproductive rights; stating that this harm rises to the level of persecution); In re C-Y-Z-, 21 I. & N. Dec. at 925, Interim Decision 3319 (Rosenberg, Bd. Member, concurring) (noting the invasiveness and excessiveness of the sanction imposed on one's spouse); see also supra note 129 Forced Abortion and Sterilization in China: The View from the Inside (indicating the sympathetic suffering exhibited by one spouse of a woman who was forced to submit to an abortion).

368 F.3d 634 (6th Cir. 2004).

See generally Abay, 368 F.3d at 638 (quoting In re Fauziya Kasinga, infra note 203) (explaining that "[f]emale genital mutilation, or FGM, is the collective name given to a series of surgical operations, involving the removal of some or all of the external genitalia, performed on girls and women primarily in Africa and Asia. Often performed under unsanitary conditions with highly rudimentary instruments, female genital mutilation is 'extremely painful,' 'permanently disfigures the female genitalia, exposes the girl or woman to the risk of serious, potentially life-threatening complications,' including 'bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus.' Female genital mutilation can result in the permanent loss of genital sensation in the victim and the consequent elimination of sexual pleasure").

See, e.g., Obazee v. Ashcroft, 79 Fed. App'x 914 (7th Cir. 2003) (unpublished) (affirming the legal theory that a parent can claim fear of persecution based only on harm faced by his or her child); Nwaokolo v. Ashcroft, 314 F.3d
303 (7th Cir. 2002) (admitting the contention that the risk of FGM to a child is relevant to a parent's asylum claim); Matter of Dibba, No. A73 541 857 at 2 (B.I.A. Nov. 23, 2001) (granting asylum to a Gambian mother and holding that allowing her child to be subjected to FGM would cause "mental suffering sufficient to constitute persecution"); Matter of Adeniji, No. A41 542 131 (oral decision) (U.S. Dep't of Justice, Immigration Court, York, Penn., Mar. 10, 1998) (granting application for withholding of removal to an alien father otherwise ineligible for asylum because his citizen daughters would be forced to return to Nigeria with him, where they would likely be subject to FGM despite their father's wishes); Matter of Oluloro, No. A72 147 491 (oral decision) (U.S. Dep't of Justice, Immigration Court, Seattle, Wash., Mar. 23, 1994) (granting suspension of deportation to an alien mother because of the risk that her American-born daughters would be subjected to FGM in Nigeria).

166 See generally Marcelle Rice, Protecting Parents: Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum, in Immigration Briefings No. 04–11 at 1.

167 Abay, 368 F.3d 634.

168 Id. at 640.

169 Id. at 642 (emphasis added).

170 Id. (concluding that having to witness her daughter undergo this forcible procedure would cause pain and suffering rising to the level of persecution).


172 Marcelle Rice, Protecting Parents: Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum, in Immigration Briefings No. 04–11 at 7 (citing Persecution of Family Members, Memorandum from Office of International Affairs, Asylum Division, (June 30, 1997) at 1) (referring to the INS memorandum, which declared that harm to an applicant's family member may constitute persecution and encouraging asylum officers to consider that "[a]n individual may suffer harm from the knowledge that another individual is harmed, particularly if that other individual is a family member. The harm may manifest itself as emotional pain from knowing that a loved one has been harmed. The harm may be intensified if the applicant feels that his or her status or actions led the persecutor to harm the family member and/or if the applicant witnessed the harm to the family member").

173 766 F.2d 621 (1st Cir. 1985).

174 Id.
175 85 F. App’x 433 (6th Cir. 2003).

176 Id.; see generally Hernandez-Ortiz v. Gonzalez, 496 F.3d 1042 (9th Cir. 2007) (examining the particular impacts on children who have witnessed abuse or violence against their family members).

177 Salazar-Paucar v. Immigration & Naturalization Serv., 281 F.3d 1069 (9th Cir. 2002), amended by 290 F.3d 964 (9th Cir. 2002).

178 Rodriguez-Matamoros v. Immigration & Naturalization Serv., 86 F.3d 158 (9th Cir. 1996); see also Ariaga-Barrientos v. Immigration & Naturalization Serv., 937 F.2d 411, 414 (9th Cir. 1991) (granting asylum based solely on violence directed against friends and family as the applicant himself had never suffered any particular instances of persecution).


180 323 F.3d 539 (7th Cir. 2003) (holding that an applicant "cannot rely solely on the persecution of [his] family members to qualify for asylum," unless the family member's political opinions have been imputed to the applicant).

181 406 F.3d 399 (6th Cir. 2005); see also Niang v. Gonzalez, 492 F.3d 505 (4th Cir. 2007) (misunderstanding the idea of indirect persecution and sympathetic suffering causing severe harm to the applicant in question, and thus overlooking the holding in Abay, but with sparse reasoning behind the decision. Moreover, the court was analyzing the requirements for a grant of withholding of removal in Niang, distinct from those of asylum in Abay.).

182 Id. (deciding that there was no reason that the individual has been or would be persecuted as a result of his familial membership).

183 See, e.g., Part II.B. In re C-Y-Z-; C. Shi Liang Lin v. U.S. Dep’t of Justice; D. Matter of J-S- (recounting the facts of these cases which included fines, threats, and intimidations against the couple as a joint entity); supra notes 25–31 (describing the joint targeting of couples); see also In re S-L-L-, 24 I. & N. Dec. at 7, Interim Decision 3541 (emphasizing different examples of couples being targeted by the Chinese Government as a single unit); Xue Yun Zhang v. Gonzalez, 408 F.3d 1239, 1945 (9th Cir. 2006) (illustrating coercive birth control policies as directed against both members of a couple).

184 Abay, 368 F.3d at 641 (evaluating the decision in In re C-Y-Z- as sufficiently analogous to the case at hand and quoting Board Member Rosenberg's concurrence regarding the impacts on the spouse of someone who has been victimized by coercive birth control policies); see also Cai Luan Chen v. Ashcroft, 381 F.3d at n. 9 (further
analogizing the tort of negligent infliction of emotional harm where Restatement (Second) of Torts § 436 allows recovery when members of the immediate family of a victim witness the infliction of harm).

185 Bah v. Mukasey, 529 F.3d 99 (2d Cir. 2008) (aff'd Matter of A-T- II, 24 I. & N. Dec. 17, Interim Decision 3622) (concerning three Guinean females who had undergone FGM in the past, with the court repeatedly noting the similarity between this type of persecution and forcible sterilizations); see also id. at 120 (Straub, C.J., concurring) (equating female genital mutilation to forced sterilization in that it is a continuing act of persecution that causes permanent deprivation).


188 Marcelle Rice, Protecting Parents: Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum, in Immigration Briefings No. 04–11 at 5.

189 See In re C-Y-Z-, 21 I. & N. Dec. at 933, Interim Decision 3319 (Vacca, Bd. Member, dissenting) (citing evidence in the record concerning the trauma and anguish the applicant faced by witnessing his wife being forced to submit to two invasive and potentially dangerous operations, which would have amounted to an emotional distress finding under tort law).

190 See also Junshao Zhang v, Gonzalez, 434 F.3d at 999 (recognizing that Congress intended to protect families against coercive birth control families); Kui Rong Ma v. Ashcroft, 361 F.3d at 559 (identifying the goal of Congress in amending the INA as being relief for couples); Lin, 494 F.3d at 329, 332 (Sotomayor, Pooler, J.J., concurring) (explaining that Congress never intended to "exclude harms 'not personally' suffered by the applicant" and revisiting cases where the BIA has explicitly identified applicants for asylum eligibility whose family members had been victims of extreme persecution).

191 Lin, 494 F.3d at 321 (Katzmann, Sotomayor, Calabresi, J.J., concurring) (explaining that the amendment only served to remove the requirement that an applicant show their own political opinion and the nexus that the persecution occurred on that account, not, as the majority finds, serving to provide an exhaustive list of those who could claim asylum relief).

192 Matter of Chang, 20 I. & N. Dec. at 43–44 (holding that the Chinese Government’s implementation of its family planning policies was not on its face persecutive and did not, by itself, create a well-founded fear of persecution on
account of one of the five grounds delineated in the act); Coercive Population Control in China: Before the
Subcomm. on Int’l Operations and Human Rights of the Comm. on Int’l Relations, 104th Cong. at 10 (testimony of
John S. Aird) (reiterating that "[n]one of these five categories quite fits the circumstances of refugees from the
Chinese program"); see also Lin, 494 F.3d at 320 (Katzmann, Sotomayor, Calabresi, J.J., concurring) (stating that
the House Committee Report concerning the enactment of the IIRIRA § 601 (a) amendment explicitly announced
Congress’ primary intent was to overturn Matter of Chang).

193 Black’s Law Dictionary (8th ed. 2004) (defining legal fiction as [a]n assumption that something is true even
though it may be untrue, made especially in judicial reasoning to alter how a legal rule operates; specifically, a
device by which a legal rule or institution is diverted from its original purpose to accomplish indirectly some other
object).

194 See In re C-Y-Z-, 21 I. & N. Dec. at 921, Interim Decision 3319 (Rosenberg, Bd. Member, concurring) ("The
scope of the definition at section 101 (a)(42)(A) has not been altered; rather, the amendment simply clarifies that
being forced to undergo such procedures or being otherwise harmed or punished for resisting the program is harm or
abuse on account of political opinion."); Lin, 494 F.3d at 324 (Katzmann, Sotomayor, Calabresi, J.J., concurring)
(indicating that the amendment also clarified the meaning of persecution as a result of one’s political opinion in
regards to coercive birth control policy cases).

195 H.R. Rep. No. 104–469, at 173–74 (characterizing the coercive birth control policy as causing the commission of
"undeniable and grotesque violations fundamental human rights").

196 Coercive Population Control in China: Before the Subcomm. on Int’l Operations and Human Rights of the
(stating that "the most shocking thing about forced abortions and sterilizations in China is not that they happen, but
that otherwise human societies such as the United States might forcibly return people who have managed to escape
from them").

Member, Rosenberg, concurring) (recognizing the statutory amendment’s deviation from established asylum
doctrine); In re A-T- I, 24 I. & N. Dec. 296, 299 (B.I.A. 2007) (commenting, in an FGM decision, that the forced
sterilization jurisprudence represents a departure from the "ordinarily applicable principles regarding asylum" law);
In re Y-T-L-, 23 I. & N. Dec. at 601 (noting the special nature of the persecution at issue in forcible abortion and sterilization cases).

198 See supra note 195.

199 Forced Abortion and Sterilization in China Hearing, at 5 (statement of Rep. Lantos, Member, Comm. on Int'l Relations).

200 1370 Cong. Rec. H7344 (June 30, 2008) (statement of Rep. Smith); see also Lin, 494 F.3d at 331 (Sotomayor, Pooler, J.J., concurring) (exclaiming the "special and egregious" nature of these forcible procedures).

201 See supra Part II.A.


204 See Karen Musalo, Ruminations on In re Kasinga; The Decision's Legacy, Immigr. & Nat'lity L. Rev., 289, 291 (1998) (identifying the Immigration Judge's decision that the applicant did not qualify for protection under the statute).

205 See, e.g., Bah v. Mukasey, 529 F.3d at 102, 111–12 (majority opinion) (reiterating the very serious nature of harm suffered by applicants in FGM cases and noting that it can cause psychologically debilitating consequences); id. at 124 (Straub, C.J., concurring) (characterizing female genital mutilation as a horrendous act of persecution with serious, life-long consequences); In re S-A-K- & H-A-H-, 24 I. & N. Dec. 464 (B.I.A. 2008) (stating that victims of FGM may qualify for discretionary grants of asylum based on the severity of the harm done to them); Abay v. Ashcroft, 368 F.3d at 642 (describing the practice of FGM as a form of physical torture causing grave and permanent harm); Press Release, U.S. Representative Zoe Lofgren, Reps. Lofgren and Conyers Call on Attorney General to Review Female Genital Mutilation Ruling (Jan. 30, 2008), available at http://cgrs.uchastings.edu/pdfs/DOC5-%20Lofgren%20and%20Conyers%20letter%20to%20A-G.pdf (exclaiming FGM to be a gross violation women's fundamental rights) (last visited Sept. 30, 2008).

206 In re Kasinga, 21 I. & N. Dec. at 365, Interim Decision 3278 (holding the applicant to be a member of a particular social group, which included young women of the Tchamba-Kunsuntu Tribe who have not undergone FGM and who oppose the practice).
See, e.g., Gomez-Benitez v. U.S. Att'y Gen., No. 07–13999, 2008 U.S. App. LEXIS 20305 (11th Cir. Sept. 22, 2008) (unpublished) (holding that "Honduran schoolboys who conscientiously refuse to join gangs" did not constitute members of a particular social group); Matter of Galdamez-Argueta, A99 474 574 (U.S. Dep't of Justice, Immigration Court, Newark, N.J., May 13, 2008) (on file with author) (determining that the separate claims of membership in a particular social group which was comprised of youth who opposed gangs was not sufficient to comprise a social group, while alternatively finding the same youth's religion warranted a grant of asylum); Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006) (declining to allow non-criminal informants against Colombian drug cartels to qualify for asylum eligibility on the basis of membership in a particular social group); Escobar v. Gonzales, 417 F.3d 363 (9th Cir. 2005) (rejecting a social group consisting of homeless children from the streets of Honduras); Fatin v. Immigration & Naturalization Serv., 12 F.3d 1233 (3d Cir. 1993) (holding that Iranian woman who opposed Iran's gender specific laws were not members of a particular social group); Gomez v. Immigration & Naturalization Serv., 947 F.2d 660 (2d Cir. 1991) (denying asylum eligibility for a woman who had been beaten and raped on five separate occasions by guerrillas because she was not a part of a qualifying particular social group under the INA); De Valle v. Immigration & Naturalization Serv., 901 F.2d 787 (9th Cir. 1990) (refusing to accept the family-members of deserters from Salvadoran military forces as a particular social group); Sanchez-Trujillo v. Immigration & Naturalization Serv., 801 F.2d 1571 (9th Cir. 1986) (concluding that young, urban, working-class, Salvadoran males who were opposed to military service, maintained political neutrality, and feared persecution on these bases did not constitute a cognizable social group). But see Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005) (ruling that all homosexuals are members of a particular social group warranting a grant of asylum eligibility).

207 See id. at 110 n. 14 (including thirty–four Congressmen who signed onto a letter to the Attorney General, Representatives Lofgren and Conyers, Senators Snowe and Levin, and New York City Bar President, Barry M. Kamins).

See supra note 191.

See, e.g., In re Y-T-L-, 23 I. & N. Dec. at 601 (explaining again that Congress intended to define forced abortion and sterilization as forms of persecution on account of political opinion).

See supra notes 189–96.

See Mohammed v. Gonzales, 400 F.3d 785, 799 n. 22 (9th Cir. 2005) (equating forced sterilization and female genital mutilation sufficiently to apply similar reasoning throughout the two types of cases); Bah v. Mukasey, 529 F.3d at 121 (Straub, C.J., concurring) (“[T]he fact that Congress specifically defined forced sterilization as persecution does nothing to meaningfully distinguish it from female genital mutilation, which, as set forth in the majority opinion, has been found to constitute persecution by the BIA and the vast majority of the courts of appeals,” and going on to explain that Congress only did so to explicitly overrule Matter of Chang, which was not necessary in FGM situations given the In re Kasinga precedent).


See In re C-Y-Z-, 21 I. & N. Dec. at 918, Interim Decision 3319 (finding that the applicant has established only asylum eligibility as opposed to an irrebuttable presumption of eligibility); see also Matter of Jianzhong Shi, A95 476 611 (Br. for Pet'r, 24) (on file with author) (noting the misinterpretation by the Lin court); Zen Hua Dong v. Mukasey, Supreme Court of the U.S. No. 07-639 (Pet. for Writ of Cert., 12 n. 2) (on file with author) (explaining the flawed reading of In re C-Y-Z- by the Lin Court, and pointing out that In re C-Y-Z- never advocated a grant of per se asylum eligibility). But see Matter of J-S-, 24 I. & N. Dec. at 522, Interim Decision 3611 (concluding that In re C-Y-Z- interprets U.S.C. § 1101 (a)(42) to confer per se refugee status to the spouses of persons who physically undergo forced abortion or sterilization procedures); Bah v. Mukasey, 529 F.3d at 119 n. 3 (construing Lin as having rejected the idea that spouses could obtain asylum solely on the forcible abortion or sterilization that occurred to their partner).

See 8 U.S.C. § 1158 (b)(B)(ii) (explaining that the testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration if the applicant satisfies the trier of fact that the applicant’s testimony is credible, persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee); see also 8 C.F.R. § 208.13 (a).
In re S-L-L-, 24 I. & N. Dec. at 4, Interim Decision 3541 (responding to the Second Circuit's request for clarification by stating that the holding is limited in scope to "applicant's who were, in fact opposed to a spouse's abortion or sterilization"); accord Sun Wen Chen v. Att'y Gen. of the United States, 491 F.3d at 108 (reiterating that In re S-L-L- made it clear that a spouse who could not prove opposition to the forcible abortion or sterilization of their partner would be denied asylum); see also In re C-Y-Z-, 21 I. & N. Dec. at 919, Interim Decision 3319 (clarifying that a well-founded fear of persecution stemming from past persecution can additionally be rebutted by a showing of substantially changed country conditions).

See Matter of X-P-T-, 21 I. & N. Dec. 634, Interim Decision 3299; see also Matter of M-F-W- & L-G-, 24 I. & N. Dec. 633, Interim Decision 3625 (B.I.A. 2008) (quoting Lin that "their political opinion exists de jure rather than as a matter of fact on which the applicant bears the burden of proof"); Matter of J-S-, 24 I. & N. Dec. at 527–28, Interim Decision 3611 (stating that if the applicant can show they underwent a forcible abortion or sterilization, they need not show why the persecution was perpetrated).

See 8 C.F.R. § 208.13 (a) (explaining that the Immigration Judge must make the normal credibility findings in favor of the asylum applicant for the matter to proceed).


Id. (emphasis added); see also id. at 527 (agreeing that a respondent may be able to qualify for asylum upon an appropriate factual showing of past persecution for some "other resistance" to a coercive population control program).

Lin, 494 F.3d at 308 (majority opinion) (decrying the critical defect of In re C-Y-Z-'s interpretation to be the creation of an "irrebuttable presumption of refugee status"). But see In re C-Y-Z-, 21 I. & N. Dec. at 915, Interim Decision 3319 (declaring that a sterilized applicant's showing of a well-founded fear cannot be rebutted by the fact that they cannot be sterilized again).

See Lin, 494 F.3d at 331 (Sotomayor, Pooler, J.J., concurring) (disclaiming the contention that In re C-Y-Z- granted an irrebuttable presumption, and continuing to explain that the burden of establishing that one qualifies under the expanded definition was not lowered).

Lin, 494 F.3d at 308 (majority opinion).
See Part II.A; In re C-Y-Z-, 21 I. & N. Dec. at 929, Interim Decision 3319 (Filppu, Bd. Member, concurring in part) (confirming that the finding of past persecution causes a regulatory presumption, "an automatic conclusion" of a well-founded fear of future persecution, completely independent of the amendment to 8 U.S.C. § 1101 (a)(42)).


See Part III.A (indicating the nature of the amendment's actual function). But see Lin, 494 F.3d at 309 (disapproving of Judge Katzmann and Sotomayor's characterization of the nexus prong as having been removed by the statute, and quizzically challenging that the nexus requirement was removed only for the first half of the statute, those who actually endured forcible abortions or sterilizations, while not applying to the second half of the statute, those who suffered persecution on account of resistance). What, purpose then would the second half of the statute serve?


See In re C-Y-Z-, 24 I. & N. Dec. at 10, Interim Decision 3319 (stating that other resistance "can cover a wide range of circumstances, including expressions of general opposition, attempts to interfere with enforcement of government policy in particular cases, and other forms of resistance to the family planning law"). But see Yi Qiang Yang v. U.S. Att'y Gen., 494 F.3d at 1311 (deciding a case where the boyfriend of a pregnant woman went to the clinic to free his girlfriend from a forced abortion and when there, beat the officials with a broom, but was unable to establish "other resistance" because the persecution was not necessarily committed as a result of his resistance).

Matter of M-F-W- & L-G-, 24 I. & N. Dec. at 638, Interim Decision 3625 ("[W]e believe that the reference to 'other resistance' must be assessed against the failures or refusals to comply with official demands to adhere to birth planning policies."); see also Yun Jun Cao v. Att'y Gen. of the United States, 407 F.3d 146, 153 (3d Cir. 2005) (ruling that writing an article critical of population control practices and exposing the practice of infanticide constitutes other resistance to coercive birth control policies).

See Part IV.C.

Id.

See Part III.B (describing the Chevron two-step test).

See Part IV.E.
In re C-Y-Z-, 21 I. & N. Dec. at 927, Interim Decision 3319 (“In essence, the new statutory language directs a finding of refugee status for any person: 1) who previously was subjected to coercive population control procedures (abortion or sterilization); 2) who previously was persecuted for resistance either to such a procedure or to a coercive program; or 3) who currently has a well-founded fear of being forced to undergo an abortion or sterilization or of being persecuted for resisting such measures.”). Outside of the other resistance argument, the previous assertions of spousal asylum eligibility presented in this Comment would permit applicants to be categorized under the first part of Board Member Filppu's analysis.

Id. at 928 (emphasis added).

Lin, 494 F.3d at 302.


See supra note 218.

See generally Tyrene White, China's Longest Campaign: Birth Planning in the People's Republic, 1949–2005, at 11 (defining resistance against China's One Child Policy, outside of the statutory context, to be "any action intended to thwart, deflect, or defeat the state's claims over childbearing behavior . . . including not only overt, collective, and organized acts and behaviors, but an entire world of covert, individual, and spontaneous gestures that may or may not succeed in their purpose or even appear to be resistance"); id. at 172 (classifying resistance to birth planning into five basic types: evasion, collusion, cover-up, confrontation, and accommodation, and discussing what each type of resistance entails).


See supra notes 230–33, 245–49 (all discussing what an appropriate showing of resistance may entail).

See Lin, 494 F.3d at 324 (Katzmann, Sotomayor, Calabresi, J.J., concurring) (explaining that the amendment also allows the presumption that the harm experienced by coercive birth control policies automatically rises to the level of persecution); In re C-Y-Z-, 21 I. & N. Dec. at 922, Interim Decision 3319 (Rosenberg, Bd. Member, concurring) (declaring that one who opposes coercive birth control policies, on whatever grounds, holds a political opinion); Part III.C (explaining the legal fiction created by the Statute and how their political opinion is imputed to the applicant); supra note 220.
Desir v. Ilchert, 840 F.2d at 723 (enunciating a foundational imputation argument that because the applicant refused to submit to his persecutors' demands, and because the persecuting party was organized around a common political opinion, the applicant could be presumed by his persecutors to hold a contrary political opinion, despite the fact that he may have refused to submit to their demands for other reasons).

Id. at 728.

See Lin, 494 F.3d at 329–30 (Sotomayor, Pooler, J.J., concurring) (interpreting the harm to be directed at the "couple who dared to continue an unauthorized pregnancy" with the hopes of having a child); see also In re S-L-L-, 24 I. & N. Dec. at 14, Interim Decision 3541 (Filppu, Bd. Member, concurring in part) (providing a demonstration that the persecution must have been motivated as a result of the resistance). Board Member Filppu's interpretation would only make sense if the act of resistance was the conception of the child or the birth of a child without permission.

See In re C-Y-Z-, 21 I. & N. Dec. at 922, Interim Decision 3319 (Rosenberg, Bd. Member, concurring) (claiming that any non-compliance, or association with one who has refused to comply, with a compulsory governmental program may cause one's political opinions to be imputed); Lin, 494 F.3d at 329–30 (Sotomayor, Pooler, J.J., concurring) (extrapolating that the pursuit of pregnancy necessarily requires both spouses); See, e.g., United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 15–16, ¶¶ 56, 57, 59 (Geneva, 1992) (explaining that evidence of resistance to a law is regarded as a form of political opposition, which is frequently demonstrated by the imposition of disproportionately severe punishment. Furthermore, punishment for rebellion against such a law amounts to persecution within internationally recognized standards, because "it is possible for a law not to be in conformity with accepted human rights standards"). But compare In re S-L-L-, 24 I. & N. Dec. at 20, Interim Decision 3541 (stating that the mere act of impregnating one's girlfriend does not constitute an act of resistance because the pregnancy might have been unplanned or unwanted, despite the fact that the couple continued to pursue a pregnancy after being turned down for a birth permit) with In re S-L-L-, 24 I. & N. Dec. at 14, Interim Decision 3541 (Filppu, Bd. Member, concurring in part) (contending that a planned pregnancy could be viewed as an act of resistance).

See Part III.B (discussing the Statute's ambiguity).
251 See Shou Wei Jin v. Mukasey, No. 07–1717, 2008 WL 4570183 (Supplemental Appellate Br. for Pet'r) (7th Cir. Sept. 29, 2008) (contending that the Attorney General's decision in J-S- should be ruled "impermissible" by the courts and accorded no deference); see also John F. Duffy & Michael Herz, A Guide to Judicial and Political Review of Federal Agencies 93–96 (American Bar Association 2005) (detailing that "courts at step-two of Chevron evaluate whether the agency, in reaching its interpretation, reasoned from statutory premises in a well-considered fashion. Courts may look, for example, to whether the interpretation is supported by a reasonable explanation and is logically coherent. In this regard, the step-two inquiry tends to merge with review under the arbitrary and capricious standard." To meet this standard, the reviewed court must provide a permissible construction and engage in reasoned decision-making, utilizing clear logic).

252 Ke Zhen Zhao v. U.S. Dept' of Justice, 265 F.3d 83, 95 (2d Cir. 2001) (declaring that in certain instances, BIA decisions may be properly disregarded, when "application of agency standards in a plainly inconsistent manner across similar situations evinces such a lack of rationality as to be arbitrary and capricious").

253 See Auer v. Robins, 519 U.S. 452, 461 (1997) (holding that an interpretation that is "plainly erroneous or inconsistent with the regulation" is accorded no deference); see also supra note 111.

254 See Lin, 494 F.3d at 338 (Calabresi, J., dissenting in part) (stating that perhaps utilizing the per se rule best comports with congressional policy goals as pursued by 8 U.S.C. § 1101 (a)(42)); see also In re S-L-L-, 24 I. & N. Dec. at 14, Interim Decision 3541 (Pauley, Bd. Member, concurring) (asserting that notwithstanding his interpretation of the statute as not including asylum eligibility for spouses, he would nonetheless affirm the In re C-Y-Z- holding because of the extreme importance of stare decisis and the thousands of opinions that have been decided utilizing this precedent).

255 See Matter of J-S-, 24 I. & N. Dec. at 534, Interim Decision 3611 (reiterating the importance of a case-by-case analysis); Lin, 494 F.3d at 333, n. 8 (Sotomayor, Pooler, J.J, concurring) (encouraging an evaluation of asylum eligibility based on a totality of the circumstances review); In re C-Y-Z-, 21 I. & N. Dec. at 929, Interim Decision 3319 (Filppu, Bd. Member, concurring in part) (divining that this issue requires a more delicate analysis as opposed to a blanket rule covering all cases).

256 See supra notes 219, 224–25 (explaining that the courts are in general agreement that the applicant should be charged with proving his opposition to the forcible abortion or sterilization of his spouse); see also Matter of J-S-, 24
I. & N. Dec. at 534, Interim Decision 3611 (acknowledging that the per se rule would improperly grant asylum eligibility to applicants who affirmatively supported their spouse's forced abortion or sterilization procedure); In re C-Y-Z-, 21 I. & N. Dec. at 928–29, Interim Decision 3319 (Filppu, Bd. Member, concurring in part) (expressing concern that some applicants may have actually approved of the forcible abortion or sterilization of their spouse elaborating that "[f]or example, a couple may jointly want more children and oppose their government's efforts to restrict family size. In these circumstances, the sterilization of one spouse adversely affects both . . . . On the other hand, a particular husband might believe the family has enough children. He then might not oppose the family's compliance with a country's population control laws through his wife's sterilization, even though she may vigorously disagree.").

257 See Lin, 494 F.3d at 325 (Katzmann, Sotomayor, Calabresi, J.J., concurring) (explaining that there is no tension in providing derivative asylum status to spouses who have not themselves suffered harm while granting asylum eligibility to those who have suffered harm when their spouses were forced to submit to abortions or sterilizations); Id. at 329 (Sotomayor, Pooler, J.J., concurring) (citing the BIA's discussion of nexus and level of harm in In re S-L-L- by examining each spouse's health and emotional situation as well as the couple's interest in procreation and child-rearing); see also In re S-L-L-, 24 I. & N. Dec. at 14, Interim Decision 3541 (Pauley, Bd. Member, concurring) (articulating disdain in the majority opinion's grant of asylum eligibility to an individual who has suffered no harm on account of their spouse's forcible abortion or sterilization).

258 See, e.g., Bah v. Mukasey, 529 F.3d at 104 (majority opinion) (citing one FGM victim who came to the United States, to "live free from that barbarous act still in practice"); see generally Lin, 494 F.3d at 331 (Sotomayor, Pooler, J.J., concurring) (resisting the conclusion that all couples have the resources and capability to flee the country at the same time and reaffirming the contention that it is common for Chinese couples to separate in order for one spouse to go abroad and acquire the necessarily resources to later bring over the other spouse); In re C-Y-Z-, 21 I. & N. Dec. at 922, Interim Decision 3319 (Bd. Member, Rosenberg, concurring) (emphasizing that it is a well-known practice among numerous cultures for male family members to immigrate to a new country where they can "forge the way for the wife and children," who will later follow after the male has a place to live and a means to support the family); Matter of Jianzhong Shi, A95 476 611 (Br. for Pet'r, 25) (on file with author) (reflecting on the difficulty of both parties being able to flee China simultaneously).
See supra note 258; Junshao Zhang v. Gonzales, 434 F.3d at 1001 (noting that the subsequent break-up of a marriage or relationship would not preclude a finding of asylum eligibility. "Given the stress on a relationship that an involuntary abortion or sterilization would produce, it would be particularly perverse for courts to treat a subsequent break-up of a marriage as somehow lessening the impact of that persecution."). But see Lin, 494 F.3d at 312 (majority opinion) (disapproving of a rule that allows an applicant to receive asylum eligibility if they left their spouse behind without the intention of ever reuniting).

See In re S-L-L-, 24 I. & N. Dec. at 5, Interim Decision 3541 (indicating that the Congress meant to afford refugee status to persons whose fundamental human rights were violated); see also supra Part III.A.

See, e.g., Michael Weisskopf, One Couple One Child, Second of Three Articles Abortion Policy Tears at China's Society, Wash. Post, Jan. 7, 1985, at A1 (citing Ministry of Public Health Records reporting 53 million abortions, 31 million female sterilizations, and 9.3 million male sterilizations from 1979–1984); Stephen W. Mosher, Population Control: Real Costs, Illusory Benefits, at 75 (referencing Chinese statistics that abortions, sterilizations, and IUD insertions average more than thirty million per year. "Many, if not most, of these procedures were performed on women who submitted only under duress."); see generally Coercive Population Control in China: Before the Subcomm. on Int'l Operations and Human Rights of the Comm. on Int'l Relations, 104th Cong. at 15 (testimony of John S. Aird) (articulating the fact that the United States obviously cannot offer asylum to all the hundreds of millions of those subjected to persecution on account of coercive birth control policies, while also stating that it is unlikely we will ever be faced with that challenge, in that very few of the victims will ever have the chance of leaving China. "We are directly responsible, however, for what we do with those who arrive here. If we send them back without giving adequate consideration to their asylum claims, we make the U.S. Government an accomplice of the Chinese family planning program.").

Bah v. Mukasey, 529 F.3d at 111 (highlighting the fact that "Congress has entrusted the agency with the weighty and consequential task of granting safe harbor to the deserving of those who flee to this country for protection").

See, e.g., In re C-Y-Z-, 21 I. & N. Dec. at 936 n. 1, Interim Decision 3319 (Villageliu, Bd. Member, dissenting) (encouraging asylum adjudicators to give heightened consideration to Chinese applicants as a result of the Chinese Government's "atrocious human rights record").
See, e.g., In re C-Y-Z-, 21 I. & N. Dec. at 921, Interim Decision 3319 (Rosenberg, Bd. Member, concurring) ("The right to privacy, the right to have a family, the right to bodily integrity, and the right to unfettered reproductive choice are fundamental individual rights, recognized domestically and internationally."); Declaration of the Rights and Duties of Man, art. 5–7, Organization of American States (1948) (proclaiming the right to protection of the law against abusive attacks upon one's private and family life, the right to establish a family, the basic element of society, and to receive protection of the family, and the right of women, during pregnancy, to special protection, care and aid); Universal Declaration of Human Rights, art. 16(1), G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (Dec. 10, 1948) (stating that all individuals shall have the right to marry and found a family); International Covenant on Civil and Political Rights, art. 9, 17, 23, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. No. 16 at 52, U.N. Doc. A/6316 (1967) (ratified by the U.S. on Sept. 5, 1992) (maintaining the right to security of person, privacy, and a prohibition of interference with one's family or home, as well as an acknowledgement of the importance of the family as a fundamental societal unit subject to protection by the state, and the corresponding right to found a family).