



# Coercive Population Control and Asylum in the U.S.

Connie Oxford

Gender & Women's Studies, SUNY Plattsburgh State University of New York at Plattsburgh,  
Plattsburgh, NY 12901, USA; oxfordcg@plattsburgh.edu

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**Abstract:** In 1980, China implemented one of the most controversial population policies in modern times. China's one-child policy shaped population politics for thirty-five years until its dissolution in 2015. During this time, many women were subjected to routine gynecological examinations, pregnancy testing, abortions, and sterilizations, which were often forced upon them by family planning officials. Some women fled China and sought refuge in the United States after having experienced a forced abortion or forced sterilization or feared that they would be subjected to a forced abortion or forced sterilization. This article focuses on how the U.S. government responded to China's one-child policy through the passage of immigration laws and policies that made asylum a viable option for Chinese nationals who had been persecuted or feared persecution because of coercive population control policies. Based on observations of asylum hearings and interviews with immigration judges and immigration attorneys, this article uses feminist ethnographic methods to show how China's one-child policy and U.S. asylum laws shape the gender politics of reproduction and migration.

**Keywords:** China; coercive population control; immigration; asylum; reproductive rights

## 1. Introduction

China's one-child policy adversely affected scores of women who were forced to abort their babies or undergo sterilization procedures to reduce the population. Moreover, it increased the rate of infanticide, abandonment of girls, and created a global adoption of Chinese children who were born despite the one-child policy's intentions. One way that the United States responded to China's one-child policy was through the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. This Act defined coercive population control, such as forced sterilizations and forced abortions, as persecution based on political opinion. Consequently, asylum seekers who had either experienced a forced abortion or forced sterilization or feared that they would be subjected to such treatment by the Chinese government were eligible for asylum in the United States. By defining coercive population control as always based on political opinion, IIRIRA rendered coercive population control cases different from other forms of gender-based persecution, such as rape, domestic violence, honor crimes, and female genital cutting by situating the Chinese state as the persecutor. This article seeks to contribute to the literature on gender and migration by showing how this law created a gendered migrant who is required to narrate a story of persecution based on the harm itself rather than why the harm was done.

This article analyzes observations of immigration court hearings of asylum seekers who feared returning to China because of the population control policies, interviews with immigration judges who adjudicate these cases, and interviews with immigration attorneys who represent asylum seekers in immigration court. It is the implementation of U.S. asylum policy that I focus on in this article. Unlike other research that focuses on the outcome of asylum cases (grants and denials), this study illuminates the process and interactions between asylum seekers and immigration officials that reveal the expectations of how asylum seekers tell stories of persecution. The main research question guiding

this work is how do asylum seekers use a rights-based discourse in their narratives of persecution during immigration court hearings? To answer this question, I draw from the literature on reproductive rights and migration studies. I argue that the narrative of persecution that asylum seekers must tell is one that is based on state coercion and the right to be free from this coercion to gain asylum. However, while this narrative is a necessary component of gaining asylum it is not sufficient as asylum seekers are subject to credibility determination and questioning about migration motives by immigration officials who may deny coercive population control claims, even when applicants use a rights-based discourse in their testimony.

## 2. Methods

This research is based primarily on observations of seven asylum hearings in the New York City, New York immigration court in 2009–2010. While this is a small number of observations, even by the standards of qualitative research that tends to have smaller sample sizes than quantitative research projects, this modest number of observations provide unique insight into the inner workings of the U.S. immigration court system. Many asylum studies focus on the laws and policies without the use of ethnographic data (Nayak 2015; Alfredson 2008). These studies tend to focus on the outcome of cases, such as grants and approvals of asylum hearings. One contribution this article seeks to make is to show how ethnographic methods can broaden our knowledge about asylum hearings as these methods focus instead on the processes and interactions among asylum seekers and immigration officials. These data show how particular narratives of persecution are told in immigration court. These data were collected nearly seven and eight years ago, before China replaced the one child policy with a two-child policy. It is this period that shapes the responses of immigration officials that I discuss in this article. I supplement the vignettes of asylum hearings with interviews with immigration judges and immigration attorneys. All names are pseudonyms. Asylum hearings in immigration court are public hearings. However, given the sensitive information that is disclosed in these hearings, asylum seekers may request a closed hearing. For all the hearings, I met with the asylum seeker and the asylum seeker's attorney (albeit briefly in most cases as these initial interactions took place just prior to the hearing) to gain their consent for me to observe the hearing for the purposes of using my notes as data for the research project. None of the asylum seekers agreed to meet with me after their hearing for a tape-recorded interview. Asylum seekers are often reluctant to give interviews for a variety of reasons that include the emotional toil retelling their story takes on them and a general distrust of being tape-recorded. Moreover, none spoke English well enough to conduct the interview without the use of a translator which I was not able to arrange. Therefore, the asylum hearings comprise the primary source of data for this project.

## 3. Reproductive Rights

The idea of reproductive rights is often traced to the second wave women's movement in the United States (Petchesky 1984; Staggenborg 1991; Solinger 2005). Yet the struggles that women have faced to control their bodies and reproductive capabilities, even in the absence of a discourse of rights, spans centuries and reveals the confluence of political, economic, and social forces (Gordon 1974). Linda Gordon argues that birth control itself has a much longer history than the movements that arose for the right to use it. Practices such as abortion and infanticide may be considered more extreme forms of birth control today. But in other historical periods they were "legal and respectable" and in a cross-cultural context were often preferable to contraception (Gordon 1974, p. 15). Reproductive rights is inextricably linked to race and class. The relationship that poor white women and women of color of all classes have had to the state stands in stark contrast to how middle and upper class white women think of the role of the state regarding reproductive freedom (Nelson 2003; Silliman et al. 2004). Angela Davis shows how African American women were subjected to routine sterilizations, also known as "Mississippi appendectomies" because states with larger concentrations of African American women were targeted (Davis 1983; Nelson 2003). Andrea Smith links the control of Native American women's

bodies to the history of colonialism that sought to decimate Native populations (Smith 2005). In this sense, birth control in the U.S. has simultaneously been a eugenics movement (Gordon 1974).

*Roe v Wade*, the 1973 landmark U.S. Supreme Court decision, gave women the right to have an abortion based on the legal logic that women had the right to privacy and therefore, decisions about reproduction were a private, individual matter. In the post *Roe v Wade* era, abortion emerged as the primary determinant of reproductive rights that effaced much of the history of how women have controlled their own fertility, what practices are acceptable, and how women's control over the bodies vis-à-vis the state has changed over time. Gordon argues that the passage of *Roe v. Wade* situated abortion as a "right to self-determination" (Gordon 1974, p. 30). The right to determine whether one wanted to terminate an unwanted pregnancy positively impacted women of all races and classes but women of color in particular, as Rickie Solinger argues, since it was mostly women of color who died from "botched procedures" (Solinger 2005). Despite this victory and others that impacted all women, women continued to be divided along race and class lines that affected whether they view the state as the guardian of reproductive rights or the perpetrator of coerced reproductive practices.

The passage of *Roe v Wade* ushered in the right to life movement that was initiated by the Catholic hierarchy but taken up later by mostly Protestant religious groups (Gordon 1974; Blanchard 1994). The primary goal of these groups was to overturn *Roe v Wade*, making abortion illegal once again. The right to life movement gained momentum beginning in the 1970s and was at its apex of activism in the late 1980s and early 1990s as its members shifted to more violent means of protest that included bombing abortion clinics and killing physicians employed by clinics that performed abortions (Flavin 2009). The right to life movement, quite deliberately, used the language of life and death as its members took up the rights of the unborn. The founder of Operation Rescue, Randall Terry, told a crowd "if you believe abortion is murder, act like it's murder" (Solinger 2005, p. 225). During the rise of the neoconservative right, the abortion debate was shaped and sharply divided between those who supported women's control over their own reproductive choices and those who supported the rights of the unborn child (Petchesky 1984).

As the debate over abortion became the *sine qua non* of reproductive rights in the U.S., women across the globe were mobilizing local, national, and transnational movements to demand reproductive rights (Petchesky and Judd 1988; Ginsburg and Rapp 1995; Knudsen 2006; Browner and Sargent 2011). Case studies from individual countries were among the first that offered empirical evidence of how the specificity of location that included a nation's political regime, economy, cultural norms, and religion affected women's reproductive capacity (Petchesky and Judd 1988; Ginsburg and Rapp 1995). These studies shed light on how women who live in societies with high rates of HIV, that are at war, and practice female genital cutting, for example, negotiate reproductive rights very differently than those who do not face these obstacles (Petchesky and Judd 1988; Ginsburg and Rapp 1995). While these studies offer a plethora of information on how women understand reproductive rights in a national context, they fall short of a transnational approach to global reproductive rights. Carole Browner and Carolyn F. Sargent's collection begins to bridge this gap by including studies of population movements and how migration shapes reproductive rights (Browner and Sargent 2011). Migrants face new cultural norms and laws regarding family reunification and polygamy, for example when they leave one country for another (Bledsoe and Sow 2011; Sargent 2011).

The global framing of reproductive rights as human rights or women's human rights took center stage at the 1993 United Nations World Conference on Human Rights, also known as the Vienna Conference. Women from around the world testified about access to contraception, family planning, and draconian abortion laws, among other topics that overwhelmingly affect women. Other United Nations' conferences, such as the 1994 International Conference on Population and Development in Cairo, provided an international venue for women to network and voice their grievances about reproductive rights (Eager 2004). Women from around the globe told different stories about what constitutes a reproductive right in their own country. However, what emerged from these conferences

was the idea that women have the right to control their own reproductive choices and that the guarantor of this right rests with the nation-state.

#### 4. Coercive Population Control

##### 4.1. *How the United States Interprets China's One Child Policy*

The dominant critique of China's population policies is firmly rooted in the discourse of human rights (Mosher 1986; Aird 1990). This critique is the one that the U.S. extols and is also the global hegemonic narrative that many countries and non-governmental organizations tell about China. The scope of which extends to other human rights abuses in China that include state abuses for members of democracy movements and prison-like labor conditions (Wu 1994; Chen 2015). The story that the U.S. tells about China is that the Chinese government deprives its citizens of the civil liberties that Americans believe are inalienable, such as the right to practice one's religion or demonstrate against the government. Yet this story is tempered with another one that invites China as an economic partner and welcomes (some) of its people as immigrants. The limitation to the human rights critique is that it assumes that all Chinese officials are human rights abusers with little or no context for how and why population control was introduced. From a human rights perspective, the Chinese state uses brute force to restrict the number of births through the forcible use of birth control (most commonly, Intra-Uterine Devices, IUDs), sterilizations of both women and men, and abortions. Moreover, the hegemonic narrative of population control assumes that all Chinese nationals of reproductive age were subjected to these coerced practices.

The human rights abuse dimension of the one-child policy is certainly real as millions of women were subjected to routine medical exams and tracked by officials who kept records of their menstrual cycles. A common form of birth control was the IUD which was compulsory for many women who had not been sterilized. When women would get pregnant many were forced to abort the fetus regardless of the gestation period, with many abortions taking place in the third trimester. Some full-term babies were delivered and then strangled or poisoned (Mosher 1983, 1993). What is important is that these abuses did not happen to all pregnant women or even all women who already had a child. Those who were targeted included married couples who already had a child, couples who violated the Chinese Marriage Act of 1980 that stipulates that men must be at least 22 years of age and women at least 20 years of age to marry, and couples who were not married. Repercussions for violating the one-child policy could include arrest, jail (for family members as well), termination of employment, demolition of homes, and confiscation of property. Most children who are born despite their parents' violation of the policy were not registered as citizens with the Chinese state and were not eligible for educational, medical, or other social benefits which may continue into their adulthood as they seek to secure employment and housing. There were always exceptions since many families would pay fines to register their child.

Susan Greenhalgh's work offers an alternative narrative to the one-dimensional argument that population control is strictly about human rights abuses. Greenhalgh argues that technology and science drove population policies that were believed to be the answer to modernizing China. Population posed a threat to the vision of China as a modern state. In 1949, the total fertility rate was 6.14, not at all unusually large for a country where most people performed farm labor. While the fertility rate both increased and decreased slightly from year to year for the next two decades, it did not begin to decrease yearly until 1971 when it was 5.44. Chinese policy makers were heavily influenced by Paul Ehrlich's research that appeared in *The Population Bomb* in 1968. Just one year later, in 1969, the United Nations Fund for Population Activities (renamed the United Nations Population Fund in 1987) was founded with the goal of facilitating population control policies in the developing world. The fear of a global population crisis, particularly one in the global south, dictated the policy agenda in working groups such as the Club of Rome that published its Limits to Growth study in 1972 that argued that large populations are not ecologically sound. Greenhalgh shows how it is within this

context of equating a smaller population with a modern, technologically advanced society that the one-child policy was born (Mosher 2008; Fong 2016). As China emerged from its isolation in the post-Mao era and into the global arena Chinese officials crafted population policies that sought to reduce total births to modernize China.

The cornerstone of the one-child policy was the “later, longer, fewer policy” first introduced in 1976. This policy encouraged couples to have their first child later, wait longer periods between having children, and to have fewer total children (Greenhalgh 2008). By 1978 when Deng Xiaoping came to power the fertility rate had dropped to 3.24 and again to 2.24 in 1980 when the one-child policy was introduced (White 2006). China’s decrease in fertility rate over the second half of the twentieth century reflected typical changes among other developing countries across the globe as migration to cities increased and with it a shift from agricultural to industrial work that made fewer children the most viable option for families. Even though there was a declining fertility rate by the time the one-child policy was introduced in 1980, the population was estimated to be 975 million, having nearly doubled in size since 1949. Moreover, the trend toward urbanization had a marginal effect on population size since 80% of the population lived in rural areas when the policy was introduced. According to Greenhalgh, Deng Xiaoping ushered China into an era of vast economic reform for which the foundation was science and technology.

The first campaign was carried out in 1981 when a nationwide quota system for births was in place (Mosher 1986). These quotas varied by geographic area (e.g., village) and were the responsibility of local officials to see that their district does not exceed the allotted births for the year. While the official state doctrine dictated one-child for everyone married, heterosexual couple, in practice, there were many exceptions that included more children for families whose first child was a girl. Moreover, families who could afford to pay fines or bribe officials, as I discuss in this article, also had more than one child. At the height of the policy in 1983 there were over 20 million Chinese sterilized with women comprising about 75% of all forced sterilizations. Since 1984 the number of abortions were greater than the number of sterilizations for each year until 2001 (Greenhalgh and Winkler 2005). For example, in 1984 there were 6,710,449 sterilizations and 8,890,140 abortions; in 2001 there were 1,803,929 sterilizations and 6,284,844 abortions.

Decreasing the total number of births was not the sole agenda of the one-child Policy. The Chinese government was equally interested in the quality of bodies that were to be part of the new modern nation that needed to compete in the global economy. In this way, the policy was also one of eugenics (Anagnost 1995; Greenhalgh 2008). By the late 1990s, the policy was carried out differently as it shifted from forced abortions and sterilizations towards stricter enforcement of fines which served as revenue for local areas with estimates as high as \$314 billion that Chinese government may have received since 1980.<sup>1</sup>

Personal accounts of women pleading with state officials not to abort their pregnancy or carry out a birth control procedure served to mobilize human rights activists that bring attention to China’s coercive measures. Moreover, these stories ignited the pro-life lobby in the United States, in particular, conservative members of Congress who have called attention to state sponsored population control. In 1985, Congress passed the Kemp-Kasten Amendment that prohibited foreign aid to any organization that is involved in involuntary sterilizations or coerced abortions. Congressional hearings focus in particular on criticism of the United Nations Population Fund (UNFPA) that not only supports China’s population control policies, as conservative members argue, but may in fact work closely with Chinese officials to carry out the procedures.<sup>2</sup> There is wide-spread support among conservative members to

<sup>1</sup> (Greenhalgh 2010). Population control in China: State Sponsored Violence against Women and Children: Hearing before the Congressional-Executive Commission on China, One Hundred Fourteenth Congress, first session, 30 April 2015.

<sup>2</sup> Coercive population control in China: Hearings before the Subcommittee on International Operations and Human Rights of the Committee on International Relations, House of Representatives, One Hundred Fourth Congress, first session, 17 May, 22 and 28 June, and 19 July 1995. Forced abortion and sterilization in China: The View from the Inside: Hearing



withdraw U.S. funding for UNFPA because of its activities in China, even though this would leave a service void for other types of family planning and reproductive healthcare in China and around the globe.

The American right took up the cause of reproductive rights that is generally situated in feminist left-wing organizing. The case of China's one-child policy became the cause célèbre of pro-life groups to bring attention to the plight of sex-selective abortions, abandonment of girls, and female infanticide. Many who identify as pro-life support the adoption of Chinese girls as one alternative to their treatment in China (Johnson 2016; Evans 2008). The United States' criticism of China extends beyond reproduction politics. The coercive account can be traced to cold war era politics and the threat of communist Red China. In the aftermath of the Tiananmen Square protests in 1989, U.S. policy makers had to reconcile their critique of China for its anti-democracy stance with their desire for economic trade. It is in this complicated and often contradictory milieu where human rights, pro-life, and pro-trade movements converge that the United States developed its asylum policy of Coercive Population Control.

#### 4.2. Chinese Immigration, U.S. Asylum Laws, and Coercive Population Control (CPC)

The first wave of Chinese immigration to the U.S. began in the 1850s as many flocked to California seeking their fortunes in gold and waned by 1882 with the passage of the Chinese Exclusion Act that responded to an era of fear known as the "yellow peril." This Act marked a watershed in U.S. immigration law as it was the first to restrict a group of immigrants based on nationality. By 1882 there were over a quarter of a million Chinese living in the United States (Lee 2003). From 1910 to 1940, Chinese immigrants were processed at the Angel Island immigration station that detained and deported immigrants entering through the port of San Francisco. While some estimates place the number as high as 300,000 who were processed at Angel Island, official immigration records show 70,052 files, of which 44,585 were Chinese (Lee and Young 2010). The second wave of Chinese immigration to the U.S. began in the late 1970s. While this second wave coincided with the implementation of the one-child policy, the increase in Chinese immigration is attributed to changes in China's economy and emigration policies that allowed Chinese nationals to leave the country. Chinese immigrants currently represent the third largest foreign-born group in the U.S. (Lee 2015). The number of Chinese immigrants nearly doubled from 384,000 in 1980 to 681,000 in 1990 and then doubled again to 1,195,000 in 2000. At the time of this research in 2009 and 2010 there were 1,683,000 Chinese immigrants; by 2013 there were just over 2 million Chinese immigrants living in the U.S. New York City is home to the highest population of Chinese immigrants with 419,000 making their home in the area that includes Newark and Jersey City (Migration Policy Institute 2017).

In 1980, the United States passed the Refugee Act introducing national legal standards for adjudicating refugee and asylum claims based on the definition of a refugee found in the Immigration and Nationality Act of 1965 defining a refugee as someone who is "unable or unwilling to return" to their country "because of persecution or a well-founded fear of persecution on account of race, religion,

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before the Committee on International Operations and Human Rights of the Committee on International Relations, House of Representatives, One Hundred Fifth Congress, first session, 10 June 1998. Coercive population control in China: New Evidence of Forced Abortion and Sterilization: Hearing before the Committee on International Relations, House of Representatives, One Hundred Seventh Congress, first session, 17 October 2001. China: Human Rights Violations Coercion in One-Child Policy Enforcement: Hearing before the Committee on International Relations, House of Representatives, One Hundred Eighth Congress, second session, 14 December 2004. China's one-child policy: The Government's Massive Crime against Women and Unborn Babies: Hearing before the Subcommittee on Africa, Global Health, and Human Rights of the Committee on Foreign Affairs, House of Representatives, One Hundred Twelfth Congress, first session, 22 September 2011. Continued human rights attacks on families in China: Hearing before the Subcommittee on Africa, Global Health, and Human Rights of the Committee on Foreign Affairs, House of Representatives, One Hundred Twelfth Congress, second session, 9 July 2012. Population control in China: State Sponsored Violence against Women and Children: Hearing before the Congressional-Executive Commission on China, One Hundred Fourteenth Congress, first session, 30 April 2015.

nationality, or membership in a particular social group” (Germain 2000, pp. 9–10). This definition of a refugee is taken from the 1951 United Nations Refugee Convention and the 1967 United Nations Protocol Relating to the Status of Refugees to which the U.S. is a signatory and provides the cornerstone of refugee law. The 1980 Act paved the way for immigrants who had been persecuted or feared that they would be persecuted to enter and remain in the U.S. lawfully. The first policy guideline that explicitly addressed Chinese nationals fleeing coercive population control measures was issued by the Department of Justice on 5 August 1988, nearly one decade after the one-child policy was implemented in China, that approved asylum claims for those with a well-founded fear of persecution (Gomez 1996). While Chinese immigrants during the 1980s may very well have left China and found other paths to immigration, such as work visas or family reunification, the paucity of data on asylees fleeing forced sterilizations or abortions makes it impossible to know just how many may have arrived during this time.

Less than a year later, in May 1989, the Board of Immigration Appeals (BIA), the appellate body for all immigration court hearings in the U.S., published *Matter of Chang*, a seminal case that argued that asylum seekers did not qualify for asylum because of population measures taken by the Chinese state because the punishment was not on account of one of the five protected grounds (e.g., race, religion, nationality, political opinion, or membership in a social group).<sup>3</sup> The legal logic behind this decision was not whether the act of a forced abortion or forced sterilization was persecution *per se*, but rather that the definition of refugee as outlined by the 1951 United Nations Refugee Convention and the 1967 United Nations Protocol Relating to the Status of Refugees and U.S. immigration law codified in the 1980 Refugee Act. Between 1989 when *Matter of Chang* was published and 1996 when Congress passed the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA), asylum seekers fleeing coerced population measures were not eligible for asylum.

On 6 June 1993, just six months after President Clinton took office, the Golden Venture ran aground near New York City, New York. The freighter carried 284 Chinese nationals, many of whom had been subjected to forced abortions and sterilizations. Some drowned trying to reach shore, many were deported, and the majority languished in U.S. immigration detention facilities until their fate was decided (Schulman 1996). Fearful of looking soft on immigration during the time of a struggling U.S. economy, President Clinton took a much harder stance on asylum than his predecessors (Pear 1994). The Golden Venture illuminated global migration patterns to the U.S. where smuggling, snakeheads, and the price one pays to come to the U.S. was at the forefront of public awareness and resulted in grave policy implications (Kwong 1997).

In 1995, the U.S. became the second country, following Canada’s lead, to issue gender guidelines for adjudicating asylum claims. These guidelines brought about an institutional awareness of types of harm that overwhelmingly tends to happen to women, such as domestic violence, female genital mutilation, honor crimes, and rape. It is within this context that a bureaucratic shift began to move toward implementing policy that reflected a dedication toward the now renowned slogan that women’s rights are human rights (Kelly 1993). Yet within the innerworkings of the U.S. immigration bureaucracy there was both a feminist contingent and a conservative pro-life group that shared the same goal: allowing women asylum who had been persecuted for coercive population control measures. Presidents Ronald Reagan and George H. W. Bush advocated granting asylum for Chinese asylum seekers who were fleeing coercive population control policies, not because they embraced feminism but because of their pro-life position.

It was not until 1996 that U.S. immigration law shifted towards admitting asylum seekers fleeing coercive population control policies. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 outlined stringent changes in the asylum system that included the one-year rule mandating that immigrants file an asylum application within one year of arrival to the United States.

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<sup>3</sup> *Matter of Chang*, 20 I.&N. Dec. 38 (BIA, 1989) (Brown 1995).

This Act also created expedited removal, or summary removal, of immigrants arriving with false or no documentation who do not explicitly express a fear of persecution at their port of entry. Within this generally restrictive legislation, however, is a significant gain for those seeking asylum from forced abortions or forced sterilizations. An amendment to this Act defines coercive population control persecution as based on political opinion. This law overturned the ruling in *Matter of Chang* and was championed by both the left for its gender inclusion in asylum policy and the right for its pro-life stance. However, the fear of opening the floodgates was tempered by placing an annual cap of 1000 persons. Once the cap was reached, applicants would be placed on a waiting list to have their status adjusted. In 2005, the cap was eliminated under the REAL ID Act (Rivera 2006; Mason 2009).

On the heels of IIRIRA, several cases made their way to the BIA and to various Circuit Court of Appeals courts across the country that challenged how IIRIRA was being implemented by immigration judges. Many of the cases dealt with definitions of marriage. In 1997 in *Matter of C-Y-Z* the BIA addressed whether spouses of victims of forced abortions or forced sterilizations are eligible for asylum. The issue was if a spouse could claim that his wife's abuse of coercive population control was also persecution for him. The BIA argued that a forced abortion or sterilization is an "infringement on a married couple's shared reproductive rights."<sup>4</sup> In 2004, three Circuit cases grappled further with the issue of marriage. In *Ma v. Ashcroft*, the Ninth Circuit ruled that husbands whose wives had been forcibly aborted or sterilized but whose marriage was not recognized by the Chinese government, such as those who married before the legal age limit, were eligible for asylum.

In *Chen v. Ashcroft* and *Zhang v. Ashcroft*, the Third and Fifth Circuits, respectively, argued that men who were not married but partnered with women who had been forcibly sterilized or pregnancies forcibly aborted, such as boyfriends and fiancés, were not eligible for asylum (Dempsey 2006). In 2006, in *Matter of S-L-L*, the BIA reaffirmed that its ruling in *Matter of C-Y-Z* and argued that "the sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried father. From the point of view of the wife, the local community, and the government, a husband shares significantly more responsibility in determining, with his wife, whether to bear a child in the face of societal pressure and government incentives than does a boyfriend or fiancé for the resolution of a pregnancy of a girlfriend or fiancé."<sup>5</sup>

Men's claims of persecution based on coercive family planning are unique to other forms of gender-based persecution. Unlike other forms of gender-based asylum, such as rape, domestic violence, honor crimes, and female genital cutting, the number of men gaining asylum for coercive population control measures implemented against their wives is significantly higher than those of women (Murphy 2008). Statistics show that as many as three out of four asylum grants for coercive population control are men. While the Chinese government forcibly sterilizes men and men may be persecuted in other ways if they protest against the policy, it is women who bear the brunt of forced sterilizations, forced abortions, and the forced use of birth control methods (White 2006). Yet it is men who win asylum. This pattern of what Heidi Murphy calls "sending the men over first" parallels earlier Chinese migrations to the U.S. where men would arrive first and women (and sometimes children) would later follow (Lee 2003). In her analysis of BIA cases, Sara MacKinnon criticizes how men gain mobility as they are able to "stand in the shoes" of female persecuted bodies (McKinnon 2016).

#### 4.3. U.S. Immigration Court

One way that migrants apply for asylum in the United States is through the immigration court of the Executive Office for Immigration Review (EOIR) that was established in 1983. Asylum claims in immigration court consist of those that were referred by an asylum officer from the Citizenship and Immigration Service (CIS) or are claims initiated by detained immigrants. This research focuses

<sup>4</sup> In re C-Y-Z, 21 I.&N. Dec. 915, 917, 919 (1997) (Duda 2008).

<sup>5</sup> In re S-L-L, 24 I.&N. Dec. 1 (2006).



on asylum applications that were referred to the New York City immigration court by the office of CIS. Asylum seekers attend two hearings. The initial hearing in immigration court is a master calendar hearing. Like arraignment hearings in other U.S. courts, plaintiffs enter a plea (or in the case of immigration court, a request for consideration of asylum). All documentation must be entered into evidence during the master calendar hearing. Documentation in the asylum application includes the I-589 asylum application form, a declaration, that is a statement outlining the applicant's narrative of persecution, identity documents, if available, such as birth and marriage certificates, expert witnesses' affidavits, and the U.S. Department of State and human rights organization reports on country conditions.

Immigration officials present at the hearing include the immigration judge and the assistant district counsel, the attorney who represents the government in immigration court. If needed, there is also a court appointed language interpreter. If the judge denies the claim, the asylum seeker can appeal to the BIA. The government too can appeal an asylum grant to the BIA. Further appeals are then taken to the U.S. Circuit Court of Appeals in which the immigration court is located that issued the lower ruling. Appeals of cases heard in the New York City immigration court are decided by the U.S. Second Circuit Court of Appeals if either the asylum seeker or the government wishes to appeal a BIA ruling. U.S. Circuit Court decisions only apply to the geographical area located in that circuit. The Second Circuit has the second highest asylum case load in the country and between 70% and 80% of all appeals are those seeking relief from China's coercive population policies ([Murphy 2008](#)). At the time of this research in 2008, the New York City immigration court adjudicated the highest number of asylum cases of any immigration court in the U.S. There was a total of 5528 asylum claims of all nationalities in the New York City immigration court in 2010. Of these, 4215 or 76% were approved making New York City the immigration court with the second highest asylum approval rate in the country. Chinese asylum seekers whose cases are adjudicated in New York City may be at an advantage since there is a greater likelihood that their claim will be approved than in other cities where the overall grant rate is lower. In 2010, in the U.S. (including all immigration courts, not just those in New York City), there were 9869 asylum claims that were granted. Of these, 3795 or 38.45% of asylum grants were from China ([EOIR 2010](#)).

## 5. Major Issues in Asylum Adjudication

This section addresses three major issues of asylum adjudication that shape the expectations that immigration officials have about how stories of coercive population control based persecution are told in immigration court. The implementation of coercive population control asylum policies reveals three themes. These three themes are persecution, credibility, and migration. The first theme, persecution, has two components. The harm itself must rise to the legal definition of persecution and the persecution must be based on one of the five legally accepted grounds. The 1980 Refugee Act created national legal standards for adjudicating asylum claims in the U.S. It defined a refugee as:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country on which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, or membership in a particular social group, or political opinion ([Germain 2000](#)).

Asylum seekers must show that the harm they experienced or fear they will experience rises to the level of persecution. All asylum seekers must demonstrate that they were persecuted or fear persecution to gain asylum. This means that the harm itself cannot be merely discrimination or harassment but must rise to the legal definition of persecution ([Macklin 1999](#)).

Legal scholar Nancy Kelly was among the first to argue that the types of harm that refugee law recognizes as persecution "privileges male-dominated public activities over the activities of

women which take place largely in the home” (Kelly 1993). It was scholar-activists such as Kelly, along with Karen Musalo, Deborah Anker, and others who worked toward changing immigration law so that officials could recognize that the types of harm that tend to happen to women—rape, domestic violence, honor crimes, female genital mutilation, and coercive family planning—are indeed persecution (Anker 2001; Musalo 2004). For coercive family planning cases the types of persecution women experience are forced use of birth control, forced sterilizations, and forced abortions. Moreover, women and men may be beaten, jailed, and persecuted in other ways if they resist arrest, speak out against family planning policies, or demonstrate against the Chinese government (Mosher 2008).

The second part to understanding persecution is that the harm must be linked to one of the five grounds (race, religion, nationality, membership in a particular social group, or political opinion). This linking is referred to as the nexus requirement (Musalo 2002). Asylum seekers often have horrific stories of persecution but if they cannot demonstrate that the harm was because of one of the five acceptable reasons for that harm they will not be granted asylum. For asylum seekers seeking relief from coercive population control measures, there is no need to demonstrate the nexus requirement because IIRIRA defined the “on account of” part as political opinion. This makes coercive population control claims different from most asylum claims since the nexus requirement is built into the 1996 Act. Moreover, IIRIRA also defined forced abortions and forced sterilizations as persecution. This means that asylum seekers only have to demonstrate that there was coercion and that they did not consent to an abortion or sterilization.

The second theme is credibility. To gain asylum, applicants must be determined to be credible. Credibility includes “demeanor, specificity, detail, and consistency”, and is perhaps the most important aspect of how cases are adjudicated (Anker 2001). Credibility is important because immigration officials must believe that the story the applicant is telling is true. Moreover, asylum seekers must be persuasive that the story they tell is not only true but that it happened to them. Immigration officials are keenly aware of the phenomenon of “boiler plate” applications that detail examples of persecution such as violence, torture, and various tactics of state repression and which is then used for many different applicants. Unethical immigration attorneys collect fees from asylum seekers who are given these prepared documents and then leave their clients to fend for themselves in immigration court (Abel 2006). When immigration officials determine that asylum seekers are not credible they are denied asylum.

The third theme is migration. This theme reveals a false dichotomy in immigration law. Immigration law bifurcates migrants into two categories: forced and voluntary. Asylum seekers are forced migrants in that their experience of persecution or fear of persecution is the motivating factor for leaving their country. Conversely, all other migrants are considered voluntary in that they did not have to leave their country. Persecution or the fear of persecution legally differentiates asylum seekers from other types of migrants, particularly economic migrants whose motivation for leaving their country is based on seeking work. The legal differentiation between economic migrants and refugees (or asylum seekers) is found in many immigration studies (Zolberg et al. 1989; Portes and Rumbaut 1996; Keely 1996). Scholars such as Alejandro Portes, and Rubin Rumbaut conceptualize immigration in such a way that non-refugees are viewed as economic migrants and refugees as political migrants. The underlying assumption to this approach is that persecution does not include an economic component. The legal and scholarly boundary between voluntary and forced migrants is artificial in that it is an imposed border lending the impression that economic and political migrants are mutually exclusive groups. Therefore, asylum seekers must narrate a story of migration that situates the persecution as the primary cause of why they left their country even if they did not learn about asylum until after their arrival in the U.S. This false boundary that hardly captures the range of migrants’ motivations for coming to the U.S. can hurt asylum seekers’ chances of gaining asylum if immigration officials view them as manipulating the system for personal gain.

## 6. Results and Discussion

### 6.1. Description of the Asylum Seekers

Lin was born in 1967 and was forcibly sterilized at the age of twenty-eight after the birth of her third child. She and her husband registered their marriage and the birth of their first daughter who was born in 1989. Although she was required to wear an IUD she and her husband left their village to avoid doing so. After moving to another village, Lin gave birth to her second daughter who was delivered at home by a private physician. Lin was monitored by local family planning officials who required her to have health examinations every three months and to wear an IUD. She was able to bribe them to have her IUD removed to have a son. After the birth of her son she was forcibly sterilized in 1995 and arrived in the U.S. in 2007. Lin was granted asylum in June 2009.<sup>6</sup>

Mei was born in 1958 and became pregnant after she was married. In 1983, local officials informed her that she would have to have an abortion because “they had used up the quota for the year and her application to have the baby was denied.” Less than a year after the abortion, Mei became pregnant a second time and gave birth to a daughter but had to sign a contract that she would not have any other children. After her daughter was born she was required to wear an IUD and submit to medical exams. During one exam, in 1986, medical examiners found that her IUD was missing and that she was pregnant to which Mei testified in court that she was unaware how this happened. She was taken immediately for a second forced abortion. Mei came to the U.S. in 2006 and was granted asylum in June 2009.<sup>7</sup>

Jia was born in 1988 and became pregnant at the age of eighteen. After a neighbor reported her to family planning officials she was forced to have an abortion because she was not married and was not eligible to have a registered marriage because of her age. She came to the U.S. in 2008 and married an undocumented Chinese national soon after. She has a son who was born in the United States in 2009. Jia was granted asylum in June 2009.<sup>8</sup>

Zhu was born in 1981. She and her boyfriend were planning to get married in 2005 when she discovered that she was pregnant. She testified that “someone from her work unit reported her to the family planning officials” and was she forced to have an abortion. She was dismissed from her employment and her boyfriend started beating her after the abortion. She moved in with her mother and the family planning officials insisted that she had to pay a fine for the abortion. After refusing to pay the fine and fearful of the threats of arrest by the officials, Zhu came to the U.S. in 2007. Zhu was granted asylum in April 2010.<sup>9</sup>

Chang is the only man I observed in immigration court whose asylum claim was based on coercive family planning. Chang was born in 1977 and in 2001 when he and his fiancée went to register for marriage she was already pregnant. After pleading with family planning officials and paying a fine, his wife could continue the pregnancy and gave birth to their son. Although his wife was required to wear an IUD after their son was born, she could put off having it inserted because of health complications from giving birth. A year later, local officials forced his wife to wear an IUD and a few months later they sought help from a private physician who removed it. Soon after she became pregnant and was forced to have an abortion. On several occasions, Chang was detained and beaten for speaking out against family planning policies. Chang came to the U.S. in 2007. Chang was granted asylum but the Assistant District Council (ADC) reserved the right to appeal the case in July 2009.<sup>10</sup>

Yow was born in 1983 and she and her husband married in China. Yow and her husband immigrated to the U.S. on his work visa in 2005. After coming to the U.S., she and her husband had

<sup>6</sup> Immigration Court Hearing. 16 June 2009.

<sup>7</sup> Immigration Court Hearing. 18 June 2009.

<sup>8</sup> Immigration Court Hearing. 18 June 2009.

<sup>9</sup> Immigration Court Hearing. 21 April 2010.

<sup>10</sup> Immigration Court Hearing. 8 July 2009.

two children who were born in the United States in 2006 and 2007. After Yow's husband was no longer employed by the company that sponsored his visa, their immigration status changed to what is referred to as being "out of status" which means they do not have a legal status to remain in the U.S. and are subject to being deported. Yow's asylum application was based on a fear of future persecution as she anticipated being forcibly sterilized upon return to China. Yow was granted asylum but the ADC reserved the right to appeal the case.<sup>11</sup>

Shu was born in 1984 and married in 2004. Shu and her husband came to the U.S. together in 2005. Two years after arriving in the U.S., in 2007, she had her first child. At the time of her hearing in 2010, she was pregnant. Shu feared that her pregnancy would be aborted and that she would be forcibly sterilized if she were deported to China. Shu was denied asylum in April 2010.<sup>12</sup>

## 6.2. Coercive Population Control as Persecution

In this section, I show how the language of "force" is a necessary component for gaining asylum. Asylum seekers must show that they were forced to endure certain procedures, hence the coercive nature of population control. The discourse of force is necessary since immigration officials must determine if asylum seekers are worthy of asylum and were indeed coerced into taking birth control and subjected to sterilizations and abortions against their will. Yet the use of force can be delayed depending on the asylum seeker's ability to bribe officials. Several asylum seekers testified that through the use of bribes, they were able to have more than one child, avoid the forced use of birth control, or prevent state officials from aborting a pregnancy.

Lin, Mei, Jia, Zhu, and Chang all experienced past persecution. Therefore, they could articulate what had happened to them that formed the basis of their asylum claim. Because Yow and Shu had not been persecuted but instead feared future persecution, there were significantly fewer questions during their hearing about how forced abortions and forced sterilizations are persecution. Lin, Mei, Jia, Zhu, and Chang's hearings focused on being forced to use birth control, being forcibly sterilized, being forced to abort a pregnancy, as well as being fined, threatened with job loss, and in Chang's case, being arrested, detained, and tortured for speaking out against the policies.

Lin, Mei, and Chang's wife were all forced to wear an IUD against their will. The following excerpts show how each used the language of force in their testimony. Lin testified that the "village required us to register after the birth of our first child and required for me to wear an IUD." She and her husband moved to another village before the IUD was inserted. After the birth of her second child, Lin described how she "had to go for examination every three months." After being forced to wear an IUD for nearly a year her husband paid a private physician \$200 to remove her IUD.<sup>13</sup>

After the birth of her daughter, Mei stated that she was:

forced to wear the contraceptive device and forced to have medical examination every three months to see if the IUD was still in my body.<sup>14</sup>

On one visit, she was:

forced to have a routine exam and they found out IUD was not there and I was pregnant. They were angry and asked why. I did not know the IUD had disappeared or that I was pregnant.<sup>15</sup>

After her second forced abortion, Mei was required to wear an IUD and again she requested that the IUD be removed because she was having health complications that included Pelvic Inflammatory Disease (PID).

<sup>11</sup> Immigration Court Hearing. 10 July 2009.

<sup>12</sup> Immigration Court Hearing. 19 April 2010.

<sup>13</sup> Immigration Court Hearing. 16 June 2009.

<sup>14</sup> Immigration Court Hearing. 18 June 2009.

<sup>15</sup> Immigration Court Hearing. 18 June 2009.

Lin used the language of force as she was “required” to register her first child’s birth, “required” to wear an IUD, and “had to go” for medical examinations. Yet Lin’s ability to thwart the family planning officials’ desire to have her submit to the forced use of birth control is evident in her ability to migrate to another city and bribe a physician to remove the IUD. This example demonstrates the use of force as a necessary component to gaining asylum even if the ways in which Lin was forced is different from other asylum seekers who did not have the economic means to leave their village and bribe a medical professional. Lin and Mei describe how they were “forced” to wear an IUD as the village “required” they do so. Family planning officials forced Mei to be examined and Lin “had to go” for check-ups. This language of force can be explained by what Linda Gordon called the “right to self-determination.” While the language of rights was initially deployed by pro-choice activists, the idea of choice and how to self-regulate reproductive choices against a coercive state becomes intrinsic in how asylum seekers differentiate themselves from women who use birth control methods, such as an IUD, voluntarily.

While Lin, Mei, and Chang’s wife were all forced to use birth control, only Lin was sterilized. Lin told the judge that because her first two children were girls that she and her husband wanted a son. After their son was born, they tried to register him so that he would later be able to attend school but that she was reported by the village committee who wanted her to be sterilized. Lin testified that the day she was sterilized:

several [family planning officials] dragged me into the car and I pleaded but they sent me to the hospital and to the surgery room.<sup>16</sup>

When asked by the ADC “did you want the sterilization?” Lin replied “no” and when asked “how many more children are you planning on having?” she answered, “my husband wanted one more.” The direct line of questioning by the ADC elicits a response from Lin that she would not have chosen to be sterilized. The ADC assumes that because Lin did not want to be sterilized that she must have desired more children. Yet in this potentially triumphant moment for Lin who is voicing her own reproductive choices not to be sterilized she does not state that she wanted more children. Instead, she defers to her husband’s wishes to have “one more”. Moreover, she stated that both she and her husband wanted a son since they had two daughters, showing how son preference for women and men accounts for their continued subversive behavior as they attempted to allude family planning officials (Burgess and Zhuang 2002).

Yow too echoed Lin’s sentiments during her hearing that she “wants more children” and added that she “believes it’s my right.” By invoking the language of “rights” Yow won favor with the judge who granted her asylum. During my interview with Kenneth, an immigration judge, he described a case where the asylum seeker had been sterilized but did not express the desire for more children:

I had a forced sterilization case and asked [the asylum seeker] if she wanted to have more children. She said ‘no’ and I said ‘so go back and live in China. What’s the problem?’<sup>17</sup>

Kenneth’s response shows how some judges do not consider forced sterilization persecution if the asylum seeker does not want more children. His logic parallels that of the ADC in Lin’s case. Kenneth assumes that the only reason a woman would not want to be sterilized, even if it is forced, is if she desires more children. Otherwise, it goes unscathed as a human rights violation. The ADC for Lin implied that Lin’s sterilization was forced since she (or perhaps only her husband) wanted more children. In both examples, immigration officials embraced the idea of forced sterilization as persecution, not if the woman did not want it, but if she wanted to have more children. This logic is problematic as it does not recognize forced sterilization as persecution for women who do not want more children. As Rosalind Pollack Petchesky argues, it reduces women to their reproductive function

<sup>16</sup> Immigration Court Hearing. 16 June 2009.

<sup>17</sup> Interview on 10 July 2009.



to bear children (Petchesky 1984). Women only have reproductive rights if they want to exercise them to have more children.

Nancy, an immigration judge, told me that:

a lot of times the Chinese talk about being sterilized and then they're not really sterilized. It's an IUD but they call it sterilization. So, you have to be careful with the translation.<sup>18</sup>

While the immigration judge quoted here is correct that forced use of birth control is different from a forced sterilization; the former a practice that can be stopped and the latter a surgical procedure with permanent non-reproductive effects. Yet the statute includes both forced use of birth control and forced sterilizations as persecution. Therefore, being "careful" only differentiates the practices as each are forms of legally recognizable persecution.

Mei, Jia, and Zhu all experienced forced abortions. Mei testified that:

they [family planning officials] threatened me and my husband that if I don't have the abortion we will be fired. We begged to have the child. They kept threatening, but without a job we could not survive.<sup>19</sup>

When the ADC asked if she and her husband could find another job she responded that there was:

no private enterprise back then, only government enterprise. My employer gave me three days to respond or be fired. The family planning officials came to my home and forced me to go to the hospital. They took me directly to the operating room. It's quite terrifying because you see the medical instruments and hear the sounds of the medical instruments.<sup>20</sup>

Like Lin, Mei too uses the discourse of force as she and her husband were threatened and intimidated through the loss of work if she did not submit to the abortion. Rather than accept her testimony as sufficient, the ADC followed-up with questions about job relocation. The implication is that if Mei was opposed to having an abortion then certainly she could find work if she were to be terminated from her job. Mei's response reveals one of the many ways that immigration officials are uninformed about life in China. The argument that private enterprise jobs are non-existent is incomprehensible to the U.S. immigration official who understands the separation of state employment and private sector work. On the one hand, it illuminates the general ignorance that immigration officials have about the pervasiveness of the Chinese state and government controlled jobs. Yet the acceptance of Mei's answer that there was "no private enterprise" in the 1980s is hardly true either. In her laudable work on Chinese immigration during the exclusion era, Estelle Lau shows how immigrants used a range of tactics to enter the U.S. (Lau 2006). These tactics such as giving false information, fabricating documents, and inventing fictitious family members, caused immigration officials to think of Chinese migrants as purposely deceptive.

During her hearing, Jia testified that:

three family planning officials commanded I go for an abortion for being pregnant before marriage.<sup>21</sup>

When the ADC asked her why she didn't hide she responded that:

I was hiding inside my home. But they dragged me to the hospital. The nurse forced me down and put a shot in my stomach. I could feel the fetus inside struggling and the next day I gave birth to a dead fetus.<sup>22</sup>

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<sup>18</sup> Interview on 17 June 2009.

<sup>19</sup> Immigration Court Hearing. 18 June 2009.

<sup>20</sup> Immigration Court Hearing. 18 June 2009.

<sup>21</sup> Immigration Court Hearing. 18 June 2009.

<sup>22</sup> Immigration Court Hearing. 18 June 2009.

Zhu too told a similar story of family planning officials coming to her home to inform her she was in violation of the policy:

they asked me to cooperate but I did not agree. They forced me, dragged me to the hospital. I was forced to lie down on the table and they used an object to suck the fetus out.<sup>23</sup>

When she returned to work one week later, she found that she had been “dismissed because of the pregnancy.” Jia and Zhu tell similar stories of being forced from their homes and “dragged” to the hospital where they had no choice but to submit to medihave to pay the fine since the child was already cal officials ending their pregnancy. Unlike Mei who was threatened with job loss, Zhu was not allowed to return to work because she had violated the family planning policy and resisted the abortion. The loss of employment shows another way that asylum seekers are harmed. Refugee law does not recognize economic discrimination as persecution. Therefore, employment termination is not considered harm. Asylum seekers who have access to resources can absorb job loss and in some instances, leverage their resources to bribe government officials.

Lin paid a \$1000 bribe so that family planning officials would let her give birth to her second child. When they demanded an additional \$8000 to register their daughter she did not pay because it was “too much money”. After she was forcibly sterilized, she was fined \$7000. When the judge asked her why she paid the fine, she said “without paying the fine we cannot use land for farming”. The judge asked about Lin’s complicity in paying the fine to determine if the fine was indeed that or if she was paying for the service voluntarily. While Lin’s family had the resources to pay the fine, it was to secure future access to land for agricultural work.

Both Jia and Zhu were fined for their pregnancies. Zhu paid \$500 after her abortion but Jia refused to pay the \$1000 fine because she:

did not think should have to pay the fine since the child was already aborted. Why should I have to pay too?<sup>24</sup>

Again, ability to pay a fine varies across the cases I discuss. Some asylum seekers could not afford to pay fines. Others could. Those who could pay were able to bribe immigration officials (albeit temporarily), such as Lin’s family, who evaded family planning workers and went without wearing an IUD long enough to conceive a second time.

Chang’s case was different from the other cases I discuss for two reasons. The persecution of being forced to submit to birth control and examinations as well as a forced abortion happened to his wife—not him—and he was arrested and detained for speaking out against the family planning policy. Unlike the male applicant in the BIA case *Matter of C-Y-Z*, Chang was not applying for asylum solely because of his wife’s persecution but also his own as he was detained and beaten for speaking out against the policy. Therefore, he was doing more than just “standing in her shoes” as Sarah McKinnon argues in her analysis of BIA cases (McKinnon 2016).

When Chang and his wife registered to marry she was pregnant with their first child. Although family planning officials had originally told them that she would have to have an abortion because she was pregnant before they married, he paid a \$1500 fine to keep the baby. After Chang’s wife gave birth to their first child, she was required to wear an IUD. She did not do so immediately as she was “weak from childbirth” as Chang testified. Chang described the day she was forced to wear one:

Two officials entered our home and dragged my wife to the family planning service station. They said she had to have an IUD and made her wear it.<sup>25</sup>

<sup>23</sup> Immigration Court Hearing. 21 April 2010.

<sup>24</sup> Immigration Court Hearing. 18 June 2009.

<sup>25</sup> Immigration Court Hearing. 8 July 2009.

Chang and his wife paid a private physician \$200 to have the IUD removed. Like Lin and her husband, Chang and his wife were also able to bribe a physician to remove his wife's IUD. During his wife's second pregnancy, Chang testified that he and his wife

went into hiding because we wanted to have the child. She went to her brother's and I stayed home. Family planning cadres came to my home and I told them she [his wife] was at a relative's house. I did not give them the address and they arrested me. They interrogated me, they beat me, they punched me. I told them my wife was coming back in three days so that they would release me and then I went into hiding. When we were discovered, four cadres rushed into our relative's house. I blocked them from dragging my wife. I was beaten, they kicked my leg, they punched me, they dragged my wife and I cursed them for being inhumane. Then they detained me and I was beaten again. Finally, I confessed that she was pregnant and they took her for the abortion.<sup>26</sup>

Like Lin, Mei, Jia, and Zhu, Chang too used the language of force as his wife was "dragged" away by state officials, initially for the forced use of birth control by wearing an IUD and then later to have an abortion. Yet unlike the other women, Chang was beaten as he attempted to stop the family planning officials from taking his wife and while he was detained. Chang experienced his own persecution, not just because he "shares significantly more responsibility in determining, with his wife, whether to bear a child in the face of societal pressure and government," as the BIA ruled in *Matter of S-L-L*, but because he was arrested and beaten.<sup>27</sup> During our interview, Michael, an immigration attorney, described how it is often harder to prove persecution for men than women:

Other resistance is written into the statute [IIRIRA]. This is a big issue for what defines other resistance. Is hiding enough or hiring a private doctor to remove the IUD or being detained or fined heavily. Does it rise to level of persecution? Getting into a scuffle with family planning officials.<sup>28</sup>

For Chang, even though the judge granted him asylum, the ADC reserved the right to appeal the case as she found him a non-credible witness based on the REAL ID Act which I discuss in the next section.

The way that asylum seekers fleeing coercive population control measures tell stories of persecution is unique to gendered forms of persecution in that the asylum seeker must establish that the act of taking birth control, being sterilized, or having an abortion was indeed coerced and was not her doing. Therefore, asylum seekers must narrate a story that uses the language of force. Yet this narrative also stands in contrast to the monolithic view of population control policies as human rights abuses that all Chinese citizens are subjected to. Asylum seekers also testified about how they paid fines so that they could have more than one child, paid private physicians to remove IUDs and deliver babies, and bribed officials so that their child could be registered with the state. These data offer an alternative explanation to the argument that all Chinese citizens were subjected to these abuses.

Moreover, because the persecution was done by family planning officials who acted on behalf of the Chinese government, the persecution is always defined as political opinion—hence, state sponsored harm. No other example of gender-based persecution—rape, domestic violence, female genital cutting, honor crimes—are always defined as on account of political opinion. Therefore, by circumscribing the act of persecution as forced and the reason for it as political opinion, U.S. immigration law has created a gendered migrant who must articulate a narrative of reproductive rights to gain asylum that is about freedom from state coercion. The first theme of coercive population control as persecution shows how asylum seekers tell stories of how their abortions and sterilizations were mandated by state officials. Lin, Mei, Jia, Zhu, and Chang testified that they were "forced" to comply with the

<sup>26</sup> Immigration Court Hearing. 8 July 2009.

<sup>27</sup> *In re S-L-L*, 24 I.&N. Dec. 1 (2006).

<sup>28</sup> Interview on 19 June 2009.

one-child policies. This discourse of force situates the narrative as one of state coercion that makes clear that asylum seekers did not want the procedures done to them. This narrative is centered in a rights-based discourse that gives asylum seekers the agency to voice opposition to China's policies. Part of being forced to comply included being "dragged", and in Chang's case "beaten" and taken away to be forcibly sterilized or have a forced abortion. This right to self-determination as Linda Gordon argued, is not about the right to *have* an abortion but the right to be free from state coerced reproductive practices.

What makes forced abortion and forced sterilization cases different from other gender-based forms of persecution, such as female genital cutting, rape, domestic violence, and honor crimes, is that the abortion or sterilization must be coerced. During my many other observations of immigration court hearings based on other gender-based forms of persecution, asylum seekers are never asked if they wanted to be beaten, raped, or have their genitals cut (Oxford 2005). Conversely, asylum seekers fleeing coercive population control policies are asked to go into greater detail about the abortion or sterilization that establishes that they were forced to have these procedures. Immigration officials are bound to ask these questions since they must enforce laws such as IIRIRA that define coercive population control as persecution as harm done by the state. But in doing so they perpetuate a narrow understanding of China as a totalitarian regime that does not consider the nuances of how the one-child policy was applied and how women undermine state control over their reproductive lives.

### 6.3. Credibility

In this section, I discuss the expectation that immigration officials have that asylum seekers be credible. The previous section that revealed how narratives of persecution for those who experienced or fear coercive population control measures are different from other asylum claims in that political opinion is always the nexus link and therefore all testimony is about establishing a right to be free from coercion against the state. This section (and the next) unfold the larger picture of how Chinese asylum seekers are part of the larger landscape of the asylum bureaucracy and migration patterns. All asylum seekers must demonstrate that they are credible to win asylum. Credibility includes consistency, veracity, and demeanor during one's testimony, as well as the ability to prove who you are with documentation. In their work on asylum seekers in the U.S. and the UK, Carol Bohmer and Amy Shuman correctly title two chapters that deal with issues of credibility by questioning "Did This Really Happen to You?" and "Are You Who You Say You Are?" (Bohmer and Shuman 2008). The question of "did this really happen to you" that Carol Bohmer and Amy Shuman pose illuminates what makes asylum law fundamentally different from other form of jurisprudence in the U.S. In immigration court, there is rarely any proof that what the asylum seeker is claiming did indeed happen. Therefore, immigration officials are left with using criteria such as the internal consistency of the story and expectations about how the story is told to determine if an asylum seeker is telling the truth. To complicate things further, Chinese asylum seekers routinely arrive in the U.S. with the assistance of a smuggler. Peter Kwon was among the first to detail the intricate smuggling networks that Chinese migrants use to get to the U.S. Smugglers arrange for travel and identification documents that look real but will have someone's name other than the migrant who is using them. This means that the norm is to travel with false documents (Kwong 1997). This guessing game of not knowing an asylum seeker's identity is documented in other periods, such as the work of Estelle T. Lau on "Paper Families" (Lau 2006). Lau details how Chinese migrants responded to exclusion laws from 1882–1943 by fabricating immigration paperwork to create familial members to facilitate the legal entry of Chinese immigrants into the U.S. The fabrication of fictitious people created a potential avalanche of migrants who could come to the U.S. through their connection to a U.S. citizen family member, even if there were no actual familial ties.

Asylum hearings start with questions about dates. When were you born? What year did you get married? How old are your children and when are their birthdays? When did you arrive in this U.S.? These questions build a foundation for determining credibility. If an asylum seeker states that

she was born in 1972 but is only 27 years old at the time of the hearing in 2009, this discrepancy can raise the suspicion of the judge or ADC that the asylum seeker is not telling the truth. Typically, when this happens, an ADC will repeat the question or the judge will intervene to clarify whether there is incorrect information in the application, a problem with the translation, or if the asylum seeker understood the questions correctly. When Jia testified that “three family planning officials commanded that I go for an abortion” in October 2005 but that the abortion did not take place until February 2006, the judge asked, “How long were you in the hospital?” to which Jia replied, “one week.” After further questioning Jia clarified that her first contact with family planning officials was in October 2005 when she found out that she was pregnant but that the abortion was not until a few months later as she went into hiding between October and February.<sup>29</sup>

Inconsistent testimony can be explained because of translation problems. For all seven asylum hearings, the applicant did not speak English (or at least well enough to communicate during the hearing) and an interpreter translated during the hearing. During Chang’s hearing, there were three occasions where the interpreter had to clarify transliteration issues over the meanings of words as they relate to time, place, and a Chinese character in the asylum application. For each time, the interpreter had to interrupt the court proceedings so that the ADC could understand what seemed to be a discrepancy in the testimony. During my interview with Shen, a court interpreter who himself had been granted asylum in the 1990s for his pro-democracy activism in China he was critical of the immigration system in the U.S.:

I have my own opinion in my heart, but I don’t show. There was one man who had a second child, from a rural area. They [family planning officials] got hold of him and forced him to be sterilized and they didn’t cut right and his wife got pregnant so they went back and did it again and the ADC said, ‘how can you get sterilized twice’? He was denied. But others who don’t deserve are given asylum. Once there was someone who was arrested for gambling and said he was arrested for democracy demonstration and was granted right away. I don’t feel compassion for them. Immigration judges are sitting over there and they don’t really know if they know about these things happening or not. The judge and the ADC have no real knowledge of politics in China. Chinese very smart and sly. The immigration official is simple and stupid.”<sup>30</sup>

Shen’s ability to identify the fissures in the immigration bureaucracy that allow Chinese migrants to fool immigration officials is because of his position as an insider both in the immigrant community (he is Chinese and is fluent in Mandarin) *and* as an insider within the immigration bureaucracy (by working as a contractor for the U.S. government as an interpreter). Estelle Lau shows how the trope of the Chinese immigrant as “cunning” emerged during the exclusion period. This image that Shen portrays of Chinese migrants as a trickster who can outsmart those who are ignorant about Chinese politics parallels Lau’s analysis of how Chinese migrants entered the U.S. more than a century ago. While internal consistency is important, immigration judges vary in their reactions to stories that sound too different or too similar to other ones. In his critique of the systematic neglect that plaintiffs complain about when using unethical immigration attorneys, Richard Abel details how some attorneys liken their services to the bargain one gets by shopping at “Filene’s Basement” (Abel 2006). Boilerplate applications are ones that are sold by corrupt organizations posing as legitimate immigration law offices. Unknowing asylum seekers pay to have a “preparer” take a boilerplate application and then change names, dates, and other information to personalize it. Boilerplate applications are summarily denied as immigration officials are familiar with them as fraudulent claims. Unfortunately, for the asylum seeker, she will have paid hundreds or thousands of dollars and is now in jeopardy of being denied asylum (Abel 2006).

<sup>29</sup> Immigration Court Hearing. 18 June 2009.

<sup>30</sup> Interview on 18 April 2010.



For example, during an immigration court hearing I observed, the hearing was underway when the applicant asked the judge if he could telephone his lawyer. The judge looked confused and told him that his attorney was sitting in the courtroom. After insisting on speaking to his lawyer, the respondent's attorney became agitated and yelled at his client "you want to call the office? That's fine." The attorney asked for a recess and the attorney and client went into the hallway where they were yelling at each other. After returning to the courtroom, the asylum seeker told the judge that the man in the courtroom was "not his lawyer" and that he wanted a new hearing with his lawyer present. The judge granted a continuance and both the applicant and the attorney left. The ADC explained to me afterward that the applicant had most likely used a "travel agency", an organization that is a front for a law office, and that he wanted his lawyer who was most likely the preparer who helped him with his statement. Like the Chinese asylum seekers that Richard Abel claims uses travel agencies that function like Filene's Basement, the asylum seeker I observed in court most likely was dismayed that the person who had taken his statement and who he most likely understood to be his attorney was a preparer with no legal qualifications who may have undermined his ability to gain asylum.

The complicated and contradictory part of asylum is that immigration officials interpret stories that are too much alike as non-credible as well as stories that are unusual as non-credible. Lin, Mei, and Chang all testified that they (or in Chang's case, his wife) were required to wear an IUD and report for mandatory check-ups every three months to the family planning clinic. Neither of the judges or ADCs in Lin's or Mei's case questioned the veracity of their testimony about the three months even though it was the same across all three cases. When Chang's hearing was adjourned, Chang, his attorney, and the judge left the courtroom. The ADC told the court clerk that:

everyone is now saying they [family planning officials] come every three months. I just don't believe it.<sup>31</sup>

She then began talking about the next hearing and referred to the asylum applicant as a "liar". The clerk made a face and then the ADC turned around, shocked to see me still in the courtroom and covered her mouth. This is an example of how some immigration officials might consider the three-month period fabricated if it is widely used for many different asylum seekers.

During my interview with William, an immigration attorney, he said that in New York City, the judges are "liberal" even when presented with boilerplate applications.

They really try to help. Some judges are open to a changing story. You don't see as many boiler plates now as you used to, but I still see them for the Chinese cases. But you also have a mass number of people with similar stories. Just because it's cookie cutter doesn't make them not true. The best time for Chinese family planning was four or five years ago, before the REAL ID Act. On the one hand, you have Republican conservatives who don't want poor people of color and then there are those who are Christian conservative who are opposed to abortion. Immigration law is schizophrenic.<sup>32</sup>

William captures the difficulty that immigration officials are faced with when large numbers of people have "similar stories." This is further complicated by the proliferation of travel agencies that purposely deceive unknowing migrants and gladly take payment in exchange for a boilerplate application. Moreover, William's interpretation of the internal consistencies of immigration law as schizophrenic get at the heart of the many layers of contradictions about how and why migrants win asylum. During our interview, Diane, an immigration judge said:

the Chinese cases, they all have a claim on paper. They come represented [with an attorney], all, 99% of them come represented. My sense of whether there's fraud or not- you know

<sup>31</sup> Immigration Court Hearing. 8 July 2009.

<sup>32</sup> Interview on 9 July 2009.

there's probably a grain of truth somewhere and with 50% of them the grain is very small. They're very well prepared, the Chinese, very well prepared. And the majority are granted."<sup>33</sup>

Diane's interview revealed her reluctance to fully embrace all the testimony she hears as true. She is clearly aware that the majority of coercive population control cases are granted, even if they scarcely contain a "grain of truth". In her work on how immigration officials controlled entry across the U.S. southern border, Eithne Luibhéid explores how they ascertained that Sara Harb Quiroz was a lesbian, a ground for removal and refusal of entry of immigrants in 1960 (Luibhéid 2002). How do immigration officials know if the applicant before them is indeed who they say they are and if they are telling the truth about what happened to them? Eithne Luibhéid describes in detail how Quiroz was dressed, her hairstyle, how she talked, and how she acted. It was the answers to these questions that provided the clues that completed the puzzle for border patrol agents that Quiroz must be a lesbian. Unlike the border patrol officers who Luibhéid discusses who seemed eager not to accept Quiroz, many immigration attorneys consider Diane as one of the "good ones" in that she has a high grant rate.<sup>34</sup> Her tone during our interview was clearly sympathetic toward asylum seekers. Yet her seemingly pro-immigrant stance did not blind her to probability that in her estimation that as few as half have only a "small grain of truth" in their testimony.

Consistent testimony is only part of establishing credibility. How you tell your story in immigration court is just as important as the story itself. Carol Bohmer and Amy Shuman describe demeanor as how asylum seekers "present themselves" since immigration officials are looking for someone who behaves as though they are telling the truth. Asylum seekers must tell their stories in a way that makes them believable to the court. The problem of course, as they put it, is that "assessments of whether someone is lying are notoriously unreliable, even when the teller is from the same culture as the listener" (Bohmer and Shuman 2008, p. 146). Because demeanor is about how one tells a story of persecution, affect is key.

When Zhu was smuggled to the U.S., she travelled on an airplane that landed in Chicago and then connected to New York City. She used a passport that belonged to someone else and the snakehead confiscated it after she landed in Chicago. During her hearing, the judge and the ADC asked several detailed questions about why she did not fly directly to New York and could she prove that she was in Chicago. In particular, they were disturbed that there were no finger prints for Zhu in the system as the judge described how "it is difficult to come into Chicago without inspection." Even though Zhu could not provide any further details about how she came to New York City, in the judge's oral decision he stated that she:

said things that do not fit into most cases. But she said them without being nervous and gave details which indicates she is talking about actual events, not a plot outline. She appeared reserved except for when she became emotional about the beating and abortion. She was emotionally moved when she testified about being beaten by her boyfriend.<sup>35</sup>

Zhu's credible testimony persuaded the judge to grant her asylum. Zhu's story of how she arrived in the U.S. is what Carol Bohmer and Amy Shuman call a "classic entry narrative" in that using someone else's passport that has the migrant's photograph but someone else's name is the most common story about how asylum seekers cross borders (Bohmer and Shuman 2008, p. 89). As a common narrative, the judge certainly would have heard this story before. What struck the judge as atypical was that Zhu would have been fingerprinted at the Chicago airport and yet no prints were available at the time of the hearing. But even with this grave discrepancy as well as her testimony that did not seem to

<sup>33</sup> Interview on 6 July 2009.

<sup>34</sup> Interview on 6 July 2009.

<sup>35</sup> Immigration Court Hearing on 21 April 2010.

fit when compared to other cases, her emotive state was what most persuaded the judge since she testified in a way that conveyed that she was not nervous. Furthermore, it was also her break from a reserved emotive state to one that was tearful that indicated to the judge that she was telling the truth.

Although the judge in Mei's hearing did not specifically cite her emotional state, she too cried when she talked about the forced abortions she experienced. After Mei's hearing concluded and she had left the courtroom, the judge told me that:

women don't lie as well as men do because they are not used to dealing with public officials like men.<sup>36</sup>

The judge's remark reflects a gendered assumption about truth-telling. Women's restricted access to public life makes them less likely to interact with public officials. This lack of interaction translates into women's greater likelihood of telling the truth since they have fewer experiences to draw from where they may have been deception in the past. Yet not all of the asylum seekers I discuss cried during sensitive testimony. Neither Lin or Jia cried when they testified about their forced sterilizations and forced abortions, even though both were found credible. Lin cried when the judge announced that she was granted asylum.

During Chang's hearing, the judge and the ADC asked several detailed questions about how he arrived in the U.S. They asked questions such as:

When did you leave China? When did you enter the U.S.? How did you get from China to the U.S.?<sup>37</sup>

Chang answered that he was smuggled via a route that took him through Hong Kong, Korea, and Mexico before crossing at the U.S. southwest border. He then flew from Los Angeles to New York City. When asked about how he could travel he answered that it was on "someone else's passport" that was "taken by the snakehead" when he arrived in New York City. Chang therefore was left with no documentary evidence or identification documents that proved he was on any of the flights that he testified he took to come to the U.S. While the judge granted Chang asylum and found him credible, the ADC stated that she would be appealing the ruling. In the ADC's statement, she said that:

it is unplausible that he didn't have an ID in hand to board a U.S. airplane [referring to the flight from LAX to JFK].<sup>38</sup>

Even though his attorney responded that it is "not unusual for one person [the snakehead] to handle all of the documents." The ADC continued explaining why she thought he was not credible as he spoke in a "monotone" voice "even when he talked about his wife's abortion and being beaten." While describing his lack of emotion she cited the REAL ID Act that justified her decision to appeal the case. In 2005, Congress passed the REAL ID Act.<sup>39</sup> This Act has a multitude of restrictions for undocumented immigrants. It makes obtaining asylum more difficult because it allows arbitrary definitions of "demeanor, candor, and responsiveness" of the applicant as interpreted by the immigration official (Bohmer and Shuman 2008, p. 77). Like Zhu, Chang too entered the U.S. using false documents with the aid of a smuggler. But her emotionally appropriate way of testifying was persuasive while Chang's lack of emotion raised suspicion in the mind of the ADC.

During the oral decision by the immigration judge in Shu's case, he too cited the REAL ID Act and stated that during her testimony there were problems with demeanor and that she "testified with her head down" and that she "spoke quietly at times." I was surprised to hear him say this

<sup>36</sup> Immigration Court Hearing on 21 April 2010.

<sup>37</sup> Immigration Court Hearing on 8 July 2009.

<sup>38</sup> Immigration Court Hearing on 8 July 2009.

<sup>39</sup> REAL ID Act. Pub.L. 109-13, 119 Stat. 302, enacted 11 May 2005.

since she cried when she testified about the possibility of having her current pregnancy aborted, rubbing her stomach, and looking down at it in tears. The judge continued with his decision by stating that he does not “believe that DHS [the Department of Homeland Security] would deport a pregnant woman to China.” Unlike the judge in Zhu’s case who was convinced that she was credible, in part, because of her emotional testimony, the judge in Shu’s case cited problems with her demeanor even though she too cried as she articulated her own fears of having her unborn child aborted. Immigration judges have different opinions about coercive population control cases that range from those who have feminist leanings and are more likely to grant cases that involve violence against women to gatekeepers who seek to limit the number of immigrants coming into the U.S. and are more likely to deny cases. Unlike the other cases that involved past persecution, Shu’s case was based on a fear of future persecution. Because no harm had come to her she could not testify about what had happened. There was no reason to doubt her because there was no past persecution. Yet the judge in Shu’s case could not deny that Shu was pregnant with her second child. His callous comment that the U.S. government would not deport a “pregnant woman to China” shows how some judges continue to “guard the golden gates” as Erika Lee discusses in her work on Asian American immigration (Lee 2003).

During our interview, Margaret, an immigration judge, was outspoken about her own personal position of protecting women’s rights and how even though she wanted to help women from China, she was critical of the intent of the law:

The members of Congress who are anti-abortion just tagged it on. And it had nothing to do with gender or protecting women or anybody else. It was just one way to get the foot in the door to say abortion is wrong. It was just political pressure to appease the pro-life group inside the United States.<sup>40</sup>

Contrast this with Nancy, an immigration judge, who was more cautious about granting cases who stated that:

when Clinton signed that bill [IRRIRA] and made it political opinion, well, you have a billion people in China—over a billion people—half of them are women, right? Okay, half of those are of childbearing age and their husbands can come too. I mean, potentially, half of the population of China can come here with a claim for asylum.<sup>41</sup>

Comparing Margaret’s and Nancy’s position about coercive population control shows how some judges think about these cases in the larger debate on reproductive rights and others are fearful that the floodgates may open to unrestricted immigration of Chinese nationals into the U.S. In their comprehensive study of asylum in the U.S., Jaya Ramji-Nogalas, Andrew I. Schoenholtz, and Philip G. Schrag, argue that the single most important variable in determining the outcome of an asylum case is the adjudicator (Ramji-Nogalas et al. 2009). This study is important because it shows how variables such as location of the immigration court or nationality of the claimant are less important than the immigration official making decisions about granting or denying a case.

The second theme of credibility shows how an emotive response can influence immigration officials regarding whether someone is telling the truth. Those who perform their narratives of persecution in such a way that is persuasive are more likely to be granted asylum. Some judges accept testimony that is atypical. The judge who presided over Zhu’s case acknowledged that her case was different but that her emotive state and the way she told the story persuaded him that she was telling the truth. All asylum seekers must prove that the harm they experienced or fear they will experience rises to the legally acceptable definition of persecution to gain asylum. They must

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<sup>40</sup> Interview on 7 July 2009.

<sup>41</sup> Interview on 9 July 2009.

also show that the persecution is on account of one of the five grounds outlined in the Refugee Act (race, religion, nationality, political opinion, and membership in a social group). Asylum seekers who have experienced or fear experiencing coercive population control are at an advantage over other asylum seekers because IIRIRA defined the harm as on account of political opinion. The U.S. immigration laws as influenced by pro-life U.S. political leaders make it easier to prove that forced abortions and sterilizations are persecution. The primary obstacle that these asylum seekers face is whether they are credible. In other words, while the policies and customs may make it likely that most Chinese nationals have been subjected to coercive population control measures, it does not mean that everyone has or that the story that asylum seekers tell is indeed what happened to them.

#### 6.4. Migration

Immigration law differentiates asylum seekers from other immigrants. The law conceptualizes asylum seekers as different from “economic” migrants because of the persecution they experienced or fear they will experience. Migration scholars perpetuate this dichotomy of the forced/voluntary migrant or political/economic migrant (Zolberg et al. 1989; Portes and Rumbaut 1996). My own observations of Chinese asylum seekers in the Los Angeles, California immigration court showed how judges routinely suspected Chinese asylum seekers of subverting the immigration system by “sneaking into” the country illegally and then attempting to adjust their status vis-à-vis a grant of asylum (Oxford 2005; Oxford 2008). Yet this dichotomy of the forced/voluntary migrant does not capture the complexities of *why* migrants decide to leave one country for another. One can be both persecuted and seek a better life.

None of the seven asylum seekers I observed were knowledgeable about asylum before they left China. Lin, Mei, and Yow migrated to the U.S. on work visas. When the judge asked Lin what was the purpose of coming to the U.S. in 2007, she testified “to do business.” The immigration judge who presided over Mei’s hearing asked her “why did it take you twenty years to leave China” since her last forced abortion was in 1986 but she did not come to the U.S. until 2006. Mei answered that she had “no opportunity” until 2006 when “a company helped me to come to the U.S.” The ADC asked Mei “what did you tell the consulate was the purpose of your visit. To which Mei replied that it was a “business exploration for a hair salon.”<sup>42</sup> The judge’s question to Mei illuminates the assumption that persecution alone necessitates migration. Refugee law is written in such a way that it is hard to justify a claim to persecution if you did not leave your country for two decades. But as Mei replied that without the opportunity to come to the U.S., migration was not possible.

Jia, Zhu, Chang, and Shu all used a smuggler to migrate to the U.S. Jia’s mother arranged for and paid the snakehead \$70,000. Zhu’s family paid \$25,000 for her to be smuggled to the U.S. When the judge asked Shu why she did not apply for asylum as soon as she had arrived in the U.S., she stated that she was “paying the debt to the snakehead and did not want to be detained before the debt was paid.” During my interview with Ting, the immigration attorney who represented Jia, she stated that:

the smuggler is like a personal friend of the family. Many different family members will contribute to paying the smuggler’s fee so that one member can go over [to the U.S.] to work and send back money to pay off the debt.”<sup>43</sup>

Asylum seekers and their families amass great debt in order send someone to the U.S. to work in hopes of being paid with remittances. The high cost of smuggling from China indicates that many of the asylum seekers I observed came from families with some wealth or at least the ability to pool extended family resources to pay the fee. Shu did not apply for asylum when she came to the U.S. because she was responsible for repaying the fee to the smuggler. And the consequences of not doing so may have

<sup>42</sup> Immigration Court Hearing on 18 June 2009.

<sup>43</sup> Interview on 6 July 2009.



been direr than risking arrest and deportation. Yet the judge's question does not fit the linear timeline of her arrival and need to apply for asylum. Shu arrived in the U.S. in 2005, had her first child in 2007, and at the time of the hearing in 2010 was pregnant with her second child. Shu was applying for asylum because she feared future persecution. It was her second pregnancy that triggered this concern since she feared that being deported to China could result in a forced abortion. This example shows how judges too can make non-sensical statements in court. What was particularly insidious about this case was that the judge denied Shu's request for asylum. This was the only judge who denied asylum of the seven cases I observed.

Asylum seekers can come to the U.S. alone or with other family members such as their spouses and children. Of the seven asylum seekers' hearings I observed, five arrived without spouses or children. Yow and Shu came to the U.S. with their husband. None came with their children. Jia, Yow, and Shu have U.S. born children. Some immigration judges are critical of women who ostensibly "abandon" their children and come to the U.S. (Oxford 2008). During their hearings, neither Lin or Mei were questioned about why they came to the U.S. without their husbands and children. The ADC asked Chang "why can your wife live in China safely and you cannot?" to which Chang answered that it was because he was the one who had been detained, not her." His response reflecting his understanding of his case as his own persecution, not that of his wife's.

Many immigrants who arrive in the U.S. are part of mixed-families which means that family members have different immigration statuses (Schueths and Lawston 2015). Some may be citizens, some legal permanent residents or documented using work visas, and others undocumented. This presents a quandary when some family members are deported and others are not. A common scenario is when the parents are undocumented but U.S. born children have U.S. citizenship status. In their work on mixed-status families, April Schueths Jodie Lawston show how the law separates immigrant families more than it keeps them together (Schueths and Lawston 2015).

For Jia, Yow, and Shu, while they are considered deportable under U.S. immigration law as undocumented immigrants, their children are not since they are U.S. citizens. This creates a dilemma for families when an adult is deported about whether to remain in the country undocumented, be deported and leave your children with family in the U.S., or bring your U.S. citizen children with you to your country of origin. Yow was granted asylum because the immigration judge found her to be credible and worthy of asylum. The ADC told me that while she is required to reserve the right to appeal the judge's ruling because Yow has U.S. citizen children, that Yow was credible and it is unlikely that her case would be appealed. After Yow's hearing, I spoke with the judge and the ADC and they explained that the "government" (ICE) typically reserves the right to appeal, even if it does not follow through on the appeal, when the applicant has U.S. citizen children. This is because the U.S. government argues that if returned to China, that these children would not be considered "Chinese" regarding their nationality by the Chinese government and therefore do not "count" as registered children for the purposes of family planning. Conversely, immigration attorneys argue that the Chinese government does consider these children Chinese because their parents are Chinese, regardless of where they were born or which other country may consider them citizens.

To complicate things further, Chinese immigrants, even asylum seekers and those who have been granted asylum, often send their U.S. born children to China. During my interview with Michael, an immigration attorney, he told me that "children are sent back so that they [the parents] can work. They come to pay off debt and send back money and they are working all day. They bring the kids back when they are school age."<sup>44</sup> During Shu's hearing, the judge stated that he was:

disturbed that you [Shu] are willing to send your daughter back to China – the same place that you claim is not safe for you or your husband.<sup>45</sup>

<sup>44</sup> Interview on 19 June 2009.

<sup>45</sup> Immigration Court Hearing on 19 April 2010.

Ting, an immigration attorney, described how:

some judges have issues with couples who have children here. They will send the child back to China and the judges say ‘why did you send them back if you claim you will be persecuted in China?’ They send them back to live with family members so that they [the parents] can work and make money.<sup>46</sup>

The judge in Shu’s case asks a reasonable question. How is it that she is not safe in China but she is willing to send her daughter to live in China? One answer is that Shu was pregnant and was afraid that she would be deported before giving birth to her second child making her eligible for a forced abortion. But the judge’s question also reveals the one-dimensional view that immigration judges have about asylum seekers. It is incomprehensible that asylum seekers would send their children to China when asylum seekers exist solely as persecuted migrants. Refugee law is written in such a way that it is implied that fleeing persecution or fear of persecution is the sole motivating factor that propels migration flows. However, these asylum seekers experiences are common in that while immigration laws differentiate political and economic migrants, people are still motivated to leave one country and move to another based on work. Moreover, as Mei described not having the opportunity to travel, immigrants must have access to resources if they employ the assistance of a smuggler.

The third theme of gender and migration shows how coercive population control measures create a particular kind of gendered migrant. In some ways, migration patterns for Chinese asylum seekers are not unlike those of other Chinese immigrants who come to the U.S. lawfully (such as on a business visa) or as undocumented (using a smuggler). It is common for asylum seekers to find out that asylum is a form of relief from deportation only after they have arrived in the U.S. Asylum seekers, like economic migrants, come to the U.S. to work. While refugee law is written as though political motivation is the sole purpose of migration, there are a myriad of reasons why people leave one country for another. Yet what is different for the asylum seekers discussed here is that unlike in the past when Chinese men migrated without their families, many female asylum seekers now come alone. This study seeks to contribute to the literature on migration studies by showing how the dichotomy of economic migrant/refugee is a false one that obscures the reasons that migrants give about why they leave one country for another.

These three themes of persecution, credibility, and migration reveal the innerworkings of the U.S. immigration court. I have argued that coercive population control cases are different from other asylum cases because the nexus is always political opinion. Therefore, asylum seekers are not required to argue *why* they were persecuted but only *how* they were persecuted. Legal scholars such as Nancy Kelly, Karen Musalo, and Deborah Anker, have argued how failure to show the nexus link to persecution (one of the five acceptable grounds of persecution—race, religion, nationality, political opinion, and membership in a social group) has been the primary struggle within the U.S. immigration system for recognizing gender-based asylum claims (Kelly 1993; Musalo 2002). The example of coercive population control cases stands in contrast to other forms of gender-based persecution cases because the persecutor is always the Chinese state. This study builds on other studies of gender-based persecution and offers coercive population control asylum hearings as an example of how the U.S. perceives the Chinese state in a particular gendered way that ostensibly denies women their productive rights to bear children.

Asylum seekers must demonstrate that they are credible and that their motivation to migrate is based on persecution, not just the economic desire for a better life. In this sense the Chinese asylum seekers I discuss are similar to other asylum seekers. However, unlike other forms of gender-based persecution such as female genital cutting, rape, domestic violence, and honor crimes that are assumed to be persecution based on the act itself, coercive family planning cases are different because using

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<sup>46</sup> Interview on 18 April 2010.

birth control, being sterilized, or having an abortion can be coerced or voluntary. This study seeks to contribute to the wealth of scholarship on reproductive rights from feminists such as Linda Gordon and Rosalind Pollack Petchesky by showing how a particular understanding of choice shapes the discourse of coercion in immigration court (Gordon 1974; Petchesky 1984). The larger context of how reproductive rights are conceived in the U.S. have shaped the debate as a woman's right to choose to take birth control, be sterilized, or have an abortion. Asylum seekers must narrate a story of harm that shows that they attempted to exercise their reproductive rights by resisting coercive state policies that forced them to do so. Establishing the harm as persecution is only part of their necessary testimony.

What this study offers that projects that draw from a larger data set do not address, is how ethnographic data, even studies with a small sample size, illuminates how immigration judges, assistant district councils, immigration attorneys, interpreters, and asylum seekers interact with one another during an immigration court hearing. Studies such as those done by Sarah MacKinnon and Eithne Luibhéid are invaluable as they offer a large sample size of BIA cases and historical documents of how migrants interact with immigration officials (McKinnon 2016). Rather than focusing solely on outcomes (grants and denials), this study shows the process of how migrants gain asylum in the New York City immigration court. Outcomes are important for understanding who gains asylum, which courts have higher grant rates, which judges are more likely to grant asylum and which ones are not. But as data outcome alone does not show the process of how migrants gain asylum. Final decisions weigh far heavier for the asylum seekers themselves as they determine access to employment, remaining in the U.S. lawfully or living in fear of deportation, and unfortunately, for many, life and death. Understanding how gender operates in the realm of transnational migration, I seek to contribute to the work on gender and transnational migration. Patricia Pessar and Sarah Mahler call for conceptual frameworks of gender to understand better the processes of migration (Pessar and Mahler 2003; Mahler and Pessar 2006). This study seeks to do that by bridging feminist understandings of reproductive rights with migration studies on credibility and migration patterns to show how a particular gendered migrant emerges who must narrate a story of persecution that invokes the right to be free from state sponsored coercion that restricts women's reproductive choices.

## 7. Future Directions

In 2015, China officially ended its one-child policy, allowing couples to have two children. The end of this policy was fueled by the same concerns that created it—China's role in the current global economy. In an effort to increase the labor supply, China is now allowing couples to have more than one child (Buckley 2015). The announcement came as no surprise to those who are critical of the unintended consequences of a population with a distorted sex ratio and an aging population that faces a dearth of social support from younger generations with fewer people (Kahn 2004; Mosher 2006). Implementation may not take effect immediately as there continue to be reports of forced abortions and sterilizations.<sup>47</sup> During my interview with Ting, an immigration attorney, she too predicted this policy change:

It's going to be harder to do family planning because China is deciding whether to allow people to have two children because the society is aging. I think that family planning [for the purposes of asylum] is finished in ten years.<sup>48</sup>

Only time will tell if Ting's predictions are true. Under a two-child policy, applicants such as Yow, who feared being sterilized because she had two children, and Shu, who feared the child she was carrying would be aborted, would not be eligible for asylum. As asylum seekers make claims in the

<sup>47</sup> China's new "two-child policy" and the continuation of massive crimes against women and children: Hearing before the Congressional-Executive Commission on China, One Hundred Fourteenth Congress, first session, 3 December 2015.

<sup>48</sup> Interview on 6 July 2009.

future the 2015 shift to a two-child policy will alter who is eligible for asylum. The future of global reproductive rights will also be affected by U.S. foreign policy. In January 2017, President Trump reinstated and extended the global gag rule. Since Ronald Reagan was president, Republican presidents have restricted funding for non-governmental organizations outside the U.S. that receive money from the United States Agency for International Development (USAID) and the U.S. State Department if they offer abortion services or counseling about abortion services (Crane and Dusenberry 2004). Trump added the stipulation that funding would be restricted from all U.S. government departments and agencies (Talbot 2017). The future of reproductive rights for women across the globe who rely on U.S. funding for non-abortion related services will be adversely affected because of the current administration's anti-abortion stance. But those who desire to seek an abortion too will be negatively affected as state coercion is only seen as such by the U.S. when countries such as China restrict women's control over their reproductive choices.

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