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The New INS Guidelines on Gender Persecution: Their Effect on Asylum in the United States for Women Fleeing the Forced Sterilization and Abortion Policies of the People’s Republic of China

I. Introduction

Many American feminists view the right to abortion as a symbol of reproductive freedom.\(^1\) Rather than simply consisting of the right to terminate a pregnancy, the right to abortion also represents a woman’s right to control her own body and reproductive capacity.\(^2\) However, in order to have true reproductive freedom, women must also be free from the threat of all types of reproductive control, including forced abortion or sterilization, or mandatory use of an intrauterine device (IUD).\(^3\) These practices are currently being used in the People’s Republic of China (PRC) to enforce its population control policy.\(^4\) As a result of the PRC’s coercive population control measures, many Chinese citizens have sought asylum in other countries based on their fear of persecution through these practices.\(^5\)

The United Nations definition of a refugee arguably encompasses coercive population control measures as bases for granting "refugee status."\(^6\) Accordingly, in 1993 Canada became the first country in the


\(^{3}\) See Cook, supra note 2, at 995. An intrauterine device, or IUD, is a contraceptive device that fell into disfavor in the 1970s when researchers discovered that one brand of IUD, the Dalkon Shield, had a design flaw that caused an increased chance of pelvic inflammatory disease, which could lead to sterility, removal of the woman’s reproductive organs, or death. See Body Talk, S.F. Chron., Oct. 17, 1991, at D6; The IUD: Controls for a Contraceptive, Newsweek, Sept. 17, 1984, at M13; Subrata N. Chakravarty, Tunnel Vision, Forbes, May 21, 1984, at 214.


\(^{6}\) An alien outside her country of nationality, but not within the United States, may apply for "refugee status" at designated consular posts or Immigration and Naturalization Service [hereinafter INS] offices abroad, which require the alien to meet the statutory definition of a refugee. AUSTIN T. FRAGOMEN AND STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE 6-7 (2d ed. 1992). See 8 U.S.C.
world to recognize that the persecution of women based on gender may constitute grounds for granting refugee status. On May 26, 1995, the United States followed suit when the Immigration and Naturalization Service (INS) issued guidelines on gender persecution.

This Comment examines how the new INS guidelines on gender persecution will alter the policy of the United States on refugee status for those fleeing the PRC's coercive population control policy, especially with respect to women. In Part II, this Comment reviews the PRC's one-couple, one-child policy and the measures used to enforce it. Part II further discusses the United Nations definition of a refugee and whether this definition could encompass the PRC's population control policies as a basis for asylum. Part III examines Canada's gender persecution guidelines, which recognize that gender persecution is a basis for refugee status under the United Nations definition. Part III also analyzes the effect that these guidelines have had on Canada's policy toward Chinese women seeking asylum in Canada based on the PRC's population control measures, and how the issuance of the Canadian Guidelines affected immigration rates in Canada.

In Part IV, this Comment traces the recent history of this issue in the U.S. judicial and administrative realms. Part V speculates on what effect the issuance of the INS gender persecution guidelines will have on U.S. policy toward Chinese citizens fleeing the PRC's coercive population policy, especially considering the effect that similar guidelines have had in Canada. Part VI concludes that the INS Guidelines could have a positive effect on the ability of Chinese women to gain refugee status in the United States based on the PRC's coercive population policies. However, the INS Guidelines may conflict with existing immigration law as represented by administrative and judicial decisions, and with established definitions of "persecution." The Comment further concludes it is unlikely that the issuance of the INS Guidelines will result in a flood of new asylum claims from women. Finally, the Comment speculates that if Chinese women are able to gain asylum under the INS Guidelines, then a corollary of the issuance


An alien in the United States may apply for asylum, which in turn requires the aliens to qualify as "refugees." Fragomen & Bell, supra, at 6-7; see 8 U.S.C. § 1158(a) (1988); see also infra notes 37-43 and accompanying text.

7 See infra notes 44-48 and accompanying text.
9 See infra notes 15-43 and accompanying text.
10 See infra notes 44-88 and accompanying text.
11 See infra notes 89-178 and accompanying text.
12 See infra notes 179-259 and accompanying text.
13 See infra part VI.
14 See infra text accompanying notes 176-85.
of these Guidelines may be that similarly situated men and women from the PRC may not be treated equally—female Chinese citizens fleeing the PRC’s forced sterilization policy may be granted asylum, while Chinese men fleeing the same policy may not be.

II. The PRC’s Population Control Policy and the United Nations Definition of a Refugee

A. The One-Couple, One-Child Policy

In 1979, the PRC adopted its one-couple, one-child policy. From 1946 until the 1970s, Mao Tse-tung had encouraged childbearing based on the theory that a worker could produce more than he or she could consume, and declared that overpopulation was a capitalist myth. However, the population boomed between 1963 and 1972. When health and living conditions started to reflect the population problem, the government reversed its position in 1979 and declared its official policy that each couple was allowed only one child.

A system of economic sanctions and rewards was put into place to encourage compliance and punish deviance from the policy. Rewards for couples who follow the policies include monthly stipends and educational and medical benefits, while sanctions include fines, withholding of social services, demotion, and loss of employment. A couple that has a second child also may be expelled from the Communist party, or have trouble buying fuel, seed or other products that are usually provided by the state. While some of the sanctions will only affect the “extra” children of the family through their parents, other sanctions are directed specifically at these children. These include the child’s loss of his or her right to free education and health

16 Gerwitz, supra note 15, at 141.
17 Gerwitz, supra note 15 at 142.
18 Gerwitz, supra note 15 at 144-45. The population problem in the People’s Republic of China (PRC) has led to difficulties ranging from shortages in arable land to a lack of funds for education. Id. In addition, the size of the PRC’s population has been linked to poor maternal and infant health and environmental problems such as increased pollution and depletion of natural resources. Id; see also Lisa B. Gregory, Note, Examining the Economic Component of China’s One-Child Family Policy under International Law: Your Money or Your Life, 6 J. CHINESE L. 45, 48-49 (1992).
19 Gerwitz, supra note 15, at 142. The one-child policy was promoted before 1979, but when incentives proved ineffective to curb population growth in rural areas, the government made the policy mandatory. Id. See also 1994 COUNTRY HUM. RTS. REP., U.S. DEP’T OF STATE DISPATCH, CHINA HUMAN RIGHTS PRACTICES (1995) [hereinafter RIGHTS PRACTICES].
20 These sanctions are discussed in detail in Gregory, supra note 18.
21 RIGHTS PRACTICES, supra note 19.
22 RIGHTS PRACTICE, supra note 19.
24 Gregory, supra note 18, at 80-81.
care subsidies, or loss of food and clothing rations.

Although the official government sanctions are generally of an economic nature, the system of policing adherence to the one-couple, one-child rule allows for sanctions of a more brutal nature. Local officials are given "quotas" specifying how many children may be born into their neighborhoods or production units, and officials may have to pay stiff fines if there are too many births. In order to adhere to these quotas, many local officials engage in physical coercion, such as forcing women to have abortions, and forcing men and women to be sterilized. Some of these abortions and sterilizations begin with the subjects being dragged from their homes in the middle of the night. The Chinese government maintains that overzealous officials are disciplined and retrained, but also concedes that strong punishment of these officials is rare. Furthermore, there is evidence that because of the considerable influence exerted over local officials by officials in higher, more powerful positions, coercive practices are encouraged when these officials in higher positions issue general, open-ended commands.

B. The United Nations Definition of a Refugee

The United Nations definition of a refugee provides that:

the term "refugee" shall apply to any person who ... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is ... unable to return, or owing to such fear, is unwilling to avail himself of the

25 Gregory, supra note 18 at 80.
26 See Gregory, supra note 18, at 80.
27 While forced abortion and sterilization are not officially sanctioned in the PRC, many women are forced by law to submit to the insertion of an intrauterine device after the birth of their first child. See Steven W. Mosher, 'One Family, One Child: China's Brutal Birth Ban—For Chinese Women, It's Abortion or Sterilization, WASH. POST, Oct. 18, 1987, at D1; Duncan Graham, Australia: Chinese Refugee Forcibly Fitted with IUD Device, Reuter Textline, July 2, 1993, available in LEXIS, World Library, TXTNWS File; see also supra note 3 (discussing the dangers of IUD use).
28 See Gregory, supra note 18, at 49.
29 RIGHTS PRACTICES, supra note 19.
30 See Mosher, supra note 27.
31 Mosher, supra note 27. Mosher gives accounts of incidents that occurred in the village of Zhuhai during a period of ardent enforcement of the population control policy. Id. The villagers related that "expectant mothers cried for help as they were dragged out of their homes into waiting vans...[t]hese vehicles became known as 'pig basket vans' after the large wicker 'pig baskets' in which pigs are carted to the slaughterhouse." Id. See also Abortion Policy Tears at China's Society, WASH. POST, Jan. 7, 1985, at A1.
33 U.S. Reactions, supra note 4.
34 For example, in 1981 Deng Xiaoping was quoted as saying, "In order to reduce the population, use whatever means you must, but do it." U.S. Reactions, supra note 4. See generally Mosher, supra note 27.
Thus, although the majority of the world’s refugee population is made up of women and children, the United Nations did not explicitly include gender persecution in its definition as a basis for refugee status. Nevertheless, the forced abortion and sterilization policies of the PRC may still constitute persecution under this definition. For example, persecution based on disagreement with the PRC’s policies on population control may constitute “being persecuted for reasons of ... political opinion.” Alternately, the persecution of women through forced abortion or sterilization may be considered “persecution for reasons of ... membership in a particular social group,” the social group consisting of all Chinese women, or possibly Chinese women who have one child and desire more children or are pregnant.

The United Nations supplemented its definition of a refugee in July 1991, when the United Nations High Commission for Refugees (UNHCR) adopted guidelines for the protection of refugee women. These guidelines recognize that women who face violent conditions should be given at least legal protection. Further, the UNHCR guidelines also invited states to address their claims under the social group category of the United Nations refugee definition, thus giving an open invitation for reform.

III. Canada’s Gender Persecution Guidelines and Caselaw

On March 9, 1993, the Canadian Immigration and Refugee Board (IRB) issued guidelines that recognized gender persecution as a
possible basis for achieving refugee status. Rather than adding to or abandoning the five enumerated grounds for asylum in the 1951 United Nations definition of a refugee, the Canadian Guidelines point out that "[t]he definition . . . may properly be interpreted as providing protection to women who demonstrate a well-founded fear of gender-related persecution." The Canadian Guidelines also emphasize that a central issue in adjudicating these claims is the identification of "the nature of the persecution feared by the claimant."

Recognizing that women may suffer different forms of persecution than men, the Canadian Guidelines set out four nonexclusive categories of persecution directed at women: persecution under the 1951 grounds "in similar circumstances as men;" persecution related to kinship; persecution based on gender discrimination; and persecution as a "consequence for failing to conform to, or for transgressing, gender-discriminating religious or customary laws and practices in their country of origin."

The effects of these guidelines have been in some ways dramatic. In 1993, the Canadian Immigration Review Board heard approximately 31,000 claims for asylum; most of these claims were made by men. The average acceptance rate for these claims is about fifty percent. However, between April 1993 and March 1994, asylum was granted for more than 100 out of 150 women who applied. The granting of asylum in these cases appears to be a direct result of the Canadian Guidelines. A Montreal attorney who represents asylum claimants has emphasized that the guidelines have given women's gender persecution claims credibility and have increased the chances of these claims being accepted. However, the Canadian Guidelines have not had a large overall effect on the number of refugees entering Canada.

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44 IMMIGRATION AND REFUGEE BOARD, GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT, WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (1993) [hereinafter CANADIAN GUIDELINES]; see also Jacque Miller, Canada Leads World in Recognizing Sex-Based Persecution, OTTOWA CITIZEN, Mar. 8, 1994, at A1; Alan Thompson, Canada First in Recognizing Abused Women as Refugees, TORONTO STAR, Mar. 10, 1995, at A2.

45 Several authors have advocated modifying the U.N. definition of a refugee. See, e.g., Rebecca O. Brennick, Reproductive Ability as a Sixth Ground of Persecution Under the Domestic and International Definition of Refugee, 21 SYRACUSE J. INT'L L. & COM. 121 (1995); Kandt, supra note 37, at 138; Shiers, supra note 23, at 1007.

46 CANADIAN GUIDELINES, supra note 44, at 2.


48 CANADIAN GUIDELINES, supra note 44, at 2-3.


50 Id.

51 Id.

52 Id.
Nurjehan Mawani, the chairperson of the IRB, noted that the new guidelines did not result in an overall increase in claims in 1993.55 In 1994, only two percent of the asylum claims were gender-related, and of these 650 claims, only 304 were granted refugee status.54 This is in line with the overall acceptance rates for refugees.55

Less than a month after the Canadian Guidelines were issued, the Canadian Federal Court of Appeal decided Cheung v. Canada,56 where asylum was granted to a Chinese woman and her daughter57 based on the woman’s fear of being forced to submit to sterilization because she had two children.58 The court specifically recognized that “[w]omen in China who have more than one child and are faced with forced sterilization constitute a social group within the meaning of the definition of Convention refugee.”59 The second part of the court’s inquiry focused on whether the applicant had a well-founded fear of persecution based on membership in this group.60 The court maintained that even though the population control policy applies generally in the PRC, “[u]nder certain circumstances, the operation of a law of general application can constitute persecution.”61 Citing Padilla v. Canada,62 the court elaborated that the applicant in this case “genuinely fears forced sterilization; her fear extends beyond the consequences of the law of general application [economic sanctions] to include extraordinary treatment [forced sterilization] in her case that does not normally flow from the law.”63 However, the court also maintained that a finding of “specialized treatment” would not always be necessary for a grant of asylum:

[I]f the punishment or treatment under a law of general application is so Draconian as to be completely disproportionate to the objective of the law, it may be viewed as persecutory. This is so regardless of whether the intent of the punishment or treatment is persecution. Cloaking persecution with a veneer of legality does not render it less persecutory. Brutality in furtherance of a legitimate end is still brutality.64

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55 Id.
57 Id. at 325. Ms. Cheung’s daughter was granted asylum because, as a second child, “she would . . . experience such concerted and severe discrimination, including deprivation of medical care, education and employment opportunities and even food, so as to amount to persecution.” Id.
58 Id. at 325.
59 Id. at 325.
60 Id. at 322.
61 Id. at 323.
64 Id.
Cheung thus opened the door for refugees from countries that have cruel or coercive policies of general application. For women, this means that abhorrent policies that apply to all or many of the women who live in a certain country may be grounds for asylum.⁶⁵

Other cases also illustrate how the Canadian courts have given special consideration to Chinese women seeking asylum based on China's one-couple, one-child policy. In Lai v. Canada,⁶⁶ the IRB maintained that a group of citizens from the PRC were not Convention refugees.⁶⁷ The trial court found that with respect to a female applicant, forced sterilization was considered to be persecution, and forced abortion was equivalent to or worse than forced sterilization.⁶⁸ The matter was remanded for a determination of whether there was a reasonable chance that the female applicant would be forced to undergo an abortion if returned to the PRC.⁶⁹ In Liu v. Canada,⁷⁰ the trial court found that the IRB erred when it asserted that a female applicant from the PRC would not face forced sterilization if she returned to China.⁷¹ However, the application was dismissed when the applicant failed to furnish evidence of a subjective fear of persecution.⁷²

Because the Canadian Guidelines addressed gender persecution directed specifically toward women, court decisions in Canada since the guidelines were issued have not showed any particular deference toward males fleeing from the PRC's population control policies. For example, in Chan v. Canada,⁷³ a federal court of appeal denied the application of a Chinese male who sought asylum based on his resistance to the one-couple, one-child policy.⁷⁴ The court rejected Chan's claim that he was a member of the group of "parents in China with more than one child who disagree with forced sterilization," and that as member of this group he would suffer persecution if returned to China.⁷⁵

⁶⁵ For example, Canada recently granted refugee status to a Somali woman and her daughter based on the woman's fear that her daughter would be genitally mutilated if they remained in Somalia. See Tom Fennell, Finding New Grounds for Refuge, MACLEAN'S, Aug. 8, 1994, at 18; Farnsworth, supra note 53, at 14. The custom of female genital mutilation, which is practiced primarily in African countries, has been performed on an estimated 114 million women worldwide. Farnsworth, supra note 53, at 14.


⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id.


⁷¹ Id.

⁷² Id.


⁷⁴ Id. at 691.

⁷⁵ Id. at 691.
In comparing the facts of the case to those in Cheung, the Chan court noted “it has not been shown that sterilization of a man is qualitatively different from sterilization of a woman.” However, the court distinguished the case before them from Cheung on the ground that Chan had not established that he would be persecuted specifically through forced sterilization if he returned to China; Chan had only established that he would be subject to economic sanctions. These economic sanctions, the court reasoned, “are not sufficient to establish persecution; economic sanctions are a valid measure for enforcing an equally valid policy of general application.”

In Liang v. Canada, the court refused review of a Chinese male’s application for asylum when the applicant failed to substantiate his participation in a demonstration, and did not establish the possibility of his forced sterilization upon his return to China. The court also found that the threat of forced sterilization did not constitute persecution. A similar ruling was made in the case of Kai Lau Chow, a male who fled the PRC after local officials ordered that he be sterilized after his third child was born. His claim was rejected by the IRB because forced sterilization did not constitute persecution.

In Kwong v. Canada, a male applicant for asylum was a security guard in the abortion and sterilization section of a hospital. The applicant helped three women escape from forced operations, was then sought by security forces, and eventually fled to Canada. The IRB denied his application based on its determination that the applicant was subject to punishment because he did not fulfill his duties, not because of opposition to the one-couple, one-child policy. However, the reviewing court found that the IRB had drawn inferences that were contradictory to the evidence and allowed the application.
IV. Coercive Population Control and Asylum: U.S. Administrative and Judicial Policy

Under the Immigration and Nationality Act (INA), the Attorney General has the power to grant refugee status to an alien if the alien falls within the INA’s definition of a refugee. The Attorney General has delegated much of the authority to administer the INA to the INS. An alien may apply for asylum either through the INS or through the immigration courts, which are subsumed under the Executive Office of Immigration Review, a separate administrative body that answers directly to the Attorney General. The Board of Immigration Appeals (BIA) reviews and hears appeals from the decisions of the immigration judges, and BIA decisions are then reviewable by the Attorney General or by the federal courts.

A. BIA and Federal Court Decisions

The INA has adopted the United Nations definition of a refugee. Thus, to be granted refugee status under the INA, the appli-
cant must show that he or she has suffered past persecution or has a well-founded fear of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion."97 A frequently litigated issue has been what constitutes a "well-founded fear."98 In INS v. Cardoza-Fonseca,99 the Supreme Court held that to show "a ‘well-founded fear of persecution,’ an alien need not prove that it is more likely than not that he or she will be persecuted,"100 rejecting the BIA’s "clear probability of persecution" standard.101 Persecution is defined as a showing that "harm or suffering will be inflicted upon [the alien] in order to punish [her] for possessing a belief or characteristic [the] persecutor [seeks] to overcome."102 This fear of persecution must have both a subjective component (i.e., the fear is genuine)103 and an objective component (i.e., the fear has "some basis in the reality of the circumstances [and is not] mere irrational apprehension").104 Furthermore, the persecution must be "on account" of one of the five grounds enumerated in the statute.105

Court decisions that are relevant to whether a Chinese woman may be granted asylum in the United States based on the PRC's coercive population control policies fall into two general categories. First, there are those cases in which a woman requests asylum on the basis of gender persecution, usually claiming that she faces persecution as a member of a particular social group;106 for example, when an Iranian woman alleges that she is persecuted for refusing to wear a veil.107 Second, there are those cases in which Chinese citizens, both men and women, request asylum because the PRC's policies of forced sterilization and abortion constitute persecution.108 In the latter cases, the claim for refugee status is usually based on either persecution on

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98 See infra notes 99-163 and accompanying text.  
100 Id. at 449.  
101 See id. at 425. Subsequently, the BIA adopted the "reasonable probability" test: "an alien possesses a well-founded fear of persecution if a reasonable person in his or her circumstances would fear persecution if she were to return to her native country." Matter of Mogharrabi, 19 I. & N. Dec. 489 (BIA 1987).  
103 Guevara-Flores, 786 F.2d at 1249.  
104 Id. (citing Bolanos-Hernandez v. INS, 767 F.2d 1277, 1283 (9th Cir. 1984)) (alteration in original).  
106 See infra notes 108-59 and accompanying text.  
107 See, e.g., Fatin v. INS., 12 F.3d 1253 (3d Cir. 1993). See infra notes 122-34 and accompanying text for a discussion of Fatin.  
108 See infra notes 140-63 and accompanying text.
account of political opinion, or membership in a particular social group, such as the group of Chinese citizens who have one child and desire another.

Generally, U.S. courts have interpreted the INA so as not to include persecution on account of gender, maintaining that gender persecution does not fall into one of the five enumerated categories. The decisions demonstrate that the courts have been reluctant to recognize the group of women who live in a certain country as comprising a particular social group. This is mainly because such a group is too large, and because the fact that women are treated badly in some countries or live under restrictive laws is not the particularized sort of persecution contemplated by the INA.

For example, in Gomez v. INS, the petitioner, a woman who had been raped and beaten on five separate occasions by guerillas in El Salvador, attempted to get asylum in the United States based on a well-founded fear of persecution if she were to return to El Salvador. An immigration judge and the BIA both found that Gomez had not established that she possessed a well-founded fear of persecution on the basis of race, religion, nationality, political opinion or membership in a particular social group. The Court of Appeals for the Second Circuit agreed, rejecting Gomez's claim of fear of persecution based on her membership in the group of women “who have been previously abused by . . . guerillas [in El Salvador]” because “there is no indication that Gomez will be singled out for further brutalization on [that] basis” and “Gomez has [not] demonstrated that she is more likely to be persecuted than any other young woman.”

The court noted that “the attributes of a particular social group must be recognizable and discrete. Possession of broadly-based characteristics

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109 See infra notes 148-63 and accompanying text.
110 See infra notes 140-45 and accompanying text.
112 See, e.g., Safaie v. INS, 25 F.3d 636 (8th Cir. 1994); Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993); Gomez v. INS, 947 F.2d 660 (2d Cir. 1991). See infra notes 116-39 and accompanying text for a discussion of these cases.
113 See, e.g., Safaie, 25 F.3d at 640. The court rejected Safaie's argument that all Iranian women constitute a particular social group for the purposes of eligibility for asylum. Id. at 639-41; see also infra notes 134-38 and accompanying text.
114 See, e.g., Safaie, 25 F.3d at 640. The Safaie court found that a group made up of “Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them” was “overbroad.” Id. (alteration in original); see also infra notes 135-39 and accompanying text.
116 947 F.2d 660 (2d Cir. 1991).
117 Id. at 662.
118 Id. at 662-63.
119 Id. at 664.
120 Id. (alteration in original).
such as youth and gender will not by itself endow individuals with membership in a particular [social] group."\textsuperscript{121}

In \textit{Fatin v. INS},\textsuperscript{122} the court held that Fatin, an Iranian woman claiming a well-founded fear of persecution because she is a woman, had not established that she would be "persecuted or ha[d] a well-founded fear of persecution based on membership [in that group]."\textsuperscript{123} The court cited \textit{Matter of Acosta},\textsuperscript{124} where the BIA discussed the meaning of "persecution" for purposes of the INA.\textsuperscript{125} In \textit{Acosta}, the BIA found that "persecution" included "threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom."\textsuperscript{126} However, the BIA noted that "[g]enerally harsh conditions shared by many other persons" are not persecution.\textsuperscript{127} Based on \textit{Acosta}, the court in \textit{Fatin} found that a definition of persecution that included "all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional" would mean that "a significant percentage of the world's population would qualify for asylum in this country."\textsuperscript{128}

\textit{Fatin} has been read so as to leave open the possibility that gender could define a particular social group.\textsuperscript{129} The \textit{Fatin} court maintained that "to the extent that the petitioners in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman,"\textsuperscript{130} she has "identif[ied] a group that constitutes a 'particular social group.'"\textsuperscript{131} However, the court asserted that the petitioner narrowed this group to "Iranian women who find their country's gender-specific laws offensive and do not wish to comply with them."\textsuperscript{132} The court found that the record did not support the conclusion that Fatin would suffer persecution because she is a member of either of these groups.\textsuperscript{133} Based on the court's discussion of persecution,\textsuperscript{134} however, it seems

\begin{footnotes}
\footnote{Id. (alteration in original).}
\footnote{12 F.3d 1233 (3d Cir. 1993).}
\footnote{Id. at 1240.}
\footnote{Id. at 1240.}
\footnote{19 I. & N. Dec. 211, 233 (BIA 1985).}
\footnote{Fatin, 12 F.3d at 1240.}
\footnote{Id. (citing 19 I. & N. Dec. at 222) (alteration in original); see also infra notes 214-23 and accompanying text.}
\footnote{Fatin, 12 F.3d at 1240 (quoting 19 I. & N. Dec. at 222).}
\footnote{Id.}
\footnote{Id.}
\footnote{See infra notes 202-06 and accompanying text.}
\footnote{Fatin, 12 F.3d at 1240.}
\footnote{Id. The court determined that three elements must be satisfied to qualify for withholding of deportation or asylum based on membership in a social group: "the alien must (1) identify a group that constitutes a 'particular social group'..., (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership." Id.}
\footnote{Id. at 1241.}
\footnote{Id. at 1241-43.}
\footnote{See supra notes 124-28 and accompanying text.}
\end{footnotes}
doubtful that the petitioner would have been able to establish this far-reaching persecution even with a more extensive record. In Safaie v. INS,\textsuperscript{135} the Court of Appeals for the Eighth Circuit similarly held that a group composed of all Iranian women is not, simply because of restrictions on women in Iran, a "particular social group" within the meaning of the INA.\textsuperscript{136} However, the court noted that although the group of all Iranian women was too broad to be considered a social group, "a group of women, who refuse to conform [to Iranian customs] and whose opposition is so profound that they would choose to suffer the severe consequences of noncompliance" may be a social group under the INA.\textsuperscript{137} As in Fatin, this language may indicate that the court was willing to recognize gender (here, in combination with other characteristics) as defining a particular social group.\textsuperscript{138} Nevertheless, the ultimate holdings of these and other federal court decisions demonstrate that U.S. courts are not yet ready to recognize that one may be persecuted as a member of such a group for the purpose of satisfying the INA.\textsuperscript{139}

With regard to claims by Chinese citizens seeking asylum because of the PRC's coercive population control policies, most decisions have followed a 1989 BIA interim decision, Matter of Chang.\textsuperscript{140} In Chang, the BIA affirmed an immigration judge's decision denying asylum to a Chinese male who claimed he had a well-founded fear of forced sterilization if he returned to China.\textsuperscript{141} The BIA rejected Chang's claim on several bases. First, he did not establish that the PRC's policy was persecutive toward him based on one of the five grounds enumerated in the INA.\textsuperscript{142} Although the respondent claimed to be a part of a particular social group made up of persons who oppose the PRC's one-couple, one-child policy, the court held that there was no evidence that the government's policy had been applied selectively, or for reasons other than population control.\textsuperscript{143} Thus, Chang did not show that because he opposed the PRC's policy he was more likely to be persecuted than any other Chinese citizen.\textsuperscript{144} The court then concluded with regard to claims of persecution based on the PRC's "one couple, one child" policy: "[w]e cannot find that implementation of the . . . policy in and of itself, even to the extent that involuntary sterilizations may occur, is persecution or creates a well-founded fear

\textsuperscript{135} 25 F.3d 636 (8th Cir. 1994).
\textsuperscript{136} Id. at 640-41.
\textsuperscript{137} Id. at 640.
\textsuperscript{138} See infra notes 202-10 and accompanying text.
\textsuperscript{139} See, e.g., infra notes 140-63 and accompanying text.
\textsuperscript{140} No. A27292715, 1989 BIA LEXIS 13.
\textsuperscript{141} Id. at *9.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
of persecution 'on account of race, religion, nationality, membership in a particular social group, or political opinion.'

Cases decided subsequent to Chang wherein Chinese citizens have attempted to gain refugee status based on the PRC's coercive population control policies generally have been unsuccessful, whether based on persecution because of membership in a particular social group, or persecution on account of political opinion. For example, in Chen Zhou Chai v. Carroll, the applicant claimed that the PRC's population control policies constituted persecution on account of political opinion. The district court affirmed the BIA's finding that "persecution 'on account of 'political opinion requires more than a generalized political motive." Further, although the claimant alleged that his political nonconformity with the leadership of his commune was behind enforcement of the policy against him, "the [immigration judge] and the [BIA] found that enforcement of the family planning policies against the Chen family was the result of general family planning enforcement and not because of [the claimant's] alleged political dissidence." The Court of Appeals for the Fourth Circuit affirmed the district court decision, stating that while "[n]o one can question the severity of the sanctions, . . . Chen did not demonstrate that the government took any actions against him for a reason other than his failure to comply with the population control policy."

In one case, however, the "political opinion" argument succeeded at the district court level. In Guo Chun Di v. Carroll, the District Court for the Eastern District of Virginia rejected Matter of Chang and granted asylum to a Chinese male fleeing the PRC because of its coercive population control policies, determining that the claimant fell under the "political opinion" wing of the INA. The district court noted that, generally, an agency's consistent interpretation of its statute

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145 Id.
146 See infra note 209 and accompanying text.
147 See infra notes 148-52 and accompanying text.
149 Id. at 571.
150 Id. (citing INS v. Elias-Zacarias, 502 U.S. 478 (1992)).
151 Id. at 574.
152 48 F.3d at 1343.
154 842 F. Supp. at 873.
or regulations is entitled to judicial deference. However, this deference only applies where an agency interprets its own statutes and regulations, and only where it interprets these statutes and regulations consistently. The court then noted that the record showed that there had been nine inconsistent administrative announcements with respect to whether an alien may be granted asylum based on his or her government's coercive population control measures and characterized these inconsistencies as "an administrative cacaphony undeserving of judicial deference." The court then interpreted the definition of a refugee set out in the INA independently of administrative interpretation of this statute, and determined that the applicant was a refugee based on political opinion under the definition. The court's interpretation of the deference issue has been criticized on the ground that the INS itself did not issue contradictory statements; to the contrary, the INS had always followed the dictates of Chang. The district court's decision was recently reversed by the Court of Appeals for the Fourth Circuit in Guo Chun Di v. Moscato. The court of appeals, referring to its recent decision in Chen Zhou Chai, stated: "Matter of Chang is still controlling precedent for aliens seeking asylum based upon their country's coercive population control policies."

158 See infra notes 165-78 and accompanying text (summarizing the inconsistent administrative actions).
159 842 F. Supp. at 867.
160 Id. at 875.
161 Herzog, supra note 153, at 244-45.
162 66 F.3d 315, No. 94-1416, 1995 U.S. App. LEXIS 25964 (4th Cir. Sept. 14, 1995) (per curiam) (The Fourth Circuit disfavors the citation of unpublished opinions. 4TH CIR. R. 36(c)).
163 Id. at *8-9 (citing Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1342 (1995)). See also Zhang v. Slattery, 55 F.3d 732 (2d Cir. 1995), cert. denied, No. 95-7131, 1996 WL 115886 (U.S. Mar. 18, 1996). The Court of Appeals for the Second Circuit similarly rejected the application of Xin-Chang Zhang, a Chinese male fleeing the PRC's population policies. Zhang, 55 F.3d at 736-37 (2d Cir. 1995). The claim had been initially denied by the BIA. Id. However, on appeal, the District Court for the Southern District of New York remanded the case to the BIA on the basis that the 1993 rule propogated by the Attorney General superceded Chang. Id. at 736. The government appealed the district court decision. Id.
B. The INS, the President and the Attorney General

On August 5, 1988, almost a year before Chang was decided, the Department of Justice issued guidelines to the INS allowing the granting of asylum to persons fleeing the PRC because of a well-founded fear of government persecution related to the PRC's coercive population control policies. However, the INS did not implement the guidelines, and the BIA noted in Chang that it was not bound by the guidelines, as these "were directed to the [INS], rather than the immigration judges and [the BIA]."

After Chang was decided in May 1989, Congress took steps to overturn it. By November 1989, both the House and Senate had passed the Armstrong-DeConcini Amendment to the Emergency Chinese Immigration Relief Act of 1989, which had been drafted to overrule Chang and, in effect, to force the INS to grant asylum to "PRC nationals . . . fearing stringent sanctions because of their defiance of their government's population control policy." However, President Bush vetoed the Emergency Chinese Immigration Relief Act, although he favored the Armstrong-DeConcini Amendment.

In January 1990, on the President's instructions, the Attorney General issued an interim rule that amended then-existing asylum regulations to provide that asylum may be granted on the basis of a well-founded fear of sterilization. President Bush then issued an executive order stating that "[t]he Secretary of State and [the] Attorney General are directed to provide for enhanced consideration . . . for individuals . . . who express a fear of persecution . . . related to th[eir] country's policy of forced abortion or coerced sterilization." However, when the Attorney General released a final rule on immigration and asylum regulations in July 1990, the issue of asylum from coercive family planning practices was not addressed, nor was the interim rule mentioned. The court in Guo Chun Di v. Carroll noted that "when the Code of Federal Regulation was published in January 1991, the
January 1990 Interim Rule had quite simply and remarkably vanished without a trace or explanation.  

Finally, in January 1993, Attorney General William Barr signed a final rule that "essentially reiterated the January 1990 Interim Rule overruling Chang." However, when President Clinton took office on January 22, 1993, his proposed director of the Office of Management and Budget issued a directive ordering all regulations that had been submitted for publication in the Federal Register to be withdrawn. Since that time, no action has been taken with respect to this rule.

V. The New I.N.S. Gender Persecution Guidelines

On May 26, 1995, the INS issued guidelines (INS Guidelines or Guidelines) that directed immigration officers to consider that women may face persecution unique to their gender. Under the INS Guidelines, gender persecution includes "sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence, and forced abortion" or other harm inflicted on a woman because she belongs to the social group composed of women. The Guidelines emphasized that "rape and other forms of severe sexual violence" are examples of serious physical harm that constitutes persecution, and maintained that "severe sexual abuse does not differ analytically from beatings, torture, or other forms of physical violence." Asylum officers are cautioned that "[t]he appearance of sexual violence in a claim should not lead adjudicators to conclude automatically that the claim is an instance of purely personal harm." Further, the INS Guidelines recognized that persecution may consist of harm inflicted on a woman because of her political or religious views on gender. In addition, a more "user-friendly" interview process for female applicants was provided. For example, the Guidelines provided that when possible, interviews with women seeking asylum

176 Id.
177 Id.
178 Id.
179 See U.S. IMMIGRATION AND NATURALIZATION SERVICE, CONSIDERATIONS FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS FROM WOMEN (1995) [hereinafter INS GUIDELINES].
180 Id. at 9.
181 Id. (citing Lazo-Majano v. I.N.S., 813 F.2d 1432, 1434 (9th Cir. 1987)).
182 Id.
183 Id.
184 Id. at 9-10.
should be conducted by women asylum officers, and that these women should have the opportunity to be interviewed outside of the hearing of other family members.\(^\text{186}\)

In order to qualify for refugee status based on gender persecution under the INS Guidelines, applicants must conform to the requirements of the INA: they must demonstrate that the acts against them are not purely personal, that the harm they fear constitutes "persecution," and that the danger of harm exists nationwide.\(^\text{187}\) Thus, "[t]he form of harm or punishment may be selected because of the gender of the victim, but the analysis of the claim should not vary based on the gender of the victim."\(^\text{188}\)

Predictions as to the probable effect of the INS Guidelines on the ability of Chinese women to gain refugee status in the United States based on the PRC's reproductive policies can be summed up by several questions: Do the INS Guidelines affect a change in asylum law? Do forced sterilization, abortion and forced IUD use constitute gender persecution? Will the Guidelines "open the floodgates," inviting massive amounts of claims? And, will the INS guidelines have the effect of excluding Chinese men who are also subject to the reproduction policies of the PRC? These questions will be examined in the following sections.

A. The INS Guidelines and Existing Refugee Law

The policy of the INS, as well as the courts, has been to follow Chang.\(^\text{189}\) The question now becomes whether the Guidelines affect any change to existing law as represented by Chang.\(^\text{190}\)

Deborah Anker, head of the Harvard Women Refugees Project, the group that formulated the INS Guidelines, claims that the Guidelines do not represent a change in existing law:

[The INS Guidelines] represent[,] no new definition, no change in the law[,] ... not even a regulatory change. [They are] simply a series of guidances to immigration officers, making it clear that they have to

\(^\text{186}\) INS GUIDELINES, supra note 179, at 5. Female applicants are often reluctant to reveal instances of sexual abuse in front of family members. Pell, supra note 185, at 669. Further, family members may actually be the perpetrators of abuse. See generally Celina Romany, State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 85 (Rebecca J. Cook ed., 1994) (discussing domestic violence in the international human rights context).

\(^\text{187}\) INS GUIDELINES, supra note 179, at 8-18.

\(^\text{188}\) INS GUIDELINES, supra note 179, at 9.


\(^\text{190}\) See supra notes 140-45 and accompanying text.
interview women in ways that are sensitive to the trauma that [the women] have faced, and that the kinds of harms that women face on account of their gender cannot any longer be excluded. Similarly, INS Commissioner Doris Meissner emphasized that “[t]hese new guidelines do not change the standard that must be met by women seeking refugee status. What they do is educate asylum officers about gender-based discrimination and provide them with procedures and methods for evaluating whether individual claims meet the refugee standard.”

The INS Guidelines themselves note that “the applicant’s gender may bear on [her] claim in significant ways to which the adjudicator should be attentive,” but that “such [gender-related] claims must be analyzed within the terms of United States law.”

If the INS Guidelines do not in fact change existing law, one might expect that they are in accord with Matter of Chang. The dictates of the INS Guidelines may certainly be reconciled with Chang in that the applicant in Chang was a male. However, the court in Chang clearly stated,

We cannot find that implementation of the “one couple, one child” policy in and of itself, even to the extent that involuntary sterilizations may occur, is persecution or creates a well-founded fear of persecution “on account of race, religion, nationality, membership in a particular social group, or political opinion.”

The Chang court further emphasized that “there must be evidence that the governmental action arises for a reason other than general population control.” These statements suggest that a woman in the position of the respondent in Chang would be unlikely to be granted refugee status unless it were shown that the population policies were applied to her selectively. Even in cases of forced abortion and forced IUD use, which are obviously only applicable to women, it would be difficult for a woman to show that these policies were being applied to her for reasons other than general population control. Furthermore, it is unclear whether “forced abortion” as listed in the Guidelines is referring to forced abortion taking place under the

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193 INS GUIDELINES, supra note 179, at 8.


195 The court notes that “[C]hong [and his wife] were forced to flee from their commune because they had two children and did not agree to stop having more children . . . . his wife was supposed to go to the clinic (to be sterilized).” Id. at *4. However, the court appears only to decide whether Chang himself may be granted refugee status. See, e.g., id. at *9 (stating that “[t]he respondent has not asserted or established that he was treated differently from other Chinese with respect to application of the ‘one couple, one child’ policy . . . .”) (emphasis added).

196 Id.

197 Id.
The only type of physical abuse that could constitute gender persecution which is discussed at any length by the INS Guidelines is sexual abuse. See INS GUIDELINES, supra note 179, at 9.

199 See INS GUIDELINES, supra note 179, at 16-17; see also supra notes 181-83 and accompanying text. For a discussion of the emphasis on the public sphere in international human rights law, see Romany, supra note 186.

200 INS GUIDELINES, supra note 179, at 16 (citing Matter of Villalta, Int. Dec. No. 3126 (BIA 1990)).

201 INS GUIDELINES, supra note 179, at 13-15.

202 INS GUIDELINES, supra note 179, at 14.

203 INS GUIDELINES, supra note 179, at 14 (quoting Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994) (citing Fatin v. INS, 12 F.3d 1233, 1241 (3d Cir. 1993)); see also supra notes 129-39 and accompanying text.

204 INS GUIDELINES, supra note 179, at 13.

205 See INS GUIDELINES, supra note 179, at 13-15.
characteristics are likely to be ascertainable by persecutors.\footnote{206} Nevertheless, the Guidelines' discussion of \textit{Fatin} and \textit{Safaie}\footnote{207} suggests that the INS is leaning toward recognizing gender as a particular social group. If this is so, persecution that applies only to Chinese women could well be a basis for refugee status in the United States.

Therefore, if read conservatively, the Guidelines simply dictate that the definition of "persecution" has been construed too narrowly, and that many forms of physical abuse that women often experience may rise to the level of persecution under the INA definition of a refugee. However, if the INS Guidelines are read to mean that women constitute a particular social group within the statutory definition of a refugee, \textit{Chang} and the INS Guidelines are not easily reconcilable. \textit{Chang} seems to dictate that neither men nor women fleeing the PRC's coercive population control measures are refugees under the INA.\footnote{208}

The effects, if any, that the INS Guidelines have had on BIA and federal court decisions is uncertain. Since the issuance of the Guidelines, there have been no BIA or federal court decisions on the ability of Chinese women to gain refugee status based on a well-founded fear of persecution in the form of forced sterilization or abortion.\footnote{209} The possibly conflicting messages of \textit{Fatin}, \textit{Safaie} and \textit{Chang}, coupled with the judicial and administrative uncertainty that surround the issue of deference,\footnote{210} make it difficult to predict how the INS Guidelines will affect federal court decisions.

\textit{B. Is it Persecution?}

Although the new INS Guidelines emphasize that persecution may include several forms of abuse that are primarily experienced by women,\footnote{211} this does not mean that the forms of abuse listed or similar harm suffered by women necessarily constitutes persecution. The Guidelines also require that the harm these women fear rise to the

\footnotesize{206} \textit{INS Guidelines}, \textit{supra} note 179, at 15. "Additional characteristics" are those that narrow the social group from all women to, for example, "women who had been previously battered and raped by Salvadoran guerillas." \textit{Id.} (citing Gomez \textit{v. I.N.S.}, 947 F.2d 660, 664 (2d Cir. 1991)).

\footnotesize{207} \textit{INS Guidelines}, \textit{supra} note 179, at 13-15.


\footnotesize{210} \textit{See supra} notes 154-60, 164-78 and accompanying text.

\footnotesize{211} \textit{INS Guidelines}, \textit{supra} note 179, at 9.
Therefore, one factor in determining whether Chinese women may be eligible for refugee status in the United States is whether forced abortion, sterilization and forced IUD use rise to the level of persecution under established definitions.\footnote{INS Guidelines, supra note 179, at 9.}

In \textit{Matter of Acosta},\footnote{See infra notes 214-23 and accompanying text.} the BIA adopted the pre-1980 Refugee Act\footnote{19 I. \& N. Dec. 211 (BIA 1985).} construction of “persecution.”\footnote{Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.).} Cases prior to the enactment of the 1980 Refugee Act construed “persecution” as threats to life or freedom, or infliction of suffering or harm upon individuals who differ in a way regarded as offensive,\footnote{See infra notes 214-23 and accompanying text.} the suffering consisting of confinement or torture.\footnote{Matter of Acosta, 19 I. \& N. Dec. at 222-23.} Furthermore, severe economic deprivation or restrictions could constitute persecution if seriously restrictive of an individual’s freedom.\footnote{See id. at 222 (citing Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969); Matter of Maccoud, 14 I. \& N. Dec. 429, 434 (BIA 1973)).} The \textit{Acosta} court held that “persecution” refers to “harm or suffering . . . inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome,”\footnote{See id. at 222 (citing Blazina v. Bouchard, 286 F.2d 507, 511 (3d Cir. 1961)).} and that this harm or suffering had to be inflicted by the government or by others that the government “was unable or unwilling to control.”\footnote{See id. (citing Dunat v. Hurney, 297 F.2d 744, 746 (3d Cir. 1962)).} The court, citing pre-1980 cases, also noted that “[g]enerally harsh conditions shared by many other persons [do] not amount to persecution,”\footnote{Id. at 222.} and “laws of general applicability [do] not constitute persecution, unless the punishment is imposed for invidious reasons.”\footnote{Id.}

In a purely physical sense, the PRC’s coercive measures are undoubtedly persecutive.\footnote{The \textit{Cheung} court characterized the forced sterilization of a woman as “a serious and totally unacceptable violation of her security of the person. Forced sterilization subjects a woman to cruel, inhuman and degrading treatment.” Cheung v. Canada, 2 F.C. 314, 324 (1993); see also supra notes 56-65 and accompanying text.} Forcing an individual to undergo an invasive medical procedure certainly constitutes “harm or suffering,”\footnote{Some human rights violations against women have been recognized as rising to the level of torture under international definitions. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, art. 2, Annex G.A. Res. 46 (XXXIX 1984), 23 I.L.M. 1027, as modified, 24 I.L.M. 535; see also Lai \& Ralph, supra note 2, at 227 n.15 (citing \textit{INTERNATIONAL HUMAN RIGHTS LAW GROUP, TOKEN GESTURES: WOMEN’S HUMAN RIGHTS AND UNITED NATIONS REPORTING} (June, 1993)).} and may in some cases constitute a threat to life.\footnote{Id. at 222.} Fur-
ther, women's reproductive and sexual rights have been recognized as rooted in the notions of the right to security of the person and the inherent dignity of the person, as enunciated in international human rights agreements.227 In addition, the ability to bear children may be viewed as a "characteristic the persecutor seeks to overcome."228 Finally, the coercive measures are encouraged by the Chinese government, if not mandated by their population laws.229

However, the fact that the population control measures apply to all Chinese women (and for sterilization, to men also), may mean that these measures do not constitute persecution because they are "laws of general applicability."230 These laws arguably are not applied "for invidious reasons,"231 but to improve the living conditions of the Chinese people.232 Therefore, under the established construction of "persecution," the PRC's population control methods as applied to Chinese women may not rise to the level of persecution.

Nonetheless, the forced reproductive control of Chinese women may be typical of the situations at which the new Guidelines are aimed. Decisions in Canada based on the Canadian Guidelines have clearly held that Chinese women facing forced abortion or sterilization may be eligible for asylum on that basis.233 Significantly, the court in Cheung v. Canada maintained that laws of general application may constitute persecution, and further, that a showing of specialized treatment was not always necessary to attain refugee status based on

226 Although abortion and sterilization are generally recognized as posing a lower risk of complications than carrying a pregnancy to term, there are still risks of infection and possibly death associated with these procedures. See D. Charles & B. Larsen, Infections in Pregnancy, in MEDICAL AND SURGICAL PROBLEMS IN OBSTETRICS 197, 197-98 (M. Brudenell & P.L. Wilds eds., 1984); A.J. Penfield, Sterilization, in COMPLICATIONS IN OBSTETRIC AND GYNECOLOGIC SURGERY: PREVENTION, DIAGNOSIS, AND TREATMENT 350, 394 (George Schaefer & Edward A. Graber eds., 1981); see also supra note 3 on the potential dangers of IUD use.


229 See id.; see also supra notes 15-56 and accompanying text.

230 See 19 I. & N. Dec. at 222.

231 See id.

232 Limiting population growth has long been considered a valid national goal, especially for countries like the PRC where high population growth has severe negative effects on social and economic welfare. See generally Stephen L. Isaacs, Reproductive Rights 1983: An International Survey, 14 COLUM. HUM. RTS. L. REV. 311 (1983). Moreover, the one-couple, one-child policy has had a dramatic negative effect on the PRC's, as well as the world's, population growth rate. Robert Schiffer, A Wrong Signal on Birth Control, N.Y. TIMES, June 21, 1985, at A29; Fall in World Birth Rate Since 1983 is Reported, N.Y. TIMES, Apr. 8, 1985, at A7. For a defense of the economic sanctions imposed under the PRC's population control policy see Gregory, supra note 18.

gender persecution. If the INS and U.S. courts follow the Canadian lead and adopt this construction of “persecution,” then Chinese women will probably be eligible for asylum based on the PRC’s reproductive control measures.

C. Opening the Floodgates

Related to the question of whether the coercive population control policies of the PRC constitute gender persecution is the question of the potential effect of this recognition on immigration rates. The specific concern regarding the new INS Guidelines is that if they do provide for a broader definition of persecution, which would include, for example, the forced abortions and sterilizations that are mandated in China, the United States would be deluged with asylum claims from women in countries with laws or policies that are generally repressive to women.

Despite this concern, the Canadian Guidelines have not “opened the floodgates” for Canada and the INS Guidelines are unlikely to do so in the United States. Although Canadian immigration statistics demonstrate that the rate of acceptance for women seeking asylum based on gender persecution has been higher than the average rate of acceptance, overall immigration rates have not increased. Based on statistics in Canada, Deborah Anker estimated that 800 more women per year will be granted asylum in the United States because of the INS Guidelines. Anker emphasized that although 800 could be considered a significant number, “[t]his is not about changing the definition [of a refugee] . . . [t]his is about treating women equally with men, not excluding them.”

One “problem” regarding the potential effect of the Guidelines is that many women around the world live in countries where they are treated very harshly. Domestic violence, sexual abuse and genital mutilation, for example, affect millions of women around the world. Thus, critics contend that, under the Guidelines, women will be able to get asylum when there is government acquiescence to “normal” harsh treatment of women. For example, Dan Stein of the Federation for American Immigration Reform, has maintained that “it appears . . . as though [the Guidelines are] going to provide a door

234 Cheung, 102 D.L.R.4th 214. See supra notes 56-64, 223 and accompanying text.
235 Anker/Stein Interview, supra note 191.
236 See supra notes 53-55 and accompanying text.
237 See supra note 55 and accompanying text.
238 Anker/Stein Interview, supra note 191.
239 Anker/Stein Interview, supra note 191.
which will open up and allow lawyers to create . . . broad classifications based on allegations of generic or general lack of fair treatment for women."\(^{242}\) He further asserted that "general government acquiescence [to wife-beating] in an Islamic country . . . tends to be the norm . . . [but] [w]e cannot bring people here simply because they are suffering under general cultural forms of oppression . . . ."\(^{243}\)

However, one must question the logic or humanity in maintaining a narrow definition of persecution in order to keep immigration rates down.\(^{244}\) The effect of such a policy is to grant asylum to a greater number of deserving men than women simply because men are generally not treated as badly as women. One commentator observed that the fear of "opening the floodgates" has thus created "arbitrary heirarchies of persecution"\(^{245}\) within U.S. immigration law: physical "political" torture suffered by men is recognized as persecution, while the private torture of rape or domestic abuse suffered by women is not.\(^{246}\) Reason dictates that if a line must be drawn to curb immigration rates, it should not be drawn between men and women.

Even with the issuance of the new Guidelines, most women will not be able to flee.\(^{247}\) Many women do not have enough money to emigrate, and many women will not leave their homes because they would have to leave their children behind.\(^{248}\) As Deborah Anker noted, "refugee women, who make up the majority of . . . refugees in the world, are the least mobile. They are left behind to take care of children, the elderly, the handicapped . . . they do not leave the[ir] countries of persecution . . . ."\(^{249}\)

**D. Men and Private Persecution**

Proponents of the Guidelines have emphasized that the Guidelines are not meant to give special treatment to women, but merely to correct inequities that exist within our immigration system.\(^{250}\) These inequities derive from the fact that U.S. immigration law historically has been directed toward those who suffer persecution for more "public" or political activities.\(^{251}\) Women often suffer persecution

\(^{242}\) Anker/Stein Interview, supra note 191.

\(^{243}\) Anker/Stein Interview, supra note 191.

\(^{244}\) See Pell, supra note 185, at 663.

\(^{245}\) Pell, supra note 185, at 663.

\(^{246}\) See Pell, supra note 185, at 663; see also Romany, supra note 186, at 92-96.

\(^{247}\) See Kandt, supra note 37, at 169; Anker/Stein Interview, supra note 191.

\(^{248}\) Kandt, supra note 37, at 165.

\(^{249}\) Anker/Stein Interview, supra note 191.

\(^{250}\) See, e.g., Kandt, supra note 37, at 166; Anker/Stein Interview, supra note 191.

\(^{251}\) See Kandt, supra note 37, at 144-46 (comparing Artega v. INS, 836 F.2d 1227 (9th Cir. 1988), in which an El Salvadoran man was granted asylum based on political opinion where he was threatened by guerillas, with Gomez v. INS, 947 F.2d 660 (2d Cir. 1991), in which an El Salvadoran woman who was raped and beaten by guerillas on five occasions was denied asylum); see also supra notes 116-21 and accompanying text.
that is more "private" in nature, for example, sexual abuse or domestic violence. The distinction between public and private abuse becomes problematic for women under existing asylum law because refugee status is only granted to those who suffer persecution at the hands of the government, or at the hands of an entity that the government cannot or will not control. Traditionally, abuse within the home was considered a private matter, and not within government control. However, as the feminist movement advanced the idea that "the personal is the political," abuse within the private sphere was recognized as being within the scope of government responsibility. Thus, some human rights advocates contend that a government should be held responsible for private abuse when government entities "systematically fail to investigate and effectively prosecute certain crimes and . . . that failure constitutes prohibited discrimination." With these considerations in mind, the INS Guidelines do not give women special treatment, but merely serve to treat men and women equally under existing asylum law, broadening the definition of persecution to include more private forms of inhumane treatment.

However, one ironic corollary of the enhanced consideration that Chinese women could receive under the INS Guidelines is that, since the policy with respect to male applicants will still be dictated by Matter of Chang, Chinese men who are similarly situated may not be eligible for asylum while women are. Thus, while recognizing gender persecution as a basis for asylum will tend to equalize the treatment of men and women under U.S. asylum law overall, the Guidelines may further cause unequal treatment within the group of asylum applicants who are Chinese citizens fearing forced sterilization.

Therefore, if the PRC's coercive population control measures as applied to women are recognized by the United States as persecutive, then the forced sterilization suffered by Chinese males should be similarly recognized by the INS. One reason for the lack of recognition by the INS and the federal courts that fear of forced sterilization is a form of persecution has undoubtedly been that forced sterilization is persecution of a more "private" type, more like that traditionally

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253 See INS Guidelines, supra note 179, at 16; Lai & Ralph, supra note 2, at 204-05.
254 Lai & Ralph, supra note 2, at 205 nn.20-21; Romany, supra note 186, at 94-96.
256 Lai & Ralph, supra note 2, at 205 n.22; see also Romany, supra note 186, at 99.
257 See Anker/Stein Interview, supra note 191.
258 See supra note 208.
suffered by women.259 Treating the abuse of both men and women in the PRC as persecutive would demonstrate that although the Guidelines apply generally to abuse suffered by women, the Guidelines are more generally directed at recognizing that "private" persecution is still persecution, no matter which gender is involved.

VI. Conclusion

The effect that the new INS Guidelines on gender persecution will have on the ability of Chinese women to gain refugee status in the United States is uncertain. Based on the effect similar guidelines have had in Canada, Chinese women should be granted asylum in this country based on this form of persecution. However, the directives of the Guidelines may conflict with decisions that hold that laws of general application put in place for the purpose of population control are not persecutive, even if forced sterilizations and abortions are the result of such laws.

One concern with recognizing gender persecution as a basis for asylum is that the "floodgates will open" and U.S. immigration rates will soar. However, as evidenced by immigration rates in Canada in the two years following the issuance of their gender persecution guidelines, the INS Guidelines will not cause the floodgates to burst.

Finally, a possible corollary of the more favorable treatment women may get under the INS Guidelines is that men and women that are similarly situated will be treated differently, as both men and women are subject to forced sterilization in the PRC. If the United States recognizes the fear of forced sterilization as a form of persecution for women, it should also recognize that men may also suffer this "private" form of persecution.

ANNE M. GOMEZ

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259 See supra notes 250-55 and accompanying text.