

LESS THAN HUMAN: CHILDREN OF A COUPLE IN VIOLATION OF CHINA'S POPULATION LAWS AND THE BARRIERS THEY FACE IN CLAIMING ASYLUM IN THE UNITED STATES

I. INTRODUCTION

Under the People's Republic of China's (China) communist regime, the ideal family consists of two parents and one child, preferably male.¹ When a couple decides to have more than one child in violation of China's one-child policy, the entire family's life is forever changed. To ensure that the violation is not repeated, government officials raid the family's home and take either the mother or father to a clinic where they are forcibly sterilized.² In cases where the mother is still pregnant, she is forced to have an abortion.³ Those couples who try to hide suffer a worse fate: government officials hold and physically abuse their relatives and neighbors until the couple submits to forced sterilization.⁴ Once forced sterilization has taken place, the government imposes a huge fine on the family that is well beyond its income.⁵ Furthermore, since forced sterilization may make a parent too weak to work, the financial burdens of the fine and support may fall to other family members.⁶ Families that do not pay the fine face repeated threats of eviction, government entry into their homes, and confiscation or destruction of their personal property.⁷ In addition, re-

1. See SUSAN GREENHALGH & EDWIN A. WINCKLER, CHINESE STATE BIRTH PLANNING IN THE 1990S AND BEYOND 22-24 (2001).

2. See Philip P. Pan, *Who Controls the Family?; Blind Activist Leads Peasants in Legal Challenge to Abuses of China's Population-Growth Policy*, WASH. POST, Aug. 27, 2005, at A1; cf. *Zhang v. Gonzales*, 408 F.3d 1239, 1243 (9th Cir. 2005) (stating that "officials from the local birth planning bureau" went to petitioner's home and took his father away to be sterilized).

3. See *China: Human Rights Violations and Coercion in One-Child Policy Enforcement: Hearing Before the H. Comm. on Int'l Relations*, 108th Cong. 2 (2004) [hereinafter *Hearing*] (statement of Rep. Christopher H. Smith, Vice Chairman, H. Comm. on Int'l Relations); Pan, *supra* note 2.

4. Pan, *supra* note 2.

5. See *Zhang*, 408 F.3d at 1243; *Wang v. Gonzales*, 405 F.3d 134, 136 (3d Cir. 2005); *Hearing*, *supra* note 3, at 3 (statement of Rep. Christopher H. Smith, Vice Chairman, H. Comm. on Int'l Relations).

6. See *Zhang*, 408 F.3d at 1243.

7. See *id.*; *Wang*, 405 F.3d at 136.

ardless of whether the fine is paid, children of couples who violate the one-child policy may be denied an education.⁸

To escape these acts of persecution, many Chinese have fled to the United States to seek asylum.⁹ While U.S. asylum law provides sanctuary to victims of forced sterilization and their spouses, if their children arrive in the United States alone they are likely to be sent back to China.¹⁰ U.S. courts have construed statutory and case law in a manner that makes it extremely difficult, if not impossible, for these children to obtain asylum. The United States should allow these children to claim asylum based on their membership in a social group that has suffered severe human rights deprivations stemming from violations of China's population control policies.

Part II of this Comment provides context for this discussion by examining the history and rationale behind China's one-child policy. Then Part III discusses U.S. asylum law as it applies to those who flee coercive population control methods. Parts IV and V address U.S. asylum law as it applies to the spouse and children of someone who has been forcibly sterilized. Finally, Part VI analyzes the proposition that asylum should be granted to children from China because of their "membership in a particular social group."¹¹

II. CHINA'S ONE-CHILD POLICY

"China's drive to control its population growth at any cost to the Chinese people is as strong and dangerous as ever."¹² Chinese officials see population control as central to solving the economic and environmental problems posed by China's burgeoning population.¹³ Yet, China has not always had a one-child policy. Ironically, in 1949,

8. See *Zhang*, 408 F.3d at 1243; *Lin v. Ashcroft*, 377 F.3d 1014, 1022-23 (9th Cir. 2004). But see *Wang*, 405 F.3d at 136.

9. See RUTH ELLEN WASEM, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 16-17 (2005) (indicating thousands of Chinese asylum seekers have been granted some form of asylum "based on persecution resulting from coercive population control policies" since 1997).

10. See *Zhang*, 408 F.3d at 1242, 1245, 1250 (holding that though a forcibly sterilized person and his or her spouse is automatically eligible for asylum based on political opinion under the Immigration and Naturalization Act (INA), 8 U.S.C. § 1101(a)(42)(B) (2000), their unaccompanied children must have "experienced past persecution or [have] established a well-founded fear of future persecution" to be eligible).

11. Immigration and Naturalization Act (INA), 8 U.S.C. § 1101(a)(42)(B) (2000).

12. *Hearing*, *supra* note 3, at 6 (statement of Rep. Christopher H. Smith, Vice Chairman, H. Comm. on Int'l Relations).

13. See Zhang Weiqing, Minister, State Family Planning Comm'n, Address to the Population Council: Family Planning Programme (July 2, 1999), available at http://www.unescap.org/esid/psis/population/database/poplaws/law_china/ch_record023.htm.

Chinese leaders considered China's large population an asset.¹⁴ However, as the population rose dramatically, Chinese leaders began to see the large population as an impediment to development.¹⁵ During the 1960s and 1970s, the government established birth control offices as part of its first efforts to stem population growth, and it discouraged couples from having more than two children.¹⁶

Chinese officials gained public support for this policy by linking population control to economic and social benefits.¹⁷ The general goal of the policy is to plan "not only economic production but also social reproduction, in order to bring them into harmony both with each other and with China's environmental capacity."¹⁸ The means by which China has sought to implement this policy, particularly the use of forced sterilizations and abortions, have been condemned as glaring human rights abuses.¹⁹ Yet, as Chinese officials point out, how could a policy that will improve people's lives through better employment, education, housing, and transportation be a violation of human rights?²⁰ The Minister of China's State Family Planning Commission has explained that because countries differ in their history and culture and are at different stages in their economic development, "the concepts on human rights and the ways to achieve it [sic] are of course different."²¹ In addition, most Chinese citizens have been willing to comply with the policy under the Marxist theory that the collective needs of the people outweigh an individual's right to reproduce.²²

On September 1, 2002, China codified its existing one child policy as the Population and Family Planning Law of the People's Republic of China.²³ The policy gives the State the power to impose a one-child limit on all couples and a requirement that married couples

14. See AllRefer.com, China: Population Control Programs, <http://reference.allrefer.com/country-guide-study/china/china55.html> (last visited Mar. 13, 2006); Kari Huus, *China: The People Bomb*, MSNBC.COM, Sept. 6, 1999, <http://www.msnbc.com/news/307034.asp?cp1=1>.

15. See AllRefer.com, *supra* note 14.

16. *Id.*

17. See Zhang Weiqing, *supra* note 13.

18. GREENHALGH & WINCKLER, *supra* note 1, at 2.

19. See, e.g., *Hearing*, *supra* note 3, at 1-3.

20. See Zhang Weiqing, *supra* note 13.

21. *Id.*

22. GREENHALGH & WINCKLER, *supra* note 1, at 26.

23. Population and Family Planning Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2001, effective Sept. 1, 2002), available at http://english.gov.cn/laws/2005-10/11/content_75954.htm; see also *Hearing*, *supra* note 3, at 22 (statement of Arthur E. Dewey, Assistant Sec'y, Bureau of Population, Refugees, & Migration, U.S. Dep't of State).

use birth control.²⁴ Two children are allowed in rural villages if the first one is female.²⁵ By carrying out this policy, China has been able to stabilize its population at about 1.3 billion.²⁶

Chinese officials have induced the compliance necessary to achieve that stabilization by various persuasive and coercive means. The less intrusive, persuasive methods consist of education and propaganda.²⁷ Officials consider these methods integral to “permanently changing the reproductive beliefs and behavior of hundreds of millions of people,” a “long-term task requiring deep cultural change.”²⁸ The underlying ideal is “voluntarism . . . which means trying to persuade people to do voluntarily what they will be required to do in any case.”²⁹

The physically coercive measures China uses to enforce compliance are notorious. First, the government mandates forcible sterilization of one parent when a couple has too many children.³⁰ Usually, the woman is forcibly sterilized because women are primarily responsible for adhering to the strict, one-child limit.³¹ Within three to six months of having her first child, a woman must have an intra-uterine device (IUD) surgically inserted into her uterus to prevent further pregnancies.³² These IUDs cause excessive bleeding, weight loss, fatigue, and anxiety in some women.³³ If pregnancy occurs despite this preventative measure, women are expected to abort the pregnancy.³⁴ During an abortion procedure, if a woman has not already been fitted with an IUD doctors will insert the IUD without informing her.³⁵ In

24. See *Hearing, supra* note 3, at 22 (statement of Arthur E. Dewey, Assistant Sec’y, Bureau of Population, Refugees, & Migration, U.S. Dep’t of State).

25. See GREENHALGH & WINCKLER, *supra* note 1, at 24; see also *Hearing, supra* note 3, at 22 (statement of Arthur E. Dewey, Assistant Sec’y, Bureau of Population, Refugees, & Migration, U.S. Dep’t of State).

26. Evan Osnos, *Chinese Peasants Jailed to Enforce 1-Child Rule; Forced Sterilizations, Abortions Protested*, CHI. TRIB., Oct. 2, 2005, at C1.

27. See GREENHALGH & WINCKLER, *supra* note 1, at 10.

28. *Id.*

29. *Id.* at 9 (original emphasis removed).

30. *Id.* at 5; see *Hearing, supra* note 3, at 1-2 (statement of Rep. Christopher H. Smith, Vice Chairman, H. Comm. on Int’l Relations).

31. See GREENHALGH & WINCKLER, *supra* note 1, at 4-5.

32. *Id.* at 5. In 2003, city officials in the small town of Jieshi had a thirty-five day objective “[t]o sterilize 1,369 women, fit 815 IUDs to the women, induce labor in 108, and carry out 163 abortions.” *Hearing, supra* note 3, at 35 (statement of Harry Wu, Exec. Dir., Laogai Research Found.) (quoting an uncited document).

33. See *Hearing, supra* note 3, at 40 (statement of Ma Dongfang, Victim of China’s One-Child Policy). Despite intense pain, illness, and excessive bleeding, doctors refused to remove the IUD implanted into Ma Dongfang. *Id.*

34. GREENHALGH & WINCKLER, *supra* note 1, at 5.

35. See *Hearing, supra* note 3, at 39 (statement of Ma Dongfang, Victim of China’s

addition to suffering the physical detriments of these birth control devices, women must also cope with the intense emotions that accompany a forced abortion. According to the U.S. State Department, approximately 500 Chinese women commit suicide each day due, in part, to the pressures of China's strict one-child policy.³⁶

Along with terminating a person's reproductive functions, China also imposes economic penalties on families that do not comply with the policy.³⁷ This "social compensation fee" can be as high as ten times the family's income.³⁸ The imposition of such an unbearable fine is one of the most persuasive compliance methods, "[b]ecause if [these families] can't live, if [they] can't get housing, if [they] can't have a wage that is somewhat livable and [they] are fined up to ten times [their] salary, how do [they] exist?"³⁹ The Chinese government justifies this fine not only as a reasonable means to enforce the policy, but also as a way to help pay for the cost of the extra children and the birth planning program.⁴⁰ In situations where a family is not able to pay the fine, the Chinese government may confiscate the family's possessions, evict the family from its home, and refuse to let the children attend school.⁴¹

World opposition to China's human rights abuses has been less than united. The international community has struggled over taking an affirmative stance against China's population control policies because "[f]ighting for human rights is almost always difficult . . . and nowhere is it more inconvenient than when dealing with the Peoples [sic] Republic of China."⁴² The U.N. Fund for Population Activities (UNFPA) has weakened attempts to cure human rights abuses in China.⁴³ The UNFPA has been "the chief apologist and cheerleader

One-Child Policy) (stating that doctors inserted an IUD without her knowledge during an abortion).

36. *Id.* at 3 (statement of Christopher H. Smith, Vice Chairman, H. Comm. on Int'l Relations) (referring to U.S. Dep't of State, *China, in* COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27768.htm>).

37. See GREENHALGH & WINCKLER, *supra* note 1, at 13-14.

38. *Hearing, supra* note 3, at 3 (statement of Christopher H. Smith, Vice Chairman, H. Comm. on Int'l Relations); cf. Wang v. Gonzales, 405 F.3d 134, 136 (3d Cir. 2005) (stating that one family was fined approximately 100 times its monthly income).

39. *Id.*

40. GREENHALGH & WINCKLER, *supra* note 1, at 13.

41. Cf. Zhang v. Gonzales, 408 F.3d 1239, 1243 (9th Cir. 2005) (stating that when the Zhang family could not pay their fine, the authorities "confiscated some of the family's possessions and threatened to evict the family from its home" and "prohibited [the Zhang children] from attending further school until the fine was paid").

42. *Hearing, supra* note 3, at 1 (statement of Rep. Christopher H. Smith, Vice Chairman, H. Comm. on Int'l Relations).

43. See *id.* at 4.

for China's coercive one-child-per-couple policy."⁴⁴ Since 2002, the United States has been the only country to refuse to contribute funds to the UNFPA because of claims, which the UNFPA insists are false, that the UNFPA supports forced sterilization and abortion in China.⁴⁵ Under the Kemp-Kasten amendment, President George W. Bush can deny funding to any organization that "supports or participates in the management of a program of coerced abortion or involuntary sterilization."⁴⁶ The U.S. will continue to deny funding to the UNFPA until China has ceased the use of coerced abortions and forcible sterilization.⁴⁷

III. U.S. ASYLUM LAW PERTAINING TO THE VICTIMS OF CHINA'S ONE-CHILD POLICY

In addition to denying funds to the UNFPA, the United States has shown its resistance to China's one-child policy by offering asylum to its refugees. Asylum law has increasingly become an arena to protect human economic and social rights.⁴⁸ U.S. asylum statutes, which are based directly on international standards,⁴⁹ protect immigrants that have suffered or will suffer deprivations of life or freedom in their home country.⁵⁰ Under the Immigration and Nationality Act (INA), a refugee is defined as a person who has been "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."⁵¹

44. *Id.* The UNFPA has provided both financial and verbal support for the one-child policy. *Id.*

45. *See id.*; Press Release, United Nations Populations Fund, UNFPA Regrets U.S. Administration's Decision Not to Restore Funding (July 16, 2004), available at <http://www.unfpa.org/news/news.cfm?ID=476&Language=1>.

46. Supplemental Appropriations Act for Fiscal Year 1985, Pub. L. No. 99-88, 99 Stat. 293 (1985); *see also* Tobey E. Goldfarb, Comment, *Abstinence Breeds Contempt: Why the U.S. Policy on Foreign Assistance for Family Planning is Cause for Concern*, 33 CAL. W. INT'L L.J. 345, 354 (2003) (indicating that the President has delegated this authority to the Secretary of State).

47. *See* Press Release, Sean McCormack, Spokesman, U.S. Dep't of State, FY 2005 Funding for the UN Population Fund (UNFPA) (Sept. 17, 2005), available at <http://www.state.gov/r/pa/prs/ps/2005/53375.htm>.

48. *See* Deborah E. Anker, *Boundaries in the Field of Human Rights: Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 150 (2002).

49. *See* REGINA GERMAIN, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 1 (3d ed. 2003). The two principal sources of international law concerning asylum seekers fleeing persecution are the Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150, and the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. *Id.*

50. WASEM, *supra* note 9, at 1.

51. 8 U.S.C. § 1101(a)(42) (2000).

Though Congress has not defined the term “persecution,”⁵² other sources offer clues as to its meaning.⁵³ In general, “persecution means a threat to life or freedom from those who differ from the persecutor in a way regarded as offensive, or the infliction of suffering or harm on such persons.”⁵⁴ The Bureau of U.S. Citizenship and Immigration Services (USCIS) lists factors that indicate persecution, such as ““arbitrary interference with a person’s privacy, family, home or correspondence; deprivation of virtually all means of earning a livelihood; relegation to substandard dwellings; exclusion from institutions of higher learning; [and] enforced social and civil inactivity”⁵⁵

Immigrants to the United States can claim refugee status based on two types of persecution, either “past persecution . . . or a well-founded fear of future persecution.”⁵⁶ To prove past persecution, an immigrant must meet two requirements. First, the immigrant must demonstrate that he or she has been persecuted in the past “on account of race, religion, nationality, membership in a particular social group, or political opinion”⁵⁷ Second, the immigrant must prove that he or she is “unable or unwilling to return to, or avail himself . . . of the protection of, [his or her country of nationality] owing to persecution.”⁵⁸ Establishing a well-founded fear of persecution is more difficult. To do so, an immigrant must first demonstrate a subjective fear of persecution based on one of five categories: “race, religion, nationality, membership in a particular social group, or political opinion”⁵⁹ Then the immigrant must show a “reasonable possibility” of serious harm “if he or she were to return to [his or her] country.”⁶⁰ Finally, the immigrant must show he or she is “unable or unwilling to return, or avail himself or herself of the protection of, that country be-

52. *See id.* § 1101.

53. GERMAIN, *supra* note 49, at 29.

54. Michael A. Rosenhouse, Annotation, *Sufficiency of Evidence to Establish Alien’s Well-Founded Fear of Persecution Entitling Alien to Status of Refugee Under § 101(a)(42)(A) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. § 1101(a)(42)(A))—Alleged Persecution in European and Asian Nations*, 182 A.L.R. FED. 147, § 2(a) (2005).

55. GERMAIN, *supra* note 49, at 30 (quoting IMMIGRATION & NATURALIZATION SERVICE, BASIC LAW MANUAL: U.S. LAW AND INS REFUGEE/ASYLUM ADJUDICATIONS 25 (1994)). The Immigration and Naturalization Service (INS) became the Bureau of U.S. Citizenship and Immigration Services (USCIS) when it was transferred to the Department of Homeland Security. U.S. Citizenship & Immigration Servs., Immigration and Naturalization Service—INS became USCIS, <http://www.visa2003.com/ins-uscis.htm> (last visited Apr. 14, 2006).

56. 8 C.F.R. § 208.13(b) (2006).

57. *Id.* § 208.13(b)(1).

58. *Id.*

59. *Id.* § 208.13(b)(2)(i)(A).

60. *Id.* § 208.13(b)(2)(i)(B).

cause of such fear,"⁶¹ a requirement that is identical to the second requirement of past persecution.

In the 1990s, anti-abortion and human rights advocates in Congress pushed to make resistance to forced sterilization a basis for asylum to protect Chinese immigrants.⁶² As a result, in 1996, Congress amended the Immigration and Naturalization Act to include men and women who have been forcibly sterilized and women who have been forced to abort a pregnancy.⁶³ Such immigrants are "deemed to have been persecuted on account of political opinion."⁶⁴ This amendment removed the previous burden on Chinese immigrants to show "not only that they had opposed the Chinese policy, but had been singled out for persecution."⁶⁵ However, to prevent a flood of immigrants, Congress provided that only 1,000 immigrants per year could claim asylum under this provision.⁶⁶ The popularity of the new forcible sterilization provision soon manifested. By 1998, the number of immigrants claiming asylum under this provision went well beyond 1,000.⁶⁷ Those immigrants who applied for asylum after the limit had been reached were granted conditional asylum.⁶⁸ Under conditional asylum, they were placed in a queue until the number limitation reset to zero the next year, and then they were granted full asylum benefits.⁶⁹ Congress lifted the 1,000-refugee limit in 2005.⁷⁰

In order to qualify as a refugee, an immigrant must first make a threshold showing that he or she is eligible for either asylum or withholding of removal. The immigrant has the burden to prove that he or

61. *Id.* § 208.13(b)(2)(i)(C).

62. Editorial, *A Window for Chinese Refugees*, N.Y. TIMES, Feb. 8, 1997, § 1, at 20.

63. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIA), Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009 (1997) (codified at 8 U.S.C. § 1101(a)(42)(B) (2000)); GERMAIN, *supra* note 49, at 22.

64. 8 U.S.C. § 1101(a)(42)(B) (2000) ("[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.").

65. *A Window for Chinese Refugees*, *supra* note 62.

66. Pub. L. No. 104-208, § 601(b), 110 Stat. 3009 (1997) (codified at 8 U.S.C. § 1157(a)(5) (2000)), *repealed by* Pub. L. No. 109-13, div. B, tit. I, § 101(g)(2), 119 Stat. 231 (2005); *A Window for Chinese Refugees*, *supra* note 62.

67. WASEM, *supra* note 9, at 16, 17, fig. 4.

68. *Id.* at 16. By the end of 2003, 2,353 aliens had been granted conditional asylum status. *Id.* at 17.

69. Letter from Livinia Limon, Dir., Office of Refugee Resettlement, to State Refugee Coordinators et al., Conditional Grants of Asylum (Nov. 8, 2000), *available at* <http://www.acf.dhhs.gov/programs/orr/policy/stltrs00.htm> (follow "Conditional Grants of Asylum" hyperlink).

70. § 101(g)(2) (striking the 1,000 refugee limit of 8 U.S.C. § 1157(a)(5) (2000)).

she fits into one of these categories, which have markedly different consequences for the immigrant. Under withholding of removal, “the Attorney General may not remove an alien to a country if the alien’s life or freedom would be threatened in that country because of . . . race, religion, nationality, membership in a particular social group, or political opinion.”⁷¹ An immigrant seeking withholding of removal must prove a “clear probability of persecution,” or, alternatively, “that it is more likely than not that he or she would be persecuted if removed to his or her home country.”⁷² Though the burden of proof for withholding of removal is higher than that for asylum,⁷³ once this burden is met, the Attorney General does not have the discretion to deport the immigrant. However, withholding of removal precludes the immigrant both from applying for permanent residency and from bringing his or her family into the United States.⁷⁴ Asylum differs from withholding of removal in several respects. First, immigrants granted asylum eventually may obtain permanent residency and citizenship in the United States.⁷⁵ Second, immigrants need only meet the less stringent, well-founded fear standard to qualify.⁷⁶ Finally, the Attorney General and the Secretary of Homeland Security may exercise discretion in granting asylum.⁷⁷

When adults and unaccompanied minors are caught smuggling themselves into the United States, they are placed in expedited removal unless they claim a fear of persecution.⁷⁸ Expedited removal allows USCIS to remove such an immigrant without further hearing.⁷⁹ The immigrant can avoid expedited removal by alleging a fear of persecution⁸⁰ and then proving a “credible fear” in a hearing before a USCIS asylum officer.⁸¹ To prove a credible fear, the immigrant must show that there is a significant possibility that he or she will be able to establish eligibility for asylum.⁸² Once a credible fear is shown, the

71. 8 U.S.C. § 1231(b)(3)(A) (2000).

72. GERMAIN, *supra* note 49, at 23.

73. 8 C.F.R. § 208.16(3) (2006); GERMAIN, *supra* note 49, at 23.

74. GERMAIN, *supra* note 49, at 23.

75. *Id.*; see 8 U.S.C.A. § 1159(a)(2)(A) (West 2005).

76. 8 U.S.C. § 1101(a)(42) (2000); GERMAIN, *supra* note 49, at 22.

77. GERMAIN, *supra* note 49, at 22.

78. *Cf.* WASEM, *supra* note 9, at 5 (stating that “[f]oreign nationals arriving without proper documents who express to the immigration officer a fear of being returned home must be kept in detention while their “credible fear” cases are pending”).

79. See GERMAIN, *supra* note 49, at 221.

80. *Id.*

81. WASEM, *supra* note 9, at 1.

82. *Id.* at 7.

immigrant is entitled to a hearing before the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR).⁸³ "EOIR's immigration judges and the Board of Immigration Appeals (BIA), entities in DOJ separate from the USCIS, have exclusive control over such claims and are under the authority of the Attorney General."⁸⁴ The Attorney General has some discretion in granting asylum to refugees, so long as the immigrant has demonstrated "past persecution or a 'well-founded fear' of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁸⁵

Unaccompanied minors enjoy additional protection. Generally, expedited removal is a last resort for unaccompanied minors.⁸⁶ When an unaccompanied minor arrives in the United States, the United Nations recommends that U.S. authorities quickly make the determination whether the child is an asylum seeker.⁸⁷ If he or she is indeed an asylum seeker experts trained in childcare should then conduct interviews to gather personal information.⁸⁸ According to the United Nations, the child is entitled to childcare, such as in a foster home,⁸⁹ and free primary education.⁹⁰ Furthermore, a legal representative should be appointed to represent the child's best interests.⁹¹ The United Nations recommends that immigration authorities make every attempt to resolve the child's application for asylum quickly.⁹²

IV. U.S. ASYLUM LAW REGARDING THE SPOUSES OF THOSE FORCIBLY STERILIZED

Though unaccompanied minors enjoy additional protections, it is much easier for a parent who has been forcibly sterilized and his or

83. *Id.* at 1.

84. *Id.* at 9.

85. *Id.*; see 8 U.S.C. § 1101(a)(42) (2000); 8 U.S.C.A. § 1158(b)(1)(A) (West 2005 & Supp. 2 2005).

86. *Cf.* IMMIGRATION & NATURALIZATION SERVICE, INSPECTOR'S FIELD MANUAL (IFM) § 17.15(a) (1998) (stating that removal orders issued concerning unaccompanied minors must be reviewed by the district director or the deputy district director before the minor is removed).

87. OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR REFUGEES GENEVA, GUIDELINES ON POLICIES AND PROCEDURES IN DEALING WITH UNACCOMPANIED CHILDREN SEEKING ASYLUM ¶¶ 5.4, 8.1 (1997).

88. *Id.* ¶¶ 5.8-5.9, 5.12.

89. *See id.* ¶ 7.5.

90. Convention on the Rights of the Child art. 28(1)(a), Nov. 20, 1989, 1577 U.N.T.S. 3.

91. OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR REFUGEES GENEVA, *supra* note 87, ¶ 8.3.

92. *Id.* ¶ 8.1.

her spouse to obtain asylum in the United States than it is for their children. Under U.S. law, immigrants who have been forcibly sterilized or have a well-founded fear of being forcibly sterilized are automatically eligible for asylum;⁹³ the law, by definition, deems these immigrants to have been persecuted based on political opinion. Political opinion persecution occurs when a person is persecuted or fears persecution for holding opinions not tolerated by his or her country's authorities.⁹⁴ The spouse of someone who has been forcibly sterilized may also obtain refugee status by claiming political opinion persecution. The case *In re C-Y-Z* stands for the proposition that a spouse of someone who was forcibly sterilized can establish past political opinion persecution and, thus, is eligible for asylum in the United States.⁹⁵ In *C-Y-Z*, a man fled to the United States after his wife had been forcibly sterilized in China.⁹⁶ The Board of Immigration Appeals held "that the spouse of a woman who has been forced to undergo an abortion or sterilization procedure can thereby establish past persecution."⁹⁷ This decision followed the Immigration and Naturalization Service's (INS) determination "that the husband of a sterilized wife can essentially stand in her shoes and make a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than on him."⁹⁸ Accordingly, the wife's persecution for her political opinion is imputed to the husband; that is, U.S. asylum law treats the husband as though he suffered the same persecution as his wife for his political opinion.⁹⁹

The policy reasons for granting asylum to the spouses of those who are forcibly sterilized center around the concept of family.¹⁰⁰ Courts have striven to fulfill the congressional intent behind the

93. 8 U.S.C. § 1101(a)(42) (2000).

94. UNITED NATIONS HIGH COMM'R 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 ¶ 80 (1992).

95. *In re C-Y-Z*, 21 I. & N. Dec. 915, 919 (B.I.A. 1997); see also *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (holding that husbands whose marriages Chinese officials refuse to recognize due to China's population control policies are eligible for asylum); *Qiu v. Ashcroft*, 329 F.3d 140, 148 (2d Cir. 2003).

96. *C-Y-Z*, 21 I. & N. Dec. at 916.

97. *Id.* at 918; Memorandum from David A. Martin, Gen. Counsel, Immigration & Naturalization Serv., to Mgmt. Team et al., Asylum Based on Coercive Family Planning Policies—Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Oct 21, 1996), available at <http://immigration.com/news/a-family-planning.html>.

98. *C-Y-Z*, 21 I. & N. Dec. at 918 (quoting the INS brief in the case).

99. *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992) (holding that imputed opinion is a valid basis for asylum).

100. *Ma*, 361 F.3d at 561.

amendments to the Immigration and Naturalization Act, namely to keep families together.¹⁰¹ In *Ma v. Ashcroft*, the Ninth Circuit granted asylum to the husband of a woman who was forcibly sterilized because, to do otherwise would break up a family, an “absurd result[]” that would contradict both the forcible sterilization provision and the “overall immigration policy.”¹⁰²

V. U.S. ASYLUM LAW REGARDING THE CHILDREN OF FORCIBLY STERILIZED PARENTS

The children of forcibly sterilized parents face greater difficulty in obtaining asylum in the United States than do their parents. This extra difficulty is surprising, as children, who make up almost half of the world’s refugee population,¹⁰³ enjoy the extra protections mentioned above. Furthermore, under the Convention on the Rights of the Child and the Universal Declaration of Human Rights, when children seek asylum in a foreign country to escape persecution, they are entitled to special consideration, and their “best interests . . . shall be a primary consideration.”¹⁰⁴ The United States does grant some extra protection, even though children must meet the same test for asylum as adults by proving past persecution or a well-founded fear of persecution.¹⁰⁵ Due to the particular sensitivity of children, acts of persecution against them that may not be as great as against an adult, suffice to establish their refugee status.¹⁰⁶ In addition, children’s asylum claims may also be evaluated in light of acts of persecution against their family members,¹⁰⁷ as the circumstances of a child’s family members are often “central to a child’s refugee claim.”¹⁰⁸ Furthermore, if there is reason to believe that the parents wish their child to be outside the country of

101. *Id.* at 559.

102. *Id.* at 561.

103. Youth Advocate Program Int’l (YAPI), Refugee and Internally Displaced Children, <http://www.yapi.org/refugee> (last visited Mar. 13, 2006).

104. Convention on the Rights of the Child, *supra* note 90, art. 3(1); *see id.*, pmb.; Universal Declaration of Human Rights, G.A. Res. 217A at 71, arts. 14(1), 25(2), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

105. *See* Memorandum from Jeff Weiss, Acting Dir., Office of Int’l Affairs, Immigration & Naturalization Serv., to Asylum Officers et al., Guidelines for Children’s Asylum Claims 17-18 (Dec. 10, 1998), available at <http://uscis.gov/graphics/lawsregs/handbook/pol-promem.htm> (follow “Guidelines for Children’s Asylum Claims” hyperlink).

106. *See id.* at 19.

107. *Ananeh-Firempong v. INS*, 766 F.2d 621, 627 (1st Cir. 1985); UNITED NATIONS HIGH COMM’R FOR REFUGEES, *supra* note 94, ¶ 43.

108. OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR REFUGEES GENEVA, *supra* note 87, ¶ 8.8.

origin on grounds of well-founded fear of persecution the child himself may be presumed to have such fear."¹⁰⁹ Though it seems that U.S. asylum law would therefore impute to a child his or her parent's fear of persecution based on political opposition to China's one-child policy, U.S. case law has held the opposite. Three important cases have determined that the child of a parent who has been forcibly sterilized may not, as a matter of law, claim automatic asylum in the United States.

A. *Lin v. Ashcroft*

In 2004, *Lin v. Ashcroft* might have answered the question of whether a child could base his or her asylum claim on the forcible sterilization of a parent. However, the Ninth Circuit could not reach the issue, as the asylum seeker in *Lin* had been deprived effective assistance of counsel.¹¹⁰ In *Lin*, Lin, a fourteen-year-old boy, fled China after his mother was forcibly sterilized for having a second child in violation of China's one-child limit.¹¹¹ The Chinese government had imposed a 50,000 renminbi (RMB) fine on Lin's family.¹¹² Due to the resulting financial difficulties, Lin's family was not able to pay his school tuition, so Lin was not able to attend school.¹¹³ At his hearing, Lin made two arguments that he had refugee status. First, he claimed that he was persecuted because of his membership in a particular social group.¹¹⁴ Second, he claimed that his parents' political opinions in opposition to China's birth control policies should be imputed to him.¹¹⁵ On the first claim, the Ninth Circuit held "Lin had a plausible claim for refugee status as a member of a particular social group—his immediate family—if he could demonstrate a well-founded fear of persecution on account of that status"¹¹⁶

In addressing the second claim, the Ninth Circuit noted that the language in section 1101(a)(42) does not require that resistance to a population control program be Lin's own.¹¹⁷ This position is consistent with the view expressed by the Board of Immigration Appeals in

109. UNITED NATIONS HIGH COMM'R FOR REFUGEES, *supra* note 94, ¶ 218.

110. *See Lin v. Ashcroft*, 377 F.3d 1014, 1014 n.1, 1031 (9th Cir. 2004).

111. *See id.* at 1019, 1022.

112. *Id.* at 1021.

113. *Id.* at 1022.

114. *Id.* at 1028.

115. *Id.*

116. *Id.* at 1029.

117. *Id.* at 1031.

C-Y-Z, which implied that a child's association with a parent who opposes China's population control policies may cause that political opinion to be imputed onto the child.¹¹⁸ The reasoning behind that view is that it would be contrary to the doctrine of imputed political opinion to allow its use only when the forcibly sterilized parent is applying for asylum in conjunction with the child.¹¹⁹ This view suggests that an individual can be persecuted and establish a reasonable basis for fear of persecution through witnessing the persecution of family members.¹²⁰ In *Lin*, the Ninth Circuit agreed, and could not find any reason why the spouse of someone forcibly sterilized should be distinguished from the child of a parent forcibly sterilized in imputing political opinion as a matter of law.¹²¹ Although the Ninth Circuit was not able to decide this issue, it recognized that "Lin would have been well-situated to bring a case testing whether 'past persecution on account of political opinion' established by forced sterilization of the mother may be imputed to her children as well as to her spouse."¹²²

B. Wang v. Gonzales

In *Wang v. Gonzales*, a Third Circuit case, Wang, a fourteen-year-old boy, sought asylum in the United States after his mother was forcibly sterilized.¹²³ The Chinese government had also imposed a fine on Wang's family that was 100 times their monthly income.¹²⁴ The family had to flee from their home and split up because they could not pay the fine.¹²⁵ Later, the family was able to return to its home and Wang's father arranged to pay the fine in installments.¹²⁶ Nevertheless, the Wangs were still continually harassed by the government.¹²⁷ Officials frequently came to their home, asked why the

118. *In re C-Y-Z*, 21 I. & N. Dec. 915, 922 (B.I.A. 1997) (Rosenberg, concurring) ("An individual's own refusal or failure to comply with a compulsory population control program, or his or her association with one who expressly resists or opposes such a program, may cause such a political opinion to be imputed to that individual.").

119. *See id.* at 922-23. (Rosenberg, concurring) ("There is nothing in the doctrine of imputed political opinion, and indeed, it is somewhat antithetical to the doctrine, to suggest that it is only available when the persecuted victim whose views are imputed to the applicant also is applying for asylum.").

120. *Id.* at 926 (Rosenberg, concurring).

121. *Lin*, 377 F.3d at 1031.

122. *Id.*

123. *Wang v. Gonzales*, 405 F.3d 134, 137, 144 n.7 (3d Cir. 2005).

124. *Id.* at 136.

125. *Id.*

126. *Id.*

127. *Id.*

fine had not been paid, and smashed the Wangs' furniture.¹²⁸ Eventually, the home was destroyed and the Wangs were forced to relocate again.¹²⁹ Though Wang's parents were able to open a snack bar, officials destroyed the business equipment.¹³⁰ Subsequently, Wang was smuggled into the United States.¹³¹

Similar to Lin, Wang based his application for asylum on two grounds of persecution. First, he claimed past political opinion persecution' under China's birth control policies.¹³² Second, he claimed membership in a particular social group.¹³³ Instead of claiming his family as the social group, Wang associated himself with "a particular social group of 'poor and uneducated Chinese who are forced to pay a heavy fine far larger than they can afford' for violating the family planning policies."¹³⁴ This claim, which alleged that members of that group were forced to engage in government-supported smuggling, was dismissed by the administrative judge for a lack of evidence.¹³⁵

In addressing Wang's political opposition claim, the immigration judge found that Wang had been persecuted by the Chinese government's actions.¹³⁶ However, the judge held that Wang could not base his asylum claim on forcible sterilization as a spouse could.¹³⁷ Instead, the judge denied Wang asylum because "Wang was not fleeing direct persecution, had attended school, . . . [and] did not leave China to escape future physical harm" and because "the past persecution was not based on physical harm"¹³⁸ On appeal, the Third Circuit held that Wang was not eligible for asylum.¹³⁹ In doing so, the court reasoned that a husband is directly affected by his wife's forcible sterilization as a parent, whereas a child only has an interest as a "potential sibling."¹⁴⁰

128. *Id.*

129. *Id.* at 137.

130. *Id.*

131. *Id.*

132. *Id.* at 139-40.

133. *Id.* at 140.

134. *Id.* (quoting the administrative record).

135. *Id.*

136. *Id.*

137. *See id.*

138. *Id.*

139. *Id.* at 144.

140. *Id.* at 143.

C. Zhang v. Gonzales

Zhang v. Gonzales was the threshold case in the Ninth Circuit for determining whether the child of a parent who has been forcibly sterilized is automatically eligible for asylum in the United States.¹⁴¹ Zhang lived in a rural village where the government allowed two children per couple.¹⁴² Zhang's parents chose to have a third child and kept him a secret from the government until they attempted to enroll him in school.¹⁴³ As punishment for defying China's one child policy, government officials ordered Zhang's father to be forcibly sterilized.¹⁴⁴ The sterilization surgery took a heavy toll, physically and emotionally, on Zhang's father and the family. After the sterilization, Zhang's father was so weak that he could not return to work, so Zhang's mother had to find work.¹⁴⁵ In addition to the forced sterilization, officials fined the Zhangs 23,000 RMB, approximately \$2,800 U.S. dollars.¹⁴⁶ Because the family could not pay the fine, government officials threatened the Zhangs with eviction and took the Zhangs' possessions.¹⁴⁷ In addition, Zhang and her two siblings were not allowed to go to school.¹⁴⁸

Foreseeing a bleak future for their children, Zhang's parents arranged to smuggle Zhang into the United States, where she hoped to get an education.¹⁴⁹ When the INS caught Zhang, "she requested asylum and withholding of removal."¹⁵⁰ Both the immigration judge and the Board of Immigration Appeals denied Zhang's requests.¹⁵¹ The Ninth Circuit held "that a child of a forcibly-sterilized parent is not automatically eligible for asylum" in the United States.¹⁵²

This opinion was a marked retreat from the view the Ninth Circuit expressed in *Lin v. Ashcroft*.¹⁵³ *Zhang* did not mention imputed politi-

141. *Zhang v. Gonzales*, 408 F.3d 1239, 1242 (9th Cir. 2005).

142. *Id.* at 1243.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 1243-44.

152. *Id.* at 1250.

153. *See id.* at 1246 (stating that, although the court had suggested in dicta in *Lin* that the child of a forcibly sterilized parent might be automatically eligible for asylum, it was compelled to defer to the BIA's reasonable interpretation that such children are not automatically eligible for asylum).

cal opinion or persecution through witnessing government acts directed at family members. In *Lin*, the Ninth Circuit could not see any reason to distinguish children from spouses.¹⁵⁴ In *Zhang*, the Ninth Circuit found a distinction akin to the one the Third Circuit found in *Wang*¹⁵⁵ to distinguish children from spouses.¹⁵⁶ The Ninth Circuit reasoned that a couple is persecuted together when one spouse is forcibly sterilized because sterilization affects their ability to have children together.¹⁵⁷ However, children are not automatically eligible for asylum because they are not necessarily persecuted by the sterilization.¹⁵⁸

VI. CREATING AN AVENUE FOR CHINESE CHILDREN TO CLAIM ASYLUM IN THE UNITED STATES

A. *Totality of Effect of Persecution on Children*

In these holdings, U.S. courts have failed to acknowledge the serious consequences that China's one-child policy has had on the victims' children. While children naturally are affected in a different way than spouses, both suffer when a parent is forced to undergo sterilization or abortion. The Chinese government enforces compliance with its population control policies by punishing an entire family if one of its members is in violation.¹⁵⁹ Children in a family that has exceeded the birth limits are persecuted for this violation through denial of education, food, and medical services; economic deprivation; social stigmatization; constant government intrusion into their private lives; and witnessing their parents suffer physically and emotionally from forcible sterilization.¹⁶⁰ According to the vice minister of the State Family Planning Commission in China, "Family planning affects all households since each person and each family must contend with the issue."¹⁶¹ The children's lives change dramatically once their parents

154. *Id.* at 1245-46.

155. *See Wang v. Gonzales*, 405 F.3d 134, 143 (3d Cir. 2005).

156. *Zhang*, 408 F.3d at 1245 (finding congressional intent to make couples eligible *per se* for asylum, but not children).

157. *Id.*

158. *Id.*

159. *See id.* at 1243.

160. *See id.*

161. Hu Huiting, *Family Planning Law and China's Birth Control Situation*, CHINA.ORG.CN, Oct. 18, 2002, <http://www.china.org.cn/english/2002/Oct/46138.htm> (interview with the Vice Minister of China's State Family Planning Commission, Zhao Bingli).

are deemed to be in violation of the policy. The family must struggle to survive in the face of the enormous fine.¹⁶² Consequently, the children may be forced to provide economic support, and the family may be displaced from its home.¹⁶³ Furthermore, the children may be deprived of an education.¹⁶⁴ These hardships constitute acts of persecution that affect all of the children of parents who violate the one-child policy.

B. Membership in a Particular Social Group—A Source of Relief for Children Seeking Asylum in Australia and Canada

As previously discussed, membership in a particular social group is one of the five categories on which immigrants may base their asylum claims.¹⁶⁵ However, a clear definition of “a particular social group” has yet to be formulated as both domestic and international asylum laws have “often stumbled when attempting to provide a coherent concept of the social group category.”¹⁶⁶ The U.N. High Commissioner for Refugees (UNHCR) suggests that a “particular social group” is comprised of people “who share a common characteristic other than their risk of being persecuted, or who are perceived by group as a society.”¹⁶⁷ This common “characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”¹⁶⁸ “Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be sufficient ground to fear persecution.”¹⁶⁹ The First, Third, and Seventh Circuits define persecution directed at a “particular social group” as:

persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. . . . However, whatever the common characteristic

162. See *Zhang*, 408 F.3d at 1243.

163. See *id.*

164. See *id.*

165. 8 U.S.C. § 1101(a)(42) (2000); see *infra* note 50 and accompanying text.

166. Michael G. Heyman, *Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence*, 36 U. MICH. J.L. REFORM 767, 774 (2003).

167. UNITED NATIONS HIGH COMM’R FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: “MEMBERSHIP OF A PARTICULAR SOCIAL GROUP” WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 11, U.N. Doc. HCR/GIP/02/02 (2002).

168. *Id.*

169. UNITED NATIONS HIGH COMM’R FOR REFUGEES, *supra* note 94, ¶ 79.

that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.¹⁷⁰

The Ninth Circuit has held, as a matter of law, that a nuclear family constitutes a "particular social group."¹⁷¹ However, the Second Circuit has held that the broad category of all children, without any further distinguishing characteristics, does not constitute a particular social group.¹⁷²

Other jurisdictions have already recognized that China's one-child policy has created particular social groups. For example, the Australian High Court has held that "black children" (children born in violation of China's one-child policy) can constitute a particular social group.¹⁷³ The High Court further stated that children are persecuted when they are deprived of education, food, and minimal levels of health care.¹⁷⁴ Similarly, in the case of a Chinese woman in violation of the one-child limit and her second child, the Canadian Federal Court of Appeal discussed two separate particular social groups.¹⁷⁵ First, the court found that mother belonged to the social group of women "who have more than one child, and are faced with forced sterilization . . ."¹⁷⁶ In addition, like the Australian High Court, the Canadian court acknowledged the social group consisting of second children born in violation of the one-child policy.¹⁷⁷ The court found that China deprives second children "of medical care, education and employment opportunities and even food . . ."¹⁷⁸ The court also mentioned family unity in granting asylum to Cheung.¹⁷⁹ U.S. courts should look to the precedent established by Australia and Canada when determining whether children of the victims of China's one child should be afforded asylum based on being members of a particular social group.

170. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); see GERMAIN, *supra* note 49, at 39.

171. *Chen v. Ashcroft*, 289 F.3d 1113, 1115 (9th Cir. 2002).

172. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

173. *Hai v. Minister for Immigration & Multicultural Affairs* (2000) 201 C.L.R. 293 (Austl.).

174. *Id.*

175. *Cheung v. Canada*, [1993] 2 F.C. 314 (Can.).

176. *Id.*

177. *Id.*

178. *Id.* at 216.

179. *Id.* at 222.

C. Accompanied Minors Versus Unaccompanied Minors

When a child's parents violate the one-child policy, it creates a situation in which the entire family is persecuted as a whole. While the spouse of someone forcibly sterilized is naturally affected by the deprivation of reproductive rights, children are affected in ways that are equally serious and detrimental. In addressing the asylum eligibility for children leaving China due to a parent's forcible sterilization, it is useful to divide the analysis between accompanied and unaccompanied minors.

1. Accompanied Minors

The U.S. cases discussing whether children can claim asylum based on a parent's forcible sterilization have all involved unaccompanied minors.¹⁸⁰ Thus, no U.S. court has laid down a definitive ruling whether a child accompanied by a forcibly sterilized parent can be granted asylum. However, one of the main goals of immigration law is family unification and many courts have recognized family as a particular social group.¹⁸¹ Under this classification, accompanied minors could obtain refugee status through a showing of persecution based on membership in a particular social group, the nuclear family.¹⁸² An alternative method to reinforce family unification has been to grant derivative status asylum.¹⁸³ Through this process, when the United States grants an adult immigrant asylum, that immigrant's spouse and children may be granted the same status if they are accompanying or planning to join the immigrant in the future.¹⁸⁴ Because section 1101(a)(42)(B) of the Immigration and Naturalization Act grants a parent who has been forcibly sterilized automatic eligibility for asylum in the United States,¹⁸⁵ a child accompanying that parent would also most likely be eligible for asylum through his or her derivative status.

180. See *Zhang v. Gonzales*, 408 F.3d 1239, 1243 (9th Cir. 2005); *Wang v. Gonzales*, 405 F.3d 134, 144 n.7 (3d Cir. 2005); *Lin v. Ashcroft*, 377 F.3d 1014, 1019 (9th Cir. 2004).

181. *Ma v. Ashcroft* 361 F.3d 553, 559, 561 (9th Cir. 2004) (finding that breaking up the family is at odds with U.S. immigration policy); *Chen v. Ashcroft*, 289 F.3d 1113, 1115 (9th Cir. 2002) (finding that families constitute "particular social groups" in the First Circuit and holding that the same is true in the Ninth Circuit).

182. *Chen*, 289 F.3d at 1115.

183. See 8 U.S.C.A. § 1158(b)(3)(A) (West 2005 & Supp. 2 2005).

184. *Id.*

185. See 8 U.S.C. § 1101(a)(42)(B) (2000).

2. Unaccompanied Minors

Difficulty arises when an unaccompanied minor bases an asylum claim on the forcible sterilization of his or her parent. Courts oppose granting these children asylum, presumably because doing so splits families, and one of the main goals of the Immigration and Naturalization Act is to keep families together.¹⁸⁶ In addition, there may also be an underlying concern that granting asylum in this manner would create a large influx of Chinese children into the United States. The fact that Chinese parents are consciously sending their children to the United States should not be taken lightly. By doing so, Chinese parents recognize that children of families that violate China's population control laws are second class citizens who face many difficulties. Both children born in excess of the limit and their siblings are deprived of some of the most basic human rights, such as education, employment opportunities, medical services, and food.¹⁸⁷ Australian and Canadian courts have already acknowledged that "black children," born in excess of the limit, can constitute a particular social group because of these deprivations.¹⁸⁸

U.S. courts have not addressed the particular social group category in much depth when dealing with forcible sterilization cases. While the Ninth Circuit has held that a nuclear family constitutes a particular social group,¹⁸⁹ federal courts have not granted unaccompanied children asylum based on their membership in a family where a parent was forcibly sterilized.¹⁹⁰ While basing a claim for asylum on family as a particular social group makes sense for accompanied children, it makes less sense when a child is leaving his family behind. The key cases dealing with granting asylum to spouses of persons forcibly sterilized have been based on imputed political opinion, rather than membership in the family as a particular social group.¹⁹¹

Under current U.S. asylum law, the prospect of obtaining asylum in the United States as an unaccompanied child from China is daunting. Both the Third and Ninth Circuits rejected claims of imputed political doctrine and membership in a family constituting membership

186. *See Ma*, 361 F.3d at 559.

187. GREENHALGH & WINCKLER, *supra* note 1, at 38.

188. *Hai v. Minister for Immigration & Multicultural Affairs* (2000) 201 C.L.R. 293 (Austl.); *Cheung v. Canada*, [1993] 2 F.C. 314 (Can.).

189. *Chen v. Ashcroft*, 289 F.3d 1113, 1115 (9th Cir. 2002).

190. *See Zhang v. Gonzales*, 408 F.3d 1239, 1243 (9th Cir. 2005); *Wang v. Gonzales*, 405 F.3d 134, 144 n.7 (3d Cir. 2005); *Lin v. Ashcroft*, 377 F.3d 1014, 1019 (9th Cir. 2004).

191. *See Qiu v. Ashcroft*, 329 F.3d 140, 148 (2d Cir. 2003); *In re C-Y-Z*, 21 I. & N. Dec. 915, 919 (B.I.A. 1997).

in a particular social group.¹⁹² Those courts mainly focused on the physical, reproductive distinction between spouses and children, and gave little consideration to the economic and emotional difficulties that the children contend with every day.¹⁹³ In contrast, the Australian and Canadian courts found these difficulties to be so compelling that they allowed children to claim asylum based on their membership in the narrow group of children who are denied education, medical services, employment, and food based on their parents' violation of the one-child policy.¹⁹⁴ Yet, the United States does not provide any avenue for these unaccompanied children to successfully claim asylum.

However, U.S. courts could recognize that membership in the particular social group of all children whose parents have violated the one-child policy, similar to what the Australian and Canadian courts have done with "black children." Currently, U.S. courts focus on the general finding that children are not necessarily persecuted by a parent's forcible sterilization. Recognizing the possibility of membership in the particular group of children whose parents have violated the one-child policy would shift the inquiry. U.S. courts would then give individual consideration to each child to determine whether that child has suffered sufficiently severe deprivations as a result of his or her parents' violation of Chinese family planning law to deserve classification as a member in that particular social group. The United States would thereby open a path to give serious consideration to the asylum claims of Chinese children, rather than turn them away merely because the parent-child relationship differs from the spousal relationship.

VII. CONCLUSION

While U.S. asylum law has evolved to provide protection to those forcibly sterilized and their spouses, the law still disregards the plight of their children. Children are denied asylum under the assumption that they could not possibly have been persecuted by a governmental act aimed at terminating their parents' ability to reproduce. Yet, when couples violate the one-child policy, their children are thereafter treated as second-class citizens and denied the opportunities afforded to the children of non-violating families. Concerns about an overflow of immigration into the United States are important and should always

192. See *Zhang*, 408 F.3d at 1245-46; *Wang*, 405 F.3d at 140.

193. See *Zhang*, 408 F.3d at 1245; *Wang*, 405 F.3d at 142-43.

194. See *Hai v. Minister for Immigration & Multicultural Affairs* (2000) 201 C.L.R. 293 (Austl.); *Cheung v. Canada*, [1993] 2 F.C. 314 (Can.).

be taken into account when formulating new laws and policies about classes of people that may be entitled to asylum. However, the denial of educational, occupational, and social opportunities that the children of violators of the one-child policy face is no less deserving of consideration. Certainly, these children deserve as much protection from such denial as they would from other acts of persecution. U.S. courts should follow the Australian and Canadian precedent and recognize that these children can be members of a particular social group for the purposes of asylum.

*Kristi Deans**

* J.D. candidate, California Western School of Law, Spring 2007; B.A., University of California, San Diego, 2004. I would like to give a special thanks to my family for their continual love and support and to Dave for keeping me sane amidst the madness of law school.

