

## NOTE

### CRACKING OPEN THE GOLDEN DOOR: REVISITING U.S. ASYLUM LAW'S RESPONSE TO CHINA'S ONE-CHILD POLICY

Give me your tired, your poor, your huddled masses yearning to  
breathe free . . . . Send these, the homeless, tempest-tost to me, I lift my  
lamp beside the golden door!<sup>1</sup>

#### I. INTRODUCTION

The United States has a long and rich history of protecting those individuals fleeing persecution. The first immigrants came because of religious persecution;<sup>2</sup> more later came because they were being persecuted for their political opinions.<sup>3</sup> Congress even extended protection to those members of a particular social group,<sup>4</sup> to cover “all the bases for and types of persecution which an imaginative despot might conjure up.”<sup>5</sup>

Today, faced with the terrible choice between country and family, many Chinese nationals flee to the United States and apply for political asylum instead of suffering brutal persecution for violating China's infamous one-child policy.<sup>6</sup> Since the 1996 amendment<sup>7</sup> to the Immigration and Nationality Act (“INA”),<sup>8</sup> the definition of refugee<sup>9</sup> has been broadened to include those people forced to undergo abortion or sterilization as a result of violating the one-child policy.<sup>10</sup> The

---

1. Emma Lazarus, *The New Colossus* (1883), reprinted in EMMA LAZARUS: SELECTED POEMS 58 (John Hollander ed., 2005).

2. See Christy Cutbill McCormick, Comment, *Exporting the First Amendment: America's Response to Religious Persecution Abroad*, 4 J. INT'L LEGAL STUD. 283, 317 (1998).

3. See *id.*

4. 8 U.S.C. § 1101(a)(42)(A) (2006).

5. Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 45 (1983).

6. The one-child policy generally restricts Chinese families from having more than one child in order to control the country's rapidly growing population. See *infra* Part II.A.

7. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009-689 (codified as amended at 8 U.S.C. § 1101(a)(42) (2006)).

8. See *id.* § 1(b); Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 (2000 & Supp. 2001-2005).

9. The INA defines a refugee as a person outside of his or her country of origin or last residence who is unable or unwilling to return to that country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A).

10. *Id.* § 1101(a)(42)(B).

administrative agency tasked with interpreting the 1996 amendment extended refugee protection to legally married spouses of one-child policy victims.<sup>11</sup> However, the circuit courts have been at odds with each other regarding this issue<sup>12</sup>—leaving both married and unmarried partners of direct victims uncertain of whether they will receive asylum protection.

This Note proposes an amendment extending asylum protection to both the legally and traditionally married spouses of direct victims of China's coercive family planning programs. Part II traces the evolution of the immigration and asylum laws passed by Congress in response to China's "one-child" policy. Part III then analyzes why the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 should be amended to explicitly grant asylum to both the direct victims of China's coercive family planning programs and their spouses. In Part IV, a proposed amendment is proffered. Finally, Part V confronts the opposition to such an amendment.

## II. CHINA'S ONE-CHILD POLICY AND U.S. ASYLUM LAW'S RESPONSE

### A. China's One-Child Policy

During the 1950s, the Chinese government sought to increase its work force by encouraging its citizens to have large families.<sup>13</sup> Chairman Mao, through his personal mouthpiece, the *People's Daily*, went so far as to condemn birth control as "a way of slaughtering the Chinese people without drawing blood"<sup>14</sup> and encouraged the people of China to have large families with the slogan: "The more babies the more glorious are their mothers."<sup>15</sup> But after twenty years, the Chinese government realized the dire consequences that would ultimately result from such encouragement. After a perceived failure at reducing birthrates,<sup>16</sup> the

11. See *In re S-L-L-*, 24 I. & N. Dec. 1, 4 (B.I.A. 2006) (en banc).

12. See *infra* Part II.C.

13. See Gerrie Zhang, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 HOUS. J. INT'L L. 557, 560 (1996) (noting that this program was one of the major causes of the explosion in China's population).

14. STEVEN W. MOSHER, *A MOTHER'S ORDEAL: ONE WOMAN'S FIGHT AGAINST CHINA'S ONE-CHILD POLICY* 56-57 (1993); see also Peter Goodspeed, *'Fewer Children—Fewer Burdens': Severe Birth Control Measures Aim to Curb Demands of Swelling Population, Still Another 64,000 Babies Born Daily*, TORONTO STAR, Jan. 11, 1991, at B1 (noting that Chairman Mao described birth control measures as "bloodless genocide").

15. Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program*, 8 YALE J.L. & FEMINISM 145, 148 (1996).

16. The "later, longer, fewer" program sought to "encourage later marriages, longer intervals between births, and fewer children." Zhang, *supra* note 13, at 561. The result after ten years was a

Chinese government unleashed the now infamous one-child policy<sup>17</sup> in an effort to stem the tide. This policy, codified in Chinese law, only permits married couples to have children.<sup>18</sup> The core of the one-child policy consists of regulations that restrict “family size, late marriage and childbearing, and the spacing of children (in cases in which second children are permitted).”<sup>19</sup> According to the Chinese government, the one-child policy has prevented between 250 and 300 million births.<sup>20</sup>

Violations of the one-child family policy result in severe punishments, including forced abortions,<sup>21</sup> imprisonment,<sup>22</sup> fatal

---

drop in the average fertility rate from 5.9 to 2.9 children per woman. Therese Hesketh et al., *The Effect of China's One-Child Family Policy After 25 Years*, 353 NEW ENG. J. MED. 1171, 1172 (2005).

17. See Anne M. Gomez, *The New INS Guidelines on Gender Persecution: Their Effect on Asylum in the United States for Women Fleeing the Forced Sterilization and Abortion Policies of the People's Republic of China*, 21 N.C. J. INT'L L. & COM. REG. 621, 623 (1996). “Chinese leaders have stressed that the one-child policy is just that—a policy, not a law to be enforced throughout China without regard to local conditions. Guidelines issued at the central level are to be adapted to the specific conditions in each province and local area.” L.M. Cirando, Note, *Informed Choice and Population Policy: Do the Population Policies of China and the United States Respect and Ensure Women's Right to Informed Choice?*, 19 FORDHAM INT'L L.J. 611, 638 n.117 (1995) (quoting Karen Hardee-Cleaveland & Judith Banister, *Fertility Policy and Implementation in China, 1986-88*, 14 POPULATION & DEV. REV. 245, 252 (1988)).

18. See generally Population and Family Planning Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2001, effective Sept. 1, 2002), (P.R.C.) available at [http://www.unescap.org/esid/psis/population/database/poplaws/law\\_china/chinapopandfamilyplanning.pdf](http://www.unescap.org/esid/psis/population/database/poplaws/law_china/chinapopandfamilyplanning.pdf). “Citizens have the right to reproduction as well as the obligation to practise family planning according to law. Both husband and wife bear equal responsibility for family planning.” *Id.* at art. 17 (emphasis added).

19. Hesketh et al., *supra* note 16, at 1171. The one-child policy is strictly enforced in urban areas that contain approximately thirty percent of the population. *Id.* The most common exception in which a couple is permitted to have a second child is limited to those couples in rural areas whose first child was either a girl or disabled—taking into account “both the demands of farm labor and the traditional preference for boys.” U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA 19 (2000). Other exceptions are made for ethnic minorities in remote areas. *Id.* Or, in rare cases, such as the May 12, 2008 earthquake that killed approximately 10,000 schoolchildren, affected families are exempted from the one-child policy. Andrew Jacobs, *One-Child Policy Lifted for Quake Victims' Parents*, N.Y. TIMES, May 27, 2008, at A8. These exceptions are not enough—they barely make a dent in the problem. To put it in perspective, even with only thirty percent of China's population being subject to the brutal one-child policy, it still affects roughly 390 million people. See *infra* note 32 and accompanying text. That is almost eighty-three million more people than the entire United States population. See U.S. Census Bureau, U.S. POPclock Projection, <http://www.census.gov/population/www/popclockus.html> (last visited Oct. 23, 2009) (estimating the United States' population to be approximately 307 million).

20. Hesketh et al., *supra* note 16, at 1172 (finding that since the one-child family policy's inception the total fertility rate fell from 2.9 to 1.7 children per woman). Ironically, this reduction in the birthrate is less than that under the more benign “later, longer, fewer” program. See *id.* (comparing a drop in the fertility rate of 2.9 children per women under the “later, longer, fewer” program with a drop in the fertility rate of 1.2 children per women under the one-child policy).

21. See Karen Y. Crabbs, Note, *United States Domestic Policies and Chinese Immigrants: Where Should Judges Draw the Line When Granting Political Asylum?*, 7 FLA. J. INT'L L. 249, 260-

beatings,<sup>23</sup> extreme economic sanctions,<sup>24</sup> and even infanticide.<sup>25</sup> Alternatively, a woman may be allowed to carry the baby to term, after which either she or her spouse is forcibly sterilized.<sup>26</sup> While the Chinese government “officially” condemns the use of these brutal methods, the decentralized nature of enforcement has resulted in the widely publicized punishment of forcible abortion and sterilization.<sup>27</sup> Even though enforcement of the policy does appear to be relaxing in some areas,<sup>28</sup> a retired China analyst with the United States Census Bureau noted that “it’s not policy [that is relaxing], it’s weakness in the administrative structure.”<sup>29</sup> Despite any official condemnation, violations of the policy continue to be severely punished.<sup>30</sup> Currently, the Chinese government has no intention of discontinuing the one-child policy,<sup>31</sup> as it is

---

61 (1992) (describing specific instances of forced abortion by the Chinese government).

22. *See Ma v. Ashcroft*, 361 F.3d 553, 555-56 (9th Cir. 2004) (describing an instance of imprisonment).

23. *See* Hannah Beech, *Enemies of the State?*, TIME, Sept. 12, 2005, at 58, 61 (describing instances of villagers being beaten to death).

24. These sanctions can include, inter alia, fines equaling several years’ worth of wages or the loss of a job. U.S. BUREAU OF CITIZENSHIP & IMMIGRATION SERVS., CHINA: INFORMATION ON TREATMENT OF RETURNING PEASANTS AND WORKERS WHO VIOLATED THE ONE-CHILD FAMILY PLANNING POLICY WHILE ABROAD (2002), available at <http://www.unhcr.org/refworld/docid/414ee9014.html> [hereinafter TREATMENT OF RETURNING PEASANTS].

25. Harry Wu, *Controlling China: The U.S. Congress Should Not Fund State-Mandated Abortions*, NAT’L REV. ONLINE, July 9, 2004, <http://www.nationalreview.com/comment/wu200407090919.asp>.

26. “[S]terilization, one of the principal forms of birth control, may also be performed when parents suffer from alleged ‘genetic disorders,’ a practice justified by the eugenic objective of ‘improving the quality of the population.’” Nicole M. Skalla, Note, *China’s One-Child Policy: Illegal Children and the Family Planning Law*, 30 BROOK. J. INT’L L. 329, 336 n.45 (2004) (quoting Patrick Goodenough, *China’s Gender Imbalance Stems from ‘Family Planning’ Policy*, CNS NEWS, Apr. 6, 2001, available at <http://cnsnews.com/ViewForeignBureaus.asp?Page=//ForeignBureaus/archive/200104/For20010406a.html>).

27. *See* Zhang, *supra* note 13, at 569 (noting reports of forced procedures occurring in “remote, rural areas”). *But see* Cleo J. Kung, *Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the U.S. Statutory Definition of “Refugee”*, 90 J. CRIM. L. & CRIMINOLOGY 1271, 1297 (2000) (arguing that forced abortions and sterilizations are the exception to the policy and that such procedures are perpetrated by corrupt local officials rather than attributable to China’s national policy).

28. *See* Hesketh et al., *supra* note 16, at 1171; accord U.S. Dep’t of State, Background Note: China (2009), <http://www.state.gov/r/pa/ei/bgn/18902.htm> (lasted visited Oct. 23, 2009) [hereinafter Background Note: China] (noting that there may be an “allowance for a second child under certain circumstances, especially in rural areas”). *But see* TREATMENT OF RETURNING PEASANTS, *supra* note 24 (“[T]here was some evidence that the Chinese government was relaxing this policy. For example, in most major cities, parents with no siblings may have two children.”).

29. TREATMENT OF RETURNING PEASANTS, *supra* note 24.

30. *See* Jim Abrams, *Abuse of One-Child Program Decried*, TORONTO STAR, Dec. 19, 2004, at B9. In one county in China, it is alleged that at least seven thousand people were forced to undergo sterilizations between March and July 2005. *See* Beech, *supra* note 23, at 61.

31. Jim Yardley, *China Says One-Child Policy Will Stay for at Least Another Decade*, N.Y.

struggling to meet its goal of keeping the population below 1.4 billion by 2010.<sup>32</sup>

*B. The Application of the IIRIRA by the Board of Immigration Appeals and Circuit Courts*

As is the case with most complex discussions, it helps to get the lay of the land before beginning. This section details the convoluted and tortuous evolution of the application over the past thirteen years.

1. The IIRIRA

Congress's abhorrence of the draconian one-child family policy resulted in the passage of the IIRIRA.<sup>33</sup> In particular, section 601(a) of the IIRIRA amended the definition of "refugee" in 8 U.S.C. § 1101(a)(42) by adding,

For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.<sup>34</sup>

This formed the cornerstone of today's immigration and asylum policy for Chinese asylum seekers. It has also turned into a touchstone for a serious divide among the Board of Immigration Appeals ("BIA") and various circuit courts of appeals.

2. The Board of Immigrations Appeals Interprets the IIRIRA

Before discussing the BIA's interpretation of section 601(a), it is necessary to briefly explain the BIA's position in the adjudicative hierarchy. The BIA stands as the "highest administrative body [in the

---

TIMES, Mar. 11, 2008, at A10 ("China's top population official said the country's one-child-per-couple family planning policy would not change for at least another decade.").

32. The State Department estimates the official number to be "just over 1.3 billion" with "an estimated growth rate of about 0.6%," and currently projects that "the population will peak at around 1.6 billion by 2050." Background Note: China, *supra* note 28.

33. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., & 28 U.S.C.).

34. *Id.* § 601(a)(1).

United States] for interpreting and applying immigration laws.”<sup>35</sup> Its primary function is to guide immigration judges (“IJs”) by “correcting their errors and publishing decisions that serve as legal precedents.”<sup>36</sup> Thus, it serves as an appellate body which reviews the IJs’ decisions. But the INA did not create the BIA as an appellate body. Instead, it delegated appellate authority to the United States Attorney General, who in turn has delegated that authority to the immigration courts and the BIA.<sup>37</sup> As such, all BIA decisions are subject to the Attorney General’s discretion and may be modified or overruled at any point<sup>38</sup> because the Attorney General’s decisions on “all questions of law” relating to immigration and naturalization are “controlling.”<sup>39</sup> In addition to this review by the Attorney General, the BIA’s decisions are subject to limited judicial review<sup>40</sup> and are entitled to *Chevron*<sup>41</sup> deference for issues of statutory interpretation.<sup>42</sup>

The BIA first addressed the application of section 601(a) in *In re C-Y-Z*.<sup>43</sup> There, a Chinese national sought asylum, alleging persecution on account of his opposition to China’s family planning policies.<sup>44</sup> After giving birth to the couple’s first child, the asylum seeker’s wife underwent forced insertion of an intrauterine device (“IUD”).<sup>45</sup> Despite being ordered to undergo a forced abortion after removing the IUD and becoming pregnant, the woman went into hiding and eventually gave birth to her second child.<sup>46</sup> After being threatened with the destruction of his home, the applicant managed to have the punishment lowered to a fine instead.<sup>47</sup> However, upon the birth of a third child, the asylum seeker’s wife was forcibly sterilized.<sup>48</sup>

The BIA held that the asylum seeker was eligible “for asylum by virtue of his wife’s forced sterilization.”<sup>49</sup> The reasoning seemed to rely

---

35. Board of Immigration Appeals, <http://www.justice.gov/eoir/biainfo.htm> (last visited Oct. 23, 2009).

36. Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals’s Summary Affirmance Procedures*, 16 STAN. L. & POL’Y REV. 481, 499 (2005).

37. See CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 3.03 (2009).

38. 8 C.F.R. § 1003.1(g) (2009).

39. 8 U.S.C. § 1103(a)(1) (2006).

40. See GORDON ET AL., *supra* note 37, § 104.05.

41. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1983).

42. The court applied the *Chevron* deference test. See *id.* at 843.

43. 21 I. & N. Dec. 915 (B.I.A. 1997).

44. *Id.* at 915-16.

45. *Id.* at 916.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 918.

completely on an “agreement of the parties that forced sterilization of one spouse on account of a ground protected under the Act is an act of persecution against the other spouse.”<sup>50</sup> Yet the BIA neither referenced the statutory language of section 601(a) on which it based its decision, nor did it provide an explicit rationale for adopting this view. Board Member Rosenberg’s concurrence in *C-Y-Z-* did, however, provide a more reasoned explanation,<sup>51</sup> arguing that eligibility for asylum should be granted by imputing the wife’s persecution to her husband.<sup>52</sup> Yet, this concurrence also failed to identify the statutory language of section 601(a) upon which its reasoning was based.

### 3. The Ninth Circuit Denies the BIA’s Interpretation

The first major case after *C-Y-Z-* to address the issue of an applicant’s marital status under the IIRIRA was *Ma v. Ashcroft*.<sup>53</sup> In this case, the Ninth Circuit reviewed the BIA’s denial of an asylum claim by Ma, a husband alleging persecution based on his wife’s forced abortion.<sup>54</sup> His wife underwent the procedure upon coming out of hiding after the government seized Ma’s father and threatened his life.<sup>55</sup>

The issue of marital status arose because Ma’s age prevented him from entering into a “legal” marriage.<sup>56</sup> In response, he and his wife were married in a “traditional” ceremony.<sup>57</sup> But the BIA refused to

---

50. *Id.* at 919.

51. *See id.* at 920 (“My agreement is based not only on the specific language of the statute as amended and the positions of the parties. It also is based on the relevant precedent decisions of this Board, the Federal courts, and the Supreme Court, which have construed the elements contained in the refugee definition and interpreted the proper exercise of discretion in asylum cases.”) (Rosenberg, Board Member, concurring).

52. *See id.* at 926-27.

53. 361 F.3d 553 (9th Cir. 2004).

54. *Id.* at 556.

55. *Id.* at 555-56.

56. *Id.* at 555. For the purposes of this Note, “legal” marriages refer to those marriages officially recognized by the Chinese government. Conversely, “traditional” marriages refer to those couples that are joined by traditional or religious marriage ceremonies, but who are not recognized as married by the Chinese government. Moreover, these couples are not recognized as married only because they do not meet the age requirement to be married in the eyes of the Chinese government. *See, e.g., id.* (stating that the Chinese government prohibits couples “from entering into a legally recognized marriage until [the couple is] twenty-two” years old). *But see id.* at 555 n.3 (noting that the legal age for women to marry in the asylum seeker’s village is only twenty). *Accord* BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP’T OF STATE, CHINA: PROFILE OF ASYLUM CLAIMS AND COUNTRY CONDITIONS 23 (1998), available at <http://www.asylumlaw.org/docs/showDocument.cfm?documentID=147> [hereinafter PROFILE OF ASYLUM CLAIMS] (“The minimum age for marriage in China is 22 for males and 20 for females. In some localities the ages are set higher. Whatever the regulated marriage age, however, couples normally are encouraged—or pressed—to delay pregnancies . . .”).

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

extend the C-Y-Z- rule of spousal asylum protection to a husband whose marriage was not officially recognized.<sup>58</sup> According to the BIA, proof of a legal marriage was required for an applicant to qualify as “the spouse of the person who was allegedly forced to have an abortion.”<sup>59</sup> Ironically, the BIA found no link between Ma’s inability to legally marry and China’s one-child policy, despite the fact that “the prohibition against underage marriages is ‘an integral part’ of China’s coercive population control program.”<sup>60</sup>

While the BIA viewed Ma’s legal marital status as dispositive, the Ninth Circuit disagreed.<sup>61</sup> The court found the BIA’s decision, which drew a distinction between legally and traditionally married couples, disregarded the congressional intent behind section 601(a) and would lead to “absurd and wholly unacceptable results.”<sup>62</sup> Thus, the court declared that it would not afford deference<sup>63</sup> to the BIA’s decision.<sup>64</sup> According to the court, because the legislative intent of section 601(a) was to provide protection to couples who have been persecuted on account of an “unauthorized” pregnancy,<sup>65</sup> and because China’s ban on “underage” marriage formed an “integral part” of its one-child policy,<sup>66</sup> husbands married in traditional ceremonies deserve as much protection as those officially married.<sup>67</sup> Were it to adopt the BIA’s holding, the court noted, it would result in the break up of a family, which “is at odds

---

58. *See id.* at 554, 558.

59. *Id.* at 557.

60. *Id.* at 559. In effect, the coercive family planning policies create the strict age requirements for marriage, and thus, having children. In turn, this creates a situation that forces young couples to violate those policies if they want to start a family. *See id.* at 559-61.

61. *See id.* at 558-59.

62. *Id.* at 559.

63. The court applied the *Chevron* deference test. *See id.* at 558; *see also* *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (describing the high level of deference afforded administrative decisions). *Chevron* deference involves a two-step process. First, a court asks whether the language of the statute addresses the specific issue in question. If so, the particular language of the statute controls the determination of that issue. *See id.* at 842-43. But if not, then the second step requires that a court limit its examination to the reasonableness of the agency’s interpretation of the statute. *See id.* at 843 (“[T]he question for the court is whether the agency’s answer is based on a permissible construction of the statute.”); John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of INS v. Ventura*, 18 GEO. IMMIGR. L.J. 605, 618 (2004) (“[T]he court is limited to assessing whether the agency’s interpretation of the statute is reasonable.”). Most importantly, a court may not impose its own interpretation of the statute in place of that of the agency. *See Chevron*, 467 U.S. at 843.

64. *See Ma*, 361 F.3d at 558-59 (explaining the usual level of deference afforded BIA decisions by the courts, and why this decision did not warrant such deference).

65. *Id.* at 559 (citing H.R. REP. NO. 104-469, pt. 1, at 174 (1996)).

66. *Id.* at 559-60 (citing various sources for the notion that the policy against early marriages is predicated upon preventing and terminating young pregnancies and births).

67. *See id.* at 561.



not only with [section 601(a)], but also with significant parts of our overall immigration policy.”<sup>68</sup> Consequently, the Ninth Circuit held that the protections of section 601(a) apply to both husbands whose marriages are recognized by Chinese authorities as well as those husbands whose marriages would be legally recognized but for China’s one-child policy.<sup>69</sup>

#### 4. Three Years of Twists and Turns

By and large, the Ninth Circuit’s decision in *Ma* did not herald the beginning of a trend towards interpreting section 601(a) to extend refugee status to legally or traditionally married spouses.<sup>70</sup> In fact, only one other circuit court to have this issue before it over the following three years followed this interpretation.<sup>71</sup> However, several circuits did follow the BIA’s interpretation in *C-Y-Z-* and *S-L-L-*.<sup>72</sup> In addition to this unity among the circuits, there were, however, a few notable cases which raised issues that would have a far-reaching effect on the interpretation of section 601(a).

For example, shortly after *Ma* was decided in 2004, the issue of marital status arose in the Third Circuit during the case of *Chen v. Ashcroft*.<sup>73</sup> There, the asylum seeker claimed he was eligible for asylum due to his fiancée’s forced abortion by Chinese authorities.<sup>74</sup> He reasoned that *C-Y-Z-*’s spousal eligibility rule should extend to him because, although he and his fiancée never married, they would have married if Chinese law allowed marriages for those his age.<sup>75</sup> In particular, the asylum seeker argued that the BIA’s interpretation of section 601(a) is “arbitrary, capricious, and irrational” and must be rejected.<sup>76</sup> While the IJ found Chen to have qualified for asylum because the facts of his case fell “by analogy” within the Board’s rule in *C-Y-Z-*

---

68. *Id.*

69. *Id.*

70. For the purpose of consistency and clarity in this Note, the term “spouse” only refers to legally married or traditionally married individuals. Similarly, the term “unmarried partner” refers to individuals who are simply dating or engaged.

71. See *Zhang v. Gonzales*, 434 F.3d 993, 1001 (7th Cir. 2006).

72. See, e.g., *Chen Lin-Jian v. Gonzales*, 489 F.3d 182, 188 (4th Cir. 2007); *Hong Zhang Cao v. Gonzales*, 442 F.3d 657, 660 (8th Cir. 2006); *Tai v. Gonzales*, 423 F.3d 1, 4 (1st Cir. 2005); cf. *Zhang v. Ashcroft*, 395 F.3d 531, 532 (5th Cir. 2004) (following *C-Y-Z-* in holding that a boyfriend was ineligible for asylum under § 601(a), but noting that since there was no traditional marriage the court “need not reach the issued raised in *Ma*”).

73. 381 F.3d 221 (3d Cir. 2004).

74. *Id.* at 222.

75. *Id.* At the time in question, Chen was nineteen, and his fiancée was eighteen. *Id.* at 223.

76. *Id.* at 224.

extending eligibility to a spouse,<sup>77</sup> the BIA reversed on the grounds that the agency did not extend *C-Y-Z-* in prior decisions to the unmarried partners of forced abortion victims.<sup>78</sup> The Third Circuit upheld this decision, adopting a view contrary to the Ninth Circuit's decision in *Ma*.<sup>79</sup>

Similarly, the Third Circuit departed from the Ninth Circuit's reasoning in that it did afford deference to the BIA's decision.<sup>80</sup> But as in *Ma*, the *Chen* court limited its review to the distinction between married and unmarried couples and declined to assess whether the underlying *C-Y-Z-* interpretation of section 601(a) was, in fact, permissible.<sup>81</sup> In particular, the court held that the BIA's decision not to extend *C-Y-Z-* was reasonable in light of the agency's "crushing caseload,"<sup>82</sup> its need to avoid problems of proof,<sup>83</sup> and the 1000-person-per-year cap imposed on asylum grants under the language of section 601(a).<sup>84</sup> The court ultimately determined that *Chevron* deference was appropriate because "it would seem absurd to characterize reliance on marital status . . . as arbitrary and capricious."<sup>85</sup> The court went on to hold that its rule was reasonable despite excluding those who wanted a legal marriage but were prevented from doing so because of China's age requirements.<sup>86</sup>

In 2005, it was the Second Circuit's turn to tackle the issue of extending refugee status to married or unmarried spouses. In *Lin v. U.S. Department of Justice (Lin I)*,<sup>87</sup> the claims of three Chinese nationals who sought asylum under section 601(a) by virtue of their unmarried

---

77. *Id.* at 223.

78. *Id.*

79. *See id.* at 235. "[T]he BIA's interpretation, which contributes to efficient administration and avoids difficult and problematic factual inquiries, is reasonable." *Id.* at 222. The Fifth Circuit similarly upheld the BIA's determination that the spousal rule did not extend to fiancés, adopting, in its entirety, the reasoning of the Third Circuit in *Chen*. *See Zhang v. Ashcroft*, 395 F.3d 531, 532 (5th Cir. 2004).

80. *Chen*, 381 F.3d at 227.

81. *Id.* ("[I]f *C-Y-Z-*'s interpretation is permissible (and we assume for the sake of argument that it is), the distinction that the BIA has drawn between married and unmarried couples satisfies step two of *Chevron*.")

82. *Id.* at 228 (quoting *Dia v. Ashcroft*, 353 F.3d 228, 235 (3d Cir. 2003)).

83. *Id.* (noting the difficulty implicit in proving paternity when a male applicant claims to have fathered an illegitimate child who was forcibly aborted).

84. *Cf. id.* at 229 (emphasizing the limited number of spots permitted by Congress for asylum claims). At the time *Chen* was decided, a 1000 person per year cap existed under the IIRIRA. This was repealed in 2005. *Lin v. U.S. Dep't of Justice (Lin I)*, 416 F.3d 184, 188 n.1 (2d Cir. 2005).

85. *Chen*, 381 F.3d at 227 n.6.

86. *Id.* at 229-30. The court noted that even in the United States, every state has the right to regulate the age at which couples can legally marry, and that China's age limit does not "necessarily amount[] to persecution." *Id.* at 230.

87. 416 F.3d 184 (2d Cir. 2005).

partners' forced abortions were consolidated.<sup>88</sup> Similar to the Third Circuit's decision, the IJ here denied each application, finding that *C-Y-Z*'s holding does not apply to a victim's boyfriend or fiancé.<sup>89</sup> After the BIA summarily affirmed each decision,<sup>90</sup> petitioners all appealed to the Second Circuit.<sup>91</sup> Here, unlike in *Ma* and *Chen*, the Court did address the underlying interpretation of *C-Y-Z*. Because the BIA failed to provide reasoning for extending section 601(a) to a victim's spouse when it decided *C-Y-Z*, it could not logically determine whether a victim's unmarried partner could be granted such protection.<sup>92</sup> As a result, the court remanded the petitions to the BIA, ordering it to explain its reasoning in *C-Y-Z* and to clarify whether section 601(a) extends to a victim's unmarried partner as well as her spouse.<sup>93</sup>

On remand, in the case of *S-L-L*,<sup>94</sup> the BIA reaffirmed *C-Y-Z* as applied to legal spouses but declined to extend per se eligibility to a victim's unmarried partner.<sup>95</sup> The BIA reasoned that the underlying purpose of section 601(a) is to protect the victim and the spouse as a marital unit.<sup>96</sup> Yet, it went on to hold that this protection only extends to a victim's legal spouse and that unmarried partners must claim asylum under section 601(a)'s "other resistance" clause.<sup>97</sup>

Finally, in 2007, the Eleventh Circuit in *Yi Qiang Yang v. United States Attorney General*,<sup>98</sup> extended the Third Circuit's decision in *Chen* and the BIA's decision in *S-L-L* when it determined that asylum applicants—married in traditional ceremonies—did not qualify as refugees under section 601(a) simply based upon their spouse's forced abortion or sterilization.<sup>99</sup> Yang claimed that he and his wife were

---

88. *Id.* at 188 (detailing the various asylum claims).

89. *See id.* (summarizing the IJ's decision restricting *C-Y-Z*'s holding to legal spouse).

90. *See id.* at 189.

91. *See id.* at 188.

92. *Id.* at 187 (remanding to BIA to clarify *C-Y-Z* and retaining jurisdiction to rehear petitions).

93. *Id.* at 192; *see also* Megan C. Dempsey, Note, *A Misplaced Bright-Line Rule: Coercive Population Control in China and Asylum for Unmarried Partners*, 92 IOWA L. REV. 213, 234-35 (2006) (noting that the court could not evaluate *C-Y-Z*'s reasonableness because BIA did not articulate a rationale).

94. *In re S-L-L*, 24 I. & N. Dec. 1 (B.I.A. 2006) (en banc).

95. *See id.* at 4.

96. *Id.* at 6 ("Congress intended [section 601(a)] to protect both spouses when the government has forced a married couple opposed to an abortion to submit to [a forced abortion].").

97. *Id.* at 10 (explaining the other resistance clause and how the spouse whose partner was the victim of a forced abortion or sterilization may receive protection under it).

98. 494 F.3d 1311 (11th Cir. 2007).

99. *Compare Yi Qiang Yang v. U.S. Att'y Gen.*, 494 F.3d 1311, 1317 (11th Cir. 2007) (stating illegally married spouses do not per se qualify for section 601 refugee status) *with Chen v. Ashcroft*, 381 F.3d 221, 232 (3d Cir. 2004) (stating it was reasonable to limit *C-Y-Z* protection to spouses), and *S-L-L*, 24 I. & N. Dec. at 9 (stating section 601 asylum protections do not extend to

married in a traditional ceremony because they were prevented from officially marrying due to the Chinese government's age restrictions for marriage.<sup>100</sup> Shortly after that traditional marriage ceremony occurred, the couple conceived a child.<sup>101</sup> Since the marriage was illegal, the Chinese government forced Yang's wife to have an abortion upon learning of the pregnancy.<sup>102</sup>

The BIA—affirming the IJ's decision—dismissed Yang's appeal by stating that underage couples are not legally married under Chinese law and only individuals in legal marriages were spouses under the rationale of *C-Y-Z*.<sup>103</sup> The Eleventh Circuit affirmed, determining the BIA's decision in *S-L-L* reasonably interpreted the refugee statute by denying protection to the unmarried fathers of aborted children.<sup>104</sup> The court stated that legal marriage reflected a commitment other relationships did not.<sup>105</sup> In addition, the court found that refugee protection under section 601(a) should only be extended to legally married husbands, as legally married husbands have a more important role in deciding with their wives whether to conceive a child regardless of any laws against it.<sup>106</sup> It also noted that the existence of a legal marriage allowed courts to make practical presumptions, including the paternity of the child and impairment of both spouses' reproductive opportunities, based on one spouse's forced abortion or sterilization.<sup>107</sup> The court recognized its decision differed from two circuits that extended refugee status to traditionally married spouses,<sup>108</sup> but determined that these other two circuit decisions had little persuasive value in light of *S-L-L*.<sup>109</sup>

##### 5. The Second Circuit Denies Per Se Refugee Status to All Spouses

After the BIA's decision in *S-L-L*, the Second Circuit surprised many by ordering sua sponte an en banc rehearing to determine two issues: (1) whether section 601(a) is ambiguous, thus requiring courts to defer to the BIA's ruling under *Chevron*; and (2) whether the BIA reasonably construed section 601(a) to offer per se asylum to a victim's

---

the boyfriends and fiancés of individuals submitted to a forced abortion or sterilization).

100. *Yi Qiang Yang*, 494 F.3d at 1313.

101. *Id.*

102. *Id.*

103. *Id.* at 1315.

104. *Id.* at 1317.

105. *See id.* (stating "legal marriage reflects a sanctity and long term commitment" which other intimate relationships do not).

106. *Id.*

107. *Id.* (citing *In re S-L-L*, 24 I. & N. Dec. 1, 9 (B.I.A. 2006)).

108. *See Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006); *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004).

109. *Yi Qiang Yang*, 494 F.3d at 1318.

legally married spouse but not to an unmarried partner.<sup>110</sup> The court held that section 601(a) is not ambiguous, and as a result, the BIA impermissibly construed the statute.<sup>111</sup> The court found that, in choosing to use the words, “person,” “undergo,” “he,” and “she” to describe the class that section 601(a) protects, Congress intended to strictly limit protection to persons, not couples.<sup>112</sup> The court further noted that section 601(a) is just an exception to the general rule that in order to obtain asylum, applicants must describe a *personal* ordeal amounting to impermissible persecution.<sup>113</sup>

As a result, not only did the Second Circuit find that section 601(a) does not apply to a victim’s common law spouse, fiancé, or boyfriend, it also abrogated *C-Y-Z-* in holding that even a victim’s legal spouse lacks automatic protection under the provision.<sup>114</sup> Thus, under the *Lin II* court’s approach, only direct victims of coercive family-planning policies are considered per se refugees under section 601(a).<sup>115</sup>

#### 6. The Attorney General Overrules the BIA

In 2008, the United States Attorney General (“Attorney General”) overruled the BIA’s decisions in *C-Y-Z-* and *S-L-L-* in the case of *In re J-S-*.<sup>116</sup> There, it was held that refugee protection under section 601(a) was not automatically extended to legally and traditionally married spouses of individuals subjected to a forced sterilization or abortion.<sup>117</sup> The asylum seeker, Shi, argued that he should be granted refugee status under section 601(a) because the Chinese government had forced his wife to be fitted with an IUD that prevented the couple from having a second child.<sup>118</sup> The IJ denied Shi’s application, finding that “[t]he forcible insertion of an intrauterine device is not tantamount to

---

110. Shi Liang Lin v. U.S. Dep’t of Justice (*Lin II*), 494 F.3d 296, 299-300 (2d Cir. 2007); see also Mark Hamblett, *En Banc Panel: No Per Se Asylum for Spouses of Persecuted Chinese*, N.Y. L.J., July 17, 2007, at 1 (noting that a sua sponte ordering of an en banc rehearing is unusual).

111. *Lin II*, 494 F.3d at 306.

112. *Id.* at 306 (finding that these clauses contemplate procedures performed on victim’s own body).

113. *Id.* at 306-07 (stating that section 601(a) does not change the refugee definition requiring personally-experienced persecution). *But see id.* at 324 (Katzmann, J., concurring) (arguing that the effect on a victim’s spouse may amount to personal persecution).

114. See *id.* at 305-06; see also Hamblett, *supra* note 110 (noting how the Second Circuit’s ruling unraveled ten years of precedent).

115. See *Lin II*, 494 F.3d at 308.

116. 24 I. & N. Dec. 520, 520 (Att’y Gen. 2008).

117. See *id.* at 521 (overruling the BIA’s decisions in *C-Y-Z-* and *S-L-L-* “to the extent those cases hold that the spouse of a person who has been physically subjected to a forced abortion or sterilization procedure is per se entitled to refugee status under section 601(a) of IIRIRA”).

118. *Id.* at 524.

sterilization nor to abortion.”<sup>119</sup>

After the BIA affirmed the IJ’s decision, Shi appealed his case to the Third Circuit.<sup>120</sup> But before the case reached the Third Circuit panel, the Second Circuit rendered its decision in *Lin II*.<sup>121</sup> In order to “provide a final administrative ruling on a statutory question that has divided the Federal courts of appeals,” the Attorney General directed the BIA to refer to him the BIA’s decision in *J-S-* for review.<sup>122</sup> The Third Circuit, in turn, dismissed Shi’s appeal following receipt of the Attorney General’s certification order.<sup>123</sup>

The Attorney General acknowledged that the BIA’s decisions in *C-Y-Z-* and *S-L-L-* were long-standing precedent that Congress and the courts had relied upon and were “undeniably important,” but that “it does not prevent the Department of Justice from reversing administrative decisions when there is good reason for doing so.”<sup>124</sup> The Attorney General went on to declare that his reasoning was that the BIA’s interpretation of section 601(a) was “unsupported by the provision’s text, structure, history, and purpose.”<sup>125</sup> When looking at the actual language of section 601(a), the Attorney General found its ordinary or natural meaning clearly limits per se refugee status to those individuals personally forced to submit to abortion or sterilization.<sup>126</sup> This textual analysis was “bolstered by reading section 601(a) in harmony with other provisions of the [INA] conferring refugee status.”<sup>127</sup> The Attorney General found it difficult to reconcile the per se rule of spousal eligibility with both the INA’s express provision requiring a spouse seeking derivative asylum to actually accompany the primary applicant into the United States and its general requirement that every applicant must establish his or her own eligibility for asylum relief.<sup>128</sup>

In addition to this textual and structural analysis, the Attorney General claimed that the legislative history of section 601(a) does not expressly address whether the spouses of individuals forced to undergo an abortion or sterilization procedure are entitled to per se refugee

---

119. *Id.* at 525.

120. *Id.*

121. *Id.* at 525-26 (citing *Shi Liang Lin v. U.S. Dep’t of Justice (Lin II)*, 494 F.3d 296, 300 (2d Cir. 2007)).

122. *Id.* at 521. The Attorney General ordered this review of the BIA’s decision pursuant to 8 C.F.R. § 1003.1(h)(1)(i) (2006). *Id.*

123. *Id.* at 526.

124. *Id.* at 532.

125. *Id.*

126. *Id.* at 529.

127. *Id.* at 530.

128. *Id.* (citing INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2006); INA § 208(b)(3)(A), 8 U.S.C. § 1158(b)(3)(A) (2006)).

status.<sup>129</sup> What is most interesting, and confusing, was that he made this claim while at the same time recognizing that the purpose of section 601(a) was to “expand” asylum relief to victims of coercive family planning policies.<sup>130</sup> The Attorney General went on to conclude that his decision did not foreclose the possibility of spouses of those personally subjected to a forced abortion or sterilization to establish eligibility for asylum on a case-by-case basis.<sup>131</sup>

### C. The “Current” State of Section 601(a)

With the Second Circuit’s decision in *Lin II* and the Attorney General’s decision in *J-S-*, there has been a growing trend among the circuit courts of appeals to follow suit. As it stands now, the Second, Third, Fifth, Sixth, Seventh, and Eleventh circuits have followed *J-S-* in determining that only direct victims of forced abortion or sterilization are eligible for per se refugee status.<sup>132</sup> The First, Fourth, Eighth, and Ninth circuits retain the interpretation of section 601(a) that extends refugee protection to the spouses of direct victims.<sup>133</sup> However, it should be noted that none of these circuits have revisited this issue since *J-S-* was decided.<sup>134</sup> Thus, it stands to reason that because the former group of circuits performed an analysis of the actual text of section 601(a) and followed the controlling decision of *J-S-*, that interpretation will be adopted by the latter group of circuits when the issue presents itself before those courts.<sup>135</sup> Notably, the only other circuit to have this particular issue before it simply dispatched the case on the matter of credibility.<sup>136</sup> As a result of this shift in the interpretation regarding spousal eligibility under section 601(a), the intention of Congress in

---

129. *Id.* at 538.

130. *Id.* at 541.

131. *Id.*

132. *See, e.g.,* Shou Wei Jin v. Holder, 572 F.3d 392, 395-96 (7th Cir. 2009); Zhao Yang Shi v. Holder, No. 08-5275-ag, 2009 U.S. App. LEXIS 11872, at \*2 (2d Cir. Jun. 3, 2009); Yu v. Attorney Gen., 568 F.3d 1328, 1334 (11th Cir. 2009); Zhao v. Holder, 569 F.3d 238, 245-46 (6th Cir. 2009); Lin-Zheng v. Attorney Gen., 557 F.3d 147, 157 (3d Cir. 2009); *accord* Cai Gui Chen v. Filip, 308 Fed. App’x. 785, 788 (5th Cir. 2009) (remanding to the BIA with the instruction to “take into consideration” the decision in *J-S-*).

133. *See, e.g.,* Weixiong Zhu v. Mukasey, 261 Fed. App’x. 43, 43 (9th Cir. 2007); Lin-Jian v. Gonzales, 489 F.3d 182, 188 (4th Cir. 2007); Hong Zhang Cao v. Gonzales, 442 F.3d 657, 660 (8th Cir. 2006); Zeng v. Gonzales, 436 F.3d 26, 28 (1st Cir. 2006).

134. *Compare supra* note 133 (indicating that the First, Fourth, Eighth, and Ninth circuit cases were decided before 2008) *with J-S-*, 24 I. & N. Dec. at 520.

135. *See, e.g.,* Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ., 550 U.S. 81, 107 (2007) (Kennedy, J., concurring) (expressing concern that putting policy before text would improperly shape “judicial interpretation of statutes”).

136. *See, e.g.,* Xunsheng Li v. Mukasey, 302 Fed. App’x. 839, 842 (10th Cir. 2008).

passing the IIRIRA has been thwarted.

### III. CONGRESSIONAL INTENT BEHIND THE IIRIRA

#### *A. The IIRIRA Was Meant to Protect Those Who Have Suffered Persecution*

The IIRIRA was passed because Congress understood that China's coercive family planning programs are a terrible violation of human rights.<sup>137</sup> The legislative history behind the IIRIRA, including debates over China's program, does not reveal an intention to limit asylum protection to direct victims only. Rather, Congress's intention was to remedy the violation of a person's basic right to procreate, which is recognized in both U.S. law<sup>138</sup> and international law.<sup>139</sup> The father of a

---

137. *Forced Abortion and Sterilization in China: The View from the Inside: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the H. Comm. on Int'l Relations*, 105th Cong. 10 (1998), available at [http://commdocs.house.gov/committees/intlrel/hfa49740.000/hfa49740\\_0.htm#11](http://commdocs.house.gov/committees/intlrel/hfa49740.000/hfa49740_0.htm#11) [hereinafter *Hearing*] (statement of Rep. Lantos, Member, House Subcomm. on International Operations and Human Rights) ("There are few crimes against human beings which are more horrendous, more despicable, more outrageous than the practice of forced abortion and forced sterilization. Such brutal violations of human rights must be condemned across the political spectrum . . ."); 142 CONG. REC. 6008 (1996) (statement of Rep. Smith) ("[O]ne of the most gruesome human rights violations in the history of the world [is] forced abortion."); 141 CONG. REC. 19,742 (1995) (statement of Rep. Ros-Lehtinen) ("[W]e know that [forced abortions] violate every known standard of human rights since God made man."); 141 CONG. REC. 19,741 (1995) (statement of Rep. Woolsey) ("I believe that the time has come to quit coddling the tyrants in Beijing. It is time to say to the Chinese Government that . . . forced abortions . . . [are] not tolerable."); 141 CONG. REC. 19,739 (1995) (statement of Rep. Wolf) ("China's strict one-child-per-family policy has resulted in gross violations of human rights, including forced abortion and sterilization."); 141 CONG. REC. 19,737 (1995) (statement of Rep. Lantos) ("The Chinese Government enforces sickening and draconian birth control policies of forced sterilization and forced abortions."); 140 CONG. REC. 464 (1994) (statement of Sen. Helms) (comparing China's one-child family policy to the actions of Nazi Germany under Hitler).

138. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (finding that the right to procreate is "one of the basic civil rights of man"); *see also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (noting that the right to have children is a special liberty protected by the Due Process Clause); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 463 (1985) (commenting that eugenic marriage and sterilization laws "extinguished for the retarded . . . the right to marry and procreate."); *Maher v. Roe*, 432 U.S. 464, 472 n.7 (1977) ("[T]he right of procreation without state interference has long been recognized as 'one of the basic civil rights of man . . . fundamental to the very existence and survival of the race.'" (quoting *Skinner*, 316 U.S. at 541)).

139. *See In re C-Y-Z-*, 21 I. & N. Dec. 915, 921 n.2 (B.I.A. 1997) (Rosenberg, Board Member, concurring) (noting that the fundamental right to procreate is reflected in international human rights standards such as the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102). The concurring opinion from Board Member Rosenberg listed several international sources that proclaim basic civil rights, including the right to procreate. *See id.* (citing Universal Declaration of Human Rights art.



forcibly aborted child has had his basic right to procreate violated as much as the mother of a forcibly aborted child.<sup>140</sup> As was noted by the Ninth Circuit, the mother's suffering, due to a forced abortion or sterilization, is "imputed" to the father.<sup>141</sup>

Concurrently, as the age limits on marriage are a key element of China's one-child policy,<sup>142</sup> asylum should not be denied to those who would have otherwise qualified except for the fact that they were unable to marry under the very rules from which they are seeking asylum.<sup>143</sup> The argument that China's age limits on marriage are acceptable because other countries have younger age limits on marriage misses the point completely.<sup>144</sup> The reasons behind the age limits on marriage illuminate the distinction. The general reason for age limits on marriage is to protect young children from being thrown into marriage situations before they are physically and mentally ready.<sup>145</sup> China's marriage restrictions have nothing to do with protecting children; rather, the goal of these restrictions is to assist in the enforcement of China's one-child family policy.<sup>146</sup>

The legislative history behind section 601(a) shows that "couples with unauthorized children" were meant to be eligible.<sup>147</sup> The *Lin II*

---

16(1), G.A. Res. 217A, at 71, 74, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (approved by the United States Senate on Apr. 2, 1992)).

140. See *Qu v. Gonzales*, 399 F.3d 1195, 1202 & n.8 (9th Cir. 2005) (noting that forcible abortion, like sterilization, should be viewed as continuing persecution because of the "irremediable and ongoing suffering of being permanently denied the existence of a son or daughter").

141. See *Xue Yun Zhang v. Gonzales*, 408 F.3d 1239, 1245-46 (9th Cir. 2005).

142. See *Ma v. Ashcroft*, 361 F.3d 553, 559-60 (9th Cir. 2004) ("The record in this case conclusively shows, and this Circuit has already held, that the prohibition against underage marriages is 'an integral part' of China's coercive population control program.") (citing *Hearing, supra* note 137, at 24-26) (statement of Zhou Shiu Yon, victim of Chinese population control program) (testifying that she was targeted for forced abortion procedures because at nineteen years of age, she was unable to legally marry her boyfriend)).

143. See *Ma*, 361 F.3d at 559 ("The BIA's refusal to grant asylum to an individual who cannot register his marriage with the Chinese government on account of a law promulgated as part of its coercive population control policy . . . contravenes the [IIRIRA] and leads to absurd and wholly unacceptable results.").

144. See *Chen v. Ashcroft*, 381 F.3d 221, 230 (3d Cir. 2004).

145. See *id.* at 230 n.12 (citing Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, G.A. Res. 1763A(xvii), art. 2, U.N. GAOR, 17th Sess., Supp. No. 17, Annex, U.N. Doc. A/RES/17/1763 (Nov. 7, 1962)); *Moe v. Dinkins*, 669 F.2d 67, 68 (2d Cir. 1982) (noting that age restrictions on marriage "prevent[] unstable marriages among those lacking the capacity to act in their own best interests").

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

147. H.R. REP. NO. 104-469, pt. 1, at 174 (1996). Congress explicitly stated that it intended to overrule "several decisions of the Board of Immigration Appeals." *Id.* at 173-74. Several cases were specified, including *Matter of G-*, 20 I. & N. Dec. 764 (B.I.A. 1993). There the applicant was the spouse of a woman who, after giving birth to their second child, was fined by the Chinese

court and the Attorney General in *J-S-* contended that Congress would have included the word spouse had it intended to grant them asylum eligibility.<sup>148</sup> But, similarly, if Congress had wanted to restrict the statute to direct victims only, the congressional record would have indicated as such. In the concurrence of *Lin II*, the judges argued that there is an explicit prohibition of asylum eligibility in section 601(a) for those “who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>149</sup> The implication here is that Congress intentionally excluded these individuals as the *only* individuals they believed should not be granted asylum eligibility.

When the issue was discussed in Congress, the emphasis was on doing something for more than just direct victims of China’s one-child policy.<sup>150</sup> In earlier congressional discussions on extending asylum protection to victims of China’s coercive family planning programs, the envisioned solution was to help those affected by the population control program and not just the direct victims of forced abortion or sterilization.<sup>151</sup> Yet the only explicit mention to a class beyond direct victims was made specifically to couples.<sup>152</sup> In light of this, it follows that Congress certainly intended to protect married couples who

---

government while his wife was ordered to report for sterilization. *Matter of G-*, 20 I. & N. Dec. at 774.

148. Shi Liang Lin v. U.S. Dep’t of Justice (*Lin II*), 494 F.3d 296, 307 (2d Cir. 2007); *In re J-S-*, 24 I. & N. Dec. 520, 532-33 (Att’y Gen. 2008).

149. *Lin II*, 494 F.3d at 318 (Katzmann, Sotomayor, Straub & Pooler, JJ., concurring).

150. H.R. REP. NO. 104-469, pt. 1, at 174 (“The United States should not deny protection to persons subjected to such treatment.”); 135 CONG. REC. 26,927 (1989) (statement of Rep. Smith) (“[T]his outrageous persecution of the family cries out for compassion . . . . Asylum for those fleeing this tyranny . . . is the minimum that we can provide.”); 135 CONG. REC. 26,924 (1989) (statement of Rep. Morrison) (“Let me say that there is no disagreement of which I am aware on the goal of allowing refugee or asylum status to Chinese nationals who are fleeing forced abortions or forced sterilization. . . . [P]eople who are faced with that kind of persecution are entitled to refugee or asylum status here in the United States.”); 135 CONG. REC. 26,924 (1989) (statement of Rep. Hefley) (“This amendment is about . . . human rights, not just forced abortion and sterilization. The plain fact of the matter is that the U.S. Government should not be in the position of ‘aiding and abetting’ the Chinese Government in its attempt to force the Chinese people to undergo mandatory sterilization.”).

151. 135 CONG. REC. 30,446 (1989) (statement of Sen. Kohl) (“This measure will provide . . . valuable protection for Chinese nationals fleeing that nation’s coercive ‘one couple, one child’ family planning policies.”).

152. H.R. REP. NO. 104-469, pt. 1, at 174. Similar debates were occurring at the same time that help shed light on Congress’s intent to specifically support married couples. When discussing the Immigration in the National Interest Act of 1995, Rep. Goodlatte stated: “Young married couples with young children, they need to be able to come here more quickly . . . .” 142 CONG. REC. 5972 (1996). Additionally, when the Defense of Marriage Act was discussed in 1996, Sen. Coats declared: “We must help married couples to stay together when times are difficult.” 142 CONG. REC. 22,451 (1996).

attempted to procreate but could not because of China's one-child policy. Moreover, "the early marriage prohibition is inextricably linked to the restrictions on childbirth."<sup>153</sup> Therefore, couples who were only married in a traditional ceremony because the one-child policy's limits on marriage denied them an official marriage also fall within the class of people intended to be protected under section 601(a). Because of this, it makes sense that both officially and traditionally married spouses should be eligible to receive asylum protection.

### *B. Granting Asylum to Spouses Will Help Preserve the Family Unit*

Affording asylum protection to spouses furthers another of Congress's goals in passing the IIRIRA: preserving the family unit. Family unification has historically been a priority for the United States, as is evidenced by the INA<sup>154</sup> and U.S. immigration policy.<sup>155</sup> A review of the number of immigrants entering the United States and the means by which they secure residency will reveal a common conclusion: United States immigration is oriented toward family.<sup>156</sup> The quota given to the various means of acquiring residency immediately exposes family unity as a main priority.<sup>157</sup> Notably, immediate relatives are completely

---

153. See *Ma v. Ashcroft*, 361 F.3d 553, 560 (9th Cir. 2004). This hopelessly circular logic has been described as:

[A] Catch-22. [Petitioner's] asylum claim is based on China's enforcement of its population control policy, part of which includes a minimum age requirement for marriages, and a minimum age for having children. The forcible abortion in this case occurred precisely because [Petitioner] and his wife married and became pregnant prior to those minimum ages. The marriage is not legal in China because of the population control policy. Congress passed [section 601(a)] to ensure that families who are victims of forced abortion and sterilization under China's population control policy would receive asylum, yet the IJ denied the claim precisely because that population control policy rendered the marriage illegal. That would entirely subvert the Congressional amendment. . . . Where a traditional marriage ceremony has taken place, but is not recognized by the Chinese government because of the age restrictions in the population control measures, that person nevertheless qualifies as a spouse for purposes of asylum.

*Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006).

154. U.S. Dep't of State, The Immigration and Nationality Act of 1952, <http://www.state.gov/r/pa/ho/time/cwr/87719.htm> (last visited Oct. 25, 2009).

155. See, e.g., *Perales v. Casillas*, 903 F.2d 1043, 1046 (5th Cir. 1990) (noting that "one of the central purposes of the immigration laws [is] family reunification"); *Kaho v. Ilchert*, 765 F.2d 877, 879 n.1 (9th Cir.1985) (commenting that one of the INA's basic objectives is to reunite families); *Lau v. Kiley*, 563 F.2d 543, 545 (2d Cir. 1977) (noting that the Act's preference system was "primarily designed to further the basic objective of reuniting families").

156. For a historical account of the emphasis upon family in U.S. immigration law, see John Guendelsberger, *Implementing Family Unification Rights in American Immigration Law: Proposed Amendments*, 25 SAN DIEGO L. REV. 253, 255-62 (1988) and John Guendelsberger, *The Right to Family Unification in French and United States Immigration Law*, 21 CORNELL INT'L L.J. 1, 7-25 (1988).

157. See 8 U.S.C. § 1151(a)(1) (2006); see also STEPHEN H. LEGOMSKY, IMMIGRATION LAW

exempt from any quantitative limits.<sup>158</sup> But more importantly, the definition of “immediate relatives” includes spouses.<sup>159</sup>

Section 601(a) currently provides asylum protection to direct victims of persecution by China’s coercive family planning policies, but that protection remains incomplete if victims are afforded asylum without their spouses. This is because the presence of a spouse facilitates the integration process, allowing the victim to establish herself more quickly in our society.<sup>160</sup> It has even been noted that family reunification is the only way to restore a victim’s dignity.<sup>161</sup>

The priority given to spouses protects and preserves the family as the fundamental unit of society, restores basic dignity to the victim, and provides protection for children.<sup>162</sup> As articulated by the United Nations High Commission for Refugees, “refugees and other persons in need of international protection who have no other country than the country of asylum or resettlement to lead a normal family life together should be entitled to family reunion in the country of asylum or resettlement.”<sup>163</sup> The Ninth Circuit recognized in *Ma* that the long-established principle of keeping families together is an important part of the analysis of a spouse’s eligibility under the IIRIRA.<sup>164</sup> There, the court noted that following the BIA’s construction of section 601(a) in *C-Y-Z-*, which excluded from asylum those prevented from marrying by China’s restrictive marriage laws, would lead to “absurd results”—“the break-up of the family unit.”<sup>165</sup>

The unification of couples and families is often assumed to have a beneficial effect on a refugee.<sup>166</sup> A reunited family helps a refugee integrate into the adopted country more quickly.<sup>167</sup> Family members are often essential for healing refugees who were victims of persecution in their home countries.<sup>168</sup> Moreover, they help stabilize the migrant—

---

AND POLICY 14 (1992).

158. 8 U.S.C. § 1151(b)(2)(A)(i).

159. *Id.*

160. Annual Tripartite Consultations on Resettlement, Geneva, Switz., June 20-21, 2001, *Background Note for the Agenda Item: Family Reunification in the Context of Resettlement and Integration*, 2, 10, available at <http://www.unhcr.org/3b30baa04.html> [hereinafter *Family Reunification*].

161. Lori A. Nessel, *Forced to Choose: Torture, Family Reunification, and United States Immigration Policy*, 78 TEMP. L. REV. 897, 926 (2005).

162. See *Family Reunification*, *supra* note 160, at 1.

163. *Id.* at 2.

164. See *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004).

165. *Id.*

166. Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law’s Conflicted Answers*, 32 HOFSTRA L. REV. 273, 285 (2003).

167. See *Family Reunification*, *supra* note 160, at 2, 10.

168. Demleitner, *supra* note 166, at 294; see also *Family Reunification*, *supra* note 160, at 10.

which contributes to the reduction of crime and tends to increase the economic productivity of the asylum seeker.<sup>169</sup>

Reuniting families also benefits the adopted country. Granting asylum to spouses assures that less of the money earned in the adopted country is sent back to the family still in the country of origin.<sup>170</sup> The economic benefits of this are clear. The reunited family spends their money and makes investments in their adopted country, which, in turn, brings more money into the adopted country's economy. Therefore, allowing a family to be reunified is not "a mere exercise of state generosity but rather a crucial aspect of integrating and stabilizing migrant populations."<sup>171</sup>

#### IV. THE PROPOSED AMENDMENT

Section 601(a) should be amended to include both legally married spouses and those spouses whose traditional marriages are not recognized by the Chinese government because the couples did not meet the strict age requirements of the family planning policies.<sup>172</sup> Extending protection to legally married spouses is not particularly controversial. Prior to *Lin II*, it was the only standard that had been universally accepted by the circuit courts to have directly decided the issue.<sup>173</sup> It is also the position that had been consistently espoused by the BIA.<sup>174</sup> Conversely, none of the circuits to have adjudicated the issue of whether to extend asylum protection to unmarried partners—such as boyfriends or fiancés—chose to do so.<sup>175</sup> Neither has the BIA.<sup>176</sup>

---

169. Demleitner, *supra* note 166, at 285.

170. *See id.* at 294-95 (citing *Encourage Expats to Bring Their Families—GCC Study*, KERALA MONITOR, June 2, 2003, <http://www.keralamonitor.com/expatsgulf.html>).

171. Demleitner, *supra* note 166, at 286.

172. This is essentially the position taken by the courts in *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004) and *Zhang v. Gonzales*, 434 F.3d 993 (7th Cir. 2006). *See also supra* Part II.B.3; *supra* note 71 and accompanying text.

173. *See, e.g.*, *Yi Qiang Yang v. U.S. Att'y Gen.*, 494 F.3d 1311 (11th Cir. 2007); *Zhang v. Gonzales*, 434 F.3d 993 (7th Cir. 2006); *Zhang v. Ashcroft*, 395 F.3d 531 (5th Cir. 2004); *Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004); *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004). Prior to the Second Circuit's decision in *Lin II*, it too extended asylum protection to a married spouse under section 601(a). *See Zhang v. INS*, 386 F.3d 66, 71-72 (2d Cir. 2004).

174. *See In re S-L-L-*, 24 I. & N. Dec. 1, 4 (B.I.A. 2006) (reaffirming the rule set forth in *In re C-Y-Z-*, 21 I. & N. Dec. 915 (B.I.A. 1997)).

175. *See, e.g.*, *Lian v. U.S. Att'y Gen.*, 228 Fed. App'x 188, 193 (3d Cir. 2007) ("Boyfriends of women subjected to involuntary abortions are not eligible for asylum."); *Chen v. Gonzales*, 457 F.3d 670, 674 (7th Cir. 2006) ("[N]o court yet has recognized an unmarried male partner . . . as a 'refugee' under § 1101(a)(42)'s forced abortion and sterilization provisions"); *Jiu Shu Wang v. United States Att'y Gen.*, 152 Fed. App'x 761, 767 (11th Cir. 2005) (noting that asylum protection based on "forced abortion or sterilization has not been imputed beyond a marital relationship"); *Zhang v. Ashcroft*, 395 F.3d 531, 532 (5th Cir. 2004) (holding that a "live-in" girlfriend is not a

With these two ends of the spectrum serving as a baseline, this Note proposes an amendment that strikes a compromise. Admittedly, this is a more conservative approach compared to ones that suggest the IIRIRA be extended to include spouses *and* unmarried partners of direct victims of China's coercive family planning policies.<sup>177</sup> This approach is suggested for practical reasons, not ideological ones. While those suggestions are certainly sympathetic and idealistic, they fail to account for the practical difficulties in extending the IIRIRA to all those who are harmed by coercive family planning policies. Further, since the goal is to provide greater protection to those who have been persecuted, the amendment proposed in this Note has a greater chance of actually being adopted by Congress than a more idealistic one. This is because it is less likely to meet the strong resistance or bureaucratic roadblocks a more expansive amendment would encounter.<sup>178</sup> Also, this solution is particularly fitting as it comports with Congress's dual intent to protect both individual victims and couples who have been persecuted and to preserve the family unit.<sup>179</sup>

For these reasons, section 601(a) should be amended to include these two types of spouses of direct victims. The specific language would read:

---

recognized relationship for purposes of extending asylum protection and noting that "merely impregnating one's *girlfriend* is not alone an act of 'resistance'").

176. *S-L-L-*, 24 I. & N. Dec. at 9 ("We do not find convincing reasons to extend the nexus and level of harm attributed to a husband who was opposed to his wife's forced abortion to a boyfriend or fiancé.").

177. *See, e.g.,* Dempsey, *supra* note 93, at 236-39 (criticizing the BIA's limiting of refugee status to married couples); Raina Nortick, Note, *Singled Out: A Proposal to Extend Asylum to the Unmarried Partners of Chinese Nationals Fleeing the One-Child Policy*, 75 *FORDHAM L. REV.* 2153, 2191 (2007) (recommending that the IIRIRA be amended to include unmarried partners). Others have also concluded that a similar statutory amendment to the one suggested in this Note should be enacted. *See, e.g.,* Megan A. Carrick, Note, *Ensuring That Federal Circuit Courts Adhere to the Spirit of the Law: Why Legally and Non-Legally Married Spouses Deserve Explicit Asylum Protection Under Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act*, 42 *CREIGHTON L. REV.* 181, 222-23 (2009) (discussing the necessity of congressional involvement); Heidi Murphy, Note, *Sending the Men Over First: Amending Section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act to Allow Asylum for Spouses and Partners*, 33 *VT. L. REV.* 143, 164 (2008) (commenting that amending section 601(a) to include both legally and traditionally married spouses is the only way to provide "absolute protection"). However, none of those that have addressed this issue—either to include all partners or only traditionally married spouses—have specifically dealt with the statutory language such an amendment should include.

178. *See* George D. Brown, *Counterrevolution?—National Criminal Law After Raich*, 66 *OHIO ST. L.J.* 947, 967 (2005) ("The political difficulties that are obvious in trying to pass any such broad statute inevitably lead toward attempts at the narrow one . . .").

179. *See* *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) ("Congress's goal in passing [section 601(a)] was to provide relief for 'couples' [who have been] persecuted on account of an 'unauthorized' pregnancy and to keep families together." (citing H.R. REP. NO. 104-469 pt. 1, at 174 (1996))).

For purposes of determinations under this Act, a person, *or the married spouse, or if unable to be married because of a coercive population control program, then the spouse married in a traditional or religious ceremony, of a person*, who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted . . . .<sup>180</sup>

## V. OBSTACLES TO THE PROPOSED AMENDMENT

### A. Allowing Anyone Other Than Direct Victims Increases the Chance of Fraud

It has been said that “like spam, Chinese family planning cases are almost never what they hold themselves out to be.”<sup>181</sup> This is particularly true when “snakeheads”<sup>182</sup> are involved in coaching asylum seekers, whom they smuggle into the United States, to say they are victims of coercive family planning programs.<sup>183</sup> Historically, the largest group of Chinese immigrants has been men arriving alone.<sup>184</sup> In fact, from 1996 to 2001, approximately three quarters of those Chinese immigrants granted asylum under section 601(a) were men.<sup>185</sup> Moreover, ninety percent of the Chinese applicants for asylum received by the Department of State come from three counties in Fujian Province,<sup>186</sup> where asylum seekers

---

180. 8 U.S.C. § 1101(a)(42)(B) (2006). The language in italics constitutes the proposed amendment. Furthermore, as this is a proposed amendment to a federal statute, the term “spouse” must be interpreted according to the Defense of Marriage Act’s definition of spouse. *See infra* notes 247-250 and accompanying text.

181. Matt Hayes, *INS China Policy Opens Border to Asylum Scams*, FOX NEWS, Feb. 5, 2004, <http://www.foxnews.com/story/0,2933,110481,00.html>; *see also* Yeh Ling-Ling, Op-Ed, *Fake Refugees Cite China’s One-Child Rule*, S.F. EXAM’R, Dec. 21, 1994, available at <http://www.cs.ucdavis.edu/~matloff/pub/Immigration/AsyRef/YehChinaSFX.html> (reporting that when the Chinese nationals being smuggled aboard were “asked in Chinese why they had come to the United States [during the review of their asylum applications], the answer given matter-of-factly by many of them was: ‘To make money!’”).

182. A “snakehead” is a term to describe human smugglers who sneak tens of thousands of Chinese into the United States each year, charging each stowaway up to \$60,000. In order to receive their payment in the United States from their passengers’ relatives or friends, they need to ensure that their charges make it successfully past immigration officials; therefore, they may instruct them to claim falsely that they are fleeing persecution. *See* Kung, *supra* note 27, at 1274-75, 1306.

183. *Id.* at 1306.

184. Patricia Wen, *Law Offers Chinese a Path to U.S.: Policy Giving Asylum to Those Facing Coerced Birth Control Benefits Mostly Men*, BOSTON GLOBE, Aug. 18, 2002, at B1.

185. *Id.*

186. PROFILE OF ASYLUM CLAIMS, *supra* note 56, at 32.

are “coached in how to satisfy the US requirements for asylum.”<sup>187</sup>

In one particularly egregious case of fraud, an asylum seeker who claimed he was persecuted because of China’s one-child policy admitted that he really came to the United States for economic reasons.<sup>188</sup> Shortly after his release, he joined a gang, extorted money from other Chinese immigrants, and was subsequently sentenced to eleven years in U.S. prison.<sup>189</sup> Critics claim that the current IIRIRA “map[s] out for aliens exactly how to obtain a grant of asylum . . . .”<sup>190</sup> As the aforementioned case illustrates, there are already certain unsavory characters seeking to fraudulently enter the United States under the guise of being victimized by China’s one-child policy. It could be said that expanding the IIRIRA to officially include other men, even if they are spouses, has the potential of attracting even more of these individuals and their fraudulent claims.

This kind of speculation, however, does not recognize that there are, in fact, safeguards in place to root out fraudulent claims. The REAL ID Act of 2005<sup>191</sup> modified the asylum laws to allow IJs to require asylum seekers to provide more corroboration of their asylum applications. This also made it easier for IJs to find asylum seekers not credible by allowing even slight discrepancies to support an adverse credibility determination.<sup>192</sup> The IJ evaluates the asylum seeker’s credibility based on “the totality of the circumstances” and “all relevant factors.”<sup>193</sup> The following factors are used to consider the credibility of the asylum seeker’s claim:

demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the

---

187. *INS: Enforcement, Asylum, and Naturalization*, MIGRATION NEWS, Aug. 1996, [http://migration.ucdavis.edu/mn/more.php?id=1007\\_0\\_2\\_0](http://migration.ucdavis.edu/mn/more.php?id=1007_0_2_0).

188. *Id.*

189. *Id.*

190. Hayes, *supra* note 181. It has been reported that an actual asylum school has been formed in the language and training institutes of San Diego, California, which take money from Chinese nationals in exchange for training them for a successful family planning case. *Id.* These schools allegedly provide a would-be refugee with a textbook and instructions in the basics of a family planning case, as well as fake documents indicating the applicant was previously arrested for fighting with Chinese authorities attempting to perform a forced abortion on his spouse. *Id.*

191. See REAL ID Act of 2005, Pub. L. No. 109-13, §§ 101(a)(iii) & 101(b)(2), 119 Stat. 231 (2005) (codified at 8 U.S.C. § 1158 (2006)).

192. 8 U.S.C. § 1158 (b)(1)(B)(iii).

193. *Id.*



Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.<sup>194</sup>

Furthermore, the REAL ID Act makes the determination of credibility more significant and even more difficult to challenge on appeal. It allows IJs to make adverse credibility determinations “without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the application's claim.”<sup>195</sup> In her concurring opinion in *In re S-M-J*,<sup>196</sup> Board Member Rosenberg noted the important point that asylum adjudicators “should avoid any predisposition against believing the applicant” for his or her inability to obtain supporting documents, further stating that “presum[ing] an individual to be a liar rather than a truth teller . . . violate[s] not only [the] duty to be impartial, but . . . abrogate[s] the statute and regulations which govern . . . adjudications.”<sup>197</sup>

In addition, the fact that others, unrelated to a particular asylum seeker, have committed fraud in the past has nothing to do with that asylum seeker's claims. Asylum seekers have a due process right to an individualized assessment of their applications.<sup>198</sup> While the United States government does have a valid concern about fraud in asylum cases, that concern does not permit IJs to weigh generalized information about fraudulent claims more heavily than the evidence the asylum seeker has submitted in the case.<sup>199</sup>

For example, asylum claims of individuals originating from the Fujian Province in China are commonly found to provide prejudicial,

---

194. *Id.* Adverse credibility findings may also be based on fraudulent documents. *See In re O-D-*, 21 I. & N. Dec. 1079, 1083 (B.I.A. 1998) (“The presentation of fraudulent documents is a critical factor in our analysis . . . Such fraud tarnishes the [asylum seeker's] veracity and diminishes the reliability of his other evidence.”). Before the REAL ID Act, “[m]inor inconsistencies . . . that [did] not relate to the basis of an applicant's alleged fear of persecution, [or] go to the heart of the asylum claim [did] not generally support an adverse credibility finding.” *Singh v. Gonzales*, 439 F.3d 1100, 1105 (9th Cir. 2006) (citations omitted) (third alteration in original).

195. *Cham v. Attorney General of U.S.*, 445 F.3d 683, 692 n.10 (3d Cir. 2006) (citing REAL ID Act of 2005 § 101).

196. 21 I. & N. 722 (B.I.A. 1997).

197. *Id.* at 739.

198. *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001) (quoting *Llana-Castello v. INS*, 163 F.3d 1093, 1096 (10th Cir. 1994)).

199. *See Tian-Yong Chen v. INS*, 359 F.3d 121, 130 (2d Cir. 2004) (warning against “excessive reliance” on a country conditions report's qualified description of general practices and noting that such “observations do not automatically discredit contrary evidence presented by the applicant”); *see also Ren v. Gonzales*, 164 Fed. App'x. 33, 35 n.3 (2d Cir. 2006) (“While the [reports of fraud from certain regions] may diminish the weight afforded to the [abortion] certificate, it is insufficient to reject the evidence outright, or to find the petitioner generally not credible . . .”).

ambiguous, and unreliable information.<sup>200</sup> As was mentioned above, “[n]inety percent of asylum claims received by the Department of State come from the Fujian province.”<sup>201</sup> The 1998 Profile of Asylum Claims lists a number of elements commonly found in claims from Fujianese.<sup>202</sup> Yet a claim based on any of these elements should not be suspect solely by the virtue of being on that list. This list could just as easily support an authentic asylum claim because all of the elements have been confirmed as possibilities.<sup>203</sup>

Additionally, the 1998 Profile of Asylum Claims raises the question of authenticity and veracity as the “[d]ocumentation from China . . . is subject to widespread fabrication and fraud.”<sup>204</sup> However, it also contains other useful information that can help IJs to identify fraudulent testimony or documents. For example, the false information may be that a particular province only issues one-child certificates and not other documents, or that a particular type of document was only issued up to a certain date.<sup>205</sup>

A critique of extending asylum protection beyond the claims of direct victims is that many men will fabricate stories to qualify under the amendment.<sup>206</sup> This argument lacks merit because people who are willing to lie in order to receive asylum would change their story to fit whatever laws are in place to regulate asylum.<sup>207</sup> “The solution to credibility problems is careful case-by-case adjudication, not wholesale denial.”<sup>208</sup> The exact same credibility rules that apply to other asylum cases should apply to these cases.<sup>209</sup> In *Chen*, the court implied that the BIA would have to engage in a “detailed (and probably inconclusive) psychological analysis concerning the nature of a claimed relationship” if it stopped requiring legal marriage certificates from asylum seekers.<sup>210</sup>

---

200. See PROFILE OF ASYLUM CLAIMS, *supra* note 56, at 33.

201. See *id.* at 32.

202. *Id.* at 32. Some of the elements common in Fujianese claims include: (a) a wife being so ill that she could not undergo sterilization, so the husband was chosen to have the procedure; (b) that an applicant got into a physical fight with aggressive birth control officials (a claim frequently arising in applications by young unmarried applicants); or (c) that fanatical birth control officials tried to impose fines claimed to be so high that the applicant and his family were unable to pay. *Id.*

203. *Id.*

204. *Id.* at 33.

205. *Id.* at 28.

206. See 142 CONG. REC. 5969 (Mar. 21, 1996) (statement of Rep. Smith).

207. *Id.*

208. *Id.*

209. See H.R. REP. NO. 104-469, pt. 1, at 174 (1996) (“Nothing in [the IIRIRA] is intended to lower the evidentiary burden of proof . . . no matter how serious the nature of the claim . . . [T]he burden of proof remains on the applicant, as in every other case, to establish by credible evidence that he or she has been subject to persecution . . .”).

210. See *Chen v. Ashcroft*, 381 F.3d 221, 229 (3d Cir. 2004).

But simply producing a piece of paper does not make an asylum seeker's claim credible.<sup>211</sup> Furthermore, skeptics should note the extremely high standard of proof required in asylum cases. The Second Circuit has even criticized the BIA's standard of proof as being so high that it "enable[s] the administrative decisionmaker to reject whichever applicants that fact-finder happen[s] to disfavor."<sup>212</sup> The Court argued that a "legal standard that empowers an [IJ] or the BIA to rule against a petitioner who fails to anticipate the particular set of details that the fact-finder desires . . . is no standard at all."<sup>213</sup> Instead, the court noted, it was sufficient for IJs concerned about the credibility of an asylum applicant, "to pose questions aimed at eliciting inconsistent or inherently implausible statements."<sup>214</sup> Yet, even with the harsh criticisms in *Qiu*, the BIA currently retains a severely elevated standard of proof.<sup>215</sup>

Reportedly high fraud rates from a particular region or certain common elements in fraudulent claims should not constitute sufficient evidence to support the denial of asylum, especially when those same regions and claims support legitimate asylum claims. Moreover, with stricter corroboration requirements, as well as an asylum seeker's credibility and the document's authenticity already being suspect, it is very challenging for would-be refugees to support their asylum applications.

As such, the concern about an increase in the amount of fraudulent claims should the IIRIRA be expanded to protect both direct victims and their spouses is unjustified. Courts should undertake individualized findings of fact about the closeness of relationship and the actual harm suffered by the applicants when making asylum rulings. An asylum seeker who credibly demonstrates he has experienced harm rising to the level of persecution when a partner underwent forced abortion or sterilization is entitled to the protection of the IIRIRA.

---

211. For an argument that all asylum applicants should be presumed credible based on a narrative recitation of the persecution they have suffered, see generally Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative*, 53 RUTGERS L. REV. 127 (2000).

212. *Qiu v. Ashcroft*, 329 F.3d 140, 151-52 (2d Cir. 2003).

213. *Id.* at 151.

214. *Id.* at 152 n.6.

215. See, e.g., *Zhang v. INS*, 386 F.3d 66, 67 (2d Cir. 2004). In a case where the authenticity of the petitioner's sterilization certificate and receipt for payment of a family planning penalty is not challenged, the BIA still found the documentary and testimonial evidence insufficient. See *id.* at 86.

*B. Extending Asylum Protection Beyond Direct Victims  
Would Open the Proverbial Floodgates*

Before the IIRIRA was passed, many expressed concern that a flood of refugees would result from granting asylum based on forced abortions and sterilizations.<sup>216</sup> While this concern is closely related to the aforementioned concern over an increase in fraudulent asylum claims, it is worth briefly addressing on its own. Simply put, the flood has not come to pass and will not be an issue if section 601(a) is extended to legally and traditionally married couples because the number of refugees granted asylum is capped annually.<sup>217</sup> Indeed, eight years after the IIRIRA was passed, the waiting list for asylum protection based on China's one-child policy consisted of a paltry seven thousand applicants.<sup>218</sup> The few thousand extra refugees that may be granted asylum is a mere fraction compared to the one million legal and illegal immigrants that arrive in the United States each year.<sup>219</sup>

The fear of a flood of asylum seekers is particularly unfounded

---

216. See, e.g., 142 CONG. REC. S4592 (daily ed. May 2, 1996) (statement of Sen. Simpson) (“[I]f this amendment . . . were to come to pass . . . I suggest that there will be millions of people who, under this language, will qualify.”).

217. Every year the President sets a limit on the number of refugees that will be admitted. See NANCY F. RYTINA, U.S. DEP’T OF HOMELAND SEC., ANNUAL FLOW REPORT, REFUGEE APPLICANTS AND ADMISSIONS TO THE UNITED STATES: 2004, at 1 (2005), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/refugeeflowreport2004.pdf>. In 2004, the maximum number to be admitted was 70,000. *Id.* This number has not increased. Compare *id.* (“For 2004, as in 2002 and 2003, the final authorized ceiling was 70,000.”) with U.S. DEP’T OF STATE ET AL., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2008: REPORT TO CONGRESS, at iv (2007), available at <http://www.state.gov/documents/organization/91978.pdf> (reporting that the President’s budget proposal for 2008 requested funding for 70,000 refugees and asylum seekers). In 2008, the United States granted asylum to approximately 20,500 individuals and resettled close to 60,200 refugees from other countries. U.S. COMM. FOR REFUGEES & IMMIGRANTS, WORLD REFUGEE SURVEY 2009—UNITED STATES (2009), <http://www.unhcr.org/refworld/docid/4a40d2b580.html>. Not only is there not a flood of refugees, but there are not even enough would-be refugees to reach the 70,000 person cap.

218. In 2003, roughly 14,000 Chinese refugees applied for asylum; approximately 7000 of those refugees based their application on persecution due to China’s coercive population control measures. See Michelle Chen, *Leaving One-Child Behind: Chinese Immigrants Seek Asylum in America from China’s One-Child Policy*, LEGAL AFF., Nov.-Dec. 2005, at 8, 9, available at [http://www.legalaffairs.org/issues/November-December-2005/scene\\_chen\\_novdec05.msp](http://www.legalaffairs.org/issues/November-December-2005/scene_chen_novdec05.msp); see also *Chen v. Ashcroft*, 381 F.3d 221, 225 (3d Cir. 2004) (citing News Release, U.S. Dep’t of Justice, EOIR Notifies Persons Eligible for Full Asylum Benefits for Fiscal Year 2003 Based on Coercive Population Control Policies (Sept. 30, 2003), available at <http://www.usdoj.gov/eoir/press/03/CPCAsylumRelease0903.pfd>).

219. Every year, approximately 800,000 illegal immigrants cross into the United States. Roughly half of those do not remain here due to deportations, death, and voluntary departures. See Mark Krikorian, *Not Amnesty But Attrition: The Way to Go on Immigration*, NAT’L REV., Mar. 22, 2004, at 38. The United States accepts “roughly a million legal immigrants and half-a-million illegals each year.” Mark Steyn, *Illegals the Political “Untouchables”*, CHICAGO SUN-TIMES, Jan. 11, 2004, at A39.

because, barring a limited number of circumstances, the person must be present in the United States to petition for asylum.<sup>220</sup> Therefore, granting asylum to the spouses of direct victims will not create any extra incentive because extending the scope of the IIRIRA will not make it any easier for a person to actually get into the United States to begin with.<sup>221</sup>

*C. If Section 601(a) Is To Be Extended At All, It Should Only Be Extended To Legally Married Spouses*

This objection to extending asylum protection to traditionally married spouses is much more tempting than those previously mentioned.<sup>222</sup> As was mentioned above, it was the only standard to have been universally accepted by the circuit courts and the BIA.<sup>223</sup> The BIA has stated that the marriage requirement “is a practical and manageable approach which takes into account the language and purpose of the statutory definition in light of the general principles of asylum law.”<sup>224</sup> Because of the strong desire to have administrative feasibility and uniformity in U.S. immigration law,<sup>225</sup> extending section 601(a) to married spouses may only resonate with Congress and the Supreme Court.

But despite this strong desire, mere administrative or judicial convenience should not outweigh Congress’s intent to protect other victims of China’s coercive family planning programs.<sup>226</sup> Furthermore, only extending per se asylum protection to married spouses would go against Congress’s goal of preserving the family unit.<sup>227</sup> The definition of a family in the United States has changed considerably over the past forty years.<sup>228</sup> It should no longer be assumed that a family only includes

---

220. 8 U.S.C. § 1158(a)(1) (2006).

221. See 142 CONG. REC. 10,047 (1996) (statement of Rep. Smith). (explaining that each applicant is still required to prove his or her case).

222. See *supra* Part V.A-B.

223. See *supra* notes 173-74 and accompanying text.

224. *In re S-L-L-*, 24 I. & N. Dec. 1, 9 (B.I.A. 2006).

225. Shi Liang Lin v. U.S. Dep’t of Justice (*Lin II*), 494 F.3d 296, 316 n.2 (2d Cir. 2007) (Katzman, J., concurring) (stating that “it would be unsound for each of the several Courts of Appeals to elaborate a potentially nonuniform body of law” and describing uniformity as “especially desirable in cases such as these”) (quoting *Jian Hui Shao v. BIA*, 465 F.3d 497, 502 (2d Cir. 2006)).

226. See *supra* Part III.A.

227. See *supra* Part III.B.

228. In 1968, eighty-five percent of children lived in households where the parents were married and living under one roof. See U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS OLD: 1960 TO PRESENT 1-2 tbl.CH-1 (2006), available at <http://www.census.gov/population/socdemo/hh-fam/ch1.pdf>. In 1978, that number decreased to

a legally married mother and father. In fact, the departure from the traditional, nuclear family has become progressively more accepted in the United States.<sup>229</sup> While some courts continue to deny parental rights and family status to non-nuclear families,<sup>230</sup> other courts have begun to recognize the notion of “functional families.”<sup>231</sup>

The notion of dedication, caring, and self-sacrifice in functional families—championed by *Braschi v. Stahl Associates*<sup>232</sup> in what was effectively a common law marriage—has been completely ignored by the BIA. In restricting the presumption of persecution to couples who are “actually committed to a marital relationship,”<sup>233</sup> the BIA neglected to take into account those couples who are committed to a marital relationship but cannot obtain an officially legal marriage because of Chinese family planning policies. Admittedly, this precise issue was not before the BIA in *S-L-L*.<sup>234</sup> The case does, however, imply that the concern is not with the intent of the relationship, but rather with whether the relationship conformed to legal standards.<sup>235</sup> Moreover, this

---

seventy-eight percent, and in 1988 the number decreased again to seventy-three percent. *Id.* By 2005, only sixty-seven percent of children lived in households where the parents were married and living under one roof. *Id.*

229. See *More Firms Covering Domestic Partners*, BOSTON GLOBE, Oct. 21, 2001, at G2 (reporting that many companies are changing the coverage of their health plans to include unmarried couples).

230. See *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (denying visitation rights to former same-sex partner because she was neither the child’s adoptive nor biological parent).

231. The seminal case adopting a functional definition of the family was *Braschi v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989). There, the New York Court of Appeals found that a same-sex couple, living together as life partners for more than ten years, should be regarded as a “family” for purposes of New York’s rent control statute. *Id.* at 55. The court refused to allow a strict definition of “family” to defeat the protective purpose of the New York rent control system as a whole. See *id.* at 54. Instead, it noted that the term family “should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order.” *Id.* at 53. The court concluded that an objective examination of the parties’ relationship—based upon the “totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties”—should control. *Id.* at 55. For further cases adopting a functional definition of family, see *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995) (holding that visitation of a non-biological parent could be in the best interests of a child, if there is a “parent-like relationship with the child and . . . a significant triggering event [that] justifies state intervention in the child’s relationship with a biological or adoptive parent”); see also *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 888 (Mass. 1999) (granting visitation rights to same-sex partner who was a de facto parent); *T.B. v. L.R.M.*, 786 A.2d 913, 914 (Pa. 2001) (holding that former same-sex partner could sue for visitation rights by standing *in loco parentis*).

232. 543 N.E.2d at 55.

233. See *In re S-L-L*, 24 I. & N. Dec. 1, 12 (B.I.A. 2006).

234. *Id.* at 9 (determining whether section 601(a) should be extended to legally married spouses and whether it should be extended boyfriends, fiancées, or unmarried partners). The BIA, however, did not reach the issue of whether it should be extended to traditionally married spouses. See *id.* at 4 n.3 (“No issue was raised . . . regarding the legality of the marriage.”).

235. *Id.* at 12.

reasoning leaves a gap in the law and is simply out of touch with the modern world.<sup>236</sup> The United States recognizes functional families, not just legal ones.<sup>237</sup> Parents are equally persecuted partners because they commit to a familial relationship, not because their relationship is sanctioned by the state.

#### *D. Amending Section 601(a) Has Implications Beyond Asylum Law*

A spouse's eligibility for asylum under section 601(a) raises two hotly debated issues: the definition of marriage and U.S. immigration policy. The very fact that even attempting to address the prospect of spousal eligibility raises these issues may itself be the biggest obstacle to remedying it. The elephant in the room, so to speak, is that both the Supreme Court and Congress have nothing to gain—and alternatively, much to lose—by weighing in.

##### 1. The Definition of Marriage

With the Supreme Court's denial of certiorari to the applicants in *Lin II*<sup>238</sup> and *Yi Qiang Yang v. Mukasey*,<sup>239</sup> it appears that the Court is unwilling to settle the dispute over whom, if anyone other than direct victims, should be eligible for asylum under section 601(a). It seems likely that the Court views the issue presented by *Ma, Chen, and Lin II* as a political question,<sup>240</sup> finding it better to employ the "technique[] of 'not doing' . . . [by] disposing of a case while avoiding judgment. . . ."<sup>241</sup>

---

236. See e.g., Katherine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 9-22 (2004) (discussing the modern recognition of parental rights of biological fathers, nonbiological fathers, married, and unmarried men); see also David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 125 (Supp. 2006) ("Unwed fathers . . . are no longer categorically disregarded by the law.").

237. This definition of family underlies arguments in favor of same-sex marriage, assisted reproduction, and same-sex or single parent adoption. See generally Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305 (2006) (arguing that discrimination against same-sex couples in matters of legal parenthood undermines legal traditions and values and hurts the welfare of children).

238. *Zhen Hua Dong v. U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007), cert. denied 128 S. Ct. 2472 (2008).

239. *Yi Qiang Yang v. Mukasey*, 494 F.3d 1311 (11th Cir. 2007), cert. denied 128 S. Ct. 2466 (2008).

240. For more thorough discussions of the political question doctrine, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 183-98 (2d ed. Yale Univ. Press 1986) (1962); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 143-49 (3d ed. 1999); LEARNED HAND, *THE BILL OF RIGHTS* 15-30 (1958); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 601-06 (1976).

241. BICKEL, *supra* note 240, at 169.

As has been noted,

[w]hen the Court is deciding a question of constitutional law or international law (and, to a somewhat lesser degree, when it is interpreting a statute), its decisions have an importance and an impact which go far beyond a mere determination of the rights and duties of the litigants in the instant case.<sup>242</sup>

In the wake of both the Supreme Court's decision in *Lawrence v. Texas*<sup>243</sup> and the Supreme Judicial Court of Massachusetts's ruling in *Goodridge v. Department of Public Health*,<sup>244</sup> the question of same-sex marriage has fueled unending cultural debate, influenced political campaigns, emboldened citizens to engage in civil disobedience, and led to calls for state and federal legislators to amend their constitutions.<sup>245</sup> With the sharp divisions surrounding the issue of same-sex marriage and the Court's reluctance to address it,<sup>246</sup> it may be that both the Court and Congress want to avoid making any decision dealing with the definition of marriage or spouse.

However, as the IIRIRA is a federal law, and the proposed amendment would include the words "marriage" and "spouse,"<sup>247</sup> the Defense of Marriage Act ("DOMA")<sup>248</sup> would be implicated. Under DOMA, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."<sup>249</sup> For better or worse, this controversial language is quite clear and remains constitutional ten years after its passage.<sup>250</sup> Consequently, if Congress

242. Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 523 (1966).

243. See generally *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that a Texas law prohibiting homosexual sodomy was unconstitutional).

244. See generally *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding that a Massachusetts licensing statute that prohibited same-sex couples from marrying violated the Massachusetts Constitution).

245. See William Raspberry, *Reasons for Marriage*, WASH. POST, Feb. 23, 2004, at A21 (noting that "gay and lesbian couples lining up for marriage licenses" are "all over the news").

246. See generally Cynthia M. Davis, Comment, "The Great Divorce" of Government and Marriage: Changing the Nature of the Gay Marriage Debate, 89 MARQ. L. REV. 795, 797-801 (2006) (characterizing same-sex marriage as a political question).

247. See *supra* note 180 and accompanying text.

248. Defense of Marriage Act, Pub. L. No. 104-199, § 7, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)).

249. 1 U.S.C. § 7.

250. See *Smelt v. County of Orange*, 447 F.3d 673, 686 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006) (affirming the district court's finding that the couple challenging DOMA's constitutionality lacked standing); *Gilmore v. Sec'y of the Dep't. of Children & Family Servs.*, 358 F.3d 804, 819-20 (11th Cir. 2004) (upholding the constitutionality of DOMA under a rational basis standard of review); *In re Kandu*, 315 B.R. 123, 132 (Bankr. W.D. Wash. 2004) (stating that



granted asylum to the spouses of victims of coercive family planning policies it would not have to address the definition of marriage or spouse at all. It has already done so with DOMA. Should the definition of marriage or spouse change, the proposed amendment's effect would remain unchanged. It would still cover the spouses—however the term is defined—of victims of population control programs.

## 2. U.S. Immigration Policy

Congress's reluctance to address the problem with the current version of section 601(a) is further complicated when it is connected with the highly charged issue of immigration into the United States.<sup>251</sup> Congress has been unable to enact any comprehensive immigration reform.<sup>252</sup> Furthermore, the Senate's reluctance to pass anything at all to fix the immigration system is evidenced by the failure of the Development, Relief, and Education for Alien Minors Act (the "DREAM Act").<sup>253</sup> The current economic crisis, national security, and the wars in Iraq and Afghanistan are taking priority on the domestic agenda. As a result, there is little support left for enacting any immigration reform.

But the pitfalls surrounding the immigration issue raised here can be avoided as well. The proposed amendment is not a part of some comprehensive immigration reform, nor is it the appropriate place for scoring points on issues in current domestic politics. Rather, it is a narrowly focused piece of legislation intended to clarify a specific aspect of the IIRIRA. As such, the concerns that usually surround immigration reform would not be implicated. The proposed amendment may help reduce a major problem: illegal immigration.

Granting refugee status to legally and traditionally married spouses may help decrease illegal immigration by allowing for a more

---

DOMA did not violate the Tenth Amendment because "the definition of marriage . . . is not binding on states and, therefore, there is no infringement on state sovereignty").

251. For examples of the issues surrounding immigration reform, see Ediberto Román, *The Alien Invasion?*, 45 HOUS. L. REV. 841, 843-45 (2008) (discussing the issues surrounding the "mass invasion" of illegal immigrants) and Patricia Smith, *The Great Immigration Debate*, N.Y. TIMES UPFRONT, May 8, 2006, at 8, 8-9 (discussing the two common approaches to fixing the immigration system—the 700-mile fence along the southern border of the United States and the guest-worker program).

252. See, e.g., Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006). Although the Bill ultimately failed in the Senate, some of its less contentious pieces have resurfaced as Congress attempts to deal with concerns of illegal immigration and national security. See Julia Preston, *In Increments, Senate Revisits Immigration Bill: Provisions for Students and Farmworkers*, N.Y. TIMES, Aug. 3, 2007, at A1.

253. See Preston, *supra* note 252. For a fuller discussion of the DREAM Act, see Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2087-90 (2008).

individualized investigation into the authenticity of family relationships. Frequently, after a refugee has secured asylum, an attempt—whether legally or illegally—will be made to reunite with their families.<sup>254</sup> Since asylum seekers have an incentive to migrate to where they already have a social network of friends and family,<sup>255</sup> illegal immigration may increase as authentic families are not able to unify through legal means. Conversely, more families would likely be lawfully unified through the proposed amendment. Additionally, the proposed amendment will prevent, or at least decrease, the illegal immigration of the spouses of the direct victim of coercive family planning programs, who are unable to obtain asylum protection under the current legislation.

## VI. CONCLUSION

The United States recognizes that China's one-child policy is a brutal violation of a couple's human rights. In response, the IIRIRA, and subsequently section 601(a), were passed to protect those persecuted by the policy. But the BIA's latest interpretation of section 601(a) does not protect those asylum seekers prevented from getting married in China by the very family planning policies from which the statute is intended to provide relief. Since Chinese laws permit only legally married people to have children, traditionally married couples who seek to have a child are at the greatest risk of being persecuted. Amending the IIRIRA to extend per se refugee status and asylum protection to these spouses fleeing China's one-child policy is appropriate as it is in line with Congress's dual intent to protect the persecuted and preserve the family unit. This is not just an immigration issue; it is a human rights issue. Thus, the United States should reaffirm its commitment to protecting both direct victims of persecution and their spouses, and open the "golden door" for them.

*Sean T. Masson\**

---

254. See Demleitner, *supra* note 166, at 295.

255. See Caroline B. Brettell, *Theorizing Migration in Anthropology: The Social Construction of Networks, Identities, Communities, and Globalscapes*, in *MIGRATION THEORY: TALKING ACROSS DISCIPLINES* 107 (Caroline B. Brettell & James F. Follifield eds., 2000); Monique Lee Hawthorne, Comment, *Family Unity in Immigration Law: Broadening the Scope of "Family,"* 11 *LEWIS & CLARK L. REV.* 809, 811 (2007) (arguing that "the scope of the word 'family' as used in our immigration policy should be changed to include different culturally relevant models of 'family'").

\* J.D., 2009, Hofstra University School of Law. So many to thank, so little space . . . to Jaime Laginestra and Angela Burton, whose friendship and support through this process was invaluable. To Drew Gulley, Michael de Matos, Nicole Wright, and, in particular, Megan Canepari, for all of their editorial assistance. To my mentor, Daniel Greenwood, for inspiring me to write this Note. Finally, to my heart and soul, Merry and James, respectively. Words can't thank you all enough . . . but hopefully these will make you smile.