Washington University Law Review

Volume 84 | Issue 6

January 2006

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

Meredith M. Snyder
Washington University School of Law

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

I. INTRODUCTION

The One Child Policy (the "Policy") is a system of laws under which China seeks to control its large population and national resources, often leading to extreme and tragic consequences.[1] Despite reports of improvements to the harsh Policy,[2] evidence suggests that Chinese nationals are still victimized by this coercive family planning strategy. Although China originally implemented the Policy to serve as a catalyst for social and economic development,[3] it has proven significantly less effective at igniting progress than the more liberal family planning schemes of other countries.[4]

In addition to China's stunted economic development, the Policy's severe rules and its often violent implementation have caused citizens to flee the country.[5] Many Chinese nationals hoping to escape the Policy come to the United States.[6] Historically, upon arrival victims have been found to be ineligible for asylum.[7] While the advent of recent legislation

---

1. *See China: Human Rights Violations and Coercion in One-Child Policy Enforcement: Hearing Before the H. Comm. On International Relations*, 108th Cong. 3 (2004) [hereinafter *Hearing*] (statement of Hon. Christopher H. Smith, Member, H. Comm. on International Relations) ("According to the State Department report . . . [the Policy has] caused an upwards of 500 suicides by women [daily].").

2. *See Hearing*, *supra* note 1, at 24 (statement of Asst. Sec. Dewey, Bureau of Population, Refugees, and Migration) (stating that innovations such as a hotline for reporting "abusive family planning practices" and the elimination of legislation requiring birth permits are encouraging).

3. *See* Gu Baochang, *Fertility: From the 1970s to 1990s*, *in* CHINA: THE MANY FACETS OF DEMOGRAPHIC CHANGE 69, 71 (Alice Goldstein & Wang Feng eds., 1996) ("The fundamental and explicit purpose of China's family planning programs has been to slow population growth so as to reduce its burden on the country and facilitate its modernization.").

4. *See Hearing*, *supra* note 1, at 10 (statement of Hon. Tom Lantos, Member, H. Comm. on International Relations) ("Developing countries that invest in health and education and enable women to make their own fertility choices have also registered faster economic growth than those that do not.").

5. According to the *2005 Yearbook of Immigration Statistics*, for example, in the 2005 fiscal year over 30,000 Chinese immigrants became naturalized U.S. citizens. See 2005 YEARBOOK OF IMMIGRATION STATISTICS 53, http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf. This figure only considers naturalized citizens, and thus excludes those who immigrate and never attain that coveted status.

6. *Id*.

7. For an example of one circuit's rationale for denying asylum eligibility, see *infra* notes 111–

provides asylum eligibility for those directly victimized under the Policy,[8] jurisdictions have split over the eligibility of these victims' spouses. Consequently, there is disagreement as to which Chinese citizens qualify as Policy victims for purposes of asylum eligibility.[9] Due to different interpretations of the legislation, circuits inconsistently grant or deny eligibility for asylum to these individuals.[10]

This inconsistency renders the legislation ineffective, especially as to those who are not legally married. While some circuits liberally grant eligibility to couples who have not participated in a legal marriage ceremony,[11] more restrictive jurisdictions limit eligibility to those couples whose marriages are legally acknowledged by the Chinese government.[12] Moreover, ambiguity also surrounds the eligibility of other family members.[13] The overall uncertainty regarding asylum eligibility renders recent legislation[14] ineffective by frustrating the legislature's intent to help Policy victims.[15]

The increased number of Chinese citizens driven to United States shores by the Policy forces courts to confront a cultural anomaly.[16] Due to the Policy's restrictions on the legal age of marriage,[17] many Chinese participate in traditional wedding ceremonies.[18] These ceremonies, while not legally recognized, enable younger individuals to establish their commitment to each other.[19] Determining the asylum eligibility of these couples forces American courts to confront the idea of the traditional, yet legally prohibited, marriage. To what extent will the United States recognize such unions?

This Note proposes a unified system of standards for determining which Chinese fleeing the Policy are granted eligibility for asylum.[20] By

---

20 and accompanying text.

8. *See infra* note 63.
9. *See infra* notes 87–120 and accompanying text.
10. *See infra* notes 87–120 and accompanying text.
11. *See infra* notes 87–110 and accompanying text.
12. *See infra* note 111 and accompanying text.
13. *See infra* notes 132–40 and accompanying text.
14. *See infra* note 63.
15. *See infra* note 109.
16. *See infra* note 90.
17. *See infra* note 32.
18. *See infra* note 90.
19. *See infra* note 90.
20. This Note is predominately concerned with the asylum eligibility of couples—those married traditionally, legally, and those not married at all. However, the eligibility of other family members such as parents will also be discussed briefly, as the policy reasons behind granting or denying their eligibility are analogous. Other types of relief such as the withholding of deportation and voluntary departure are beyond the scope of this Note. For definitions of these types of relief, see *infra* note 58.

granting traditionally married couples asylum eligibility, the United States combats the harsh age restrictions of the Policy,[21] while simultaneously considering issues of practicality.[22] In order to determine eligibility for traditionally married couples, courts should consider five factors: (1) whether the couple has any children; (2) the age of the applicants; (3) sworn testimony; (4) the presence of documentation denying the legal marriage or levying penalties for violations of the Policy; and (5) any other relevant concerns.[23] Part II of this Note discusses the history of the Policy and U.S. legislation aimed at combating its harsh implementation.[24] Part II also describes the incongruent rulings of American circuit courts on the asylum eligibility of those fleeing the Policy.[25] Part III analyzes the current state of the law, and Part IV proposes a set of uniform standards by which to assess the asylum eligibility of traditionally married couples and describes how these standards will further legislative intent.[26]

II. HISTORY

A. The History and Current Status of the Policy

The Policy was first implemented in 1979.[27] Although typically thought of as a clear-cut reaction to unmanageable overpopulation, it was actually the result of a complex combination of social and economic factors.[28] Throughout the Mao era, which is generally considered to date from the late 1940s to 1976, China's population grew at exponential rates as the government aimed to increase productivity by maintaining a large

---

21. *See infra* note 32.
22. *See infra* note 117.
23. *See infra* notes 181, 196 and accompanying text.
24. *See infra* notes 27–67 and accompanying text.
25. *See infra* notes 68–145 and accompanying text.
26. *See infra* notes 148–97 and accompanying text.
27. Alice Goldstein, *The Many Facets of Change and Their Interrelations, 1950–1990*, *in* CHINA: THE MANY FACETS OF DEMOGRAPHIC CHANGE 3 (Alice Goldstein & Wang Feng eds., 1996).
28. Wang Feng, *A Decade of the One-Child Policy: Achievements and Implications*, *in* CHINA: THE MANY FACETS OF DEMOGRAPHIC CHANGE, *supra* note 3, at 98 (citing Xinxia Zhang, *On the Background of the One Child Policy*, *in* COLLECTION OF RESEARCH MATERIALS ON THE SINGLE CHILD PROBLEM (Sociology Dep't, Beijing: Peking University ed. 1985)). Feng states:

> [P]olicymakers in Beijing had three reasons for launching the ambitious and, to many observers, inconceivable one-child per couple population policy: (1) an already huge population base of 1 billion by the end of the 1970s, (2) the shift of focus of the [Communist] Party's work from revolution to developing economy (modernization), and (3) the fact that a rapid fertility decline had already proved possible.

Id.

workforce.[29] However, as early as the 1950s, the government saw the large population as an impediment to economic development.[30]

Family planning strategies were first introduced in China in the late 1970s.[31] Rather than regulating births, these early programs encouraged couples to refrain from marriage until their mid-twenties.[32] By delaying marriage, the Chinese government hoped to lower the population and bolster economic development.[33]

When these early efforts proved ineffective, the Chinese government introduced the Policy in 1979.[34] Initially, the Policy was a system of rewards and punishments based upon the number of children in a family.[35] Unlike the earlier programs, the Policy was not concerned with the age of marriage, but instead focused solely on the number of children born to each family.[36]

While the Policy has been persistently enforced in China since its inception, it has evolved over time and varies throughout the nation.[37] For example, the Policy has *never* been applied uniformly to all citizens; its implementation has varied depending on factors such as the ethnicity of

---

29. *See* Kimberly Sicard, *Section 601 of IIRIRA: A Long Road to Resolution of United States Asylum Policy Regarding Coercive Methods of Population Control*, 14 GEO. IMMIGR. L.J. 927, 928 (2000) ("In the 1950s, the Communist leadership under Chairman Mao encouraged population growth because of the belief that a large population would help achieve production and construction goals . . . ."); *see also Leaders and Dictators: Mao Zedong*, http://www.time.com/time/time100/leaders/profile/mao.html (last visited Mar. 15, 2007) (describing Mao's reign).

30. Goldstein, *supra* note 27, at 7.

31. *Id.* ("Nationwide, strongly enforced family planning policies came into effect in 1970. National policy was summed up in the slogan *wan, xi, shao* (later, longer, fewer): late marriage, longer spacing between children, and fewer children.").

32. *Id.* at 8 (commenting that traditionally, women in China married at a young age). However, China's First Marriage Law set the mandatory ages for legal marriage at eighteen for women and twenty for men, while in 1981 the New Marriage Law raised these ages to twenty and twenty-two, respectively. *Id.*

33. *See* Goldstein, *supra* note 27, at 7. However, in the late 1970s, Chinese leaders became aware that the age structure meant that "the population would continue to grow . . . despite the [contemporary] family planning policy." *Id*. Because of the vast numbers of young Chinese, legislation mandating age of marriage was insufficient to curb the perceived overpopulation issue. *Id.*

34. *See* Goldstein, *supra* note 27.

35. *See id*. at 7. Goldstein explains that "[i]n January 1979 the [Policy] was launched with a series of rewards for those women who bore only one child, and punishments for women who had more than two." However, "in the ensuing years, punishments were also meted out to any woman who exceeded one birth." *Id.*

36. *See* Gu, *supra* note 3, at 74. According to Gu, "[t]he family planning program in China in the 1980s gave great attention to the number of children ever born per woman, but overlooked the timing of marriage and childbearing, particularly the first birth." *Id.* That is, the period immediately following the institution of the Policy was marked by "the shift of orientation from 'later, longer, fewer' to 'advocating one child per couple.'" *Id*.

37. Feng, *supra* note 28, at 101.

the couple.[38] Furthermore, the Policy's inconsistent application can also be attributed to the vast geographical diversity of China.[39]

Today, although its methods of implementation vary across China, the Policy is enforced by all levels of the government.[40] While there are claims that the Policy is enforced less stringently today,[41] reports of its harsh tenets and inhumane regulations persist.[42] Consequently, the United States continues to recognize that it must take a strong stance against the Policy.[43]

B. United States Asylum Procedure Overview

Any alien in the United States may apply for asylum.[44] The Attorney General has discretion to grant asylum if the alien is a "refugee" as defined by the Immigration and Nationality Act (the "INA").[45] While the INA *officially* vests this discretion with the Attorney General, immigration judges ("IJs") act for the Attorney General in evaluating the claims of

---

38. *Id.* Feng describes the inequitable application of the Policy: "From the start, exceptions were made, for example, for minority ethnic groups, remarried couples without their own children, and couples with retarded or handicapped children." *Id.*

39. *Id.* Feng gives an example of this fluctuation. "A major relaxation of [the Policy] occurred in 1984, when in many rural areas couples with only one female child were allowed to have a second birth, and in mountainous and extremely poor areas, all couples were allowed to have a second birth." *Id.* He also alludes to the variation in Policy implementation in different geographic areas: "Nevertheless, [the Policy] remains fully implemented in urban areas and, whenever possible, in rural areas." *Id.*

40. *See Hearing*, *supra* note 1, at 34 (statement of Harry Wu, Executive Director, Laogai Research Foundation) ("The [Policy] is a national policy mandated from the top level of the Chinese Communist Party Government, which holds all officials of every level and every work unit responsible for carrying out the [Policy], from the provincial government level to the tiniest of villages."); *see also* Gu, *supra* note 3, at 71 ("The program is endorsed by the national government as one of the nation's priorities and has its own hierarchical organization from the central level down to the village and the neighborhood community; . . . [it is] designed to raise the societal awareness of the urgency of population control.").

41. *See Hearing*, *supra* note 1, at 24.

42. *See id.* at 1–3 (statement of Hon. Christopher H. Smith) (discussing story of a woman who lost her job and was subject to physical abuse as a result of protesting the Policy).

43. *Id.* at 9 (statement of Hon. Tom Lantos).

44. Jiu Shu Wang v. U.S. Att'y Gen., 152 Fed. App'x 761, 767 (11th Cir. 2005).

45. *Id.* (citing 8 U.S.C. § 1101(a)(42)(A)). The INA defines "refugee" as:

> [A]ny 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.

8 U.S.C. § 1101(a)(42)(A) (2000).

refugees seeking asylum.[46] To establish asylum eligibility, the alien must establish (1) past persecution on the basis of a protected ground;[47] or (2) a well-founded fear of future persecution due to this protected ground.[48] The standard for persecution is high, and must surpass mere harassment.[49] The fear of persecution must also be both "subjectively genuine and objectively reasonable."[50] Furthermore, a showing of past persecution creates the presumption of a well-founded fear of future persecution.[51]

After an immigration judge (IJ) makes a determination on a case, the parties may appeal this decision to the Board of Immigration Appeals (BIA).[52] Due to the BIA's status as an administrative agency, its interpretations of immigration statutes are entitled to *Chevron* deference.[53] This deference requires courts to adhere to an agency's interpretation of statutes it administers if the statute is ambiguous and the agency's construction of it is permissible.[54]

C. Pre-IIRIRA Legislation and Case Law

Originally, under United States law, individuals fleeing the Policy had no claim for asylum eligibility.[55] The Immigration and Nationality Act (INA) and the subsequent Refugee Act of 1980 failed to protect this category of applicant in the statutory definition of "refugee."[56] Under the

---

46. Guang Run Yu v. Ashcroft, 364 F.3d 700, 702 (6th Cir. 2004) (citing 8 U.S.C. § 1158(a)–(b)).

47. Protected grounds include race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 U.S.C. § 1101(a)(42)(A)(2000). Furthermore, "the past persecution that [an applicant] has endured makes her *eligible* for asylum; the next question is whether she is *entitled* to asylum as a matter of discretion." Rodriguez-Matamoros v. INS, 86 F.3d 158, 161 (9th Cir. 1996).

48. *Wang*, 152 Fed. App'x at 768 (citing Sepulveda v. U.S. Att'y Gen., 401 F.3d 1226, 1230–31 (11th Cir. 2005)).

49. *Id*.

50. *Id*.

51. *Id.* (citing Al Najjar v. Ashcroft, 257 F.3d 1262, 1289 (11th Cir. 2001)).

52. *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 422 (1999).

53. Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984).

54. *Aguirre*, 526 U.S. at 424 (citing *Chevron*, 467 U.S. at 842). The *Aguirre* Court stated that *Chevron* deference applies to the BIA's interpretation of the Immigration and Nationality Act due to the Attorney General's discretion in enforcing the statute, the vesting of this discretion in the BIA, and the importance of maintaining the executive branch's authority in immigration issues. The Court stated that "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" *Aguirre*, 526 U.S. at 425, (citing INS v. Cardoza-Fonesca, 480 U.S. 421, 448–49 (1987)).

55. *See* Sicard, *supra* note 29, at 931 (citing Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in various sections of 8 U.S.C.)). This statute amended the INA and established the procedures for granting asylum to refugees. *Id.*

56. *See* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2000) [hereinafter INA]. Under this statute, "refugees" are those fleeing persecution on the grounds of race, religion,

INA, the BIA decided the seminal case *In re Chang* in 1989.[57] In this case, the BIA heard the appeal of a man whose application for asylum had been denied by an IJ.[58] The applicant testified that the Chinese government attempted to coerce his family to abide by the Policy, and that he was afraid to return to China due to this coercion.[59] Under these facts, the BIA dismissed the appeal for asylum.[60] The BIA concluded that the Policy was not facially "persecutive."[61] Because the Policy was not persecutive, the BIA ruled that asylum claims stemming from it were without merit.[62]

D. The IIRIRA and Case Law in its Wake

In 1996, with the passing of section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress amended the INA and expanded the category of individuals considered "refugees" to include those fleeing the Policy.[63] This legislation was enacted, in part,

---

nationality, political opinion, or membership in a social group. *Id.*; *see also supra* note 45.

57. *In re* Chang, 20 I. & N. Dec. 38 (BIA 1989) (denying asylum eligibility to individual whose application was based solely on his subjection to the Policy), *superseded by statute,* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 601, 110 Stat. 2009 (1996), *as recognized in In re* X-P-T, 21 I. & N. Dec. 634 (BIA 1996).

58. *Id.* at 39. The applicant in this case actually applied for asylum, withholding of deportation, and voluntary departure. *Id.* Asylum is a status sought by individuals already in the United States who have a well-founded fear of persecution by the government of their native country. Visalaw.com, The ABC's of Immigration—Immigration Terminology, Part I, http://www.visalaw.com/03aug1/2aug103.html (last visited Mar. 15, 2007). Withholding of deportation is similar to asylum. However, this form of relief is mandatory for qualified applicants, whereas asylum is discretionary. Relief from Deportation, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm01939.htm (last visited Mar. 15, 2007). Voluntary departure is an alternative to deportation. It allows aliens to return to their country of origin and "is preferable to a removal order." 8 Immigration Basics—Voluntary Departure, http://www.immigrationequality.org/manual_template.php?id=1062 (last visited Mar. 15, 2007). For purposes of this Note, only *Chang*'s discussion of asylum is relevant. *See supra* note 20.

59. *Chang*, 20 I. & N. Dec. at 39. The applicant testified "that he was afraid of persecution in China; . . . that he and his wife were forced to flee from their commune because . . . [they] did not agree to stop having more children . . . [and] that the 'government' wanted him to go to a clinic to be sterilized." *Id.*

60. *Id.* at 48.

61. *Id.* at 43. The BIA based this determination on the fact that the Policy is an effort to provide "for . . . [the] vast population in good years and in bad." *Id.* While the BIA admitted that the Policy could be implemented in more humane ways, it considered China's overpopulation and concluded that implementation of the Policy did not fall within the definition of "persecution" provided in the INA. *Id.* at 44.

62. *Id.* at 44.

63. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 601, 110 Stat. 3009-546 (1996) [hereinafter IIRIRA] (codified as amended at 8 U.S.C. § 1101(a)(42) (2000)). The statute provides:

> For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure to or refusal to undergo such a procedure or for other resistance to a coercive population control

to facilitate legal entries into the United States.[64] Many argue that by expanding the statutory definition of "refugee" to include victims of the Policy, the U.S. government took a definitive stand against the harsh Chinese laws.[65] However, the IIRIRA was merely the first step toward successfully addressing the needs of Chinese victims—the statute is fraught with ambiguity.[66] Consequently, judges across jurisdictions have struggled to determine which victims successfully qualify for asylum eligibility under the IIRIRA.[67]

In 1996, the BIA overruled *Chang* in light of the IIRIRA and extended asylum eligibility to those directly victimized by the Policy.[68] *In re X-P-T* marked this major turning point in BIA precedent.[69] In *X-P-T*, the IJ found that the applicant and her husband violated the Policy, and that the applicant's subsequent sterilization did not afford asylum eligibility for the applicant.[70] On appeal, the BIA held that the applicant[71] was eligible for asylum due to the amendments made by section 601 of the IIRIRA.[72]

> program, shall be deemed to have been persecuted on account of a political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

Id. IIRIRA's more expansive definition of refugee explicitly includes those fleeing the Policy "under the rubric of [the protected ground of] political opinion." Yuan Rong Chen v. Gonzales, 457 F.3d 670, 671–72 (7th Cir. 2006).

64. *See* H.R. REP. NO. 104-828, at 1 (1996) (Conf. Rep.).

65. *See* Sicard, *supra* note 29, at 940 (stating that the IIRIRA "resolved the debate" as to whether the U.S. government would "take a stand against human rights abuses in China").

66. The statutory terms "other resistance" and "well founded fear" of persecution in the IIRIRA have caused much debate in the courts. *Compare* Ru-Jian Zhang v. Aschroft, 395 F.3d 531, 532 (5th Cir. 2004) (holding that impregnating a girlfriend does not constitute "resistance"), *with* Xu Ming Li v. Ashcroft, 356 F.3d 1153, 1153 (9th Cir. 2004) (holding that a woman who "announced her opposition to government population control policies and [was] thereafter subjected to a forced gynecological exam and threatened with future abortion, sterilization of her boyfriend, and arrest" [had] demonstrated "other resistance"). *See also* Ai Feng Yuan v. U.S. Dep't of Justice, 416 F.3d 192, 198 (2d Cir. 2005) (holding that parents-in-law did not demonstrate a well-founded fear of persecution because all of the actions taken against them were efforts to force daughters-in-law to comply with the Policy, so it was unlikely they would be persecuted in the future).

67. *See infra* notes 74–84 and accompanying text.

68. *In re* X-P-T, 21 I. & N. Dec. 634 (BIA 1996). For the purposes of this Note, those "directly victimized" refers to women subjected to physical procedures or restraint by government officials enforcing the Policy. Other victims are those related to the women—such as partners, spouses, and family.

69. *Id*.

70. *Id.* The IJ found that the applicant and her husband violated the Policy by "having three children." As a consequence of this violation, the applicant was forcibly sterilized. *Id.* at 635.

71. It is important to note that *X-P-T* extends asylum eligibility only to the *applicant*, rather than to both the applicant and her husband.

72. *Id.* at 638 ("[A]s a result of the amendments made by section 601 of IIRIRA, that forcible sterilization is a basis for grants of asylum . . . . Section 601 thus supersedes our contrary ruling in *Matter of Chang*."). For the statutory text of IIRIRA's section 601, see *supra* note 63.

While this case established eligibility of those *directly* victimized by the Policy, it failed to answer the question of whether spouses are eligible for asylum.[73]

X-P-T left ambiguous the eligibility of indirectly victimized spouses for asylum under section 601 of the IIRIRA.[74] The BIA addressed this lingering question in 1997 in the case *In re C-Y-Z.*[75] The applicant for asylum in *C-Y-Z* claimed he was persecuted in China for his opposition to the Policy.[76] He stated that after the birth of his family's third child, his wife was forced to undergo sterilization.[77] The applicant testified that prior to this incident, authorities forced his wife to receive an intrauterine device, and after his protests, he was arrested.[78] Without giving a detailed rationale in its opinion, the majority determined that the applicant had established past persecution.[79] Due to the combination of this persecution and the absence of changed conditions in China, the BIA held that the applicant was eligible for asylum.[80] While the dissenting opinions argued that the majority stance neither furthered legislative intent nor was faithful to a narrow interpretation of section 601 of the IIRIRA,[81] the majority of the BIA did not address these contentions.[82] Instead, the majority focused

---

73. While *X-P-T* does not overtly deny the husband of the applicant eligibility, it fails to address the question. The BIA addresses only the applicant's victimization and asylum eligibility. It is not clear whether the husband also sought asylum.

74. *See supra* note 63.

75. *In re* C-Y-Z, 21 I. & N. Dec. 915 (BIA 1997).

76. *Id.* at 916.

77. *Id.*

78. *Id.* In addition to these incidents, the applicant further stated that after the birth of their second child his family was fined two thousand yuan, and that he paid this fine to avoid "having his house destroyed by birth control cadres." *Id.*

79. *Id.* at 918.

80. *Id.* at 919. The BIA stated: "Further, because of the regulatory presumption of a well-founded fear of future persecution that arises from a finding of past persecution and the absence of changed country conditions . . . the applicant has demonstrated statutory eligibility for asylum . . . ." *Id.* at 919–20.

While the majority opinion provides little rationale for its decision to extend eligibility to spouses, the concurring opinion states that "[i]t is not . . . unusual . . . that the applicant should be granted asylum although the harm experienced was not by him, but by a family member." *Id.* at 926 (Rosenberg, Board Member, concurring). The concurring opinion expounds upon this legal trend, explaining, "[i]t not only constitutes persecution for the asylum applicant to witness or experience the persecution of family members, but it serves to corroborate *his or her own fear of persecution*." *Id.* Through these quotations, the concurring opinion demonstrates that there is established precedent for the BIA's decision in *C-Y-Z.*

81. *See, e.g.*, *C-Y-Z*, 21 I. & N. Dec. at 933 (Vacca, Board Member, dissenting) ("If Congress had desired to include spouses of individuals who had been forced to undergo involuntary abortion or sterilization procedures, they would have done so expressly in the statute."); *see also id.* at 935 (Villageliu, Board Member, dissenting) ("A narrow reading of [IIRIRA's] section 601(a) does not support a grant of asylum to this applicant.").

82. The majority is concerned with the "presumption of a well-founded fear of future persecution

broadly on the applicant's established fear of persecution stemming from the abusive treatment he received at the hands of Policy enforcers.[83] The ambiguity of the majority's ruling has lead to inconsistent circuit court rulings as to which applicants are eligible for asylum.[84]

E. Circuit Court Disparity Following C-Y-Z

Due to the deference courts are required to pay to the BIA's interpretation of the INA,[85] the ambiguous *C-Y-Z* ruling is problematic. As American courts struggle to confront traditional, yet legally prohibited marriages and their place in asylum policy, the lack of rationale provided by the BIA in *C-Y-Z* as to its extension of eligibility to spouses leaves judges without direction when determining who is considered a spouse for eligibility purposes.[86]

1. The Permissive Circuits

In 2004, the Ninth Circuit addressed the legacy of ambiguity left by the BIA's *C-Y-Z* decision.[87] In *Kui Rong Ma v. Ashcroft*, the Ninth Circuit tackled the complex issue of how to craft asylum eligibility in a practical manner, without furthering Policy objectives.[88] In *Ma*, the applicant and his partner wanted to marry, but were prohibited from doing so by the government due to their ages.[89] Consequently, they partook in a traditional ceremony.[90] Soon after this wedding, the applicant's wife became

---

that arises from a finding of past persecution and the absence of changed country conditions." *Id*. at 919 (majority opinion).

83. *See supra* notes 77–78 and accompanying text.

84. *See* Ai Feng Yuan v. U.S. Dep't of Justice, 416 F.3d 192 (2d Cir. 2005) (commenting that in *C-Y-Z* the BIA never explained why it adopted its position).

85. *See supra* notes 53–54 and accompanying text.

86. *See supra* notes 74–84 and accompanying text for a discussion of the ambiguous *C-Y-Z* ruling.

87. Kui Rong Ma v. Ashcroft, 361 F.3d 553 (9th Cir. 2004). For a similar holding, see *Xue Yun Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005) (holding that restricting eligibility to legally married couples contravenes legislative intent and caters to the coercive provisions of the Policy).

88. *Ma*, 361 F.3d at 560. The Ninth Circuit explained that the conflict in *Ma* involved a situation in which "the early marriage prohibition is inextricably linked to the restrictions on childbirth." *Id*.

89. *Id*. at 555. As part of the coercive family planning practices in China, the government has established age restrictions on when couples may marry. The events of *Ma* occurred under the New Marriage Law, so the applicant could not enter into a legally recognized union until age twenty-two, and his partner could not legally marry until she was twenty. When the events of the case commenced, the applicant was nineteen, and his partner was twenty-one. *Id*.

90. *Id*. A traditional Chinese wedding ceremony often serves as a proxy for legal union for couples who are prohibited from marrying by the New Marriage Law. *See* Xiao Lan Zheng v. Ashcroft, 382 F.3d 993, 995 (3d Cir. 2004) ("[The couple in that case was] one year shy of the legal

pregnant.[91] When the authorities learned this, they forcibly aborted the pregnancy and fined the couple.[92] While the BIA rule stated only that "legally" married spouses were eligible for asylum,[93] the Ninth Circuit held that this limited eligibility actually furthered Policy objectives.[94] The court reasoned that basing eligibility on the Chinese government's determination of "legality" would legitimize and support its coercive laws.[95] Consequently, the court chose to expand asylum eligibility for Chinese nationals fleeing the Policy in an effort to combat the effects of its harsh laws.[96] The Ninth Circuit also advocated the extension of eligibility to applicants whose marriages were not legally recognized at the time of application.[97] However, the court did not actually extend eligibility to such an individual because the applicant's marriage in *Ma* was legally recognized by China at the time of the ruling.[98]

The Ninth Circuit cemented *Ma*'s extension of *C-Y-Z* in *Xiao Lan Zheng v. Ashcroft*.[99] In *Zheng*, the court heard the case of an asylum applicant, who, like the applicant in *Ma*, partook in only a traditional wedding ceremony.[100] The couple was not only penalized for this transgression at the time of their original union, but they were further

---

age for marriage. They had a small, traditional Chinese wedding ceremony."); *see also* Rui-Jian Zhang v. Ashcroft, 395 F.3d 531, 532 (5th cir. 2004) (commenting that the couple at issue was neither legally married nor married in a traditional ceremony, and this distinguished the case from *Ma*).

91. *Ma*, 361 F.3d at 555.

92. *Id.* The court further explained that the pregnancy was in its third trimester at the time of the abortion. *Id.*

93. *Id.* at 557. The BIA stated that "[it] decline[d] to extend [*C-Y-Z*] protection to legally unmarried partners." *Id.*

94. *See supra* note 88 and accompanying text.

95. *Ma*, 361 F.3d at 559 ("[T]he prohibition against underage marriage is 'an integral part' of China's coercive population control program." (quoting Xu Ming Li v. Ashcroft, 356 F.3d 1153, 1160 n.5 (9th Cir. 2004) (en banc))).

96. *Id*. at 561.

97. The Ninth Circuit stated that in light of Congress's purpose "to give relief to victims of China's oppressive population control policy," eligibility should be extended to "husbands whose marriages would be legally recognized, but for China's [Policy]." *Id*.

98. The Third Circuit noted that the seemingly groundbreaking nature of the *Ma* ruling is potentially undercut by the fact that the couple's marriage was legally recognized by the Chinese government at the time of the Ninth Circuit's decision. *See infra* note 118 and accompanying text. As the *Ma* court noted "the Chinese government had recently issued a certificate recognizing [Ma's] marriage as a 'de facto' marriage." *Ma*, 361 F.4d at 557. Thus, the court did not actually grant eligibility to a traditionally married applicant. While the Ninth Circuit held that "eligibility for asylum may not be denied . . . [because China refuses to grant official recognition to marriages]," it did not grant eligibility to such an individual. *Id.* at 559.

99. 382 F.3d 993 (9th Cir. 2004).

100. *See supra* notes 89–90. In this case, the couple had a traditional ceremony and did not even attempt to apply for a marriage certificate due to the New Marriage Law. *Zheng*, 382 F.3d at 995. Their lack of marriage certificate, and their consequential lack of authorization to have a child, caused the couple to be fined heavily after the birth of their daughter. *Id*.

penalized years later after having reached the legal age of marriage.[101] The court examined the situation and found that, according to *Ma*,[102] the applicant in *Zheng* was also eligible for asylum.[103] The Ninth Circuit found eligibility[104] because the couple could in no way have complied with the Policy due to the government's actions.[105] This decision marks the actual application of the court's sentiment in *Ma*.

In January 2006, the Seventh Circuit employed the Ninth Circuit's rationale and held that denying asylum solely based on the lack of a legally sanctioned marriage improperly furthered Policy objectives.[106] In *Junshao Zhang v. Gonzales*, a male asylum applicant claimed that he participated in a traditional marriage in China when he was under the legally prescribed age for marriage.[107] He claimed that after his wife became pregnant, she was forced to have an abortion after the government learned of their illegal acts.[108] On these facts, the Seventh Circuit held that to deny asylum simply because the applicant was not a legal spouse was to "subvert the [IIRIRA amendment to the INA]."[109] Accordingly, the court

---

101. *Id*. at 1002 ("[When the couple] reached the legal age, the local officials refused to issue them a marriage certificate because they had not paid their fines, which penalized [them] for getting married early and for having unauthorized children.").

102. *See supra* notes 94–97 and accompanying text for a summary of the Ninth Circuit's rationale in *Ma*.

103. *Zheng*, 382 F.3d at 1002. The court cited *Ma*'s discussion of China's harsh laws regarding age of marriage and explained why granting asylum eligibility only to legally married couples catered to Policy objectives. *Id.* The Ninth Circuit then held that Zheng was "therefore eligible for asylum because of the forced abortion of his child even though China does not recognize his marriage." *Id.*

104. In *Zheng*, the Ninth Circuit found that the applicant was *eligible* for asylum, but remanded "to the BIA to exercise its discretion whether to grant Zheng asylum." *Id*. It bears repeating that there is a difference between being granted asylum and being found eligible for asylum. After a determination of eligibility, the grant of asylum is at the discretion of the IJ. *See* Rodriguez-Matamoros v. INS, 86 F.3d 158 (9th Cir. 1996).

105. *Zheng*, 382 F.3d at 1002. The Chinese government refused to issue the couple a marriage certificate even after they reached the legal age. *Id*.

106. Junshao Zhang v. Gonzales, 434 F.3d 993 (7th Cir. 2006).

107. *Id.* at 995.

108. *Id.* The applicant also claimed that his wife was detained by the Chinese government for two days and that he was forced to pay a fine as a penalty for the couple's acts. *Id*.

109. *Id.* at 999 (citing Kui Rong Ma v. Ashcroft, 361 F.3d 553, 558–61 (9th Cir. 2004)). The Seventh Circuit stated:

> Congress passed § 601(a)(1) of . . . IIRIRA to ensure that families who are victims of forced abortion and sterilization under China's population control policy would receive asylum, yet the IJ denied the claim precisely because that population control policy rendered the marriage illegal. That would entirely subvert the Congressional amendment, and deny asylum to anyone whose sterilization or abortion was set in motion by a decision to marry and procreate prior to the minimum age. Where a traditional marriage ceremony has taken place, but is not recognized by the Chinese government because of the age restrictions in the population control measures, that person nevertheless qualifies as a spouse for purposes of asylum.

Id.

found Zhang to be eligible for asylum, and remanded the issue to the Attorney General so that he could exercise his discretion about whether to grant asylum.[110]

2. The Restrictive Circuits

The Third Circuit applied a more restrictive rationale in *Cai Luan Chen v. Ashcroft*.[111] This case involved an applicant whose fiancée became pregnant.[112] Upon learning of the pregnancy, officials ordered an abortion.[113] When the couple did not immediately respond, officials attacked the applicant.[114] Eventually, the applicant fled to the United States, and his fiancée was forced to undergo an abortion in her eighth month of pregnancy.[115] The applicant sought asylum in light of the *C-Y-Z* opinion, asserting that he would have been married but for the Policy.[116] The Third Circuit rejected this argument, strictly limiting *C-Y-Z* to all legally married partners.[117] The court acknowledged that this decision was in tension with *Ma*, but distinguished the two cases by stating that *Ma* never directly addressed whether *C-Y-Z* may be extended to those applicants whom the Chinese government refuses to legally acknowledge as spouses, and that *Ma* did not apply to "unmarried persons."[118] The court

110. *Zhang*, 434 F.3d at 1002. For a discussion of the procedure surrounding the grant or denial of asylum, see *supra* notes 44–54 and accompanying text.

Since the rendering of its *Zhang* decision, the Seventh Circuit has expressly aligned itself with the Ninth Circuit, stating: "[W]e have joined the Ninth Circuit in extending protection to spouses in cases 'where a traditional marriage ceremony has taken place, but is not recognized by the Chinese government because of the age restrictions in the [Policy].'" Yuan Rong Chen v. Gonzales, 457 F.3d 670, 674 (7th Cir. 2006). While extending asylum eligibility to traditionally married couples, however, the Seventh Circuit in *Chen* declined to extend eligibility to boyfriends. *Id.*

111. 381 F.3d 221 (3d Cir. 2004) (holding that refusing to extend eligibility to "unmarried partners is reasonable").

112. *Id.* at 223.

113. *Id*.

114. *Id.* (officials "[hit] him with sticks").

115. *Id.*

116. *Id.* at 222. The applicant stated that he was never married due to "China's inflated minimum marriage age requirement." *Id.*

117. *Id.* at 229 (stating that this limitation would "[promote] administrability and verifiability"). The court also discussed the ambiguity and consequential difficulty of accurately applying *C-Y-Z*, stating that two *possible* rationales for the decision might be: 1) a forced abortion or sterilization of one spouse might cause "sympathetic suffering" for the other, constituting persecution; or 2) a forced abortion or sterilization of one spouse might adversely impact the couple's ability to functionally raise a family. *Id.* at 225–26.

118. *Id.* at 231–32. The court pointed out that by the time the Ninth Circuit ruled in *Ma*, Ma's marriage was legally recognized by the Chinese government. *Id*. Moreover, the court commended that "*Ma*'s express holding applies only to putative husbands and not unmarried partners." *Id.* at 232. For a discussion of the scope of *Ma*'s ruling, see *supra* note 98 and accompanying text.

further distinguished the *Zheng* opinion from *Ma* by disagreeing with the Ninth Circuit's interpretation of the legislative intent surrounding the IIRIRA.[119] By distinguishing *Ma* and disagreeing with *Zheng*, the Third Circuit's rationale suggests that it read the BIA's ambiguous *C-Y-Z* decision as a narrow one that should be applied in limited circumstances.[120]

The Fifth Circuit applied the *Chen* rationale in *Ru-Jian Zhang v. Ashcroft*, and denied asylum eligibility to an unmarried applicant.[121] Like the *Chen* court, the Fifth Circuit distinguished the Ninth Circuit's interpretation of *C-Y-Z*.[122] Unlike *Ma* and *Zheng*, the *Zhang* case did not involve a married couple—either legally or culturally.[123] Thus, while the court was able to distinguish these cases, it had no occasion to critically analyze them.[124] In *Zhang*, the applicant was unmarried, but his pregnant, live-in girlfriend was directly victimized under the Policy.[125] In light of its interpretation of *C-Y-Z*, the court upheld the BIA's decision to deny the application.[126]

It is important to note that this distinction drawn by the *Chen* court is rendered irrelevant by the Ninth Circuit's subsequent *Zheng* opinion. While *Chen* was decided on August 20, 2004, *Zheng*, decided on September 2, 2004, granted asylum eligibility to the male member of a couple that was only traditionally married. Xiao Lan Zheng v. Ashcroft, 382 F.3d 993, 995 (9th Cir. 2004). After finding the applicant eligible, the Ninth Circuit remanded the case to the BIA so that it could "exercise its discretion whether to grant Zheng asylum." *Id.*; *see also supra* notes 97–105.

119. *Chen*, 381 F.3d at 231–32. The court stated that limiting *C-Y-Z* to married couples does not necessarily contravene Congress's policies. *Id.* The court developed this idea by noting that some legislators "had reservations about the ease with which 'young Chinese single-unmarried-males' might falsely claim eligibility for asylum under the proposed amendment." *Id.* at 233 (citing 142 Cong. Rec. S4593 (daily ed. May 2, 1996)).

120. *See, e.g.*, Yong Zhen Chen v. Ashcroft, 106 Fed. App'x 129, 131 (3d Cir. 2004) (refusing to apply *C-Y-Z* to an unmarried applicant because the "BIA does not urge . . . otherwise" and statutory interpretation of who constitutes a "refugee" under IIRIRA requires "an individualized analysis of the alleged persecution").

121. Ri-Jian Zhang v. Ashcroft, 395 F.3d 531 (5th Cir. 2004). The facts of this case are scant. The Fifth Circuit merely stated that the applicant was an unmarried male whose "live-in" girlfriend remained in China. The court explained that the applicant's girlfriend was "a Chinese national living in China" and "was fined and forced to have an abortion pursuant to China's population control program." *Id.* at 532. In the initial hearing, the BIA denied the applicant's asylum eligibility, citing *C-Y-Z*. *Id*. In the appeal, the Fifth Circuit affirmed the BIA's decision due to the fact that "Zhang, lacking spousal status, exhibited no legally cognizable 'resistance' to China's population control program." *Id*. The court further stated that "merely impregnating one's girlfriend" did not constitute "resistance". *Id.*

122. *Id*.; *see also supra* note 118 and accompanying text.

123. *Zhang*, 395 F.3d at 532. The court indicated that there was no "informal" marriage. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

3. The Second Circuit's Reservation of Judgment

The Second Circuit recently acknowledged the ambiguous legacy of *C-Y-Z*, refusing to rule on the question of which Chinese family members were eligible for asylum.[127] In *Shi Liang Lin v. U.S. Department of Justice*,[128] this circuit simultaneously considered three cases in which asylum applications had been rejected by IJs.[129] In each of the three cases, the petitioners were not legally married to their partners, and the IJs relied upon similar rationales in each to deny eligibility.[130] After the BIA affirmed the IJs' opinions in each of the cases, the Second Circuit reviewed these decisions and dismissed them due to the unclear status of unmarried individuals in light of *C-Y-Z*.[131]

4. Circuit Positions on the Eligibility of Other Family Members

While the Second Circuit has refused to rule on the eligibility of unmarried partners, it has ruled on cases involving parents and parents-in-law of those directly victimized under the Policy.[132] The opinion of *Ai Feng Yuan v. U.S. Department of Justice* suggests that, absent BIA opinions to the contrary, the Second Circuit might grant eligibility to unmarried partners. In this case, the court denied eligibility to all parents and parents-in-law of Policy victims.[133] The applicants in *Yuan* were the parents-in-law of two women persecuted under the Policy.[134] One woman

127. Shi Liang Lin v. U.S. Dep't of Justice, 416 F.3d 184, 192 (2d Cir. 2005).

128. *Id.*

129. In both Lin's and Zou's cases, the IJ rejected claims stemming from the persecution of their girlfriends. *Id*. at 188. The IJs relied on the 1000-person cap on asylees under section 601(a) of IIRIRA (which was in existence at the time), and on the absence of marriage. *Id.* In petitioner Dong's case, the IJ rejected a claim based from the persecution of his fiancée. *Id*. The IJ reasoned that *C-Y-Z* has not been extended beyond spouses of those persecuted. *Id.* at 189.

130. The IJs in each case explicitly cited *C-Y-Z*. *Id*. at 188–89. While the IJ in Lin's case relied on the 1000-person cap argument, he also stated that it would not be "appropriate to expand [*C-Y-Z*] to unmarried couples." *Id*. at 188. The IJ in Zou's case cited *C-Y-Z* but relied upon the unmarried status of Zou and his girlfriend. *Id.* In Dong's case, the IJ relied exclusively on *C-Y-Z* and the BIA's failure to extend it to individuals other than legal spouses. *Id.* at 189.

131. The *Lin* court stated:

> Of course, it may be the case that permissible distinctions can be drawn between spousal eligibility, on the one hand, and boyfriend and fiancé eligibility, on the other. It may also be the case, however, that the rationale for spousal eligibility applies with equal logic and force to the eligibility of boyfriends and fiancés. Until the BIA has clarified why it established spousal eligibility in the first instance, we cannot know.

Id. at 192.

132. *See, e.g.*, Ai Feng Yuan v. U.S. Dep't of Justice, 416 F.3d 192 (2d Cir. 2005).

133. *Id*. at 198.

134. *Id.* at 194.

was forced to receive an intrauterine device, while the other was forced to undergo an abortion.[135] Although the applicants were not directly victimized, the resistance of their relatives affected them dramatically, as the authorities harassed their relatives to induce their compliance.[136] Under these facts, and in light of the relevant statutory language, the court determined that parents and parents-in-law are not eligible for asylum.[137] However, the court emphasized the fundamental right to procreate shared by spouses.[138] As both traditionally and legally married couples have the ability to procreate, perhaps the Second Circuit suggested a willingness to align with the more permissive circuits.

Other circuits have addressed the eligibility of children of Policy victims.[139] These circuits typically refuse to impute a parent's eligibility for suffering persecution under the Policy to children, and consequently deny children asylum eligibility.[140]

5. Status of Other Circuits

Whereas the Ninth, Seventh, Fifth, and Third Circuits have all definitively ruled on the question of how far to extend asylum eligibility for traditionally married couples,[141] and the Second Circuit has deferred to the BIA to ameliorate the ambiguity surrounding the issue,[142] the other

135. *Id.* These types of persecution are typical methods of enforcing the Policy. *See also supra* notes 77–78, 108, 115 and accompanying text.

136. *Yuan*, 416 F.3d at 194. The court described this harassment: "Not finding [the daughter-in-law], [the authorities] broke the furniture in petitioners' house and threatened to arrest [the husband]. Later . . . [he] was fired from his state job . . . ." *Id.* The Second Circuit also explained the harassment of the female petitioner: "[She] was detained . . . and [was] only released when the daughter-in-law reported for her checkup. [She] was again detained . . . [and] was not released until the daughter-in-law reported to the family planning officials." *Id.* at 195. The female petitioner testified that she had been beaten, but this was not supported by reliable evidence. *Id.* n.2.

137. *Id.* at 198. The court examined the IIRIRA and stated that its plain language indicates that individuals other than direct victims are not eligible for asylum. *Id.* at 196. However, the court simultaneously recognized that the BIA extended eligibility to legal spouses. *Id.* In order to justify this interpretation of the statute, the Second Circuit stated that the right to procreate is shared by both spouses. *Id.* at 197. However, the persecution of a child or a child's spouse does not hinder this fundamental right to procreate. *Id.*

138. *Id.*

139. *See, e.g.*, Yu Gao v. U.S. Att'y Gen., 167 Fed. App'x 313, 316 (3d Cir. 2006) (stating that applicant herself must have experienced persecution to be eligible for asylum); Jiu Shu Wang v. U.S. Att'y Gen., 152 Fed. App'x 761, 769 (11th Cir. 2005) (stating that there is no authority imputing refugee status stemming from a forced abortion or sterilization procedure from an eligible mother to a child).

140. *See, e.g.*, *Wang*, 152 Fed. App'x at 770–71; *Gao*, 167 Fed. App'x 313.

141. *See supra* notes 87–126 and accompanying text.

142. *See supra* notes 127–31 and accompanying text.

circuits have yet to address this question.[143] While the First Circuit remains neutral,[144] the Fourth, Sixth, Eighth, and Tenth Circuits have yet to comment on this issue at all.[145]

This brief synopsis of judicial opinions on the asylum eligibility of Chinese nationals fleeing the Policy reveals deep philosophical divisions among the circuits, and these divisions hinder legislative goals.[146] As a result of this conflict, jurisdictions struggle with how to incorporate the notion of the traditional Chinese marriage into asylum policy.[147]

III. ANALYSIS

While the law surrounding asylum eligibility for those fleeing the Policy is difficult to discern, there are a few universally held rules relating to the issue.[148] Direct victims of the Policy are always granted eligibility for asylum.[149] Legally acknowledged spouses of direct victims are also always granted eligibility.[150] Boyfriends and girlfriends have never been granted asylum eligibility.[151]

---

143. *See, e.g.*, Xue Xiang Chen v. Gonzales, 418 F.3d 110, 111 (1st Cir. 2005) (stating that "[t]here is an active circuit split" on what family relationship is sufficient to render an individual eligible for asylum and that "[the circuit acknowledges] but [does] not weigh in on the question [of whether or not it is irrational for the BIA to permit spouses to apply for asylum, but not boyfriends or girlfriends]").

144. *See supra* note 143.

145. The Eleventh Circuit has commented on this issue, but has yet to take a definitive position. *See, e.g.*, *Wang*, 152 Fed. App'x at 767–69 (acknowledging that in light of *C-Y-Z* the "forced abortion or sterilization of a wife can be imputed to her husband," differentiating between spouses and "live-in girlfriend[s]," and distinguishing *Ma* due to the fact that Wang and his girlfriend were "not married, [either] officially or unofficially").

146. *See* Kui Rong Ma v. Ashcroft, 361 F.3d 553, 560 (9th Cir. 2004) (citing Perales v. Casillas, 903 F.2d 1043, 1051 (5th Cir. 1990) ("one of Congress's reasons for enacting the visa preference provisions is family unification"); *see also* H.R. REP. NO. 104-828, at 1 (1996) (listing as the goals of IIRIRA: "to reform the legal immigration system and facilitate legal entries into the United States"). These sources suggest that the vague state of current immigration law for those fleeing the Policy directly prevents these legislative goals from coming to fruition. By inconsistently granting and denying eligibility, circuit courts neither enable entry into the United States nor promote family unification. A uniform stance on which applicants are granted eligibility for asylum would enable Chinese citizens to make an informed decision about whether or not to apply for asylum. If applicants have family unification as a primary goal, knowing whether or not their entire family would be considered eligible would dictate their course of action. A consistent stance would also free the courts from addressing futile claims of eligibility.

147. *See, e.g.*, *supra* note 143.

148. *See generally infra* notes 149–51 and accompanying text.

149. This rule was achieved by the 1996 enactment of IIRIRA. *See generally supra* note 63 and accompanying text.

150. This was established by *In re C-Y-Z*, 21 I. & N. Dec. 915 (BIA 1997). *See generally supra* notes 75–84 and accompanying text. Although the ruling in this case is ambiguous as to how far this eligibility extends, circuits agree that it undoubtedly grants legally married couples per se eligibility.

With these established principles in mind, this area of law is seemingly straightforward. However, the unsettled nature of asylum eligibility for those fleeing the Policy lies in the status of couples who are only *traditionally* married.[152] While some circuit court decisions push for the eligibility of *all* married couples—whether they are married legally *or* traditionally[153]—others limit *C-Y-Z* to legally married couples.[154] The ambiguous *C-Y-Z* ruling leaves circuit courts without a clear idea of whether traditionally married individuals should qualify for asylum eligibility.[155] These questions in turn lead to confusion over the status of boyfriends,[156] girlfriends, and other family members.[157]

The Seventh and Ninth Circuits are the most lenient in this area of law—they support the idea that traditionally married couples should be granted asylum eligibility.[158] While the Ninth Circuit was initially criticized for failing to act on this liberal sentiment, it recently relied on this idea to provide asylum eligibility in *Zheng*.[159] The Ninth Circuit's groundbreaking rulings in this area of law inspired the Seventh Circuit to adopt its rationale.[160] Perhaps other circuits will follow suit and find traditionally married applicants eligible for asylum.

If the Seventh and Ninth Circuits are on one end of the asylum eligibility spectrum, the Third and Fifth Circuits lie at the opposite extreme.[161] These jurisdictions employ a restrictive approach to asylum

---

See, e.g., Cai Luan Chen v. Ashcroft, 381 F.3d 221, 222 (3d Cir. 2004) (explaining that the BIA interpreted IIRIRA to establish eligibility of the "*spouse* of a person who was forced to undergo an abortion or sterilization").

151. *See Chen*, 381 F.3d at 223 (citing the BIA's statement that *C-Y-Z* has never been extended to "unmarried partners"). In *Lin*, the Second Circuit remanded three cases involving unmarried (either legally or traditionally) couples to the BIA due to *C-Y-Z*'s ambiguity, suggesting that these individuals could potentially be granted eligibility in the future. Shi Liang Lin v. U.S. Dep't of Justice, 416 F.3d 184, 192 (2d Cir. 2005).

152. *Compare* Kui Rong Ma v. Ashcroft, 361 F.3d 553 (9th Cir. 2004) (leaving the possibility open that traditionally married couples could be eligible for asylum), *with Chen*, 381 F.3d 221 (definitively limiting *C-Y-Z* to legally married couples).

153. *See supra* notes 87–110 and accompanying text.

154. *See supra* notes 111–26 and accompanying text.

155. *See supra* note 84 and accompanying text.

156. *See supra* notes 127–31 and accompanying text. The *Lin* court addressed the issue of the status of boyfriends and fiancés of direct victims of the Policy. Shi Liang Lin v. U.S. Dep't of Justice, 416 F.3d 184 (2d Cir. 2005).

157. *See supra* notes 132–40 and accompanying text.

158. *See supra* notes 99–105 and accompanying text. The Ninth Circuit expressed this idea in both *Ma* and *Zheng*.

159. *See supra* notes 99–105 and accompanying text.

160. *See* Jinshao Zhang v. Gonzales, 434 F.3d 993, 999–1001 (7th Cir. 2006).

161. *See supra* notes 111–26 and accompanying text.

eligibility.[162] They interpret *C-Y-Z*'s ambiguity strictly to include only legally married couples,[163] and have not extended eligibility to traditionally married couples, dating couples, and other family members.[164]

The juxtaposition of the Seventh and Ninth Circuits' rationale with that of the Third and Fifth Circuits' approach reveals two different policy choices regarding immigration law.[165] While the expansive approach of the Seventh and Ninth Circuits seems to favor accommodating victimized Chinese nationals at any cost,[166] the more limited rationales of the Third and Fifth Circuits seem to be more concerned with the practicality of allowing increased numbers of individuals into the United States.[167] Their restrictive approaches are certainly more practical, but they pose the risk of failing to grant asylum eligibility to legitimate Policy victims.

In between the two views of granting asylum eligibility for traditionally married spouses, and restricting it to legally married spouses, there lies a vast expanse of muddled law and confused, undecided circuits.[168] While some circuits have yet to address the extent to which asylum eligibility is available for traditional spouses of direct Policy victims,[169] some await a BIA clarification of the *C-Y-Z* ruling,[170] and others have stated their opinions on the subject in dicta.[171]

The international effects of this ambiguity in American law renders clarification imperative.[172] Where does the notion of the "traditional marriage" fit into our jurisprudence? The various jurisdictional approaches reveal inconsistent policy choices.[173] Because asylum eligibility for Policy

---

162. *See supra* notes 111–26 and accompanying text.

163. *See supra* notes 111–26 and accompanying text.

164. Both the Fifth and Third Circuits are careful to distinguish their cases from those of the Ninth Circuit. The opinions of cases such as *Chen* and *Zhang* clearly reveal their criticisms of the Ninth Circuit's expansive view of asylum eligibility. *See, e.g.*, *supra* notes 122–26 and accompanying text.

165. For a summary of these circuits' approaches, see generally *supra* notes 87–126 and accompanying text.

166. *See generally supra* notes 87–110 and accompanying text.

167. *See generally supra* notes 111–26 and accompanying text.

168. *See supra* notes 127–31, 142–45 and accompanying text.

169. *See supra* note 145 and accompanying text.

170. *See supra* note 142 and accompanying text.

171. *See supra* note 145.

172. By granting Policy victims asylum eligibility, the United States firmly demonstrated its disapproval of the coercive Chinese laws. *See* Sicard, *supra* note 29. If the judicial ambiguity is not resolved, Policy victims will be unable to seek respite in the United States, and the IIRIRA will amount to nothing more than ineffective, half-hearted opposition to the Policy.

173. The inconsistent policy choices involve the difference between international and domestic priorities. As discussed in the text, the Ninth Circuit's desire to expand asylum eligibility addresses the international plight of Policy victims by enabling more victims to enter the United States. Conversely,

victims is an international issue, it is essential for the United States to take a strong and clear position in order to send a message to both China and other nations about its stance on the Policy.

IV. PROPOSAL

The disparate criteria used to assess the asylum eligibility of Chinese nationals fleeing the Policy must be standardized across the country.[174] The application of statutory principles must be unified. This Note proposes a set of rules and factors that should be applied in every jurisdiction in order to facilitate the process of determining asylum eligibility.[175] Homogenizing the rules to make applicants of comparable relation uniformly eligible will remove burdens from both courts and applicants. Uniform rules will also successfully address how courts should incorporate the notion of the traditional Chinese marriage into the American jurisprudential tradition. Furthermore, a standard set of rules will clear courts of frivolous and less extreme applicant claims,[176] increase the speed with which decisions are made, and enable applicants to better plan their actions in order to keep their families together.[177]

---

the Third and Fifth Circuits strive to exclude all partners except legal spouses. This policy of limitation affords less aid to Chinese nationals, but is arguably more practical for domestic reasons. By restricting grants of asylum eligibility, the Third and Fifth Circuits prevent an economically unmanageable number of refugees from entering the United States. However, it is important to consider that the more restrictive the policy regarding asylum eligibility is, the more potentially legitimate claims may be overlooked.

174. *See, e.g.*, *supra* notes 141–47 and accompanying text. These notes illustrate the confusing and inconsistent state of current law. While the Third and Fifth Circuits employ a restrictive interpretation of the BIA's vague *C-Y-Z* opinion in order to deny asylum eligibility to *all* legally unmarried applicants, the Ninth and Seventh Circuits extend *C-Y-Z* to couples who are traditionally married. The confusion is heightened by examining other jurisdictions. *See supra* notes 141–47 and accompanying text; *see also* Shi Liang Lin v. U.S. Dep't of Justice, 416 F.3d 184, 192 (2d Cir. 2005). Thus, the legacy of ambiguity left by *C-Y-Z* not only perpetuates a circuit split, it leads some jurisdictions to refrain from addressing this pivotal issue entirely. *Lin*, 416 F.3d at 192. In light of this uncertainty, the Second Circuit has recently taken an affirmative step to clarify the *C-Y-Z* rationale by remanding three cases to the BIA for a more detailed explanation of the case. *Id.*; *see also* Zhou Yun Zhang v. INS, 386 F.3d 66, 87 (2d Cir. 2004) (stating that "the BIA . . . leaves us guessing at its reasoning" and "remand is required because the finding was not adequately explained").

175. *See supra* notes 21–22 and accompanying text.

176. *See supra* note 119. Legislators have previously expressed concern over falsified claims of asylum eligibility by single males. Lawmakers also demonstrated their desire to apply section 601 of IIRIRA only to the most extreme forms of persecution for resistance to "coercive population control program[s]." Cai Luan Chen v. Ashcroft, 381 F.3d 221, 233 (3d Cir. 2004) (citing 142 CONG. REC. H2634 (daily ed. May 2, 1996) (statement of Rep. Smith)). The legislators expressing this view suggest that expanding eligibility would open courts up to comparably minor claims of persecution. *Id.*

177. Consider *Zheng*, in which the applicant left his partner in China while traveling to the United States to seek asylum. Xiao Lan Zheng v. Ashcroft, 382 F.3d 993, 996 (9th Cir. 2004). If a procedure is standardized so that potential eligibility (or lack thereof) is apparent, future applicants will only

Legally married couples should retain their asylum eligibility,[178] and couples that are neither legally nor traditionally married should not be eligible for asylum.[179] Those who claim to be traditionally married couples—those couples who have pledged themselves in contravention of Policy oppression—should be eligible for asylum *only* after courts weigh a variety of factors.[180] These factors, or the "Factor Test," are: (1) whether or not the couple has children; (2) the age of the applicants; (3) sworn testimony demonstrating that a traditional ceremony occurred; (4) the presence of any government documentation restricting the couple from legally marrying or levying penalties upon them for Policy violations; and (5) any other relevant concerns.[181]

A. Arguments for Legally Married Couple Eligibility

Because the matter is well settled, the asylum eligibility of legally married couples does not require extensive discussion.[182] Due to the Immigration and Naturalization Service's position that past persecution of one spouse can be established by the forced abortion or sterilization of another spouse,[183] the absence of changed circumstances in China,[184] and the BIA's clear decision on the issue, circuits now uniformly grant eligibility to legally married couples.[185]

---

attempt entry if they honestly believe they might be found eligible. If they do not believe that they will be eligible for asylum in the United States, they will either stay in China, or attempt entry into another country, thus eliminating the need to leave families behind to live under the Policy.

178. The eligibility of legally married couples is a settled matter in all jurisdictions. *C-Y-Z* decided this question. *See supra* notes 74–84, 150 and accompanying text.

179. For an elaboration of this argument, see *infra* notes 186–88 and accompanying text.

180. *See infra* note 181 and accompanying text. It is important to note that this test (the "Factor Test") will determine who, for purposes of asylum eligibility, has been "traditionally married." It does not purport to distinguish some traditionally married couples from others.

181. Admittedly, the vast variation in the Policy's application across China, and the remote geographical location of many witnesses, will make fulfilling each of these factors difficult. This explains the factor-based nature of the inquiry. Under the Factor Test, courts can flexibly consider the totality of the circumstances in each couple's case before making a determination of asylum eligibility. For a discussion of the diverse manner in which the Policy is applied throughout China, see *supra* notes 37–39 and accompanying text.

182. *See supra* notes 74–80 and accompanying text.

183. *In re* C-Y-Z, 21 I. & N. Dec. 915, 918 (BIA 1997). The BIA cites the INS brief for the admission that "[i]ts legal perspective . . . is that the husband of a sterilized wife can essentially stand in her shoes and make a *bona fide* . . . application for asylum based on problems impacting more intimately on her than on him." *Id*.

184. *See supra* note 1 and accompanying text.

185. *See supra* note 178 and accompanying text.

B. Arguments for Excluding Non-Married Couples from Eligibility

Although the exclusion of all nonmarried couples from asylum eligibility initially seems harsh, it is necessary to accommodate legitimate concerns expressed by Congress.[186] First, the restriction of eligibility to married couples would help to prevent those with falsified claims from being granted asylum.[187] By requiring formal commitment as a prerequisite for asylum eligibility, the United States will help to ensure that only individuals with close connections to direct Policy victims are considered eligible for asylum. Second, and for similar reasons, this restriction on eligibility limits applications to victims of the most severe forms of persecution.[188] By requiring a close connection between applicants and their significant others, American courts can self-select adjudicated claims. The connection demonstrated by a marriage (either legal or traditional) ensures that the asylum applicant and the direct Policy victim have a close connection, and that their separation would cause much strife. By limiting the asylum applicant pool to the most desperate applicants, case loads will be reduced and these most pressing claims can be heard in a relatively expedient manner.

C. Arguments for the Use of the Factor Test in Evaluating Traditionally Married Couple Eligibility

The Factor Test for evaluating the eligibility of those who claim to be traditionally married couples represents the best compromise between the competing policy concerns of the disjointed circuit courts. Restricting asylum eligibility to legally married couples would be akin to allowing China's restrictive Policy to define American courts' understanding of "family."[189] Honoring the Chinese government's restrictive notion of

186. *See supra* notes 119, 176.

187. *See supra* notes 119, 176 and accompanying text.

188. *See supra* notes 119, 176 and accompanying text. Legislators who express concern over fraudulent claims of asylum eligibility also suggest that expanding eligibility would open courts up to comparably minor claims of persecution.

189. In *Ma*, the Ninth Circuit described the effects of allowing the Chinese government to define the notion of "family":

> Only by adopting the BIA's rule restricting relief to legally registered spouses would we create the harsh and arbitrary result that the government decries . . . namely breaking apart a family. If . . . Ma's wife . . . applied for asylum, she would be automatically eligible based on her forced abortion. Yet, under the BIA's rule, Ma's husband would not be eligible because under China's population control program their marriage was "underage" and could not be "legally registered." [This would cause] . . . the break-up of a family, a result that is at odds . . . with significant parts of our immigration policy.

family could lead to the division of functional and happy family units—units that are illegal in China due to the coercive Policy.[190] Predicating the notion of family on an arbitrary age set forth by a coercive law is to give effect to this law and its harsh effects.

Conversely, uniformly granting asylum eligibility to all legally unmarried couples ignores the substantial dangers of both fraudulent claims and an impractically excessive number of immigrants entering the United States.[191] While ideally no dishonest applicants would be found eligible for asylum, it is necessary to carefully distinguish between unmarried couples and traditionally married couples. A failure to do so could lead to falsified claims of asylum eligibility. Excluding false claims is also necessary in order to prevent the entry of an unmanageable number of immigrants into the United States.[192]

The Factor Test represents the best compromise of these competing policy concerns.[193] By granting *some* traditionally married couples, but not *all*, asylum eligibility, the Factor Test simultaneously decreases the number of false claims, helps keep refugee numbers manageable, and honors the pressing claims of traditionally married couples.

Under the Factor Test, judges would be required to evaluate: (1) whether or not the applying couple has children; (2) the age of the applicants; (3) sworn testimony demonstrating that a traditional marriage ceremony occurred; (4) the presence of any government documentation restricting the couple from legally marrying or levying penalties upon them for Policy violations; and (5) any other relevant concerns. Applicants would not be forced to fulfill each of these criteria.[194] Rather, the Factor Test allows judges to evaluate the totality of the circumstances with respect to each applicant and provides guidelines as to what facts indicate both the incidence of a traditional marriage and either past persecution or a well-founded fear of future persecution.[195] Each of the proposed factors examines the depth of couples' commitment to each other and the likelihood of persecution (both past and future).[196] Further, the flexibility

---

Kui Rong Ma v. Ashcroft, 361 F.3d 553, 561 (9th Cir. 2004).

190. *Id*.

191. *See supra* notes 119, 176, and 186.

192. *See supra* note 173.

193. For a summary of these competing policy concerns, see *supra* notes 158–67 and accompanying text.

194. For a discussion of the difficulties of placing such a high evidentiary burden on applicants, see *supra* note 181.

195. For a discussion of these and other requirements of asylum eligibility, see *supra* notes 44–54 and accompanying text.

196. The first and second factors, the presence of children and the ages of the couple, bear on

of the factors, and the wide leverage afforded to judges, acknowledges the difficulty of applying rigid standards to an area of law confronted by myriad applicants with myriad pasts.[197]

The Factor Test's flexible approach and its focus on identifying traditionally married couples with legitimate eligibility claims ensures that valid policy concerns will be addressed. Furthermore, it allows judges to adequately examine each applicant's situation before rendering a decision.

V. CONCLUSION

Since the implementation of the Policy, many Chinese nationals have attempted to flee to the United States.[198] In light of an ambiguous ruling by the BIA,[199] circuits have struggled to determine exactly which Chinese nationals are eligible for asylum.[200] Today, the applicable law is vague and difficult to discern.

This Note proposes rules and factors that allow courts to consistently determine whether applicants are eligible for asylum.[201] By granting all legally married couples eligibility,[202] denying all non-married couples eligibility,[203] and employing the Factor Test in determining traditionally married couple eligibility,[204] this Note's proposal will meet the needs of

---

whether the couple defied Policy mandates. If the ages of the children and the ages of the applicants demonstrate that the couple was below the legally prescribed age of marriage under the New Marriage Law when their children were born, this proves Policy defiance and the likelihood of persecution. Furthermore, the first factor, the presence of children, helps to indicate the depth of a couple's commitment. The third factor, sworn testimony regarding a traditional marriage, is included to demonstrate the extent of a couple's commitment. The fourth factor, whether or not there is documentation regarding Policy defiance and penalties, helps judges evaluate the extent of past persecution and the likelihood of future persecution. The fifth factor, which calls for judges to examine "any other relevant concerns," acknowledges the vast variety of applicant situations, and allows judges to particularize their inquiry based upon the histories of specific applicants.

197. The pasts of applicants are myriad in part because the Policy is not applied uniformly across China. *See, e.g.*, *supra* notes 38–39 and accompanying text.

198. *See supra* note 5.

199. For discussions of the *C-Y-Z* decision and the legacy of its ambiguity, see *supra* notes 75–84 and accompanying text. This case is deemed ambiguous because the BIA never adequately explained its rationale for extending asylum eligibility to spouses of those persecuted under the Policy. *See* Shi Liang Lin v. U.S. Dep't of Justice, 416 F.3d 184, 192 (2d Cir. 2005) ("Thus, because the BIA has never adequately explained its rationale for establishing *spousal* eligibility under IIRIRA § 601(a) . . . it may be the case that permissible distinctions can be drawn between spousal eligibility . . . and boyfriend and fiancé eligibility . . . . It may also be the case . . . that the rationale [applies equally to both].").

200. *See supra* notes 74–84 and accompanying text.

201. *See supra* notes 174–81 and accompanying text.

202. *See supra* note 178 and accompanying text.

203. *See supra* note 179 and accompanying text.

204. *See supra* notes 174–81 and accompanying text.

victimized Chinese nationals, while addressing the competing concerns of practicality and falsified claims.

By adhering to the guidelines of this Note, courts can integrate the notion of a "traditional marriage" into American jurisprudence. Allowing traditionally married couples to be eligible for asylum is integral in the struggle to combat the harsh effects of the Policy, but safeguards are needed to prevent both abuse and an unmanageable influx of immigrants. The Factor Test addresses these concerns by limiting eligibility to valid claims through the use of a particularized judicial inquiry in each case.

Meredith M. Snyder[*]

---

* A.B. English Literature (2004), Washington University in St. Louis; J.D. (2007), Washington University School of Law.