

THE ZERO-CHILD POLICY: HOW THE BOARD OF IMMIGRATION APPEALS DISCRIMINATES AGAINST UNMARRIED ASYLUM-SEEKERS FLEEING COERCIVE FAMILY PLANNING MEASURES

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INTRODUCTION

Most nations consider the right to bear children to be among the most cherished human rights. Enshrined by the United Nations in the Universal Declaration of Human Rights¹ and implied as a fundamental right embodied by the Fourteenth Amendment of the Constitution,² the right to bear chil-

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¹ Universal Declaration of Human Rights, G.A. Res. 217 A, art. XVI, cl. 1, U.N. Doc A/810 (Dec. 10, 1948) (“Men and women of full age . . . have the right to marry and to found a family.”).

² U.S. CONST. amend. XIV; *see Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535 (1942).

dren has united activists from across the political spectrum.³ Ostensibly for this reason, the United States has granted asylum to refugees who have proven that their native countries have persecuted them under coercive family planning policies since the passage of section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).⁴

Under United States immigration law, most asylum claims require proof of persecution based on political opinion, religion, or membership in a certain ethnic group.⁵ However, asylum applicants under section 601(a) need only prove that they have been victims of coercive family planning practices, not that their victimization was based on membership in a particular group.⁶ The statute is neutral with respect to the asylum-seeker’s country of origin. However, the purpose of the legislation, since its inception, has primarily been to aid victims of the coercive family planning measures that China has employed since it made it a goal, twenty-five years ago, to reduce the number of offspring of every woman to one.⁷

Scholars have examined the legitimacy and morality of China’s population control measures.⁸ Some have argued that basic human rights such as food and shelter cannot be provided to China’s citizens unless the country’s population growth is drastically curtailed, and that these coercive measures are perhaps the only means likely to succeed.⁹ Others have countered that

³ Both advocates for refugees and anti-choice groups have condemned involuntary population control practices. See Katherine L. Vaughns, *Retooling the “Refugee” Definition: The New Immigration Reform Law’s Impact on United States Domestic Asylum Policy*, 1 RUTGERS RACE & L. REV. 41, 82 (1998).

⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 601(a) (enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997), Pub. L. No. 104-208, 110 Stat. 3009, 3009-546, 3009-689 [hereinafter IIRIRA]; see, e.g., *In re C-Y-Z*, 21 I. & N. Dec. 915 (BIA 1997).

⁵ To be declared a “refugee” within the meaning of section 1101(a)(42)(A) of the Immigration and Nationality Act (“INA”), an asylum-seeker must have a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A) (2000).

⁶ The statute equated past persecution or fear of future persecution based on coercive methods of population control with persecution on account of political opinion. See IIRIRA § 601(a)(1), 110 Stat. at 3009-689 (codified at 8 U.S.C. § 1101(a)(42)(B) (2000)).

⁷ In 1979, at the same time that Deng Xiaoping instituted market reforms in China, the country began implementing what has come to be known as the “one-child” policy.” See Margaret Y.K. Woo, *Biology and Equality: Challenge for Feminism in the Socialist and the Liberal State*, 42 EMORY L.J. 143, 151, 166 (1993).

⁸ See, e.g., Christie N. Love, *Not In Our Country? A Critique of the United States Welfare System Through the Lens of China’s One-Child Law*, 14 COLUM. J. GENDER & L. 142 (2005); April Adell, Note, *Fear of Persecution for Opposition to Violations of the International Human Right to Found a Family as a Legal Entitlement to Asylum for Chinese Refugees*, 24 HOFSTRA L. REV. 789 (1996).

⁹ Cleo J. Kung, Comment, *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 (2000).

China's policies constitute appalling human rights violations, and that the United States should take a firm stance against them.¹⁰

China has come close to succeeding in its mission of reducing population growth into the low single digits.¹¹ To achieve its goal, China has employed a combination of social and economic incentives and punishments, including forcible sterilizations and abortions for those who fail to abide by the detailed set of laws prescribing when citizens may bear children.¹² The additional constraints China has placed on marriage have reduced birth rates even further.

While the language of the statute is silent about spouses of victims of coercive family planning measures, referring only to direct victims, the Board of Immigration Appeals ("BIA") has held that those whose husbands and wives have been victimized directly by coercive family planning practices should be allowed to "stand in [the] shoes" of their spouses for the purpose of qualifying for asylum.¹³ The BIA, however, has declined to expand the scope of coverage under section 601(a) beyond spouses—never explaining, beyond a basic policy choice, either the reasoning behind extending asylum coverage to spouses or the logic of denying asylum to non-marital partners.¹⁴ In many cases, the BIA has simply affirmed the ruling of the immigration judge ("IJ") without issuing an opinion.¹⁵

There is currently a split among several Courts of Appeals as to whether section 601(a) covers the non-marital partners of victims of forced sterilization or abortion.¹⁶ Whereas the Third,¹⁷ Fifth¹⁸ and Eleventh¹⁹ Circuits have affirmed denials of asylum to fiancés and boyfriends of women who have been involuntarily sterilized or forced to have an abortion, the

¹⁰ See, e.g., Adell, *supra* note 8.

¹¹ In 2004, according to a report published by the Council of Europe and Eurostat, China's population grew by only 0.6%. Gregor Kyi, *Population in Europe 2004: First Results*, JOINT COUNCIL OF EUROPE/EUROSTAT DEMOGRAPHIC DATA COLLECTION 4 (2005).

¹² See Mary H. Hansel, Note, *China's One-Child Policy's Effects on Women and the Paradox of Persecution and Trafficking*, 11 S. CAL. REV. L. & WOMEN'S STUD. 369, 373–74 (2002).

¹³ *In re C-Y-Z*, 21 I. & N. Dec. 915, 918 (BIA 1997).

¹⁴ See *Lin v. Gonzales*, 416 F.3d 184, 192 (2d Cir. 2005) ("[T]he BIA has never adequately explained its rationale for establishing *spousal* eligibility under IIRIRA § 601(a) . . ." (emphasis in original)).

¹⁵ See 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, 482 (2005) (describing how, under the BIA's 2002 streamlining regulations in 8 C.F.R. § 1003.1(e)(4), one member of the BIA can "issue an 'Affirmance Without Opinion' (AWO) if he finds that the immigration judge reached the right result . . . even if he finds shortcomings in the immigration judge's reasoning").

¹⁶ See *Chen v. Gonzales*, 418 F.3d 110, 111 (1st Cir. 2005) ("There is an active circuit split on this question of law.").

¹⁷ *Chen v. Ashcroft*, 381 F.3d 221 (3rd Cir. 2004) (finding fiancés of victims ineligible).

¹⁸ *Zhang v. Ashcroft*, 395 F.3d 531 (5th Cir. 2004).

¹⁹ *Wang v. Gonzales*, No. 05-11125, 2005 U.S. App. LEXIS 21251 (11th Cir. Sept. 28, 2005).

Ninth²⁰ and Seventh²¹ Circuits have granted asylum to men who—too young under China’s laws to officially marry their partners—married them in traditional Chinese ceremonies instead.²² The Second Circuit recently remanded three consolidated cases to the BIA concerning the eligibility of boyfriends and fiancés for asylum under section 601(a).²³ It has charged the BIA with fully explaining its reasoning for extending asylum to married partners and its rationale, if any, for denying similar protections to non-marital partners.²⁴

This Comment will look at existing United States statutory and case law and will discuss whether it is rational for courts to limit such asylum only to couples officially married under Chinese law, given that Congress has decided that all victims of China’s policies deserve asylum. This Comment proceeds in four parts. Part II.A provides an overview of China’s family planning policies and how they developed. Part II.B outlines the statutory evolution of asylum law as it relates to coercive family planning policies. Next, Part III will examine the circuit split on the issue of whether, in addition to spouses of victims of coercive family planning measures, non-marital cohabitating partners should also be eligible for asylum.

Finally, in Part IV, this Comment argues that limiting the application of section 601(a) to the legal spouses of directly victimized asylum applicants fleeing coercive family planning is an arbitrary construction of the statute. The exclusion of non-marital cohabitating partners is inconsistent with legislative intent, Congress’s condemnation of China’s population control policy, the principle of equal protection as it relates to the fundamental right to create a family, and the overall purpose of U.S. asylum policy.

I. BACKGROUND

A. *History of China’s Reproductive Policies*

The Chinese government has sought to control population growth in one direction or the other for over half a century, launching sweeping campaigns first to swell its ranks and later to slow its population explosion. After China’s population exceeded one billion, the state began a propaganda

²⁰ *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004).

²¹ *Zhang v. Gonzales*, 434 F.3d 993 (7th Cir. 2006).

²² As part of China’s effort to reduce fertility, it has unusually elevated minimum ages for marriage for both men (22) and women (20). See *Zhang*, 434 F.3d at 995. The provinces must enact their own regulations to effect the national goal of delayed marriage. See Law on the Population and Family Planning (P.R.C.), Order No. 63, art. 18 (Dec. 29, 2001) [hereinafter Family Planning Law], available at <http://www.unescap.org/esid/psis/population/database/poplaws/law%5Fchina/china%20pop%20and%20family%20planning.pdf> (last visited Nov. 15, 2006).

²³ *Lin v. Gonzales*, 416 F.3d 184 (2d Cir. 2005).

²⁴ *Id.*

campaign to limit births. Over time, it formalized its goals into laws regulating whether and when citizens could bear children, culminating in a national, comprehensive statute enacted in 2002.

1. *Population Policies Under Mao.*—The coercive family-planning methods that presently characterize Chinese practice date only to the 1970s and contrast markedly with the pro-growth policies Chairman Mao advanced following the Second World War.²⁵ For much of the two decades following the founding of the People's Republic of China in 1949, the government encouraged its citizens to bear as many children as possible to boost industrial strength and productivity.²⁶ Party leaders under Mao dismissed warnings from the international community about the dangers of such rapid population growth as anti-Chinese Western propaganda.²⁷

Although the government briefly softened its resistance to birth control measures after the first official census in 1953–54 yielded an unexpectedly high tally, Mao had decided by 1958 that a larger population was still needed to carry out the Great Leap Forward.²⁸ The population of China doubled while Mao was in power, to 1.2 billion people; in 1970, the average Chinese woman bore nearly six children in her lifetime.²⁹ An ensuing famine, however, led to a government-led birth control campaign, which by the middle of the 1970s became increasingly strict.³⁰

2. *Origins of Coercive Population Control Measures.*—The 1970s ushered in a period of informal population control coercion in China, culminating in recent years in a statutorily formalized nation-wide policy with perverse effects. In 1973, China's state council began promoting the slogan, "Late, Spacing, Few" or, in Chinese, "*wan xi shao*."³¹ This campaign, which lasted until 1979, urged couples to marry later, wait longer between the births of their children, and bear fewer children.³² At the same time, the national government assigned population-growth targets to local family-planning officials.³³ Although the government directed officials not to use

²⁵ See Xizhe Peng, *Population Policy and Program in China: Challenge and Prospective*, 35 TEX. INT'L L.J. 51, 53 (2000).

²⁶ See Love, *supra* note 8, at 149–50.

²⁷ See Nicole M. Skalla, Note, *China's One-Child Policy: Illegal Children and the Family Planning Law*, 30 BROOK. J. INT'L L. 329, 332 (2004). Mao, believing that big populations strengthened nations, liked to say, "every mouth comes with two hands attached." Carroll Bogert & George Wehrfritz, *Rethinking Family Values*, NEWSWEEK, Jan. 22, 1996, at 44.

²⁸ JOHN S. AIRD, *SLAUGHTER OF THE INNOCENTS: COERCIVE BIRTH CONTROL IN CHINA* 21, 23 (1990).

²⁹ See Bogert & Wehrfritz, *supra* note 27, at 44.

³⁰ See Love, *supra* note 8, at 150 (citing JOHN S. AIRD, *SLAUGHTER OF THE INNOCENTS: COERCIVE BIRTH CONTROL IN CHINA* 20, 21, 26, 27 (1990)).

³¹ Yilin Nie & Robert J. Wyman, *The One-Child Policy in Shanghai: Acceptance and Internalization*, 31 POPULATION & DEV. REV. 313, 315 (2005).

³² *Id.*

³³ See Love, *supra* note 8, at 157.

coercive techniques, it would have been impossible to achieve the required numbers through non-coercive means; as a result, sterilizations began in earnest.³⁴

In December 1982, the State Family Planning Commission made the policies of the previous decade official by announcing that one member of any couple with two children must submit to sterilization and terminate any further pregnancies.³⁵ For the next two decades, the central government employed a decentralized population-control system, delegating to each region the responsibility for limiting local fertility.³⁶ Although the central government still officially condemned coercive techniques, it punished local officials when the births in their areas exceeded their quotas.³⁷

On a national level, in 2002, China enacted its first formal, comprehensive population control law, the Population and Family Planning Law (“PFPL”).³⁸ The government designed this law to standardize implementation of the government’s restrictions on births, and empowered the National Population and Family Planning Commission (“NPFPC”) to enforce it, with assistance from the nationwide China Family Planning Association.³⁹ Each province is responsible for drafting and implementing its own regulations to help realize the goals of the PFPL, whether through quotas and targets, fines and disciplinary measures, or both.⁴⁰

While most provinces have ceased this practice, almost 20% of China’s provinces still require married women to apply for and receive government permission before becoming pregnant for the first time.⁴¹ In some counties, the shortage of available annual permits forces couples seeking to have a first child to wait at least a year before receiving permission to conceive.⁴² Those who have unapproved children must pay a “social compensation fee” of up to ten times their annual income.⁴³ Upon court approval, provincial family-planning officials may seize the property of couples who cannot, or

³⁴ *Id.*

³⁵ *Id.* at 151.

³⁶ Thomas A. Brown II, *Forced Abortions and Involuntary Sterilization in China: Are the Victims of Coercive Population Control Measures Eligible For Asylum in the United States?*, 32 SAN DIEGO L. REV. 745, 752 (1995).

³⁷ *Id.* at 752–53.

³⁸ See Family Planning Law, *supra* note 22.

³⁹ BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP’T OF STATE, S. RPT. 109-33, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2004, VOL. 1, at 682, 694 (Sept. 2005) [hereinafter COUNTRY REPORT] (submitted to the Senate Committee on Foreign Relations and the House Committee on International Relations).

⁴⁰ *Id.* at 695.

⁴¹ *Id.* Twenty-five out of thirty-one provinces have chosen to drop this requirement. *Id.*

⁴² *Id.*

⁴³ *Id.*; see also Hannah Beech, *Enemies of the State? How Local Officials in China Launched a Brutal Campaign of Forced Abortions and Sterilizations*, TIME, Sept. 19, 2005, at 58 (“The costs can be exorbitant for a peasant . . . \$365 or more for the first additional child in Linyi, around four times the average annual net income in this impoverished region.”).

will not, pay the fees.⁴⁴ Additionally, 30% of the provinces explicitly require women with unapproved pregnancies to undergo abortions, while another 43% call for “remedial measures,” often including abortions and sterilizations.⁴⁵

Chinese officials, sensitive to criticism from Western nations, call the one-child policy a misnomer.⁴⁶ However, while there are statutory exceptions to the rule, they are quite limited. Rural couples with only a daughter and urban couples who were both only children may apply to have a second child, and members of ethnic minorities in remote areas are allowed to bear more children.⁴⁷ Although the PFPL allows married couples to have only one child, certain regions permit couples to apply for permission to have a second child after the first is at least four years old.⁴⁸

3. *China’s Population-Controlling Marriage Restrictions.*—In addition to the direct population control methods discussed above, the restrictions China places on marriage represent another significant component of its population control system. Most countries set statutory minimum ages for marriage to ensure physical and emotional maturity as well as both spouses’ ability to consent.⁴⁹ China’s elevated standard, in contrast, is designed to further limit population growth.⁵⁰ China’s minimum marriage ages of twenty years for women and twenty-two years for men—codified in the Marriage Law of the People’s Republic of China—are easily the highest in the world.⁵¹ In addition, these figures are merely national floors; many provinces trying to meet local population growth targets have set minimums as high as twenty-three years for women and twenty-five years for men.⁵²

In China, those prohibited by age from marrying are prohibited from becoming pregnant as well.⁵³ It is illegal in almost every province for unmarried couples to bear a child, and single women who become pregnant may be forced to have abortions or pay very high social compensation

⁴⁴ COUNTRY REPORT, *supra* note 39, at 695.

⁴⁵ *See id.*

⁴⁶ Family Planning Law and China’s Birth Control Situation (Oct. 18, 2002), <http://www.china.org.cn/english/2002/Oct/46138.htm> (interview of Zhao Bingli, vice minister of the State Family Planning Comm’n (P.R.C.)).

⁴⁷ *Id.*

⁴⁸ COUNTRY REPORT, *supra* note 39, at 695.

⁴⁹ *See* Yuval Merin, *The Right To Family Life and Civil Marriage Under International Law and Its Implementation in the State of Israel*, 28 B.C. INT’L & COMP. L. REV. 79 (2005).

⁵⁰ *See* Skalla, *supra* note 27, at 334.

⁵¹ Marriage Law art. 5 (P.R.C. 1980) (effective Jan. 1, 1981; revised Apr. 28, 2001), available at <http://links.jstor.org/sici?sici=0030-851X%28198422%2957%3A2%3C266%3ATMLOTP%3E2.0.CO%3B2-7>.

⁵² *See* *Chen v. Ashcroft*, 381 F.3d 221, 223 (3d Cir. 2004) (noting that the petitioner aliens, nineteen and eighteen years of age, were told by their local government office that the minimum marriage age was twenty-five for men and twenty-three for women).

⁵³ COUNTRY REPORT, *supra* note 39, at 12.

fees.⁵⁴ Local officials require unmarried women to undergo frequent gynecological exams to ensure that they are not pregnant; if they are, they are required to have abortions.⁵⁵

B. Evolution of Asylum Law Related to Those Fleeing Coercive Family Planning Measures

United States asylum law has historically required applicants to ground their claims in past or future persecution based on membership in a racial, religious, political or ethnic group. Under this framework, China's population control policies did not rise to the level of persecution and thus did not allow general victims of coercive population control to gain asylum. However, the 1989 massacre at Tiananmen Square and the 1993 grounding off of Long Island of a ship filled with refugees fleeing coercive population control measures heightened U.S. awareness of China's policies. As a result, Congress passed an amendment in 1996 changing the definition of refugee for asylum purposes to include victims of coercive family planning, whether or not the persecution was based on a refugee's membership in a specific group.

1. Treatment of Coercive Family Planning Victims Prior to the Passage of IIRIRA § 601.—Under United States law, a person seeking asylum as a refugee under the Immigration and Nationality Act ("INA") must show either that they have "suffered past persecution on account of 'race, religion, nationality, membership in a particular social group, or political opinion,' or have a well-founded fear of future persecution on these grounds."⁵⁶ Prior to the enactment of the IIRIRA in 1996, United States immigration courts characterized China's population control method as a nationally uniform policy that did not rise to the level of persecution; thus, they consistently rejected it as grounds for asylum.⁵⁷

For almost two decades after China began implementing its one-child policy, the courts limited asylum on this basis to refugees who could claim that the Chinese government applied the policy to them in a discriminatory manner because of their membership in a class protected by the INA.⁵⁸ For instance, in 1989, the BIA held in *Matter of Chang* that an asylum-seeker must establish either that a coercive population control policy's application to him was facially persecutory, or that it was being applied to him selectively because of his race, nationality, or political opinion.⁵⁹ Immigration

⁵⁴ *Id.* In only one province in China, Jilin, an unmarried woman who "intends to remain single for life" may apply to have a child; this concession is a clear exception. *Id.*

⁵⁵ See, e.g., *Li v. Ashcroft*, 356 F.3d 1153, 1156 (9th Cir. 2004).

⁵⁶ *Qiu v. Ashcroft*, 329 F.3d 140, 148 (2d Cir. 2003) (quoting 8 U.S.C. § 1101(a)(42) (2000)).

⁵⁷ See, e.g., *Matter of Chang*, 20 I. & N. Dec. 38 (BIA 1989).

⁵⁸ *Id.*

⁵⁹ *Id.*

officials did not deem China's coercive population measures alone to rise to the level of persecution.⁶⁰ Therefore, merely proving that one had been subjected to a forced sterilization or an involuntary abortion was insufficient to qualify for asylum as long as the treatment suffered was part of a population control strategy that the government applied to the whole country indiscriminately.⁶¹

Only weeks after *Chang* was decided, the world watched in horror as Deng Xiaoping sent in thousands of troops to quash pro-democracy protesters, leading to the tragic massacre at Tiananmen Square on June 4, 1989.⁶² As China's previously unnoticed population control abuses leapt to the public eye, Congress tried to overrule *Chang* by adding the Armstrong-DeConcini Amendment to the Emergency Chinese Immigration Relief Act of 1989.⁶³ President Bush, however, promptly vetoed it for diplomatic reasons and directed Attorney General Meese in an executive order to provide "enhanced consideration" to those claiming asylum on coercive population control grounds.⁶⁴

In 1990, Attorney General Dick Thornburgh attempted to implement Bush's directive by promulgating an interim rule overruling *Chang*.⁶⁵ Six months later, however, the Immigration and Naturalization Service ("INS") excluded this interim rule from its final asylum regulations.⁶⁶ Ignoring the President's executive order, the BIA continued to apply *Chang* to all subsequent population control asylum petitions.⁶⁷

Chinese asylum claims again captured national attention when, just over four years after the Tiananmen Square incident, the freighter *Golden Venture* ran aground several hundred yards off of Long Island.⁶⁸ Most of the nearly 300 smuggled Chinese refugees on board claimed persecution under China's coercive population control policies.⁶⁹ In response, President Clinton announced that "Chinese nationals who could demonstrate that they

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See Kung, *supra* note 9, at 1299.

⁶³ Emergency Chinese Relief Act of 1989, H.R. 2712, 101st Cong. § 3(a) (1989); see also Motion to Instruct Conferees on H.R. 2712, Emergency Chinese Adjustment Act of Status Facilitation Act of 1989, 135 CONG. REC. H7945, H7946 (daily ed. Nov. 2, 1989) (statement of Rep. Hefley).

⁶⁴ Kimberly Sicard, Note, *Section 601 of IIRIRA: A Long Road to a Resolution of United States Asylum Policy Regarding Coercive Methods of Population Control*, 14 GEO. IMMIGR. L.J. 927, 933-34 (2000).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 935.

⁶⁹ See Richard T. Pieniak, *Refugees Still Held Captive By Red Tape: Amnesty Fight Lasts a Decade*, N.Y. DAILY NEWS, June 1, 2003, at 8.

had suffered or might suffer severe harm from coercive birth control policies” could remain, temporarily, in the United States.⁷⁰

2. *The Passage of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996.*

a. *The provisions of the statute.*—On September 30, 1996, President Clinton enacted the IIRIRA.⁷¹ One sentence at the end of section 601(a)—defining “refugee” for purposes of the Act—dramatically changed judicial treatment of asylum-seekers fleeing coercive family-planning measures:

For purposes of determination 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.⁷²

With this provision, Congress created a regulatory presumption of a “well founded fear of persecution,” past or future, for any asylum-seeker who has been the victim of coercive family planning measures or who reasonably fears that he or she will be subjected to them if they return to their country.⁷³

At the same time, however, the IIRIRA imposed a 1000-person annual cap on the number of people who could receive asylum under this provision.⁷⁴ This low ceiling on the number of refugees that the United States would accept under a particular provision of the INA was probably a compromise with anti-immigration factions to ensure the passage of the rest of the amendment.⁷⁵ In cases of asylum, the applicant is usually already in the United States, making administration of caps almost impossible and therefore not very meaningful.⁷⁶ Caps are otherwise used exclusively for immigration quotas in situations where those wishing to immigrate wait in their country of origin to receive refugee status.⁷⁷

b. *The legislative history of the statute.*—Congress passed section 601(a) through the efforts of congressmen and senators from across the

⁷⁰ Sicard, *supra* note 64, at 936.

⁷¹ See IIRIRA, *supra* note 4.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 8 U.S.C. § 1157(a)(5) (2000).

⁷⁵ See Vaughns, *supra* note 3, at 85. “Reportedly, Congress agonized over the exact wording of the statute’s language” out of concern for opportunistic asylum-seekers. *Id.* The cap of 1000 was originally set at 2000, although any cap on an asylum class is unusual. *Id.*

⁷⁶ *Id.* at 86.

⁷⁷ See INA § 207, 8 U.S.C. § 1157 (2000).

political spectrum who wanted to grant broad relief to victims of China's population control policies. Although an anti-abortion New Jersey congressman, Representative Christopher H. Smith, spearheaded section 601, activists on both sides of the aisle added their support to it.⁷⁸

During debate on the amendment, Rep. Smith addressed the concerns of those who feared that section 601(a) would open the floodgates to smugglers using false coercive population control claims.⁷⁹ Pointing out that “[p]eople who are willing to lie in order to get asylum will simply switch to some other story,” he argued that “[t]he solution to credibility problems is careful case-by-case adjudication, not wholesale denial.”⁸⁰ For the same reason, the House Committee emphasized that the success of a claim under section 601(a) would continue to depend on the credibility of the asylum-seeker.⁸¹

The text of the revised definition of “refugee” was “not intended to lower the evidentiary burden of proof for any alien, no matter how serious the nature of the claim.”⁸² Indeed, the asylum-seeker still bears the burden of proof of persecution, and while this is a difficult assessment for asylum officers and IJs, Congress believed that it was “no more so in the case of claims based on coercive family planning than in cases based on other factual situations.”⁸³ Thus, by retaining the same evidentiary burden for section 601(a) asylum-seekers that other aliens face, Congress limited the potential for fraud in its use.

c. The INS's interpretation of the statute.—Along with the Executive Office of Immigration Review, the INS has jurisdiction over asylum claims. Therefore, following the passage of IIRIRA, the General Counsel of the INS, David A. Martin, issued a memorandum on the new policy that the INS would adopt towards those seeking asylum on coercive family planning grounds.⁸⁴ Section 601(a), he explained, “relieves applicants of the burden of demonstrating a nexus between the persecution for their resis-

⁷⁸ Vaughns, *supra* note 3, at 82 (“The revised definition was arguably forged by a political coalition comprised of anti-abortion lobbyists from the religious right and the refugee advocates from the liberal left.”).

⁷⁹ Snakeheads, or human smugglers, 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 9, at 1275, 1286.

⁸⁰ 142 CONG. REC. H11,067 (daily ed. Sept. 25, 1996) (comments of Rep. Smith).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Memorandum from David A. Martin, Gen. Counsel, Immigration & Naturalization Serv., Asylum Based On Coercive Family Planning Policies—Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Oct. 21, 1996) [hereinafter INS Memo], available at <http://immigration.com/news/a-family-planning.html> (last visited Nov. 16, 2006).

tance to such practices and a status protected under the Refugee Act.”⁸⁵ Those eligible for asylum under the new legislation included applicants who had been “forced to abort a pregnancy, forced to undergo sterilization, or otherwise persecuted for refusal to undergo such a procedure.”⁸⁶

Similarly, a “well-founded fear” of being subjected to such treatment upon return to one’s country of origin would qualify under section 601(a) as a “well-founded fear of persecution on account of political opinion.”⁸⁷ Crucially, this memo also stated the INS’s opinion on spousal asylum: the agency “believe[s] that an applicant whose spouse was forced to undergo an abortion or involuntary sterilization has suffered past persecution, and may thereby be eligible for asylum under the terms of the new refugee definition.”⁸⁸

According to the INS memo, section 601(a) would not lower the standards of credibility for asylum applicants claiming persecution based on coercive population control measures.⁸⁹ Echoing the House Committee, Martin emphasized that INS attorneys and asylum officers should continue to carefully assess credibility “by attempting to elicit detailed testimony about the applicant’s past experiences, comparing the applicant’s live testimony with prior statements, examining any documentary evidence provided by the applicant, and considering any other relevant information about conditions in the applicant’s home country, region or town.”⁹⁰ In any case on appeal before the BIA, an individual wishing to qualify for asylum must provide “specific, detailed, and credible testimony, or a combination of detailed testimony and corroborative background evidence.”⁹¹ The weaker an applicant’s testimony is, the greater the corroborative evidence that is required.⁹²

The INS’s memo also addressed the ceiling for grants of asylum based on coercive family planning techniques. Although section 601(a) originally limited the number of asylum grants to 1000 people in any given year, Martin stated that “[t]he application of this limit would not affect an applicant’s entitlement to withholding of deportation based on coercive population control practices.”⁹³ For the next several years, although an official procedure for dealing with the cap was never imposed, asylum applicants who were granted conditional asylum beyond the 1000-person limit were placed on

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Qiu v. Ashcroft*, 329 F.3d 140, 150 (2d Cir. 2003) (quoting BIA opinion).

⁹² See INS Memo, *supra* note 84.

⁹³ *Id.*

waiting lists that sometimes stretched on for years.⁹⁴ Eventually, however, new legislation abolished the cap.

In May 2005, Senator Sam Brownback added a measure to the REAL ID Act of 2005 that finally eliminated the 1000-person-per-year cap.⁹⁵ In his remarks, Senator Brownback told his colleagues that he was “extremely pleased” that they were repealing the “arbitrary 1,000 annual cap” that the 1996 amendment had imposed on “refugees fleeing coercive population control.”⁹⁶ Part of the motivation for eliminating the cap may have been the diminution in numbers of asylum-seekers over the preceding years.⁹⁷ However, legislators also recognized that the high burden of proof already required of refugees sufficiently constrained the volume of successful asylum applicants.⁹⁸

II. JUDICIAL TREATMENT OF THE 1996 AMENDMENT

Soon after the passage of section 601(a), the BIA ruled in *In re C-Y-Z*⁹⁹ that both spouses of victims of coercive family planning and the victims themselves are *per se* eligible for asylum.¹⁰⁰ In the nine years since, the Courts of Appeals have heard dozens of appeals from subsequent BIA decisions on denials of asylum under section 601(a). The *Chevron* doctrine applies when courts review the interpretations of a statute by an agency charged with administering that statute.¹⁰¹ Step one of that doctrine requires the reviewing court to determine whether Congress “has directly spoken to the precise question at issue.”¹⁰² If Congress has not done so, instead leaving “a gap for the agency to fill,” then under step two, the court must decide whether the agency’s interpretation is “arbitrary, capricious, or manifestly contrary to the statute,” in which case it is not entitled to deference.¹⁰³

⁹⁴ Sicard, *supra* note 64, at 937.

⁹⁵ REAL ID Act of 2005, Pub. L. No. 109-13, div. B, title II, § 101(g)(2), 119 Stat. 231, 302, 305 (2005) (“Persons resisting coercive population control methods.—Section 207(a) of the Immigration and Nationality Act (8 U.S.C. 1157(a)) is amended by striking paragraph (5).”).

⁹⁶ 151 CONG. REC. S4838 (daily ed. May 10, 2005) (remarks of Sen. Brownback).

⁹⁷ *Id.* Sen. Brownback noted that asylum applications had decreased from 140,000 to slightly more than 30,000 a year, and that only around 10,000 people a year were actually granted asylum. *Id.*

⁹⁸ As Sen. Brownback commented, those “fleeing persecution must already meet a high burden of proof and undergo intensive security measures to obtain asylum.” *Id.* Recognizing that legitimate security concerns exist “in the post-9/11 environment,” he continued by pledging his commitment to “ensuring legitimate asylum-seekers a haven without imposing unrealistic barriers.” *Id.*

⁹⁹ *In re C-Y-Z*, 21 I. & N. Dec. 915 (BIA 1997).

¹⁰⁰ *Id.*

¹⁰¹ See *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996).

¹⁰² *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

¹⁰³ *Id.* at 843–44.

Because section 601(a) is silent on asylum claims derivative of spouses, the Circuits review the BIA decisions using *Chevron* deference.¹⁰⁴ In doing so, they have squarely rejected the attempts of children and parents of victims of coercive family planning to gain asylum under section 601(a).¹⁰⁵ However, the Circuits have split on whether to extend eligibility to boyfriends and fiancés of victims, given that China's marriage restrictions prevent many who wish to marry from doing so, and that unmarried couples are barred entirely from having any children.¹⁰⁶

A. Allowing Asylum for Victims of Spouses: In re C-Y-Z

In 1997, the BIA first held in *In re C-Y-Z* that the spouse of a forcibly sterilized asylum recipient should also be per se eligible for asylum himself, even if he was not accompanied by his spouse, since the act of sterilization was an act of persecution against both spouses.¹⁰⁷ More precisely, the court held that the man could “stand in his wife’s shoes.”¹⁰⁸

Although the court never fully explained this departure from the plain language of the statute in expanding the scope of this form of asylum, it is likely that the concession by the INS strongly influenced it. Indeed, the INS memo written following the passage of the amendment stated that “[i]n general, we believe that an applicant whose spouse was forced to undergo an abortion or involuntary sterilization has suffered past persecution, and may thereby be eligible for asylum under the terms of the new refugee definition.”¹⁰⁹ Further, in its appeal brief in *C-Y-Z*, the INS conceded that “the spouse of a woman who has been forced to undergo an abortion or sterilization procedure can thereby establish past persecution.”¹¹⁰

In its decision, the BIA noted broad agreement between both the petitioner and the INS that “forced sterilization of one spouse on account of a ground protected under the Act is an act of persecution against the other spouse.”¹¹¹ The court granted asylum due to the “agreement of the parties” on this issue, and because of the “regulatory presumption of a well-founded fear of future persecution that arises from a finding of past persecution and the absence of changed country conditions.”¹¹²

¹⁰⁴ Step two of the *Chevron* doctrine, which applies when Congress has not spoken specifically to a question, requires the court to defer to any reasonable agency interpretations. *Id.*

¹⁰⁵ See *Yuan v. Gonzales*, 416 F.3d 192 (2d Cir. 2005) (holding that petitioners whose daughters-in-law were subjected to involuntary abortions and sterilizations were not eligible for asylum under § 601(a)); *Chen v. Gonzales*, 417 F.3d 303 (2d Cir. 2005) (holding that the son of a forcibly sterilized woman was not eligible for asylum under § 601(a)).

¹⁰⁶ See *infra* Section II.B and accompanying footnotes.

¹⁰⁷ *In re C-Y-Z*, 21 I. & N. Dec. 915 (BIA 1997).

¹⁰⁸ *Id.*

¹⁰⁹ See INS Memo, *supra* note 84.

¹¹⁰ *In re C-Y-Z*, 21 I & N Dec. at 918.

¹¹¹ *Id.* at 919.

¹¹² *Id.*

Since that time, the immigration courts and the BIA have consistently held that spouses of victims of coercive family-planning policies are automatically as eligible for asylum as the victims themselves—whose claims depend largely on their credibility.¹¹³ However, neither the immigration courts nor the BIA have ever provided a textual explanation for this interpretation of section 601(a).

B. *Extending Asylum Eligibility Beyond C-Y-Z*

The circuit courts have differed sharply in the years since *C-Y-Z* on whether asylum eligibility under section 601(a) should extend not only to spouses of victims but to boyfriends and fiancés as well. The Ninth and Seventh Circuits have granted coverage to unofficial spouses, while the Third, Fifth and Eleventh Circuits have refused to expand the statute's reach. The Second Circuit, noting the split, has asked the BIA for further clarification on the reasoning behind its interpretation.

1. Ninth and Seventh Circuits Grant Coverage to Unofficial Spouses.—The Ninth Circuit, in its *Ma v. Ashcroft* decision, enunciated a broader scope of asylum eligibility under section 601(a).¹¹⁴ There, the petitioner, Ma, and his wife, Chiu, married in a non-legal traditional Chinese ceremony because Ma was under 22 years of age, the minimum age for legal marriage.¹¹⁵ When Chinese government officials discovered Chiu had become pregnant, they forced her to have an abortion.¹¹⁶ The IJ hearing the case granted Ma asylum, stating that “there does not appear to be a logical or statutory basis to rule that a common law husband cannot meet his burden of proof when his common law wife has had a forced abortion.”¹¹⁷ However, on appeal by the INS, the BIA revoked petitioner Ma's asylum, stating that without proof of a “legal” marriage, Ma could not satisfy his burden of showing he was “the spouse of the person who was allegedly forced to have an abortion.”¹¹⁸

The Ninth Circuit reviewed the BIA's denial of Ma's motion to reconsider, which had included further evidence that China's population-control-driven marriage restrictions directly caused his “inability to register his traditional marriage.”¹¹⁹ In its opinion, the Ninth Circuit panel examined the

¹¹³ See, e.g., *Qiu v. Ashcroft*, 329 F.3d 140, 144–45 (2d Cir. 2003) (holding that a petitioner may claim persecution under IIRIRA § 601(a) solely on the basis of his wife's forced sterilization); *He v. Ashcroft*, 328 F.3d 593, 603–04 (9th Cir. 2003) (holding that petitioner was per se eligible for asylum where his wife had undergone an involuntary sterilization).

¹¹⁴ See *Ma v. Ashcroft*, 362 F.3d 553 (9th Cir. 2004).

¹¹⁵ *Id.* at 555.

¹¹⁶ *Id.* at 556.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 557.

¹¹⁹ *Id.* Ma provided a report from the Chinese Communist Party stating that the prohibition against marriage before the age of twenty-two constituted an element of the country's population control sys-

case law on spousal asylum and noted that the male petitioners in *C-Y-Z* had all entered into traditional marriages that were not legal under Chinese law because at least one of the spouses was under the statutory minimum age.¹²⁰ In that case, however, the INS and the BIA never even mentioned the parties' failure to officially register their marriages.¹²¹

The Ninth Circuit held that China's restriction against underage marriages constituted "'an integral part' of China's coercive population control program."¹²² Further, the court held that Congress intended section 601(a) to "provide protection to individuals who suffer persecution, in the form of forced abortion, as a result of their violation of the population control program."¹²³ Therefore, the BIA's exclusion of underage husbands from asylum eligibility "contravene[d] the purpose and policies of the statutory amendment."¹²⁴

In addition to interfering with Congress's statutory intent, the BIA's preferred interpretation would be "at odds . . . with significant parts of our overall immigration policy" because it would lead to the "break-up of a family."¹²⁵ Calling the results of the BIA's construction "absurd and wholly unacceptable,"¹²⁶ the court extended the protections of section 601(a) to "husbands whose marriages would be legally recognized, but for China's coercive family planning policies."¹²⁷ Most other circuits have declined to follow the Ninth Circuit's reasoning in this controversial decision.¹²⁸

Recently, however, the Seventh Circuit in *Zhang v. Gonzales*¹²⁹ followed the Ninth Circuit in holding that a person who—barred by age restrictions from legally marrying—is married only in a traditional Chinese ceremony "nevertheless qualifies as a spouse for purposes of asylum."¹³⁰ The court described the BIA's position that asylum cannot be extended to non-legal spouses as "a Catch-22" when an asylum claim is "based on

tem, and a certificate from the Chinese government confirming that he and his wife had undergone "a wedding ceremony according to the rural customs." *Id.*

¹²⁰ *Id.* at 559 n.8.

¹²¹ *Id.* ("The evident purpose of these decisions is to fulfill Congress's goal in passing the amendments—to provide relief for 'couples' persecuted on account of an 'unauthorized' pregnancy and to keep families together.") (citing H.R. REP. NO. 104-469, pt. 1, at 174 (1996) (Conf. Rep.)).

¹²² *Id.* at 559. "The record . . . establishes that women are prohibited from having children prior to entering into a marriage sanctioned under the Chinese population control policy and that the policy against underage marriages was designed to reduce the period of time during which couples could legally reproduce." *Id.* at 559–60.

¹²³ *Id.* at 560.

¹²⁴ *Id.*

¹²⁵ *Id.* at 561; *see also* *Perales v. Casillas*, 903 F.2d 1043, 1051 (5th Cir. 1990); *Kaho v. Ilchert*, 765 F.2d 877, 879 n.1 (9th Cir. 1985); *Lau v. Kiley*, 563 F.2d 543, 545 (2d Cir. 1977).

¹²⁶ *Ma*, 361 F.3d at 559.

¹²⁷ *Id.* at 561.

¹²⁸ *See infra* Part II.B.2 and accompanying notes.

¹²⁹ *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006).

¹³⁰ *Id.*

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."¹³¹

In this case, the court pointed out, the woman had a "forcible abortion" precisely because of the marriage restrictions.¹³² Just as the petitioner's non-legal wife was the "direct victim" of the forcible abortion, the court deemed the petitioner a "victim" as well, because the abortion "deprived him of his unborn child . . . and forever deprived him of the ability to become a parent to that unborn son or daughter."¹³³ The court therefore vacated the BIA's denial of asylum and remanded the case to the Attorney General "to exercise his discretion."¹³⁴ To date, no other circuits have followed the Seventh and Ninth Circuits' decisions.

2. *Third, Fifth and Eleventh Circuits Deny Asylum to Non-Legal Spouses.*—The Third, Fifth and Eleventh Circuits have, in granting nearly absolute deference to the BIA, consistently upheld denials of asylum to non-legal spouses.

a. *The Third Circuit.*—The Third Circuit in *Chen v. Ashcroft*¹³⁵ in 2004 gave far more deference to the BIA in upholding a denial of asylum than the Ninth Circuit did in *Ma v. Ashcroft*.¹³⁶ In *Chen*, the asylum-seeker, unable to marry his fiancée because the law in their province set minimum ages of twenty-five for men and twenty-three for women, lived with her in his parents' house.¹³⁷ When Chen's fiancée became pregnant, they applied unsuccessfully for a license to marry.¹³⁸ Government officials discovered the pregnancy soon after and raided Chen's parents' home, beating Chen with sticks when he refused to reveal his fiancée's hiding spot.¹³⁹ At the time of Chen's fiancée's forced abortion, Chen was twenty, still five years from eligible marrying age.¹⁴⁰

The IJ granted Chen asylum, reasoning that although he and his fiancée had not married legally or in a traditional ceremony, their situation did "fall by analogy within *C-Y-Z*, if not by the letter."¹⁴¹ On appeal, the BIA reversed, writing only that the rule of *C-Y-Z* "had 'not been extended to in-

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 1001.

¹³⁴ *Id.* at 1002.

¹³⁵ *Chen v. Ashcroft*, 381 F.3d 221, 231–35 (3d Cir. 2004).

¹³⁶ *Id.*

¹³⁷ *Id.* at 223.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See id.*

¹⁴¹ *Id.*

clude unmarried partners” and that the beating Chen suffered at the hands of government officials did not constitute persecution.¹⁴²

Judge Alito upheld the BIA’s limitation of asylum eligibility to legally married couples on two grounds: congressional intent and Chevron deference.¹⁴³ First, as evidence that Congress wanted to “limit the scope of relief made available by the amendment,” he cited the 1000-person annual cap under section 601(a).¹⁴⁴ He further stated that “with the exception of forced abortions and sterilizations, the concept of ‘persecution’ is left completely undefined,” in the statute, and that this statutory silence demonstrates Congress’s “intent to delegate interpretive authority” to the BIA.¹⁴⁵

Second, Judge Alito concluded that the BIA’s “interest in promoting administrability and verifiability is sufficient to clear the low hurdle” of the second half of the *Chevron* standard, which forces courts to grant deference to reasonable agency interpretations of the statutes they administer.¹⁴⁶ Restricting the application of *C-Y-Z* to married persons, he held, “avoids difficult and problematic factual inquiries” and is therefore “reasonable.”¹⁴⁷ He also noted that “the marriage relation is used in so many areas of the law (income tax, welfare benefits, property, inheritance, testimonial privilege, etc.) that it would seem absurd to characterize reliance on marital status in *C-Y-Z* as arbitrary and capricious.”¹⁴⁸ While admitting that the plight of the plaintiff in *Chen* demonstrates that “*C-Y-Z* is underinclusive with respect to a narrow but sympathetic class,” he concluded that “a rule is not irrational just because it is underinclusive to some extent.”¹⁴⁹ He surmised that the court in *C-Y-Z* used marital status to identify those “whose opportunities for reproduction and child-rearing were seriously impaired” and those who experienced severe emotional trauma because of their spouse’s involuntary abortion or sterilization.¹⁵⁰

The court also criticized the Ninth Circuit’s opinion in *Ma v. Ashcroft*, writing, “If *Ma* meant to say that individuals who suffer under a coercive population program may be eligible for asylum even if their suffering (or feared suffering) is not proved or presumed to rise to the level of persecution, we emphatically disagree.”¹⁵¹ He further chastised the Ninth Circuit for even ruling on the eligibility of those married in traditional, but not offi-

¹⁴² *Id.*

¹⁴³ *Id.* at 223–24.

¹⁴⁴ *Id.* at 225.

¹⁴⁵ *Id.* at 232.

¹⁴⁶ *Id.* at 229.

¹⁴⁷ *Id.* at 222.

¹⁴⁸ *Id.* at 227 n.6.

¹⁴⁹ *Id.* at 230.

¹⁵⁰ *Id.* at 227.

¹⁵¹ *Id.* at 232–33.

cial, Chinese ceremonies, noting that Ma's official marriage prior to the time of the decision obviated the need to reach this question.¹⁵²

Since the *Ma* court found it “absurd and wholly unacceptable” to deny asylum to a person based solely on a consequence of a population control policy “expressly deemed by Congress to be oppressive and persecutory,”¹⁵³ the *Chen* court was concerned that immigration courts might grant asylum to any victim of coercive population control prevented from marrying by China's restrictions on marriage.¹⁵⁴ Judge Alito admitted that when the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* directed member countries to impose legislative minimums for marriage age, the purpose was to prevent the “betrothal of young girls before the age of puberty,” not to control the population of the state.¹⁵⁵ However, he saw “no basis for concluding that Congress's intent in amending § 1101(a)(42) was to afford relief to every person who is a victim of any rule or practice that forms a part of the Chinese population control program.”¹⁵⁶ In addition, unlike the jurisdictions that have acknowledged a circuit split on this question, Judge Alito characterized the holding in *Ma v. Ashcroft* as dicta.¹⁵⁷

b. The Fifth Circuit.—In a case decided the same year as *Chen*, the Fifth Circuit in *Zhang v. Ashcroft* affirmed the BIA's denial of asylum to the petitioner, whose “live-in” girlfriend had been forced to undergo an involuntary abortion.¹⁵⁸ The court distinguished the petitioner in this case from the successful petitioner in *Ma v. Ashcroft* by pointing out that Zhang had not even had an “informal” marriage with his live-in girlfriend, let alone a legally registered one.¹⁵⁹ Since the petitioner “lack[ed] spousal status,” the court looked for other “legally cognizable ‘resistance’”—which, under the language of the statute, would be sufficient to make him eligible for asylum—and held that “merely impregnating one's girlfriend is not alone an act of ‘resistance.’”¹⁶⁰

¹⁵² *Id.* at 231. Curiously, under this theory, if a couple were married even a day before the hearing, they would seemingly both be eligible for asylum.

¹⁵³ *Id.* at 232 (citing *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004)).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 230 n.12 (citing *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* art. 2, Dec. 9, 1964, 521 U.N.T.S. 231, 234).

¹⁵⁶ *Id.* at 232.

¹⁵⁷ *Id.* at 231 (“Because Ma's marriage had been recognized by the Chinese government by the time of the BIA's decision, it was unnecessary for the Ninth Circuit to reach the question whether the BIA can reasonably refuse to extend *C-Y-Z* to cases involving persons whom the Chinese authorities refuse to recognize as married.”).

¹⁵⁸ *Zhang v. Ashcroft*, 395 F.3d 531, 532 (5th Cir. 2004).

¹⁵⁹ *Id.* at 532 & n.2.

¹⁶⁰ *Id.* at 532 (emphasis in original).

c. The Eleventh Circuit.—The Eleventh Circuit followed the lead of the Third and Fifth Circuits by denying asylum to a petitioner who claimed that Chinese authorities had forced his girlfriend to have an abortion.¹⁶¹ In *Wang v. Gonzales*, the court rejected the petitioner’s attempt to analogize his situation to that of the petitioner in *Ma*.¹⁶² Wang argued that although his age prevented him from being “officially married,” he still had a “‘spousal relationship’ with his girlfriend.”¹⁶³ Noting that no “binding authority” existed as to whether asylum could be “imputed beyond a marital relationship” to a “common law spouse,” the court stated that most existing persuasive authority, other than the Ninth Circuit, held that it could not.¹⁶⁴ Therefore, the court denied asylum on that ground and on the petitioner’s other basis: that his mother had been subjected to an involuntary abortion when he was four years old.¹⁶⁵

By accepting the BIA’s extension of asylum to legally married spouses of coercive family planning victims while refusing to extend eligibility to unmarried partners, the Third, Fifth and Eleventh Circuits have drawn a firm—but overly rigid—line.

3. *Second Circuit Asks the BIA for Clarification.*—The Second Circuit confronted the BIA’s lack of reasoning in *C-Y-Z* when it decided *Lin v. Gonzales*, a consolidated case concerning the asylum eligibility under section 601(a) of non-marital partners of victims of coercive family planning policies.¹⁶⁶ The BIA had summarily affirmed the IJ’s adverse determinations against each petitioner.¹⁶⁷ Two of the petitioners claimed that Chinese officials subjected their girlfriends—at least one of whom was too young to marry—to involuntary abortions because they were pregnant while unwed.¹⁶⁸ The third sought asylum after his fiancée was forced to have two abortions and after officials threatened him personally with sterilization if she ever became pregnant again.¹⁶⁹

The court observed that the BIA’s summary affirmance of the IJs’ opinions in these three cases was based, at least in part, on *C-Y-Z*.¹⁷⁰ However, the court stated, the BIA had troublingly failed to explain in *C-Y-Z* why it had construed section 601(a) to confer asylum eligibility on spouses.¹⁷¹ Therefore, although every circuit court had for years accorded

¹⁶¹ *Wang v. Gonzales*, 152 Fed. Appx. 761, 769 (11th Cir. Sept. 28, 2005).

¹⁶² *Id.*

¹⁶³ *Id.* at 766.

¹⁶⁴ *Id.* at 767–69.

¹⁶⁵ *Id.* at 769.

¹⁶⁶ *Lin v. Gonzales*, 416 F.3d 184, 187 (2d Cir. 2005).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 186–88.

¹⁶⁹ *Id.* at 188–89.

¹⁷⁰ *Id.* at 188.

¹⁷¹ *Id.*

Chevron deference to the IJs' interpretation of section 601(a) to include spouses, the court in *Lin* decided to re-examine whether such deference was proper.¹⁷²

The court stated that an IJ's "summarily affirmed construction of the INA" is not "promulgated in the exercise of" the Attorney General's authority for two reasons.¹⁷³ First, while the Attorney General "expressly delegated rule-making authority to the BIA," it never gave such authority to IJs.¹⁷⁴ Because the opinions of IJs are not binding on each other, they do not "carry[] the force of law."¹⁷⁵ Second, when the BIA summarily affirms the decision of an IJ without issuing an opinion, a Court of Appeals need not extend *Chevron* deference to the BIA.¹⁷⁶ Under the "streamlining regulations" Congress passed to increase the efficiency of the BIA's operations, the BIA's summary affirmance of an IJ's decision indicates approval merely of the result, not necessarily the reasoning of that decision.¹⁷⁷ Because of this interpretation, and because neither the BIA nor IJs regard summary affirmances as binding, a court evaluating the reasonableness of a summary affirmance by the BIA "has no way of knowing that the BIA has, in fact, adopted the IJ's particular construction of a statute."¹⁷⁸

Satisfied that no *Chevron* deference was due the IJs' opinions it was reviewing directly, the court in *Lin* found that the decisions lacked even persuasive power under the lower standard for *Skidmore* deference.¹⁷⁹ Since the BIA did not "articulate a reasoned basis" in *C-Y-Z* for granting per se eligibility to spouses under section 601(a), the court held that "IJs cannot possibly advance principled—let alone persuasive—reasons to distinguish between" spousal eligibility under section 601(a) and "the eligibility of boyfriends and fiancés under that same statutory provision."¹⁸⁰

Therefore, the court in *Lin* remanded the consolidated case to the BIA, asking it to "more precisely explain its rationale for construing section 601(a) to provide that . . . the spouses of those directly victimized by coercive family planning policies are *per se* as eligible for asylum as those directly victimized themselves" and to "clarify whether, when, and why

¹⁷² *Id.*

¹⁷³ *Id.* at 189.

¹⁷⁴ *Id.* at 190 (citing 8 C.F.R. § 1003.1(g) (2004)).

¹⁷⁵ *Id.* at 189 ("Indeed, were we to accord *Chevron* deference to non-binding IJ statutory interpretations, we could find ourselves in the impossible position of having to uphold as reasonable on Tuesday one construction that is completely antithetical to another construction we had affirmed as reasonable the Monday before. Such a scenario cannot be countenanced in a system of law.").

¹⁷⁶ *Id.* at 190–91.

¹⁷⁷ *Id.* at 190 (citing 8 C.F.R. § 1003.1(e)(4) (2004)).

¹⁷⁸ *Id.* at 191.

¹⁷⁹ *Id.* (citing *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (holding that "those factors which give [the agency's interpretation] power to persuade, if lacking power to control," entitle agency decisions to a lesser form of deference)).

¹⁸⁰ *Id.* at 191.

boyfriends and fiancés may or may not similarly qualify as refugees pursuant to IIRIRA § 601(a).¹⁸¹ Essentially, it requested a more reasoned basis for the BIA's construction of the statute under administrative law principles.

At the same time, the court—admitting its suspicion that “the BIA’s analysis in *C-Y-Z* rested largely on the Immigration and Naturalization Service’s concession in that case”—emphasized that the court was “tak[ing] no stand” on whether section 601(a) can confer asylum eligibility on “spouses of those directly victimized by coercive family planning policies.”¹⁸² However, unless and until the BIA explains its rationale and provides a “reasoned basis” for that extension, the court stated that it could not determine whether that rationale “applies with equal logic and force to the eligibility of boyfriends and fiancés.”¹⁸³

In sum, by issuing an opinion in *C-Y-Z* with insufficient reasoning behind their statutory interpretation, the BIA has left a legacy of a decade of disagreement. Although there is a general consensus among the circuit courts that more peripheral family members should not receive asylum eligibility under section 601(a), sharp distinctions remain between the circuits that believe it is reasonable for the BIA to limit the extension of asylum to legal spouses and those that call such line-drawing entirely irrational.

III. ANALYSIS

The future of asylum claims under section 601(a) depends heavily on the outcome of the BIA's decision in the remanded case of *Lin v. Gonzales*. The BIA may take three possible directions. First, it is possible that, when they confront the underlying statute once more, they will retreat from granting per se asylum eligibility to legal spouses of victims of coercive population control measures, as they first did in *C-Y-Z*.¹⁸⁴ Second, the agency could choose to explain, in detail, why it interpreted the statute to extend only to legal spouses of victims when the plain language of the statute seems to cover only actual victims. Finally, the BIA may provide reasoning for the inclusion of legal spouses that applies with equal force to unmarried partners, as the Second Circuit mused in *Lin v. Gonzales*. The Ninth Circuit might find any explanation other than the third an absurd interpretation of the statute, in which case they would likely continue to extend coverage to both members of couples who would be married but for China's marriage restrictions. However, the other circuits, having granted *Chevron* deference consistently in the past, would be likely to follow the BIA no matter what conclusion it comes to.

¹⁸¹ *Id.* at 192.

¹⁸² *Id.* at 191.

¹⁸³ *Id.* at 192.

¹⁸⁴ See *In re C-Y-Z*, 21 I. & N. Dec. 915, 919 (BIA 1997).

The language of section 601(a) is silent on the question of spousal eligibility for asylum. Therefore, the BIA's interpretation of the statute—granting eligibility only to legal spouses and not to other partners of victims of coercive family planning—is not entitled to deference if arbitrary or capricious.¹⁸⁵ The Ninth and Seventh Circuits have held that the BIA's construction of the statute is just that.

The BIA's current interpretation of section 601(a) following *C-Y-Z* is contrary to legislative intent to protect all victims of coercive family planning for three reasons. First, it is in derogation of the United States immigration policy goal of reuniting families. Second, it fails to honor the fundamental human right to procreate. Finally, it cannot be justified on administrative grounds, as it is not an effective tool to combat fraud.

A. Honoring Legislative Intent to Protect All Victims of Coercive Family Planning

As the legislative history of section 601(a) makes plain, Congress's intent in passing the statute was to extend relief to married and unmarried couples who are victims of China's population control program.¹⁸⁶ Courts declining to extend *C-Y-Z* to unmarried couples have often stated that they do not believe Congress intended section 601(a) to extend relief to every victim of China's population control program.¹⁸⁷ However, even if true, it is difficult to understand how Congress could have intended to deny protection to those most commonly trapped by China's laws: those couples not allowed to marry and therefore not allowed to have *any* children under the population control program.

Evidence from the congressional hearings suggests that legislators intended section 601(a) to provide relief to everyone who suffered directly as a result of China's population control policies. During the debate on the passage of IIRIRA, Representative Smith characterized section 601(a) as one designed to “restore an important human rights policy that was in force from 1986 until 1994.”¹⁸⁸ His remarks reveal that he understood this legislation to protect not only victims of forced abortions and sterilizations, but victims of “other forms of persecution for resistance” to coercive family planning.¹⁸⁹ For instance, he urged caution about sending asylum seekers back to China “in light of evidence that a number of those sent back . . . since 1993 have been subjected to . . . forced labor, beatings, and other harsh treatment”—punishments often incurred by men, married or not, who violated population control policies.¹⁹⁰

¹⁸⁵ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

¹⁸⁶ See *infra* notes 188–92.

¹⁸⁷ See, e.g., *Chen v. Ashcroft*, 381 F.3d 221, 232 (3d Cir. 2004).

¹⁸⁸ 142 CONG. REC. H11,067, 24,796 (daily ed. Sept. 25, 1996) (comments of Rep. Smith).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 24,797.

Further, the language of the House Resolution shows no intent to limit relief to married couples. In fact, after describing the “excessive fines” and the governmental destruction of houses and belongings faced by “[c]ouples with unauthorized children”—couples whose marital status was not specified—the House Committee stated that “[t]he United States should not deny protection to persons subjected to such treatment.”¹⁹¹

Thus, Congress intended this amendment to provide asylum eligibility to anyone whose “human rights” were threatened by coercive family planning practices.¹⁹² The drafters of section 601(a) had in mind not only the protection of women who were victims of forced abortions or sterilizations, but also the protection of men whom Chinese officials would otherwise subject to corporal punishment or sterilizations for their role in unauthorized pregnancies. Since every non-marital pregnancy is illegal in China, men who impregnate women they have not legally married—often because of restrictive marriage age regulations—are even more vulnerable than married men.

It is likely that Judge Alito would have ruled the same way in *Chen v. Ashcroft* even if the case had come before him a year later, when he could no longer rely on the original 1000-person yearly cap to bolster his argument that Congress did not intend to provide relief to all those who suffer under China’s population laws.¹⁹³ It is true that Congress could have added language to the REAL ID Act of 2005 clarifying whether non-spousal partners should also be granted asylum under the Act. In light of the repeal of the cap, however, it is impossible to state that Congress did not intend to provide relief to unmarried couples, as well as married couples, with this law.¹⁹⁴

B. *Furthering the U.S. Immigration Policy Goal of Reuniting Families*

Since family unification has long been a primary policy goal of the INS and of the INA, the Ninth Circuit’s reliance in *Ma v. Ashcroft* on the long-established principle of keeping families together is correct and should be followed by the other circuits.¹⁹⁵ Indeed, as the court noted, following the BIA’s construction of section 601(a)—which excluded from asylum those prevented from marrying by China’s restrictive marriage laws—

¹⁹¹ H.R. REP. NO. 104-469, pt. 1, at 174 (1996) (Conf. Rep.).

¹⁹² *Coercive Population Control in China: Hearings Before the Subcomm. on Int’l Operations & Human Rights of the House Comm. on Int’l Relations*, 104th Cong. (1995).

¹⁹³ *Chen v. Ashcroft*, 381 F.3d 221, 232 (3d Cir. 2004).

¹⁹⁴ *Cf. Sutton v. United Airlines*, 527 U.S. 471, 484–85 (1999) (finding that Congress could not have intended to include under the ADA “all those whose uncorrected conditions amount to disabilities,” because that population, at 160 million, is far more numerous than the statutorily defined group of disabled Americans, which numbered 43 million). Thus, the inclusion, or in this case, repeal, of a number has substantive implications regarding the scope of an Act.

¹⁹⁵ *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004).

would lead to “absurd results—the break-up of the family unit.”¹⁹⁶ In construing the statute to extend per se asylum eligibility to non-“legal” spouses of victims of China’s population control measures, the court in *Ma* not only honored established policy values; it also adhered to important case law precedent.

In three cases from the 1970s, 1980s and 1990s, three different circuits came to very similar conclusions about the significance of family unification as an immigration policy objective.¹⁹⁷ First, in *Lau v. Kiley*, the Second Circuit addressed the question of whether the petitioner, a permanent resident alien from China, could obtain preferential visa status for his son, born out-of-wedlock in China.¹⁹⁸ INA § 203(a)(2) granted “spouses and unmarried children of aliens lawfully admitted for permanent residence ‘second preference’ in obtaining immigrant visas.”¹⁹⁹ Prior to the appeal, the district court had held that terms relating to the legitimacy of the child were “meaningless in the context of the Chinese legal system,” since at the time of the petitioner’s son’s birth in China, the relevant Chinese law held that all births were “legitimate.”²⁰⁰

Further, since the “foremost policy” behind the preference system of visas was “the reunification of families,” the district court held that it was “sufficient if a petitioner [was] able to prove the existence of the requisite family relationship” even if he was not married.²⁰¹ The Second Circuit affirmed this holding and remanded to the BIA to determine if the evidence was sufficient to show that the petitioner was the father of the man he claimed as his son.²⁰²

Next, in *Kaho v. Ilchert*, where the petitioners were adopted by a cousin under “customary” tradition in Tonga after the death of their mother, the Ninth Circuit addressed the question of whether such adoptions were valid for immigration purposes.²⁰³ The court noted that the BIA had, in the past, held that it was unnecessary for an adoption to be “recognized by a juridical act” to be valid and pointed out that its contrary position in the case at issue was inconsistent with the purpose of the INA, which is “to reunite families.”²⁰⁴

¹⁹⁶ *Id.* at 561.

¹⁹⁷ See *Lau v. Kiley*, 563 F.2d 543 (2d Cir. 1977); *Kaho v. Ilchert*, 765 F.2d 877 (9th Cir. 1985); *Perales v. Casillas*, 903 F.2d 1043 (5th Cir. 1990), *vacated on other grounds*, 950 F.2d 1066 (5th Cir. 1992).

¹⁹⁸ 563 F.2d at 546.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 547.

²⁰¹ *Id.*

²⁰² *Id.* at 552.

²⁰³ 765 F.2d 877, 879 (9th Cir. 1985).

²⁰⁴ *Id.* at 885.

Finally, in *Perales v. Casillas*, petitioners entered the country illegally to join their wives, who were United States citizens.²⁰⁵ There, the district court found that deporting them would be “contrary to one of the central purposes of the immigration laws—family reunification.”²⁰⁶

As this trio of cases demonstrates, keeping families together has long been a primary objective of United States immigration law. Admittedly, unlike most of the asylum-seekers under section 601(a), the petitioners in *Lau* and *Kaho* were children, and those in *Perales* were spouses of U.S. citizens; it is arguable, therefore, that they are more likely to gain citizenship than older petitioners. However, since one of the purposes of section 601(a) is to preserve the right to future offspring, cohabitating partners confronted with forced abortions or involuntary sterilizations must receive the same favorable consideration as spouses under section 601(a).

Of course, jurists such as Judge Alito would like to confine the definition of a family to a legally married couple and their children; in his opinion in *Chen v. Ashcroft*, he proclaimed 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.²⁰⁷ However, there is another, far simpler standard that asylum applicants could be required to meet. In lieu of a marriage certificate, unmarried applicants could simply prove their cohabitation by producing a household registry, an official document listing all residents of a dwelling, which the Chinese government requires citizens to submit every year.²⁰⁸

C. *The Right to Procreate as a Fundamental Right*

The right to procreate, canonized in international treaties and proclamations and in the case law of many countries, should not belong only to those who are legally married under their country’s laws. While circuit courts have universally followed *In re C-Y-Z*’s seminal interpretation of section 601(a), they have apparently skipped over the insightful concurrence of BIA Member Lory D. Rosenberg.

She noted that “[t]he right to privacy, the right to have a family, the right to bodily integrity, and the right to unfettered reproductive choice are fundamental individual rights, recognized domestically and internationally.”²⁰⁹ She further observed that these rights are “found not only in United States constitutional law, but also in the international human rights standards reflected in the Refugee Act of 1980 . . . Article 16(1) of the Universal Declaration of Human Rights . . . [and] . . . the International Covenant

²⁰⁵ 903 F.2d 1043, 1046 (5th Cir. 1990).

²⁰⁶ *Id.*

²⁰⁷ 381 F.3d 221, 229 (3d Cir. 2004).

²⁰⁸ See *Qiu v. Ashcroft*, 329 F.3d 140, 150 (2d Cir. 2003).

²⁰⁹ *In re C-Y-Z*, 21 I. & N. Dec. 915, 921 (BIA 1997).

on Civil and Political Rights.”²¹⁰ Rosenberg emphasized that procreative rights provide the foundation for granting asylum to both members of a couple fleeing coercive population control measures, even when those measures only directly victimized one member of the couple.²¹¹

One of the earliest cases recognizing the right to reproduction in the United States was *Skinner v. Oklahoma ex rel. Williamson*.²¹² There, the jury convicted the defendant of three felonies and the judge ordered him to be sterilized.²¹³ When the defendant claimed that Oklahoma’s Criminal Sterilization Act violated the Equal Protection Clause of the Fourteenth Amendment, the Court stated that reproduction is “one of the basic civil rights of man,”²¹⁴ a right “which is basic to the perpetuation of a race.”²¹⁵ Because “procreation” was deemed “fundamental to the very existence and survival of the race,” any classification that infringed on this right for some people but not others must pass strict scrutiny.²¹⁶

Opponents of extending asylum eligibility to non-“legal” spouses would likely argue that the INS’s determination of whether or not to grant asylum to Chinese refugees of coercive family planning is not a classification that infringes on its subjects’ rights. While it is true that the actions of the Chinese government, not the INS, have violated the asylum-seekers’ reproductive civil rights, *Skinner* demonstrates the centrality of the right to procreate.

This, in turn, bolsters the Ninth Circuit’s argument in *Ma* and the Seventh Circuit’s argument in *Zhang*: It is absurd to follow a classification system that splits couples who have endured either forced abortions or sterilizations when that persecution was accompanied by a parallel restriction on marriage. Judge Alito’s reliance in *Chen v. Ashcroft* on the use of the “marriage relation” in areas of the law such as “income tax, welfare benefits, property, inheritance, [and] testimonial privilege,” to justify the use of the marital status distinction rigidly ignores the restrictions in China that make marriage unattainable for many who wish to marry.²¹⁷ In addition, the fact that a classification is not arbitrary in some areas of law does not mean that it can never be arbitrary no matter where it is employed.

Judge Alito also argued in *Chen* that it would be reasonable for the BIA to assume that “forced abortions and sterilization procedures tend to

²¹⁰ *Id.* at 921–22 n.2.

²¹¹ *Id.* at 926 (“It not only constitutes persecution for the asylum applicant to witness or experience the persecution of family members, but it serves to corroborate his or her own fear of persecution.”).

²¹² 316 U.S. 535, 541 (1942).

²¹³ *Id.* at 537.

²¹⁴ *Id.* at 541.

²¹⁵ *Id.* at 536.

²¹⁶ *Id.* at 541. Although the Court failed to condemn all forms of eugenics, it held that sterilization may not be applied unevenly to those who committed certain crimes while those who committed comparably grave crimes escape the scalpel. *Id.*

²¹⁷ *Chen v. Ashcroft*, 381 F.3d 221, 227 n.6. (3d Cir. 2004).

have a more severe impact on spouses than on unmarried partners.²¹⁸ Upon even slight consideration, this groundless assertion makes little sense. Considering that many of the petitioners in coercive family planning-based asylum claims are unmarried only because of China's legal restrictions against marriage, it is difficult to see how their involuntary legal status would diminish their pain at the injury of their partner. Using marriage as a proxy for suffering is capricious and does nothing to further the objectives of section 601(a).

A fundamental human right does not become less fundamental when it is applied to non-legally married couples. Their right to bear children is violated no less than the right of a married couple when subjected to involuntary population control measures. The BIA should therefore make non-legally married, cohabitating partners of victims of coercive family planning, whether married in traditional Chinese ceremonies or not, as per se eligible for asylum as their legally married counterparts have been since *C-Y-Z*.

D. Using an Appropriate Standard of Proof to Combat the Potential for Fraud

Since the standard of proof for unmarried asylum applicants claiming persecution on coercive family planning grounds need be no lower than that used for married applicants, combating fraud is not a rational justification for excluding non-marital partners from asylum. Opponents of expanding asylum to non-marital partners often cite the potential for fraud inherent in section 601(a). Merle Goldman, a professor of Chinese history at Boston University and a researcher at Harvard's Fairbank Center for East Asian Research, for example, believes that the "potential for abuse is huge" with Section 601 in general.²¹⁹

Opponents note the frequency with which snakeheads²²⁰ coach the people they smuggle into the United States to say they are victims of coercive family planning.²²¹ Those who wish to keep asylum limited argue that an immigration provision already ripe for fraud becomes even more so when opened up to unmarried men—traditionally the largest group of Chinese immigrants.²²² Indeed, in the first five years after Congress passed Section

²¹⁸ *Id.* at 228–29.

²¹⁹ 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.

²²⁰ See *supra* note 79 and accompanying text, stating that snakeheads are professional smugglers who receive exorbitant payments from the friends and relatives of their customers once they reach the United States.

²²¹ See Kung, *supra* note 9, at 1306.

²²² See, e.g., *Chen v. Ashcroft*, 381 F.3d 221, 228 (3d Cir. 2003); Wen, *supra* note 219.

601, approximately three quarters of those Chinese immigrants granted asylum under its provisions were men.²²³

However, one reason for the disparity in the numbers of men and women being granted asylum is that men are often the first members of a couple or a family to immigrate in order to establish themselves and find work before their loved ones join them.²²⁴ As Lory D. Rosenberg noted in her concurrence in *C-Y-Z*, it is not unusual for men to precede their families in immigrating; this has been the practice for decades, from those fleeing famine to those escaping civil wars or religious persecution.²²⁵ Further, if critics are anxious about unmarried men making false section 601(a) claims, they will likely find it difficult to explain why a fraudulent, unaccompanied male asylum-seeker is any more credible if he is married than unmarried.

Those who warn that allowing non-legally married partners to gain asylum along with their fiancées will allow a flood of deceptive claims to succeed should take comfort in the extraordinarily high standard of proof required in these cases. In fact, in *Qiu v. Ashcroft*, the Second Circuit criticized the BIA's standard of proof as being so high that it "enable[d] the administrative decisionmaker to reject whichever applicants that fact-finder happen[ed] to disfavor."²²⁶ The court quoted the BIA's decision as stating that an asylum-seeker must provide "[s]pecific, detailed and credible testimony, or a combination of detailed testimony and corroborative background evidence."²²⁷

In *Qiu*, the BIA criticized the petitioner for failing to produce his children's birth certificates; they also noted with disapproval that, although he had provided a Certificate of Sterilization for his wife, he had not sufficiently proven that she was sterilized against her will.²²⁸ When Qiu was asked whether his wife "wanted to be sterilized," he responded that she was "taken away by force" by government birth control officials.²²⁹ The Second Circuit pointed out that the BIA had not even established whether birth certificates, which are easily obtained in an affluent Western society, were even available in Qiu's province.²³⁰

The Second Circuit argued that the BIA's standard in *Qiu*, which allowed them "to rule against a petitioner who fails to anticipate the particular

²²³ Wen, *supra* note 219.

²²⁴ *Id.*

²²⁵ *In re C-Y-Z*, 21 I. & N. Dec. 915, 927 (BIA 1997) (Lory D. Rosenberg, Board Member, concurring) (noting that, "[i]n an ideal world, perhaps she who has suffered the more egregious physical persecution should be the first to leave the zone of danger and be afforded refuge," but historically, "the husband and father forges the way for the wife and children, who follow when he has established a place to live and a means to support them").

²²⁶ 329 F.3d 140, 151–52 (2d Cir. 2003).

²²⁷ *Id.* at 150.

²²⁸ *Id.*

²²⁹ *Id.* at 151.

²³⁰ *Id.* at 154.

set of details that the fact-finder desires,” was so elastic that it was really “no standard at all.”²³¹ Testimony is overly vague if it fails to “identify facts corresponding to each of the elements of one of the ‘refugee’ categories of the immigration statutes.”²³² Under section 601(a), therefore, the asylum-seeker in *Qiu* had to specifically allege “(a) that his wife was forced to be sterilized against her will, and (b) that the agents of coercion were government birth control officials.”²³³ It was sufficient for IJs concerned about the credibility of an asylum applicant, the court said, “to pose questions aimed at eliciting inconsistent or inherently implausible statements.”²³⁴

Nevertheless, even after the BIA decided *Qiu*, the BIA retained a stringently elevated standard for specificity of testimony.²³⁵ Thus, while requiring an officially registered marriage as a prerequisite for asylum under section 601(a) probably diminishes the number of applicants able to meet their burden of proof, any arbitrary classification will do the same. To claim that fraud deterrence justifies the distinction, however, is difficult, if not impossible, to credibly support.

CONCLUSION

By changing the statutory definition of refugee in 1996 to provide special consideration to one particular group of asylum-seekers—Chinese victims of coercive population control methods—Congress took a very unusual, and very drastic, step. The United States is unable to grant asylum to every applicant who wishes to receive it. Without a doubt, there are groups of people throughout the world facing equal, if not more serious, persecution that does not fit into the ordinary categories allowed under the definition of a refugee. The reasons for this special exception probably lie somewhere on the spectrum between humanitarianism and politics; those supporting human rights and those strongly opposed to abortion formed an alliance of convenience to pass the legislation.²³⁶

The BIA’s current interpretation of section 601(a), based on its decision in *C-Y-Z*, excludes from coverage those asylum-seekers prevented from getting married in China by the very system of population control from which the statute is intended to provide relief. Since Chinese laws permit only married people to have children, unmarried couples are at the greatest risk of being victimized by coercive family planning measures. Therefore, immigration courts must be more—not less—sensitive to their

²³¹ *Id.* at 151.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 152 n.6.

²³⁵ *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 was not challenged, the BIA still found the documentary and testimonial evidence insufficient. *Id.* at 86.

²³⁶ *See supra* note 78.

claims. In its decision on remand of *Lin v. Gonzales*, the BIA should examine honestly the legislative history of section 601(a), take the fundamental human right to procreate into greater consideration, and further the United States immigration policy goal of uniting families. If it does so thoroughly, the clear result is to expand the BIA's reading of section 601(a) to cohabitating partners of victims of coercive family planning as well as legal spouses.

In today's political climate, some judges are not likely to cede any ground on issues relating to marriage, and it is possible that some circuits that now grant *Chevron* deference to the BIA's interpretation of section 601(a) would cease to do so if the BIA expanded its reading of the statute. However, depending on political pressure from another sector of the conservative base—anti-abortion activists—more circuits may soon follow the Ninth Circuit's decision in *Ma* and the Seventh Circuit's in *Zhang*. In doing so, they would end a perverse interpretation of the law that contravenes congressional intent, U.S. immigration policy, and the fundamental rights of all people, married or not, to have children.

