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# A Compromise Solution to Prevent Fraudulent Claims Under IIRIRA Section 601(a)

## A SYSTEM OF CONDITIONAL GRANTS

### INTRODUCTION

A young Chinese woman is caught with fake travel documents at John F. Kennedy Airport. Later, she recounts her experience:

I told [the immigration official], as instructed by my snakehead,<sup>1</sup> "I am married. I already have a child, and I am now pregnant. The Chinese government was about to force me to have an abortion," and so on and so forth. It was really a joke. I was not even married. They took my fingerprints and released me.<sup>2</sup>

Fraudulent stories regarding China's coercive population measures, just like the story told above, are all too common at the borders of the United States. Although, in a strange turn of events, it is usually men, rather than women, who are telling them.<sup>3</sup> The problem has arisen as a result of legislation intended to provide a solution for an extremely serious human rights concern in China, which has instead often been used as a tool to defraud the United States into granting asylum benefits to undeserving aliens.

In 1996, after facing years of strong social and political pressure to help those persecuted under China's family planning methods,<sup>4</sup>

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<sup>1</sup> Those who are in charge of Chinese human smuggling are called snakeheads. 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, 1274 (2000).

<sup>2</sup> *Id.* at 1306-07.

<sup>3</sup> See Paul Sperry, *Chinese Aliens Flock to O'Hare: Immigrants with Bogus Asylum Claims Flooding America's Busiest Airport*, WORLDNETDAILY, Feb. 6, 2003, available at [http://worldnetdaily.com/news/article.asp?ARTICLE\\_ID=30903](http://worldnetdaily.com/news/article.asp?ARTICLE_ID=30903); see also Elisabeth Rosenthal, *Chinese Town's Main Export: Its Young Men*, N.Y. TIMES, June 26, 2000 (discussing the fact that since 1990, approximately 80% of the middle-age men in one Chinese town have left for the West, usually for the United States).

<sup>4</sup> Kimberly Sicard, *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, 932-36 (2000). Sicard describes the increased social pressure on the United States government arising after pro-democracy rallies in Tiananmen Square were stifled by 150,000 Chinese troops in 1989 and after a freight ship named the *Golden Venture* ran aground in New York in 1993 carrying 276 Chinese refugees, of which 90% filed for asylum relief based on China's One-Child Policy. She also discusses the political pressure coming from both human rights advocates and pro-life activists. *Id.*

Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA” or “Act”).<sup>5</sup> The aim of section 601(a) of the Act, although not explicitly stated, was to provide relief to victims of China’s coercive population control practices.<sup>6</sup> To accomplish this purpose, section 601(a) broadened the definition of “refugee”<sup>7</sup> to include those who have been forced to undergo an abortion and/or sterilization, or who have been persecuted for any other resistance to a country’s population control methods.<sup>8</sup> While it is undisputed that section 601(a) grants per se refugee status to those claimants who are the *direct* victims of persecution under the population control policies, there is great disagreement among the United States Courts of Appeals over whether the same relief should be given to *indirect, physically unharmed, partner* victims *solely* on the basis of their partner’s persecution. This disagreement largely stems from a decision rendered by the Board of Immigration Appeals (“BIA”), the administrative agency charged with implementing section 601(a), one year after section 601(a)’s enactment. In *In re C-Y-Z-*, the BIA held that section 601(a) also gives the “spouse”

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<sup>5</sup> Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.).

<sup>6</sup> Sicard, *supra* note 4, at 927 (“Although Congress wrote the statute to apply to any country employing coercive methods of population control, China and the One Child Policy are clearly the statute’s subjects.”); *see also* Thomas L. Hunker, *Generational Genocide: Coercive Population Control as a Basis for Asylum in the United States*, 15 J. TRANSNAT’L L. & POL’Y 131, 140 (2005-2006). In fact, at the time section 601(a) was adopted, “China [was] the only country reported to have mandatory population control policies.” 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, 86 (1998-1999).

<sup>7</sup> 8 U.S.C. § 1101(a)(42) originally read:

The term “refugee” means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation...may specify, any person who is within the country of such person’s nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

*Id.* IIRIRA’s section 601(a)(1) expanded this definition to read:

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.

8 U.S.C. § 1101(a)(42).

<sup>8</sup> 8 U.S.C. § 1101(a)(42).

of a persecuted person per se qualification for refugee status.<sup>9</sup> This holding and the subsequent Courts of Appeals decisions interpreting it have paved a path by which indirect male partner victims can easily qualify for asylum relief under section 601(a). In doing so, these decisions have opened the door for widespread abuse by many men who are using false claims based on the alleged persecution of their female partner to qualify as refugees in the United States.

This Note, through exploration of the humanitarian crisis in China and the U.S. government's response to it, argues that new legislation is required in order to clearly address the seriousness of the Chinese birth control practices and the justifiable U.S. immigration concerns of limiting fraudulent refugee claims, both of which have been muddled by the courts' inconsistent attempts to balance these somewhat conflicting objectives. Part I of this Note gives a brief history of China's population control policies. Part II discusses the U.S. refugee system in general, and how section 601(a) of the IIRIRA has changed this general scheme. Part III discusses the Courts of Appeals' interpretations of the section 601(a). Finally, Part IV begins by explaining how some of these courts' broad interpretations of the scope of section 601(a) have allowed many men to fraudulently enter into the United States based on the alleged persecution of their female partners. Part IV then goes on to suggest that a legislative amendment that creates a system of conditional grants of refugee status would serve the dual purpose of benefiting the true victims of the coercive family planning methods, as section 601(a) was intended to do, while also deterring these fraudulent claims by indirect male victims.<sup>10</sup>

## I. CHINA'S ONE-CHILD POLICY

The People's Republic of China ("China") has a lengthy, and rather contradictory, history of regulating its population growth. From

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<sup>9</sup> *In re C-Y-Z*, 21 I. & N. Dec. 915, 918-19 (BIA 1997) ("We find that the applicant in this case has established eligibility for asylum by virtue of his wife's forced sterilization.").

<sup>10</sup> See Karen Y. Crabbs, *United States Domestic Policies and Chinese Immigrants: Where Should Judges Draw the Line When Granting Political Asylum?*, 7 FLA. J. INT'L L. 249, 250 n.3 (1992). Crabbs illustrates the delicacy of deciding whether to grant asylum:

For political reasons, a country which grants foreigners asylum must be careful that such action does not appear too judgmental and thus undermine international relations with the country from which the applicants are fleeing. A country must be careful when granting immigrants asylum for economic reasons as well. Many American economists advocate an extremely selective policy of asylum determination. They view incoming immigrants simply as possible moneymakers or moneytakers. If we take the former, we will enrich our country; but if we choose the latter, we end up a poorer nation because the immigrant will subtract value from our country. Other arguments for limiting immigration into the United States include the effect the additional population would have on the environment or on unemployment and other social problems. At the current rate of birth but *without* large-scale immigration, the United States could maintain a stable population.

*Id.* (internal citations omitted).

the country's founding in 1949 and throughout the 1950s, the central government, rather than trying to limit population growth, actively encouraged it.<sup>11</sup> In fact, the Chinese government was convinced that a large population was necessary to meet the production needs of the socialist country.<sup>12</sup> In addition to governmental concerns, Chinese citizens, few of whom benefited from social security or pension plans, had many children to ensure their well-being in old age.<sup>13</sup> Moreover, in rural areas, children were (and still are) often needed for increased labor power on the farms.<sup>14</sup> These factors, combined with the traditional desire to carry on the family name,<sup>15</sup> led to rapid population growth in the country. By 1970, most Chinese women gave birth to six children in their lifetime.<sup>16</sup> In light of this population boom, the central government was suddenly faced with "massive starvation" and "economic and social stagnation."<sup>17</sup> These concerns led the government to create the "wan, xi, shao" campaign, translated as "later, longer, fewer," which encouraged couples to marry later, wait longer after marriage to have children, and have fewer children in total.<sup>18</sup> In 1979, the Chinese government determined that more drastic measures were required, and so it adopted a comprehensive family planning policy to help combat population

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<sup>11</sup> 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). China was "convinced that a large population was favorable for production and socialist construction." The central government at this time completely disregarded warnings from world-renowned economists concerning the dangers of such a policy of unchecked population growth. Sara E. Stewart, *Lin v. United States Dep't of Justice: The Circuits Split on the Issue of Whether Marital Status is Dispositive of Asylum Eligibility in the United States for Individuals Who Suffer Persecution Under China's Coercive Family Planning Practices*, 59 ME. L. REV. 169, 172 (2007).

<sup>12</sup> Zhang, *supra* note 11. Mao Zedong has stated: "It is a very good thing that China has a big population . . . . Of all the things in the world, people are the most precious." 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, 149 (2005) (quoting JOHN S. AIRD, *SLAUGHTER OF THE INNOCENTS: COERCIVE BIRTH CONTROL IN CHINA* 22 (1990)).

<sup>13</sup> Sicard, *supra* note 4, at 928.

<sup>14</sup> *Id.*; see also *Grey Areas in China's One-Child Policy*, BBC NEWS, Sept. 21, 2007 [hereinafter *Grey Areas*], available at <http://news.bbc.co.uk/2/hi/asia-pacific/7002201.stm> ("Rural families also want boys so they can help with farm work.").

<sup>15</sup> Sicard, *supra* note 4 ("In addition, sons continue the family line."); see also, *Grey Areas*, *supra* note 14 (Mrs. Wu, a Chinese citizen states, "When I got married I only wanted one child. But because it was a girl, my parents-in-law wanted me to try for a boy to carry on the family name.").

<sup>16</sup> Kyle R. Rabkin, *The Zero-Child Policy: How the Board of Immigration Appeals Discriminates Against Unmarried Asylum-Seekers Fleeing Coercive Family Planning Measures*, 101 NW. U.L. REV. 965, 969 (2007).

<sup>17</sup> Charles E. Schulman, *The Grant of Asylum to Chinese Citizens Who Oppose China's One-Child Policy: A Policy of Persecution or Population Control?*, 16 B.C. THIRD WORLD L.J. 313, 317 (1996). China felt the consequences of its unimpeded population growth when, by 1979, the country was trying to sustain over 20% of the world's entire population with less than 8% of the world's arable land. *Id.* at 316-17; see also Kung, *supra* note 1, at 1303 (noting that even as early as 1958, famine ensued and that "[b]etween 1958 and 1962, a nationwide famine killed at least 20 million people").

<sup>18</sup> Stewart, *supra* note 11. The goal of the campaign was to have a growth rate of zero by 2000. Schulman, *supra* note 17.

growth.<sup>19</sup> Of central importance to this plan was the implementation of the “one couple, one child” policy<sup>20</sup>—popularly known today as the “One-Child Policy” (“OCP”).<sup>21</sup> The OCP generally restricts married Chinese couples to having one child, although there are some notable exceptions to the rule.<sup>22</sup>

In 1981, the government created the State Family Planning Commission (“SFPC”) to set target population goals.<sup>23</sup> The SFPC, in turn, delegates the task of monitoring and enforcing OCP targets to officials at the provincial and local levels.<sup>24</sup> While this decentralized system has led to varying enforcement techniques throughout China’s provinces, local officials have generally put into place a stick-and-carrot system of economic and social rewards and penalties to encourage couples to comply with the OCP rules.<sup>25</sup> Couples that abide by the OCP, for example, may be rewarded with cash stipends for their child’s medical and educational purposes, a larger residence for their family, and extended time off from work for the mother after giving birth.<sup>26</sup> On the other hand, punishments for disobeying the OCP range from monetary penalties, to job demotions or firings, to imprisonment and the seizure or destruction of the couple’s property.<sup>27</sup> The most extreme enforcement techniques include forced Intrauterine Device (“IUD”) insertions, late-term abortions, and sterilizations.<sup>28</sup> Although the central government has officially condemned all such coercive methods since 1984,<sup>29</sup> local

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<sup>19</sup> Zhang, *supra* note 11, at 561; *see also* Information Office of the State Council of the People’s Republic of China, A Strategic Policy That Suits National Conditions § 1 ¶ 5 (1995), available at <http://www.china.org.cn/e-white/familypanning/13-2.htm> (last visited Feb. 9, 2009).

<sup>20</sup> Zhang, *supra* note 11, at 561.

<sup>21</sup> Eloisa A. Rivera, Comment, *Authorized Marriages Only? Refugee Relief Under Section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 40 U.C. DAVIS L. REV. 229, 233-34 (2006).

<sup>22</sup> The term “One Child Policy” is a bit of a misnomer, as there are a number of exceptions to the one couple, one child rule. For example, in some cases ethnic minorities are allowed to have more than one child. Likewise, couples in rural areas who have a daughter as their first child may be permitted a second after a certain amount of time. Zhang, *supra* note 11, at 561-62 (1996); *see also Grey Areas, supra* note 14 (A “significant number of people” have more than one child either because they fall under one of the exceptions, or because they ignore the rules, no matter what the consequences. In fact, “[i]n July [of 2007], it was revealed that nearly 2,000 officials and celebrities in Hunan Province breached the nation’s family planning regulations between 2000 and 2005.”).

<sup>23</sup> Schulman, *supra* note 17.

<sup>24</sup> *Id.* at 317-18. Thirteen million volunteers also partake in enforcing the OCP. *Id.* at 318.

<sup>25</sup> Zhang, *supra* note 11, at 562. In addition, education is used to teach people about the dangers of continued population growth. *Id.*

<sup>26</sup> *Id.* at 563.

<sup>27</sup> Erin Bergeson Hull, Note, *When Is the Unmarried Partner of an Alien Who Has Been Forcibly Subjected to Abortion or Sterilization a “Spouse” for the Purpose of Asylum Eligibility? The Diverging Opinions of Ma v. Ashcroft and Chen v. Ashcroft*, 2005 UTAH L. REV. 1021, 1025 (2005).

<sup>28</sup> *Id.* at 1025-26.

<sup>29</sup> SUSAN GREENHALGH & EDWIN A. WINKLER, U.S. DEP’T OF JUSTICE, IMMIGRATION & NATURALIZATION SERV., CHINESE STATE BIRTH PLANNING IN THE 1990S AND BEYOND 16 (2001), available at <http://www.uscis.gov/files/nativedocuments/pschn01001.pdf> (last visited Dec. 29, 2008).

officials routinely turn to such practices in fear of punishment for failure to meet the quotas set in place by the SFPC.<sup>30</sup> In fact, by the mid-1980s, forced birth control practices, including abortions, sterilizations, and IUD insertions, averaged nearly thirty million per year.<sup>31</sup>

Another integral tool in China's family planning policy is its Marriage Law of 1980,<sup>32</sup> which sets forth minimum marriage ages—twenty for females and twenty-two for males.<sup>33</sup> However, these ages are only a floor and in many provinces the local governments have set the actual minimum age for marriage a number of years higher.<sup>34</sup> The Marriage Law also requires every couple to register their marriage with the government.<sup>35</sup> If a couple fails to get this registration or their registration is denied, i.e., because one of the partners is below the minimum age, the government will not legally recognize the marriage, and the couple will not be legally permitted to have a child.<sup>36</sup> Marriage without this official government authorization is termed a “traditional” marriage.<sup>37</sup> If a woman gets pregnant while in a traditional, rather than a “legal,” marriage, local officials once again have wide discretion in punishing the couple and aborting the child, even where that child would only be the couple's first child.<sup>38</sup>

Through the combination of such laws and enforcement techniques, Chinese officials have recently reported that since its implementation the OCP has been responsible for preventing

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<sup>30</sup> *Id.*; see also, Hannah Beech, *Enemies of the State?*, TIME, Sept. 12, 2005 (“One set of bad population figures can stop an official from getting promoted.”). Beech also explains that local officials in Linyi started mass sterilizations and abortions after getting castigated for having the highest rate of extra births in Shandong. *Id.*; Rivera, *supra* note 21, at 235 n.40 (noting that “[t]he Chinese government rewards local officials who achieve the birth quotas for their province. . . . [b]ut it also punishes them with sanctions, demotions, and salary reductions if they fail to achieve the quotas”). Since “the goal is to achieve the targeted birth quota, family-planning officials are obligated and motivated to track down women with ‘out-of-plan’ pregnancies and make sure that they have abortions, regardless of how far their pregnancies have advanced.” 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, 163 (1996).

<sup>31</sup> Hunker, *supra* note 6, at 134.

<sup>32</sup> Marriage Law (promulgated by the Nat'l People's Cong., Sept. 10, 1980, effective Jan. 1, 1981) LEXIS PRCLEG 11 (P.R.C.).

<sup>33</sup> *Id.* art. 5. These age minimums are “easily the highest in the world.” See Rabkin, *supra* note 16, at 971; see also *Chen v. Ashcroft*, 381 F.3d 221, 230 (3d Cir. 2004) (noting that “it appears probable that no other country sets the minimum as high as does China”). Article 5 of the Marriage Law says that “late marriage and late childbirth” shall be encouraged. Marriage Law art. 5.

<sup>34</sup> Rabkin, *supra* note 16, at 971.

<sup>35</sup> Rivera, *supra* note 21, at 236.

<sup>36</sup> *Id.* In fact, “[l]ocal 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.” Rabkin, *supra* note 16, at 972.

<sup>37</sup> See *Ma v. Ashcroft*, 361 F.3d 553, 555 (9th Cir. 2004).

<sup>38</sup> Rivera, *supra* note 21, at 237; see also *Ma v. Ashcroft*, 361 F.3d 553, 555 (9th Cir. 2004) (an example of a woman being forced to abort her child because she wasn't in a legal marriage, even though the couple had no other children yet).

approximately 400 million births.<sup>39</sup> Despite calls for change to stop this “ongoing genocide,”<sup>40</sup> coercive enforcement methods are still widely used in China today.<sup>41</sup> In fact, a recent congressional hearing reported that “China’s drive to control its population growth at any cost to the Chinese people is as strong and dangerous as ever.”<sup>42</sup> While the OCP, when originally enacted, was supposed to be terminated by 2000,<sup>43</sup> in 2008 Chinese population officials said that the Policy will persist for at least another decade.<sup>44</sup>

## II. UNITED STATES REFUGEE POLICY AND THE EFFECT OF SECTION 601(A) ON THE DEFINITION OF “REFUGEE”

### A. *United States Refugee Policy*

Before specifically examining the U.S. government’s response to the extreme humanitarian crisis that has resulted from China’s OCP and other related population planning policies, it is useful to have a basic understanding of how a claimant can generally gain refugee status in the United States. This background information explains how the various broad or narrow interpretations of who falls under section 601(a) can have a major impact on how easily a claimant can gain refugee status. It

<sup>39</sup> *Has China’s One-Child Policy Worked?* BBC NEWS, Sept. 20, 2007, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7000931.stm>. This number was from 2007 and is up from 300 million in 2003. *A Brother for Her: Could China’s Most Notorious Social Policy Soon Be Scrapped?*, ECONOMIST, Dec. 18, 2004, available at <http://www.highbeam.com/doc/1G1-129367160.html> [hereinafter *A Brother for Her*]. The fertility rate has reportedly fallen from 2.29 children per woman in 1980 to 1.69 children per woman in 2004. *Id.*

<sup>40</sup> Stephen Moore, *Don’t Fund UNFPA Population Control*, WASH. TIMES, May 9, 1999 (also referring to the OCP as a “fanatical crusade”), available at [http://www.cato.org/pub\\_display.php?pub\\_id=5457](http://www.cato.org/pub_display.php?pub_id=5457); see also *A Brother for Her*, *supra* note 39 (discussing how some Chinese scholars believe that the costs of dealing with an aging population and the increasingly worrisome male to female sex ratio may outweigh the benefits of keeping the OCP in place and stating that “officials have hinted in the past that the policy could be eased after 2010”); James Reynolds, *Chinese Challenge One-Child Policy*, BBC NEWS, May 25, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6694135.stm> (discussing how one Chinese province recently burned cars and destroyed official buildings when officials tried to collect fines from those who had more than one child, and how many people take fertility drugs because, if you have more than one child at the same time, there are no penalties).

<sup>41</sup> Although there is no hard data about how often coercive population control policies are really used, there are many undocumented stories of coercive techniques that are still widely practiced as part of enforcing the OCP. GREENHALGH & WINKLER, *supra* note 29.

<sup>42</sup> *China: Human Rights Violations and Coercion in One-Child Policy Enforcement: Hearing Before the H. Comm. On Int’l Relations*, 108th Cong. at 1 (2004), available at <http://www.internationalrelations.house.gov/archives/108/97363.pdf>; see also *Has China’s One-Child Policy Worked?*, *supra* note 39 (“And it looks likely that, nearly 30 years after the policy was first introduced, it will not be relaxed to allow couples to have more children. . . . At [a] press conference earlier this year, Minister Zhang said there was not the ‘slightest doubt’ about the need to continue with the policy.”).

<sup>43</sup> Zhang, *supra* note 11, at 562 (“The one-child policy will be officially withdrawn in the year 2000.”).

<sup>44</sup> Jim Yardley, *China Says One-Child Policy Will Stay for at Least Another Decade*, N.Y. 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.”).



also highlights how broad interpretations of section 601(a) have made it much easier for Chinese men, with only a false claim of persecution, to gain refugee status, and why new legislation should be enacted to curb this problem. New legislation can help prevent the further diversion of resources away from those with genuine claims of persecution—those who section 601(a), and the refugee laws in general, are truly designed to protect.

There are two main routes a migrant may take when seeking to gain asylum. First, a migrant may affirmatively seek asylum through a request to a U.S. Citizen and Immigration Services (“USCIS”) asylum officer, who will conduct an interview with the applicant and determine whether to grant asylum.<sup>45</sup> If the USCIS officer denies the application, the applicant will then be able to go to immigration court where an immigration judge (“IJ”) will review his or her claim.<sup>46</sup> Second, a migrant can seek asylum defensively through a ruling of an IJ once a removal proceeding has been brought against him or her.<sup>47</sup> U.S. immigration law requires that aliens who arrive at a U.S. port of entry without, or with fraudulent, travel papers, must be detained and placed in expedited removal proceedings.<sup>48</sup> At this point, the migrant can express a fear of persecution, and an IJ will review the case.<sup>49</sup> Under either route to asylum, the BIA is responsible for hearing appeals from decisions of the IJs.<sup>50</sup> All BIA decisions are then subject to review by the federal courts.<sup>51</sup>

An asylum officer or IJ has discretion to grant the migrants application upon an affirmative finding that the alien meets the definition of a “refugee.”<sup>52</sup> A “refugee,” in turn, is defined by 8 U.S.C. § 1101(a)(42) as a person who “is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of [the applicant’s native country] because of persecution or a well-founded fear or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>53</sup> What qualifies as

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<sup>45</sup> U.S. Citizenship and Immigration Servs., Obtaining Asylum in the United States: Two Paths, available at [www.uscis.gov](http://www.uscis.gov) (search “obtaining asylum in the United States”; then follow “Obtaining Asylum in the United States: Two Paths” hyperlink) (last visited Mar. 27, 2009). If an application under the Refugee Act is made within the United States and granted, this person is said to have been granted “asylum.” If the application under the Refugee Act is made from outside the United States and granted, this person is said to have been granted “refugee status.” The terms are used interchangeably in this Note. See RapidImmigration.com, Political Asylum & Refugee Status, [http://www.rapidimmigration.com/usa/1\\_eng\\_kit\\_asylum.html](http://www.rapidimmigration.com/usa/1_eng_kit_asylum.html) (last visited Jan. 22, 2009).

<sup>46</sup> *Obtaining Asylum in the United States: Two Paths*, supra note 45.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> BIA Decisions, available at [www.uscis.gov](http://www.uscis.gov) (follow “Laws & Regulations” hyperlink, then follow “BIA Decisions” hyperlink) (last visited Jan. 31, 2009). The BIA is the highest administrative body within the Department of Homeland Security. *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Approval, Denial, or Referral of Application, 8 C.F.R. § 208.14 (2005).

<sup>53</sup> 8 U.S.C. § 1101(a)(42) (2006).

persecution on account of “political opinion” is where section 601(a), and the court interpretations of it, becomes so important.

*B. IIRIRA Section 601(a) and Its Effect on the U.S. Refugee Qualifications*

Throughout the 1980s, reports of China’s coercive family planning enforcement practices spread worldwide, leading to international outrage and United States action.<sup>54</sup> After years of unsuccessful proposed legislation by human rights activists<sup>55</sup> to provide enhanced protection for victims of these “undeniable and grotesque violations of fundamental human rights,”<sup>56</sup> efforts finally culminated with Congress’s 1996 enactment of section 601(a) of the IIRIRA.<sup>57</sup> The specific language of section 601(a)(1) provides that:

For purposes of determinations under this chapter, 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>58</sup>

The statute effectively eradicated the highly criticized<sup>59</sup> prior practice of the BIA, by which the Board required Chinese asylum claimants to show that the coercive family planning practice was being selectively applied against them on account of one of the five enumerated protected classes in the “refugee” definition—race, religion, national origin, social group, or political opinion.<sup>60</sup> In other words,

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<sup>54</sup> Zhang, *supra* note 11, at 572 (discussing the U.S. withdrawal of financial support for the UN Fund for Population Activities (UNFPA) that provided assistance to China’s government in implementing the OCP).

<sup>55</sup> Hunker, *supra* note 6, at 139 (discussing Attorney General Edwin Meese’s guidelines that would have permitted asylum for OCP victims as “the first of a litany of ‘botched efforts . . . to protect Chinese fleeing from their country’s one child policy’” (quoting Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881, 882 (2000))); *see also* Abrams, *infra*, at 886 (discussing more failed efforts at helping OCP victims); Sicard, *supra* note 4, at 932-36. Many of the efforts for reform of treatment of persecuted women came from anti-abortion and human rights advocates. Kristi Deans, *Less Than Human: Children of a Couple in Violation of China’s Population Laws and the Barriers They Face in Claiming Asylum in the United States*, 36 CAL. W. INT’L L.J. 353, 360 (2006).

<sup>56</sup> H. R. REP. NO. 104-469, pt. 1, at 174 (1996).

<sup>57</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) § 601(a), 8 U.S.C. § 1101(a)(42) (2006).

<sup>58</sup> 8 U.S.C. § 1101(a)(42)(B).

<sup>59</sup> Jamie Jordan, Note, *Ten Years of Resistance to Coercive Population Control: Section 601 of the IIRIRA of 1996 to Section 101 of the REAL ID Act of 2005*, 18 HASTINGS WOMEN’S L.J. 229, 239 (2007).

<sup>60</sup> Matter of G-, 20 I. & N. Dec. 764, 779 (1993) (“Coerced abortions and sterilization are certainly horrible acts. However, . . . the applicant has failed to show that the one couple, one

section 601(a) eliminated the burden on OCP applicants of proving a “nexus” between their persecution under the OCP and one of these protected statuses.<sup>61</sup> For example, before section 601(a) was enacted, an applicant would only meet the requirements of the refugee statute by showing that the OCP practices were being enforced against him or her *because* of his or her race or *because* of a specific political opinion he or she had. However, it was very difficult for an applicant to show that the OCP was being selectively enforced against him or her, since enforcement of the OCP is so widespread throughout China. Further, enforcement is done with the goal of population control in mind rather than with the goal of harming those of a particular religion, race, or political opinion. Thus, in *Matter of Chang*, decided seven years before section 601(a) was passed, the BIA held that a man who had alleged that his family was persecuted under the OCP did not qualify as a refugee under the Refugee Act because the OCP was not, in and of itself, “persecutive.”<sup>62</sup> By coming to this conclusion, the BIA made it clear that in order to qualify under the pre-section 601(a) refugee definition based on OCP practices, an alien would not only have to show that he or she was the victim of a coercive birth control method, but also that enforcement of the OCP was selectively applied against him or her based on his or her race, religion, national origin, social group or political opinion. With the enactment of section 601(a), however, this all changed. Under section 601(a), any *direct* victim, whether male or female, 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,” is *automatically* deemed to have a well-founded fear of

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child policy was applied to him for reasons protected under the Act.”); *accord* *Matter of Chang* 20 I. & N. Dec. 38, 44 (B.I.A. 1989). In *Chang*, the judge explained as follows:

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

. . . .

Thus, an asylum claim based solely on the fact that the applicant is subject to this policy must fail. An individual claiming asylum for reasons related to this policy must establish, based on additional facts present in his case, that the application of the policy to him was in fact persecutive or that he had a well-founded fear that it would be persecutive on account of one of the five reasons enumerated in section 101(a)(42)(A).

*Id.*

<sup>61</sup> 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), *available at* <http://immigration.com/news/a-family-planning.html>. By linking resistance to coercive population control practices to political opinion, section 601 of the 1996 Act relieves applicants of the burden of demonstrating a nexus between the persecution for their resistance to such practices and a status protected under the Refugee Act. *Id.*

<sup>62</sup> *Matter of Chang*, 20 I. & N. Dec. 38, 43 (BIA 1989).

persecution on account of his or her “political opinion.”<sup>63</sup> By lifting the burden on the applicant of proving a nexus between his or her persecution and one of the protected categories in the refugee definition, section 601(a) is unambiguously intended to provide per se refugee status to the *direct* victims of persecution, or those who have a well-founded fear of direct persecution.<sup>64</sup> The plain language of the statute, however, is seemingly silent as to its intended effect on husbands, fiancés, or boyfriends of such persecuted women.<sup>65</sup> If the woman who has been forced to abort a child can be granted political asylum in the United States, then should the man whose child was also aborted, but who did not himself have to physically endure the pain of the forced abortion, also meet the refugee definition based on this abortion? What about where the physically unharmed man comes to the United States while his allegedly persecuted partner remains in China? And if this is the case, how will an IJ be able to distinguish between genuine and fraudulent claims by physically unharmed males who have no evidence at all of the persecution allegedly done against their female partners? The series of cases discussed below illustrate how the BIA has addressed some of these issues and how the different Courts of Appeals have expanded or narrowed the BIA’s determinations.

### III. THE BIA’S DECISION AND THE DIFFERING CIRCUIT COURT INTERPRETATIONS OF THAT DECISION

Before either the BIA or a federal court reviewing the BIA’s decision can expand or narrow the plain-meaning of the statute, which seemingly only grants relief to the direct victims of persecution, it must determine that the statute is silent or ambiguous with respect to the issue at hand—i.e., whether section 601(a) explicitly provides protections for indirect partners of the direct persecution victim. This determination of silence or ambiguity is required under the Supreme Court’s decision in *Chevron v. NRDC*, which mandates that “[i]f the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>66</sup> However, if the court finds the statute is silent or ambiguous, then the

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<sup>63</sup> IIRIRA § 601(a)(1), 8 U.S.C § 1101 (a)(42)(b) (2006).

<sup>64</sup> *In re X-P-T-* was the first BIA case decided under section 601(a). *In re X-P-T-*, 21 I. & N. Dec. 634 (BIA 1996). The BIA held that any alien who had been forced to have an abortion or sterilization, or who had been persecuted for other resistance to the OCP, had suffered persecution under the “political opinion” status of the original refugee definition, and thus qualified as a refugee. *Id.* at 636.

<sup>65</sup> For purposes of this Note, it is assumed that the coercive family planning techniques (i.e., abortions, IUD insertions, and sterilizations) are being used against women, despite that fact that both men and women are subject to forced sterilizations. Thus, the discussions in this Note about the refugee status of husbands and unmarried boyfriends/fiancés based on their wives or girlfriends’ persecution can apply equally to wives and girlfriends when their husband or boyfriend/fiancé is forcefully sterilized.

<sup>66</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

federal court, under the second step of *Chevron*, must defer to the agency's interpretation of the statute, here the BIA's, "unless [such interpretation is] arbitrary, capricious, or manifestly contrary to the statute."<sup>67</sup> In other words, a court should only follow the BIA's interpretation if it finds that such an interpretation constitutes "a permissible construction of the statute."<sup>68</sup> Different applications of these two *Chevron* steps have led to the numerous competing interpretations of section 601(a) amongst the circuit courts.

A. In re C-Y-Z-

*In re C-Y-Z-*<sup>69</sup> is the seminal BIA case with respect to asylum relief under section 601(a), and it is the application of this holding that has spawned the conflicting Courts of Appeals' interpretations of section 601(a). The asylum applicant in *C-Y-Z-* was a male Chinese citizen, who was legally married in China and who had three children.<sup>70</sup> In his application he stated that after the birth of his first child government officials in China forced his wife to get an IUD insertion.<sup>71</sup> After the IUD was removed, his wife became pregnant a second time, and this time she was ordered to have an abortion.<sup>72</sup> She was able to escape the abortion only by hiding in a relative's home.<sup>73</sup> When his wife became pregnant a third time, she again hid with relatives, but after she gave birth, she was sterilized against her will.<sup>74</sup> Eighteen months later, the applicant left China for the United States.<sup>75</sup> When the case was originally brought before the Immigration Judge, section 601(a) had not yet been enacted.<sup>76</sup> Therefore, the IJ denied the applicant's claim relying on *Matter of Chang's* not-yet-overruled holding that applicants have a burden of proving a "nexus" between their persecution under the OCP and one of the protected statuses listed in the Refugee Act.<sup>77</sup> The IJ noted that "if indeed [the applicant's wife] was forced to undergo an involuntary sterilization, [she] did not gain anything from having the applicant abandon her and the children for the United States. . . . In effect, the applicant seeks to ride on his wife's coattails."<sup>78</sup> The applicant then appealed to the BIA and before the BIA decided the case, section 601(a)

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<sup>67</sup> *Id.* at 844.

<sup>68</sup> *Id.* at 843.

<sup>69</sup> *In re C-Y-Z*, 21 I. & N. Dec. 915 (BIA 1997).

<sup>70</sup> *Id.* at 915.

<sup>71</sup> *Id.* at 916.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* To support his claim, the applicant presented copies of his marriage certificate, a copy of his wife's sterilization certificate, his children's birth certificates, etc. *Id.*

<sup>76</sup> *Id.* at 917.

<sup>77</sup> *Id.* at 916-17.

<sup>78</sup> *Id.* at 916.

was enacted, abolishing the nexus requirement of the Refugee definition for those persecuted under coercive population policies.<sup>79</sup>

Once the case reached the BIA, the Immigration and Naturalization Service (“INS”) conceded in its appeal brief that, as argued by the applicant, the husband of a persecuted wife could “stand in [his wife’s] shoes.”<sup>80</sup> Nevertheless, the INS argued that any persecution that may have occurred to the applicant was over<sup>81</sup> and that any possible harm did not directly impact the applicant. In rebuttal, the applicant argued that because he could stand in this wife’s shoes, he has established past persecution.<sup>82</sup> Furthermore, because the conditions in China with respect to its OCP had remained unchanged, he alleged that he continued to have a well-founded fear of future persecution.<sup>83</sup> The BIA, largely relying on the INS’s concession, agreed with the applicant, and ruled that “the applicant has established eligibility for asylum by virtue of his wife’s forced sterilization.”<sup>84</sup>

A major problem with *C-Y-Z*’s holding was the BIA’s lack of clarity in explaining its rationale for accepting the INS’s concession and the applicant’s argument that a husband can stand in his wife’s shoes for purposes of establishing past persecution under section 601(a).<sup>85</sup> For example, the BIA did not point to any specific language in section 601(a)

<sup>79</sup> *Id.* at 917.

<sup>80</sup> *Id.* at 918 (“The [INS] is aware that its legal perspective as directed by the General Counsel is that the husband of a sterilized wife can essentially stand in her shoes and make a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than on him.”).

<sup>81</sup> *Id.* at 928 (Board Member Filppu’s concurring and dissenting opinion notes that the applicant had testified that in the time between his wife’s sterilization and his arrival in the United States, which was over 17 months, he had absolutely no problems with the Chinese government).

<sup>82</sup> *Id.* at 918.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*; *see also id.* at 919 (“In view of the enactment of section 601(a) of the IIRIRA and the agreement of the parties that forced sterilization of one spouse . . . is an act of persecution against the other spouse, the applicant has established past persecution.”).

<sup>85</sup> Board Member Filppu recognized this in his separate opinion. He notes that the INS brief, which concedes that a wife’s persecution can establish persecution for a husband, fails to set forth “the reasoning behind this position on ‘joint spousal persecution.’” *Id.* at 928. He further concludes that husbands should not be granted *per se* refugee status based on their wife’s persecution:

It seems to me that the infliction of an abortion or sterilization procedure on one spouse may or may not lead to the conclusion that the other spouse has been persecuted. For example, a couple may jointly want more children and oppose their government’s efforts to restrict family size. In these circumstances, the sterilization of one spouse adversely affects both . . . . On the other hand, a particular husband might believe the family has enough children. He then might not oppose the family’s compliance with a country’s population control laws through his wife’s sterilization, even though she may vigorously disagree. . . . But it is not self-evident to me why the wife’s sterilization would necessarily amount to past persecution of the consenting husband.

*In re C-Y-Z*, 21 I. & N. Dec. at 928-29. Additionally, dissenting board member Villageliu stated that “my reluctance to join the majority is that I find it implausible that the natural reaction of a husband whose wife has been sterilized, and who deems it persecutive, would be to then proceed to the United States seeking asylum, leaving her behind.” *Id.* at 935.

that supports this theory. Nor did it explain the scope of its holding. It leaves open the question as to whether its holding should apply only to legally married husbands, or extend to traditionally married husbands as well. Nor does the court speak to whether unmarried partners, such as fiancés or boyfriends, can also stand in their female partner's shoes. Thus, while the BIA has the power to interpret section 601(a),<sup>86</sup> its bare bones reasoning of this case left the door open for the federal circuit courts, facing appeals from the BIA, to develop their own interpretations of section 601(a) based on their own policy ideas. And indeed, there is a big split among the Courts of Appeals as to how broadly the BIA's decision should extend.

*B. The Ninth Circuit Construes the Holding of C-Y-Z Broadly*

In *Ma v. Ashcroft*<sup>87</sup> the Ninth Circuit interpreted the BIA's C-Y-Z holding broadly.<sup>88</sup> Ma, a Chinese citizen, married his wife, Chiu, at age nineteen.<sup>89</sup> Since Ma was not of legal age to get married under China's Marriage Law, the government refused to legally recognize the marriage.<sup>90</sup> Thus, even though Ma and Chiu were wed in a traditional marriage, Chiu could not legally have a child and any resulting pregnancy could be subject to a forced abortion.<sup>91</sup> Chiu soon got pregnant, and in the third trimester of the pregnancy, she was detained by birth control officials and was forced to abort the pregnancy.<sup>92</sup> Soon

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<sup>86</sup> 8 C.F.R. § 1003.1(g) (2000). Section 1003.1(g) provides:

Except as Board [i.e., BIA] decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States. By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues. Selected decisions designated by the Board, decisions of the Attorney General, and decisions of the Secretary of Homeland Security to the extent authorized in paragraph (i) of this section, shall serve as precedents in all proceedings involving the same issue or issues.

*Id.*

<sup>87</sup> 361 F.3d 553 (9th Cir. 2004).

<sup>88</sup> *Id.* at 554-55.

<sup>89</sup> *Id.* at 555.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 555-56. A more detailed version of the facts is as follows: Ma, no longer wanting to live in fear, attempted to register his marriage to Chiu with local authorities. This attempt, however, put local officials on notice that Ma and Chiu had violated the OCP, and later word spread to officials that Chiu was pregnant. Soon thereafter, five officials came to Ma's home, wanting to do a physical examination on Chiu. However, Chiu, fearing that this would happen, was already hiding with relatives in a nearby village. Since the officials could not find Chiu, they instead beat Ma and seized Ma's father, threatening that they would hold the father until Chiu came forward for an abortion. When word spread to Chiu that officials were holding Ma's father, she went to the Family Planning Office, begging that he be released. There, Chiu was detained and forced to abort her child. After the abortion, Ma and Chiu decided to leave China. Chiu encouraged Ma to go first and send for her as soon as possible. Ma thus left China, smuggled in a boat. *Id.*

thereafter, Ma left for the United States with the hope of sending for his wife once he got settled.<sup>93</sup> Once in the United States, Ma applied for asylum,<sup>94</sup> specifically alleging persecution on the basis of China's refusal to recognize his marriage and the OCP regulation that forced his wife to abort their child.<sup>95</sup> The immigration judge granted Ma's claim, and the INS appealed to the BIA.<sup>96</sup>

The BIA held that Ma, because of his lack of a legally recognized marriage, did not qualify as a "spouse" under its previous holding in *C-Y-Z*.<sup>97</sup> The BIA thus somewhat clarified that its holding from *C-Y-Z* was a narrow one, something that they had not made clear in *C-Y-Z* itself. Ma petitioned the BIA to reconsider his case, but the Board denied his request,<sup>98</sup> determining that its *C-Y-Z* holding was limited to spouses in legally registered marriages only.<sup>99</sup> Ma then appealed to the Ninth Circuit where he argued that the BIA's decision denying him asylum was based on an erroneous bright-line distinction between legally married couples and traditionally married couples.<sup>100</sup> He further argued that such a distinction was senseless because only those who are too young to marry under China's Marriage Law, which is itself an integral part of the OCP, are in traditional marriages.<sup>101</sup>

The Ninth Circuit agreed with Ma.<sup>102</sup> It noted:

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, a policy deemed by Congress to be oppressive and persecutory, contravenes the statute and leads to absurd and wholly unacceptable results. Accordingly, we need not defer to the BIA's decision.<sup>103</sup>

In other words, the Ninth Circuit did not defer to the BIA's decision because, under the second step of *Chevron*, it believed that the BIA's limitation of granting relief to "legal," but not "traditional," spouses was an unreasonable interpretation of section 601(a). The court further noted that granting relief only to legal spouses could lead to the absurd result of breaking up the family, which would not only be "at odds" with the purpose of section 601(a), but also with U.S. immigration policy as a

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<sup>93</sup> *Id.* at 556.

<sup>94</sup> *Id.* When the boat in which Ma was being smuggled was intercepted, Ma was put in a detention center for a number of years, but eventually applied for asylum. *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 556-57.

<sup>97</sup> *Id.* at 557.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 555.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 559. The Seventh Circuit has followed the Ninth Circuit's lead in extending relief to traditional spouses. *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006) (describing the BIA's bright-line rule between legal spouses and traditional spouses as a "Catch-22").



whole.<sup>104</sup> This absurd result could occur, for example, if Chiu was granted refugee status based on her forced abortion, while Ma, not legally recognized as her husband, would be unable to derivatively achieve the same status.<sup>105</sup> Finally, the court noted that while in most instances it defers to other nations' minimum marriage ages, it would not do so here.<sup>106</sup> It reasoned that in light of the enactment of section 601(a) to provide relief to OCP victims, and in light of the fact that the minimum marriage ages in China are an essential part of the OCP, it would avoid such deference because giving it "would contravene the fundamental purpose of the statute."<sup>107</sup>

Thus, under the Ninth Circuit's decision in *Ma*, any spouse, whether traditional or legal, qualifies for relief under section 601(a) based solely on the persecution of their wife. Note, however, that while this holding does not appear to be exceedingly broad, it has left the door wide open to the possibility for manipulation and fraudulent claims under section 601(a). This is because those who are married in a traditional marriage rather than a legal marriage will have no proof of their marriage from the Chinese government because the Chinese government has rejected the couple's marriage application.<sup>108</sup> It can therefore be quite easy for both fiancés and boyfriends of persecuted females to allege that they were actually in a traditional marriage with their partner. Even beyond fiancés and boyfriends, however, the Ninth Circuit's holding opens the door to the possibility of fraudulent claims. While a "legal" spouse should at the least be able to prove that he was legally married (by presenting official government documents such as the marriage certificate, joint tax returns, joint bank account statements, property titles, etc.), and will hopefully have documented evidence of his wife's persecution (medical records showing that she was pregnant at one time, etc.), a person claiming to be in a mere traditional marriage is unlikely to have many of these documents. Thus, nearly anyone, even males who do not even have a partner *at all*, can, under the Ninth Circuit's broad holding, easily make a fraudulent claim that they now meet the requirements of section 601(a). Indeed, as will be discussed below, fraudulent asylum claims by Chinese males under section 601(a) have recently become quite common.

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<sup>104</sup> *Ma*, 361 F.3d at 561 ("Application of the BIA's rule would result in the separation of a husband and wife, the break-up of a family, a result that is at odds not only with the provision at issue here, but also with significant parts of our overall immigration policy.").

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Note, however, that the couple, in trying to prove that they were wed in a traditional marriage ceremony, may actually have proof of the *denial* of a legal marriage from the Chinese government. See Meredith M. Snyder, Note, *For Better or Worse: A Discussion of the BIA's Ambiguous C-Y-Z- Decision and its Legacy for Refugees of China's One Child Policy*, 84 WASH. U. L. REV. 1541, 1543 (2006).

C. *The Third Circuit Construes the Holding of C-Y-Z- Narrowly*

Shortly after *Ma* was decided, the Court of Appeals for the Third Circuit, unlike the Ninth Circuit, held that it must accord *Chevron* deference to the BIA's *C-Y-Z-* holding that per se relief will only be granted to those husbands who are legally married to their wives. In *Chen v. Ashcroft*,<sup>109</sup> Chen and his girlfriend, Chen Gui, started living together when Chen was nineteen years old and Chen Gui was eighteen.<sup>110</sup> When the couple discovered that Chen Gui was pregnant, they applied for a marriage license.<sup>111</sup> However, since neither Chen nor Chen Gui had reached the minimum age for marriage, the application was denied by the Chinese government.<sup>112</sup> OCP Officials, receiving word of the pregnancy, went to look for Chen Gui.<sup>113</sup> Chen Gui was not home, and Chen, after getting into a minor physical fight with the officials, was told that he had a few days to inform them of her whereabouts, or he would be arrested.<sup>114</sup> The couple then went into hiding, and Chen soon thereafter left for the United States.<sup>115</sup> After Chen left, he learned that the OCP officials ultimately had found Chen Gui and had forced her to abort their baby in the eighth month of the pregnancy.<sup>116</sup> When the INS initiated removal proceedings against Chen, he sought asylum relief under section 601(a).<sup>117</sup> Similarly to *Ma*, Chen argued that although he was not legally married, the BIA's distinction between the status of legally married couples and the status of other couples "evinces such a lack of rationality as to be [an] arbitrary and capricious" interpretation of section 601(a).<sup>118</sup> He also claimed that, if not for China's refusal, he and Chen Gui would have been legally married.<sup>119</sup> The BIA, however, summarily reaffirmed that its *C-Y-Z-* holding had "not been extended to include [legally] unmarried partners."<sup>120</sup> Chen appealed to the Third Circuit.<sup>121</sup>

The Third Circuit assumed for the sake of argument that *C-Y-Z-*'s interpretation of section 601(a) was permissible under step one of *Chevron*—i.e., that the statute was ambiguous as to its intended relief

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<sup>109</sup> 381 F.3d 221 (3d Cir. 2004).

<sup>110</sup> *Id.* at 223.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 227.

<sup>119</sup> *Id.* at 222.

<sup>120</sup> *Id.* at 223. In this case, the IJ who initially heard Chen's case granted his asylum petition. The IJ reasoned that since Chen and Chen Gui would have married if they had been legally allowed to, they fell under *C-Y-Z-*'s holding "by analogy . . . if not by the letter." The INS then appealed to the BIA. *Id.*

<sup>121</sup> *Id.*

for physically unharmed partners of persecuted women.<sup>122</sup> The court then concluded that under the second step of *Chevron*, it must accord deference to the BIA's limitation because expanding relief to only legal spouses of persecuted victims was within the range of permissible interpretations of section 601(a).<sup>123</sup> The court first reasoned that using legal marital status to distinguish those who deserve per se relief from those who still must prove the nexus requirement of the refugee definition was a simple way to identify those whose opportunities to reproduce and raise children were seriously impaired by the wife's forced abortion or sterilization and those who would likely suffer the most emotional pain by such persecution.<sup>124</sup> Second, the court noted that, in light of the BIA's heavy caseload, it was entirely reasonable for it to adopt a position requiring a legal marriage because only legal marriages can be proven by documentation.<sup>125</sup>

The court further noted that the BIA might have wanted to avoid the practical difficulties that would arise if unmarried males had to prove paternity of a child that was forcibly aborted and the great potential for false claims that would come along with such a difficulty.<sup>126</sup> It specifically pointed to legislative history of section 601(a) in which some legislators appeared concerned "about the ease with which 'young Chinese single-unmarried-males' might falsely claim eligibility for asylum under the proposed amendment, resulting in a flood of meritless applications."<sup>127</sup> Finally, the court expressly disagreed with the Ninth Circuit's *Ma* rationale. It stated: "[W]e see no basis for concluding that Congress's intent in amending [the original refugee definition] was to afford relief to *every* person who is a victim of *any* rule or practice that

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<sup>122</sup> *Id.* at 227.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 227-28. Chen argued that even if it was rational not to extend the *C-Y-Z* holding to include all unmarried indirect male partners, the holding should at the very least be extended to cover those who wanted to marry but were denied a marriage certificate because they did not meet the minimum age requirements. However, the Third Circuit rejected this argument as well, noting that they must respect the minimum age requirements put in place. The court conceded, however, that, "Chen's situation simply shows that *C-Y-Z* is underinclusive with respect to a narrow but sympathetic class," but went on to say that this underinclusiveness is not enough to deem the BIA's interpretation as unreasonable. *Id.* at 229-30.

<sup>125</sup> *Id.* at 229. The court, in further determining that *C-Y-Z* was not arbitrary and capricious, also pointed to the fact that marital status is used as a proxy in many areas of law—i.e., "income tax, welfare benefits, property, inheritance, testimonial privilege, etc." *Id.* at 227 n.6.

<sup>126</sup> *Id.* at 229 ("The BIA might also have been concerned that unmarried asylum-seekers would falsely claim to have had an intimate relationship with a person who suffered a forced abortion or sterilization, and the BIA might have felt that it would be too difficult to distinguish between those unmarried persons who had a truly close relationship with the person who underwent the medical procedure and those unmarried asylum seekers who did not.")

<sup>127</sup> *Id.* at 233 (quoting 142 CONG. REC. S4592 (daily ed. May 2, 1996) (statement of Sen. Simpson)). While the *Ma* court had pointed to legislative intent to show that section 601(a) was adopted to provide relief to persecuted "couples" and to prevent the break up of families, *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (quoting H. R. REP. NO. 104-469(1), at 174 (1996)), the *Chen* court points to legislative history of fraudulent claims under section 601(a). *Chen v. Ashcroft*, 381 F.3d 221, 233 (3d Cir. 2004).

forms a part of the Chinese population control program.”<sup>128</sup> The court therefore concluded that “the BIA’s interest in promoting administrability and verifiability” was sufficient to meet the low burden of reasonableness under the second step of *Chevron*,<sup>129</sup> and that it was therefore compelled to rule in line with *C-Y-Z*.

*D. The Second Circuit Disagrees with C-Y-Z-’s Holding*

With this circuit split firmly in place, in July 2007 the Court of Appeals for the Second Circuit took an entirely different approach to the interpretation question, further adding to the confusion of the scope of section 601(a). The Second Circuit was faced with the three appeals of Lin, Dong, and Zou.<sup>130</sup> Each of these refugee applicants was a legally unmarried male Chinese citizen who alleged that he should qualify as a refugee under section 601(a) on account of his partner’s persecution.<sup>131</sup> As expected, the BIA denied each of their asylum claims, finding that its holding in *C-Y-Z* did not extend to non-legally married spouses.<sup>132</sup> On appeal, the Second Circuit, rather than assuming that section 601(a) was silent or ambiguous with respect to indirect victims of persecution (as the Third Circuit had done in *Chen*)—an interpretation that would permit the BIA to “fill in the gap” under step two of *Chevron*—remanded the case to the BIA.<sup>133</sup> The purpose of the remand was to give the BIA an opportunity to explain how it read section 601(a) to grant per se relief to indirect partners of direct victims *at all*, and further, to clarify its reasoning for extending such relief to legal spouses *only*.<sup>134</sup> On remand,

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<sup>128</sup> *Chen v. Ashcroft*, 381 F.3d 221, 232 (3d Cir. 2004). The court discussed that since the asylum statute clearly limits relief only if the harm amounts to a level of “persecution” (with only abortions and sterilizations automatically meeting that requirement), then it necessarily excludes lesser harms (i.e., being in a minor fight, getting a fine, or losing your job) even if those harms implicate humanitarian interests for which the statute was passed. *Id.* at 231-33.

<sup>129</sup> *Id.* at 229.

<sup>130</sup> *Lin v. U.S. Dep’t of Justice*, 494 F.3d 296, 296 (2d Cir. 2007).

<sup>131</sup> *Id.* at 299. Specifically, Lin alleged that he and his girlfriend were denied governmental permission to marry and have a child because his girlfriend was below the minimum marriage age. *Id.* at 301. When his girlfriend got pregnant and was forced to have an abortion, Lin left for the United States. His girlfriend was not well enough to travel so she stayed behind in China. Petitioner Dong, when detained in the United States, claimed that his fiancée (who was still in China) had been forced to have two abortions. Petitioner Zou, who was too young to marry his girlfriend, claimed that his girlfriend had been forced to undergo an abortion. *Id.*

<sup>132</sup> *Id.* at 299.

<sup>133</sup> *Lin v. U.S. Dep’t of Justice*, 416 F.3d 184, 187 (2d Cir. 2005).

<sup>134</sup> *Id.* The Second Circuit stated that the because the BIA had failed

to articulate a reasoned basis for making [legal] spouses eligible for asylum under IIRIRA § 601(a), IJs cannot possibly advance principled—let alone persuasive—reasons to distinguish between, on the one hand, the BIA’s decision to create spousal eligibility under IIRIRA § 601(a), and, on the other hand, the eligibility of boyfriends and fiancés under that same statutory provision.

*Id.* at 191. Indeed, “a fresh look at *C-Y-Z* reveals that the BIA never adequately explained how or why, in the first instance, it construed IIRIRA § 601(a) to permit spouses of those directly victimized by coercive family planning policies to become eligible for asylum themselves.” *Id.* With no basis

the BIA affirmed its *C-Y-Z-* position.<sup>135</sup> It also clarified that only those legal spouses who actually opposed their wife's persecution should qualify under the statute.<sup>136</sup> However, it once again failed to specifically point to any text of section 601(a) to support this reading, and instead pointed merely to the "overall purpose of the amendment" for its conclusion that both partners of a legal marriage deserved protection under section 601(a) rather than only the direct victims of the persecution.<sup>137</sup>

The Second Circuit then ordered a rehearing of the petitioners cases to consider two particular issues: (1) whether section 601(a)'s language is ambiguous so as to allow the BIA to determine its effect on partners of direct victims, and (2) if section 601(a) is ambiguous, was *C-Y-Z-*'s bright-line rule between legal marriages and traditional marriages or other relationships a reasonable construction of the statute.<sup>138</sup> With respect to the first issue, the Second Circuit examined the language of section 601(a) itself to determine whether Congress, through the statute, had directly and unambiguously spoken as to its intended effect on indirect victims.<sup>139</sup> The court determined the language to be unambiguous in *not* extending *per se* refugee status to anyone beyond the direct victim.<sup>140</sup> Since section 601(a) refers to "*a person* who has been forced to abort a pregnancy,"<sup>141</sup> "*a person* who had been forced . . . to undergo an involuntary sterilization,"<sup>142</sup> "*a person*" who "has been persecuted for

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given by the BIA, the Second Circuit stated that it would be "impossible" to make a reasoned decision as to whether it should affirm or reverse the petitioners' cases. *Id.*

<sup>135</sup> *In re S-L-L-*, 24 I. & N. Dec. 1., Interim Decision (BIA) 2006 WL 3337624 (BIA), at \*4. In order to come to such a conclusion, the BIA necessarily had to first determine that section 601(a) was unclear as to the scope of its protections for indirect victims and thus the BIA had the power to fill this gap, as it did in fact conclude. *Id.* Having concluded that the statute was silent, the BIA looked at "the focus of the amendment and the legislative history" in order to justify its *C-Y-Z-* holding. *Id.* Focusing on policy considerations, the BIA noted the responsibilities with respect to family planning that legally married couples share. *Id.* at \*6. Once again, it stopped short of extending automatic relief to non-legally married partners because "the sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried father." *Id.* at \*9. The BIA also noted that *C-Y-Z-* was already a ten-year-old precedent. *Id.* at \*4. Board Member Pauley concurred, but stated that had the BIA been "writing on a clean slate," he would have opted for a case-by-case approach of whether the indirect partner had been persecuted for other resistance to a coercive OCP practice rather than granting legally married spouses *per se* relief. *Id.* at \*13. Board Member's Filppu and Cole dissented, reasoning that section 601(a) was unambiguous in that it used the words "a person" rather than "a couple." *Id.* at \*16.

<sup>136</sup> *Id.* at \*4.

<sup>137</sup> *Id.* at \*8.

<sup>138</sup> *Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 299-300 (2d Cir. 2007).

<sup>139</sup> *Id.* at 305-06.

<sup>140</sup> *Id.* at 304-07 ("We conclude that Congress has spoken to this issue and that it has done so unambiguously."). The Second Circuit noted that in previous cases it had deferred to the BIA's holding without ever doing a *Chevron* analysis. *Id.* at 305. For example, in *Yuan v. U.S. Department of Justice*, although the court noted that "[b]y its plain language, the law would seem to extend refugee status only to actual victims of persecution—for example, a woman who was 'forced to abort a pregnancy,' but not her husband," it nevertheless "followed the lead of the BIA." 416 F.3d 192, 196 (2d Cir. 2005).

<sup>141</sup> 8 U.S.C. § 1101(a)(42)(B) (2006) (emphasis added).

<sup>142</sup> *Id.* (emphasis added).

failure or refusal to *undergo* such a procedure,”<sup>143</sup> and “*a person* who has a well founded fear that *he* or *she* will be forced to *undergo* [such a procedure],”<sup>144</sup> rather than stating “*a married couple* who has been subjected to a forced abortion or involuntary sterilization”<sup>145</sup> or something analogous, the Second Circuit concluded that Congress did not intend to extend *per se* relief beyond the direct victim.<sup>146</sup> Consistent with the interpretive principle that “the inclusion of some obviously results in the exclusion of others,” the court also reasoned that, because section 601(a) specifically mentioned some people (e.g. those who directly undergo, fear, or resist abortions or sterilizations), it would be unreasonable to read it so as to apply to others.<sup>147</sup> Because it concluded that the statute was unambiguous with respect to *indirect* victims in its application, the court did not need to reach the second issue of whether or not the BIA’s bright-line rule was a reasonable interpretation of the statute.<sup>148</sup>

Under the Second Circuit’s approach, a male can only qualify for asylum relief under section 601(a) if he demonstrates that *he himself* has been sterilized or can show “other resistance”<sup>149</sup> to a coercive population control program” or “a well founded fear that he . . . will be . . . subject

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<sup>143</sup> *Id.* (emphasis added). The court noted that the natural meaning of “undergo” means submitting to a procedure that affects *your own body*, not anyone else’s. *Lin v. U.S. Dep’t of Justice*, 494 F.3d 296, 305 (2d Cir. 2007) (emphasis added).

<sup>144</sup> 8 U.S.C. § 1101 (a)(42)(B) (emphasis added).

<sup>145</sup> *Lin v. U.S. Dep’t of Justice*, 494 F.3d 296, 305 (2d Cir. 2007) (“Had Congress intended this clause to refer to a spouse or partner of someone who has been physically subjected to a forced procedure, it could simple have said so.”) (internal quotation marks omitted).

<sup>146</sup> *Id.* at 304.

<sup>147</sup> *Id.* at 307. The court noted that the “critical defect in the BIA’s policy of according *per se* refugee status to spouses of individuals explicitly protected by § 601(a) is its creation of an irrebuttable presumption of refugee status for a new class of persons.” *Id.* at 308. The court further noted that if its conclusion is contrary to Congress’s intentions, Congress could, of course, amend the statute. *Id.* at 309 n.10.

<sup>148</sup> *Id.* at 309. Nevertheless, some would argue that the mere existence of the previous circuit split, and the numerous circuit courts who concluded that section 601(a) *was* ambiguous, is proof enough to contradict the Second Circuit’s finding that section 601(a) is unambiguous as to its treatment of indirect partners of physically harmed victims. See Katherine F. Riordan, Comment, *Withholding Automatic Asylum for Spouses or Partners of Victims of China’s Coercive Family-Planning Policies*: Shi Liang Lin v. U.S. Dep’t of Justice, 494 F.3d 296 (2d. Cir. 2007), 41 SUFFOLK U. L. REV. 983, 989-90 (2008).

<sup>149</sup> The Second Circuit admits that what is required under the phrase “other resistance” is ambiguous and thus subject to a reasonable BIA interpretation. *Lin*, 494 F.3d at 312. In *In re S-L-L-*, the BIA held that to show “other resistance,” an applicant must demonstrate both resistance to coercive OCP practices and that he or she has suffered based on such resistance. *In re S-L-L-*, 24 I. & N. Dec. 1, at 10, Interim Decision (BIA) 2006 WL 3337624 (BIA). The fact that the person’s spouse has been the victim of a coercive OCP practice could play into this analysis, but, standing alone, would not be enough to let the person automatically satisfy the “other resistance” language. *Lin*, 494 F.3d at 313. An example of “other resistance” besides a forced abortion or sterilization that might rise to the level of persecution so as to fall under section 601(a) would be extreme economic sanctions or penalties imposed based on the female’s refusal to abort a child. Karen Y. Crabbs, *United States Domestic Policies and Chinese Immigrants: Where Should Judges Draw the Line When Granting Political Asylum?*, 7 FLA. J. INT’L L. 249, 271-72 (1992).

to persecution for such . . . resistance.”<sup>150</sup> Alternatively, an indirect claimant can gain derivative asylum if his spouse *has already applied and qualified* for asylum based on her direct persecution.<sup>151</sup> And, of course, the alien can always try to meet the traditional nexus requirement of the refugee definition. The Supreme Court denied certiorari of the claimants in this case,<sup>152</sup> thus leaving the three contrasting approaches of the Courts of Appeals in place.

#### IV. DECIPHERING THE FUTURE

##### A. *The Problem: The Effect of the Case Law on Section 601(a) Usage*

The inconsistent application of the statute among the circuits and specifically the broad interpretation followed by the Ninth Circuit<sup>153</sup> has raised serious doubt as to whether section 601(a) sufficiently serves those for whom it was primarily implemented to protect and who most urgently and deservingly need its protections—direct female victims of OCP policies and the victims’ families. When section 601(a) was written in 1996, there were two major concerns raised regarding its enactment. The first was a serious fear that it would open the floodgates to meritless claims by large numbers of Chinese citizens in general. This concern stemmed from the fact that coercive OCP enforcement techniques are used throughout the vast majority of China’s provinces,<sup>154</sup> with millions

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<sup>150</sup> *Lin*, 494 F.3d at 314 (quoting 8 U.S.C. § 1101(a)(42)). The court did not find *stare decisis* to be a valid reason to continue to follow an interpretation of the statute that was inconsistent with its plain language. *Id.* at 310. Nor would the court, given the clarity of the statute, use legislative history to help determine its correct interpretation. *Id.* However, the court noted that there was legislative history to support its holding. For example, it pointed to a House Report that stated:

The Committee is aware that asylum claims based on coercive family planning are often made by entire groups of smuggled aliens, thus suggested that at least some of these claims, if not the majority, have been ‘coached.’ *Section [601(a)] is not intended to protect persons who have not actually been subjected to coercive measures or specifically threatened with such measures.*

*Id.* at 310-11 (quoting H.R. REP. 104-469, pt. 1, at 174 (1996) (alterations and emphasis by the Second Circuit)).

<sup>151</sup> *Id.* at 312. Under 8 U.S.C. § 1158(b)(3)(A), “a spouse . . . of an alien who is granted asylum . . . may, if not otherwise eligible for asylum, . . . be [automatically] granted the same status as the alien if accompanying, or following to join, such alien.” 8 U.S.C. § 1158(b)(3)(A). The court noted that such a policy of granting the direct victim asylum first, and then derivatively allowing a spouse to do so, not only encourages the preservation of the family unit, but also eliminates the perverse incentive of encouraging husbands to leave their wives. *Lin*, 494 F.3d at 312.

<sup>152</sup> *Zhen Hua Dong v. Dep’t of Justice*, 128 S. Ct. 2472 (2008).

<sup>153</sup> The Fifth Circuit has followed the Ninth’s Circuit broad approach. *Chen v. Gonzales*, 457 F.3d 670, 674 (“[W]e have joined the Ninth Circuit in extending protections to spouses in cases ‘[w]here a traditional marriage ceremony has taken place . . . .’” (quoting *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006) (alteration in original))).

<sup>154</sup> *Hunker*, *supra* note 6, at 146 (“Arguably, every alien fleeing China could claim refugee status under section 601 because the practice of coercive population control permeates most areas of the country.”).

of people being exposed to the practices in their lifetimes.<sup>155</sup> To alleviate this concern, Congress initially enacted a one-thousand-per-fiscal-year cap on the number of people who could qualify for asylum under the statute.<sup>156</sup> Even though the one-thousand-per-year cap was repealed in 2005,<sup>157</sup> the United States has not experienced the feared “flood” of Chinese refugees,<sup>158</sup> which has alleviated the initial fear that this would occur.<sup>159</sup> The second concern was that section 601(a) was gender-biased in that males would have a harder time than females claiming asylum under the statute.<sup>160</sup> However, this concern does not logically recognize that the statute should more readily apply to women than men because state population policies, including China’s, most frequently target women.<sup>161</sup> For example, women in China are subjected to forced sterilizations more often than men, despite the fact that both genders are potentially subject to such a procedure capable of having such a procedure.<sup>162</sup> As a result, between 1979 and 1984, thirty-one million women received forced sterilizations while only<sup>163</sup> 9.3 million men did.<sup>164</sup> This large differential in treatment can be explained in part because some people in China believe that vasectomies make men weak.<sup>165</sup> In addition,

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<sup>155</sup> *Id.* at 134; *see also* Rivera, *supra* note 21, at 259 (“One hundred million—that is the number of couples that the Chinese government had prevented from having a child as of 1993.”); Patricia Wen, *Law Offers Chinese a Path to US*, BOSTON GLOBE, Aug. 18, 2002, at B1 (“If these asylum cases work so easily, millions of Chinese would qualify [for asylum] based on the one-child policy.” (quoting Chinese immigrant Dong-Sheng Zang)).

<sup>156</sup> The statute read, “For any fiscal year, not more than a total of 1,000 refugees may be . . . granted asylum . . . pursuant to a determination under the third sentence of section 101(a)(42),” which discusses persecution under China’s OCP. 8 U.S.C. § 1157(a)(5); *see* Chen v. Ashcroft, 381 F. 3d 221, 225 n.2 (3d Cir. 2004). Once the 1000 limit was surpassed in any given year, the INS would begin to issue asylum claimants conditional grants. In practice, it would usually take up to seven years before the receiver of such a conditional grant would get the full benefits of asylum. Furthermore, it usually took another sixteen years before the claimant would be able to receive the status of a legal permanent resident. Jordan, *supra* note 59, at 230-31.

<sup>157</sup> Jordan, *supra* note 59, at 231.

<sup>158</sup> Hunker, *supra* note 6, at 147.

<sup>159</sup> The number of asylum claimants from China has slowly increased from 4913 new claims a year for fiscal year 1998 to 7934 new claims a year for fiscal year 2007, with Chinese applicants making up only 6.9% of all asylee applicants that year. United States Dep’t of Justice, Electronic Reading Room Information, *available at* <http://www.usdoj.gov/eoir/efoia/foiafreq.htm> (follow 1998 and 2007 hyperlinks under “Statistics, Publications, and Manuals”). Additionally, although there are no statistics, it is clear that not every Chinese alien who applies for asylum in the United States is doing so based on persecution under the OCP.

<sup>160</sup> Jordan, *supra* note 59, at 240 (“[T]here was early criticism that the amendment was gender-biased because it would be easier for a female to claim asylum under the amended definition based on a forced abortion than it would be for the father of an aborted baby to claim asylum.”).

<sup>161</sup> Abrams, *supra* note 55, at 889.

<sup>162</sup> Ellen Keng, Note, *Population Control Through the One-Child Policy in China: Its Effects on Women*, 18 WOMEN’S RTS. L. REP. 205, 209 (1997).

<sup>163</sup> I do not use the word “only” here to intend that 9.3 million is a small number. I use the word merely to demonstrate that 9.3 million is comparatively smaller than 31 million.

<sup>164</sup> Jason D. Lazarus, Note, *Xin-Chang Zhang v. Slattery: An Illustration of the Need for a Change in the United States’ Immigration Laws to Provide Appropriate Consideration of Asylum Claims by Chinese Nationals Fleeing China’s Coercive Population Control*, 5 J. TRANSNAT’L L. & POL’Y 65, 70 n.34 (1995).

<sup>165</sup> Kung, *supra* note 1, at 1312.



only women are subject to other coercive techniques such as forced abortions and IUD insertions. Therefore, the statute logically should be written with broader protection for women than for men. In spite of the greater necessity for women to be protected under the statute, the perceived gender-bias concern was partially removed in 1989 by the BIA's decision in *C-Y-Z*, making it much easier for legally married male partners to come within the protections of the statute.<sup>166</sup> This perceived concern was further alleviated with the decision from the Ninth Circuit in *Ma*, which extended relief to the male spouses of persecuted women in traditional marriages.<sup>167</sup>

With the implementation of such decisions, however, a new problem has arisen that is in striking contrast to the initial concern of male-gender bias. This new problem is that, while most OCP victims are women, section 601(a) is being overwhelmingly used by men to gain asylum in the United States.<sup>168</sup> In fact, those in the field of immigration have commented that "the little-known provision of US immigration law . . . has become a quick way into the country for thousands of Chinese citizens—three-quarters of them men."<sup>169</sup> The concern has shifted from a general fear of "floodgates" and male gender-bias, into a fear of specificity that section 601(a) has, in particular, opened the floodgates for Chinese males seeking asylum in the United States by way of false coercive population control claims.<sup>170</sup>

The fact that three-fourths of those using section 601(a) are male is not a problem in and of itself. Indeed, there are a number of completely reasonable explanations for such a phenomenon. One explanation is that men who have been directly persecuted through forced sterilizations might be more likely to leave their families and homeland than females who have been directly persecuted. This can be explained in part by the harsh travel conditions that most migrants have to endure to get to the U.S.—a journey a male might be more willing to face.<sup>171</sup> Additionally, women will often remain in China, despite

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<sup>166</sup> *In re C-Y-Z*, 21 I. & N. Dec. 915 (BIA 1997).

<sup>167</sup> *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004).

<sup>168</sup> Wen, *supra* note 155 ("But the law intended to shelter Chinese women has largely benefited Chinese men."); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 629 n.16 (1993).

<sup>169</sup> Wen, *supra* note 155 ("Of the 10,000 Chinese people who have obtained political asylum based on China's one-child policy, federal statistics show, three out of four are men.").

<sup>170</sup> Moshe S. Berman, Note, *The Appropriate Response of the United States to Forced Abortion in China: Should Section 601(a) of the IIRIRA be Extended to Allow Asylum for Unmarried Couples?*, 41 NEW ENG. L. REV. 339, 352 n.104 (2006-2007) ("[I]f this amendment . . . were to come to pass . . . I suggest that there will be millions of people who, under this language, will qualify." (quoting Senator Simpson)); see also Rabkin, *supra* note 16, at 975.

<sup>171</sup> Rosenthal, *supra* note 3 (reporting that the traveling "at best involve[s] flying through a series of countries with forged travel documents and at worst mean[s] crossing borders on foot or packed in airless trucks, disguised as tomatoes"); see also Kung, *supra* note 1, at 1275 ("Lured by the prospect of a richer life in the United States, Chinese emigrants may endure treacherous journeys by air, sea and land in abhorrent conditions . . .").

persecution, because they feel obligated to tend to their familial duties.<sup>172</sup> A second possibility is that, where the male has not been directly persecuted but his female partner has been, it is common for the man to come to the United States prior to the female spouse or partner in order to secure a job.<sup>173</sup> Once settled, the males will then, theoretically, seek to have their partners and children join them.<sup>174</sup> Indeed, such a practice has been in place for decades and is reflected in the *Ma* case above where Ma left China before his wife and alleged that he hoped to send for her shortly thereafter.<sup>175</sup>

While these explanations are plausible and help justify the discrepancy in section 601(a)'s gender usage to some extent, fraud undeniably also plays a major part in the equation. Some Chinese men are undoubtedly using stories of partner persecution as mere pretext to gain refugee status in the United States. While a male migrant may be hesitant to falsely claim that the Chinese government forced him to be sterilized for fear that a medical examination could reveal the truth, he would likely be more willing to falsely claim persecution based on the persecution of his legal or traditional wife. While a claim of indirect persecution *might* be enough to qualify the man under the "other resistance" clause of section 601(a), the applicant faces a greater probability of denial using that route instead of the stand-in-the-shoes-of-his-partner route.<sup>176</sup> This is true because the BIA continues to hold that "generally harsh conditions shared by many others do not [rise to a level of other resistance] persecution, even where a policy may be repugnant to our concepts of freedom."<sup>177</sup> Thus, it appears that a male applicant's best chance of qualifying as a refugee where he has not been directly persecuted (sterilized) under OCP practices is to claim that his female partner has been directly persecuted.

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<sup>172</sup> Abrams, *supra* note 55, at 904 ("The husbands and fathers escape persecution, while women often remain to tend to family responsibilities.").

<sup>173</sup> Wen, *supra* note 155 (reporting that Nancy Kelly, an immigration specialist, argues that "families send the men out first so they can get a job, then try to get the rest of the family over"); see also *Ma v. Ashcroft*, 361 F.3d 553, 556 (9th Cir. 2004) ("Chiu encouraged Ma to leave for America first and then to send for her as soon as possible."); Abrams, *supra* note 55, at 904 ("[W]omen often lack the economic independence to escape oppressive conditions.").

<sup>174</sup> Wen, *supra* note 155; see also *Ma*, 361 F.3d at 556; *In re C-Y-Z-*, 21 I. & N. Dec. 915, 927 (BIA 1997) (Rosenberg, concurring) ("The fact that the respondent preceded his family is no different from the cultural practice followed by hundreds of thousands of immigrants and refugees who fled anti-Semitic pogroms in czarist Russia, famine in Ireland, fascism in Germany, political or religious upheaval in other European countries, and civil war and death squads in Central America."); Rabkin, *supra* note 16, at 993 (noting that families escaping civil wars, famine, and religious persecution have for many years sent the male over first to get established before bringing over the rest of their family); Rosenthal, *supra* note 3 (where a woman living in a town known as "widow's village" because most of the husbands left for the United States, says, "Of course I plan to go join my husband").

<sup>175</sup> *Ma*, 361 F.3d at 556.

<sup>176</sup> See *supra* note 149 and accompanying text.

<sup>177</sup> Abrams, *supra* note 55, at 901 & n.123 (referring to the BIA's decision in *In re Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985)).

The case law interpreting the statute, with the exception of the recent Second Circuit holding in *Lin*, affords men who would otherwise have to meet the nexus requirement of the traditional refugee definition a less complicated path to asylum. So long as the claimant appears credible, his own testimony may well be enough for him to gain asylum.<sup>178</sup> With documentation being scarce in even legitimate refugee cases, a lack of a marriage certificate from the Chinese government will not necessarily be enough to dispose of the claim.<sup>179</sup> Furthermore, since even in legitimate cases it is common for a male to come to the United States before his female partner, oftentimes the female will not be available to undergo a medical examination or to test her credibility. Thus, the IJ will likely have nothing to help guide his asylum decision except for a credibility determination of the physically unharmed male applicant's story. It is for these reasons that Merle Goodman, a professor of Chinese history, has noted that "[t]he potential for abuse [under Section 601(a)] is huge."<sup>180</sup>

Unfortunately, this cynical view of fraudulent claims as the explanation for why so many men are using section 601(a) is not without merit. In fact, while there is no way to know exact numbers, there are many documented cases of Chinese asylum seekers presenting claims that are later found to be fraudulent.<sup>181</sup> The easier it is to make a claim under section 601(a), the higher the likelihood is that an alien wanting to

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<sup>178</sup> See *In re S-M-J-*, 21 I. & N. Dec. 722, 723 (BIA 1997) ("[A]n alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of the alien's alleged fear."); see also John R.B. Palmer, *The Second Circuit's "New Asylum Seekers": Responses to an Expanded Immigration Docket*, 55 CATHOLIC U. L. REV. 965, 984 (2006) (discussing the fact that, if a person is deemed credible, a lack of corroborating evidence will not be a valid reason to deny an asylum claim unless the Immigration Judge can explain why there should be corroborating evidence, and that the applicant's explanation as to why he does not have such evidence is insufficient); Rabkin, *supra* note 16, at 975 ("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."). Such a situation (where an IJ would deny a credible Chinese person asylum based on his lack of corroborative evidence), however, would likely be rare, because oftentimes even legitimate asylum-seekers lack any type of documentation of persecution.

<sup>179</sup> See Palmer, *supra* note 178, at 983 ("[A] genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation." (quoting *Abankwah v. INS*, 185 F.3d 18, 26 (2d Cir. 1999) (internal quotation marks omitted)).

<sup>180</sup> Wen, *supra* note 155. Merle Goodman is a professor and a researcher for Harvard University's Fairbank Center for East Asian Research. *Id.* But note that later in the article, Shen-Shin Lu, a Boston lawyer, says that "[w]hile there's room for abuse in these asylum cases, . . . many Chinese men are forced to be sterilized after having one child, so it's not unreasonable for men to directly appeal for asylum based on the one-child policy." *Id.* (internal quotation marks omitted). Dong-Shen Zang, a Harvard student and Chinese immigrant, noted that he thinks many Chinese citizens would be embarrassed to seek asylum relief based upon a fabrication of persecution, knowing that such a claim would be a manipulation of the statute and the U.S. immigration system. Rather, he states that most Chinese immigrants will either enroll in school, get a job, or get sponsored by other relatives already living in the United States, and only then will they seek permanent residency. *Id.*

<sup>181</sup> Palmer, *supra* note 178, at 992 ("It is not that the administrators have no grounds to be skeptical. Many of today's asylum seekers do present fraudulent claims.").

come to the United States might take advantage of the “loophole.”<sup>182</sup> This fear of fraudulent claims is exacerbated “when high-volume law offices and ‘travel agencies’ end up standardizing peoples’ stories so that they can churn out large quantities of cookie-cutter filings.”<sup>183</sup> Thus, when a Chinese applicant is defending against a removal proceeding, there are known places where he can go to quickly and cheaply obtain help. These agencies are able to provide these quick and inexpensive services to the applicant, however, only by using a somewhat standardized story for all section 601(a) applicants, with many stories based on the female partner’s persecution under China’s OCP.<sup>184</sup> Similarly, “snakeheads,” who are in charge of human trafficking rings in China,<sup>185</sup> are known for frequently coaching males they smuggle into the United States to memorize tales of the persecution that their partners faced under the

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<sup>182</sup> *Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. (2001) (statement of Dan Stein, Executive Director, Federation for American Immigration Reform), available at [http://www.mnforsustain.org/stein\\_d\\_asylum\\_policy\\_fair\\_may\\_2001.htm](http://www.mnforsustain.org/stein_d_asylum_policy_fair_may_2001.htm) (“The invitation for false claims is compounded by the now unmanageably broad definitions of who is an asylee.”).

<sup>183</sup> Palmer, *supra* note 178, at 980; see also Susan Sachs, *Cracks in Façade of Refuge: Documentary Shows Pitfalls in Process of Seeking Asylum*, N.Y. TIMES, Dec. 19, 1999, at A53 (discussing a documentary called *Well-Founded Fear* that gives a behind-the-scenes look at the asylum process in New York). The documentary in Sachs’s article tells the story of “[a] Chinese man follow[ing] the instructions of the smuggler who brought him to the United States and concocts an improbable story of fleeing his country’s one-child policy.” It also reports that in the view of some long-time asylum interviewers, most of the stories told by applicants are contrived and thus the interviewers oftentimes have to rely on nothing more than their “gut feelings” in determining whether to approve the application. The documentary further tells of many interviewers’ resentment over being lied to and shows one interviewer, Jim, who mutters, “Oh, another Chinese” and who later rolls his eyes when the person cannot get his story straight. *Id.*

<sup>184</sup> See *supra* note 2, and accompanying text; see also Matt Hayes, *Corrupt Lawyers Aid Immigration Woes*, FOXNEWS.COM, Apr. 29, 2002, <http://www.foxnews.com/story/0,2933,72149,00.html>. Hayes writes,

For most lawyers, the practice of immigration law is attractive simply because there are so many immigrants. There are over 100,000 new political asylum cases each year alone. But this volume also drives down rates and makes the lawyer less than diligent in assessing the credibility of his client’s asylum claims. To be too diligent could mean one less fee.

*Id.*

<sup>185</sup> Those who are in charge of Chinese human smuggling are called snakeheads. The snakehead system is quite a complex one: “Big snakeheads” control networks of “small snakeheads,” debt collectors, and enforcers. The small snakeheads are generally local Chinese people and are in charge of recruiting people to be smuggled and for collecting down payments from them. Once the down-payment is paid, middlemen guide the migrants from one point to the next and enforcers are in charge of controlling the people as they are en route to the United States. Once arrived, the migrants are locked in safe-houses until their fees are paid. Kung, *supra* note 1, at 1274. Lured by the American dream, experts have estimated that each year snakeheads smuggle approximately 50,000 Chinese citizens into the United States. *Id.* at 1273 & n.12, 1275 (noting that estimates range from 10,000 a year and that such human trade is big business, yielding an estimated \$3 billion a year, with each migrant usually paying between \$30,000 and \$60,000 for his trip). The reason so many Chinese turn to this path is that it is very difficult for the average Chinese citizen to get a passport (which they must apply for), a visa from the U.S. embassy in Beijing, and an exit permit, all of which are required to travel abroad. Snakeheads, for a hefty price, will procure fake copies of these needed documents. Documents in hand, the migrants will travel by land, sea, or air, often in horrible conditions, on journeys that can be months long. *Id.* at 1278-81. “[M]any don’t survive the journey.” Hayes, *supra* note 184.

OCP, even when no such persecution ever took place.<sup>186</sup> Thus, these aliens will be prepared with their story of persecution if they are ever caught. In addition to verbal fabrication of persecution stories, human smuggling by snakeheads oftentimes involves false documents.<sup>187</sup> A 1998 State Department Report found that in certain areas of China, documentation “is subject to widespread fabrication and fraud.”<sup>188</sup> Authentic-looking marriage certificates can easily be printed to add credibility to a male’s claim that his “legal” spouse has been persecuted. And, even if an immigration officer discovers the documents as false, the applicant can then simply tell his coached story of his partner’s persecution and hope that his credibility has not been too damaged by way of the false documents to warrant an adverse asylum determination by the official.<sup>189</sup> Section 601(a) thus acts as a safety net—if the migrant is not caught, he will be safe, and, if he is caught, he can simply give his false documents or tell his oftentimes-false memorized story to be granted asylum relief.

Despite the fact that asylum officers know such fraud is taking place, and perhaps even frequently so, the “overwhelming majority” of asylum claims under section 601(a), most of which are made by males, are granted.<sup>190</sup> Asylum officers are required to determine credibility by “elicit[ing] 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.”<sup>191</sup> Asylum officers who have no access to information, especially at the point of entry, are sympathetic to plausible stories of Chinese men who claim their Government persecuted their wives, for there is nothing to possibly contradict their stories. For example, one supervisor at O’Hare airport in Chicago stated,

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<sup>186</sup> Rabkin, *supra* note 16, at 992 (discussing how opponents of broadening section 601(a) often cite “the frequency with which snakeheads coach the people they smuggle into the United States to say they are victims of coercive family planning”); *see also* Kung, *supra* note 1, at 1273 (noting that China “is a major source of smuggled migrants”).

<sup>187</sup> Palmer, *supra* note 178, at 995 (noting that “[t]o the extent that [State Department] reports are accurate, it would not be illogical to conclude that any given group of Chinese asylum seekers may be carrying a higher than average proportion of fraudulent documents”).

<sup>188</sup> Xiu Ling Zhang v. Gonzales, 405 F.3d 150, 157 (3d Cir. 2005) (discussing the judge’s possible reliance on this report); *see also* Palmer, *supra* note 178, at 995 n.208.

<sup>189</sup> Kung, *supra* note 1, at 1289 (noting that INS officials are trained to detect such fake passports and visas).

<sup>190</sup> Sperry, *supra* note 3 (discussing how, after LAX starting cracking down on undocumented Chinese nationals, O’Hare had a huge influx, where they know the longest they will be held is two weeks); *see also* Wen, *supra* note 155. But Wen notes that immigration officials may well have started cracking down—while only 52 asylum requests under section 601(a) were denied in 1998, 324 were denied in 2000. *Id.*

<sup>191</sup> Memorandum from Office of 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), *available at* <http://immigration.com/news/a-family-planning.html>.

“We’re letting these people in even though we really have no idea who they are . . . . It’s almost impossible to get any information or any kind of background checks from our embassy in Beijing.”<sup>192</sup> And later the supervisor said, “We’re getting a lot of men who say their wife is pregnant with their second child, . . . [b]ut when we ask where their wife is, they say she’s back in China.”<sup>193</sup> Relying on asylum officers as a means of separating honest and fraudulent cases, circuit courts that have granted per se relief to spouses under section 601(a) have opened the door to new issues of fraud.<sup>194</sup> In fact, the sheer number of false claims can hurt asylum-seekers with legitimate claims as immigration officials start to become more and more skeptical of anyone claiming asylum under section 601(a).<sup>195</sup> With snakeheads and “travel agents” coaching Chinese male migrants to exploit the ease with which males are granted political asylum under section 601(a), and with courts struggling to find the proper balance for letting in those with legitimate claims while keeping undeserving aliens out, there is a clearly a need for change.<sup>196</sup>

*B. Suggestions to Deter Fraudulent Claims under Section 601(a)*

With respect to the circuit court decisions discussed above, none of these holdings are without serious flaws. The Ninth Circuit’s expansive approach from *Ma*, which grants both legal and traditional spouses per se relief,<sup>197</sup> does nothing to *solve* the fraud problem. Rather, it is these expansive applications of section 601(a) that have been a *cause* of the problem. Additionally, from a policy perspective, in order to

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<sup>192</sup> Sperry, *supra* note 3 (quoting an INS inspections supervisor) (internal quotation marks omitted).

<sup>193</sup> *Id.*

<sup>194</sup> Kung, *supra* note 1, at 1305.

<sup>195</sup> *Id.* at 1307.

<sup>196</sup> Cleo Kung’s Comment about Snakeheads suggests that section 601(a), having subjected the already over-burdened U.S. asylum system to the abuses of Chinese smugglers, should be completely repealed. He says the statute is redundant in that anyone who is actually persecuted under China’s coercive OCP practices would qualify for refugee status under the pre-section 601(a) definition of a refugee. However, I believe that such a step is unwise and that there are other possible solutions to help limit abuse without going so far as completely repealing the statute. While Kung states that anyone who has actually been persecuted under the OCP would qualify as a refugee on account of his or her political opinion, he does not explain why, if this is true, the BIA, prior to the adoption of section 601(a), had *not* granted refugee status solely on the basis of OCP persecution. *Id.* at 1306, 1312. In fact, the BIA’s previous failure to grant refugee relief to those persecuted based on OCP policies was one of the major motivations for the enactment of section 601(a). See *supra* notes 60-62 and accompanying text. Many other commentators on the subject of section 601(a) simply argue that the Ninth Circuit’s broad approach to section 601(a) should be more widely adopted, pointing to the serious human rights abuses in China and the fact that unmarried male partners whose children have been aborted are just as harmed by the coercive act as are legally married male spouses. See, e.g., Berman, *supra* note 170, at 3367-68; 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, 2183 (2007); Rabkin, *supra* note 16, at 986. However, these suggestions to follow the *Ma* approach seem to discount the serious U.S. immigration concerns of limiting fraudulent claims under section 601(a). See *infra* Part IV.B.

<sup>197</sup> *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004).

follow this approach the United States has to disrespect China's marriage law. While these laws are unquestionably tied to the OCP, they may also be necessary to help to diminish China's population growth—a goal that many people agree to be a valid one. While the coercive enforcement techniques of the OCP are criticized, the OCP, in general, when done with appropriate incentives to follow the OCP rules, may be the only way to ensure China's long-term success.<sup>198</sup> The OCP can help to prevent serious food shortages, environmental problems, and health problems for Chinese citizens. Thus, despite the marriage law being tied to the OCP, this alone might not be a legitimate reason for the United States to disrespect it, when the law by itself is not physically harmful to the Chinese citizens.

While the Third Circuit's narrower approach in *Chen* is a step in the right direction, there is still nothing to prevent males in a traditional marriage from simply lying and saying they are in a legal marriage.<sup>199</sup> Immigration officials may have a difficult time making an adverse credibility determination when most legitimately legally married spouses lack documentation of their marriage.<sup>200</sup> Additionally, such a system does little to help ensure the benefits of U.S. law to those directly persecuted under the OCP.

Thus, from the perspective of trying to reduce fraudulent use of section 601(a), if any of the above circuit decisions should be followed at all, it should be the Second Circuit's case-by-case approach from *Lin*. The *Lin* court has been the only court, to date, to adequately analyze section 601(a)'s language prior to ruling. This analysis is in contrast to the Third and Ninth Circuits' analysis, which simply assumed that section 601(a) was silent or ambiguous as to its protections for indirect, physically unharmed partners. Given the Second Circuit's detailed analysis of the statute's language, it is the most likely to represent Congress's intended treatment of such partners. For example, Congress's repeated use of the phrase "a person," rather than "a couple" should not be ignored. Additionally, this restrictive interpretation, which denies per se relief to any and all indirect victims solely on the basis of their partner's persecution, eliminates the low hurdle that males have faced since *C-Y-Z-*. Reimplementation of the nexus requirement of the Refugee Act will raise the burden of proof on the applicant and will thereby reduce the number of fraudulent claims attempted and reduce those that go undetected. However, a case-by-case approach toward indirect

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<sup>198</sup> The OCP has brought the birthrate in China down from 33.43 per thousand people in 1970 to 21.06 per thousand people in 1990. China's One Child Policy in 1997, <http://nhs.needham.k12.ma.us/cur/kane97/P6/eep6/eep6.html> (last visited Jan. 21, 2009); see also Alister Doyle, *China Says One-Child Policy Helps Protect Climate*, REUTERS, Aug. 30, 2007, available at [http://www.reuters.com/article/environmentNews/idUSL3047203920070830?src=083007\\_0844\\_DOUBLEFEATURE\\_iraq\\_touts\\_progress](http://www.reuters.com/article/environmentNews/idUSL3047203920070830?src=083007_0844_DOUBLEFEATURE_iraq_touts_progress).

<sup>199</sup> Berman, *supra* note 170, at 374 ("[P]eople 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>200</sup> Sperry, *supra* note 3.

victims would be time consuming and costly for the BIA. Without a bright-line rule, all appeals from IJs to the BIA would have to be carefully considered on the merits rather than being summarily decided based on the marriage status of the male. The BIA's caseload has already been described as "crushing," and such a detailed analysis of all indirect victims' claims would only add to this heavy burden.<sup>201</sup>

There are a number of other possible strategies that could be followed, which are also unlikely to be effective at preventing fraud. One such strategy might be to re-implement an annual cap on the number of people who can use section 601(a) every year, as existed when section 601(a) was originally implemented. The number should be set higher than the previous one-thousand-per-year cap to reflect the reality that today far more than one thousand claimants a year are likely to have valid claims under section 601(a). However, the number should also be lower than the number of people currently using section 601(a) to limit some of the fraudulent claimants from gaining refugee relief. While such a strategy would certainly achieve a desired effect of closing the floodgates to some extent, there would still be no guarantee at all that those being closed out will be the ones with the fraudulent claims. In fact, such a cap may serve to deny asylum to people who have legitimate claims, which is why the cap was abandoned in the first place.

A second possible solution would be to *require* documentation of medical examinations and/or marriage certificates so that fraud-perpetrating males could not simply rely on their coached story, without more, to gain refugee status. However, as noted above, documentation fraud in China is already widespread.<sup>202</sup> Having such a requirement may have the perverse effect of encouraging greater documentation fraud. Indeed, unscrupulous snakeheads and lawyers may, knowing of such a requirement, try to turn a larger profit than they already do by charging more for such documents. Moreover, because many refugees quickly flee their home country without time to seek out such documents,<sup>203</sup> such a strategy might also have the unintended consequence of denying legitimate section 601(a) claimants refugee status.

Given the above stated concerns, the best possible solution may be to enact a legislative amendment to section 601(a) that implements a system of conditional refugee grants to indirect male victims. Such a system should be modeled after the regulations put in place by Congress to deter immigration based on fraudulent marriages—i.e., marriages between aliens and U.S. citizens that are entered into solely for the immigration benefits available to the alien based on such a marriage. In

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<sup>201</sup> *Chen v. Ashcroft*, 381 F.3d 221, 228 (3d Cir. 2004).

<sup>202</sup> Palmer, *supra* note 178, at 995 (noting that "[t]o the extent that [State Department] reports are accurate, it would not be illogical to conclude that any given group of Chinese asylum seekers may be carrying a higher than average proportion of fraudulent documents").

<sup>203</sup> *Id.* at 980.



1986 Congress passed the Immigration Marriage Fraud Amendments (IMFA) to directly help combat such marriage fraud.<sup>204</sup> Although marriage fraud undoubtedly occurs on a much grander scale than section 601(a) fraud, the same principles that are used to deter fraud in the former can likewise be used to deter the lesser volume, but no less important, fraud under the latter.

The most important tool put in place by the IMFA amendments was its system of conditional grants of lawful permanent residency for any alien who obtains lawful permanent resident status based on a marriage that is less than two years old.<sup>205</sup> This conditional period lasts for two years, and ninety days before the two years expires the married couple is to jointly petition DHS to “remove” the conditions.<sup>206</sup> The couple may be called in for an interview at this time in which they must once again prove that their marriage is not a sham. If successful, the conditions on the alien’s permanent residency will be removed and then he or she will have the full benefits of being a lawful permanent resident<sup>207</sup>—including the rights to work or study in the United States, to live here indefinitely, to leave and enter the United States as he or she pleases, and to later become a citizen of the United States. In general, the idea of the marriage fraud amendments is to prevent aliens from gaining these benefits based on their marriage to a U.S. citizen if the marriage was entered into solely to gain these benefits rather than because the couple wanted to build a life together.

Under the conditional-grant system in the section 601(a) context, a per se approach for credible males would be left in place for any indirect partners so as to avoid increasing the already heavy caseload on the BIA. However, the grant of refugee status would be made conditional on the male’s female partner later joining him in the United States, and upon the determination that she is actually his partner, and that she was actually persecuted as required under section 601(a). This approach would conform to the reality that, in many cases, males usually arrive in the U.S. first to establish some stability before their families join them.<sup>208</sup> It also recognizes that males should not be too easily rejected, as even in legitimate cases of persecution there will often be little evidence. Under the proposed system, however, like under the marriage fraud context, the indirect male victims would be given a time limit, perhaps two years, which is determined to be enough time to become somewhat financially secure. At the end of this two-year time-period, the alien’s political asylum status would automatically expire, making the alien an illegal alien who is subject to removal proceedings. However, ninety days prior

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<sup>204</sup> See Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended at 8 U.S.C. 1154, 1184, 1186a (1994)).

<sup>205</sup> 8 U.S.C. § 1186a (2006).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> See *supra* notes 169-171 and accompanying text.

to expiration, the male would have the ability to file a petition to remove the conditions on his asylum status. The male and his female partner would then be interviewed by an immigration officer, during which the officer would have the opportunity to review the bona fides of the male applicant's underlying story. The male would have to prove that his persecuted female partner has come to the United States, and thus his political asylum claim was a legitimate one whose status should be continued.<sup>209</sup>

With some exceptions, if the female does not join the male by the time the male has to petition for continued asylum protections, the male's conditional grant would be revoked on the theory that if the female was the one directly persecuted, the male should not be able to gain the benefits of asylum based solely on her persecution when she does not gain refugee status on those grounds—the male should not be allowed to “ride the wife's coattails”<sup>210</sup> while leaving the real or imaginary female partner behind in China. Exceptions or extensions of the time limit may be granted upon the request of the applicant after an administrative decision, and any adverse determinations could be appealed to the federal courts for judicial review. Reasons for extensions or excusal of the time limit might include a female's inability to travel due to illness, pregnancy, death, and other similar reasons that would prevent either the female from coming to the United States. However, the immigration officers must construe any such exceptions narrowly so as to not eradicate the entire purpose of the legislative amendment.

In addition to the conditional-grant system, IMFA also stiffened a number of other provisions with the goal of preventing and punishing marriage fraud. These included the strengthening of the restrictions on immigration for anyone who has ever been involved in marriage fraud<sup>211</sup> and the establishment of criminal sanctions for involvement in marriage fraud, with harsh penalties of up to a \$250,000 fine and five years in prison.<sup>212</sup> Once again, these same ideas should be extended to include under their scope fraudulent claims made under section 601(a). Finally, the Department of Justice should start to crack down and impose harsher

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<sup>209</sup> This idea is similar to how the United States currently deals with aliens who try to obtain permanent residency based on marriage to U.S. citizens. Immigration officials assume that the marriage was entered into solely to obtain permanent resident status in the U.S., and thus the alien is only granted a two-year conditional grant of residency, after which the alien, together with his or her American spouse, must petition immigration to take away the conditions so that the alien can then become a legal permanent resident rather than a conditional legal permanent resident. *See* U.S. Citizenship and Immigration Services, How Do I Remove the Conditions on Permanent Residence Based on Marriage?, <http://www.uscis.gov> (search “How do I remove”; then follow first hyperlink) (last visited Apr. 17, 2009).

<sup>210</sup> *In re C-Y-Z-*, 21 I. & N. Dec. 915, 916 (BIA 1997).

<sup>211</sup> 8 U.S.C. § 1154.

<sup>212</sup> *Id.* § 1325.

disciplinary sanctions on lawyers who knowingly participate in these fraudulent claims.<sup>213</sup>

Note, however, that such a system will only work to deter fraudulent claims if males actually abide by it and see a real incentive to come forward and petition for the removal of their conditional status rather than disappearing in the system as they previously would have done,<sup>214</sup> especially when their underlying claim was a fraudulent one. However, the incentive to come forward does exist. Under the new proposed system, the alien's visa papers will clearly be marked as expiring at the end of the two-year period. Thus, the male who fails to come forward to try to make his case will become an illegal alien, unable to legally work in the United States and unable to go and come from the United States as they please. This is unlike the system that is currently in place, in which there is no conditional element at all—once the refugee is accepted under section 601(a) that status can last forever. The idea here is that a Chinese male whose female partner has not actually been persecuted under section 601(a) might not go through all the trouble of trekking to the United States on an often costly and difficult journey, and hoping that the couple's fraudulent claim will at least initially be believed, where, even if it is believed, in two years time they will become illegal aliens, subject to deportation when they fail to petition to remove the conditions on their asylum status.<sup>215</sup> Just like in the marriage fraud context, the reduction of the potential benefits of using a fraudulent claim, coupled with the increased costs of being caught using such a fraudulent claim, can act a strong deterrent to making these fraudulent claims in the first place.

Not only would the conditional-grant system ideally act as a strong deterrent, it would also serve the often-discussed congressional intent of keeping families together. Indeed, many of the circuit courts that interpreted section 601(a) to be silent regarding indirect victims, relied on the breaking-up-of-families rationale in determining that *per se* relief should be granted to indirect male spouses.<sup>216</sup> The concerns of the Third Circuit that a policy granting *per se* relief to an indirect male spouse allows him to “capitalize on the persecution of his wife to obtain asylum even though he has left his wife behind and she might never join

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<sup>213</sup> Current immigration regulations impose disciplinary sanctions on any attorney who “knowingly or with reckless disregard makes a false statement of material fact or law, or willfully misleads, misinforms, threatens or deceives any person (including a party to a case or an officer or employee of the Department of Justice) . . . .” 8 C.F.R. § 1003.102(c) (2009).

<sup>214</sup> Kung, *supra* note 1, at 1295 (“If released, they may never return to court and will simply vanish into Chinese migrant communities in the U.S.”).

<sup>215</sup> Note, however, that the proposed legislation would probably do little to deter those aliens who do not care about being illegal aliens.

<sup>216</sup> See, e.g., *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004) (where the court notes that not granting *per se* relief could lead to the absurd result of breaking up the family, which would not only be “at odds” with the purpose of section 601(a), but also with U.S. immigration policy as a whole).

him and he might intend that she not do so” would also be relieved.<sup>217</sup> A male who is claiming asylum based solely on his wife’s persecution should not be able to gain the benefits of asylum based on his wife’s persecution if the wife herself does not gain those benefits.

#### CONCLUSION

Until Congress adopts new legislation, the *Lin* decision is the best of the circuit decisions and should be adopted by the Supreme Court if it decides to grant certiorari to resolve this circuit split. However, the best possible solution would be for Congress to adopt legislation that puts into place a system of conditional grants of asylum relief for indirect male partners of female victims of Chinese birth control policies. Not only will such an approach eliminate the current confusion regarding how far *C-Y-Z*’s holding extends in protecting such victims, but it will also help to keep families together by preventing males from abandoning their wives in China once they have gained refugee status in the United States. Furthermore, and most critically, a conditional grants system will help ensure that females who have been persecuted in China will be able to take advantage of the protections of section 601(a) more often, and it will reduce exploitation of section 601(a) by deterring males from memorizing tales of their partner’s persecution as a mere pretext to gain asylum in the United States. In light of the ongoing human rights violations in China under the guise of population control, the U.S. should do whatever it can to help those who have really been persecuted, while also trying to limit section 601(a) from becoming a tool under which any Chinese citizen can easily gain the benefits of refugee status in the United States. The system of conditional grants described above appears to be the best way to achieve these dual goals.

*Orly Gez*<sup>†</sup>

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<sup>217</sup> *Chen v. Ashcroft*, 376 F.3d 215, 223 n.2 (3d Cir. 2004).

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